Environmental Defenders Office

Submission to the Inquiry into the *Environment Protection & Biodiversity Conservation Amendment (Standards & Assurance) Bill 2021*

25 March 2021

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

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Executive Summary

Background

The *Final Report of the Independent Review of the Environment Protection & Biodiversity Conservation Act 1999* **(EPBC Act) (Final Report)** by Professor Graeme Samuel was released on 28 January 2021. The Final Report includes 38 recommendations and three tranches of law reform to overhaul the EPBC Act. The first tranche includes recommendations to establish a full suite of legally enforceable national environmental standards; an Environmental Assurance Commissioner (**EAC**); oversight committees; strong compliance and enforcement; bilateral agreement amendments; an Indigenous participation and engagement standard and process for reform, and a revised offset policy, amongst other recommendations.

The Australian Government has not made a formal response to the 38 recommendations in the Final Report. However, two Government Bills are before parliament addressing specific related issues. There are also three private member's Bills proposing to amend the EPBC Act that have been introduced and sent to Committee inquiries (separate legal analysis has been undertaken for these Bills).

Standards and Assurance Bill

Our analysis in relation to the Standards and Assurance Bill can be summarised as follows:

- The *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* (**Streamlining Environmental Approvals Bill**) was introduced in August 2020 to facilitate the devolution of Commonwealth approval powers to states and territories. It was referred to the Senate Standing Committees on Environment and Communications, which reported in November 2020. EDO's analysis of the Bill is available in our submission to the Senate Committee.[1] This Bill pre-empted the release of the Samuel Review Final Report.

- The *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021* (**Standards and Assurance Bill**) has now been introduced in order to garner support for the Streamlining Environmental Approvals Bill that has not yet passed the Senate. The Bill is designed to address two key recommendations of the Samuel Review: to establish a power to make legally enforceable national environmental standards and to establish an EAC. These are two critical foundational elements of the inter-related package of reforms recommended by the Samuel Review.

- While it is a critical first step to establish a power to make legally enforceable national environmental standards, the proposed requirements for quality, application and enforcement of standards are weak; and the proposed EAC is a far cry from the 'strong cop on the beat' initially recommended by Graeme Samuel's Interim Report. As drafted, the Bill does not reflect the fundamental Samuel recommendation that national standards must be clear and consistently applied and enforced. The focus of the Bill is to facilitate devolution – ie, to have the bare minimum of standards and a nominal EAC in place – in order to justify handing over approval powers under the current framework. This is inconsistent with the Final Report that confirmed current

[1] Environmental Defenders Office, *Submission to the Inquiry into the Environment Protection & Biodiversity Conservation (Streamlining environmental approvals) Bill 2020*, 18 November 2020, available at https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-environment-protection-biodiversity-conservation-streamlining-environmental-approvals-bill-2020/

legal settings have failed to protect the environment and specifically warned against cherry-picking certain recommendations just for the purpose of devolving Commonwealth powers to states and territories.

In summary, the two schedules in the Standards and Assurance Bill do not justify support for the Streamlining Environmental Approvals Bill as they do not address all the preconditions that Samuel has recommended for determining potential accreditation of states and states and territories to make decisions consistent with legally enforceable national environmental standards.

Summary of detailed analysis and further recommendations

Final Report of the Independent Review - Tranche 1 reforms

- The Minister for the Environment released the Final Report of the Independent Review of the EPBC Act by Professor Graeme Samuel on 28 January 2021. The Report includes 38 recommendations and three tranches of reform to overhaul the Act.
- The Government Bills before Parliament attempt a limited version of three elements only: devolution, standards and an EAC.
- This 'cherry-picking' of elements is inconsistent with the Final Report, which provides that an interrelated package of assurance, compliance and enforcement, committee oversight, participation and review, and information and engagement reforms are also needed. Logistically, the whole package of proposed architecture is a pre-condition to any devolution if it is to work in practice.
- The Government should publish a full response to the Final Report.
- Legislation should be drafted incorporating all the elements identified by the Final Report for tranche 1 immediate reforms.
- A comprehensive legislative package should be presented to the parliament.

EPBC Amendment (Standards and Assurance) Bill 2021

- The *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021* was introduced following the release of the Samuel Review Final Report and addresses only two elements of reform recommended in the Final Report: national environment standards and the establishment of an EAC.
- The Bill is intended to augment and garner support for the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill* 2020 that is before the Senate. These two Bills should be withdrawn and replaced by a comprehensive legislative package that implements tranche 1 of reforms identified in the Final Report.

National environmental standards

- A power to make legally enforceable national environmental standards is of critical importance. However, a framework for making standards will be ineffective if there are no clear requirements around the quality, consistent and comprehensive application of standards. The focus on facilitating (and expediting) devolution of approval powers, and the high levels of discretion in the Standards and Assurance Bill, have the potential to undermine the critical foundation of reform recommended by Professor Graeme Samuel. The development of national environmental standards must be done properly, prior to any further consideration of the Streamlining Environmental Approvals Bill and preferably as part of a comprehensive legislative package that implements tranche 1 of reforms identified in the Final Report.

- As part of a package of tranche 1 legislative reforms, Schedule 1 of the Bill should be strengthened to:
- Require that national environmental standards must be made for the following matters: matters of national environmental significance, Indigenous participation and engagement, compliance and enforcement, and data and information. The Bill should stipulate a non-exhaustive list of standards that must be made that, as a minimum, must include those recommended in the Final Report.
- Require bilateral agreements, decisions or things under the Act *to be consistent with* national environmental standards.
- Specify in legislation the processes to which national environmental standards will be directly applied, including to individual projects and actions.
- Clarify the list of considerations relevant to a determination of consistency with standards (ie, to focus on the standards being demonstrably and directly applied, rather than broadly applied in conjunction with other environmental measures).
- Define the public interest (for example to limit use of the exemption to matters of defence or national security, or for dealing with or preventing a national emergency), and require the Minister's statement of reasons to include the environmental implications of applying a public interest exemption.
- Require reviews of standards to be conducted by Independent scientific experts, and require the Minister to respond publicly to reviews.

