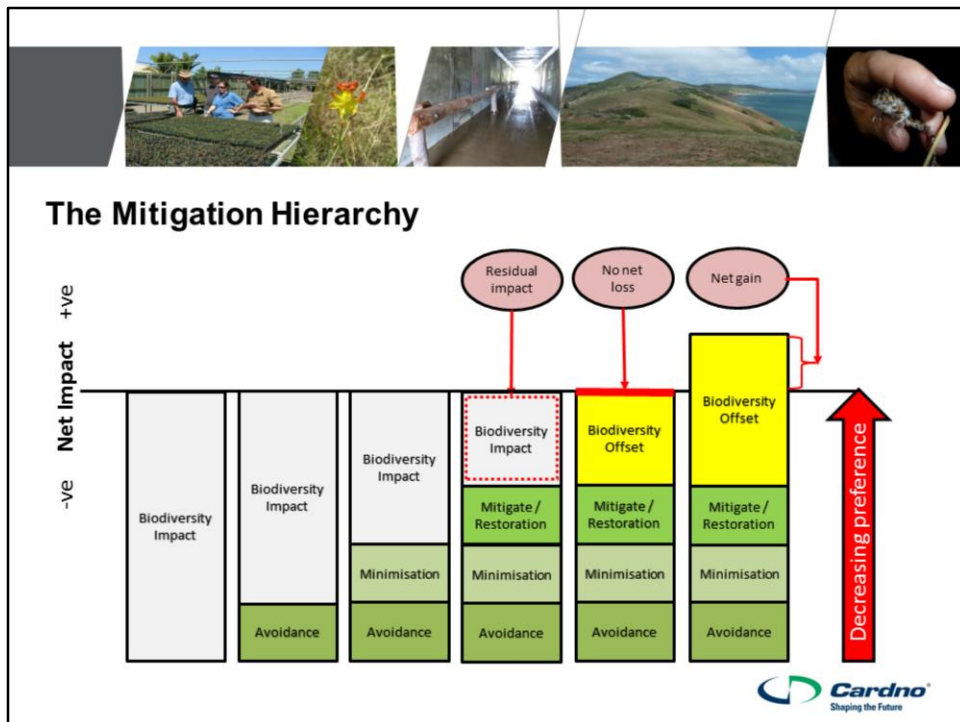




Before we move on with the rest of our exciting program there is something we need to briefly discuss....
The Mitigation hierarchy.



- I'm sure most of you are familiar with the hierarchy, but as a recap I will briefly go through how it works.
- The hierarchy is represented in many ways, often with different graphics and subtle differences in terminology. Frequently it is presented in the form of a graph.
- We start with an impact to a biodiversity value. The impact is negative and is therefore below the line.
- We can reduce the impact by avoiding the value (sometimes the impact can be entirely prevented through avoidance).
- We can continue to reduce the impact by way of minimization. For example, through limiting the length of the construction period to avoid the breeding season of a threatened species.
- Finally, mitigation and rehabilitation can be used to further reduce the impact.
- Once all of these steps have been executed the remaining impact is referred to as the residual impact.
- By offsetting this residual impact we end up in a situation where there is no net loss.
- However, the approach often is to aim for a biodiversity gain. Now we're in positive territory and it is a Net Gain.
- But of course as we move through the hierarchy we go through a series of less favorable approaches. So the ultimate preferred approach is to avoid the impact in the first instance.

Biodiversity Offset Frameworks in Australia

Pending (see *Environment Protection Bill 2019*)

Environmental Protection Act 1986

Native Vegetation Act 1991


Various Acts under the Resource Management and Planning System

Environmental Offsets Act 2014


Biodiversity Conservation Act 2016

Planning and Development Act 2007

Planning and Environment Act 1987



Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)



Now in Australia there are biodiversity offset frameworks in place or under development in all States and Territories.

Sitting along side these is the Commonwealth Framework under the EPBC Act.

And now many local governments are adopting biodiversity offset frameworks – such as Brisbane City Council (indeed all of the south east Queensland local governments who join us here today have such frameworks).

Integral to each of these frameworks is the mitigation hierarchy.




Questions from delegates

- What mechanisms do jurisdictions have in place to encourage avoidance and minimisation, particularly after approval?
- International and Australian reviews suggest that offsetting as a policy can only work effectively when it is not the primary approach for development and that avoiding and minimising impacts should always be the priority before offsetting. In my experience this doesn't seem to be the approach taken for many projects with politicians pushing projects that may have extreme impacts but trying to reassure the public that offsetting will make everything alright. How does each jurisdiction implement the avoid, minimise then offset priorities and ensure that it is implemented effectively without political interference?





