

30 January 2026

Mr Mike Kaiser
Secretary
Department of Climate Change, Energy, the Environment and Water
GPO Box 3090
CANBERRA ACT 2061

Dear Mr Kaiser

Draft National Environmental Standards on Matters of National Environmental Significance and Environmental Offsets

The Law Council welcomes the opportunity to make a submission to the Department of Climate Change, Energy, the Environment and Water regarding its consultation on the Exposure Draft National Environmental Standards (**NES**) on Matters of National Environmental Significance (**MNES**) and Environmental Offsets (**ED MNES Standard** and **ED Environmental Offsets Standard** respectively).

The second independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) undertaken by Professor Graeme Samuel in 2020 (the **Samuel Review**) recommended the development of NES as the centrepiece to necessary reform of the EPBC Act.¹ The power to make NES was legislated through the recent *Environment Protection Reform Act 2025* (Cth) (**EPR Act**), which inserts a new Part 19B to the EPBC Act allowing the Minister to make, revoke, or vary NES. The Law Council welcomed the provision of architecture to support the development and application of NES under the EPBC Act,² and looks forward to supporting the development of those Standards.

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- ¹ Professor Graeme Samuel AC, Independent Review of the EPBC Act (Samuel Review) (Final Report, October 2020) ii < <https://www.dcceew.gov.au/sites/default/files/documents/epbc-act-review-final-report-october-2020.pdf>>. Note NES for MNES were originally developed in 2024 under the previous Government but were never finalised. See e.g. Department of Climate Change, Energy the Environment and Water, Australian Government, *Nature Positive Plan: Better for the environment, better for business* (Report, December 2022) 11 < <https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf>>.
- ² Law Council of Australia, Submission No 555 to the Inquiry into the Environmental Reform Bill 2025 and six related bills (22 December 2025) 3 < <https://lawcouncil.au/publicassets/8d74ee46-27f0-f011-94c2-005056acd090/4770%20-%20S%20-%20Environment%20Protection%20Reform%20Bill%202025%20and%20six%20related%20bills.pdf>>.

This submission is informed by input from the Law Council’s Legal Practice Section Australian Environment Planning and Law Group, the Law Institute of Victoria, the New South Wales Bar Association and the Victorian Bar.

General comments

We understand the NES are intended to help protect the environment, provide clear rules for businesses to follow, and ensure fair and consistent decision-making.³ The Law Council has previously noted the importance of drafting NES with both clarity and precision to support decision-makers in the administration of processes and to instil public confidence.⁴ We note that the Foreword to the Samuel Review also observed that:

*The activities of government should be consistent with the Standards, noting that an elected government should always retain the ability to exercise discretion in individual cases. Such discretion should be a rare exception, demonstrably justified in the public interest, with reasons and environmental implications transparently communicated.*⁵

It is therefore important that the NES are drafted in clear, directive and unqualified terms and that any carveouts in relation to its principles are clearly articulated, preferably in the instrument itself. Noting the NES are left to be prescribed by regulation, strong drafting will influence their ultimate impact and effectiveness towards delivering the intended improvements in environmental outcomes and regulatory certainty.

In this submission we identify some inconsistencies in language across the exposure draft instruments and accompanying Policy Positions for MNES and Environmental Offsets which would benefit from clarification. We note that where terms are used that are defined in the EPBC Act, they should be consistent with that definition under the Act in the instrument and the supporting policy document.⁶ For example, if the reference to “ecologically sustainable development” in subparagraph 6(1)(c) of the ED MNES Standard is to be consistent with the EPBC Act, the reference should be to “the principles of ecologically sustainable development” as is used in subsection 5(2) of the Act.

The draft Policy Positions explain the background to the relevant Standard, including its objectives, outcomes and principles, the definitions of certain terms (where not identified in the Standard itself) and how it should be considered and applied. The draft MNES Standard Policy Position states that “[p]olicy and guidance will explain how to demonstrate that the Principles [in the MNES Standard] have been met”.⁷ It is unclear whether the current draft positions will form part of such guidance. Going forward, supporting policy

³ Department of Climate Change, Energy, the Environment and Water, Australian Government, *National Environmental Standards for Matters of National Environmental Significance (MNES) and Environmental Offsets* (November 2025) <<https://consult.dcceew.gov.au/natl-environmental-standards-mnes>>.

⁴ (n 2) Law Council of Australia [13].

⁵ (n 1) Samuel Review, ii-iii.

