BCA Business Council of Australia

Environment Protection Reform

Standard on Matters of National Environmental Significance submission

May 2026

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1. Introduction

The Business Council of Australia's (BCA) membership includes more than 120 chief executives from leading companies across the Australian economy. We have been engaged with government and stakeholders on the reform of the Environment Protection and Biodiversity Conservation (EPBC) Act since prior to the Samuel Review in 2020. Our membership includes companies directly engaged in EPBC Act assessments and approvals, including in the mining and resources, energy, property, infrastructure, and legal sectors. More broadly, our members also have a strong interest in achieving positive environmental outcomes for the nation.

For the EPBC Act reforms to ultimately be judged as successful, they will need to deliver measurable improvement in environmental outcomes, working towards the goal of halting and reversing environmental decline, while supporting the efficient delivery of ecologically sustainable development.

We appreciate the opportunity to provide feedback on the draft Standard on Matters of National Environmental Significance (MNES). The BCA will separately provide submissions on the other items open for consultation in parallel. The Standards will operate as a package of documents, and there is a clear need for cross reference between them. We note however that the full package of Standards is not available at the time of preparing this submission, limiting the quality of feedback that may be provided.

2. Key recommendations

Recommendation 1.

The Standard must be written in a way that allows for its practical implementation as part of the decision making and approval process. The new drafting, which makes clear that if the principles are satisfied the Standard can be deemed by the decision maker as being satisfied, addresses this issue. Other amendments to the Outcomes and Objectives would further improve clarity for proponents and assessors.

Recommendation 2.

Objectives and Outcomes should be updated to better link back to the EPBC Act.

This includes updating references to 'protection from significant impacts' and amending references to 'human health' so they are in line with the Objectives of the EPBC Act itself (i.e. the protection of the environment), rather than covering aspects that are regulated elsewhere.

Recommendation 3.

Update Section 7, clause 4(c) to recognise when applying the mitigation hierarchy (Section 8) that a NOPSEMA framework cannot allow for a residual significant impact, and therefore only clauses 1 through 6 of the mitigation hierarchy apply (steps 1 through 3 avoidance, mitigation, and repair, but not step 4 offset).

Recommendation 4.

The references to 'possible' throughout Principle 1 (the mitigation hierarchy) should be replaced with 'reasonably practicable', a term that has an understood legal definition from management of work health and safety risk. Other subjective terms should be considered for clarification or addressed with further detail.

Recommendation 5.

Provide clearer guidance and clarifying examples, together with consideration of state and territory implementation of repair and rehabilitation, to provide clarity on the kinds of impacts that are considered subject to the repair obligation under the mitigation hierarchy.

Recommendation 6.

In terms of Principle 2, 'reasonably foreseeable future actions' that relate to third-party projects should be limited to actions in respect of which an assessment of environmental impacts has been published, and should be focused on significant adverse impacts. Administrative guidance will be required on how other reasonably foreseeable future events and circumstances should be identified, including in relation to the impacts of climate change, what the criteria for 'reasonable foreseeable' is, what the scope is that proponents should be considering, and what level of confidence is required for something to be incorporated or considered by the proponent and assessor.

Recommendation 7.

Principles 2, 3 and 4 should be reviewed to remove duplication and where appropriate recognise other Standards rather than duplicate their content in an abridged way, so that there is built in consistency across the package as a whole. For the avoidance of doubt, the BCA supports the substantive outcomes of these principles, and does not intend for these to be deferred or diluted by virtue of this recommendation.

Recommendation 8.

Incorporate ecologically sustainable development into the principles of the Standard, reflecting its importance in the overall Act.

Recommendation 9.

Ensure that definitions for important terms are provided and linked back to the Act or to scientifically defined terms.

3. Delivering a workable Standard

The Standards that are introduced will need to be implementable across different scales, from the individual project action to strategic assessments, from regional planning to state and territory accreditation, and additionally at a national level. What is applicable at a regional or national level as an outcome or objective is not necessarily able to be accomplished at an individual project action level.

This issue is particularly acute given the Senate's change to the legislation requiring 'consistency' with the new Standards, rather than the Government's previous proposed drafting, which required that actions were 'not inconsistent' with the Standards.

In the BCA's submission to the consultation earlier this year on the previous draft MNES Standard, we raised the concern that the then draft Standard provided "high level objectives for each category of protected matter covered by the EPBC Act ... written in a way that sets the desirable environmental outcomes sought to be achieved over the long term. This is appropriate as language for the nation or the government in terms of the aspiration and intention of a combined set of work, but does not necessarily work if applied to a singular project action."

