



Australian Government

Department of Agriculture, Water and the Environment

MEMORANDUM OF UNDERSTANDING

Memorandum of Understanding in
relation to the Pilbara
Environmental Offsets Fund

Commonwealth of Australia as represented by
the Minister for the Environment

State of Western Australia as represented by
the Minister for Environment

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Details

Parties

1. Commonwealth of Australia as represented by the Minister for the Environment.
2. State of Western Australia as represented by the Minister for Environment.

Recitals

- A.** The Commonwealth and the State of Western Australia are committed to cooperative efforts to achieve a strategic landscape-scale approach to environmental offsets in the Pilbara. This approach aims to achieve biodiversity outcomes for Protected Matters that are greater than the sum of outcomes from individual environmental offsets.
- B.** The State of Western Australia has established, and will administer, the Pilbara Environmental Offset Fund (the Fund or PEOF) to facilitate a strategic approach to the delivery of landscape-scale environmental offset projects in the Pilbara. The Fund will receive payments and fund environmental offset projects or activities where this is permitted by condition(s) of approval granted under the EP Act or the EPBC Act.
- C.** The Fund will provide streamlining benefits for approval holders required to meet environmental offset obligations for approved actions in the Pilbara region.
- D.** Crucial to the success of the Fund is its ability to overcome challenges faced by approval holders in:
 - a. attaining protection of offsets for at least the same duration as the impact of the action to ensure offset projects deliver enduring outcomes for Protected Matters; and
 - b. achieving environmental outcomes on a landscape-scale to address the cumulative impacts on Protected Matters from current and future activities in the region such as mining, irrigated agriculture and infrastructure for tourism.
- E.** The purpose of this MoU is to set out the agreed arrangements and commitments by the parties in relation to administration and use of the Fund.
- F.** This MoU does not replace or revoke any other existing arrangement between the parties.
- G.** The parties acknowledge that this MoU is not a legally binding or legally enforceable instrument, and a breach of this MoU will not give rise to any cause of action or right to take legal proceedings. However, both parties commit to using their best endeavours to achieve the arrangements and commitments agreed to in this MoU and acknowledge that commitment to the Fund by the Commonwealth up until the end date of this MoU or thereafter, will be informed by continued action consistent with the terms of this MoU.

Agreed Terms

1. Definitions and interpretation

1.1 Definitions

In this MoU, except where the contrary intention is expressed, the following definitions are used:

Commencement Date	the date on which this MoU is executed by the parties, or, if executed on separate days, the date on which the MoU is executed by the last party to do so.
DAWE	the Commonwealth Department of Agriculture, Water and the Environment or any other Commonwealth government agency that administers this MoU from time to time.
DWER	the Western Australian Department of Water and Environmental Regulation or any other Western Australian government agency that administers this MoU from time to time.
End Date	5 years from the Commencement Date.
EP Act	<i>Environmental Protection Act 1986 (WA).</i>
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth).</i>
EPBC Act Environmental Offsets Policy	EPBC Act Environmental Offsets Policy, as amended from time to time.
EPBC Act offset payment	An offset payment made as a result of a condition attached to an EPBC Act approval.
FM Act	<i>Financial Management Act 2006 (WA).</i>
Fund	An account, called the Pilbara Environmental Offset Fund (PEOF) Account, established under section 16(1)(d) of the FM Act and administered by the Western Australian Government to achieve environmental offsets in the Pilbara.
Information	includes data.
Security of Offsets Plan	Security of Offsets Plan referred to in clause 3.3 and to be attached as a schedule to this MoU within 12 months of commencement of this MoU.
Law	any applicable statute, regulation, by-law, ordinance or subordinate legislation in force from time to time in Australia, whether made by a State, Territory, the Commonwealth, or a local government.
Memorandum of Understanding or MoU	this agreement between DAWE and DWER as amended from time to time in accordance with clause 8.1, and includes any schedules and attachments.
MoU Period	the period specified in clause 2.

