



**NELA Submission on the draft national
Other Effective area-based Conservation Measures (OECMs)
Framework**

1. About NELA and its interest in this consultation

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, environmental regulation and regulatory theory, and natural resource management.

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. As a body with particular expertise and interest in environmental laws, NELA and its members recognise the importance of clear, strong, transparent and ambitious laws for safeguarding Australian environments, and we bring that recognition to bear in this submission.

We are grateful for the opportunity to make a submission on this consultation paper.

2. Summary of this submission

The Australian Government has committed to comprehensive, meaningful reform of Australia's environmental laws, including by committing in its Nature Positive Plan to 'protect and conserve 30% of Australia's land and oceans by 2030' to align with Target 3 of the Global Biodiversity Framework (**GBF**) under the Convention on Biological Diversity (**CBD**).

In this submission, NELA highlights three important considerations for the Australian Government as it develops reforms to implement the OECM mechanism, including:

- Any OECM Framework should not be finalised before public consultation on the National Roadmap for 30x30 is undertaken. The Australian Government needs to provide greater transparency on the extent to which the proposed new OECM Framework will complement the National Reserve System (**NRS**). Further information is also needed on how OECMs intend to improve existing protection and restore biodiversity, beyond an attempt to change how Australia accounts for its protected area estate and meet the new 30x30 target under the GBF.

- The Australian Government’s proposed interpretation of OECMs which accepts a non-binding intention indication (minimum 25 years) of a landowner is potentially inconsistent with the CBD’s definition of an OECM which requires governance and management ‘that achieve positive and sustained long-term outcomes’ and is at odds with robust secure practice for protected areas in Australia. OECMs under Australian law, can and should be supported by legal means.
- Robust assurance measures should be a key principle of the Framework. The governance and assurance mechanisms within the proposed OECM Framework (section 5) needs further development and consultation with experts and potential OECM 3rd party governance bodies. Currently, who is responsible for what is not clear within the Framework which provides a concerning assurance framework unable to build trust and confidence.

3. Greater clarity needed in how an OECM mechanism in Australia will contribute better outcomes for nature and encourage greater ambition and conservation effort

The Australian government has led on the world stage in achieving the new GBF. Domestically, and in response to the damning recent State of Environment reports and Samuel Review of our main environmental law, the Australian Government has also committed to a host of reforms under its Nature Positive Plan. The premise of the new GBF and domestic environmental reforms is to do better for the Australian environment and our communities. The proposed new OECM Framework fails to demonstrate how it will contribute better outcomes for nature, for example, by facilitating improvements and generating resourcing for declared OECMs and connect in high integrity ways with the Nature Repair Act. A new OECM Framework that maintains the status quo but which enables the Australian government to report new ‘conserved’ areas under the GBF is at odds with the spirit and intention of the GBF and Australia’s Nature Positive Law reform agenda.

Australia’s protected area estate is world leading and while recent investment has been inadequate to maintain conservation values, the robust NRS strategy and the embedded scientific foundations of a ‘Comprehensive, Adequate and Representative’ estate, the mix of National Parks, Indigenous Protected Areas, and Privately Protected Areas (PPAs), along with clearly stated security mechanisms that require 99-year protected areas where permanency is not possible, is laudable. For these reasons, notwithstanding the need for ongoing investment, the NRS is a trusted institution in Australian environmental laws and policies. With the national ‘Roadmap for protecting and conserving 30% of Australia’s land by 2030’ still under development, the proposed OECM Framework is concerning because there is no commitment from the Government regarding NRS growth, expansion, and investment.

The OECM Framework should not be finalised before public consultation on the National Roadmap. Greater transparency is needed from the Australian Government regarding the extent that the OECM Framework will be relied upon to meet the new 30x30 target, and further information on how the proposed new OECM Framework is intended to protect and restore biodiversity is needed.

Ancillary Conserved Areas such as catchments offer a useful example of both the opportunities and the challenges with a formal OECM mechanism within Australian protected area policy. The consultation paper defines ‘Ancillary Conserved Areas’ as ‘areas where there is no explicit intent to conserve biodiversity, however the site is being conserved as a result of the primary management activity’ (p 25). For such areas to be recognised and ‘counted’ as an OECM, there must be a ‘clear long-term intention... for the continuation of management activities that are delivering in-situ biodiversity conservation outcomes’ (p 14), along with no land use zoning or plans to sell or develop the site that are incompatible with conservation outcomes. Recognising such areas as OECM areas may not require any improvement in the management arrangements, no increase in funding or effort, and no additional benefits to biodiversity. NELA suggests that such an outcome is inconsistent with the improvements that are implicit in the 30x30 target under the GBF.

4. 25-year non-binding ‘intention’ is at odds with the spirit of the CBD and Australia’s legal frameworks that underpin its protected area estate

The proposal for OECMs based on a non-binding 25-year ‘intention’ is potentially inconsistent with the CBD’s definition of an OECM which requires governance and management ‘that achieve positive and sustained long-term outcomes...’

Australia is a global leader in demonstrating how existing property law mechanisms can effectively commit private land managers to their intentions to conserve land for the benefit of local communities and the environment. Such mechanisms include the more robust and secure state-based frameworks that establish Australia’s world leading PPA estate with in-perpetuity conservation covenants, to more flexible registerable instruments under state-based planning frameworks which landowners can agree with government departments and local Councils. Further and increasingly, there are also carbon agreements and other restoration focused agreements that a landowner can register on their property’s title, and which also secure a landowner’s commitment to land management over a certain period.