Environment Assurance Commissioner

- The proposed provisions establish an EAC position with a degree of independence and general audit functions focused primarily on bilateral agreement implementation. This is relatively weak when compared to the 'strong cop on the beat' recommended in the Interim Report of the Independent Review, and a long way from an independent EPA model.
- As drafted the audit powers are not comprehensive. Key concerns include: that the EAC *c*annot monitor/audit individual decisions – just "generally" audit and/or monitor; the annual plan requirements potentially prevent EAC doing an unscheduled audit in response to non-compliance – potentially limiting its ability to be responsive and targeted; there is blurred line between the EAC and the Department in terms of operational work; it is not clear who can refer complaints to the EAC; and it is unclear what action would result from EAC audits.
- The burden of ensuring actual compliance with, and enforcement of, national environment standards is therefore predominantly on states and territories. There is no national standard for compliance and enforcement proposed in association with this Bill, despite the Final Report stipulating this as critical to ensure a consistent approach to implementing standards and a pre-condition to any accredited arrangements.
- EDO recommends that to provide adequate assurance, an **independent regulator be established**.
- If however the EAC model is pursued, Schedule 2 should be strengthened by:
- Deleting the limit on monitoring and auditing individual decisions and actions;
- Clarifying powers to compel production of information;
- Clarifying that any person can refer a complaint to the EAC;
- Requiring the Minister to publicly respond to audit reports; and
- Requiring a mandatory compliance and enforcement standard be developed as a precondition to any accreditation or devolution.

This analysis is structured as follows:

1. **Introduction**
2. ***Independent Review of the EPBC Act Final Report* – Tranche 1 Reforms**
3. **Analysis of the *Environment Protection and Biodiversity Conservation Amendment* *(Standards and Assurance) Bill 2021***

1. Introduction

The *Final Report of the Independent Review of the Environment Protection & Biodiversity Conservation Act 1999* **(EPBC Act) (Final Report)** by Professor Graeme Samuel was released on 28 January 2021. The Final Report includes 38 recommendations and three tranches of law reform to overhaul the EPBC Act. The first tranche includes recommendations to establish a full suite of legally enforceable national environmental standards; an Environmental Assurance Commissioner (**EAC**); oversight committees; strong compliance and enforcement; bilateral agreement amendments; an Indigenous participation and engagement standard and process for reform, and a revised offset policy, amongst other recommendations.

There has been no formal Government response to the Final Report, however there are now a number of Bills proposing to amend the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) before federal parliament. These are:

- ***Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020*** – This Bill passed the House of Representatives in September 2020. It was referred to the Senate Environment and Communications Legislation Committee for inquiry on 12 November, submissions were received by 18 November, a hearing was held on 23 November, and the Committee reported 27 November. The Bill is still before the Senate.

- ***Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021*** – This Bill was introduced 25 February and referred to the Senate Environment and Communications Legislation Committee for inquiry and report by 1 June 2021. Submissions are due 25 March 2021.

- ***Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020*** – This private member's Bill was introduced on 9 December 2020, and referred to the Senate Environment and Communications Legislation Committee for inquiry and report by 11 May 2021. Submissions are due 19 March 2021.

- ***Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021*** – This private member's Bill was introduced on 4 February 2021 and referred for inquiry and report by 2 December 2021, with submissions due 8 April 2021.[2]

- ***Commonwealth Environment Protection Authority Bill 2021*** introduced on the 22 March to establish a national EPA.[3]

[2] For completeness we note there is also a Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 that was referred to inquiry 27 February 2020; Submissions have closed; and the Committee is due to report by 11 May 2021. See: Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 – Parliament of Australia (aph.gov.au)

[3] See: Commonwealth Environment Protection Authority Bill 2021 – Parliament of Australia (aph.gov.au)

The Final Report recommended a comprehensive overhaul of the Act and a detailed package of inter-related reforms. It is therefore of concern that the primary response to date has been the proposal of piecemeal amending legislation on specific topics.

Our analysis of the Streamlining Environmental Approvals Bill was provided to the completed inquiry process.[4] EDO has prepared legal analysis of the RFA and Koala Bills for separate inquiry processes.

This submission provides a detailed analysis of the Standards & Assurance Bill in the context of the Final Report.

2. ***Independent Review of the EPBC Act Final Report* – Tranche 1 Reforms**

The Final Report stipulated a number of key elements for immediate reform as summarised in **Box 1**. Several of these elements are absent from the two government Bills before parliament as noted below.

Box 1 - 12.2.1 Immediate steps should be taken to start reform (p194 Final Report)

"*The Review has recommended that National Environmental Standards be immediately made, with strong Commonwealth oversight by the independent Environment Assurance Commissioner (EAC). For the Standards to work, implementation needs to be supported by the provision of expert advice, transparency of decision-making, access to data and information, strong independent compliance and enforcement, effective monitoring and evaluation, access to justice and investment in restoration. The Review has prepared recommended National Environmental Standards (Appendix B).*

The recommended National Environmental Standards should set clear rules for decision-making. These should be immediately finalised as part of a full suite of Standards and adopted by early 2021 to kick-start change.

Pursuit of bilateral agreements with the States and Territories should be underpinned by the National Environmental Standards, and subject to the rigorous oversight of the EAC. This requires an immediate tranche of legislative changes to create legally enforceable Standards and to create the position of Environment Assurance Commissioner.

While it is important that the Commonwealth provides a sound mechanism for willing States and Territories to enter these arrangements, the appetite to do so may vary. Streamlining with States and Territories is not the sole goal of reform.

Immediate amendments to enable National Environmental Standards, and more effective bilateral agreements should be accompanied by those to establish the comprehensive advisory committee structure and the EAC to ensure environmental outcomes are being achieved. An interim national environmental information supply chain custodian should also be appointed during the immediate reform stages.

The process for delivering complex reforms and the mechanisms required to underpin continuous improvement should also commence immediately. This will enable policy development to occur, implementation plans to be finalised and resourcing commitments to be made."