⁶ See *Legislation Act 2003* (Cth) s 13(1). Note this provides that expressions used in any instrument have the same meaning as in the enabling legislation and that that instrument is to be read and construed subject to the enabling legislation, so as not to exceed the power of the person to make the instrument.

⁷ Department of Climate Change, Energy, the Environment and Water, Australian Government, *Draft Policy Position: National Environmental Standard for Matters of National Environmental Significance*, (November 2025) 10 <https://storage.googleapis.com/files-au-climate/climate-au/prj38a8e553bef96ceb5490c/page/Draft_MNES_Standard_Policy_Paper_PDF_1.3MB_.pdf>.

and guidance documents should be prepared for each NES, revised and updated to become a formal policy instrument to support NES operation once finalised.

Each of the draft Policy Positions also note that the Minister will be able to make EPBC Regulations to outline the application of each Standard to relevant EPBC Act decisions,⁸ and (as noted above) refer to policy and guidance to be developed in future.⁹ This ultimately limits the ability of practitioners, proponents and the public to fully understand the operation and application of the relevant Standard at this point in time, and our comments are provided with that caveat.

ED MNES Standard

The MNES Standard will be made as a legislative instrument by the Minister for the Environment and Water and is intended to apply to decisions regarding all MNES as well as matters protected by Part 3 of the EPBC Act.

Proposed section 5 identifies the objectives of the Standard, while section 6(1) describes outcomes that the Standard is intended to achieve. However, elements of the drafting of those provisions are duplicative in purpose and meaning. This includes, for example, their overlapping reference to the intended aim or outcome being to ensure that decisions provide for environmental protection, conservation and recovery/restoration, and similar features in subsections 5(2) and 6(1)(b) and (c). Their distinction and intended operation should be addressed more clearly.¹⁰ For example, the objectives of the ED MNES Standard could focus on specific protected matters (as per section 5(3)) and its outcomes could be articulated in relation to decisions that deliver (or contribute to the delivery of) environmental protection, conservation and recovery/restoration.

The expected use of the MNES Standard by different stakeholders is set out at Figure 1 of the draft MNES Policy Position.¹¹ Delegated authorities should also be referenced in that Figure as they are also required to apply the NES in their decision-making.

'Recovery' and 'restoration'

Proposed subsections 5(1) and 6(1)(a) of the ED MNES Standard use the terms 'recovery' and 'restoration' respectively. However, the draft MNES Policy Position uses the word 'restore' rather than 'recovery' and states that 'restore' relates to "repairing, rehabilitating or reinstating damage, degraded or lost conditions of or for the protected matter".¹² To the extent that 'recovery' and 'restoration' are intended to reflect the same concept, the same expression should be used in each provision to avoid ambiguity. We suggest the preferable term to use would be 'restore' or 'restoration'.

⁸ (n 7) *Draft Policy Position NES for MNES*, 21; Department of Climate Change, Energy, the Environment and Water, Australian Government, *Draft Policy Position: National Environmental Standard for Environmental Offsets*, (November 2025) 22, 26 <https://storage.googleapis.com/files-au-climate/climate-au/p/prj38a8e553bef96ceb5490c/page/Draft_Offset_Standard_policy_paper.pdf>.

⁹ *Ibid* (n 7) *Draft Policy Position NES for MNES*, 14, 16, 21; *Ibid* *Draft Policy Position: NES for Environmental Offsets*, 23-24.

¹⁰ We acknowledge this is addressed at page 5 of the MNES Policy Position but should be clarified both in terminology and in the MNES Standard.

¹¹ (n 7) *Draft Policy Position: NES for MNES*, 4.

¹² *Ibid*, 6.

The Law Council also expresses concern over use of the qualifying phrase ‘where necessary’ in respect to the words ‘recovery’ and ‘restoration’ in the proposed subsections 5(1) and 6(1)(a) of the ED MNES Standard, a point which has not been clarified in the draft Policy Position. This qualifier appears to depart from the Samuel Review’s recommendation of a national standard to “[m]aintain and improve... recovery” in addition to conservation.¹³ In other words, conservation *per se* would not be sufficient—it should always be accompanied by restoration to deliver improved environmental outcomes. For this reason, we submit that “where necessary” should be deleted in those provisions.

