

17th April 2020

Professor Graeme Samuel AC, and
EPBC Act Review Secretariat
Department of Agriculture, Water and the Environment (DAWE)
GPO Box 787
CANBERRA ACT 2601



Dear Professor Samuel and the Secretariat,

RE: Submission to Independent review of the EPBC Act

Thank you for this opportunity to make a submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act (hereafter “EPBC Act”).

I am a researcher based at the University of New South Wales, Canberra. My expertise sits broadly within environmental policy, governance and economics, and I have particular expertise in the design and evaluation of environmental offset policy under the EPBC Act. I also have relevant expertise in working to design a public-private investment vehicle with an aim to deliver environmental, social and economic outcomes in Queensland (briefly listed at **Appendix 1**):

In this submission, I draw heavily on research I conducted between 2013 and 2017 on the interpretation and application of the EPBC Act Environmental Offsets Policy (2012). This work involved over 30 hours of interviews with government staff, industry proponents, environmental consultants and brokers, and legal professionals involved in the implementation of the Policy. Further details are provided in **Appendix 2**.

Below I sequentially respond to the Questions posed within the Independent Review of the EPBC Act Discussion Paper. In line with my expertise, I restrict my responses to Questions relating to biodiversity, policy and governance, and make no comment on Indigenous or Heritage matters.

I welcome the opportunity to provide further information or to discuss my submission in more detail.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'MEGAN EVANS', written over a horizontal line.

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Responses to Questions

QUESTION 1: Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

The Commonwealth can, and should, regulate matters of national environmental significance – including additional matters such as the release of substantial greenhouse gas emissions, major land clearing and deforestation, terrestrial and marine protected areas, and significant water resources

There are several reasons for this:

- The Commonwealth is well within its Constitutional powers to regulate activities that impact on matters of national environmental significance¹.
- The Commonwealth, not the States or Territories, are responsible for operationalising Australia's responsibilities under international agreements relating to biodiversity, world heritage, and wetlands, via the EPBC Act
- The States and Territories are not required to act in the national interest – and history has shown this to be the case. Recent examples include the huge increases in domestic greenhouse gas emissions (GHG) from deforestation in Queensland and New South Wales as a result of weakened state-level regulations². These GHG releases were significant enough to effectively cancel out the positive impact of the Federal Government's public investment in land-based carbon sequestration (carbon farming)³
- In many cases, State and Territory agencies are proponents of actions that impact on MNES or would otherwise benefit from the approval of such actions – hence an additional layer of governance is required to regulate in instances of conflicts of interest.

Some members of the community are concerned about the regulatory burden of Commonwealth environmental legislation, in addition to State and Territory legislation.

However, it is my view that:

- I. **Much of the regulatory burden associated with complying with the EPBC Act is due to decades of insufficient investment in basic regulatory resourcing and capacity, including digital infrastructure.**

¹ Australian Panel of Experts in Environmental Law (APEEL). 'Constitutional authority of the Australian Government to make next generation environmental laws', Technical Paper 2 – Environmental Governance (2017), pp 13-17

² Evans, M.C., 2018. Effective incentives for reforestation: lessons from Australia's carbon farming policies. *Current Opinion in Environmental Sustainability* 32, 38–45. <https://doi.org/10.1016/j.cosust.2018.04.002>

³<https://www.theguardian.com/environment/2018/may/29/land-clearing-wipes-out-1bn-taxpayer-funded-emissions-gains>

- II. Further, the Commonwealth could the reduce regulatory burden associated with policy uncertainty and ambiguity (currently afforded by the EPBC Acts considerable discretionary powers) by **providing clear guidance and rules around “no go zones” or “red flag areas”** where activities will not be permitted due to the high likelihood if unacceptable impacts on matters of national environmental significance.
- III. Finally, the Commonwealth could further reduce regulatory burden and uncertainty by providing **strategic leadership in the protection of Australia’s environment by investing in landscape planning, national environmental accounts, and long-term incentives** for landholders, businesses and the wider community to manage and protect biodiversity and natural capital.

I provide further detail on each of these points below.

I. Insufficient resourcing, capacity, and infrastructure

- According to the Australian National Audit Office, DAWE **primarily relies on hard-copy records for its compliance monitoring function**. DAWE introduced an electronic document management system (SPIRE) in July 2014, but pre-existing hard copy records and network drive files were not migrated to SPIRE⁴
- My research shows that **DAWE staff cannot quickly and easily access basic spatial information** on approved environmental offsets, protected areas, critical habitat and wildlife corridors⁵. This contributes to:
 - o assessment delays, as DAWE staff must rely heavily on the information provided by the proponents (which is “*highly variable*”⁶ in quality and requires cross-checking), and
 - o poorer environmental outcomes, for example due to:
 - the risk of approving impacts on the condition of an environmental offset being provided, but it is revealed only after approval that the MNES is degraded to the point that offset are no longer feasible or appropriate⁷.

⁴ Australian National Audit Office, 2017. Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit (Performance Audit Report No.36 of 2016-2017).

⁵ “*This department’s not so good at having spatial platforms that are readily available and you can interact with easily...It’s there but it’s not super discoverable.*” (Interviewee 24, Assessments officer).

