Law Council
OF AUSTRALIA

5 June 2026

Mr Mike Kaiser
Secretary
Department of Climate Change, Energy, the Environment and Water
GPO Box 3090
CANBERRA ACT 2061

Dear Mr Kaiser

Revised draft National Environmental Standard on Environmental Offsets

The Law Council welcomes the opportunity to make a submission to the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) on the updated Exposure Draft National Environmental Standard (**NES**) for Environmental Offsets (**updated ED Environmental Offsets Standard**) and accompanying updated draft Policy Position Paper. This submission is informed by Australian Environment Planning Law Group of the Law Council's Legal Practice Section, the Law Institute of Victoria, The Law Society of Western Australia and the Queensland Law Society.

This submission builds on our feedback on the earlier draft instrument,[1] and provides further commentary with the benefit of additional time to consider its contents.

In the Law Council's view, advanced offsets, bioregional planning, and greater flexibility, including mechanisms to share risk and benefit, should be central to the updated ED Environmental Offsets Standard. These elements would address persistent implementation challenges, including demonstrating commencement and net gain, the accumulation of underutilised government funds, and the lack of incentives for proponents and third parties to deliver offsets. They would also support a more functional offsets market and reduce the risk of legal challenge.

Net gain

As noted in our previous submission, the concept of 'net gain' in this instrument is a positive step. However, clarity on its definition and application is vital.[2] The updated ED Environmental Offsets Standard requires proponents at the project planning stage to assess whether proposed offsets will deliver the "required net gain" for affected matters of national environmental significance.

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1 Law Council of Australia, Submission to the Department of Climate Change, Energy, the Environment and Water, *National Environmental Standard for Matters of National Environmental Significance and Environmental Offsets* (30 January 2026).

2 Ibid 5-6.

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While the updated draft Policy Position Paper states that applying the Standard will enable proponents to provide clear evidence that residual impacts are compensated to a net gain, the concept of "net gain" remains inadequately defined in both the Standard and the Paper.

"Required net gain" is defined in section 4 of the updated ED Environmental Offsets Standard, and in the Policy Position Paper, by reference to section 527K of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Section 527K does not define "net gain"; rather, it sets out a "net gain test". An action passes this test only where approval conditions are drafted to ensure that compliance will result in a net gain for the protected matter, either to a standard prescribed by regulation or, in the absence of such regulations, to a standard determined by the Minister.

The current definition of "net gain" found in the Updated Policy Position Paper is vague and does not provide further guidance.[3] Nor is "net gain" defined through regulations. As a result, absent an approval that imposes conditions, proponents are unable to meaningfully assess whether a proposed offset will achieve the "required net gain".

While the Policy Position Paper later indicates that future policy documentation, supported by an updated Offsets Calculator and a new Restoration Contributions Calculator, will guide the application of the net gain test and the evidence required to demonstrate it, no timeframe has been provided for this material. Without such guidance, the determination of quantum is left up to broad discretion of the decision-maker.

The current drafting therefore raises both legal and practical concerns that limit the ability of proponents to assess compliance with the updated ED Environmental Offsets Standard at the project planning stage, prior to a Ministerial decision. As was stated in our previous submission, further clarity regarding "net gain" should be provided if the updated ED Environmental Offsets Standard is to be of use to proponents before a decision on a proposed action is made.[4]

Separately, we note the earlier draft Policy Position Paper required "*independent expert review and endorsement*" of the proposed offset and its outcomes to support confidence in achieving "net gain".[5] This has been replaced with a "*suitably qualified expert*", removing the requirement for independence.[6] The Law Council considers the earlier wording preferable.

NES Objectives

Subsection 514YD(4) of the EPBC Act requires an NES to prescribe outcomes or objectives, while permitting principles or processes to guide their achievement. Accordingly, sections 5 and 6 of the updated ED Environmental Offsets Standard set out the relevant objectives and outcomes, and sections 8 to 15 establish the applicable principles.

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3 Department of Climate Change, Energy, the Environment and Water, Australian Government, *Updated Draft Policy Position: National Environmental Standard for Environmental Offsets* (April 2026), 8.

4 (n 1) 6.

5 Department of Climate Change, Energy, the Environment and Water, Australian Government, *Draft Policy Position: National Environmental Standard for Environmental Offsets* (November 2025) 12.

6 (n 2) 14.

Proposed subsection 7(2) provides that actions achieve those objectives and outcomes in sections 5 and 6 if they are consistent with the principles in sections 8 to 15. This contrasts with subsection 7(1), which treats the principles as a means of achieving the objectives. In the Law Council's view, subsection 7(2) may be inconsistent with section 514YD(4) of the EPBC Act insofar as the purpose or object of the NES is tied to compliance with the principles, rather than requiring the principles to be interpreted in light of those objectives. Subsection 7(2) therefore risks the potential effect that only the principles will need to be complied with, without regard to the objectives or outcomes, potentially lowering environmental protection standards provided. In the Law Council's view, subsection 7(2) should be removed.

