Biodiversity Council

Submission to the National Environmental Standard for Matters of National Environmental Significance (MNES)

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Lis Ashby - Policy Lead, Biodiversity Council - lis.ashby@biodiversitycouncil.org.au

Professor Jan McDonald (Environmental Law, University of Tasmania)

Professor Martine Maron (Centre for Biodiversity Conservation Science, University of Queensland)

Professor Brendan Wintle (Director, Melbourne Biodiversity Institute, University of Melbourne) - brendanw@unimelb.edu.au

About The Biodiversity Council

The Biodiversity Council brings together leading experts including Indigenous knowledge holders to promote evidence-based solutions to Australia's biodiversity crisis. The Council was founded by 11 universities with the support of Australian philanthropists.

Introduction

The Biodiversity Council welcomes the opportunity to provide feedback on the draft National Environmental Standard for Matters of National Environmental Significance (MNES Standard).

Background

The consultation includes a policy paper and legislative instrument. The legislative instrument formalises the standard as law under the *Environment Protection and Biodiversity Conservation Act 1999 (*EPBC Act). The policy paper explains how the standard is intended to work.

This is the second round of public consultation on the MNES Standard. The first round of consultation ran from November 2025 to January 2026.

The development of National Environmental Standards formed the centrepiece of the Samuel Review recommendations. The Review concluded that the Act focussed too heavily on process and that standards which set clear outcomes and requirements provide benefits to the community, businesses and government.

The Review noted that precise, quantitative standards for MNES will "provide for effective environmental protection and biodiversity conservation and ensure that development is sustainable in the long-term." The Review suggested that future standards could include quantitative measures such as population size and trends, and area and quality of habitat.

The Samuel Review developed a recommended National Environmental Standard for MNES which provides a model against which the legislative instrument can be compared. The Review suggested that the recommended standard for MNES is a first and immediate step that should be taken and that it would:

> *..clarify the existing settings of the EPBC Act to define clear limits of acceptable impacts for MNES, while accepting flexibility for development. They represent an improvement on the status quo, where opaque rules and unfettered discretion in decision-making often results in the trading away of environmental outcomes*.

The Review noted that the standards would support more streamlined decision making because "[i]f the outcomes are clear and legally required, it does not matter who makes project assessment and approval decisions."

Our position

The revised draft MNES Standard represents a significant step backward from the version released for public consultation in November 2025. Our five key concerns[1] from the first draft remain unaddressed and the standard has been further weakened by:

1. **Substituting process for outcomes.** A new Clause 7 enables the objectives and outcomes of the Standard to be ignored if the high-level, process-based principles are met.
2. **Narrowing the objectives for listed threatened species, ecological communities and migratory species.** Amendments that move from protecting habitat more broadly to only habitat that is irreplaceable and necessary for the species to remain viable in the wild.

1. Substituting process for outcomes

If a proponent applies the principles in the standard, their project is deemed to meet required outcomes and objectives regardless of real-world consequences.

The principles are:

1. '**Have regard to**' the mitigation hierarchy (i.e. avoid and minimise impacts).
2. '**Consider**' adverse impacts to protected matters (which relates to the context in which the matter is occurring).
3. Compensate for residual significant impacts (i.e. provide offsets).
4. Use best available data and consult with Indigenous people and the public.

The new Clause 7 provides that activities will achieve the outcomes and objectives of the Standard if the four principles paraphrased above are met.

This is highly problematic. The principles articulate processes, not outcomes. They are highly subjective and flexible in their application. Every one could be met while achieving an outcome entirely contrary to the objectives and outcomes articulated at Item 5 of the Standard, including "..the protection, conservation and, where appropriate, management, restoration and recovery of protected matters".

That a proponent only has to "**have regard to**" the mitigation hierarchy is deeply retrogressive compared with previous drafts of the standard.

[1] a) application of the standard is narrower than that proposed by Samuel Review; b) the instrument does not adequately address cumulative impacts; c) the instrument does not require consistency with conservation planning instruments; d) the instrument does not include monitoring, evaluation, reporting and improvement, and e)the objective for threatened species and migratory species is inadequate.

Principle 1 is littered with discretion:

- 'Step 1 - Avoidance' is 'to the extent possible'
- 'Step 2 - Mitigation' notes that the "impact **should** be mitigated through a demonstrated process of identifying and implementing measures to reduce the impact" [emphasis added]
- 'Step 3 - Repair - notes that "any **repairable** impacts on protected matters **should** be repaired as soon as possible" [emphasis added] but qualifies this by noting that repairs will only be viable if they can be done in a timely manner and are feasible and sustainable.
- 'Step 4 - Offset' is directive - "any residual significant impact of the action or class of actions on a protected matter **must** be compensated for by an offset activity or a restoration contribution charge." [emphasis added]. Reliance on offsetting is problematic as they often fail[2] and this is likely to be exacerbated by changes to offsetting under the EPBC reforms, particularly the creation of the new Restoration Contributions Holder.[3]

Despite the prevalence of the mitigation hierarchy in biodiversity policy around the world, there are no clear rules about when a proponent has satisfied one step and when to move from one level of the mitigation hierarchy to the next.[4] Maron et al. 2016 states:[5]