PEOF	See 'Fund'.
Pilbara	The Pilbara bioregion as classified in the Interim Biogeographic Regionalisation for Australia.
Protected Matter	A matter protected by a provision of Part 3 of the EPBC Act, as set out in section 34 of the same Act.

1.2 Interpretation

In this MoU, except where the contrary intention is expressed:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time and any schedules, appendices or annexures to that document or instrument;
- (d) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (e) a reference to a statute, ordinance, code or other Law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (f) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (g) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this MoU or any part of it; and
- (h) headings are for ease of reference only and do not affect interpretation.

1.3 Priority of documents

If there is inconsistency between any of the documents forming part of this MoU, those documents will be interpreted in the following order of priority to the extent of any inconsistency:

- (a) Agreed Terms;
- (b) Schedules;
- (c) any attachments to the Schedules; and
- (d) documents incorporated by reference in this MoU.

2. Duration of MoU

This MoU begins on the Commencement Date and continues until the End Date.

3. Commitments of the parties

3.1 EPBC Act approval conditions

- (a) Commencement of this MoU will not automatically result in an offset condition requiring payment to the Fund to be attached to an EPBC Act approval.

- (b) The use of the Fund to achieve an offset will be considered by the Commonwealth Minister for the Environment, or their delegate, on a case-by-case basis when considering approvals and any attached conditions. In each case, the Minister or their delegate, will consider whether the Fund has the appropriate mechanisms in place to ensure the successful delivery of the offset in accordance with the conditions of approval, the EPBC Act Environmental Offsets Policy and commitments in this MoU.
- (c) Where relevant, a party agrees to notify the other party within 30 days, if the party becomes aware that there has been an actual or perceived contravention of an EPBC Act offset condition.

3.2 Mechanisms to secure long-term protection of offsets

- (a) The parties will work together, over the MoU Period, to identify, pursue, establish and enact conservation mechanisms for use by the Fund in the Pilbara for the purpose of securing enduring habitat protection for Protected Matters in line with the EPBC Act Environmental Offsets Policy. Mechanisms to be considered should align with the following principles:
 - (i) the tenure of a direct offset should be secured for at least the same duration as the impacts on the Protected Matter from the action, not necessarily the duration of the action itself; and
 - (ii) the best legal mechanisms for protecting land are intended to be permanent (lasting forever) and are secure (that is, they are difficult to change or alter).

These two elements are important because they mean that land set aside as an offset will continue to provide a secure benefit to the impacted Protected Matter.

- (b) Input and assistance in identifying, pursuing, establishing and enacting legal mechanisms to secure reliable conservation mechanisms may be sought from other relevant State and Commonwealth government agencies, Natural Resource Management Groups and other relevant parties. These will include, but not be limited to, the following entities (noting the names of these entities may change from time to time):
 - (i) the Western Australian Department of Planning, Lands and Heritage;
 - (ii) the Western Australian Environmental Protection Authority;
 - (iii) the Western Australian Government Department of Mines, Industry Regulation and Safety;
 - (iv) the Western Australian Government Department of Biodiversity Conservation and Attractions;
 - (v) the Western Australian Government Department of Primary Industries and Regional Development; and
 - (vi) the National Indigenous Australians Agency.
- (c) The parties acknowledge that commitment to the Fund by the Commonwealth beyond the end date of this MoU is contingent on the Western Australian Government progress towards and establishment of legally binding mechanisms to ensure enduring protection of offsets in the Pilbara.

3.3 Security of Offsets Plan

- (a) The parties commit to progressing the works outlined at clause 3.2 through the development of a Security of Offsets Plan.
- (b) The objective of the Security of Offsets Plan is to ensure that mechanisms identified, pursued, established and/or enacted to protect the outcomes of offsets administered through the Fund using EPBC Act payments (with the exception of research projects), are the best legal mechanisms for protecting land and are intended to be permanent (lasting forever) and secure (that is, they are difficult to change or alter).
- (c) The Security of Offsets Plan will set out the steps to be undertaken by the parties for the MoU period to achieve the Security of Offsets Plan objective.
- (d) The Security of Offsets Plan will be developed by DWER and is to be agreed to by both parties and attached as a schedule to this MoU within 12 months of commencement of this MoU.