[4] Available at: Submission to the Inquiry into the Environment Protection & Biodiversity Conservation (Streamlining environmental approvals) Bill 2020 - Environmental Defenders Office (edo.org.au)

The Final Report further summarized the key elements of tranche 1 in Figure 12 of the Final Report (p198). We summarise the extent to which the Bills address the key elements below.

Final Report – Tranche 1 elements	**Government Response based on the Bills**
TRANCHE 1 Implement the full suite of Standards under a new head of power. Establish Environment Assurance Commissioner. Recast statutory committees and establish Ecologically Sustainable Development Committee. Establish strong, independent Commonwealth compliance and enforcement. Instigate priority Indigenous-specific reforms, including putting in place a Standard. Build stable State and Territory bilateral agreements. Make repairs for known inconsistencies, gaps and conflicts in the EPBC Act. Examine the feasibility of mechanisms to leverage private sector investment. Revise the offsets policy.	The Government has proposed the existing MNES requirements only. There are critical standards missing. The Standards & Assurance Bill establishes an EAC, but with limits on their powers to audit individual decisions and operational independence. Not in Bill. Not in Bill or otherwise established yet. Not in Bill. Streamlining Environmental Approvals Bill focusses on this. Streamlining Environmental Approvals Bill focusses on this where relevant to devolving powers only. Not in Bill or otherwise addressed. Not in Bill or policy amendment.

In our expert view, **the damning findings of the Final Report make it impossible to proceed with any devolution based on the weak requirements of the existing Act.**

The Standards and Assurance Bill has been introduced to augment the Streamlining Environmental Approvals Bill that is intended to facilitate imminent approval bilateral agreements – in the first instance with Western Australia – based on negotiation around current requirements. The Final Report specifically warns against this approach noting:

> *Consultation with States and Territories is essential. However, the process cannot be one of negotiated agreement to accommodate existing rules or development aspirations. To do so would result in a patchwork of protections or rules set at the lowest bar.*

While new standards are the centrepiece, it is made very clear throughout the Final Report that an interrelated package of assurance, compliance and enforcement, committee oversight, participation and review, and information and engagement reforms are also

needed. Logistically, the whole package of proposed architecture is a pre-condition to any accreditation if it is to work in practice. The Final Report states:

> *In isolation, National Environmental Standards are insufficient. A broader framework of reform is required to provide confidence that good decisions are being made about Australia's environment in a way that adheres to the law. Reform is also required to understand if Australia is on track to deliver the intended environmental outcomes, or what adjustments might be needed.*
>
> *Settling only for the full suite of Standards recommended by the Review, rather than pursuing the fundamental reform of the EPBC Act that is needed and the investment in restoration that is required, means accepting the continued decline of our iconic places and the extinction of our most threatened plants, animals and ecosystems.*

Professor Samuel is very clear that accreditation can only occur when a state or territory can demonstrate it is capable of meeting *all* his proposed Standards and assurance requirements. The Final Report warns:

> *While it is important that the Commonwealth provides a sound mechanism for willing states and territories to enter accreditation arrangements, a focus solely on accreditation at the expense of other reforms it not recommended.*

And explicitly concludes that:

> *Accreditation is not about the Commonwealth handing away responsibility to the States and territories. It is not a devolution of responsibility. Accrediting another decision-maker does not mean that the Commonwealth gets out of the business of environmental protection and biodiversity conservation. Rather, the recommended reforms would result in a greater focus at the Commonwealth level on setting the National Environmental Standards, accrediting others, providing oversight of the activities of others, and ensuring national environmental outcomes are being achieved.*

The final chapter of the Final Report details a reform pathway. It is very clear that there are a significant number of critical reforms concerning standards, assurance, governance, data, information and participation that should be progressed immediately. The Bills before Parliament attempt a limited version of three these elements only: devolution, standards and an EAC. The Final Report makes it crystal clear that the reform needed is comprehensive and must be done properly to ensure our unique environment is managed and protected for future generations.

Summary – Tranche 1 reforms

The Government should publish a full response to the Final Report.

Legislation should be drafted incorporating all the elements identified by the Final Report for tranche 1 immediate reforms.

A comprehensive legislative package should be presented to the parliament.

3. Analysis of the *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021*

Purpose and context of the Bill

The Explanatory Memorandum states the Bill will:[5]

- establish a framework for the making, varying, revoking and application of National Environmental Standards. The application of the Standards to bilateral agreements with the states and territories will provide confidence that the requirements of the Act are being met when they conduct project assessments and make approval decisions under accredited processes; and

- establish an Environment Assurance Commissioner to undertake transparent monitoring or auditing (or both) of the operation of bilateral agreements with the states and territories and Commonwealth processes under the Act for making and enforcing approval decisions.

As noted, the Standards and Assurance Bill has been introduced to garner support and facilitate passage of the controversial Streamlining Environmental Approvals Bill that was roundly criticised for pre-empting the Samuel Review and for lacking any reference to national environmental standards or to assurance mechanisms. Now that the Final Report of the Samuel Review has been made public, it is clear that these two Bills, in combination, will still not achieve the full suite of tranche 1 measures recommended in the Final Report.

In summary, while the Standards and Assurance Bill represents a critical first step to establish a power to make legally enforceable national environmental standards, the proposed requirements for quality, application and enforcement of standards are weak. As drafted, the Bill does not reflect the fundamental Samuel recommendation that national standards be clear and consistently applied. The focus of the Bill is to facilitate devolution – ie, to have the bare minimum of standards and a nominal EAC in place – in order to justify handing over approval powers under the current framework. This is inconsistent with the Samuel Review that heavily criticized the current legislation and specifically warned against cherry-picking certain recommendations just for the purpose of devolving powers.

As outlined above, EDO recommends that legislation should be drafted incorporating all the elements identified by the Final Report for tranche 1 immediate reforms and introduced to the Parliament. However, for the purpose of this analysis, we have undertaken a detailed examination of the proposed Bill, and explained how it would need to be strengthened to "provide confidence" that strong, effective outcome-based national environmental standards were being comprehensively and consistently applied at all scales.

