

14 November 2023

Nature Positive Taskforce
Ngunnawal Country, John Gorton Building
King Edward Terrace, Parkes ACT 2600 Australia
Department of Climate Change, Energy, the Environment and Water



Environment Institute
of Australia and
New Zealand Inc.

Dear Taskforce,

RE: Initial consultation on Australia's new national environment laws – EIANZ feedback

Thank you for the opportunity for the Environment Institute of Australia and New Zealand (EIANZ) to participate in the consultation on Australia's new national environment laws. This submission has been developed collaboratively by our representatives, Carolyn Cameron and Dr Ailsa Kerswell, with endorsement from the EIANZ Board.

The EIANZ is a non-profit, multi-disciplinary association of environmental practitioners. Its membership is represented by a diverse range of technical disciplines including scientists, policy makers, engineers, lawyers, and economists. We advocate for environmental knowledge and awareness and advancing ethical and competent environmental practice.

Overall, we recognize the considerable thought and effort that has gone into reforming the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and are pleased to see the reform agenda progressing. The material provided during the consultation demonstrates some of the ways in which the Australian Government is planning to strengthen and streamline Australia's environmental laws in response to the Independent Review of the EPBC Act, undertaken by Professor Graeme Samuel AC (the Samuel Review) and as outlined in the Government's Nature Positive Plan. We recognise that more information is still to come.

However, we are concerned the proposed inclusions are not sufficient to deliver demonstrable change either for improving outcomes for the environment nor for streamlining how business and industry interact with these laws. We discuss these issues further below and provide recommendations for improvement. This is not to say there are not positive inclusions in the proposed new law and we also highlight these below.

We provide a thorough analysis and suggestions below and our representatives would be pleased to discuss any matters raised in this feedback with the Taskforce. We also look forward to continuing to be part of the consultation process, with the view to providing constructive feedback aimed towards achieving better outcomes for both the environment and those that interact with our national environmental laws.

Yours sincerely,

A handwritten signature in black ink that reads "Vicki Brady".

Vicki Brady
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Detailed feedback on initial tranche of consultation material

This feedback is structured per the key themes of the material presented. We have provided feedback generally under the headings of:

- *What's good* – areas of the new laws that we support and think should be retained
- *What needs improvement* – areas of the new laws that should be reconsidered, particularly to facilitate better outcomes for the environment and streamlining for those who interact with these laws
- *Considerations for implementation* – suggestions based on our unique perspective as environmental practitioners i.e. we are the people that implement these laws on a day-to-day basis. The success of any new laws will be founded on effective implementation.

Environmental impact assessment and approvals

What's good:

Explicit requirements for proponents to demonstrate how they have avoided and mitigated impacts to Matters of National Environmental Significance (MNES) during project design – this brings the new Act into line with international best practice for impact assessment.

Clear prohibitions on approving actions and robust definitions for unacceptable impacts, Critical Protection Areas and viability – this is an important inclusion that provides clear 'rules' around when decision makers must say no to a project, which are not currently in the EPBC Act.

One step process for a decision on a project – this should provide streamlining given the statutory timeframes for decision making are now shorter for a 'standard impact pathway' compared to the current controlled action pathway. However, see implementation considerations below.

What needs improvement:

The 'test' for requiring approval under the new laws is the same as the EPBC Act, i.e. significant impacts. The definition of a significant impact appears to continue to be defined per the current EPBC Act Significant Impact Guidelines 1.1. These guidelines are now 10 years old and what is a significant impact continues to be debated during project assessments, with many impacts to MNES being considered not significant whilst contributing to the overall loss and decline of threatened species habitat (in particular and other MNES more generally). These guidelines also do not address new concepts such as irreplaceability or viability (which are important inclusion in the new Act). It is recommended that either (or both) the definition of a significant impact is clarified and strengthened or the Significant Impact Guidelines 1.1 are reviewed and updated to align with the new Act, contemporary best practice and considering the recommendations of the Samuel Review.