> *"Developers and regulators decide on a case-by-case basis with little guidance or reference to past cases on whether an impact can or cannot be avoided and how much impact minimization is adequate before the residual impact can be considered unavoidable and therefore a candidate for offsetting."*

There is a significant body of research that demonstrates that even though avoiding impacts is the most important step in the mitigation hierarchy,[6] it is neglected[7] due to a lack of

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[2] Henry, K., Keniry, J. Leishman, M. and Mrdak, M. (2023) Statutory Review of the Biodiversity Conservation Act 2016. Final Report https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf
Independent Pricing and Regulatory Tribunal NSW (2024) Biodiversity Credits Market Monitoring Annual Report 2023-24, December 2024. https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2023-24-Biodiversity-Credits Market-Monitoring-December-2024.PDF

[3] See submissions regarding the Offsets Standard consultation and Nature Repair Market.

[4] Maron et al. (2016) Taming a Wicked Problem: Resolving Controversies in Biodiversity Offsetting, *BioScience*, **66**: 489–498 https://academic.oup.com/bioscience/article/66/6/489/2754298

[5] Ibid.

[6] Arlidge, W. N. S. et al. (2018) A Global Mitigation Hierarchy for Nature Conservation, *BioScience*, **68**(5), 336-347. https://academic.oup.com/bioscience/article/68/5/336/4966810

Ghijselinck et al. (2026) Beyond compliance: Strengthening mitigation hierarchy implementation in environmental impact assessment practice *Environmental Impact Assessment and Review,* **116**, 108134 https://www.sciencedirect.com/science/article/abs/pii/S0195925525003312

[7] Phalan et al. (2017). Avoiding impacts on biodiversity through strengthening the first stage of the mitigation hierarchy, *Oryx*, **52**(2). https://www.cambridge.org/core/journals/oryx/article/avoiding-impacts-on-biodiversity-through-strengthening-the-first-stage-of-the-mitigation-hierarchy/DDBA2EA1D468985A9CE5D089ABC5FAD5

political will, weak regulations, lack of technical knowledge and/or a perception that avoidance is too costly.[8] This was a key finding of the Samuel Review in respect of the current operation of the EPBC Act's offsets regime. In the absence of a measurable outcome or objective, the hierarchy is easy to game - developers simply need to put in a proposal that is twice as large as they actually intend to construct, then reduce the project by half to show they are reducing their impact. Moreover, there is little specificity about the mitigation measures to be applied. There are numerous examples where strategic plans or policy frameworks provide a 'menu' of mitigation options for proponents to choose from with little-to-no guidance on which would be most effective to reduce impacts.[9] Overall, application of the mitigation hierarchy can (and often does) result in poor outcomes for MNES. Only a standard that **sets and requires strong positive outcomes** for MNES can guard against continued decline and loss of biodiversity.

The high levels of discretion and lack of strong and clearly articulated outcomes in the current draft of the standard make it impossible to distinguish between proponents who genuinely prioritise reducing biodiversity impacts and proponents who merely create a case on paper that they have taken all 'practicable steps'.

The remaining three principles do not address the shortcomings in Principle 1.

Principle 2 relates to information:

> *"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 1: 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; and (b) the interaction of different stressors, for example the combined impacts of light, noise, and habitat clearance to breeding success of endangered species as a result of an action or class of actions.*
>
> *Note 2: When considering bioregional plans and strategic assessments the context may also include the following: (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, actions taking place over a period of time."*

Despite the two notes, the principle fails to provide adequate decision-making criteria or link back to the mitigation hierarchy. This omission is highly problematic for threatened species and ecological communities, whose very listing underscores that they are already facing severe, compounding threats. What circumstances or threats would necessitate reconsidering the project's location or design? When would offsetting be considered

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Bigard et al. (2017) The inclusion of biodiversity in environmental impact assessment: Policy-related progress limited by gaps and semantic confusion, *Journal of Environmental Management,* **200**, 35-45. https://www.sciencedirect.com/science/article/pii/S0301479717305303

[8] Phalan et al. (2017).

[9] For example see our submissions regarding the NSW Central Coast Strategic Conservation Plan and the National Onshore Windfarm Guidance.

unachievable? Yet again this principle is highly discretionary and full of potential loopholes providing a very low bar for approvals and leading to ongoing destruction of MNES habitat.

Cumulative impacts are only relevant under "(b) individually minor, but collectively significant, actions taking place over a period of time" in regard to bioregional plans and strategic assessments. The phrasing clearly implies that cumulative impacts are not to be considered in relation to individual project-level decisions, which is where the bulk of impacts approved under EPBC Act occur. This is a critical deficiency and fails to remedy one of Graeme Samuel's key concerns of the 'death by a thousand cuts'. Consider the case of the Black-throated finch. This species was listed as vulnerable under the EPBC Act in 2000 and upgraded to endangered in 2005. Almost all of the 700+ referrals for development projects to clear finch habitats between 2000 and 2016 were approved without an assessment of the cumulative impact of those applications. For the long-term survival of species and ecosystems that are threatened with extinction, it is essential that we stop whittling away their remaining habitat project by project.