Analysis of clauses

Schedule 1 - National environmental standards

Part 1 – Main amendments

The Explanatory Memorandum (**EM**) states: The amendments in Part 1 of Schedule 1 will provide assurance that accredited state and territory processes for environmental assessments and approvals are "*sound and directed towards delivering national*

[5] See: Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 – Parliament of Australia (aph.gov.au)

environmental outcomes for nationally protected matters." [emphasis added] This language is weaker than stating clearly that the Bill inserts provisions that require state and territory processes to meet and implement national environment standards comprehensively. There is considerable discretion in how standards may be applied to achieve overall outcomes, as discussed below.

Item 1 – The test inserted after existing section 46(3)(a) is relatively weak. A requirement that a management arrangement or authorisation process "not be inconsistent with" national standards – if one or more exist - is weaker than requiring decisions to "be consistent with" mandatory national environmental standards. Professor Samuel recommended that standards must be made (no "if") and that any accredited process must be consistent with those standards. The Final Report Recommendation 3 states "The Act should require that activities and decisions made by the Minister under the Act, or those under an accreditation arrangement, *be consistent with* National Environmental Standards." [emphasis added].

Item 2 – The new subsection 47(2) repeats the weak test by providing that the Minister may make a declaration of classes of action that do not require assessment under Part 8 where a bilateral agreement is in place, and if standards exist, the assessment of an action in a specified manner (ie, the state process as described in the bilateral agreement) is *not inconsistent with* the national environmental standards (emphasis added to highlight weak drafting). Further, this new subsection is based on a subjective test – the Minister must be 'satisfied' of the lack of inconsistency.

Item 3 - The weak test is also to be inserted after 48A(3), and although this section deals with 'mandatory provisions' of bilateral agreements, it only applies *if* standards are made. EM (p10) states:

> Item 3 of Part 1 inserts new subsection 48A(3) into the Act requiring approval bilateral agreements to include a provision that decisions approving the taking of actions in accordance with a bilaterally accredited management arrangement or a bilaterally accredited authorisation process will not be inconsistent with one or more National Environmental Standards in force under new Part 5A. An approval bilateral agreement will not have any effect if it does not include a provision of this nature. To satisfy this requirement, a provision of a bilateral agreement could set out the context by reference to which a decision under an accredited arrangement or process is determined to be not inconsistent with one or more National Environmental Standards that are in force and relevant to the decision. This context could include, for example, the collective impacts on protected matters of actions approved under the arrangement or process, the implementation of avoidance, mitigation and offset measures for all actions approved under the arrangement or process, and the implementation of other relevant environmental measures.

This provision requires bilateral agreements to refer to national environmental standards, but allows for negotiation on how a state or territory may argue their processes are not inconsistent with the standards by references to broader environmental measures. This is contrary to Professor Samuel's statements about ensuring consistent application of granular standards, and avoiding jurisdictional negotiation of standards. This is discussed further below.

Item 4 – Adds inconsistency with national environmental standards to the list of circumstances where the Minister must consult with a state or territory prior to suspension or cancellation of a bilateral agreement.

Item 5 – Inserts inconsistency with national environmental standards as a ground for the Minister to make a declaration of suspension/cancellation of a bilateral agreement. This is in the subjective opinion of the Minister.

Item 6 – Insert **new Chapter 3A – Part 5A National environmental standards**

The new **section 65C(1)** empowers the Minister to make national environmental standards. The standards will be legislative instruments. While it is critical to have a clear head of power to make legally enforceable standards, it is drafted as discretionary ("may" not "must" make standards) and as noted, the requirements for quality, application and enforcement of standards are weak and/or non-existent. As drafted, it does not reflect the Samuel recommendation that national standards be mandatory, clear and consistently applied. The Final Report identified standards that should be made as part of immediate reforms – the Bill does not include this list.

The new **section 65(C)(2)** provides standards commence after 1 month and before 6 months of the standard being made. EM (p7) states that it "is necessary to allow an appropriate period between the time a National Environmental Standard is made, and when it commences, to ensure that state and territory processes will not be inconsistent with a National Environmental Standard when it commences." It is appropriate that standards commence promptly, but we note that states and territories may need to undertake significant legislative reform processes in this time.

New **section 65(C)(3)** provides there is no disallowance of "the first standards made in relation to a particular matter." The EM (p6) justifies this clause by stating:

> National Environmental Standards in force under new Part 5A will be integral to facilitating single-touch approvals under accredited state and territory environmental assessment and approval processes. The disallowance of the first Standard made in relation to a particular matter would frustrate this process, as it would mean no National Environmental Standards would exist for a particular matter and bilateral agreements would not be underpinned by the National Environmental Standards. As the Minister must be satisfied that the processes accredited for a bilateral agreement are not inconsistent with one or more National Environmental Standards that are in force under new Part 5A (see Items 1 and 2), they are an essential pre-requisite for the entry into, and the ongoing operation of, bilateral agreements with the states and territories. As such, an exemption from the disallowance provisions of the Legislation Act for the first Standard made in relation to a particular matter is required to ensure the effective operation of bilateral agreements. In addition, as a state or territory process proposed for accreditation for the purposes of a bilateral agreement will be benchmarked against the National Environmental Standards in force under new Part 5A, the exemption from disallowance is necessary to provide certainty to the states and territories, and assurance to the public generally, that those processes meet the necessary standards to make environmental assessment and approval decisions in relation to Commonwealth protected matters.

This statement confirms that the Bill is predominantly designed to facilitate devolution of approval powers by creating 'single touch' approvals. The Streamlining Environmental Approvals Bill attempted to devolve powers in the absence of standards and consequently did not gain crossbench support to pass the Senate. Having now agreed that devolution must be based on standards, it is suggested that the single touch plan will be frustrated by a lack of standards so it is necessary to ensure interim standards can be made as soon as possible and not be disallowed by parliament. This is putting the cart before the horse. It is

essentially saying that mechanisms for quality control of standards would frustrate the political expediency of progressing single touch approvals.

In our view, to reverse trajectories of decline and regulatory failure, a full suite of standards must be developed *prior to* the devolution agenda being considered or progressed. Having a full suite of national environmental standards in force must be a precondition to any approval bilateral agreement being made. It must be done properly, with the scrutiny of the Parliament, and not rushed to facilitate a political agenda.