It appears the test for what is for a low versus a standard impact pathway is the significance of impacts. Given the potential for interpretation of whether impacts are significant or not (per above comment), this risks proponents planning on a low impact pathway when decision makers may consider the project is on a standard impact pathway. In order to still deliver a streamlined process, there must be good clarity about what is a low impact pathway and a process for a project to get 'transferred' from low to standard impact pathway, if necessary.

Implementation considerations:

Streamlining and better environmental outcomes will be best achieved via clear, robust and evidence-based policy guidance and tools to support impact assessment (both for proponents and regulators). In addition to strengthening the Significant Impact Guidelines 1.1, the raft of other related policy guidance should also be reviewed and updated, to support the new environmental laws.

The capacity of the Environment Protection Agency (EPA) as the new regulatory arm of government must be considered and considerably strengthened, particularly if shorter statutory timeframes and robust decision making are to be achieved. Considerable effort needs to be invested in the employees of this new organisation to ensure that they have adequate skills in undertaking these assessments.

Clear guidance on the expectations of what information proponents will need to provide to support a standard impact pathway approval will be critical to achieving streamlining and preventing lengthy 'stop the clock' timeframes.

Recovery Strategies

What's good:

Concept of Protection Statements – these will be useful tools for guiding both upfront design of projects, impact assessment and decision making and design of recovery actions/contributions. They should also be used to underpin areas such as bioregional planning.

Critical Protection Areas (CPAs) definition (including definitions for irreplaceability and persistence) is also strong and aligned with current scientific thinking. We are also very supportive of impacts to these areas being prohibited – acknowledgement that some areas are irreplaceable and, therefore, cannot be impacted is a considerable improvement on the current EPBC Act. See also comments regarding implementation.

What needs improvement:

Lack of recognition of likely/ projected impact of foreseeable climate change on habitats when describing CPAs – the only time the current draft refers to climate change appeared to be in the draft National Standard for Restoration Actions and Restoration Contributions when referring to a 'high certainty of projected gain', the proposed definition of which includes '... restoration actions will restore habitat with a high confidence of success, taking into consideration the future adverse effects of climate change'. Given that climate change is already recognised in many conservation planning documents, we recommend it must be explicitly included in future recovery strategies.

Recovery of threatened species and communities has been consistently under-funded for decades. We recommend the new Act includes provisions for adequate funding of all recovery strategies.

Considerations for implementation:

Similar to our comments on environmental assessment and approvals under the new Act, there is a large body of work that will be required to support the proposed recovery strategy reforms. This must be well funded, resourced and undertaken by suitably qualified professionals. In particular, given how consequential CPAs will be, we strongly recommend these areas are spatially mapped,

where possible, and where not, explicated species-specific definitions are developed to allow proponent and decision makers to be very clear about what is a CPA and what is not.

Building on the above, we note that many of the current conservation planning documents are outdated and will require review and an update; both to make them align with the currently best available information on species/communities and also as a key implementation tool for restoration. Many include recovery actions that are primarily related to more research, survey and monitoring, or focus on landholder engagement. In many cases the direct, on-ground actions to support recovery are lacking. This will present a challenge for implementing restoration actions and contributions under that National Environmental Standard (addressed below).

Further to this, we would recommend the Taskforce undertake some 'stress testing' of the concept of CPAs, if this has not already been done. What areas would be considered CPAs, where are these located and how likely is it that they can be avoided – if future decision makers must say no to projects that would impact CPAs (which we fully support), then the wider implications should be explored, particularly with reference to the need to rapidly expand the renewable energy sector and the current housing crisis.

MNES National Environmental Standard

What's good, and recommendations for improvement:

The MNES standard generally seems robust and is aligned with international best practice of employing the mitigation hierarchy and ensuring meaningful involvement of First Nations peoples in decision making. Whilst the standard speaks to 'relevant decisions' it currently appears to be highly geared towards project-level decisions. Per the Samuel Review, we recommend the standards clearly apply to all decision making undertaken under the new Act.