While in most state jurisdictions, conservation covenants create PPAs that contribute to the NRS, these mechanisms can be adapted to offer different levels of protection and be set-term agreements which are likely to better suit the intention of an OECM Framework, as would other registerable property instruments that are routinely used by local, State and Commonwealth governments to secure landowner’s intentions and bind future landowners.

For publicly managed land, it is possible that a consideration of ongoing past use and the legislative governance framework that applies to a public land manager, may enable a credible assessment of the likelihood of ongoing, long-term management for biodiversity benefits. For example, a water supply catching areas or local government reserves that meet relevant biodiversity criteria.¹

However, for privately managed land which is commonly traded the situation is different. Given the availability of registrable mechanisms at law, and a longstanding practice in Australia to use them to bind successors in title to a current landowner's intentions, the Australian government's proposal *not to* require long term security for OECMs appears to be incompatible with the internationally accepted definition of an OECM. Further, it is not reflective of the spirit and intention in which OECMs have been developed at international law.

25-year timeframe

Further, while NELA appreciates the potential importance of termed agreements for private land conservation, particularly under mechanisms such as the Nature Repair Act, an unsecured 25-year timeframe does not seem compatible for an OECM Framework which must be 'long term' under the IUCN's definition.

A 25-year period could be more consistent with IUCN guidance of what constitutes 'long-term',² if for example, there was a secured 25-year commitment, with a stated longer-term intention or willingness to consider renewal of protection at the completion of the 25-year term (i.e. an optional 25-year rolling form of ongoing legal protection).

5. The Framework is silent on the assurance mechanisms that will be necessary to ensure that the Framework can be successfully implemented

Assurance mechanisms in environmental law ensure that a legal framework is transparently monitored, that progress on its implementation is reported, and to provide certainty of compliance with its obligations. Maintaining the quality of assurance mechanisms is critical to overall confidence in the OECM Framework.

Professor Samuel's Independent Review of the EPBC Act demonstrated a weak culture of assurance under that Act. This is problematic because it erodes public trust in the law's

¹ See here for a more detailed assessment of the types of areas in Australia that could meet the internationally accepted definition of an OECM: Fitzsimons, J.A.; Partridge, T.; Keen, R. *Other Effective Area-Based Conservation Measures (OECMs) in Australia: Key Considerations for Assessment and Implementation*. Conservation 2024, 4, 176–200. <https://doi.org/10.3390/conservation4020013>

² See for example Mitchell, BA, Stolton, S, Bezaury-Creel, J, Bingham, HC, Cumming, TL, Dudley, N, Fitzsimons, JA, Malleret-King, D, Redford, KH & Solano, P 2018, 'Guidelines for privately protected areas', IUCN-WCPA Best practice protected area guidelines series, no. 29., pg 33.

ability to deliver on environmental commitments.³ A culture of weak assurance is also problematic because it risks lending weight to criticisms that the OECM Framework will merely contribute to Australia's reporting on its 30x30 target, rather than delivering practical, measurable and rigorously monitored improvements in the protection of Australian nature.

For these reasons, the Framework must include a commitment to establishing a culture of strong assurance, including active implementation and measurable improvements in monitoring, compliance, and enforcement of conservation outcomes.

NELA submits that robust assurance measures should be a guiding principle for the Framework.

The Framework – as articulated in section 5 - appears to lack meaningful integrity mechanisms, including for oversight, auditing, and compliance, to establish an effective governance regime for OECMs. This represents a serious risk to the Australian Government's efforts to reduce biodiversity loss through the new OECM Framework, let alone achieve its broader policy goal of achieving nature positive outcomes.

Firstly, the Framework fails to clearly articulate who has governance responsibility to approve and provide ongoing monitoring and reporting for OECMs. Section 5.1.1 seems to anticipate that any third party can approve an OECM but with no assurance for how 3rd parties will be governed and monitored and by whom (assuming 3rd party approvers are not constrained to government and statutory bodies).¹

Further, section 5.3 seems to anticipate that the landowner will be responsible for monitoring. But who is overseeing that this monitoring is occurring and/or providing the necessary support to individuals and private landowners?

Further, it is not clear:

- *who* will decide whether existing monitoring is adequate and on what basis, as is proposed at section 5.3.3?
- *who* is the landowner making their 'long term commitment' to and *who* is Appendix 4 'site assessment tool' being assessed by?
- *who* do landowners contact if they sell their OECM or change the management of their OECM? What happens if they don't tell anyone? How does the Government intend to keep track of this?
- *who* reports data to the Australian Government and provides the conserved areas data 'on a regular basis'? Who is responsible for ensuring removal of the conserved area from the data base?

³ Samuel G, 'Independent Review of the EPBC Act – Interim Report' (2020) 92. file:///C:/Users/domin/Downloads/EPBC%20Act%20Review_Interim%20Report_June2020.pdf

- How will the Department manage self-reporting into CAPAD in the manner proposed?
- *who* is responsible for providing the assurance that is discussed generally at section 5.6?

Australia has a wealth of experience in and established bodies that operate under robust frameworks to assist landowners in managing land for conservation across different landscapes and timescales. Such bodies include covenanting agencies, local councils, state Departments, Indigenous land managers, national resource management bodies, eNGOs, and other public sector bodies. NELA submits that each of these bodies are well placed to deliver an effective OECM Framework in partnership with Australian landowners. However more clarity and assurance mechanisms are needed from the Australian government to enable this to happen.

Each of the above questions indicate that further targeted consultation is necessary before the OECM Framework can be finalised to enable the Framework to implement a strong assurance and governance Framework for OECMs. NELA would be pleased to participate in ongoing consultation on these important matters.