- Delegates who registered earlier for this conference were given the opportunity to provide questions for our panel which is in following the following session.
- Two of these questions were about the mitigation hierarchy and how jurisdictions apply it effectively.
- The first considers how the hierarchy is followed after approval.
- The second asks how it is applied without political interference.
- I can't answer these directly, but I will explore examples that touch on some of the issues raised in the questions.
- Let's consider how the hierarchy is intended to be applied in our current frameworks.



The Mitigation Hierarchy in Policy

Policy	Application of mitigation hierarchy
Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy	<i>Offsets will not be considered until all reasonable avoidance and mitigation measures are considered, or acceptable reasons are provided as to why avoidance or mitigation of impacts is not reasonably achievable</i>
Queensland Environmental Offsets Policy	<i>Environmental impacts must first be avoided, then minimised, before considering the use of offsets for any remaining impact</i>
Brisbane City Plan 2014 Offsets Planning Scheme Policy	<i>The Council's environmental offset requirements are underpinned by the premise that impacts are avoided, then minimised, before considering the use of offsets for any remaining impacts</i>

Let's consider a few example policies at the Commonwealth, State and Local government levels, being the EPBC Act Offsets Policy, the Queensland Environmental Offsets policy and the Brisbane City Planning Scheme.

Each require that the mitigation hierarchy must be considered before we even get to the point of considering offsets.




The Mitigation Hierarchy in Legislation

[South Australia's Native Vegetation Regulations 2017](#)

The mitigation hierarchy is as follows:

- (a) **Avoidance** — measures must be taken to avoid clearance of native vegetation;
- (b) **Minimisation** — if clearance of native vegetation cannot be avoided, measures must be taken to minimise the duration, intensity and extent of impacts of the clearance on biological diversity to the fullest possible extent (whether the impact is direct, indirect or cumulative);
- (c) **Rehabilitation or restoration** — measures should be taken to rehabilitate ecosystems that have been degraded, and to restore ecosystems that have been destroyed, by impacts of clearance of native vegetation that cannot be avoided or further minimised;
- (d) **Offset** — where required under these regulations, any adverse impact on native vegetation or ecosystems that cannot be avoided or minimised must be offset by the achievement of a significant environmental benefit that outweighs that impact.



While policies are good, embodying the requirement to address the mitigation hierarchy in legislation is better. South Australia's Native Vegetation Regulation is an example of how this is achieved.

Lets look now at the mechanics of applying the hierarchy – I'll consider 3 approaches associated with 3 frameworks.

Application of the Hierarchy – Commonwealth example

Submitting a referral under the EPBC Act – A fact sheet for a person proposing to take an action

A person must not take an action that has, will have or is likely to have a significant impact on any of the matters of national environmental significance without approval from the Australian Government Minister for the Environment, the Minister.

An action is a project, a development, an undertaking or activity or a course of activities, or a discharge of any of these things.

What is an action? (Even proposed actions need to be referred, you need to consider:

- Is the proposed action likely to have a significant impact on a matter of national environmental significance?
- Is the proposed action likely to have a significant impact on the environment to ground the action by Commonwealth agreement or action on Commonwealth land or the environment on Commonwealth land (the action needs Commonwealth land)?

The referral and assessment process under the EPBC Act involves the following steps that have led to an agreement with Commonwealth authorities to work the Department process.

Key steps to understanding the referral process:

1. Submitting a referral to the Commonwealth Government

2. Assessment and approval process

3. Implementation and monitoring

4. Review and reporting

5. Final report and monitoring

Measures to avoid or reduce impacts

In some cases, your proposed measures may be adequate to avoid or reduce impacts on matters of national environmental significance and further assessment and approval may not be required. For example, a proponent may consent to carrying out construction activities at a time that will avoid the breeding season of migratory birds, thereby avoiding significant disturbances to a protected species. Using appropriate avoidance measures may mean that the proponent can proceed without further assessment and approval under the EPBC Act. They will be able to do:

- Avoid or reduce impacts on matters of national environmental significance
- Avoid or reduce impacts on the environment to ground the action by Commonwealth agreement or action on Commonwealth land or the environment on Commonwealth land

Pre-referral meeting

A pre-referral meeting provides an opportunity for you or your representative to discuss your issue directly with our assessment officer and to put together a comprehensive and targeted referral. Referral documentation that is complete or with limited remaining documentation will assist the assessment officer and save time for you and the Department.

