Biodiversity Coordination Unit
Department for Environment and Water
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RE: National Environmental Law Association Submission: Developing a Biodiversity Act for South Australia Discussion Paper

The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to make a submission to the South Australian Biodiversity Coordination Unit in relation to the Discussion Paper (**Discussion Paper**).

1. About NELA and its interest in the Discussion Paper

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes directors with expertise in international and domestic legal frameworks for biodiversity conservation, ecological restoration, environmental and carbon markets, energy transition, climate change laws and policies, natural disasters, environmental regulation and regulatory theory, natural resource management and Environmental, Social & Governance (**ESG**) frameworks.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. NELA is also a member of the International Union for the Conservation of Nature (**IUCN**) Australasia Chapter; and of the leadership committee of the Professional Bodies Climate Action Charter Australia and New Zealand Forum, which represents professional members in Australia across a wide range of sectors from finance, insurance, science, engineering, law, health, construction, and the built environment.

The reform project that is underway in South Australia represents a critical and unique opportunity to develop the state's first biodiversity legislation – a statute that is fit-for-purpose, ambitious, adaptable and nation-leading. NELA is pleased to contribute to that project, drawing on its expertise and experience in environmental law reform at the national level and in other states and territories. NELA supports the goal of producing a Biodiversity Act for South Australia that will, as the Minister has suggested, 'prioritise the protection of biodiversity' (p 3) and reverse the trajectory of biodiversity decline in the State.

This Discussion Paper is important to NELA's members, particularly in South Australia, but also in other states where those members have and are participating in environmental law reform projects. NELA's members recognise the importance of clear, strong, transparent and ambitious laws for safeguarding Australian environments. NELA is grateful for the opportunity to make a submission.

2. The Discussion Paper Topics

NELA makes the following points in relation to the topics set out in the Discussion Paper:

- We broadly support the framing of each of the topics.
- We strongly recommend that, in designing legislation to reflect these topics, the South Australian government also plan for supporting infrastructure including, most crucially, appropriate resourcing.
- In particular, we strongly support the full implementation in legislation of points 1-4 under Topic 2, about avoiding impacts; and points 8-9 under Topic 4, about identifying biodiversity threats and mandating a response to those threats.
- In designing the legislation to implement Topics 2 and 4, in particular (including that prioritises and provides guidance about avoidance, requires evidence to justify efforts to avoid and minimise harm, ensures that biodiversity is left measurably better off, identifies threats and creates obligations to address them), we emphasise the critical need to ensure that the proposed Act:
    - clearly articulates each relevant obligation;
    - is explicit and specific about who holds the obligation and how they can acquit it;
    - articulates when each obligation will arise; and
    - provides guidance about how the costs of meeting those obligations will be allocated; whether that includes incentives, a proponent having to bear all or some of the costs, opportunities to offset those costs through the taxation system, access to biodiversity and/or climate markets, or other arrangements.

3. Broader context for the proposed Biodiversity Act

3.1. Supporting South Australia's achievement of Global Biodiversity Framework Target 3 – the area-based target

The Discussion Paper's Topic 8 addresses Target 3 of the Kunming-Montreal Global Biodiversity Framework (the **GBF**), which is knowns as the '30x30' target, to protect 30% of the area of the State – not limited to terrestrial areas but also freshwater, coasts and oceans – by 2030. We support the South Australian Government's plan to implement mechanisms to achieve that target in the new Biodiversity Act. For a rigorous and valuable examination of what might be required to implement the target effectively, we commend the following resource to the Biodiversity Coordination unit:

> Global Environment Facility, WWF and The Nature Conservancy, *30x30: A Guide to Inclusive, Equitable and Effective Implementation of Target 3 of the Kunming-Montreal Global Biodiversity Framework* (WWF 2023), www.iucn.org/resources/grey-literature/30x30-guide-inclusive-equitable-and-effective-implementation-target-3.

The Guide provides a 'how-to' for implementing, monitoring and reporting on this target, while maintaining, for example, policy coherence and recognising the limitations of monitoring, projections and competing values.

NELA supports the proposal from the Australian Land and Conservation Alliance that a new Biodiversity Act for South Australia represents an opportunity to establish an independent statutory Trust to broaden opportunities for private land conservation and restoration. We submit that the establishment of such a Trust could be a simple and effective mechanism to enable restoration alongside achieving strong legal protections for critical habitats on private land.

3.2. Achieving Global Biodiversity Framework Target 2 is also a priority – the restoration target

Equally important to the area-based target, is GBF Target 2: the restoration target. Under that target, parties including Australia have agreed to:

> *Ensure that by 2030 at least 30 per cent of areas of degraded terrestrial, inland water, and marine and coastal ecosystems are under effective restoration, in order to enhance biodiversity and ecosystem functions and services, ecological integrity and connectivity.*

This highly ambitious target requires countries to support and invest in large scale restoration measures to repair the legacy of environmental destruction across land- and seascapes.

At present, the Discussion Paper only refers to restoration under Topic 2 on 'avoiding impacts', and briefly in Topic 8 on '30x30'. Restoration is undoubtably an important part of the avoid/mitigate/restore/offset hierarchy, but its role there is simply to support no net loss of nature as

part of a proposed development. The type of restoration contemplated by Target 2 of the GBF requires restoration far beyond that, to achieve significant net gains for nature, with efforts aimed at restoring ecosystem functions and connectivity. This major upscaling of restorative efforts can be supported by funding and other financial incentives, across both private and public tenures. NELA notes that there is an indication of funding for use of private land for this purpose, and this is welcomed.

The proposed Act provides the South Australian government with an opportunity to take leadership in Australia on progress towards Target 2 of the GBF, through including restoration as an object of the legislation (decoupled from development), and through including statutory machinery for public-led restoration, and funding for private restoration. On this point, drafting for South Australia's new Act could draw on the example of the European Union's new *Nature Restoration Law*, the details of which can be found here: https://environment.ec.europa.eu/topics/nature-and-biodiversity/nature-restoration-law_en.

We urge the South Australian government to place ecological restoration – and the goal of improving, enhancing and restoring South Australian environments – at the heart of its new Biodiversity Act, so that the Act will be a conservation-oriented law, rather than a development-oriented law.

3.3. The statutory goal of Ecologically Sustainable Development

As a rule, ESD principles have not proven to be a helpful and conservation-oriented guide for decision making in regulatory frameworks (see, Ken Henry's Review in 2023 of the Biodiversity Conservation Act 2016 (NSW)). The South Australian Biodiversity Act could take a number of different approaches as an alternative to the ESD framing. One approach that could be useful is to list a series of principles that can guide decision making under the Act ('directing principles', see p 5 of the following report: APEEL, *Foundations of Environmental Law: Technical Paper 1*, 2017, available at www.edo.org.au/wp-content/uploads/2022/06/APEEL-Technical-Papers-1-8-Compilation.pdf; and see the discussion on statutory objects, goals and principles in the ENREL submission to this review, cited below). To be clear, these would not be objects or goals of the Act, but principles to guide the process and focus of decision making.

The following examples should be investigated for inclusion in the South Australian Biodiversity Act:

- **precautionary principle** (framed in a way that requires decision makers to act decisively to protect biodiversity in the face of a potential threat, and to take a conservative, protective approach to any proposal to harm or destroy biodiversity);
- **principle of ecological integrity** (to draw decision makers' attention beyond individual species and ecosystems to their functions, health, resilience and integrity more broadly);

- **principle of cumulative impact** (to draw decision makers' attention to broader timescales and beyond the individual scenario that they have been presented with – such as an individual development proposal or an individual application to restore or enhance an ecosystem);
- **principle of restoration and enhancement** (this is less common than the others mentioned above and, as a result, perhaps even more important for inclusion – to ensure that enhancing and improving nature is at the forefront of decision making under the new Act); and
- **principle of Traditional Ecological Knowledge** (this has not been listed in other Australian legislation but NELA strongly recommends the specific inclusion of a principle that obliges decision makers to seek out and give weight to TEK as a guide for decision making under the Act. For more detail on what this principle may require, we refer to the submission on this point by the Biodiversity Council; and the Biodiversity Council's 10 Point Plan, discussed below).

4. NELA's submissions on *national* environmental law reforms and their relevance to South Australia's reform process

NELA has been an active contributor to national reforms in recent years. We **attach** two Position Papers which set out information that is likely to be relevant to the Biodiversity Coordination Unit's consideration of these issues: (1) Matters of National Environmental Significance and Priority EPBC Act Reforms; and (2) Environmental Offsets.

4.1. Matters of National Environmental Significance and Priority EPBC Act Reforms

In this Position Paper, we emphasised the following important considerations for national law reform, which we suggest are equally important in state legislation:

- **Legislate to achieve biodiversity recovery, not maintenance of the status quo**: the Act must include goals and substantive arrangements that embed environmental recovery and improvement. Relevant arrangements ought to include a positive obligation on government to prepare a recovery plan for any species or ecological community at the time of its listing as threatened (a requirement that is common elsewhere in the world, see e.g., the United States *Endangered Species Act 1973*, and the clear success that has flowed from this obligation to undertake and fully-resource recovery planning, see <www.govinfo.gov/features/ESA-50th-anniversary>). Recovery plans should include a list of the actions needed to prevent the species or community from declining further, and decision makers should be prohibited from approving actions that are inconsistent with a recovery plan.