3.4 Baseline Assessment and Monitoring

- (a) As part of establishing and administering the Fund, DWER is developing a monitoring and evaluation framework for the Fund. This will enable monitoring arrangements of the Fund to align with the EPBC Act and Commonwealth policy frameworks under that Act, DWER will ensure the monitoring and evaluation framework for the Fund achieves the commitments set out in this clause.
- (b) A key objective of the monitoring and evaluation framework for the Fund is to gather and analyse data and information to assess the extent of change to habitat conditions for Protected Matters in the Pilbara as a result of offset projects administered through the Fund.
- (c) The monitoring and evaluation framework for the Fund will include the Fund's approach to the measurement and ongoing monitoring of baseline and changes to the habitat condition of each Protected Matter in the Pilbara. This approach is to be negotiated and agreed to by both parties within 12 months of commencement of this MoU.
- (d) The parties will work together to develop appropriate indicators and baseline assessment and monitoring methodologies for Protected Matters in the Pilbara. DAWE will undertake identification and analysis of gaps in knowledge on Protected Matters in the Pilbara. Results of this analysis will be used to target and prioritise research and data sharing efforts to fill gaps in knowledge, establish baselines and ongoing monitoring of habitat conditions for Protected Matters in the Pilbara.
- (e) Work to measure baseline and ongoing monitoring of habitat conditions, or other appropriate indicators, for Protected Matters may be funded from the 10% of EPBC Act offset payments allowed to be expended on research programs as stipulated in the EPBC Act Environmental Offsets Policy agreed at clause 3.7(b) of this MoU.

3.5 Long-term strategy for offsets (2025 and beyond)

- (a) The parties understand that a current lack of knowledge of the environmental values, regional context and ecology of the Pilbara is one of the key threats and

challenges to undertaking environmental impact assessments and delivering conservation mechanisms to protect the natural values and biodiversity of the Pilbara.

- (b) The parties will work together to develop a long-term strategy for offsets to set out the Fund's approach, from 2025 onwards, to administering offsets required by EPBC Act conditions of approval. This strategy will be included in the PEOF Implementation Plan when this is updated on or before November 2024.
- (c) The long-term strategy for offsets will be informed by improvements in knowledge and available mechanisms to protect offsets as a result of work progressed under the Security of Offsets Plan and the monitoring and evaluation framework.
- (d) The long-term strategy for offsets will assist in providing assurance to EPBC Act decision makers as to the suitability of the Fund for receiving EPBC Act offset payments.
- (e) The long-term strategy for offsets will identify conservation mechanisms and key strategic conservation areas that provide habitat for Protected Matters in the Pilbara under the EP Act and the EPBC Act to be used by the Fund to assist in identifying potential project locations, priority topics for research and development of project selection criteria.
- (f) The DWER will submit the long-term strategy for offsets to the DAWE for Commonwealth Minister for the Environment agreement within four years of commencement of this MoU.
- (g) The parties acknowledge that commitment to the Fund by the Commonwealth beyond the end date of this MoU is dependent on the DWER identifying key conservation mechanisms and strategic conservation areas that provide habitat for Protected Matters in the Pilbara.