Principle 3 is a restatement of Step 4 in Principle 1.

Principle 4 relates to information and process:

> "Proposals for actions or classes of actions must be supported by:
>
> (a) appropriate, suitable and best available data and information;
>
> (b) where relevant, effective and genuine engagement with, and contribution of knowledge from, indigenous persons, where the engagement and contribution is appropriate and adapted to the nature of the interests of such persons; and
>
> (c) effective consultation with the public in relation to the action."

In short, the principles set no limits and have no teeth. If we are to halt the decline of threatened species and ecosystems and other Matters of National Environmental Significance, we need to guarantee outcomes, not process.

Recommendation 1: *The Biodiversity Council recommends that 7(2) and 7(4) be deleted.*

2. Narrowing the objectives for listed threatened species, ecological communities and migratory species

The objectives for threatened species and ecological communities have been narrowed.

In the 2025 Draft of the Standard, the objective was:

> *"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. Protection and recovery actions support the viability of threatened species in the wild."*

In the revised Standard it is:

> *"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."*

It is the department's position that it is a 'minor correction to punctuation'. However, the removal of the commas changes the meaning from protection and conservation of all habitat, inclusive of irreplaceable habitat necessary for viability, to protection *only* of irreplaceable habitat necessary for viability. This reduces the scope of protection dramatically, and is inconsistent with the Outcomes of the Standard which include to "provide for the protection, conservation, and, where appropriate, restoration and recovery of protected matters" and to "contribute to the promotion and enhancement of the diversity, abundance, resilience, and integrity of protected matters **across their entire geographic area**" [emphasis added].

The change means that the standard focuses only on outcomes for a small subset of the habitats required for MNES to survive and recover in the wild, restricting consideration to only what is both irreplaceable **and** required for a viable population. This sets a very high bar on protection and sets up the standard to fail to conserve and recover MNES, **even if the outcome of protecting irreplaceable habitat were achieved**.

Under the proposed wording, the standard would not protect areas of future climate refugia needed to support climate adaptation by accommodating changes to species' ranges as animals and plants move in response to climate change. The narrower definition also fails to protect currently-unoccupied habitat that might be vital for future population recoveries or reintroduction programs aimed at helping a species recover. For example, the recovery plans of the Western Swamp Tortoise, Southern Corroboree Frog, Leadbeater's possum, Eastern Bristlebird and Pookila all include translocation or reintroduction actions.

Recommendation 2: *The Biodiversity Council recommends that the objective be reworded to achieve protection of all mapped likely and known habitats for threatened species, ecological communities and migratory species, in the following terms:*

"Habitat of the listed threatened species (including critical habitat and habitat that 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."

Summary of recommendations

The Biodiversity Council's key recommendation is that this national environmental standard set **outcomes-based standards** for protecting MNESs, not process-based measures. This is in line with the key finding of the Samuel Review. The reversion of the currently proposed standard to a principles and process-based assessment process is retrogressive and directly contradicts the key recommendation of the Samuel Review to enact outcomes-based national environmental standards.

Key recommendations from this Biodiversity Council submission:

Recommendation 1: *The Biodiversity Council recommends that 7(2) and 7(4) be deleted.*

Recommendation 2: *The Biodiversity Council recommends that the objective be reworded to relate to all habitat for threatened species, ecological communities and migratory species.*

The following recommendations are based on the Biodiversity Council's 30 January 2026 submission on the first draft of the MNES NES (annexed to this submission) that have not been addressed in the currently proposed standard and remain relevant. Our January submission is available here:
https://biodiversitycouncil.org.au/admin/uploads/BC_MNES_Standard_COMBINED_e1a4ee6d4a.pdf

Recommendation 3

The Standard should apply to plans and policies that relate to MNES, not just decisions (approvals) relating to actions.

Recommendation 4

The MNES and Offsets standards must adequately address cumulative impacts by:

- expressly referencing cumulative impacts in the text itself

- Setting thresholds on cumulative impacts across multiple actions and establishing how accumulating impacts will be measured and reported and who will be responsible for the measurement and reporting; and

- Clarifying who must assess and judge whether an individual impact will push cumulative impacts beyond the specified threshold.

Recommendation 5

The NES must ensure that protection statements adhere to existing conservation planning documents, such as recovery plans and listing advice, and confirmed by the Threatened Species Scientific Committee.

Recommendation 6

The NES must include monitoring, evaluation, reporting and improvement requirements, including who will be responsible for monitoring and reporting to ensure transparency and public visibility of monitoring and reporting outcomes.

Recommendation 7

The objective for threatened species and migratory species should be strengthened in the following terms:

Populations of threatened species and habitat, including critical habitat of the listed threatened species where the habitat is irreplaceable and necessary for a threatened species survival in the wild, is protected, conserved and restored to ***ensure*** the survival and recovery of the threatened species. AND

Protection and recovery actions maintain and increase the abundance and distribution of threatened species, and ensure the viability of threatened species in the wild."