⁶ Interviewee 21, Assessments officer

⁷ “*...the more and more we become comfortable with using the offsets policy, the assessment officers are saying yes you can impact that if you offset this somehow, approved, handed over to the post approvals officers...[the proponent] may then turn around and say actually there’s no offsets*” (Interviewee 29, Post-approvals)

- an inability to identify landscape-scale outcomes that facilitate ecological benefits and economic efficiencies, such as located offsets within high priority corridors or adjacent to protected areas.⁸

- **DAWE staff face extreme organisational, political and time pressures, including:**

- Inadequate training and support (for example, the last known training on the application of the EPBC Act Offsets Policy was in 2012, and inconsistent feedback on the quality of and enforceability environmental conditions⁹)
- High individual workloads, high staff turnover, inconsistent advice from Branch heads, inadequate formalisation of advice into internal guidance¹⁰, variable interaction and physical separation between Branches, loss of corporate knowledge through voluntary redundancy rounds;
- Political and time pressures on assessments staff to “backload” the details of environmental conditions until after the project is approved, thereby reducing the quality and enforceability of conditions, placing additional burden on post-approval staff and reducing the regulatory power of the Commonwealth¹¹;
- Considerable time is spent educating and negotiating with proponents who are either ill-equipped to understanding and complying with the EPBC Act, or who are deliberately obstructionist¹².

II. “Red flags” or “no go zones” would reduce regulatory burden, create business certainty, and improve environmental outcomes

⁸ On how spatial data would assist assessments workflow: *“I’d at least be able to tell if what we were doing was additional to what had been done elsewhere...when you’re trying to draw linkages or create linkages between other projects you could do that hopefully more easily. It would also build up a sense of what is achievable within particular areas as well.”* (Interviewee 20, DotEE Assessments officer)

⁹ *“...we only hear about it again if something goes pear shaped in post like something hits the fan”* and *“...we don’t get feedback on which [management action] is going to be the most beneficial so we just try and keep up to date with the latest research with whatever matter we’re dealing with... if weeds are the main threat then we’d say manage the weeds and we just hope for the best.”* (Interviewee 23, DotEE Assessments officer)

¹⁰ *“...you give the feedback back to a person, an assessment officer, an approvals officer, and then the next time you find exactly the same problem with another assessment officer...”* (Interviewee 28, DotEE Compliance and enforcement)

¹¹ *“... when it gets to the pointy end of timelines and statutory timelines are running out and decisions have to be made and there’s multi-billion or million dollar projects on the line, often it’s easier for delegates and others to give proponents the benefit of the doubt and assume that they’ll come around and follow through on what’s agreed.”* (Interviewee 24, DotEE Assessments officer)

¹² Some proponents who negotiated “in bad faith”, had low capacity and expertise, had not factored the cost of offsets into their business plans, or who displayed reluctance to deliver an offset require considerable time and effort to be educated by assessment officers on how to comply with the EPBC Act, to the point where sometimes *“you might as well do it [the EIS and offset proposal] yourself”* (Interviewee 17, DotEE Compliance and enforcement).

- There are clear ecological limits to the extent of degradation that matters of national significance can incur before they become functionally or effectively extinct.
- There is considerable evidence that **the EPBC Act has not been effective in preventing extinctions**, or extensive degradation of environmental values such that they are at high risk of extinction¹³
- My research indicates that **clear guidance to industry proponents on “no go zones” or “red flag areas” would deliver environmental and economic benefits**, for example where highly threatened species which have limited habitat remaining and offsets are no longer feasible. Such information would provide “*greater clarity to the market*”¹⁴, but would require a commitment from the Australian Government to provide strategic leadership, and to invest in spatial data infrastructure and education for the regulated community to enable such an approach.

III. “Nirvana”: strategic leadership from Government

The most common theme across all interviewees in my research, regardless of whether they were from government, industry, or consulting, was a desire for a “strategic” approach to environmental protection. “Strategic” was generally used by interviewees to describe an approach which required:

- Operation across larger spatial and temporal scales than current arrangements;
- Coordination, alignment and/or strategic partnerships between multiple parties external to the Department, including State Governments, Local Governments, proponents, NGOs and management agencies;
- Improved coordination and integration within the Department;
- Long term strategic oversight and coordination;
- Better alignment between federal, state and local legislation which governs environmental protection and planning,
- Investment in infrastructure, resources and staffing commensurate with the ambition and scale of such an approach.

One industry proponent noted that:

¹³ For example: Reside, A. E., A. J. Cosgrove, R. Pointon, J. Trezise, J. E. M. Watson, and M. Maron. 2019. How to send a finch extinct. *Environmental Science & Policy* 94:163-173 <https://www.sciencedirect.com/science/article/abs/pii/S1462901118308414> and Woinarski, J. C. Z., S. T. Garnett, S. M. Legge, and D. B. Lindenmayer. 2017. The contribution of policy, law, management, research, and advocacy failings to the recent extinctions of three Australian vertebrate species. *Conservation Biology* 31:13-23 <https://conbio.onlinelibrary.wiley.com/doi/abs/10.1111/cobi.12852>

¹⁴ Interviewee 31, DotEE Policy and reform

“...the nirvana would be strategic leadership from the regulators with a shopping list of already approved and higher priority areas to secure that you can basically pick off the shopping list”
(Interview 2, Industry)

Such a strategic approach **would require the Australian Government to take responsibility for driving a national response to environmental degradation**, for the benefit of current and future Australians.