3.6 Offset pricing and administration cost review

- (a) With the intention to accurately define the cost of offset delivery in the Pilbara and standardise offset pricing where reasonable, the parties will work together to regularly review offset pricing rates for Protected Matters in the Pilbara.
- (b) These reviews will ascertain:
 - (i) The actual cost of implementing offset activities so that the offset pricing rate reflects the listing status and habitat value for the Protected Matter and is equal to the actual cost of implementing an appropriate offset for the Protected Matter.
 - (ii) The actual cost of planning, administering, monitoring and reporting on offsets to achieve outcomes required by EPBC Act conditions of approval.
 - (iii) Mechanisms able to be enacted to recover costs for administering offsets from EPBC Act approval holders.
- (c) The parties will agree to review scope and methodology prior to commencement of these reviews.
- (d) To support accurate, justifiable and transparent costings, the parties will maintain appropriate records of all assumptions and calculations used to develop or revise offset pricing rates and administration costs.

- (e) These reviews will be undertaken prior to, or concurrently with, the first and subsequent evaluations of the Fund scheduled to occur by November 2021 and November 2024 respectively (see clause 4.2).
- (f) Within two months of finalisation of the first review the parties will consider application of mechanisms to recover costs of planning and administering offsets through Fund.

3.7 Operation of the Fund

- (a) EPBC Act conditions will specify the minimum amount of money to be paid for the required offset with reference to the relevant Protected Matter. All monies paid into the Fund as a result of an EPBC Act condition of approval will be spent for the benefit of the relevant Protected Matter, as specified in the condition and consistent with all requirements set out in the EPBC Act Environmental Offsets Policy.
- (b) Subject to clause 3.7(d), a maximum of 10 per cent of funding from EPBC Act offset payments received in a financial year may be expended on research programs as set out in the EPBC Act Environmental Offsets Policy, with priority given to projects which fill identified knowledge gaps for Protected Matters in the Pilbara.
- (c) Any research programs funded using EPBC Act offset payments will meet criteria for such programs as set out in the EPBC Act Environmental Offsets Policy.
- (d) Deviation from the maximum 10 per cent research funding requirement will only be considered where:
 - (i) it can be demonstrated that a greater benefit to the Protected Matter is likely to be achieved through increasing the research funding;
 - (ii) scientific uncertainty is so high that it is not possible to determine a direct offset that is likely to benefit the Protected Matter; and
 - (iii) the parties have agreed to the deviation in writing.
- (e) The cost of administering the Fund and reporting for the Fund will not be paid by the Commonwealth.
- (f) Offset activities delivered by the Fund as a result of an EPBC Act condition of approval will:
 - (i) be additional to what may already be required by a duty of care, or to comply with environmental planning laws at any level of government; planning regulations, or agreements made under other schemes or programs;
 - (ii) be consistent with the EPBC Act Environmental Offsets Policy, including the tenure of offsets being secured for at least the duration of the impact;
 - (iii) be consistent with EPBC Act Threat Abatement Plans and Recovery Plans and have regard to Conservation Advices;
 - (iv) be measured and tracked against supporting baseline data on relevant ecological indicators to enable assessment of compliance with EPBC Act offset conditions; and

- (v) have monitoring and reporting timeframes which align with the relevant ecological indicators.
 - (g) While noting the long-term and strategic objectives of the Fund, EPBC Act offset payments will be committed to, and spent on, offset project(s) that deliver a timely conservation gain for the relevant Protected Matter. That is, offsets are to be implemented either before, or at the same point in time as, the impact occurs. If funds remain unspent after 12 months from commencement of the impact the parties will discuss and agree on a course of action.
 - (h) DWER will maintain appropriate records to demonstrate compliance with clauses 3.7(a) to 3.7(g) and will make these available to DAWE on request.
 - (i) DWER will notify DAWE if it becomes apparent that:
 - (i) the Fund will cease to operate, or
 - (ii) a decision is being made to terminate this MoU.
- The parties will then agree on a course of action in relation to any remaining uncommitted or unspent EPBC Act offset payments.