- **Include strategic, landscape scale approaches**: consistent with the Henry Review of the NSW Act, and the Regional Planning process that the Australian Government foreshadowed in its Nature Positive Plan, regional or landscape-scale approaches to recovery and conservation can enable conservation of cryptic, abundant-but-ecologically-critical, and non-listed and non-charismatic species that are crucial for healthy and resilient landscapes, but often overlooked and unprotected by common conservation tools such as species listings.
- **Connect goals such as recovery with decision making powers and constraints**: NELA strongly recommends against terminology such as 'have regard to', which has been demonstrated in almost every review of environmental laws across Australia to be wholly insufficient to protect biodiversity. Broad discretion for decision makers typically results in far-weaker protections for biodiversity because ambitious action is less clearly supported by the legislation and thus more amendable to being overturned in litigation or political lobbying. Stronger statutory terminology, such as 'further', 'act consistently with', or 'achieve' are more likely to result in the Act being effective at conserving South Australian biodiversity.
- **Protect habitat**: a very large proportion of threatened species are directly threatened by habitat loss or conversion but 'critical habitat' protections are all but absent in Australian legislation. South Australia's Biodiversity Act should recognise the crucial role that habitat plays in species persistence and ecological health and resilience, and provide an explicit and enforceable mechanism for protecting habitat (again, the United States' *Endangered Species Act 1973* provides terminology for this kind of protection that has been heavily litigated but legally resilient and remarkably effective in practice, compared to Australian laws).
- **Make the connection between biodiversity and climate change explicit**: recognising the scale, speed and extraordinary threat that climate change poses for biodiversity will be very important in the new South Australian legislation. Climate is not the only threat to biodiversity, and other threats should be able to be identified and acted on (such as habitat loss, and excessive discretion for decision makers, as indicated above). However, climate change will require new and more adaptive forms of decision making (see pp 7-8 in the Position Paper), as well as adjusting the necessary focus of biodiversity laws. For example, species distributions will shift as the climate changes, undermining the clarity of what is 'native' to a particular area; and native species may become invasive in ways that demand active management and perhaps eradication – complicating historically 'bright line' distinctions and definitions (for more detail on this point, see the submission by the Environment Institute to this review).
- **Be creative in designing statutory tools for compliance**: best-practice compliance tools require sound and up-to-date data, monitoring, consistent and transparent reporting, National Environmental Accounting, tracking changes over time, mandatory approaches to learning, and

engagement with compliance hierarchies and, we recommend, with responsive forms of regulation (see Braithewaite, here: https://johnbraithwaite.com/responsive-regulation/).

4.2. Environmental Offsets

In the second of NELA's national Position Papers, we reviewed scholarship about biodiversity offsetting and made recommendations about what a best-practice arrangement for offsets might require. NELA has expressed reservations about the use of offsetting as a tool for environmental management, given the clear evidence that offsetting arrangements around Australia to date appear to have exacerbated environmental decline and loss.

Nevertheless, if environmental offsets are contemplated as a component of South Australia's new conservation laws, we urge the review team in South Australia to consider our recommendations for designing a market mechanism that is more effective than those currently in place elsewhere in Australia.

5. Other submissions

NELA supports the work of the Biodiversity Council, and its recently released 10 Point Plan for national environmental law reform.[1] This Plan is relevant to the South Australian Discussion Paper in the following ways:

- As a means to increase the involvement of First Nations People (**Topic 1**), the Biodiversity Council identifies the need to protect culturally significant entities through a listing process beyond threatened species listing. This is proposed to complement Indigenous heritage listing and would need to be accompanied by a realignment of policy and practice to promote the traditional management of culturally significant entities.
- Strong legal protections for critically important areas for threatened species and ecological communities are needed. Identifying, protecting and effectively managing critical habitats needs to be the highest priority to prevent species declines with conservation experts empowered to develop strategies and plans and investments made in their implementation and ongoing monitoring (**Topic 4**).
- Any new regulatory framework for improved biodiversity data (**Topic 7**) needs to be accompanied by major and ongoing investments for comprehensive data and supporting systems (including IT

[1] The 10 Point Plan is available here: https://biodiversitycouncil.org.au/admin/uploads/Biodiversity_Council_2023_Delivering_on_nature_positive_10_essential_elements_of_national_environmental_law_reform_876c64a13a.pdf.

systems and funding of any new scientific committees (**Topic 5**)). Continuous review of the state of the environment in South Australia, should be based on a consistent, integrated and comprehensive approach to natural capital accounting.

NELA has had an opportunity to review submissions to the South Australian Discussion Paper prepared by the following groups:

- Australian Land Conservation Alliance (**ALCA**);
- Biodiversity Council; and
- The University of Adelaide's Environment, Natural Resource and Energy Law (**ENREL**) Research Unit.

We have referred to particular aspects of our support for the Biodiversity Council, ALCA and ENREL submissions in text, above.

6. Learning from other jurisdictions

In drafting the new Biodiversity Act for South Australia, NELA urges the Biodiversity Coordination Unit to learn from the scathing reviews that have followed statutory reviews of national and state legislation in Australia in recent years. NELA emphasises the value of learning from shortfalls in other jurisdictions, and taking the opportunity to improve on those legal frameworks that have come before it. In particular, NELA strongly encourages the Biodiversity Coordination Unit to avoid the shortfalls that have been demonstrated in the design, implementation and/or resourcing of other state and national environmental laws, which have prevented those laws from achieving their goals and, in fact, have presided over extraordinary biodiversity loss. Important examples include Allan Hawke's and Graeme Samuels' decadal reviews of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) published in 2009 and 2020, respectively; and the Ken Henry review of the *Biodiversity Act 2016* (NSW), published in 2023.

7. Conclusion

NELA appreciates the opportunity to make this submission to the South Australian Biodiversity Coordination Unit, in anticipation of a new Biodiversity Act in the state. We urge the Biodiversity Coordination Unit to be courageous in designing this law, and to avoid the pitfalls of existing legal frameworks that have resulted in such consistent biodiversity decline across this extraordinary continent.

NELA looks forward to further opportunities to participate in the consultation process as the reform project progresses. In the meantime, please direct questions about this submission to the Co-convenors of the NELA Publications, Advocacy & Submissions portfolio: Madeline Simpson and Phillipa McCormack at publications@nela.org.au.

This submission was drafted by Justine Bell-James, Sarah Brugler and Phillipa McCormack of the NELA Publications, Advocacy & Submissions Portfolio on behalf of the NELA Board.

NELA Issues Paper for Commonwealth Environment Minister - EPBC Act Reforms

1. Executive Summary

The Australian Government has committed to comprehensive, meaningful reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), including in its Nature Positive Plan and through the Nature Repair Market Bill 2023. In this position paper, NELA highlights a number of important areas of environmental concern that should receive close attention as the Australian Government reforms are developed, including: streamlined assessment processes, connecting environmental 'recovery' with decision-making, improving compliance tools and making explicit the connection between climate change and biodiversity conservation.

2. Issues and Recommendations

2.1. Assessment and decision-making

The Samuel Review and a variety of stakeholders have recommended simplifying and clarifying referral and assessment processes under national environmental laws. For example, current impact thresholds have been identified as unclear and environmental impact assessments 'have not demonstrably delivered environmental outcomes or efficiencies'.[1] Instead, EPBC Act assessment processes are inefficient, complex and unsupported by strong processes and systems. These processes also duplicate activities prescribed by other Commonwealth agencies and laws.[2]

NELA supports recommendations to simplify processes for referral and assessment provided these are coupled with improvements to those processes to achieve better environmental outcomes.

Alongside this emphasis on simplifying and enhancing outcomes under new legislation, NELA urges the Australian Government to design its new environmental laws in a way that facilitates environmental resilience and promotes biodiversity adaptation under changing environmental and climatic conditions. NELA's recommendations about climate change are set out in detail below, at Part 2.6.

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[1] Environmental Defenders Office, 'Submission to the 10 year review of the EPBC Act' (Discussion Paper, 2020) <https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf> (in relation to strategic impact assessments under Part 10 of the Act). See also Maitz, N. M., Taylor, M. F. J., Ward, M. S., & Possingham, H. P., 'Assessing the impact of referred actions on protected matters under Australia's national environmental legislation. Conservation Science and Practice' (2023) 5(1), e12860. <https://doi.org/10.1111/csp2.12860> (finding that habitat of threatened species in QLD and NSW continues to be lost despite EPBC Act assessment processes), cited in Biodiversity Council, 'New study finds EPBC Act assessment decisions are having little effect on reducing habitat loss for threatened species' (2023) <https://biodiversitycouncil.org.au/media/uploads/2023_2/202302_factsheet_maitz_epbc_act_assessments_v1.pdf> . See also Law Council of Australia, 'Submission to the EPBC Act review' (2020) at pages 31-32 (with respect to the underuse of strategic impact assessments under Part 10 of the EPBC Act and deficiencies of project-based environmental impact assessments); Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law' (2019) 42(4) UNSW Law Journal 1179, 1190 (with respect to deficiencies in project-based environmental impact assessments).

[2] Independent Review of the EPBC Act, 'Commonwealth-led assessment processes are inefficient' (Interim Report, 2020) <https://epbcactreview.environment.gov.au/resources/interim-report/chapter-4-efficiency/43-commonwealth-led-assessment-processes-are-inefficient>.