QUESTION 2: How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

The Australian Government has defined **ecologically sustainable development (ESD)** as:

*‘...using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased’.*¹⁵

Achieving ESD requires the integration of short and long-term environmental, economic, social, and equity considerations. **As such, it is extremely difficult to evaluate ESD considerations at a project-by-project scale under the EPBC Act.**

My research provides evidence that the **interpretation of ESD by delegated authorities and Ministers** when making decisions under the EPBC Act is **inconsistent with its legislative intent and statutory principles** (e.g intergenerational equity, precautionary etc)¹⁶

For example, one interviewee noted:

*“...under the Act it’s **very hard to refuse a project on the basis that you can’t find an offset...** we have to consider sustainable development from a social and economic point of view as well as the environmental aspects.”* (Interviewee 23, DotEE Assessments officer)

In theory, **the scarcity of suitable environmental offset is meant to indicate that a MNES is so highly threatened that further impacts will soon lead to its extinction**¹⁷. This aligns with **basic economic theory** – scarcity of a product increases its price such, that an agent must change its

¹⁵ Australian Government, National Strategy for ESD, ‘What is Ecologically Sustainable Development?’ <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD>

¹⁶ Macintosh, A., 2015. The impact of ESD on Australia’s environmental institutions. Australasian Journal of Environmental Management 22, 33–45. <https://doi.org/10.1080/14486563.2014.999724>

¹⁷ “You’ve got a fixed amount of offset. Unless we grow new areas of koala habitat very quickly and that’s not happening, we’re literally just going to run out of offsets.” Interviewee 20, DotEE Assessments

behaviour – by reducing its consumption of a product (a particular MNES), or switching to consumption of a cheaper product (e.g moving its operation to a less environmentally damaging location).

In practice, however, I have found evidence that approval decisions are made such that highly threatened MNES incur unacceptable impacts. These decisions appear to be **justified by an incomplete definition of ESD**, whereby “social, economic and environmental factors” are considered at the scale of a single project, in an opaque and likely short-term fashion. This issue is further exacerbated by:

- inadequate information flow and interaction between assessments, post-approval and compliance and enforcement branches, meaning that impacts may be approved despite offsets not being feasible or appropriate (**see page 5 of this submission**),
- Inappropriate interpretation and application of the EPBC Act Environmental Offsets Policy, and an incorrect assumption that there are no ecological limits¹⁸,
- The decision process for the application of the EPBC Act Environmental Offsets Policy, whereby offsets may still be applied if offsetting is deemed to NOT be appropriate or feasible (Figure 1, orange circle, below)

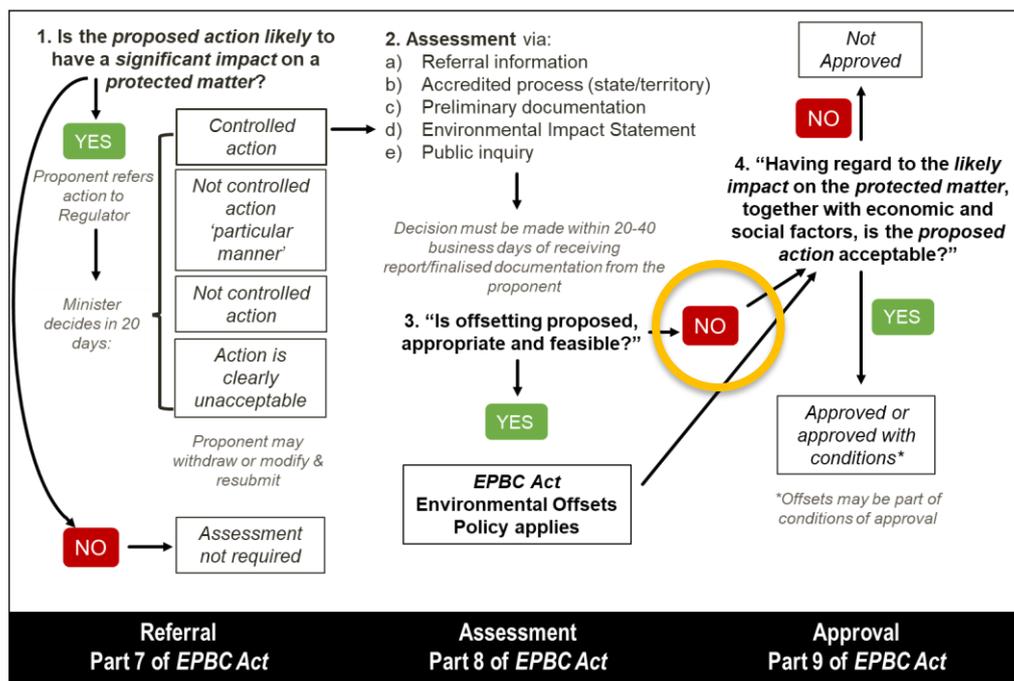


Figure 1: Decision process for application of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999. M Evans, own work

¹⁸ -“...if something is unoffsettable in direct terms you can look to do virtually all of your offset in indirect terms and compensatory terms [as a financial contribution].” Interviewee 24, DotEE Assessments

“...[there is] a longstanding assumption that you can always offset something” (Interview 20, DotEE Assessments)

QUESTION 3: Should the objects of the EPBC Act be more specific?

Yes. Currently, the objects are too vague and open to inconsistent interpretation. I concur with the objects, secondary objects and provisions drafted by the Environmental Defender's Office on page 22 of their Submission to the 10-year review of the EPBC Act.

QUESTION 4: Should the matters of national environmental significance within the EPBC Act be changed? How?

Yes – MNES should be expanded to include:

- the release of substantial greenhouse gas emissions,
- major land clearing and deforestation,
- terrestrial and marine protected areas (the NRS), and
- significant water resources.

With regards to the NRS, it is remarkable that areas that Commonwealth, State and Territory governments have recognised as containing outstanding biodiversity values are not themselves protected under the EPBC Act.

Privately protected areas, where individual landholders invest their private resources to maintain biodiversity as a public good, contribute significantly to the NRS and to the Commonwealth's commitment to expand the protected area system in accordance with the international Convention on Biological Diversity. Governments routinely invest in recruiting more private landholders to voluntarily manage their properties sustainably in a way that protect biodiversity. Yet such areas are not protected from impacts such as coal and gas extraction, leading to a major disincentive for landholders to undertake such activities¹⁹.

