

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 EPBC 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 OFFSETTING

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.

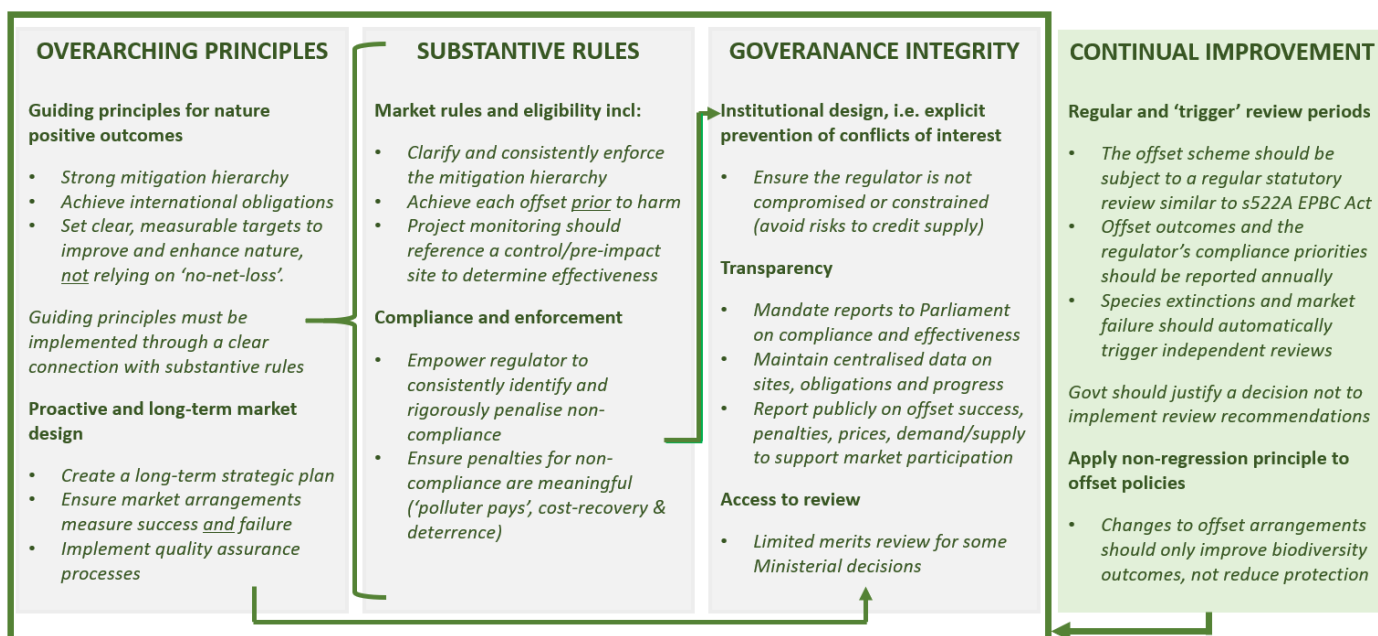


Figure 1. Components of a best practice legal framework for biodiversity offsets

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 drivers⁷ – 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/>>.

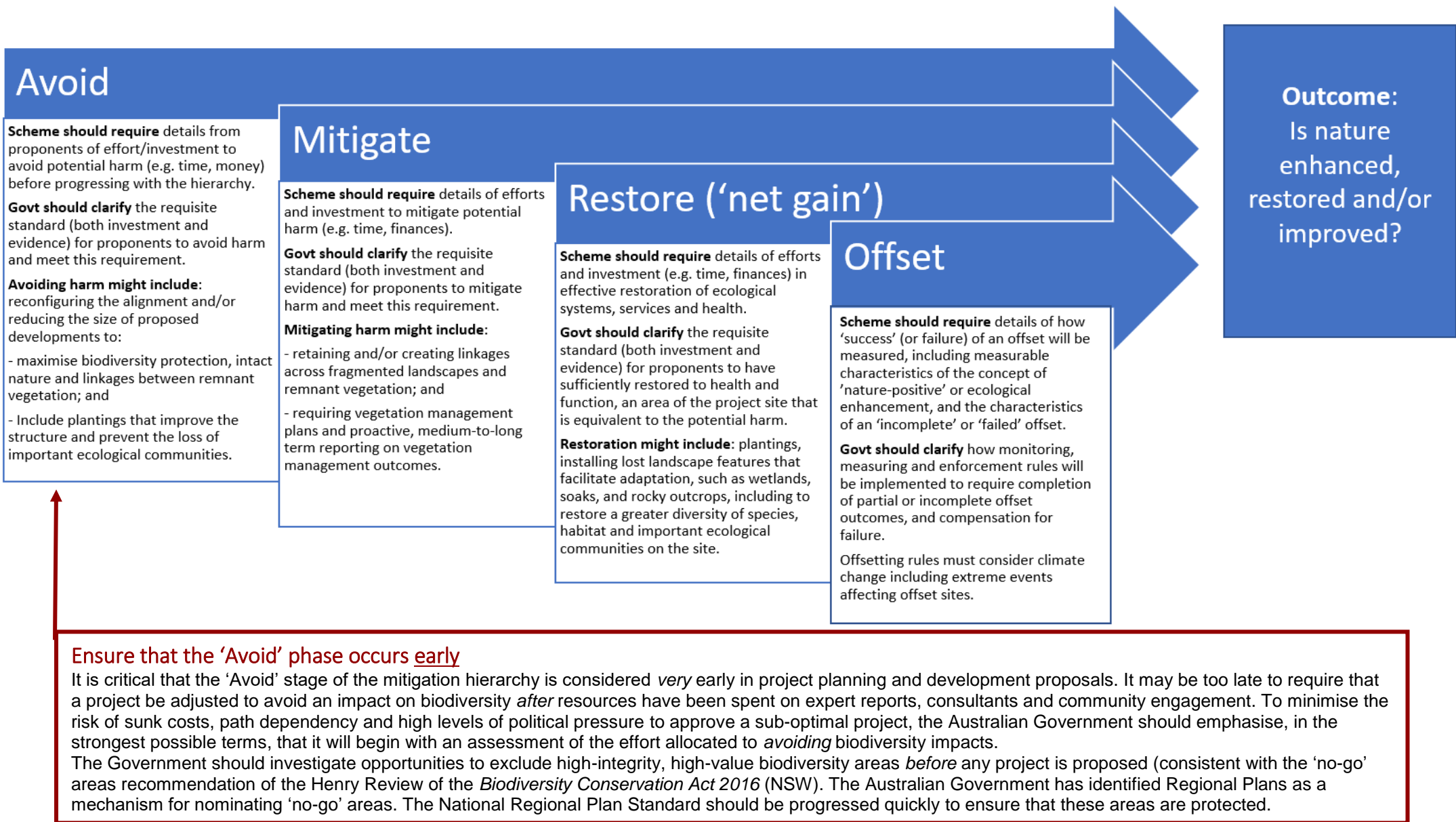


Figure 2. The mitigation hierarchy should be applied strictly and consistently to improve environmental outcomes

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.

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 al '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.

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 is 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>.