Developing new National Environmental Standards and Regional Plans will be central to improving the efficiency and quality of Commonwealth-led assessment pathways under a new environmental legislative framework. Equally important is the need for improvements to information-gathering, data collation, storage and availability which underpin assessment processes, and to regulatory and enforcement systems which ensure post-assessment compliance. A thorough analysis of the various regulatory and enforcement systems that are relevant to environmental outcomes—across, for example, biosecurity, native forestry, protected areas and compliance arrangements for major national infrastructure projects—is required to resolve inconsistencies, gaps and conflicts to ensure integrity of these processes.

2.2. Recovering biodiversity to prevent extinction and promote healthy environments

Planning for recovery

Without achieving the recovery of threatened species and ecological communities, the EPBC Act cannot deliver on the Australian Government's nature positive goals, nor on its international commitments under the Global Biodiversity Framework. If species populations and ecological communities are not being recovered, ecosystems will continue to decline and threatened species lists will continue to expand, with all of the attendant costs and challenges of large bureaucratic lists. In addition to the costs and complexity of expanding bureaucratic lists, the broader effects of environmental decline will continue to grow. Ecosystem decline results in direct impacts on human communities, socially and economically. For example, degradation of Mountain Ash forests has tangible negative impacts on water flow in catchments which supply drinking water.[3]

In its present form, the EPBC Act has failed to prevent extinction, let alone facilitate species' recovery. While vulnerable species are protected under s 18(4) of the EPBC Act, vulnerable ecological communities are not protected from harm under the EPBC Act and are not included in the Act's offence provisions. Critically, while significant effort and resources are invested in assessing and listing threatened species, once listed, these resources and efforts are not sustained to deliver improved outcomes for biodiversity. This is despite the promotion of conservation of biodiversity being a specific objective of the EPBC Act.[4]

NELA proposes that there be a positive obligation that a recovery plan or conservation advice be presented, either by government or the Threatened Species Scientific Committee, at the same time as a species listing statement (that is, when a species is proposed to be listed for the first time), to ensure that a plan for recovering that species is part of the process of recognising that it is threatened. Recovery documents should include details of actions necessary to prevent the species from declining further, and development approvals should not be inconsistent with either the recovery plan or conservation advice (see further discussion under 'connect recovery with decision making', below). The Australian Government should also develop and publish a clear policy position that it will fund priority recovery actions—whether described in a recovery plan or conservation advice—or it should articulate other means by which recovery will be resourced (i.e. through competitive grant processes; by reverse auction; through government incentives for philanthropic investment or—perhaps most appropriately—through a rigorous, comprehensive and high-integrity combination of public funding and other means).

The development of Regional Plans, as foreshadowed by the Australian Government in its Nature Positive Plan, could have benefits for the recovery of threatened species and vulnerable ecological communities. The benefits of a regional planning approach include the ability for pre-emptive action to address species decline before a species becomes eligible for listing – including protecting abundant species that play important ecosystem roles including 'top order' predators

[3] Taylor et al, 'Resource Conflict Across Melbourne's Largest Domestic Water Supply Catchment' (2018) Fenner School of Environment and Society, Australian National University, Canberra. https://openresearch-repository.anu.edu.au/handle/1885/149441 . See also, Bergstrom et al, 'Combating ecosystem collapse from the tropics to the Antarctic' (2021) 27(9) *Global Change Biology* 1693 https://onlinelibrary.wiley.com/doi/10.1111/gcb.15539

[4] EPBC Act, s 3(1)(c).

such as quolls, eagles and sharks, or ecosystem engineers such as bilbies and bettongs, lyrebirds and parrotfish. Regional planning also enables more effective and efficient research and management to restore habitat that supports vulnerable ecological communities and threatened species.

NELA strongly recommends that new Regional Plans specify priorities for threatened species and ecological communities, based on present threats and future climate projections, and list corresponding performance targets against which success can be measured, lessons can be articulated, and adjustments can be implemented.

NELA strongly supports the (ongoing) development of a Common Assessment Method for listing threatened species, ecological communities and ecosystems.[5] In addition, NELA recommends:

- introducing a new, Independent Scientific Committee that is empowered to assess and directly list threatened species, ecological communities and ecosystems for national protection, with clear, statutory assessment timeframes to avoid delay;
- expanding emergency listing provisions to include threatened species, critical habitats, and ecological communities;[6]
- clarification in the EPBC Act that the national EPA must not approve adverse actions in areas of habitat that are critical for the survival of threatened species or ecological communities;
- new threat categories to reflect international standards, such as processes for listing threatened ecological communities, near-threatened species and data-deficient species;[7] and
- development, implementation of, and investment in, recovery plans in a coordinated manner, Australia-wide.

NELA supports the recommendation made by the Environmental Defenders Office[8] to extend assessment, authorisation and offence provisions of the EPBC Act to vulnerable ecological communities.

Connect recovery with decision-making

NELA submits that current statutory requirements which prescribe that when making a decision on an action, the Minister must 'have regard to' an approved Conservation Advice for a species or ecological community that is likely to be impacted by the action and 'must not act inconsistently' with a Recovery Plan[9] fall short of ensuring that decision making is consistent with those documents. While a failure of the Minister to consider a relevant Conservation Advice *at all* may be fatal to the validity of a decision,[10] if the Minister gives genuine consideration to the advice, a development that is inconsistent with preventing extinction of a species may be approved even in the absence of any conditions directed to mitigating impacts on the species.

NELA recommends more stringent statutory requirements to ensure that, when making a decision under the Act, the Minister must not act:

(a) inconsistently with a recovery plan, conservation advice, threat abatement plan and international agreement;[11] or
(b) in a way that will or is likely to cause a listed threatened species or ecological community to become extinct within a specified time period.

[5] https://www.dcceew.gov.au/environment/biodiversity/threatened/cam
[6] See e.g., *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 324JL.
[7] See the International Union for the Conservation of Nature, 'Red List of Threatened Species' (Web Page) <www.iucnredlist.org/en#:~:text=The%20IUCN%20Red%20List%20Categories%20and%20Criteria%20are,Endangered%2C%20Critically%20Endangered%2C%20Extinct%20in%20the%20Wildand%20Extinct>.
[8] Above n1.
[9] EPBC Act, s 139.
[10] See for example, *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694.
[11] Consistent with recommendations from the Environmental Defenders Office (n 1).

2.3. Reconnect Australia's Ramsar obligations and climate change

Article 3.2 of the Ramsar Convention requires parties, including Australia, to monitor and report to the Ramsar Convention Secretariat if the ecological character of any Ramsar wetland has changed, is changing, or is likely to change, as a result of technological developments, pollution or other human interference.[12] More than a decade ago, the Australian government developed a National Guideline on the application of reporting obligations under Article 3.2[13] The National Guideline states that a notification will not be made where climate change is the principal cause of identified ecological character change.[14] This is not consistent with the spirit of decisions of the Conferences of the Parties to the Ramsar Convention, particularly Resolution X.24 on 'Climate change and wetlands', which emphasises the critical climate mitigation and adaptation benefits of wetlands, the vulnerability of wetlands to climate impacts and the importance, under the Convention, of protecting from climate change, restoring after climate impacts, and facilitating climate resilience for listed wetland ecosystems.[15]

Changes at a Ramsar site will typically arise from a combination of human activities and natural factors and, if the focus is on preventing the decline and loss of internationally significant wetlands across Australia, the implications of climate change should trigger obligations to report and actively recover those ecosystems.

The National Guideline was developed in 2009 and is in need of review and update. Reforms to the National Guideline on reporting are consistent with the broad aims of the Ramsar Convention, which is 'the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world',[16] and with a 'nature positive' approach to environmental law.

2.4. Protect habitat

The current legal regime offers inadequate protection for species' and communities' habitats in Australia, despite habitat loss and conversion being a substantial threat to nearly half of Australia's currently listed threatened species.[17]

Critical habitat is the habitat that a species needs to survive today and for at least the next 10 years. The habitat that a species needs to survive should be identified for all species in Australia that are listed as threatened with extinction, so that we have an opportunity to prevent that extinction. The Act should prohibit actions that will or are likely to have a significant impact on critical habitat for listed threatened species or ecological communities without a permit.[18] Statutory protections should also extend beyond Commonwealth Areas, either by agreement with state or territory governments, or through the implementation of a National Standard that includes

[12] Article 3.2 of the Ramsar Convention 1971; see Department of Climate Change, Energy, the Environment and Water, 'Notification of change in ecological character – Fact sheet' (2012) <https://www.dcceew.gov.au/water/wetlands/publications/factsheet-notification-change-ecological-character>.
[13] National Guidance on Notifying Change in Ecological Character of Australian Ramsar Wetlands (Article 3.2) (2009), Department of Environment, Water, Heritage and the Arts. https://www.dcceew.gov.au/water/wetlands/publications/national-guidance-notifying-change-ecological-character-australias-ramsar-wetlands
[14] Ibid, p 8-9.
[15] 'Wetlands and Climate Change', Decision of the 10th Conference of the Parties to the Convention on Wetlands (Changwon, Republic of Korea, 28 October-4 November 2008) Resolution X.24, https://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_x_24_e.pdf; and see Resolution X.16 at the same Conference of the Parties, flowchart C on page 8, which indicates that a change in ecological character that is more than 'to trivial to report' should be the subject of a report to the Ramsar Secretariat under Article 3.2 – making no exception or qualification for changes that are exclusively as a result of climate change, see https://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_x_16_e.pdf.
[16] Department of Climate Change, Energy, the Environment and Water, 'Australia's obligations under the Ramsar Convention: Legislative support for wetlands – Fact sheet' (2012) <https://www.dcceew.gov.au/water/wetlands/publications/australias-obligations-under-ramsar-convention-legislative-support-wetlands-fact-sheet>.
[17] See Maitz, N. M., Taylor, M. F. J., Ward, M. S., & Possingham, H. P., 'Assessing the impact of referred actions on protected matters under Australia's national environmental legislation. Conservation Science and Practice' (2023) 5(1), e12860. <https://doi.org/10.1111/csp2.12860> (finding that habitat of threatened species in QLD and NSW continues to be lost despite EPBC Act assessment processes).
[18] Environmental Defenders Office (n 1).

critical habitat protection as a 'baseline' standard to which state and territory environmental laws must adhere.