QUESTION 5: Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

This question describes a false dichotomy. Assessment and approval processes are obviously linked to biodiversity conservation. Voluntary and incentive-based policy instruments must be underpinned by a strong regulatory basis in order to be effective (Figure 2)²⁰. A complementary mix of policy tools is

¹⁹ Adams, V.M., Moon, K., 2013. Security and equity of conservation covenants: Contradictions of private protected area policies in Australia. *Land Use Policy* 30, 114–119. <https://doi.org/10.1016/j.landusepol.2012.03.009>

²⁰ Ayres, I., Braithwaite, J., 1992. *Responsive Regulation: Transcending the Deregulation Debate*. Transcending the Deregulation Debate. Oxford University Press.

frequently required to effectively deliver positive public policy outcomes²¹. This is fundamental concept of public administration²².

There may be circumstances where volunteerism and self-regulation can be effective – given the EPBC Act’s poor record in capturing all relevant impacts on MNES (in part due to its reliance on self-referrals)²³, and disproportionate incidence of referrals from the agricultural sector²⁴ despite the majority of historical and contemporary habitat loss resulting from agricultural clearing, it is highly likely that further deregulation of the EPBC Act would lead to detrimental environmental, social and health outcomes for the broader Australian community.

Deregulation of land clearing controls in Queensland and New South Wales provides further evidence of the need to maintain a fundamental basis in regulation. Regulatory controls are also necessary for environmental markets to operate effectively – there are important lessons from Australia’s experience with carbon markets in this regard²⁵.

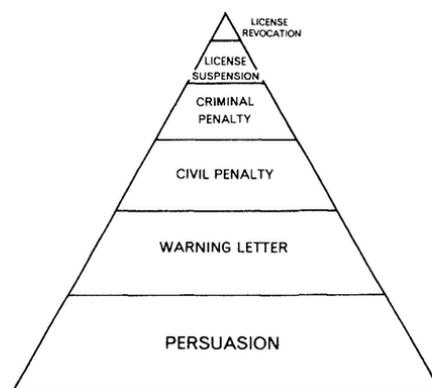


Figure 2.1. Example of an enforcement pyramid. The proportion of space at each layer represents the proportion of enforcement activity at that level.

Figure 2. “Responsive regulation” enforcement pyramid, popularised by Ayres and Braithwaite (1992). Persuasive “carrots” (volunteerism, incentives) are not effective unless there is a clear risk of enforcement “sticks”

²¹ Young, M.D., Gunningham, N., 1997. Mixing instruments and institutional arrangements for optimal biodiversity conservation, in: Hale, P., Lamb (Eds.), *Conservation Outside Nature Reserves*. Centre for Conservation Biology, University of Queensland, pp. 123–135.

²² Gunningham, N., Sinclair, D., 2017. Chapter 8: Smart Regulation, in: Drahos, P. (Ed.), *Regulatory Theory: Foundations and Applications*. pp. 133–148. <http://dx.doi.org/10.22459/RT.02.2017>

²³ Ward, M.S., et al, 2019. Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia. *Conservation Science and Practice*. <https://doi.org/10.1111/csp2.117>

²⁴ Craik, W. 2018. Review of interactions between the EPBC Act and the agriculture sector. Independent report prepared for the Commonwealth Department of the Environment and Energy. Available at: <https://www.environment.gov.au/epbc/publications/review-interactions-epbc-act-agriculture-final-report>

²⁵ Evans, M.C., 2018. Effective incentives for reforestation: lessons from Australia’s carbon farming policies. *Current Opinion in Environmental Sustainability* 32, 38–45. <https://doi.org/10.1016/j.cosust.2018.04.002>

QUESTION 6: What high level concerns should the review focus on?

- **For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards?**

Clear, nationally consistent standards can be a useful tool to drive positive environmental outcomes and reduce regulatory burdens associated with lack of coordination and policy alignment. However, national standards and strategies for biodiversity conservation (e.g. ²⁶) typically lack any kind of regulatory or incentive-based teeth, and their goals are rarely, if ever, achieved²⁷. Further, an effective national standard must incentivise States and Territories to rise to meet the standard set by the Federal government, rather than the Federal government accrediting poorer quality State and Territory policies and standards, as has occurred with environmental offset policy.

- **How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation?**

It is clear that the EPBC Act has not been effective in achieving its statutory objectives to protect the environment and promote ESD and biodiversity conservation. The latest State of the Environment report²⁸ provides ample evidence, as do the suggested references at footnote 15.

- **What have been the economic costs associated with the operation and administration of the EPBC Act?**

Public policy is all about benefits, costs, and trade-offs. Any analysis of the economic costs of operating and administering the EPBC Act would require analysis of not only the economic costs of regulation, but the costs of regulatory failings – including economic, social, environmental and health costs due to the ineffective protection of MNES.

QUESTION 7: What additional future trends or supporting evidence should be drawn on to inform the review?