In contrast, Minister Ley in her Second Reading speech stated:

> National environmental standards are a fundamental change to Australia's national environmental law. In the first instance, the government is prioritising the development of interim national environmental standards for matters of national environmental significance, reflecting the existing requirements of the EPBC Act. This will make the Commonwealth's existing rules clear.

This is particularly controversial as the Government is currently recommending a set of standards that are basically a summary of the existing settings of the EPBC Act instead of adopting the interim standards proposed by Graeme Samuel in the Final Report. The Final Report recommended a suite of standards be implemented immediately (including for indigenous engagement, compliance and enforcement and data and information, not just standards for matters of national environmental significance), and flagged others for future development. This new subsection would remove parliamentary scrutiny of the Government's version of standards and means that existing settings could be in place for 2 years – the same settings that Graeme Samuel found to be inadequate. Considerable expert input went into development of the interim standards proposed in the Final Report. These must be the starting point for developing standards.

This provision as drafted would potentially also apply to new standards made on new matters in future years as and when they are developed.

New **section 65(C)(4)** relates to incorporation of other instruments and as drafted, would allow "an instrument or other writing" to be adopted as a standard "even if it does not yet exist when the standard is made." We understand that it may be preferable for standards to refer to updated conservation advices and best-available information (for example in relation to international obligations), however the scope of this provision should be clarified. This could create uncertainty if the relevant other writings are not finalised in a timely manner, and it may be difficult for a Minister to be satisfied that arrangements or processes are not inconsistent with standards when relevant details and documents are not yet in existence.[6] It

[6] The EM explains this in the following way: *Under section 14 of the Legislation Act, unless there is a contrary intention, legislative instruments:*

- *may apply, adopt or incorporate (with or without modification) the provisions of a Commonwealth Act, a legislative instrument (within the meaning of the Legislation Act) or rules of court as in force at a particular time, or as in force from time to time; and*
- *may only apply, adopt or incorporate (with or without modification) any matter contained in any other instrument or other writing as in force at the time the legislative instrument commences or a time before it commences.*

New subsection 65C(4) creates a contrary intention for the purposes of subsection 14(2) of the Legislation Act. New subsection 65C(4) will enable a National Environmental Standard to apply, adopt or incorporate an instrument or other writing as it exists at a particular time, or as in force or existing from time to time, even if the instrument or other writing does not yet exist when the Standard is made. For example, a National Environmental Standard may make reference to Australia's obligations under international conventions, or may refer to Commonwealth instruments, such as conservation advices. It is necessary to allow instruments or other writings to be applied, adopted or incorporated into a National Environmental Standard either as in force or existing from time to time to ensure the environmental outcomes of a Standard are able to be met, and will ensure the

would be of concern if a standard could refer to a non-existent future policy, or if bilateral agreements could be finalised based on a non-existent future policy (noting that the Streamlining Environmental Approvals Bill proposes accreditation of policies, guidelines and subordinate instruments not 'in law').

New **section 65D** provides Ministerial power and discretion to vary or revoke national environmental standards. Consultation requirements for legislative instruments under the Legislation Act will apply[7], and an instrument varying or revoking a standard would be disallowable, but again, this process can incorporate an instrument or writing that does not exist yet. According to the EM, delayed commencement (when a new standard is made) would not be necessary for a revocation or where variations are minor. The Bill does not define minor variations but the EM (p7) notes: "a variation may be minor in nature and does not substantially affect the operation of a National Environmental Standard." It is not clear what the Minister can consider when deciding whether to vary or revoke a standard. For example, could an environmental standard be revoked due to socio-economic impacts? Excessive discretion has been a problem with the current Act, and there is a clear need for improved assurance, transparency and objective criteria to underpin decision-making.

New **section 65E** deals with transitional arrangements, and provides that standards or variations may not apply in certain circumstances including processes that commenced before a standard was made. It may be confusing if this provision allows continued carve outs of processes where standards will not be applied? In contrast, a key recommendation of the Final Report was consistent application of standards, and a lifting of the bar as processes are improved and updated over time to meet standards.

New **section 65F** relates to notifying states and territories regarding making, varying or revoking of standards. This includes a 'request' that state or territory Ministers advise of any accreditation arrangement or process that is inconsistent with a standard or variation. According to the EM, "if a process that underpins an approval bilateral agreement is inconsistent with a new or varied National Environmental Standard on its commencement, it will be open to the Minister to suspend and/or cancel the bilateral agreement." However, this does not apply if the Minister is of the opinion that the variation is 'minor.' There is no definition of 'minor' in the Bill, however, the EM states (p11):

> A variation will be considered to be minor if it does not involve a significant change in the effect of a National Environmental Standard. This could include, for example, correcting typographical errors or updating references to documents.

How the discretion is exercised under this process will be critical for ensuring consistent application of standards.

Standard remains contemporary as documents are updated or created over time. It is the intention that any instruments or other writings applied, adopted or incorporated into a National Environmental Standard will be freely and publicly available. For example, section 266B of the Act requires the Minister to publish conservation advices on the internet within 10 days of approval.

[7] In relation to consultation on standards, the EM (p6) states: *A National Environmental Standard will be a legislative instrument for the purposes of the Legislation Act. As such, the consultation requirements of section 17 of that Act will apply. Section 17 requires appropriate and reasonably practicable consultation to be undertaken before a legislative instrument is made. Appropriate consultation will depend on the circumstances, but will include the extent to which the consultation process drew on the knowledge of persons having expertise in fields relevant to the proposed National Environmental Standard, and the extent to which persons likely to be affected by the proposed National Environmental Standard had an adequate opportunity to comment on its proposed content. It is anticipated that the National Environmental Standards will be developed in consultation with science, Indigenous, environmental and business stakeholders and the community, as well as the states and territories.*

New **section 65G** provides for reviews of national environmental standards. The first review is to be at 2 years, and then 5 yearly after that. As noted above, there is significant concern that interim standards based on the current failed settings of the Act will therefore be in place for 2 years, with no parliamentary scrutiny through disallowance. There is also no requirement for the standards review processes to be undertaken by independent experts - just "persons". The EM (p9) states:

> the amendments provide the Minister with the flexibility to ensure the review is conducted by a person or persons with the appropriate expertise relevant to the specific Standard. This may include, for example, the Department or members of a committee established under the Act.