The next step is to make a pre-referral meeting with the assessment officer to discuss your referral at any time before you submit a formal referral of your proposed action to:

- your assessment officer and approval process

EPBC Ref: [redacted]

Dear Mr [redacted]

Additional information required for preliminary documentation

Playa Valley, 1000 Providence Court and South, QLD

4. AVOIDANCE AND MITIGATION


The Department considers further details on the proposed mitigation and rehabilitation measures is required. The preliminary documentation must include the following information:

Firstly the EPBC Act.

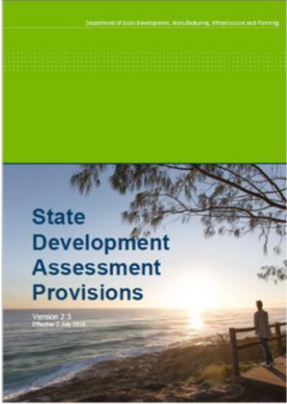
The hierarchy needs to be considered throughout the assessment process.

Initially when a referral is lodged a proponent is required to demonstrate how the hierarchy has been considered.

If a decision is made that the project is a controlled action then there is a need to explore the hierarchy further. In this example where a project is assessed through preliminary documentation there was a need to further demonstrate Avoidance and Mitigation.



Application of the Hierarchy – Qld example




Department of State Development, Manufacturing, Infrastructure and Planning

State Development Assessment Provisions

Version 7.3
December 2016


PO7 Development:

1. avoids impacts on **matters of state environmental significance**; or
2. minimises and mitigates impacts on **matters of state environmental significance** after demonstrating avoidance is not reasonably possible; and
3. provides an **offset** if, after demonstrating all reasonable avoidance, minimisation and mitigation measures are undertaken, the development results in an acceptable **significant residual impact on a matter of state environmental significance**.




The Queensland State Development Assessment Provisions provide assessment benchmarks for applications affecting matters of interest to the State including matters of state environmental significance. The provisions include performance outcomes that must be met in order to achieve compliance.


This performance outcome requires applicants to demonstrate they have applied the mitigation hierarchy.




Application of the Hierarchy – NSW example



Biodiversity Assessment
Method



Guidance to assist a
decision-maker to determine
a serious and irreversible
impact



The NSW Biodiversity Assessment method incorporates the mitigation hierarchy.

One interesting addition to the method though is consideration of “serious and irreversible impact”. Effectively this process identifies that there are some values for which avoidance is the only acceptable outcome.

Difficulties in application

(a) Avoidance
 (b) Minimisation
 (c) Rehabilitation or restoration
 (d) Offset

- But when we get to the point of actually applying the hierarchy there are of course often difficulties.
- Sometimes it is impossible to avoid the impact. Take for example an extractive resource such as a hard rock quarry. The quarry must be located where the resource occurs and often it is necessary to utilize resources proximate to where it is needed – the roads, buildings and other infrastructure we use daily.
- Or take this hypothetical example – a road reserve in Brisbane. This isolated patch in the suburbs is likely to support multiple biodiversity values. As the population increases it is likely that the road will need to be realized. Now it may be possible to avoid the impact by way of tunneling under the biodiversity values, but this will be incredibly expensive, perhaps to the point where it is cost prohibitive. In this instance should community’s need for this infrastructure override the need to avoid the biodiversity values.
- Generally, minimization of impacts is readily addressed. However, returning to one of the delegate questions, ensuring promised minimization approaches can be hard to adhere to due to unforeseen issues.
- An example of where mitigation can be difficult is where the subtle differences between rehabilitation and offset delivery is confused. Quite a bit of debate on this subject ensued in relation to a project I was involved with a few years back.
- And then we get to offsetting. Sometimes, I have to concede, we seem to arrive at an offsetting outcome without adequately considering the hierarchy.



- Now, despite the mitigation hierarchy being fundamental to biodiversity offsets, they are often inadequately considered for a range of reasons. These reasons, and discussion regarding potential solutions, could form the basis of a standalone conference.
- The presentations over the next two days focus on the delivery of biodiversity offsets.
- So, while we might occasionally touch on the hierarchy over the next two days, I will quietly close the door on the issue and give the floor to the next speaker of this session.