Key future trends include:

- The increased likelihood, duration, and magnitude of extreme weather events such as fire, flood and drought, due to unmitigated climate change;

²⁶ Australia's Strategy for Nature <https://www.environment.gov.au/biodiversity/conservation/strategy>; Australia's Biodiversity Conservation Strategy 2010-2020 <https://www.environment.gov.au/biodiversity/publications/biodiversity-conservation-strategy-consultation-draft> ;

²⁷ Australia's Native Vegetation Framework included the goal "By 2020 there will be a net national increase in the extent of native vegetation, including where it can contribute to landscape connectivity" <https://www.environment.gov.au/land/publications/australias-native-vegetation-framework>

²⁸ State of the Environment 2016 Report to the Australian Government, 'Overview', at <https://soe.environment.gov.au/theme/overview>

- The effects of climate extremes on human health (e.g smoke from bushfires, deaths from heatwaves), threats to built and green infrastructure, impacts on agriculture and food security;
- The need to rapidly decarbonise our economies, which will influence how power will be generated and used;
- Increasing private sector interest and investment in sustainable enterprise, biodiversity conservation and the Sustainable Development Goals²⁹

QUESTION 8: Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

The question of whether proponents should be conditioned to deliver outcomes, versus being conditioned to follow procedural steps, is complex. In short, **there needs to be a balance of outcomes- and process-based conditions.**

Answering this question in detail is the subject of the next 3 years of my research (Figure 3).

Currently, environmental conditions under the EPBC Act are overwhelmingly process-based. An overreliance on process-based conditions can lead to inefficiencies, “box ticking”, and does not guarantee environmental outcomes are being delivered. A clear example is the case of the Hume Highway development, where proponents were conditioned to install nest boxes to compensate for impacts to hollow-bearing trees. Subsequent research showed that the nest boxes did not effectively compensate for impacts to threatened species – nevertheless, the proponent was compliant with their environmental conditions which stipulated nest boxes be *installed*, not that they be *effective*³⁰.

However, a total reliance on outcomes-based conditions would also likely be detrimental. First, it may create perverse incentives to seek out “easy” environmental gains that can be easily measured and attained with certainty over a short term. More difficult to achieve, uncertain or long-term environmental outcomes may not occur.

The Department of the Environment and Energy released an Outcomes-based conditions policy in 2016³¹. Based on my informal observations and anecdotal evidence, I suggest it is likely that the Department has rarely, if ever, applied outcomes-based conditions to EPBC Act approvals since the introduction of the (voluntary) policy in 2016. A more widespread, and informed adoption of outcomes-based conditions (and in an appropriate combination with process-based conditions) would require

²⁹ Vali N. More than philanthropy: SDGs are a \$12 trillion opportunity for the private sector. UNDP. 2017. <http://www.undp.org/content/undp/en/home/blog/2017/8/25/More-than-philanthropy-SDGs-present-an-estimated-US-12-trillion-in-market-opportunities-for-private-sector-through-inclusive-business.html>.

³⁰ Lindenmayer, D.B., Crane, M., Evans, M.C., Maron, M., Gibbons, P., Bekessy, S., Blanchard, W., 2017. The anatomy of a failed offset. *Biological Conservation* 210, Part A, 286–292. <https://doi.org/10.1016/j.biocon.2017.04.022> and <http://theconversation.com/the-plan-to-protect-wildlife-displaced-by-the-hume-highway-has-failed-78087>

³¹ Commonwealth of Australia, 2016. Outcomes-based conditions policy and guidance. Canberra. <http://www.environment.gov.au/epbc/publications/outcomes-based-conditions-policy-guidance>

significant investment in training for Department staff, education for proponents, and investment in information systems.

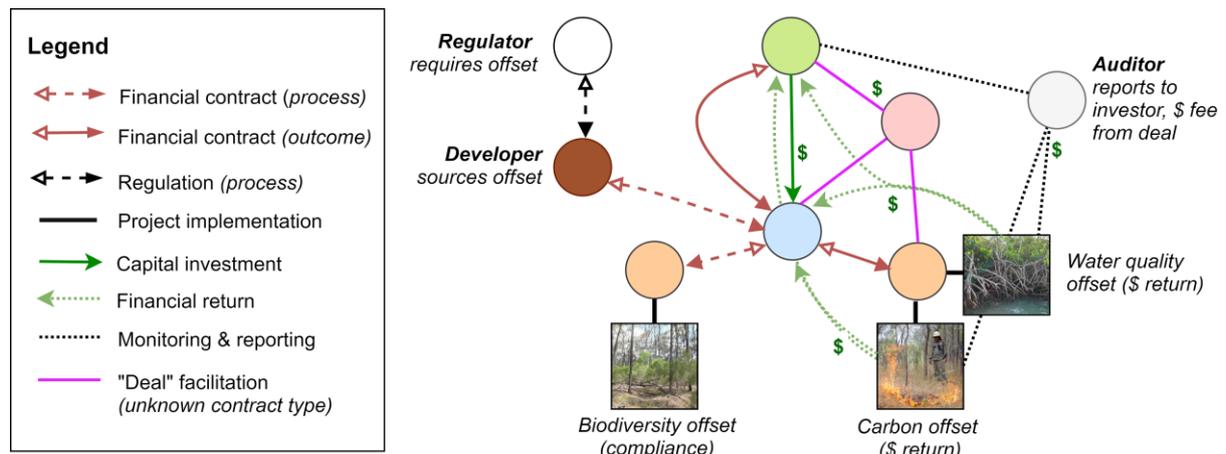


Figure 3. What is the appropriate mix of process and outcomes-based contracts to ensure environmental outcomes are delivered and transaction costs minimised? M Evans, own work.

QUESTION 10: Should there be a greater role for national environmental standards in achieving the outcomes the EPBC Act seeks to achieve? In our federated system should they be prescribed through:

- Non-binding policy and strategies?
- Expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrier Reef catchments?
- The development of broad environmental standards with the Commonwealth taking a monitoring and assurance role? Does the information exist to do this?

See response to Question 6.

QUESTION 11: How can environmental protection and environmental restoration be best achieved together?