Independent expert reviewers should be explicitly required in the Bill. The Bill requires the review report to be published ('as soon as practicable'), but there is no detail regarding how/whether the Minister must respond to the report.

Division 3 – section 65H - Requirements for decisions or things under the Act – sets out considerations for a person to be satisfied that making a decision or doing a thing is not inconsistent with a national environmental standard. The person may take into account:

> (a) policies, plans or programs of the Commonwealth, a State or self-governing Territory;
> (b) funding by the Commonwealth, a State or self-governing Territory of activities related to the environment;
> (c) funding by the Commonwealth, a State or self-governing Territory of activities related to the promotion, protection or conservation of heritage.

This creates a broad range of what can be considered when deciding if an accredited process or management arrangement, decision or thing is not inconsistent with a standard. It is not simply a matter of deciding whether the actual specific standard is being met/implemented, rather this provision opens the door for negotiation. It may be submitted by a state or territory that while the strict terms of the standard are not being met for a particular development – for example, there will be significant impacts on an MNES [etc], it would be possible to argue that there will be funding or 'promotion' of conservation elsewhere that will balance out the specific inconsistency. This suggests it is not whether a specific decision like an approval actually meets a specific standard, but that the broader context is relevant. This could allow decisions to be endorsed on the basis of overall, collective, regional outcomes broader than a specific project. While regional outcomes are important, this approach will fail to address cumulative impacts of individual projects – another problem identified in the Samuel Review.

The provision does not provide an exhaustive list of considerations so it is also not clear what other general issues may be considered. This needs clarity as it relates to the critical issue of applying standards consistently at all scales. Professor Samuel recommended that standards be clear, granular and enforceable – not part of an overall broad brush approach. He also warned against negotiating individual standards with states and territories and creating a patchwork of low bar standards. The additional considerations in this provision potentially undermine the purpose of clear, enforceable mandatory standards. The introduction of discretion to consider other measures has potential to undermine the intent as stated in the EM that standards "will be specific, and provide clear rules, giving upfront clarity and certainty for decision-makers and proponents." (EM p5)

Subsection 65H(4) empowers the Minister to determine a list of decisions or things that must not be inconsistent with the standards – ie, to decide what decisions and processes under the Act the standards will apply to. Minister Ley in the Second Reading speech stated:

> The bill will also allow the minister to determine which decisions under the EPBC Act the national environmental standards will apply to. This mechanism will allow the standards to apply to a range of different decisions under the act over time."

This determination will be a legislative instrument. It also potentially provides discretion for the Minister to effectively exclude decisions or things from the requirement to not be inconsistent with national environmental standards by not including them in the determination. This extends beyond an exemption for processes commenced before standards are made. It is not clear how/when this determination will be used. While determinations are to be legislative instruments (and therefore usually subject to parliamentary scrutiny and disallowable unless stated otherwise), it is of concern how certain processes and decisions could be excluded from the application of national standards under this power. There should be more clarity about when standards apply in the Bill.

Subsections 65H(7)-(9) establish an exception from standards in the "**public interest**" as determined by the Minister and made by legislative instrument (so disallowable). This is limited to the Minister, with the Second Reading speech stating:

> The amendments provide the minister, and only the minister, with the ability to do this. States and territories will not be able to make decisions that are inconsistent with the standards.

There is a requirement that a statement of reasons be published, however there is no definition of what "public interest" means in the Bill. The EM states:

> For example, in the context of the public interest, it may be necessary to balance environmental considerations with the social and/or economic impacts of a project, or where a Standard may not be met due to the need to balance multiple protected matters.

The potential for misuse of this power is significant when compared with how the current "national interest" exemption that has been applied, including for political reasons. The Final Report recommendation 3(c) specified that the Minister's statement of reasons should specifically detail the environmental implications of the decision. The Bill does not reflect this requirement.

Item 7 defines national environmental standard as a standard in force under new Part 5A. This is intended to include the Interim standards to be used for 'single touch' approval devolution noted above.

Item 8 refers to application of provisions and specifies which amendments apply to bilateral agreements made before, on or after the commencement of the Item (ie, the Bill if passed). For example, provisions relating to applying standards apply to future agreements and decisions. Where standards don't apply to existing assessment bilateral agreements made prior to this Bill, there is no clear requirement for those agreements to be updated, but an assumption the would be updated should that jurisdiction pursue an approval bilateral agreement.

Part 2 – Contingent amendments – makes the weak test as set out in Item 1 subjective - ie, "the Minister must be satisfied" that a management arrangement or authorisation process

is not inconsistent with the standards if they are made. A consistent criticism of the current Act is the high degree of Ministerial discretion in decision-making. The way in which standards are proposed to be established, considered and applied by this Bill would again entrench Ministerial discretion. While a degree of discretion may be necessary in certain circumstances, objective tests are preferable. Where there are high levels of Ministerial discretion, there needs to be a correspondingly high level of oversight, transparency and review mechanisms to ensure accountability.

Summary - National environmental standards

A power to make legally enforceable national environmental standards is of critical importance. However, a framework for making standards will be ineffective if there are no clear requirements around the quality, and consistent and comprehensive application of standards. The focus on facilitating (and expediting) devolution, and the high levels of discretion in the Bill, have the potential to undermine the critical foundation of reform recommended by Prof Graeme Samuel. The development of national environmental standards must be done properly and prior to any further consideration of the Streamlining Environmental Approvals Bill.