Failure to address this concern would have meant that the Standards were not workable as part of the assessment process for individual projects.

We recognise that the Government has tried to address this issue through the new instruction for decision makers inserted into section 7 of the MNES Standard. This now makes clear that if an action is consistent with the principles of the Standard, a decision maker may be satisfied that it is consistent with the Standard as a whole. The BCA notes that the amended EPBC Act (new Section 514 YD) provides that Standards must have outcomes or objectives, and that they may prescribe principles by which an outcome or objective is achieved. In this respect, the principles are the practical mechanisms by which the Standard's outcomes and objectives are achieved.

These changes in the revised draft MNES Standard address the issue around application at different scales, as the principles are drafted in a way that can be applied to and met by individual actions. This will provide for increased certainty and applicability of the Standard, particularly at project scale.

To further strengthen the clarity and applicability of the language used, the wording in the Objectives and Outcomes could be amended to provide clarity on how they are relevant to individual actions. The intention is not to weaken environmental protection, but rather to facilitate their relevance to individual actions. This would require project action-level qualifiers to be attached to each of the statements as appropriate, such as:

- "to the extent relevant to the action"
- "to the extent achievable by the action"
- "contribute to"; and
- "not inconsistent with".

The intent of these changes would be to align the Objectives and Outcomes with the Principles, making clear the appropriate limit of application to individual elements while retaining a focus on conservation outcomes.

Ultimately, one of the central premises of the Standards are to provide clear and consistent outcomes for decision makers and proponents. The language of the Standard should reflect that.

Recommendation 1.

The Standard must be written in a way that allows for its practical implementation as part of the decision making and approval process. The new drafting, which makes clear that if the principles are satisfied the Standard can be deemed by the decision maker as being satisfied, addresses this issue. Other amendments to the Outcomes and Objectives would further improve clarity for proponents and assessors.

3.1 Other practical assistance

The Government should consider the following to improve deployment and workability:

- Publishing practical 'how-to' guidance and decision templates as soon as possible to assist proponents and decision makers. Providing clear guidance on what constitutes sufficient evidence for each principle (including acceptable methodologies, baseline setting, how "repair" is demonstrated etc) would reduce rework and delays for applicants.
- Aligning evidence requirements with consistent datasets and reporting formats will assist in reducing duplicative surveys, and enable financiers to rely on comparable, auditable information over the project lifecycle.
- Clarifying the interactions across Standards and timing (with a clear transition plan). Provide an integrated implementation timeline for MNES, Offsets, Data & Information, Community Engagement, and First Nations Engagement Standards that is visible to the public (i.e. all proponents and stakeholders) plus transitional provisions so projects in train are not exposed to abrupt shifts in information requirements.
- Introduce proportionality and safe-harbour pathways for low-risk actions, with streamlined evidence and engagement expectations for lower-impact proposals, while maintaining the unacceptable-impact criteria. This would support smaller proponents and reduce transaction costs.

4. Getting the details right

4.1 Objectives and Outcomes

- Both the Objectives and the Outcomes refer to the protection of protected matters under the EPBC Act. To better align with the terminology of Part 3 of the Act and improve the clarity of the drafting, references to 'protect' or 'protection' could be updated to clarify that the reference is to 'protection from significant impacts'.
- Objective (2) states "This Standard aims to promote and enhance the diversity, abundance, resilience, and integrity of protected matters …". Given that protected matters include physical places, such as National and World Heritage, to which some of these terms and objectives would not apply, suggest this needs amendment, such as a caveat 'where applicable'.
- Within the Objectives table in Section 5 (3) the references to 'human health' and 'critical human water needs' essentially extend the EPBC Act beyond environmental protection and into areas addressed by other regulatory protections. These should be removed or refined so that the focus remains aligned to the Objects of the Act.
  - In particular, item 9 of the table, on water resources: it is unclear how 'critical human water needs' and 'provisioning, regulating, cultural and supporting services provided by a water resource' will be identified. There is typically detailed water resource planning undertaken at the state and territory level which should be the primary tool to provide this oversight. At a bare minimum there must be clear linkage, clarity, and consistency established with state water resource planning.

Recommendation 2.

Objectives and Outcomes should be updated to better link back to the EPBC Act.

This includes updating references to 'protection from significant impacts' and amending references to 'human health' so they are in line with the Objectives of the EPBC Act itself (i.e. the protection of the environment), rather than covering aspects that are regulated elsewhere.

