

BCA

Business Council of Australia

Environment Protection Reform Bill 2025 and related bills

Submission

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Note: this submission has been prepared to meet the requested 12 November 2025 submission date following introduction of the legislation on 30 October and only focuses on select areas of the reform package.

1. Key recommendations

1. Provided the amendments proposed in the submission are made, the bills should be passed.
2. Replace the complex unacceptable impacts table construct in the bill with a single clear criterion for unacceptable impacts. This should set the threshold at a level allowing potential significant impacts to protected matters to be assessed, while ruling out clearly unacceptable impacts as intended. At a bare minimum, the current criteria requires redrafting to address the concerns raised.
3. Appropriate guardrails placed on environment protection orders, including administrative appeals provisions, clear time limits with extension available via court injunction processes, and retention of natural justice provisions.
4. The new maximum civil penalty provisions in the bill should be gradated, so they are proportionate, considering technical and administrative breaches, accidental and unintentional breaches, and wilful and egregious breaches, commensurate with the level of environmental harm.
5. Clear guidance that projects which currently use the 'preliminary documentation' or 'public environment report' assessment pathways would have access to the new streamlined assessment. The explanatory memorandum to the bill however does not support this. If that cannot be provided, those assessment types should be retained, so that there are pathways to deal with medium complexity projects, particularly where bilateral assessment and approval pathway are not available.
6. The new 5-year time limit for non-controlled actions that have not substantively commenced should be able to be extended on application without requiring a new referral. The 5-year timeframe should also be increased.
7. Acknowledging the Government's mandate to establish an NEPA, the body should be focused on strengthened compliance, enforcement, and assurance. The functions related to decision making (including assessments, variations of actions, and condition setting) should remain with the Department. Failure of the CEO to comply with the Statement of Expectations should allow for their removal.
8. Disclosure of scope 1 and 2 greenhouse gas information and related content should be for the purposes of transparency and informing other Commonwealth regulatory processes, not to form part of assessment or conditions under the EPBC Act, to avoid conflicting policy outcomes as these matters are considered under other government mechanisms.
9. The requirement to achieve a net gain for projects with a residual significant impact should be set in the Offset Standard, not in legislation, while the detail of what constitutes net gain should be set in regulation. This should be consulted on as a package together with the updated offset calculator.
10. The commencement of the new net gain requirements, national environmental standards test, and unacceptable impact test should be contingent on at least one state or territory being accredited for approvals. The Government should aim to have accreditation in place for all the major states within six months of the legislation coming into effect.
11. Add modification processes to the EPBC Act, to allow proponents to apply to modify the scope of a project under both a non-controlled action decision, and a controlled action approval.

2. Introduction

The Business Council of Australia (BCA) appreciates the opportunity to make a submission to this Senate Committee Inquiry into the proposed Bills reforming the Environment Protection and Biodiversity Conservation (EPBC) Act and establishing the National Environment Protection Agency (NEPA) and Environment Information Australia (EIA). The BCA's membership covers a broad range of sectors across the economy, including many that have a direct involvement in EPBC assessment and approvals processes. This includes mining and resources, energy and electricity, housing, construction and construction materials, technology and telecommunications, infrastructure, and consulting and law.

The EPBC Act is one of the principal pieces of environmental protection legislation in Australia, along with state and territory environment and planning acts, and national greenhouse gas emissions legislation and frameworks. The Act must operate in a way that delivers strong environmental protection, while facilitating timely and efficient assessment and decision-making processes, allowing appropriate ecological sustainable development to progress. It is widely agreed that the current EPBC Act is failing to achieve this.

In reforming the EPBC Act to address these failings, the BCA is seeking a reform program that delivers efficiency and certainty benefits for business proponents, provides better outcomes for the environment, while facilitating national priorities like the energy transition, digital infrastructure, mining of critical minerals, and delivery of more homes. It is welcome that these are also the outcomes the Government is seeking.

We also acknowledge that the Government has now taken an approach more aligned to the recommendations of the Samuel Review than the previous Nature Positive (Stage 2) bills that were introduced into Parliament in 2024, and the BCA endorses the desire to make more comprehensive amendments to the EPBC Act as a cohesive package.

2.1 Delivering the major elements of the Samuel Review

When Professor Graeme Samuel's final report into the review of the EPBC Act was released in January 2021 ("the Samuel Review"), the BCA called it a "Once in a decade chance for reform".

We agreed at the time with the approach proposed, which was intended to lift environmental standards while facilitating environmentally appropriate economic development. The BCA wants to see laws which both deliver net benefits for the environment and for business, and which in turn will increase economic activity, jobs and living standards for Australians. To that end, we have continued to back reforms to the EPBC Act over the last five years which sought to substantively deliver on the reform package put forward by Professor Samuel.

2.2 Support the package – if appropriately amended

Given our support for the Samuel Review, the BCA in-principle backs the intent of the Government's environmental reform package.

There are areas however where the bills deviate from what the Samuel Review recommended, and there are some cases where the detail of what is proposed may have significant negative impacts on businesses, or has not yet been provided. This includes unacceptable impacts, where the drafting does not seem to match the Government's stated intentions.

From a business perspective, it will be essential that the Parliament addresses these issues before the legislation is passed, otherwise there is a risk that the unintended consequences could be counterproductive to delivering the efficiency and certainty improvement outcomes being sought.

Other stakeholders will be better placed to provide insight as to whether the reform package delivers an overall net benefit for the environment, although we note the reforms do deliver significant new tools to protect the environment. From a business perspective, we are concerned that in the absence of amendment the reform package will not deliver an overall net benefit for business. The good news is that we consider that our concerns

can be readily addressed with amendments to the bills before the Committee, and in this submission our intent has been to highlight pathways for this to occur.