As part of a package of tranche 1 legislative reforms, Schedule 1 of the Bill should be strengthened to:

- Require that national environmental standards must be made for the following matters: matters of national environmental significance, Indigenous participation and engagement, compliance and enforcement, and data and information. The Bill should stipulate a non-exhaustive list of standards that must be made that, as a minimum, must include those recommended in the Final Report.
- Require bilateral agreements, decisions or things under the Act *to be consistent with* national environmental standards.
- Specify in legislation the processes to which national environmental standards will be applied, including to individual projects and actions.
- Clarify the list of considerations relevant to a determination of consistency with standards (ie, to focus on the standards being demonstrably and directly applied, rather than broadly applied in conjunction with other environmental measures).
- Define the public interest (for example to limit use of the exemption to matters of defence or national security, or for dealing with or preventing a national emergency), and require the Minister's statement of reasons to include the environmental implications of applying a public interest exemption.
- Require reviews of standards to be conducted by Independent scientific experts, and require the Minister to respond publicly to reviews.

Schedule 2 - Environmental Assurance Commissioner

The EM states (p14):

> Schedule 2 establishes the Environment Assurance Commissioner to provide strong, rigorous assurance that environmental assessment and approval systems, either under bilateral agreements with the states and territories, or under the Act, are working well and are delivering outcomes for the environment, business, and the community.

It is clear that the focus is at systems level assurance, primarily to provide confidence that bilateral agreements are meeting requirements of the EPBC Act, and justify passage of the Streamlining Environmental Approvals Bill.

This approach is not likely to galvanise the necessary consistency, independent oversight, cultural change, nor translate to actual on-ground environmental outcomes – ie, ensuring every action and project meets national environmental standards and delivers environmental outcomes. Our **overarching recommendation is that an independent regulator be established in legislation**. We recommend the private member's bill proposing to establish a national EPA be given further consideration in inquiry and amendments be developed as part of the package of tranche 1 reforms.

This part of the submission provides analysis of the proposed EAC model.

Part 18A – Environmental Assurance Commissioner

New **section 501B** in **Division 2—**Establishment and functions of Environment Assurance Commissioner – establishes the new Commissioner (EAC) as an independent, statutory position within the Department.

Section 501C sets out the functions of the EAC including to monitor and/or audit: the operation of bilateral agreements, and processes under Part 7 (about whether actions are controlled actions); the assessment under Part 8 of the relevant impacts of controlled actions; the approval under Part 9 of the taking of controlled actions; the assessment under Division 1 of Part 10 of the impacts of actions and the approval of the taking of actions (under strategic assessments); and the giving of advice under Subdivision A of Division 4 of Part 11 in relation to proposals to give authorisations of actions.[8] The EAC is required to publish audit reports within 30 business days (not including weekends or public holidays). The list of functions is not exhaustive and may be extended by regulation.

The EM (p15) states:

> The ability of the Commissioner to monitor or audit (or both) the operation of bilateral agreements under new paragraph 501C(1)(a) would include, for example, states and territories implementation of the National Environmental Standards, whether the states and territories are adhering to the provisions of bilateral agreements, and whether states and territories are approving actions in accordance with the accredited processes. The Commissioner's functions in relation to bilateral agreements would be in addition to any assurance mechanisms contained in bilateral agreements. States and territories will be responsible for the compliance and enforcement of actions approved under an approval bilateral agreement.

This statement confirms that the EAC does not have a compliance and enforcement role – and is limited to monitor and/or audit "actions taken to monitor compliance with Parts 3, 7 and 9." Enforcement of standards will be a matter for states and territories and the EAC is limited to monitoring their compliance monitoring processes.

[8] Despite a clear focus on monitoring and/or auditing bilateral agreements, the EAC functions also include powers to audit and/or monitor actions under Subdivision A of Division 4 of Part 11 including: providing foreign aid; managing aircraft operations in airspace; adopting or implementing a major development plan for an aircraft; or actions authorised by a sea dumping permit (under the *Environment Protection (Sea Dumping) Act 1981*) or a Basel permit (granted under the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*). The EAC could receive requests to divert resources to these areas.

There is no requirement for the Minister to publicly respond to audit reports. Professor Samuel recommended "EAC reports should provide recommendations for action to the Environment Minister where there are issues of concern. The Minister should be required to publicly respond." (Final Report p1). This is not in the Bill.

New **subsection 501C(3)** limits the EAC functions stating "This section does not permit the Environment Assurance Commissioner to monitor or audit a single decision." The EM (p17) states:

> As the Commissioner will provide oversight and assurance of environmental assessment and approval systems, new subsection 501C(3) makes it clear that the Commissioner's functions do not include the monitoring or auditing of single decisions. The note to new paragraph 501C(3) clarifies that monitoring or auditing under new section 501C must be more general. Although the Commissioner is prevented from monitoring or auditing single decisions, new subsection 501C(3) does not prevent the Commissioner from undertaking an audit by reference to a sample of decisions.

This is despite the EM stating earlier that the EAC can monitor or audit: "the processes for the assessment of the relevant impacts of controlled actions under Part 8 and the processes for the approval of the taking of controlled actions under Part 9 (*including decisions to attach conditions to an approval*)" (emphasis added).

The Minister in her Second Reading speech stated:

> The Environment Assurance Commissioner will not have a role in monitoring or auditing individual decisions. It is not a second decision-making body, and it is not a replacement for, or a precursor to, legal review processes for decisions.

This limitation may mean that the EAC is not able to be agile and respond to issues as they arise and would need to wait for a pattern of inconsistency or non-compliance before being able to audit/monitor projects. (It is also worth noting that while the Minister specifically refers to the role of legal review, the Final Report recommendations to expand legal review on the merits are not included in this Bill).

New **subsection 501C(4)** empowers the EAC to request information or documents or ask questions of a person to assist in the carrying out of its functions. This could apply to a state or territory government, or other accredited decision-makers, but it is unclear if this could extend to proponents of individual projects given the limitation in **(3)**. There is also no detail on what happens if a person refuses to comply with a request from the EAC. If there is no power to compel production of relevant information, this has the potential to further limit audit functions.