2.5. Recommit to a comprehensive implementation of CITES through Australian laws

The Australian Government signed up to the Kunming-Montreal Global Biodiversity Framework in December 2022, which includes a goal of reducing new species invasions and the impact of invasive species on biodiversity. The two fundamental components of meeting that goal in Australia are to (a) prevent non-native species being imported and released into the wild in Australia; and (b) prevent non-native (particularly alien invasive) species being transported from one state or territory in Australia and released into another state or territory (and thus expand their range and the scope and scale of their impact).

At present, there are severe limitations in the connections between statutory and institutional arrangements for biosecurity and environmental management across Australia, including in the goals, implementation, monitoring and enforcement of these regimes. For example, some plant species that are listed as noxious weeds in northern Australia are still sold at plant nurseries for garden plantings in southern Australia, despite clear evidence that climate change over the coming decades will render the conditions in southern Australia ideal for those species to become rapidly environmentally destructive. While the Australian Government has a relatively well-resourced and effective biosecurity regime at national points of ingress, governed primarily under the *Biosecurity Act 2015* (Cth), the states and territories have wildly different capacities and track record on preventing the introduction and movement of non-native species. This is an area of law where closer integration and better communication between enforcement regimes could yield excellent co-benefits for industries such as agriculture, as well as for biodiversity conservation outcomes.

Australia is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**). Indeed, Part 13A of the EPBC Act implements Australia's obligations under CITES by regulating international movement of wildlife and wildlife products. In addition to improving the consistency and effectiveness of Australia's internal biosecurity arrangements, NELA recommends a tightening of these national legal provisions, listing and enforcement arrangements, and resourcing, implementation, and management of Australia's international obligations under CITES—particularly in relation to unregulated sections of the international pet trade into Australia.[19] This will likely require both rationalisation, clarification and a closer interaction between national biosecurity and environmental legislation, and between these national laws and their state and territory equivalents. Tightening import and domestic, cross-border transport loopholes will help Australia to meet its Global Biodiversity Framework targets and reduce the extraordinary costs associated with new invasive species incursions to Australian natural environments and to Australian agriculture and other land management industries.

The EPBC Act currently requires permits for importation of Appendix II CITES listed species. This arrangement is costly and yields little conservation benefit, since, often, 'the exporting country has already conducted a sustainability assessment'.[20] NELA supports the recommendation of the Samuel Review, that permit requirements be removed where sustainability assessments have been executed before export. NELA also supports calls that have been made by experts over many years, including the Invasive Species Council, to adopt nationally consistent 'safe lists' (also referred to as 'permitted lists') or lists of species that are approved for transport across state and territory borders, as well as for import into Australia.[21] Generally, the safe list approach

[19] See, e.g. Lassaline and Cassey, 'Buying bugs and beetles, or shopping for scorpions and snails? Australia's pet trade includes hundreds of spineless species' (*The Conversation* 23 June 2023) <https://theconversation.com/buying-bugs-and-beetles-or-shopping-for-scorpions-and-snails-australias-pet-trade-includes-hundreds-of-spineless-species-207932>.
[20] Independent Review of the EPBC Act, 'Wildlife Trade and Permitting' (Final Report, 2020) <https://epbcactreview.environment.gov.au/resources/final-report/chapter-6-commonwealth-decisions-and-interactions-other-commonwealth-laws/64-wildlife-trade-and-permitting>.
[21] See, e.g. Invasive Species Council, 'Stopping weed invasions: a 'white list' approach' (Fact Sheet, 2009) https://invasives.org.au/wp-content/uploads/2014/02/fs_weedwhitelist.pdf; Csurhes S, Randall R, Goninon C, Beilby A, Johnson S and Weiss J, 'Turn the tap off before you mop up the spill: Exploring a permitted-list approach to regulations over the sale

prohibits the transportation or import of any species unless it is listed on a safe list. This requires an assessment of a species that is proposed to be imported/transported and, once approved, it is added to the safe list and can be imported/transported in future. The safe list approach is preferred to the alternative (more common) 'deny list' approach where species can be imported/transported unless they are listed as prohibited. Invasive or harmful species can be listed but those lists always lag behind both the legal and illegal trade in wildlife and plant species, creating much greater risks for biosecurity breaches and new invasive species becoming established.[22]

2.6. Make explicit the connection between climate change and biodiversity conservation

Climate change, and the related but distinct challenge of changing bushfire regimes, have already been recognised as 'key threatening processes' under the EPBC Act. However, the Australian Government has previously determined that management plans under the EPBC Act are not the most effective way to address those threats to Australian biodiversity.[23]

NELA recommends that the Australian Government reconsider this position. Developing a management plan under the EPBC Act for the threatening process of climate change would allow the Australian Government to anticipate the kinds of reforms that may be necessary in a new Act, and begin the process of identifying, prioritising and resourcing critical climate adaptation and resilience goals for conserving Australian biodiversity across industries, jurisdictions and ecosystems. Drawing an explicit connection between climate change and biodiversity loss will also help to reconcile the Government's intentions across a host of its reporting obligations, including its Nature Positive Plan, legislated greenhouse gas emissions target, international commitment to implementing the Global Biodiversity Framework, and response to the State of the Environment 2021 report, along with its actions to meet the 'no species loss' target in its latest Threatened Species Action Plan.

An explicit connection between climate change and biodiversity conservation in national environmental laws will require clear and future-oriented statutory objects; legal mechanisms that account for rapidly changing and emerging threats to biodiversity, including anticipating and empowering 'emergency' conservation interventions; legal mechanisms that protect future biodiversity values such as climate refugia and adaptive capacity rather than only past values such as 'nativeness' and 'wilderness'; and adaptation-oriented approaches to monitoring, approval-adjustments and enforcement.[24]

Adaptive management has long been regarded as a crucial approach to environmental governance as the climate changes, but its implementation in environmental laws in Australia and around the world has been patchy, at best. McDonald and Styles have recommended five

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and interstate movement of potentially invasive plants in the States and Territories Australia' (2006) Proceedings of the 15th Australian Weeds Conference. C Preston, JH Watts and ND Crossman, Weed Management Society of South Australia Inc, Adelaide: 95-98; Parliament of Victoria, Legislative Council, Environment and Planning Committee, 'Inquiry into ecosystem decline in Victoria: Volume 1' (Report, tabled 2 December 2021) recommendation 4 which recommended that the Victorian Government review the legislative framework for the management of invasive species, with this review to consider 'the merits of shifting to a permitted 'safe list' approach defining which taxa non-indigenous to Victoria can be introduced, sold, or kept in the State' (see page 88 – 91 and the submissions of the Victorian National Parks Association and Invasive Species Council cited therein) https://www.parliament.vic.gov.au/epc-lc/article/4455.

[22] Parliament of Victoria, Legislative Council, Environment and Planning Committee, 'Inquiry into ecosystem decline in Victoria: Volume 1' (Report, tabled 2 December 2021) at page 88 citing evidence of the 'reactive' nature of listing restricted plant species.

[23] See Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law' (2019) 42(4) UNSW Law Journal 1179, 1190 (with respect to deficiencies in project-based environmental impact assessments for addressing cumulative effects such as those of climate change).

[24] See, for example, McCormack, 'The legislative challenge of facilitating climate change adaptation for biodiversity' (2018) 92(8) *Australian Law Journal* 546; McDonald and Styles, 'Legal strategies for adaptive management under climate change' (2014) 26(1) *Journal of Environmental Law* 25-53; McDonald et al, 'Adaptation pathways for conservation law and policy' (2019) Wiley Interdisciplinary Reviews: Climate Change e555'; Woinarski et al 'Biodiversity and fire emergency decision making' (2023) International Journal of Wildland Fire (online early); Reside et al, *Climate change refugia for terrestrial biodiversity* (National Climate Change Adaptation Research Facility 2013) <https://nccarf.edu.au/climate-change-refugia-terrestrial-biodiversity-defining-areas-promote-species-persistence/>.

mechanisms for implementing adaptive management in law,[25] arguing that '[w]ider use of these flexibility mechanisms would enable environmental decision-making to respond to the impacts of climate change, while continuing to provide a level of legal certainty'.[26] We have briefly summarised these five mechanisms below. NELA supports the inclusion of the following mechanisms in new national environmental legislation:

1. **new statutory objectives** that expressly require planning for the impacts of climate change, recognising the importance of resilience and adaptive capacity as statutory goals that must be furthered or promoted in decision making under the Act;
2. requirements for **monitoring and evaluation of projects, plans and activities**, to ensure that decision makers are equipped to learn from both success and failure in past decisions ('[a]ny regulatory attempts at adaptive management which do not require feedback about actual versus projected impacts will lack the information necessary to modify practices to incorporate new knowledge'[27]);
3. opportunities to undertake **staged and tiered approvals processes**, recognising that uncertainty about the impacts of a new activity can be mitigated by approving that activity, or undertaking a new project, in stages (whether spatial – i.e. gradually expanding the activity's physical 'footprint', or temporal, in which certain components are approved early, and others at a later date). These processes would ensure that further approvals will only be granted if 'mandatory monitoring and evaluation show the impacts of the first stage are acceptable'.[28] However, this approach should not allow decision makers to approve vague or poorly defined proposed projects with critical environmental assessments taking place after that approval is granted, nor should this allow decision makers to defer controversial decisions about a project or activity until after significant environmental impacts have already occurred;
4. empower decision-makers to impose **conditional approvals and statutory triggers** in clearly defined circumstances – which may, for example, allow conditions on an approval to 'be modified upon the occurrence of a specified event or environmental indicator… [such as] a decline in species or ecosystem health or other unfavourable environmental impact or trajectory';[29] and
5. implement **proportionate resource allocation** models, which take the form of a 'variable approach to natural resource exploitation under conditions of stock or resource uncertainty, or proportionate extraction rights that vary based on resource availability. Decisions follow pre-set management rules, based on environmental or ecological indicators or the currency of stock assessment data'.[30] This approach is currently used by the Australian Fisheries Management Authority (AFMA) in Australian fisheries but could be applied more broadly in, for example, Regional Forestry Agreements, water management across the Murray Darling Basin and other nationally-significant freshwater habitats such as Ramsar-listed wetlands. While not technically 'resource extraction', a similar evidence-based, precautionary approach could be applied to approvals that involve harming threatened species, ecological communities and their habitats. As climate change triggers sudden and unpredictable changes in populations of listed species and communities, including after catastrophic, continental-scale fires such as those experienced in 2019-2020, activities that harm listed species and their habitats take on greater significance, and may render it reasonable to revisit Australian Government approvals for those activities.

The detailed evidence that is now available about the impacts of climate change on Australia's biodiversity, including from independent reports commissioned by the Australian Government,[31]

[25] McDonald and Styles, 'Legal strategies for adaptive management under climate change' (2014) 26(1) *Journal of Environmental Law* 25-53.
[26] Ibid.
[27] Ibid at 42.
[28] Ibid at 44.
[29] Ibid at 45.
[30] Ibid at 50.
[31] E.g. Steffen et al, *Australia's Biodiversity and Climate Change* (CSIRO and the Australian Government, 2009), https://www.publish.csiro.au/book/6178/.

and in the regional chapters published periodically by the IPCC, should also guide detailed reviews and revisions to Regional Forest Agreements (**RFAs**) in those states with RFAs that have not yet announced a transition away from native forest logging (specifically, New South Wales, Tasmania and Queensland). Current RFAs are outdated and have failed to adequately stem biodiversity losses and account for the implications of climate change in habitat conservation, industry sustainability and viability, and potential ecosystem collapse.[32] The Victorian and Western Australian governments have recently announced rapid transitions away from native forestry and the remaining three states with native forestry industries may follow suit over coming decades. The Australian Government has an opportunity to support and equip state governments to ensure that former native forestry coupes are effectively managed over the long term, in a way that fosters ecological restoration and adaptation-oriented biodiversity conservation.

NELA also wishes to highlight the potential for the Australian Government – in its role as a party to every Australian RFA – to guide a more holistic and proactive approach to managing Australia's native forests in those states that continue to support a native forestry industry, such that the native forestry industry is managed in a way that is more consistent with Australia's national environmental goals and conservation priorities. The Australian Government could, for example, clarify that any statutory replacement to the EPBC Act *does* apply to the native forestry industry in its management and harvesting operations, in contexts where forestry activities do not meet national environmental standards (particularly in relation to biodiversity conservation and climate mitigation and adaptation). NELA recommends that the Australian Government take a proactive approach to native forestry, focusing on co-benefits for industry and environments, including by integrating a nature-positive and approach to native forest management.[33]

2.7. Compliance tools

The EPBC Act in its current form lacks meaningful oversight and compliance mechanisms to ensure that the goals of the Act are achieved.[34] This represents a serious risk to the Australian Government's efforts to reduce biodiversity loss, let alone achieve its policy goal of nature positive outcomes. NELA recommends simplifying existing compliance tools, and introducing a broader range of compliance tools that encompass information and incentives, directives and warnings such as infringement notices and directions orders, and strong compliance and enforcement tools.

NELA highlights the following operational recommendations to improve the oversight and successful achievement of national environmental standards:

- Introducing consistent, mandatory monitoring and reporting on the health of matters of national environmental significance, as a mechanism for (a) identifying successes, shortfalls and lessons from conservation projects as they are implemented; (b) enhancing the efficiency and effectiveness of implementation and resourcing, particularly for projects funded by the Australian Government; and (c) implementing continual and measurable improvement in conservation outcomes, as evidence of good environmental governance;
- Creating an online open access data, monitoring and reporting hub to facilitate comparative reporting and promote learning and information-sharing across conservation projects and

[32] Professor David Lindenmayer, 'Major issues associated with Regional Forest Agreement and links to EPBC Act Reforms' (Submission to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020, 2021) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/RegionalForestAgreement/Submissions.

[33] See, e.g., the Environmental Defenders' Office, 'Inquiry into the Long Term Sustainability and Future of the Forest Products Industry', available at https://www.edo.org.au/publication/inquiry-into-the-long-term-sustainability-and-future-of-the-timber-and-forest-products-industry/.

[34] See Law Council of Australia, 'Submission to the EPBC Act review' (2020) at page 5 (supporting more rigorous enforcement of the EPBC Act provisions).

jurisdictions, consistent with the Australian Government's commitment to more comprehensive and accessible environmental data;

- Establishing independent reporting vis-à-vis the 'State of the Environment' and 'National Sustainability Outcomes' with an aim of increasing public awareness, refining policy-making and implementation, and improving environmental performance;
- Introducing National Environmental Accounts, as a foundation for better understanding and improving over time, the extent, condition and threat status of natural assets – focusing at first on comprehensive coverage of matters of national environmental significance but expanding over time to a broader and more holistic approach to environmental accounting and ecosystem services; and
- Requiring a mandatory approach to learning from species extinctions, which may take the form of a National Environmental Coroner; an Environmental Ombudsman; a permanent 'Term of Reference' for a Standing Parliamentary or Senate Committee; or another body that can conduct inquiries in public, with powers to investigate, compel evidence and make findings of fact about a species extinction.[35]

NELA supports two particular reforms that could readily improve compliance in the short-to-medium term. First, the government could enact new powers to issue warning notices and environmental protection notices – for minor or suspected breaches – to direct certain action. Second, the government could introduce a comprehensive definition of 'take' regarding animals, plants and fungi belonging to a threatened species or ecological community. The definition should expand on existing terms, 'harvest, catch, capture, trap and kill' to include actions to 'harass, harm or pursue' an animal or 'crush, cut, remove or destroy' a plant or fungus, or to attempt any of these actions. As noted above, Australia's environmental laws have consistently fallen short of protecting critical habitat. A broader and more effective definition of 'take' could include a prohibition related to habitat, for example, that a person must not: 'destroy, fragment, convert or otherwise harm habitat that is necessary for the survival of an organism or ecological community' (broader than listed, critical habitat and defined instead by reference to its significance for a species' persistence).

The Samuel Review recommended the establishment of a new position, viz, Environment Assurance Commissioner.[36] Acting independently and upon statutory appointment the Commissioner would be responsible for overseeing and auditing the performance and decision-making of both Commonwealth and accredited parties. The Government responded in its Nature Positive Plan that the position which the Review recommended the Environment Assurance Commissioner perform will be performed by the new national EPA, which will make decisions in accordance with National Environmental Standards and assure accredited parties and instruments apply the standards. NELA supports the integration of this assurance role within the national EPA, provided the EPA is given an explicit assurance function and the statutory powers and resourcing necessary to achieve it. Further, as discussed in NELA's Issues Paper on the National Independent EPA dated 11 July 2023, it would be appropriate to consider vesting independent oversight of the EPA's exercise of its own functions in another body, whether already existing (such as the Commonwealth Auditor-General) or a new body (such as an Environment Auditor).

National Environmental Law Association
17 July 2023

[35] First recommended by Woinarski et al, 'The contribution of policy, law, management, research, and advocacy failings to the recent extinctions of three Australian vertebrate species' (2017) 31(1) *Conservation Biology* 13.
[36] Independent Review of the EPBC Act, 'Accreditation, audit and independent oversight' (Final Report, 2020) <https://epbcactreview.environment.gov.au/resources/final-report/chapter-7>.

NELA Position Paper: Environmental Offsets

1. EXECUTIVE SUMMARY

1.1. Offsets are not explicitly addressed in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Despite this, they have been included in conditions of approval under the EBPC Act since it was enacted.[1]

1.2. NELA has prepared this Position Paper on the understanding that the Australian Government intends to implement a national environmental offsets scheme, including to be used as conditions on approvals, in the legislation that will replace the EPBC Act. We consider the characteristics of a best practice framework in Figure 1, articulating four separate but interrelated stages of the legal framework (overarching principles, substantive rules, integrity and continual improvement). We address each in turn in Part 3, below.

2. THE CHALLENGE: ONLY 'BEST PRACTICE' WILL MEET THE GOVERNMENT'S POLICY GOALS

2.1. Given the limitations and failure of existing offsetting schemes, and the significance of the impact of a failed scheme on biodiversity decline, the Australian Government will need to ensure that any offsetting arrangement that it implements represents not just Australian, but global, best practice.