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

Proposed subparagraph 8(5)(b) states that repair will generally be a viable option only where such activities are “feasible”. We have observed an inconsistency in the definition and approach to that term in the draft Policy Position. At page 12, the draft Policy Division defines the term “[as per dictionary meaning]—For guidance: that which is possible and likely to be achieved”. At page 14, it states that considerations to assess feasibility “will be further guided by policy and will consider whether a measure can be reasonably implemented in practice, considering a combination of technical, ecological, financial, legal, and social criteria, to ensure it can genuinely reduce environmental impacts”. The draft Policy Position would benefit from clarification of which definition will be applied, and that definition should preferably be in the NES itself (or alternatively, consistent with earlier comments, in the draft Policy Position).

We also note that rehabilitation activities are not considered to be repair under the draft Policy Position.¹⁴ Those activities should be clarified in the draft Policy Position, including whether they may include offsets, mitigation or something else.

Principle 2—Actions appropriately consider impacts to protected matters

Proposed section 9 of the ED MNES Standard appears to be intended to address the specific considerations identified by the Samuel Review in relation to an ‘Overarching MNES Standard’, namely, an assessment of impacts “having regard to the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts”.¹⁵ We suggest that proposed section 9 should incorporate this language as it provides clearer direction to proponents and decision-makers as to what is required to be considered. The notes to proposed section 9 could also make clear that, in considering context, it is necessary to consider the cumulative impacts of proposed actions or exacerbation of key threatening processes, and to take account of the predicted impacts of climate change.

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

Proposed section 10 provides that compensation for a residual significant impact “*should generally*” only be considered after prior steps in the mitigation hierarchy have been exhausted (emphasis added). As drafted, that phrasing suggests there are exceptions to

¹³ (n 1) Samuel Review, 203. Note wording from Overarching MNES Standard, *National Standard 1(e)*.

¹⁴ (n 7) *Draft Policy Position: NES for MNES*, 12.

¹⁵ (n 1) Samuel Review, 203. Note wording from Overarching MNES Standard, *National Standard 1(b)*.

the strict application of the mitigation hierarchy. This risk could be mitigated by deleting the word ‘generally’ from section 10. That would also be consistent with the draft Policy Position, which states that the “required compensation for residual significant impacts... will be understood... following appropriate consideration of the application of the mitigation hierarchy”, and that as a result, it is “a last resort once all subsequent steps in the mitigation hierarchy have been exhausted”.¹⁶ If there are any circumstances where this principle should be applied differently, they should be clearly identified in the instrument itself or accompanying policy.

Principle 4—Appropriate evidence, First Nations engagement and consultation

Proposed subsection 11(a), which requires actions to be supported by “appropriate and suitable data and information”, is expressed in general terms. We understand that a separate Data and Information NES is intended to be issued which must provide clear guidance as to data and information that is “appropriate and suitable”. This is necessary, particularly to underscore that the data and information upon which decisions are based ought to be scientifically sound and in accordance with best practice. We note for completeness that the precautionary principle is among the underpinning principles of ecological sustainable development and so will also need to be considered as part of the overall assessment in accordance with sections 5 and 6 of the ED MNES Standard.

Proposed section 11 further stipulates that actions should be supported by appropriate consultation with First Nations people and “other interested parties”. While it is presumed that consultation will need to abide by the forthcoming NES on engagement with First Nations people, this should be explicit in the MNES Standard.

Further, a definition of other interested parties is not provided. Subsection 475(6) of the EPBC Act defines interested persons and organisations in the context of applications for injunctions under that Act, but that definition may not be appropriate for the purposes of consultation under this Standard. This should be clarified in the Standard itself or and accompanying policy.

ED Environmental Offsets Standard

Like the ED MNES Standard, the ED Environmental Offsets Standard will also be made as a legislative instrument by the Minister for the Environment and Water and is intended to cover all MNES and matters protected by Part 3 of the EPBC Act.

We note that this Standard generally appears to contain clearer guidance than the ED MNES Standard. Noting the Samuel Review’s observation that “offsets are too often used as a default measure... [instead of] a last resort”,¹⁷ care will need to be taken in implementation to avoid this issue and ensure that restoration contributions are not used in a manner that avoids actual securing of offsets.

As an overarching comment, the concept of ‘net gain’ in its objects is a positive step. However, the use of the term in the NES should be clear in the instrument and consistent with its use in the EPBC Act (as recently amended). Section 5 of the ED Environmental Offsets Standard refers to a framework that will deliver a “net gain”, without defining what

¹⁶ (n 8) *Draft Policy Position: NES for Environmental Offsets*, 17.