Division 3 — provides for **Appointment of Environment Assurance Commissioner and terms and conditions.** New **section 501D** establishes that the EAC is appointed by the Governor-General for 5 year terms, with a maximum of 2 terms. The Governor-General must be satisfied of their expertise (areas of expertise or qualifications are not stipulated in the Bill), and that the EAC has no pecuniary or other conflicts of interest etc. **Section 501E** provides for appointment of an Acting EAC during vacancies. There is no specified limit on term length for an acting EAC in the Bill. **Section 501F** sets out remuneration. **Section 501G** provides for leaves of absence as approved by the Minister. The EAC may do other paid work if approved by the Minister if satisfied there are no conflicts under **section 501H**.

There is no **subsection I.**

New **section 501J** requires disclosure of any conflicts to the Minister but does not stipulate that this information be made public.

New **section 501L** provides that the appointment of the EAC can be terminated for a range of reasons including misbehaviour, incapacity, bankruptcy, extended absence etc. Other terms and conditions are determined by the Minister, but it is not specified whether these are public in **section 501M**.

New **section 501N** confirms the EAC has responsibilities as an official of the Department for the purposes of finance law, including duties in relation to exercising due care and diligence, acting in good faith and for a proper purpose, and not improperly using information or position[9]. Disclosure requirements are as set out in these amendments – section 501J.

Division 4 sets out a process for developing **annual work plans**. New **section 501P** provides that the Minister makes a written 'statement of expectations' for the EAC. The EAC is to have regard to this when preparing a work plan identifying priorities for the year. The Minister is to respond to the work plan by agreeing or requesting changes in writing, with reasons. The EAC must have regard to any requests for changes from the Minister and then provide the Minister with a finalised plan. The finalised plan, statement of expectations, and any requests are to be published after the plan is finalised. Neither the statement of expectations or the work plan are legislative instruments – ie, they are not subject to parliamentary scrutiny and disallowance. Similarly, variations to a work plan may be made in writing and provided to the Minister, but are also not legislative instruments under new **section 501Q**.

This Division therefore provides a clear and active role for the Minister to input and shape annual work plans.

The Minister noted in the Second Reading speech that: "In addition to the preparation of annual work plans, the commissioner will have the capacity to proactively conduct unplanned audits where necessary." However, it is assumed the EAC would need to make a variation to a work plan in order to deviate resources to an unplanned audit as this is not explicit in the Bill. Apart from the annual work plan and requests from the Minister, there is no reference to third parties being able to refer concerns to the EAC.

Division 5 deals with other matters. A critical provision is:

> **501R Commissioner not subject to directions by Minister**
>
> The Environment Assurance Commissioner is not subject to the directions of the Minister in relation to the Commissioner performing the Commissioner's functions.

This provision is critical for ensuring the independence of the EAC. However, as noted above, the Minister has a heavy hand in the annual work plan process and in practice, it may be unlikely that the EAC will make plans inconsistent with Ministerial expectations. This, in addition to the limitation on examining individual decisions, has the potential to unduly constrain the agility of the EAC to be nimble and responsive in auditing issues as they arise. The EAC will also have a close relationship and dependency on the Department that is subject to Ministerial direction (discussed below).

Further, new **section 501S** provides that the Minister may request the EAC to perform specific functions. This request must be given in writing with reasons. The EAC can then agree to or refuse the request, with reasons given in writing, and published within 30 days.

[9] See Division 3 of Part 2-2 of the *Public Governance, Performance and Accountability Act 2013*.

While it is good to specify that the EAC has the ability to refuse a request, it may be unlikely to be exercised in practice – except if the EAC has not got sufficient resources to perform a function additional to identified priorities. There is a danger of this process being politicised and impacting on the independence of the EAC. How this provision operates in practice will be highly dependent on the personality of the appointed EAC.

New **section 501T** provides that the Secretary may make departmental staff available to assist the EAC. The Minister noted in the Second Reading speech that: "the Environment Assurance Commissioner will be housed in the department and will be supported by dedicated resources." Again, to ensure actual independence of the EAC, these staff would need to be answerable to the EAC and not the Secretary. The EAC may be independent in law but may have a heavy influence due to a close relationship with, and dependency on, the Department.

New **section 501U** confirms the EAC may disclose information and documents to the Minister, Secretary, Departmental staff, specific committees, or other people as defined in regulations. It is not clear if this would include bodies such as the Audit Office?

New **section 501V** appears to give the option that the Annual Report of EAC activities can be given to the Minister ***or*** be part of the overall Departmental annual report for the year. Again, the second option raises questions about the true operational independence of the EAC. The report is to be tabled in parliament and must be published.

New **Section 501W –**provides that the EAC may delegate all or any functions or powers to Secretary or Departmental staff, apart from finalising annual plans, responding to Ministerial requests and annual reporting. Again, this potentially blurs the line between an independent EAC and the Department.

Summary - Environment Assurance Commissioner

In summary, the proposed provisions establish an EAC position with a degree of independence and general audit functions focused primarily on bilateral agreement implementation. This is relatively weak when compared to the 'strong cop on the beat' recommended in the Interim Report of the Independent Review, and a long way from an independent EPA model.

As drafted the audit powers are not comprehensive. Key concerns include that the EAC cannot monitor/audit individual decisions – just "generally" audit and/or monitor; the annual plan requirements potentially prevent EAC doing an unscheduled audit in response to non-compliance – potentially limiting its ability to be responsive and targeted; there is blurred line between the EAC and the Department in terms of operational work; it is not clear who can refer complaints to the EAC; and it is unclear what action would result from EAC audits.

The burden of ensuring actual compliance with, and enforcement of, national environment standards is therefore predominantly on states and territories. There is no national standard for compliance and enforcement proposed in association with this Bill, despite the Final Report stipulating this as critical to ensure a consistent approach to implementing standards and a pre-condition to any accredited arrangements.

EDO recommends that to provide adequate independent oversight and assurance, an independent regulator be established.

If however the EAC model is pursued, the Schedule should be strengthened by:

- Deleting the limit on monitoring and auditing individual decisions and actions;

- Clarifying powers to compel production of information;
- Requiring the Minister to publicly respond to audit reports;
- Clarifying that any person can refer a complaint to the EAC;
- Requiring a mandatory compliance and enforcement standard be developed as a precondition to any accreditation or devolution.

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