4.2 Principles

Given the centrality of the principles of the Standard, getting the language used in each of these correct is essential to the success of the reforms overall.

4.2.1 NOPSEMA Framework

Under the new tests for a decision maker in Section 7, 4(c) refers to the test under a NOPSEMA management or authorisation framework and its consistency with the principle in Section 8 (Principle 1, the mitigation hierarchy).

The mitigation hierarchy at Section 8 (7) includes a requirement to offset residual significant impacts, however, under the amended EPBC Act (Section 36 H(2)(d)) a NOPSEMA framework should not result in actions which have a residual significant impact on matters protected by the Act. As such, this part of the mitigation hierarchy is not relevant to a NOPSEMA framework.

This could be clarified by specifically excluding this part of the mitigation hierarchy from the requirement in Section 7 4(c), that a NOPSEMA framework is not inconsistent with sections 8(1) – 8(6).

Recommendation 3.

Update Section 7, clause 4(c) to recognise when applying the mitigation hierarchy (Section 8) that a NOPSEMA framework cannot allow for a residual significant impact, and therefore only clauses 1 through 6 of the mitigation hierarchy apply (steps 1 through 3 avoidance, mitigation, and repair, but not step 4 offset).

4.2.2 Mitigation hierarchy

The mitigation hierarchy is a requirement of Principle 1. The hierarchy now uses the terms:

- Step 1 – Avoidance: "to the extent possible"
- Step 2 – Mitigation: "where possible"
- Step 3 – Repair: "repairs as soon as possible"

These are ambiguous in terms of determining what is 'possible', leaving their application open to subjective judgement without any definition. The term 'possible' could be interpreted to require that avoidance measures be implemented, regardless of cost or of other trade-offs. In real world conditions, there is typically a comparison of alternative approaches to an action with different impacts, which may involve trade-offs in the degree of impact on two or more protected matters, or trade-offs with economic or social impacts on the community.

The mitigation hierarchy should be updated to instead reference whether a step is "reasonably practicable". This term gives clearer meaning to what is 'possible', by implying a proportionality assessment that weighs the likelihood and degree of harm against the cost, time, and difficulty of eliminating or minimising the risk. This is an appropriate term in respect of the application of the mitigation hierarchy and presumably what it intends to achieve.

This language is not intended to weaken environmental protection outcomes but instead provides clearer direction for assessors on what is intended as 'possible' by using accepted terminology for weighing these types of decisions.

The term 'reasonably practicable' is already used elsewhere in the EPBC Act, as well as in other Commonwealth legislation (such as the Work Health and Safety Act 2011). It is also consistent with NOPSEMA's current 'As Low As Reasonably Practicable' (ALARP) principles. The use of this term would also underscore the principle of ecologically sustainable development, by appropriately integrating economic, environmental, social and equitable considerations into the mitigation hierarchy.

This carries into Principle 3, which refers to "steps in the mitigation hierarchy (avoidance, mitigation and repair) have been exhausted", which should also recognise this being the case 'where reasonably practicable'.

There are also other terms within the mitigation hierarchy that are somewhat subjective. This includes 'timely manner', the threshold of 'the level of significance', and handling the use of adaptive management in respect to mitigation (where the significant impact has been mitigated through adaptive management, but there is a risk a significant impact still may occur).

Recommendation 4.

The references to 'possible' throughout Principle 1 (the mitigation hierarchy) should be replaced with 'reasonably practicable', a term that has an understood legal definition from management of work health and safety risk. Other subjective terms should be considered for clarification or addressed with further detail.

Step 3 of the mitigation hierarchy requires that "any repairable impacts" on protected matters should be repaired as soon as possible. The Standard provides a high-level definition of a repairable impact as an impact which is minimal and temporary in nature, with a note referencing the construction phase. This still provides limited

guidance on what kinds of impacts should be considered repairable. It should be noted that many projects do not necessarily have a distinct 'construction phase' if they are long term in nature, with construction and operation occurring in parallel and progressive restoration occurring in tandem. In this context, it is not clear why site restoration and rehabilitation would not be considered repair at the conclusion of all phases of an action.

Further, the exclusion of rehabilitation activities continues to provide an area of differentiation in the application of the mitigation hierarchy between the Standard and the practice in some states. The note for example references 'rehabilitation at the conclusion of an action', but in some jurisdictions (such as Queensland) the statutory regime requires progressive rehabilitation, and so, not all rehabilitation will occur at the conclusion of the activity.