2.2. Offsetting schemes are consistently criticised as market failures, including because these schemes typically either fail to stem – or actively contribute to and accelerate – biodiversity loss.[2] Professor Samuel AC's *Independent Review of the EPBC Act* found that the existing Australian environmental offsets policy exacerbates environmental decline because it is 'ineffective at compensating for loss and inconsistently implemented'. Samuel commented that '[t]he decision-making hierarchy of 'avoid, minimise and only then offset' is not being applied – offsets are too often used as a default measure not as a last resort'.[3]

2.3. Researchers in Australia and elsewhere have repeatedly demonstrated that poorly functioning offset schemes have significant negative impacts on biodiversity, locking in habitat and ecosystem loss due to offsets that take years to eventuate (e.g. removing trees with established habitat hollows with offsets

[1] Senate Environment and Communications References Committee, *Inquiry into Environmental Offsets Report* (June 2014) p. 7.
[2] For example, Graeme Samuel, *Final Report of the Independent Review of the EPBC Act* (Australian Government 2020) p, 138; See Organisation for Economic Co-operation and Development (OECD) (2016), *Biodiversity Offsets: Effective Design and Implementation*, OECD Publishing, Paris; Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (Aug 2022); WA Department of Water and Environmental Regulation, *Review of the Western Australian Environmental Offsets Framework* (Oct 2019); Victorian Auditor-General's Office, *Offsetting Native Vegetation Loss on Private Land* (May 2022).
[3] Samuel (n 2) pp 44.

that involve restoring an area that will not provide hollows for many decades, or is located a long distance from the affected habitat. Offsets can also reduce the resilience of biodiversity to extreme events such as bushfires, and have not typically accounted for the impacts of climate change.[4]

2.4. To meet its international commitments under the 2022 Global Biodiversity Framework for the implementation of the Convention on Biological Diversity, and its domestic commitments under the Nature Positive Plan, released in response to Graeme Samuel's report on the EPBC Act, the Australian Government will need to implement a legal framework that is **better resourced, implemented and enforced, and more effective than any scheme that has been introduced to date, in Australia**. In the discussion below, we seek to identify what 'best practice' biodiversity protection and market integrity might include in a biodiversity offsetting scheme.

3. COMPONENTS OF A BEST PRACTICE LEGAL FRAMEWORK FOR BIODIVERSITY OFFSETING

3.1. In Figure 1, we summarise key components of a legal framework that is more likely to be effective than existing schemes in Australia. We have drawn on examples and scholarship from overseas and within Australia, at national, state and local scales, including recommendations from recent reviews and inquiries. This is an overview and not a comprehensive analysis of all necessary aspects of an effective regulatory regime. We will address in turn, each of the following separate but interrelated stages of the legal framework illustrated in Figure 1: Overarching Principles; Substantive Rules; Governance Integrity; and Continual Improvement.

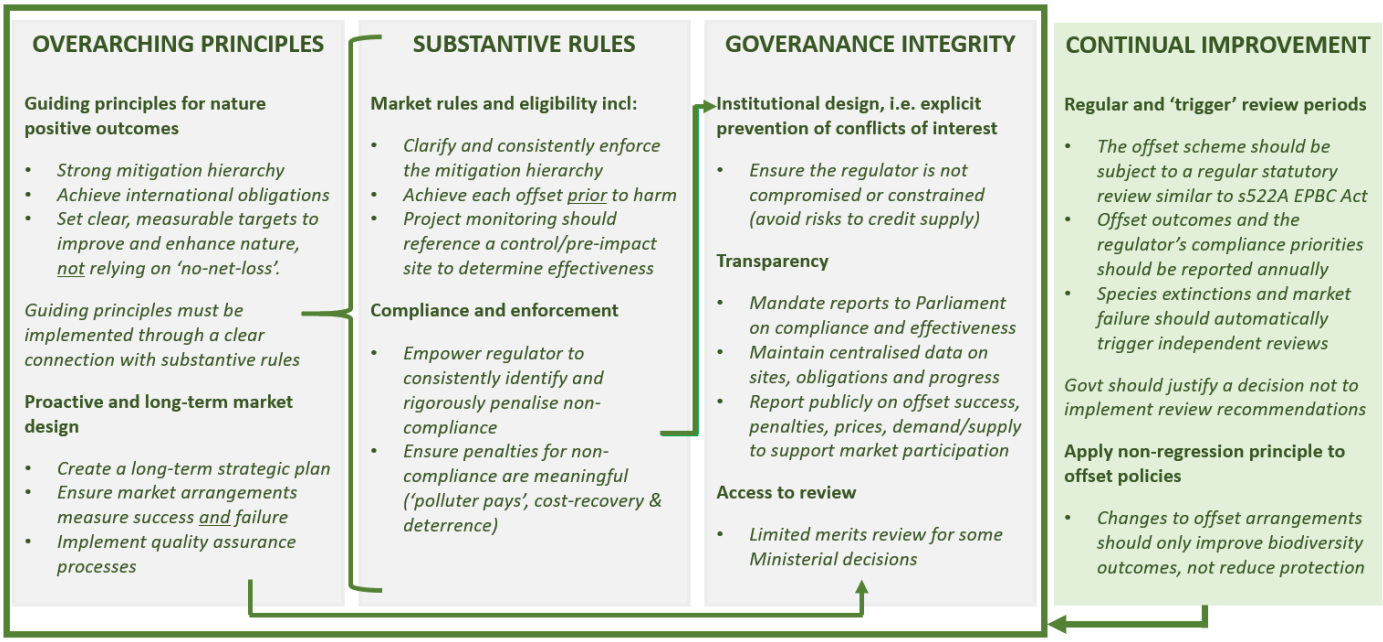


Figure 1. Components of a best practice legal framework for biodiversity offsets

3.2. Overarching principles and market design

3.2.1. Principles-based legislation is common in Australia and recognised as good statutory drafting practice. However, national and state/territory environmental laws rarely draw an explicit connection between

[4] McDonald et al, 'Promoting resilience to climate change in Australian conservation law: the case of biodiversity offsets' (2016) 39(4) *University of New South Wales Law Journal* 1612-1651.

overarching principles and substantive obligations to implement, further or achieve those goals.[5] As the Australian Government seeks to achieve nature positive outcomes, **guiding statutory principles** about protecting and enhancing biodiversity **must be both (a) articulated and prioritised** over other development-related objectives; **and (b) explicitly implemented** through substantive obligations to 'achieve', 'further' or act in a way that is 'consistent with' those objectives; with access to merits and judicial review for a failure to comply with those obligations. Obligations to 'have regard' or 'take into account' statutory principles are insufficient and, in existing laws, have not protected the environment.

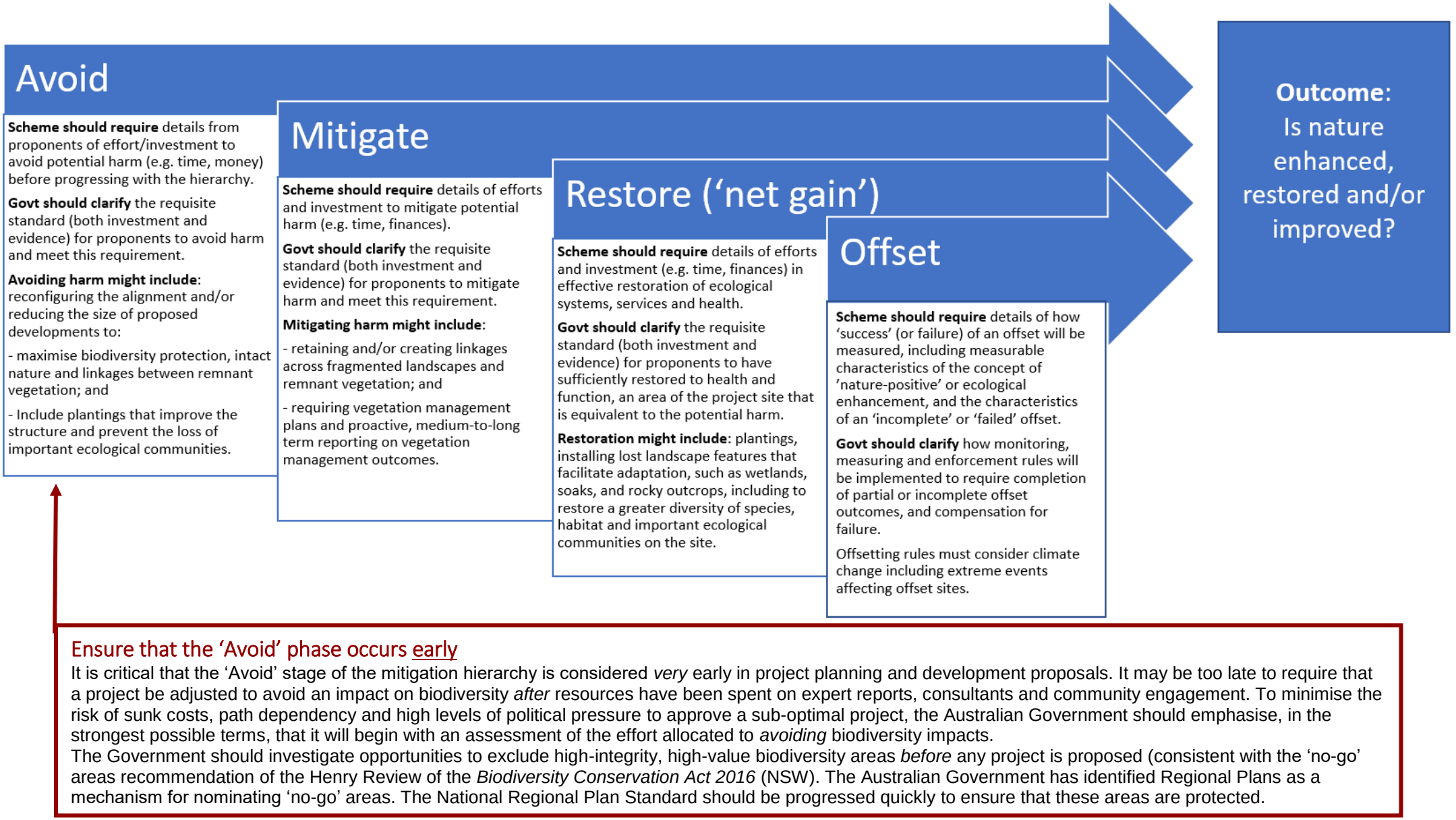
3.2.2. While the mitigation hierarchy is commonly mentioned in offsetting schemes around Australia, one of the **most common critiques of biodiversity offset schemes is a failure to implement the mitigation hierarchy**. In Australia, offsets are commonly determined without any reference to efforts by a proponent, including the time, resources and funding or consultation that has been invested in seeking to avoid, mitigate or restore potential harm. This is a fundamental shortfall that must be rectified in any statutory scheme implemented by the Australian Government.