Explicitly acknowledging a requirement to address detrimental cumulative impacts and threatening processes is a clear improvement on the current EPBC Act and should be retained. There may be more information to come (if so, please provide in the next tranche of consultation); however, the current statement seems 'a bit light on' compared to the explicit suggestions of the Samuel Review and the acknowledged role that cumulative non-significant impacts play in the decline of threatened species and communities. We recommend the approach to addressing cumulative impacts to MNES is strengthened to truly deliver net positive outcomes for MNES (see next point).

We are supportive of the standard requiring net positive outcomes for MNES. However, the current proposed Act is unlikely to deliver such an outcome, given that 1) only significant residual impacts must be offset and 2) cumulative impacts do not appear to be addressed meaningfully. We recommend the approach to delivering net positive outcomes is strengthened via revisiting these two key areas.

The MNES standard requires relevant decisions to 'Enable and where relevant provide for monitoring, evaluation and reporting of outcomes from MNES'. We are very supportive of monitoring, evaluating and reporting (MER) being included in the standard. However, we suggest the requirement could again be strengthened to provide for mandatory and robust MER, given this is the key mechanisms via which achievement of the outcomes of the standard will be demonstrated.

We are pleased to see terms like baseline, like-for-like and habitat being explicitly defined.

Restoration Actions and Contributions National Environmental Standard

We note that the new Act does not appear to use the word 'offsets' but rather refers to restoration actions and restoration contributions. We are interpreting this as being an acknowledgement of the challenges with offsets and a refocusing on offsets that are geared towards restoration rather than simply locking up areas of habitat that have little scope for achieving an environmental gain. However, we remind the Taskforce that internationally accepted definitions of the mitigation hierarchy¹ are to avoid – minimise – rehabilitate or restore – offset. Therefore, there is a serious risk that the currently proposed approach is inconsistent with international best practice in eliminating offsets from the scope of the Act, i.e. the new Act only includes the first three steps of the hierarchy, ending with restoration. We suggest this is not what is intended, but recommend this risk is considered.

What is good:

It is important that climate change risks are included in this standard – this is the only place we could see mention of this, so far.

As above, we are pleased to see that restoration will only be allowed after all measures to avoid and reduce impacts have been demonstrated – it is important that this is embedded in the new Act. However, also note that restoration will only be required for significant residual impacts to MNES – refer to comment above regarding this and our suggestion for strengthening.

We are supportive of the clear link between the proposed restoration statements and recovery actions/contributions (noting the implementation challenges discussed above). The definition of direct restoration actions is also inclusive of all reasonable approaches currently considered to be effective.

The list of what must be delivered by restoration actions (e.g. feasible, like-for-like, additional) is consistent with international requirements for best practice offsets.

The ability to deliver endorsed advanced restoration actions prior to the commencement of an action is an improvement on the current EPBC Act offsets policy, which allows for advanced offsets but without a mechanism for these to be implemented. We recommend these are incentivised, particularly if restoration contributions are taken forward. Having projects in place ahead of impacts occurring is a key element of delivering net positive outcomes for MNES.

What needs improvement:

As noted above, restricting the scope of restoration to only account for significant residual impacts is the status quo per the current EPBC Act and should be strengthened.

We understand the mechanism for determining the projected gain of xx% above baseline will be determined using the current EPBC Act offsets calculator, with an expected output of 100+xx% output. This should be clarified, with a review of the functionality and appropriateness of the offsets calculator, as well as a clear justification for what the xx% metric will be. We note that in jurisdictions such as the United Kingdom, a blanket percentage has been adopted (in the UK 10%); however, we recommend the Australian Government consider whether a blanket uplift is

¹ For example the IUCN Policy on Biodiversity Offsets, available here:
https://www.iucn.org/sites/default/files/2022-06/iucn_biodiversity_offsets_policy_jan_29_2016_0.pdf

appropriate or whether a more nuanced approach could be taken, for example a larger required uplift for endangered versus vulnerable species, bioregionally-based metrics.