¹⁷ (n 1) Samuel Review, 44.

“net gain” means in the Standard itself. Page 7 of the draft accompanying Policy Position states that “net gain” is the “measurable improvement for the affected protected matter relative to an agreed baseline”, which reflects Principle 4 of the Standard. Page 16 of the Policy Position states that regulations will include information on how net gain can be demonstrated.

By contrast, the EPBC Act, as amended by the EPR Act, refers to actions “passing the net gain test” with the test being defined in new section 527K. That section provides for regulations to prescribe the net gain for the matter as part of that definition (or otherwise as the Minister is satisfied is appropriate).¹⁸ While these varying descriptions of “net gain” are not necessarily inconsistent, greater precision is required between the NES, the Policy Paper, the EPBC Act (as amended) and the forthcoming regulations to improve clarity and application of the test.

Principle 1—Feasibility

Proposed section 8 of the ED Environmental Offsets Standard concerns “feasibility”. The draft Policy Position states that term is to be given the ordinary dictionary meaning, being “that which is possible and likely to be achieved”. We are concerned that the scope of this definition is too broad and does not provide sufficient clarity for its application. For an offset to be feasible it ought to be economically sound and sustainable over time.

We also note a cross-referencing error to outcomes in proposed subsection 8(4), said to be identified in subsection s 8(1) but which should instead refer to section 8(2).

Principle 2—Security

Proposed section 9 of the ED Environmental Offsets Standard focuses on the “security” of the offset activity. Proposed subparagraph 9(3)(a) provides that arrangements should be in place to ensure the site where offset activities occur is managed to prevent loss and degradation of the protected matters during the “maintenance period”, being up to 25 or 100 years (as defined in subsection 9(5)). We are concerned that this may be difficult to achieve in practice, particularly in areas where impacts are occurring where there are multiple competing land uses, in very remote areas, or in areas that are regarded as prospective for mining, and that this should be acknowledged in the draft Standard. Similar considerations apply to Principles 6 and 7 of the draft Standard.

Proposed subparagraph 9(5)(b) also refers to the Minister’s determination of whether the offset outcome is self-sustaining. The process for this determination, including how and when such a determination will be made, should be clarified in accompanying policy.

Principle 3—Direct and tangible

Principle 3 addresses the direct and tangible benefits of offsets. Its current wording risks allowing offsets with indirect benefits to be disregarded, even where they are available. Where feasible, such offsets should be required in addition to offsets with direct benefits, as a combined approach delivers stronger environmental outcomes. The principle could then be renamed to ‘Benefits’ to better convey its intent.

¹⁸ *Environment Protection Reform Act 2025* (Cth) s 527K(1).

Principle 4—Measurable improvements

Principle 4 requires offsets to deliver demonstrable improvements relative to the baseline condition of the affected matter. While the baseline is defined as an evidence-based estimate of likely condition in the absence of the action, the Policy Position refers to an ‘agreed baseline’ between the Minister and the proponent.¹⁹ This approach risks implying that baselines are negotiable. It is also inconsistent with the Samuel Review’s recommendation to establish objective environmental and performance baselines to inform decision-making.

Proposed Additional Principle—Transparency

The ED Environmental Offsets Standard should include an explicit principle on transparency. As acknowledged at page 1 of the draft Policy Position, the Samuel Review identified that there is “no transparency around the location, quality, and quantity of approved offsets”. Introducing a dedicated transparency principle to address this issue would better align the Instrument with the Review’s recommendations.

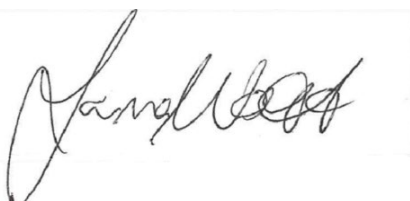
Monitoring and reporting

Finally, members have observed that the Samuel Review’s recommendation for monitoring and reporting requirements within an overarching environmental standard has not been adopted as part of the Exposure Draft NES.²⁰ It is unclear whether this is because it is intended to be contained in a separate environmental standard yet to be prepared, but consideration of such provisions is encouraged.

Contact

If the Law Council can be of any further assistance in this consultation, in the first instance, please contact Xenia Taunt-Rivers, Research Officer [REDACTED]

Yours sincerely



Tania Wolff
President

¹⁹ (n 8) *Draft Policy Position: NES for Environmental Offsets*, 16.

²⁰ (n 1) Samuel Review, 204.