



**Australian Government**  
**Department of the Environment**

# **Outcomes-based environmental regulation: an Australian Government perspective**

**EIANZ Annual Conference 2014**



# Globally, the preferred approach to regulation is changing over time

- There is an increasing move internationally towards outcomes-based regulation
- Countries such as the USA and Canada have increasingly explored outcomes-based approaches to different regulatory regimes in recent decades
- The Australian Productivity Commission recommends that, where possible, outcomes-based conditions be the default approach.<sup>1</sup>

## **Benefits of outcomes-based regulation**

- Offers a tailored approach rather than 'one size fits all'
- Encourages innovation: businesses are able to develop their own solutions to deliver an outcome
- Potentially faster and/or simpler assessments and approvals for proponents
- Private sector utilised to collect environmental information through baseline surveys and ongoing monitoring

# Outcomes-based regulation needs to be applied in the right circumstances

## Risks of outcomes-based regulation

- Compliance risk to business if outcomes are set too high
- Small businesses may not have capacity to develop their own solutions
- Difficulty enforcing ambiguous outcomes/conditions
- Outcomes can be difficult to define in some circumstances

## Canadian government principles for outcomes-based regulation

- Rate of compliance – level of conformity to regulations
- How well the regulatory objectives can be measured – measurable and enforceable standards
- Appropriate timelines – deadlines need to be appropriate to encourage innovation.
- Level of risk associated with the activity – low to medium risk activities

# Outcomes-based regulation creates risks for business and regulators in the EPBC Act context

The Department investigated the application of outcomes-based regulation in the EPBC Act context

- conducted a trial with selected low risk projects
- consulted with a few selected peak bodies, businesses, and scientific and regulatory experts

## Key risks

- It can be difficult to define outcomes for MNES
  - Enforcement risks for regulators
  - Compliance risks for business
  - Risks to MNES
- Businesses may sometimes find it easier to implement prescriptive conditions
  - Discourages innovation

## But the Department's current approach to regulation has its own risks...

- Prescriptive conditions also present risks and need to be carefully worded or they may not be enforceable.
- For example, the Port of Gladstone Independent Review indicated conditions lacked clarity and this led to enforcement difficulties



### **Condition 8**

**The design, construction material and construction methodology and management for the outer bund wall of the Western Basin land reclamation area must ensure appropriate design of the reclamation area to prevent water quality impacts from leaching material through the bund wall, decant waters and storm-water run-off.**

## ...and does not necessarily achieve good environmental outcomes

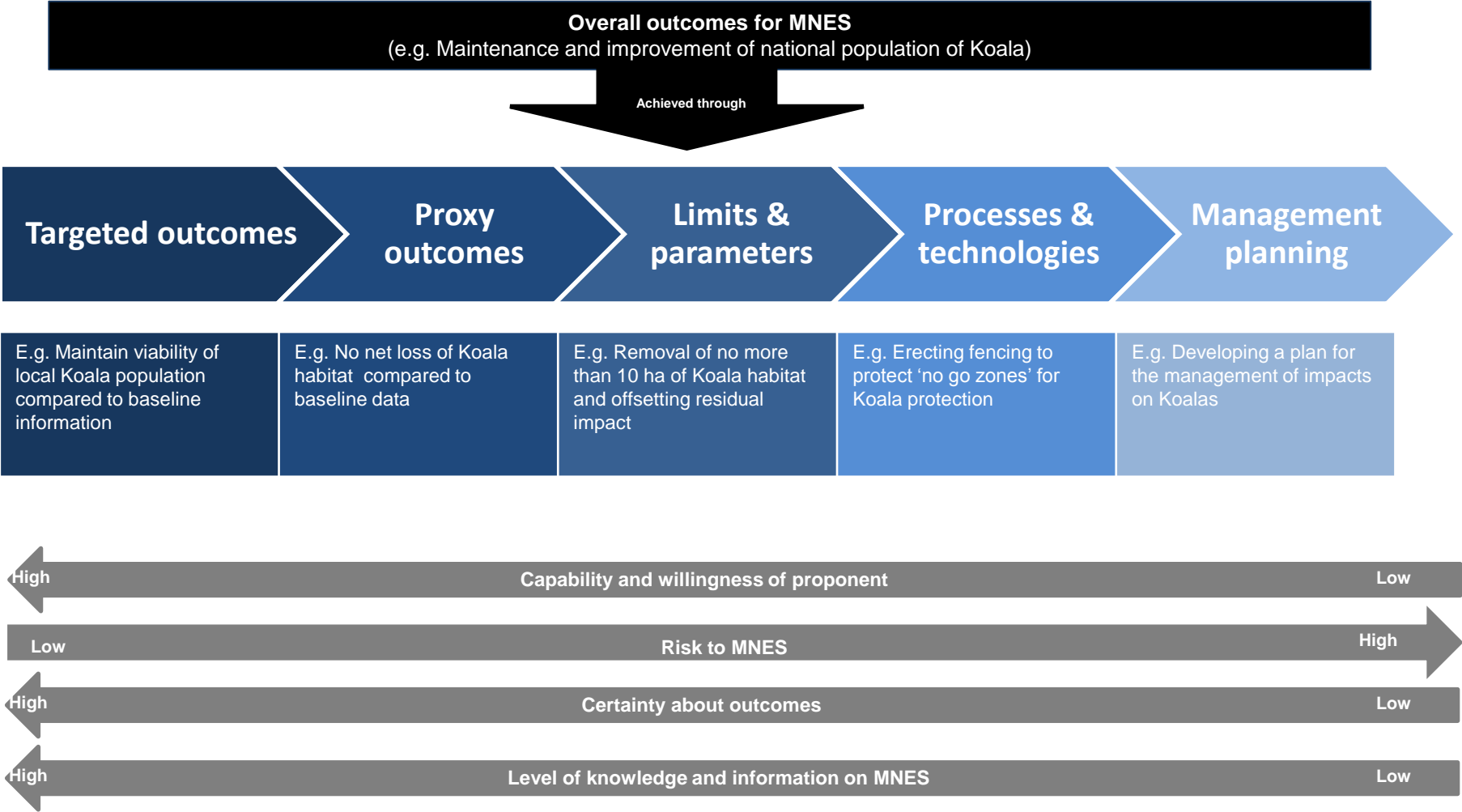
- The Department frequently requires management plans in lieu of placing conditions on projects
- Compliance efforts focus on assessing plans, not outcomes
- A recent ANAO audit found that staff are primarily involved in assessing and approving management plans