3.8 Exchange of information

- (a) Parties agree to share Information for the purposes of:
 - (i) attribution of conservation gain to EPBC Act conditions of approval (generally or in relation to specific conditions for specific Protected Matters); and
 - (ii) undertaking a review conducted under this MoU.
- (b) Parties agree to comply promptly with any reasonable request from the other party to supply Information relating to this MoU.
- (c) Subject to any relevant Law, the permission of the owner of the relevant Information and the confidentiality requirements of the party providing the Information, the parties agree to make available to each other any appropriate and relevant Information for the parties to meet their respective responsibilities relating to this MoU.
- (d) Each party agrees that any Information disclosed by one party will remain the property of the owner and its use will be subject to such conditions as may be agreed. Subject to any relevant Law, the parties agree that Information will not be used or communicated to any other person without the permission of the owner.

3.9 Cooperation and Governance

- (a) Principles and methods of governance and administration of the Fund are set out by the State of Western Australia in the:
 - (i) PEOF Governance Framework
 - (ii) PEOF Project Reference Group (PRG) Terms of Reference
 - (iii) PEOF Implementation Advisory Group (IAG) Terms of Reference
 - (iv) PEOF Implementation Plan and Guidelines
 - (v) Special Purpose Statement for the Pilbara Environmental Offset Fund Account made under s 17 of the FM Act.

- (b) For the initial Implementation Plan review cycle (i.e. from the launch of the Fund in November 2019 until completion of the first evaluation of the PEOF Implementation Plan by DWER as discussed at clause 4.2(a)), DAWE will participate as member of the PRG. DAWE's membership of this group will be reviewed as part of the review of this MoU (refer clause 4).
- (c) For the initial Implementation Plan review cycle (as defined at clause 3.9(b)), DAWE will participate as an invitee to the IAG meetings and discussions. DAWE's participation in this group will be reviewed as part of the review of this MoU (refer clause 4).
- (d) The parties understand that, at the time of commencement of this MoU, some of the principles and methods of governance and administration set out in the documents listed at clauses 3.9(a)(i)-(iv) may not align with commitments by the parties in this MoU relating to the delivery of EPBC Act offsets. Where this is the case, the parties will work cooperatively to ensure delivery of EPBC Act offsets meet the commitments set out in this MoU, and amend documents listed at clauses 3.9(a)(i)-(iv) and other public communication such as websites, to reduce any inconsistencies, where practicable and as agreed in writing between the parties.
- (e) If there is inconsistency between the PEOF Implementation Plan and any of the documents forming part of this MoU, those documents forming part of this MoU take priority. DWER intends to correct or resolve any inconsistencies when the PEOF Implementation Plan and this MoU are next amended or replaced.

4. Review

4.1 Review of this MoU

- (a) DAWE will review the operation of this MoU, in full, upon commencement of the evaluation of the Implementation Plan. The first evaluation is scheduled to be completed by November 2021 and November 2024 respectively (under clause 4.2).
- (b) The review of this MoU will assess progress made by the parties towards achieving the MoU objectives (in recital D) and commitments, including:
 - (i) a Security of Offsets Plan (see clause 3.3), and milestones in the Plan;
 - (ii) a monitoring and evaluation framework (see clause 3.4), and milestones in the framework;
 - (iii) a long-term strategy for offsets (see clause 3.5);
 - (iv) review of offset pricing for Protected Matters (see clause 3.6);
 - (v) administration of EPBC Act offset payments in accordance with the EPBC Act Environmental Offsets Policy (see clause 3.7); and
 - (vi) attribution of all EPBC Act offset payments and projects funded by EPBC Act offset payments (see clause 3.7).
- (c) The parties may also review the operation of any part of this MoU at any time. Such reviews will assess the extent to which commitments by the parties have been achieved. Results of such reviews will be shared between the parties to facilitate achievement of commitments in the MoU.

- (d) Findings from reviews of this MoU will inform the parties' consideration of extension or renegotiation of the MoU in 2025.