3.2.3. To effectively implement the mitigation hierarchy (see **Figure 2**), the Australian Government must **ensure that proponents provide evidence of the resources that they have invested** (or signed an enforceable undertaking to invest) **in complying with the first three stages of that hierarchy**.

Biodiversity offsets should only be available for residual losses that cannot be avoided, mitigated or restored. That is, offsets should not be permitted where avoiding or mitigating impacts is simply costly or inconvenient, but only where those impacts are *unavoidable*. To ensure that this standard is clear, predictable and enforceable, the Government might also require that an application for an offset can only be approved if the proposed project is nationally significant or beneficial to the Australian public.

3.2.4. Clear and specific reference scenarios, against which an offset is measured to determine whether it has been successful, are rarely articulated in existing offsetting schemes.[6] The Australian Government's proposed National Standard for Offsets presents a promising opportunity to define reference scenarios with specificity, and in the context of other cumulative harms to the environment, in a way that will facilitate environmental gains rather than ongoing biodiversity decline. At present, biodiversity loss (and by extension, the concept of 'no net loss') is assessed on a case-by-case basis at the scale of an individual development application and in the context of ongoing biodiversity decline as a result of a host of drivers[7] – beyond the impact of an individual development. This means that existing assessments of no net loss for an individual project are conducted against a backdrop of continuing decline, so the standard of no net loss can be met despite very real biodiversity losses. A National Standard for Offsetting should require that environmental harm from any proposed development is assessed at a landscape (not site) scale, accounting for interacting and cumulative stressors, and that potential offsets are assessed at that same scale.

[5] McCormack, 'The legislative challenge of facilitating climate change adaptation for biodiversity' (2018) 92(8) *Australian Law Journal* 546.
[6] Martine Maron, et al, 'The many meanings of no net loss in environmental policy (2018) 1 *Nature Sustainability* 19–27.
[7] Australian Government, *State of the Environment 2021* <https://soe.dcceew.gov.au/>.



Ensure that the 'Avoid' phase occurs early

It is critical that the 'Avoid' stage of the mitigation hierarchy is considered *very* early in project planning and development proposals. It may be too late to require that a project be adjusted to avoid an impact on biodiversity *after* resources have been spent on expert reports, consultants and community engagement. To minimise the risk of sunk costs, path dependency and high levels of political pressure to approve a sub-optimal project, the Australian Government should emphasise, in the strongest possible terms, that it will begin with an assessment of the effort allocated to *avoiding* biodiversity impacts.

The Government should investigate opportunities to exclude high-integrity, high-value biodiversity areas *before* any project is proposed (consistent with the 'no-go' areas recommendation of the Henry Review of the *Biodiversity Conservation Act 2016* (NSW). The Australian Government has identified Regional Plans as a mechanism for nominating 'no-go' areas. The National Regional Plan Standard should be progressed quickly to ensure that these areas are protected.

Figure 2. The mitigation hierarchy should be applied strictly and consistently to improve environmental outcomes

3.2.5. A fundamental pre-requisite to achieving an effective biodiversity offsets scheme is to articulate and implement **market design principles**, well-before a scheme is operational. The New South Wales Auditor General published a scathing critique of the NSW Government's failure to proactively and effectively design a functioning market for offsets in that state. The recommendations of the Auditor General should be implemented as an essential starting point for any new national offset scheme.

3.3. Substantive rules, obligations, incentives, compliance and enforcement

3.3.1. Every offset must be real, timely, permanent, additional, like-for-like, rigorously modelled, monitored and reported publicly. If a permanent, additional, like-for-like offset is unavailable, a proposed project should be redesigned or refused (following a process such as that set out in **Figure 2**). There should be no opportunity for a project to be approved if a proponent cannot identify an investment that would offset the specific impacts of the project. These ideas have been analysed in detail in a variety of other reports and, while critical to an effective scheme, will not be considered further in this position paper.[8]

3.3.2. An effective legal framework for conserving Australian nature must include an opportunity for decision makers to refuse a project where an impact cannot be avoided and cannot be offset. As the Ken Henry-led independent review of the *Biodiversity Conservation Act 2016* (NSW) emphasised, some impacts are unacceptable and cannot be offset. Any possibility of approving such projects cannot be consistent with a nature positive approach or with objectives focused on conserving nature and preventing extinction. The Australian Government has an opportunity, in designing this offset scheme, to exclude that possibility except in exceptional cases where discretion is exercised in a way that is fully transparent.

3.3.3. The benefit of an offset to biodiversity should be required to be achieved, demonstrated and independently verified, prior to any action that will cause the unavoidable harm for which the offset has been approved. This is because a 'credit' as a form of legal property, is specifically designed to be able to quantify and be traded based on the reliability of measurable outcomes, not the promise of future gains. Ensuring that the timing of the benefit precedes the timing of the harm to biodiversity will help to ensure that offsets are not illusory or fraudulent, building trust in the market and ensuring that the scheme has a possibility of resulting in nature-positive outcomes.

3.3.4. The mitigation hierarchy must be clear, and consistently enforced, so that the scheme is administered in a way that is efficient, predictable and fair. Enforcement must be consistent, predictable and meaningful beyond the mitigation hierarchy too. That is, across the scheme, enforcement must be sufficiently serious to deter non-compliance, recognising the importance of principles such as, for example, cost-recovery, in establishing a regulated market.

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[8] Martine Maron, Jonathan R. Rhodes, Philip Gibbons, 'Calculating the benefit of conservation actions' (2013) 6 *Conservation Letters* 359-367; Megan C. Evans, 'Backloading to extinction: Coping with values conflict in the administration of Australia's federal biodiversity offset policy' (2023) 82(2) *Australian Journal of Public Administration* 228 – 247; Martine Maron et a 'Locking in loss: baselines of decline in Australian biodiversity offset policies' (2015) 192 *Biological Conservation*, 504-512; Katherine Miller et al, 'The development of the Australian Environmental Offsets Policy: From theory to practice' (2015) 42 *Environmental Conservation*, 306-314.

3.3.5. Where a proponent fails to demonstrate that the required offset has either been obtained or maintained at a standard that, in fact, offsets the loss, or if the ultimate offset is insufficient (that is, its additionality or permanence is questionable), proponents should face the risk of having a development permit refused or revoked. If development has proceeded without the necessary offset being obtained or maintained, the proponent should be subject to heavy financial penalties commensurate with the significance of the loss of otherwise-protected biodiversity. Penalties should reflect similar policy approaches to non-compliance in other, market-based context. Insights can be drawn from the regulatory arrangements for ASIC and the ACCC role in corporate non-compliance and breaches of the competition and consumer law.

3.4. Governance integrity, transparency and access to review

3.4.1. NELA proposes the following three recommendations as indicative of the broad literature on governance integrity, and critically important to the design of any new Commonwealth Offset scheme.[9]

3.4.2. The biodiversity credit market must have design integrity[10]

- The government must ensure the effective structure, design and operation of the market for biodiversity offsets. In doing so, the government must be mindful of structural issues that can impede effectiveness, such as actual and perceived conflicts between the government's role as market regulator, market facilitator and credit purchaser.
- An offset market must be equipped to appropriately value threatened ecosystems, species and habitats, including to guard against price distortion. Clear and straightforward rules designed early, made publicly accessible, and enforced consistently, will help to minimise the risk of market distortions.
- The 'like-for-like' principle is fundamental and must be maintained for the ecological and economic integrity of a functional biodiversity offsetting market with any possibility of facilitating nature positive outcomes.

> **LEARN FROM SHORTFALLS IN EXISTING SCHEMES**
> A key criticism of the NSW Biodiversity Offsetting, highlighted in the recent independent review of the *Biodiversity Conservation Act 2016* (NSW) led by Ken Henry is that the scheme's effectiveness is being compromised by payments made into the Biodiversity Conservation Fund instead of from credits, sourced from direct investment into new or existing environmental offset projects. The Fund in NSW is consistently growing, demonstrating a lack of nature positive investments commensurate with development impacts on biodiversity. Growth in a fund of this kind is not an indicator of success, or market integrity.