- Should the EPBC Act have a greater focus on restoration?
- Should the Act include incentives for proactive environmental protection?
- How will we know if we're successful?
- How should Indigenous land management practices be incorporated?

Improvements in the operation and effectiveness in the EPBC Act would likely lead to a greater focus on restoration. By communicating clear limits on further removal of habitat, such as through clear guidance and rules around "no go zones" or "red flag areas" (see pages 5-6 this submission) and the correct application of the EPBC Environmental Offsets Policy, restoration would be more frequently

used to deliver environmental offsets. Our research³² has shown that assessment officers typically overestimate the benefit of protecting existing habitat when applying the EPBC Act Environmental Offsets Policy. Restoration, where feasible, is far more likely to deliver an “*improve or maintain*” outcome.

There is a need for effective incentives for landholders and businesses to invest in environmental protection. Such schemes typically offer too little incentive for many to participate— covering only the cost of some environmental works, rather than the opportunity costs of production. To deliver long term, positive environmental, social, economic outcomes. Successful programs such as the Environmental Stewardship Program³³ are subject to short-termism, further disincentivising participation.

There is much to learn from the successes, and failures, of the Australian carbon farming sector³⁴. The 10-year contracts offered by the Clean Energy Regulator have provided sufficient certainty to many landholders who have voluntarily entered into carbon sequestration contracts, which are financially attractive enough to reduce or forego marginal agricultural production, delivering environmental, social and economic outcomes.

QUESTION 14: Should the matters of national significance be refined to remove duplication of responsibilities between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?

No. See response to Question 1.

QUESTION 15: Should low-risk projects receive automatic approval or be exempt in some way?

No. See response to Question 5.

- How could data help support this approach?

- Should a national environmental database be developed?

- Should all data from environmental impact assessments be made publicly available?

As noted in Question 1, the **hard-copy system** (including PDFs) of collating and filing environmental data under the EPBC Act is archaic and ineffectual. There is an urgent need for

³² Maseyk, F.J.F., Maron, M., Gordon, A., Bull, J.W., Evans, M.C., 2020. Improving averted loss estimates for better biodiversity outcomes from offset exchanges. *Oryx* 1–11. <https://doi.org/10.1017/S0030605319000528> And <http://www.nespthreatenedspecies.edu.au/publications-tools/guidance-for-deriving-risk-of-loss-estimates-when-evaluating-biodiversity-offset-proposals-under-the>

³³ Here's a good news conservation story: farmers are helping endangered ecosystems <https://theconversation.com/heres-a-good-news-conservation-story-farmers-are-helping-endangered-ecosystems-60794>

³⁴ Evans, M.C., 2018. Effective incentives for reforestation: lessons from Australia's carbon farming policies. *Current Opinion in Environmental Sustainability* 32, 38–45. <https://doi.org/10.1016/j.cosust.2018.04.002>

investment in nationally consistent, user-friendly IT systems that enable the EPBC Act to be more efficiently and effectively administered. Such a system could include:

- An interface whereby proponents and environmental consultants could digitally upload environmental impact assessment data; rather than printing such data in PDF reports that are thousands of pages in length, and from which data cannot be easily accessed or extracted;
- An interface that is internally facing for use by Government staff, for reporting, compliance, and data discovery
- A public facing interface which could include information that demonstrates the environmental outcomes being delivered by the EPBC Act, including a public register of environmental offsets.

Although proponents are typically conditioned to make annual reports publicly available, in practice **environmental impact assessment data remains inaccessible**, as extracting data requires visiting individual proponent websites, and extracting data from dozens of individual PDFs. **This is not sufficiently transparent.**

The most recent Australian National Audit Office report (2017), in a follow-up previously tabled reports in 2014 and 2016, highlighted persistent deficiencies in EPBC Act compliance functions:

- *“Environment is not well placed to demonstrate that the [transfer of responsibility for approved controlled actions from environment assessment branches to post approval monitoring teams] is operating effectively and, ultimately, that all approved controlled actions are subject to appropriate compliance activity.”*
- *“...continuing IT system functionality limitations impact on Environment’s ability to effectively and efficiently monitor its regulatory performance.”*
- *“Further: internal report arrangements do not provide timely and targeted information on the performance of the compliance function; and performance information reported externally by Environment does not currently provide stakeholders with sufficient insights into the extent to which compliance monitoring activities have been effective in protecting the environment from significant impacts.”*

A Senate Committee report recommended in 2014³⁵ that the Department “*expedite the development of a publicly available nationally coordinated register of environmental offsets.*”

In my research, interviewees across multiple stakeholder groups (government and industry) were generally supportive of a public register of offsets, as it was said to promote transparency,

³⁵ The Senate Environment and Communications References Committee, 2014. Environmental offsets. Commonwealth of Australia. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets

accountability, and provide the Australian community confidence that environmental assets are being managed effectively³⁶.

QUESTION 16: Should the Commonwealth’s regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?

This is a false dichotomy: there needs to be a combination of proactive, landscape-scale approaches alongside species- and site- specific processes. Investment in strategic and bioregional planning, spatial data collection and provision, and information systems would deliver improvements in the effectiveness and efficiency of species- and site- specific processes.

QUESTION 17: Should the EPBC Act be amended to enable broader accreditation of state and territory, local and other processes?

No. See responses to Questions 1 and 6.

QUESTION 18: Are there adequate incentives to give the community confidence in self-regulation?

No. See responses to Questions 1, 2 and 5.

QUESTION 21: What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision makers under the EPBC Act be supported by different governance arrangements?

Both the transparency of decisions (and data informing decisions) and the governance arrangements around the EPBC Act require reform. I refer to and concur with the Environmental Defender’s Office recommendations on governance and transparency.