Bioregional planning

In the Law Council's view, linking offset activities to bioregional planning should be a standalone principle. Identifying priority areas for offsets and restoration through bioregional planning would deliver greater protection value than piecemeal, project-by-project offset activities. Restoration-focused offset activities depend on effective bioregional planning to succeed, and bioregional planning in turn depends on advanced restoration offsets. Regional plans should therefore identify priority areas for advanced offsets. Where delivered to protect areas of ecological value or in need of conservation or aligned with regional restoration priorities, such offsets can facilitate approvals while strengthening environmental outcomes and improving the efficiency of the approvals process.

References to conservation planning documents

Sections 10(3) and 13(2)(b) of the updated ED Environmental Offsets Standard rely on conservation planning documents to determine when indirect offsets are prioritised and whether non–like-for-like offsets are acceptable. The Law Council is concerned that, where these documents are outdated, they may not address offsets or reflect current science. Updates to all conservation planning documents should be a matter of priority. Until this is achieved, application of these provisions should be guided by current scientific evidence.

Advanced restoration actions or offsets

Advanced restoration actions represent an opportunity to avoid potential implementation challenges, including commencement ahead of impact and the delivery of net gain. While contemplated by section 170CAA of the EPBC Act, advanced restoration actions need to be more clearly supported as an offset to incentivise early implementation by proponents and third parties and enable a functional market for "advanced offsets".

This requires clear principles and a reliable registration scheme. The 'Restoration Contributions Holder' should be empowered, consistent with sections 177CS and 177DB of the EPBC Act, to implement offsets in advance for later allocation to meet the net gain test. This would reduce legal risk that may otherwise affect the application of the net gain test to conditions involving restoration contribution charges. The same ability should also extend to proponents and third parties. More broadly, advanced offsets can better align regulatory requirements with commercial incentives for proponents, providing more opportunities for delivery of restoration through offsets.

Principle 2—Security

The updated draft Policy Position Paper is inconsistent with Principle 2 in the updated ED Environmental Offsets Standard. It introduces an "activity period" not reflected in the Standard. It also misstates the maintenance period requirement. The Standard requires maintenance until the *earlier* of 20 years or when the offset is self-sustaining, whereas the Policy Paper refers to "[w]here the impact is temporary, for a *minimum* of 20 years or until self-sustaining" (emphasis added). The Law Council also suggests that consideration should be given in the Principle to the staging of tenure types to secure an offset activity to provide greater flexibility to secure an offset having regard to State and Territory tenure regimes.

Principle 4—Measurable improvements

Section 11(2) states that the relevant baseline for an affected protected matter is to be "determined at the time of the decision to approve the taking of the action". As raised in our previous submission, this creates uncertainty for proponents required to apply the NES at the project planning stage, before a decision is made.[7]

Principle 7—Relevant area

In areas with overlapping land uses, or where land is open for mining (including exploration), it may be difficult to locate an offset in the "same area" as the proposed or approved action. Principle 7 permits offsets to be located elsewhere where it is not "reasonably practicable" to do so.

However, the Standard provides no guidance on what must be demonstrated to satisfy this threshold. For example, it is unclear whether factors such as land being designated "open for mining", irrespective of tenure, or prohibitive cost of securing land in the same area, would render compliance not reasonably practicable. Greater clarity is required.

Principle 8—Offset commenced prior to impact

The Law Council is concerned that Principle 8 may impose significant upfront costs for getting an offset activity underway, particularly where the proponent has no independent revenue stream. While section 15(1) contemplates staging of offset activities where a project can be staged, this will not be feasible in all cases, potentially constraining otherwise acceptable projects. Further, section 15(5) makes compliance dependent on the existence of a government-established register. If such a register is not established, delayed, suspended or repealed, proponents may be unable to satisfy the Principle or may face delays to project commencement.

In our view, the framework for staged offsets to align with staged project delivery is currently underdeveloped and risks creating unrealistic proponent expectations and increased exposure to legal challenge. While full project approval upfront provides investment certainty, proponents would likely seek any opportunity to stage offset delivery. This would require decision-makers to approve the full extent of anticipated impacts over the life of a project based on evidence of offsets for only initial stages. In turn, decision-makers would need a reasonable basis to be satisfied that offsets will be secured for later

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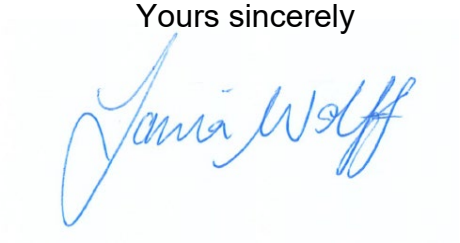
[7] (n 1) 7.

stages. Failure to do so could see the decision face legal challenges, as has been seen in the Gelorup cases.[8]

Contact

If the Law Council can be of any further assistance in this consultation, in the first instance, please contact Xenia Taunt-Rivers, Research Officer [redacted]

Yours sincerely



Tania Wolff
President

[8] *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water (No 2)* [2022] FCA 1554, *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139.