Finally, in respect to Step 3, it should be made clear that this requirement is in place if there are residual repairable *significant* impacts on protected matters. This distinction is already made in Steps 2 and 4, but not in Step 3.

Recommendation 5.

Provide clearer guidance and clarifying examples, together with consideration of state and territory implementation of repair and rehabilitation, to provide clarity on the kinds of impacts that are considered subject to the repair obligation under the mitigation hierarchy.

4.2.3 Principles 2 – 4

Principle 2 specifies that the context covered includes "past, present, and reasonably foreseeable future events". The requirement to consider 'reasonably foreseeable' (a subjective term) future events may create an obligation for proponents to speculate about the potential impacts of other third-party projects that have been announced but not yet assessed. There should be clarification exactly what is meant by this requirement, for example, if the intention is to consider third party actions, or if the intent is to capture reasonably foreseeable impacts of global climate change on the particular matter (which then opens the question as to the appropriate climate change scenario a proponent should consider). Consistent with the requirements of the Act, this should also link to '*significant* adverse impacts' rather than simply 'adverse impacts'. It also should be made clear that the intent is not to introduce the assessment of greenhouse gas emissions into the Standard, but rather the impact of future climate change scenarios.

It will be important for the Department to provide guidance on how such events and circumstances should be identified and assessed, and where the reasonableness threshold lies. It is also worth stating that, in respect to cumulative impacts that may be captured, it will be important that broader regional decline is not being attributed to individual proponents via the inclusion in an assessment in this way.

Recommendation 6.

In terms of Principle 2, 'reasonably foreseeable future actions' that relate to third-party projects should be limited to actions in respect of which an assessment of environmental impacts has been published, and should be focused on significant adverse impacts. Administrative guidance will be required on how other reasonably foreseeable future events and circumstances should be identified, including in relation to the impacts of climate change, what the criteria for 'reasonable foreseeable' is, what the scope is that proponents should be considering, and what level of confidence is required for something to be incorporated or considered by the proponent and assessor.

Principle 2 requires that actions appropriately consider the adverse impacts to a protected matter and the context in which the impact might occur. Arguably, that is appropriately part of the consideration as a proponent progresses through the mitigation hierarchy, and as such could be integrated into Principle 1.

It is also notable that Principle 3 regarding the compensation of residual significant impacts, and Principle 4, insofar as engagement and consultation, replicate (at a high level) requirements imposed by other National

Environmental Standards, and so are duplicative. They introduce subjective language that is undefined (for example, "*appropriate, suitable and best available* data and information"). It is preferable, rather than replicating a small portion of the requirements as part of the MNES Standard, to instead reference those Standards directly. This will provide for consistency across the package of Standards in place. This is particularly pertinent to Principle 4, which appears to have a requirement for the contribution of knowledge from Indigenous persons, without the detailed framework that is expected to be included in the First Nations engagement Standard (including details such as where engagement is not possible, and identification of appropriate stakeholder groups). This is critical for the meaningful Indigenous engagement and inclusion of Indigenous knowledge, which the BCA supports.

Recommendation 7.

Principles 2, 3 and 4 should be reviewed to remove duplication and where appropriate recognise other Standards rather than duplicate their content in an abridged way, so that there is built in consistency across the package as a whole. For the avoidance of doubt, the BCA supports the substantive outcomes of these principles, and does not intend for these to be deferred or diluted by virtue of this recommendation.

4.3 Ecologically sustainable development

The EPBC Act explicitly embeds ecologically sustainable development as both a core objective and part of the set of mandatory decision-making principles, including the integration of environmental, economic and social considerations. The draft MNES Standard does not expressly reflect or operationalise these statutory principles. This creates a risk of inconsistency between the Standards framework and the Act it is intended to support.

Recommendation 8.

Incorporate ecologically sustainable development into the principles of the Standard, reflecting its importance in the overall Act.

4.4 Clarifying terminology

The Standard should rely on and utilise established terminology from the Act or scientifically defined terms where possible, or otherwise provide definitions for terms that may be ambiguous. Examples include:

- Viability: this term is defined in the Act, and therefore should be included in the list of terms defined in the Act as specified in Section 4.
- Restoration action: provide a definition and clarify that this refers to the actions as set out in Section 177CS of the Act.
- Specify transparent criteria, evidentiary thresholds, and publication requirements for 'national-interest' exceptions to provide clarity and reduce reputational risk.

Recommendation 9.

Ensure that definitions for important terms are provided and linked back to the Act or to scientifically defined terms.

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