- Transparency of market information is essential for a functioning, effective biodiversity offset market. Legal mechanisms that facilitate transparency include obligations to:
  - collect and publish information relating to supply and demand for credits and credit pricing;
  - collect and publish information about accredited projects and their delivery on approved offsets;

[9] The first three recommendations (in paragraphs 3.4.2, 3.4.3 and 3.4.4) build on recommendations from the Parliament of NSW, *Legislative Council Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme* (Nov 2022).
[10] Ibid, recommendation 15.

- conduct, engage broadly, and report publicly on, periodic reviews of the offsetting scheme as a whole, including its delivery on statutory objectives (specifically including its contribution to nature positive outcomes under the replacement to the EPBC Act);
- empower the new Commonwealth EPA to undertake regular, periodic assessments such as those listed above, with public reporting obligations; and
- engage actively, transparently, and in good faith, to maximise the conservation outcomes of the work of the international Taskforce on Nature-related Financial Disclosures, including to establish a global nature-related public data facility.

3.4.3. Transparency is essential to maintain confidence and trust[11]

- Transparency is essential to maintain confidence and trust in the integrity of the biodiversity offsets and the biodiversity credit market more broadly. Key aspects of the scheme that must be made transparent include the location and performance over time of offsets traded and credited under the scheme.
- We recommend that the Australian Government establish a publicly available spatial database that gathers data on both: (a) approved projects that will have development impacts on biodiversity for which offsets have been approved; and (b) approved offset projects. If the Nature Repair Market supports trading of both nationally-generated credits and credits generated under state and/or territory schemes, the database should also gather and report on data about the operation of the national and state and territory schemes, across the Australian continent.
- To avoid the controversy and impacts on trust and legitimacy that have arisen in relation to certain Methodologies under the Carbon Farming Act, the Australian Government should prepare a clear policy that is publicly available and creates predictability and transparency around the arrangements that the Australian Government will implement to monitor, measure and enforce the biodiversity offsetting standard and other objectives and obligations under the legislation that replaces the EPBC Act.

3.4.4. Actual and perceived conflicts of interest in the biodiversity credit market must be recognised and managed[12]

- Different areas of a scheme might be susceptible to conflicts of interest. For example, ecological assessors might be subject to pressure from clients, or have a vested interest in a land use development/project being approved.
- The Australian Government must ensure that the scheme is established and regulated in a way that maximises opportunities to avoid, quickly identify, and effectively manage, potential conflicts of interest. Mechanisms for achieving these outcomes include establishing transparent processes for declaring and managing conflicts of interest up front, including among stakeholders in the biodiversity market, and clear delineation of the responsibilities, mandate and boundaries on the role of the national market regulator.
- The Australian Government should also put in place arrangements to govern the performance of accredited offset assessors, to ensure the quality of ecological assessments and biodiversity

[11] Ibid, recommendation 18.
[12] Ibid, recommendation 19.

reporting, and to minimise the risk of allegations that the biodiversity credit market is affected by conflicts of interest.

3.4.5. Value trade-offs

3.4.6. A biodiversity offsetting scheme will necessarily involve trade-offs between values. For example, a proponent may apply to undertake an activity that will contribute renewable energy to the Australian Energy Market, or create new employment opportunities, or provide low-cost housing to a marginalised community. However, in doing so, that activity may require the destruction of an endemic species' only remaining habitat, or its only secure population, thus exposing the species to likely extinction. NELA recommends that offsets should not be available for that kind of loss – that is, the near certainty of permanent biodiversity loss. Reducing a species' habitat to an extent that no longer supports its evolution and capacity to adapt to climate change is also likely to lock in the species' eventual extinction and should be weighed carefully and transparently against values such as urgent social housing. Ensuring that the 'avoid' phase of the mitigation hierarchy is implemented early in a project development should help to minimise these kinds of 'taboo' or 'tragic' trade-offs.[13]

3.4.7. It is complex but not impossible to manage these kinds of trade-offs in a way that is transparent, legitimate and with integrity. The insurance industry, for example, has valuation techniques for balancing risks associated with loss of life and loss of property, and biodiversity valuation and natural capital accounting techniques are advancing rapidly.

3.4.8. Whether a decision to approve an application for an offset increases the risk of a species' extinction, or the risk of biodiversity loss, should be a mandatory consideration that must be published in any decision about whether to approve an offset. This should be so, even if a proposed development will not, itself, cause the extinction but will increase threats to a species from other cumulative impacts such as catastrophic bushfire or invasive predators.

3.4.9. In some cases, the Australian Government may decide that a proposed development is of greater value than the conservation of a species or ecological community. NELA does not support biodiversity being traded-off in this way, particularly given the Government's commitment to nature-positive environmental laws. Nevertheless, if the Australian Government elects to approve an offset in such circumstances, that decision and the evidence that informs it should be required to be transparent and publicly available.

3.4.10. If the Australian Government permits activities that guarantee (or contribute to inevitable) extinction, it must also acknowledge that the offset directly conflicts with its Threatened Species Action Plan and the concept at the heart of its Nature Positive Plan, to 'protect and recover' Australian environments.

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[13] **Taboo trade-offs** are forced choices that pit values that may be considered sacred, absolute and inviolable (such as a threatened species) against secular values, such as a house; while **tragic trade-offs** pit one set of sacred values (such as human life) against another set, such as a species extinction. See generally, Tetlock PE, 'Thinking the unthinkable: sacred values and taboo cognitions' (2003) 7 *Trends in Cognitive Sciences* 320.

3.4.11. Access to review

3.4.12. The final phase of public participation in environmental decisions is the right of individuals and groups to have decisions scrutinised by an independent arbiter in a tribunal or court, in the public interest (sometimes described as 'public interest litigation'). This is a matter that NELA recommends for careful consideration in the design of new legislation to replace the EPBC Act.

3.4.13. For the purposes of this position paper, NELA notes that review opportunities under the new Act should include merits review for certain decisions about biodiversity offsetting, including where a decision to approve an offset directly conflicts with an approved Regional Plan or which is likely to result in the extinction or permanent loss of a protected matter under the Act, such as a species, ecological community or ecosystem.

3.4.14. Decision making powers under the Act, including in relation to biodiversity offsets, should involve far less broad-ranging discretions than those available under the existing EPBC Act, to minimise the need for review as a default option and to maximise the integrity of decisions; consistency with the rule of law; and adherence to the objects and/or principles that purport to guide decisions under the new Act.

3.5. Continual improvement

3.5.1. The Australian Government should ensure that there is a statutory obligation to, periodically, initiate independent reviews of the operation and outcomes of the national biodiversity offset scheme (in a manner similar to section 522A of the EPBC Act). NELA recommends the first review take place within five years of the commencement of any new scheme. This kind of statutory trigger ensures that scrutiny occurs at arms-length from government, helping to identify market failure but also to highlight and inform opportunities for regular and meaningful improvement. A review must be implemented to have a practical effect and the history of the EPBC Act make it clear that governments do not necessarily implement recommendations of these kinds of reviews. To maximise the efficiency of such a review process – which is wasted time and resources if it remains unimplemented – Commonwealth legislation should require the Minister to provide a justification for not implementing the recommendations of this kind of inquiry, publicly and based on clear and rigorous evidence. A trigger such as the one described here could be a key mechanism for maximising the effectiveness and integrity of the scheme, and for supporting adaptation and pursuing 'best practice' over time.

3.5.2. There are other legal mechanisms, beyond time-based review clauses, that can prompt improvement to legal instruments and processes. For example, sunset clauses set a statutory expiry date for designated legal instruments – which could include the National Standard on Biodiversity Offsets – and require the relevant policymaker (in this case, the Department) to review the instrument, publish it for consultation if appropriate, and re-make or issue a new instrument based on the results of that review. Another legal mechanism to achieve improvements is a statutory 'trigger' that requires a review of an instrument or statutory process if a particular threshold if met. For example, a particular rate of decline or, for example, the extinction of a population or keystone species in a threatened community or ecosystem. Legislation that establishes such a trigger can set a clear and measurable threshold for the trigger (or define where the threshold will be set, such as the regulations), and impose particular

requirements such as an independent review, an inquiry, or that the instrument is suspended until the triggering event has been addressed or resolved.[14]

3.5.3. NELA recommends that the Department investigate the use of a review or trigger mechanism in the replacement to the EPBC Act, to ensure that any shortfalls in the operation of a National Standard for Biodiversity Offsetting are identified quickly, and addressed in a meaningful way. These mechanisms for continual improvement will help to ensure that the Act and its related regulatory instruments are equipped to promote and achieve nature positive outcomes.

This Position Paper was prepared by NELA Board Members and supporting officers, led by Dr Phillipa McCormack, and with external support and input, including by Dr Paul Govind.

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[14] For more details on adaptive mechanisms in law, we recommend the following research: MF Frohlich et al, 'The relationship between adaptive management of social-ecological systems and law: a systematic review' (2018) 23(2) *Ecology and Society* 23 https://doi.org/10.5751/ES-10060-230223; and J McDonald and M Styles, 'Legal Strategies for Adaptive Management under Climate Change' (2014) 26(1) *Journal of Environmental Law* 25-53 https://doi.org/10.1093/jel/equ003.