### **Management plans do not necessarily lead to good environmental outcomes.**

- Approval holder was required to develop and submit a management plan to replace Bulokes to be cleared by the action
- Approval holder didn't develop a management plan, but planted the required Bulokes,
- The regulatory focus of the conditions was still the management plan.
- A variation to the approval conditions allowed the approval holder to continue with the work to provide foraging for the threatened species
- Would have been more efficient and effective for the original approval conditions to specify the outcome

# When the risks are managed outcomes-based approvals can be a better practice approach...



# ...which provide significant scope to reduce and simplify environmental approval conditions

Below is an example of how existing prescriptive conditions can be revised to be more outcomes-based

## Prescriptive conditions<sup>19</sup>

## Outcomes-based conditions<sup>20</sup>

### Fish passage for an iron ore mine in the Northern Territory

1. To ensure passage for freshwater sawfish (*Pristis microdon*) is maintained, the person taking the action must construct waterway crossings over all waterways along the haul road route in accordance with the *Culvert Fishway Planning and Design Guidelines* (Kapitzke 2010) and the *Why do Fish Need to Cross the Road? Fish Passage Requirements for Waterway Crossings* (Fairfull & Witheridge 2003).
2. All waterway crossings must be monitored prior to and at the end of the wet season to ensure that there are no impediments to freshwater sawfish (*Pristis microdon*) passage. Any impediments to freshwater sawfish (*Pristis microdon*) passage identified to be caused by or associated with the waterway crossings must be removed. Impediments must be removed on the day they are identified. If the impediment cannot be removed on the day it is identified, the person taking the action must notify the department within 48 hours and provide a report detailing the nature of the impediment (including photographs) and actions to be taken to remove the impediment.

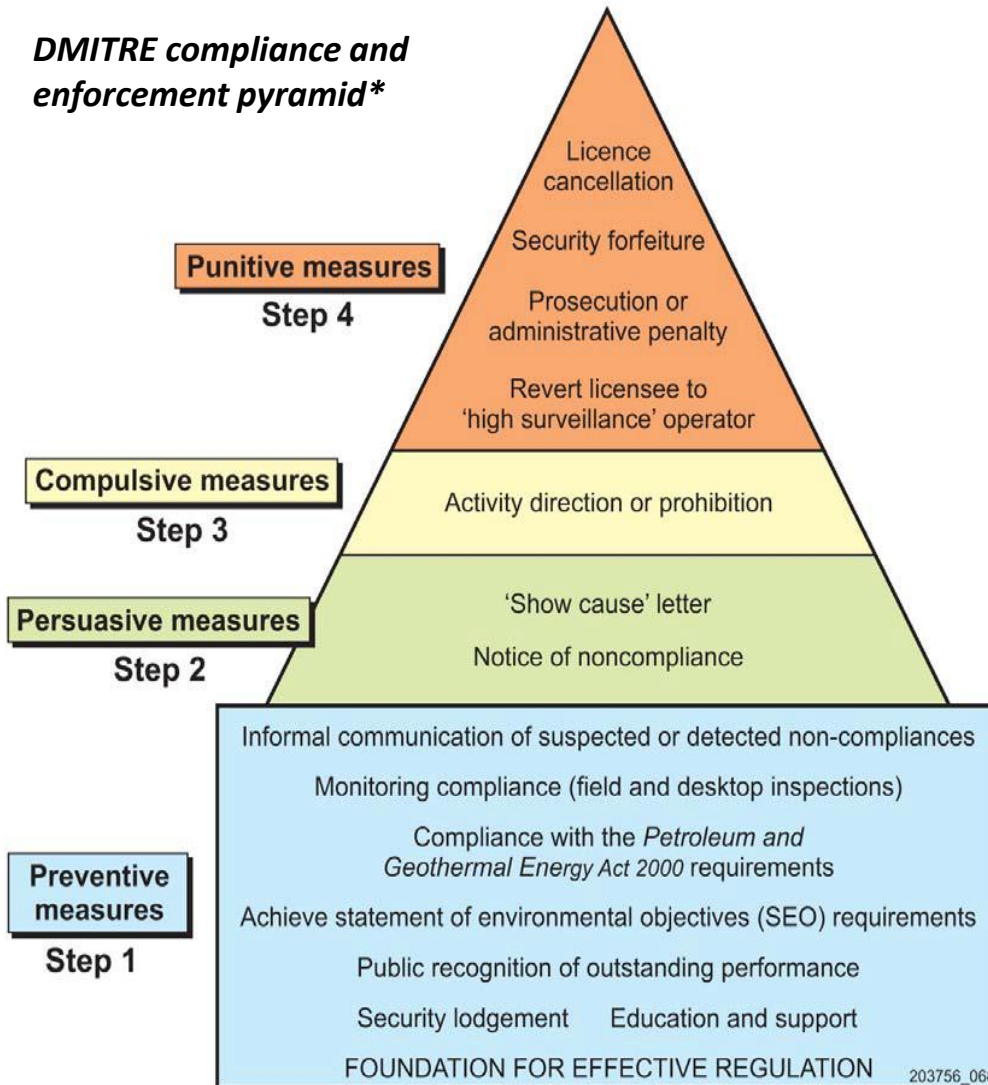
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1. In order to maintain aquatic fauna connectivity, the approval holder must maintain passage for freshwater sawfish (*Pristis microdon*) over all waterways along the haul road route.