4.2 Evaluation of the Fund

- (a) As set out in the PEOF Implementation Plan, evaluations of the Fund will be undertaken every three years. The first evaluation is set to be completed within two years of the Fund's commencement or by November 2021. Also as stated in the Implementation Plan, these evaluations will assess whether:
 - (i) environmental matters can and are being improved to the extent required
 - (ii) the Fund is being delivered consistently with environmental offset policies of the Western Australian and Commonwealth governments
 - (iii) delivery of the Fund is consistent with the Fund's governance framework
 - (iv) delivery of the Fund builds on successful programs already underway, and with regional stakeholders including ranger groups.
- (b) Findings from evaluations of the Fund will be provided to DAWE in a timely manner.

4.3 Cooperation with amendments to the Fund or this MoU

- (a) The parties commit to cooperate in the development, maintenance, review, and implementation of the Fund and the operation of this MoU.
- (b) DWER will undertake to promptly notify DAWE and actively engage at an early stage if the Fund or its governance arrangements (see clause 4.1(b)) are amended, or proposed to be amended, in a manner that would impact either parties' ability to meet the commitments in this MoU.
- (c) The parties will then seek to agree as soon as practicable on whether it is necessary to make amendments or replace this MoU.
- (d) Failure to consult DAWE on amendments, or proposed amendments to the Fund, its governance arrangements or this MoU may put at risk, the Commonwealth's ability to commit to the Fund up until the end date of this MoU or thereafter.

5. Dispute resolution

The parties will use their best endeavours to resolve by negotiation any dispute that arises between them in the course of carrying out this MoU. A party will not terminate this MoU as a result of a dispute until the following process has been exhausted:

- (a) If there is a dispute between the parties concerning this MoU, either party may give written notice of the dispute to the other party which will state that it is a notice under this clause and will specify the details of the dispute concerned.
- (b) Management representatives of each of the parties will endeavour in good faith to agree upon a resolution of the dispute.
- (c) Should management representatives fail to reach a resolution within 14 business days of receipt of a notice of dispute (or another timeframe agreed in writing between the parties), the dispute will be taken to Senior Executive Service (SES) or equivalent representatives of each of the parties.
- (d) SES representatives will endeavour in good faith to agree upon a resolution of the dispute.

- (e) Should the SES representatives fail to resolve the dispute within 10 business days (or other timeframe agreed in writing between the parties), the dispute will be taken to the:
 - (i) relevant Deputy Secretary of DAWE, and
 - (ii) relevant Chief Executive.

6. Termination

Subject to clause 5, either party may terminate this MoU by giving 30 days written notice to the other party. The termination will take effect on expiry of the notice or such later date as is agreed by the parties.

7. Notices and other communications

Any notice given by a party under this MoU must be in writing and provided to the appropriate representative in a manner as agreed between the parties.

8. Miscellaneous

8.1 Variation

This MoU may be varied by agreement of the parties and any such variation shall be set out in writing and signed by all parties.

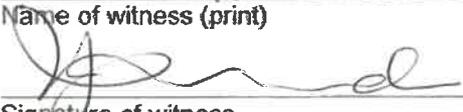
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Accepted and agreed to by the parties

SIGNED for and on behalf of the
Commonwealth of Australia as represented
by the Minister for the Environment

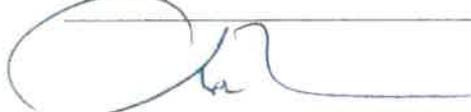
The Hon Sussan Ley MP
Minister for the Environment

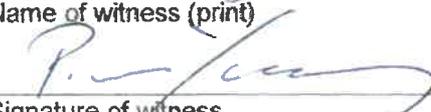

Signature
19th November 2020
Date

JENNY HOWARD
Name of witness (print)

Signature of witness
19/11/2020
Date

SIGNED for and on behalf of the
State of Western Australia as represented
by the Minister for Environment

The Hon Stephen Dawson MLC
Minister for Environment


Signature
11/11/20
Date

Pierre Yang
Name of witness (print)

Signature of witness
11/11/2020
Date