My only further comment is that the EDO’s recommended structure of:

- a government Department,
- an independent statutory authority (e.g Environmental Protection Agency) and
- a Sustainability Commission for high-level oversight

is not dissimilar to the structure Australia has adopted to govern the carbon market (Figure 4). Governance of Australian Carbon Credit Units (ACCUs) under the Emissions Reduction Fund is facilitated by:

- The (former) Department of Environment and Energy, who supports method development,

³⁶ “I think it’s useful for everyone...it’s less work for the proponents, less work for consultants. Landholders who want to put an offset up can see what the market value is and how that changes over time. And it’s better for us and a better environment outcome. It ticks all the boxes.” (Interviewee 24, DotEE, Assessments)

- The independent Clean Energy Regulator, and
- The independent Emissions Reduction Assurance Committee.

I see no reason why a similar governance structure can't be adopted for MNES under the EPBC Act – or integrated with the existing, highly regarded structure governing ACCUs.

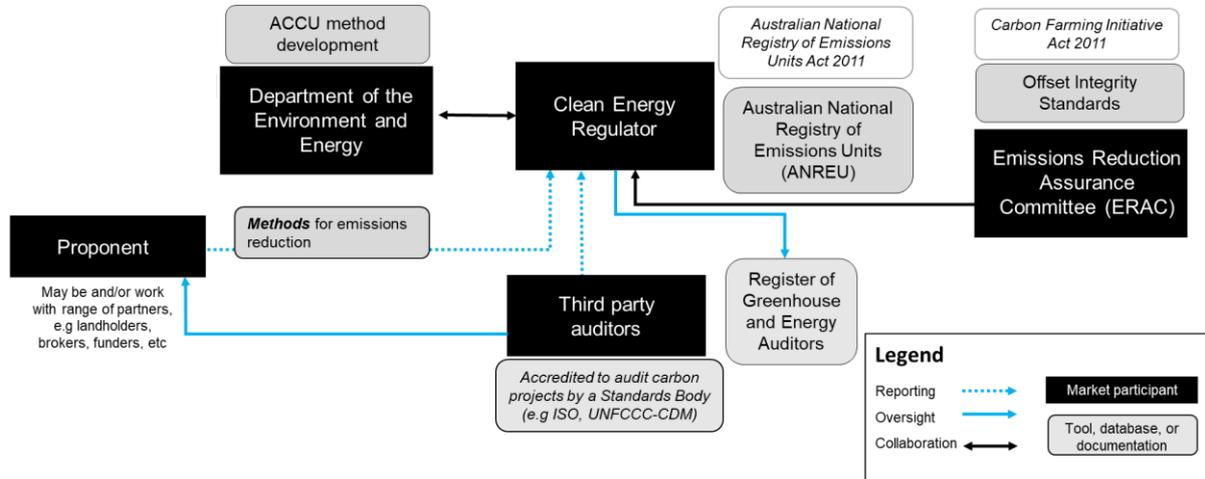


Figure 4. Governance of Australian Carbon Credit Units (ACCUs) under the Emissions Reduction Fund in Australia. M Evans, own work.

QUESTION 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

Typically, the term “innovative approaches” is used to refer to private-sector investment or environmental markets. My view is that there is little need for innovative approaches to more efficiently and effectively deliver the intended outcomes of the EPBC Act. Primarily, there is a need for adequate resourcing and infrastructure. See responses to previous questions.

QUESTION 23: Should the Commonwealth establish new environmental markets? Should the Commonwealth implement a trust fund for environmental outcomes?

Responses to Questions 1 and 2 provide reasons for caution in establishing new environmental markets. Generally, they are resource, time and data intensive to establish, and are not necessarily more efficient and effective than regulation.

The issue of a trust fund is related to the issue of strategic leadership (Question 1, pages 5 to 6). In my research, a trust fund was suggested by several interviews as a mechanism for enabling a “strategic” approach. A national offset trust fund, for example, allow proponents to effectively “pay and go” rather than being required to deliver an offset. This would mean the risk and liability would move from the proponent, to the Federal Government.

However, some industry proponents and brokers were sceptical of the Federal government’s ability to effectively and efficiently operate such a fund, based on experience in other jurisdictions (e.g

Queensland and Western Australia) and a perception that the money would shift into consolidated revenue.

Interviewees expressed **support for an independent authority to administer such a fund**. Some respondents argued that an offset fund must be liquid if it is to be effective, which would require that the 'like for like' offset policy requirement be relaxed. This approach may lead to additional risks as the connection between the impact and the promised compensation would be diminished, but such risks could be mitigated by effective oversight from an independent authority.

I strongly suggest that experience on the use of trust funds in other jurisdictions (e.g. highly variable success in the implementation of environmental offsets funds in Queensland and Western Australia) **should inform the Review's investigation into their possible use under the EPBC Act.**

QUESTION 24: What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?

See responses to Questions 1 and 2.

QUESTION 25: How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?

- Could public sector financing be used to increase these investments?

- What are the benefits, costs or risks with the Commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?

This is a complex question, and I would be happy to offer suggestions based on my current research, and from my experiences in working to establish the Queensland Land Restoration Fund over the phone or in person (Appendix 1).

In short, private investment will only flow where the public sector has effectively de-risked the investment. Businesses are not willing to invest where they cannot be assured of the return (monetary, social, environmental) of their investment. Government must lead by example, and this starts with fundamental regulatory reform of the EPBC Act such that it operates effectively and efficiently and provides a strong framework from which to build a portfolio of investments in sustainable agriculture, nature-based solutions, and carbon sequestration.