# Designing successful outcomes-based regulation relies on trust and good relationships with business

## *DMITRE compliance and enforcement pyramid\**



- In consultations, business emphasised the importance of good relationships between business and regulators, including ongoing post-approval support.
- For example, the South Australian Petroleum legislation utilises a model based on trust and reward for proponents.

\* Government of South Australia, Department of Manufacturing, Innovation, trade, Resources and Energy, *Petroleum and Geothermal Energy Compliance Policy, 2012*

# It is essential that outcomes are measurable and enforceable

Good baseline data can assist with defining the 'right' outcome by allowing the outcome to be relative.

*For example, 'maintain or improve the abundance of Thick-billed Grasswren on the project site'.*



- Available data (on a project basis and a whole of system level) remains an obstacle for many projects
- A key message from both business and departmental officers is that it is necessary to have accurate baseline data to measure outcomes
- This may be difficult for greenfields projects and those referred early in the development process
- A combination of regulatory approaches may be necessary

## Trusted proponents could access a faster assessment process if they engaged early in the design process

- Trusted proponents with appropriate projects could commit to outcomes-based conditions.
- Would need to provide less detail about processes/ methods/ particular management actions
  - Assessment process could be faster because of commitment to outcomes
- Department and proponent could co-design conditions

Expressing trust in proponent can become a lever to motivate companies to commit to achieving environmental outcomes

Businesses consulted emphasised the importance of co-design and support

A regulator can assess the overall risk of the action in order to determine the most appropriate approach

A regulator can assess the overall risk of a project based on the following criteria:

- **Risk to MNES** if outcomes not achieved
- **Ability to define outcomes** for MNES
- **Information available:**
- **Complexity of management of impacts**
  - Nature of the action
  - Nature of MNES

### **Capability and willingness of the proponent**

- Level of capability:
  - Environmental record
  - Level of existing environmental management systems
  - Demonstration of level of commitment to improving or developing environmental management systems
- Willingness achieve good environmental outcomes:
  - Commitment to public reporting and accountability

# Public accountability for outcomes is a key element of a successful outcomes-based system

Conditions on approvals should include public accountability mechanisms in three categories.

## Monitoring

- The approval holder must establish:
  - parameters for assessing the achievement of outcomes,
  - a monitoring network which demonstrates progress against those parameters
- The approval holder must inform the regulator if monitoring indicates that outcomes may not be achieved as required by these conditions.
  - The regulator can provide support and assistance to approval holders to ensure outcomes are achieved.

## Reporting Non-compliance

- The approval holder must provide full details to the Department in writing of any non-compliance with any condition.

## Reporting

- The approval holder must ensure that compliance reports are prepared and published on its website annually, including all related documentation.
- The approval holder should make monitoring data publicly available.
  - Allows the public to see how the approval holder is tracking.
  - Data can help the regulator to build a more comprehensive overview of the status of a particular MNES.
  - Members of the public can use the data for research.

# Designing an outcomes-based environmental approval system

The Department is now considering how it could design and implement an outcomes-based approach

- More extensive consultations on how risks can be managed and benefits realised
- Development of risk assessment tools for use by business and assessment officers
- Defining measurable, enforceable outcomes

*Anyone interested in having input can contact:*

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