We see more risks than benefits from the proposed restoration contributions (basically an offsets fund). It is likely to be a very attractive option for proponents to 'pay and walk away' thereby shifting the obligation and risks of restoration onto the Australian Government and/or a Government endorsed Trust. In order for this pathway to be supported by EIANZ, we suggest:

- The restoration contribution framework must be carefully designed, accounting for all the learnings from other, similar frameworks in Australia (e.g. Qld financial payment scheme, NSW biodiversity offsets framework, Pilbara environmental offsets fund).
- Payments cannot be an acceptable option, if like-for-like restoration cannot be delivered. This approach will be inconsistent with the MNES standard (net positive outcome for impacted protected matters). Similarly, if restoration actions for a particular matter cannot be delivered, then we suggest the impacts themselves should be considered unacceptable and not go ahead.
- Pricing must be sufficient to deliver both the required biodiversity outcomes and respond to unforeseen events. Most previous similar schemes in Australia and internationally have been underpriced and these lessons must be learned in any restoration contributions pricing structure.
- The 3-year lag between payment and the commencement of actions must be avoided. This is inconsistent with achieving net positive outcomes for MNES and is not aligned with the requirement for restoration actions nor the current EPBC Act offsets policy (whereby offsets must be in place before an action commences). Endorsed advanced restoration actions are a mechanism to remove the lag.

Implementation considerations:

The proposed restoration actions and contributions will make the EPBC Act Offsets Policy obsolete. Given the importance of offsets/restoration both for achieving environmental outcomes and project approvals for proponents, new policy guidance must be developed as a priority.

We strongly recommend that all restoration action / contribution proposals be designed by suitably qualified professionals, with an appropriate track record of delivering high quality, scientifically robust and ethical offsets proposals.

National Environmental Standard for Data and Information

This standard appears evidence based and sound. We support the current proposed standard.

Community Engagement and Consultation National Environmental Standard

This current draft Standard is totally inadequate. It is recommended that drafters go back to the accepted first principles of public participation in environmental decision-making. Similar to the robust approach to the foundations for the draft Data and Information Standard, there are conventions, standards and established good practice guidelines which should be the basis for Australia's National Environmental Standard for Community Engagement and Consultation. A list of international best practice standards is provided to inform the redrafting of the Standard.

The role of community engagement and public participation has long been an area of contention in environmental decision making. The Samuel Review found in Section 5 that the community participation is limited to process – they do not feel heard.

Drafting a new Act provides a fundamental opportunity to rethink and establish a strong foundation for community input into plan making as well as project-based decision making. Currently the draft Standard is primarily focused on directing procedures for project proponents, without thinking more broadly how or why those logistical directions reflect contemporary internationally accepted approaches to effective public participation in environmental decision making.

There is no mention in the draft Standard of community involvement in listing decisions or in developing protection statements, and only a passing reference to strategic assessments and regional planning with regards to climate change and ecosystem services. Here, obviously, the role of affected communities in plan initiation, review of alternatives, assessment and review is fundamental. For example, the Aarhus Convention suggests for plan making to 'provide for early public participation, when all options are open and effective public participation can take place.'

Please find links to relevant best practice principles from the International Association of Impact Assessment:

<https://www.iaia.org/uploads/pdf/SP4.pdf>

https://www.iaia.org/uploads/pdf/SP12_Public%20participation%20in%20IA%20Follow%20up.pdf

https://www.iaia.org/uploads/pdf/SP9_Indigenous_Peoples_Traditional_Knowledge.pdf

Also please see the link to an international Standard on Stakeholder Engagement:

<https://www.accountability.org/standards/aa1000-stakeholder-engagement-standard/>

EIANZ has members who are internationally acknowledged experts in this complex area of public policy who could provide targeted assistance to help the Department craft a world class Standard on this vital component of robust environmental decision making. We would welcome the opportunity to support the Department with this Standard.