Appendix 1: The author's experience relevant to this submission

- **2011 – 2012:** Research on the design of the Australian Government's Offset Assessment Guide – a decision-support tool that calculates what conservation actions are required to offset a development's impact on threatened species (<http://www.uq.edu.au/research/impact/stories/a-calculated-approach/>). This work involved informal discussions with assessments and post-approvals staff, as well as members of the SES.
- **2013 – 2014:** A formal placement with the Australian Government where I supported the work of the Regulatory Reform Taskforce within Department of Sustainability, Environment, Water, Population and Communities, with a specific focus on the EPBC Act Environmental Offsets Policy (2012).
- **2013 – 2017:** An evaluation of the interpretation and application of the EPBC Act Environmental Offsets Policy and the Offset Assessment Guide (see Appendix 2)
- **2016 – 2017:** Development of a guidance document to assist assessment officers working within the Department in their use of a specific element of the Offset Assessment Guide (<http://www.nespthreatenedspecies.edu.au/publications-tools/guidance-for-deriving-risk-of-loss-estimates-when-evaluating-biodiversity-offset-proposals-under-the>). This work involved informal discussions with assessments and post-approvals staff.
- **2018 – 2019:** Principal Scientist, Land Restoration Fund, Department of Environment and Science, Queensland Government. The aim of the \$500 million Land Restoration Fund is to facilitate a pipeline of land-based carbon projects that deliver social, economic and environmental outcomes. I led the scientific program that underpins the measurement and verification of environmental co-benefits.
- **2020 -current:** I hold an Australian Research Council DECRA Fellowship which will investigate the growth of private sector investment (such as impact investing) in biodiversity and natural capital, and how this may be operationalised to provide “win wins” for governments, communities, businesses and the environment.

Appendix 2: Research methods and interview participants

This research was conducted as part of a PhD thesis at the Australian National University. The ethical aspects of this research have been approved by the ANU Human Research Ethics Committee (Human Ethics Protocol 2015/274). The **aim of the research was to understand the effectiveness of the EPBC Act Environmental Offsets policy**, as perceived by stakeholders involved in its implementation. Full results are contained within my PhD thesis³⁷ and a detailed report provided to the Department of Environment and Energy in 2017³⁸.

Table 1. Summary of interview participants

Stakeholder group	Description	Number interviewed
Government	Department of the Environment and Energy staff working in offset assessments, approvals, compliance and enforcement, including Branch heads	13
Industry	Representatives from companies who have experience in delivering offsets as part of federal environmental approvals for developments (mining, gas, urban)	4
Brokers	Intermediary contracted by the industry proponent (offset buyer) or the offset provider to mediate an offset transaction	3
Legal & financial advice	Intermediary contracted by the industry proponent or the offset provider to provide independent legal or financial advice. Work with brokers but do not mediate the transaction	4
Consultants	Ecological specialists with experience in conducting Environmental Impact Assessments for developments, contracted by the industry proponent (for impact assessment) or the offset provider (for assessment of offset suitability)	3
NGO	Environmental non-government organisation, either directly involved in offset transactions as an offset provider, and/or through policy advocacy	3

Interviews with non-government participants were conducted between December 2015 and March 2016, and interviews with staff from the Australian Government's Department of the Environment and Energy were during April and May 2016. Government staff within the Department's Environmental Standards Division were responsible for the assessment, approval, monitoring and compliance of biodiversity offsets under the EPBC Act. Executive-level staff within this Division responded to interview requests and identified up to four staff from their Branch to participate in the study. A sample interview schedule (Box 1) and participant information sheet was provided to all respondents prior to the interview.

³⁷ Evans, M.C., 2017. Public policy for biodiversity conservation: evaluating outcomes, opportunities and risks. Available at: <https://openresearch-repository.anu.edu.au/handle/1885/133677>

³⁸ Evans, M.C., 2017. An evaluation of the interpretation and application of the Environment Protection and Biodiversity Conservation Act (EPBC Act) 1999 Environmental Offsets Policy (Report prepared for the Department of the Environment and Energy). Available upon request.

Interviews lasted for up to one hour and were digitally recorded with the permission of the participant, or otherwise transcribed by hand during the interview. Handwritten notes were also taken during each interview. Digital recordings were professionally transcribed between May and July 2016. Interview transcripts were subsequently provided to all participants, who had the opportunity to check the transcript for inaccuracies or ambiguities and make any necessary revisions.

Box 1: Sample interview questions

1. Could you describe your current role, and contact with offsets in this role?
2. From your perspective, what do you consider to be a “good” or “successful” biodiversity offset outcome?
3. Do you think that the offsetting arrangements you’re involved would meet the definition of a “suitable offset” as defined by the EPBC Act Environmental Offsets Policy? Why/why not?

“Suitable offsets must deliver an overall conservation outcome that improves or maintains the viability of the protected matter”
Australian Government (2012) Environment Protection and Biodiversity Conservation Act
1999 Environmental Offsets Policy
4. Thinking now about the implementation of biodiversity offsetting: Which parts of the offset process are you involved in, which parts are conducted by other parts of the Department?
5. From your perspective, what are some of the key things needed for the biodiversity offsetting process to go smoothly?
6. What are some reasons that process might not go smoothly?
7. Thinking now about monitoring and evaluation of biodiversity offsetting: What role does your branch/section play in monitoring, reporting and evaluation of biodiversity offsetting?
8. Do you think there is adequate monitoring and evaluation of biodiversity offsetting? Why/why not?
9. In your view, what are 3 key things needed to improve biodiversity offsetting in Australia/under the EPBC Act?
10. Is there anything else you would like to add?