Recommendation 1

Provided the amendments proposed in the submission are made, the bills should be passed.

3. Areas requiring amendment

The BCA is of the view there are some important areas of the bills before the Committee that must be amended to ensure they provide the necessary clarity required and that they ultimately deliver on the promise of 'better for business, better for the environment'. The BCA's support for the bills is contingent on amendments being made to the package.

3.1 Unacceptable impacts criteria

The new unacceptable impacts test in the legislation will effectively rule out many projects from even being considered from the outset.

The Samuel Review did not propose legislated 'unacceptable impacts' tests but rather that the Standards would be used to provide the detail on the clear outcomes and limits for decision makers.

The Government has characterised the unacceptable impact tests as ensuring that projects like 'mining under Uluru' are clearly ruled out. Our concern is that the proposed criteria goes well beyond this, is complex in construction, can be broadly interpreted, and that they are being inserted into legislation.

Some of the thresholds can be readily interpreted as essentially the same as a 'significant impact', which is the threshold for actions to be assessed for decision under the Act. This could set a low bar for knocking out projects as 'unacceptable', even though they may appropriately be approved with conditions under the current provisions. While we appreciate the intent of providing a quick 'no' for projects, the consequence of the criteria as drafted is that many projects will get an immediate 'no', without the opportunity to have put their case and undertake an assessment.

For example, for a listed threatened species in the vulnerable category, the unacceptable impact test proscribed by the bills are:

"An unacceptable impact is a significant impact that:

- a) **seriously impairs**, will **seriously impair**, or is likely to **seriously impair**, the **viability** of the listed threatened species; or
- b) causes, will cause, or is likely to cause, serious damage to **critical habitat** of the listed threatened species where the habitat is **irreplaceable** and necessary for the listed threatened species to remain **viable** in the wild."

seriously impairs is defined as: "something if, compared to the action not being taken, the impact results in the thing being seriously altered for the worse" having "regard to the nature, intensity, duration, magnitude, geographic extent and context of the impact".

viability is defined as: "viability of a species or ecological community means the ability of the species or ecological community to survive and recover in the wild, either as a whole or in a particular region".

Irreplaceable is defined as: "habitat is irreplaceable for a species or ecological community if, whether biologically, physically or technically, it is impossible to reverse damage to the habitat, or impossible to restore, recreate or replace the habitat:

- a) in a relevant timeframe and location; and
- b) with the function (including the complexity and scale) necessary to support the viability of the species or community."

In this construct, consistent with dictionary definitions, ‘seriously’, which is not defined in the legislation, can be interpreted as a synonym of ‘significant’, meaning this threshold does not materially differentiate an unacceptable impact from a ‘significant impact’ which is potentially approvable and able to be assessed, from an ‘unacceptable impact’, which cannot be approved.

The definition of ‘viability’ could be interpreted to mean a species being impacted across a small, (undefined) region, classifying a project as unacceptable, even if more broadly this is not the case. The term “recover in the wild” is also ambiguous in terms of magnitude and timeframe.

These challenges are further amplified across other matters of national environmental significance, for example with National and World Heritage, the absence of clear materiality thresholds that distinguish between significant and unacceptable impact means that even minor, temporary or intangible impacts—such as minor changes to the visual or spatial setting of heritage—could be deemed “unacceptable” as it alters the values of the National or World Heritage place.

It is essential that the criteria for unacceptable impacts in these contexts are clearly defined and proportionate, to avoid unintended consequences for projects that support both environmental and cultural outcomes.

The risk with the criteria as proposed in the current bills is that they could unintentionally rule out numerous (ordinarily approvable) projects key to Australia’s current and future economic prosperity and priorities, that are not, objectively, clearly unacceptable, including across the energy transition, critical minerals, housing, and more. Ambiguity, and the similarity of elements of the unacceptable impact test with a significant impact creates heightened uncertainty for business and invites risk of legal challenge. All of this, at face value, is counter to the Government’s intention to deliver a system which provides greater certainty.

To address this, the criteria should be clarified to a single, clear test rather than the current complex construct presented in the bills, which is an 11-page table of criteria, coupled with multiple subsidiary definitions. The threshold should be set in line with the Government’s stated intention of ruling out the extreme end of significant impacts, which are clearly unacceptable. This would provide a safeguard, consistent with the recommendation of the Samuel Review, to protect those matters at risk. At a bare minimum, the criteria put forward should be amended to address the ambiguity and potential unintended capture of a wide range of projects as unacceptable.

Recommendation 2

Replace the complex unacceptable impacts table construct in the bill with a single clear criterion for unacceptable impacts. This should set the threshold at a level allowing potential significant impacts to protected matters to be assessed, while ruling out clearly unacceptable impacts as intended. At a bare minimum, the current criteria requires redrafting to address the concerns raised.

3.2 Guardrails for environment protection orders

The proposed environment protection orders will allow the independent NEPA to halt activities that the CEO reasonably believes are or are likely to contravene the Act. There is no requirement for evidence, no limits on the timeframes on the exercise of these powers in an order, no requirement for reasons to be provided, no appeals processes other than a full judicial review, and the requirement for natural justice is explicitly excluded. This approach is entirely lacking in safeguards, balance and due process.

The Samuel Review highlighted the need for strengthened compliance and enforcement powers. It did not however call for new ‘stop work’ style orders, and instead this is a proposal that was developed as part of the previous ‘Nature Positive’ reforms. It should be noted that while these orders have been described as ‘stop work’ provisions, they also enable the NEPA to direct the recipient to “undertake specified actions in a specified manner”, and are broad in their potential application.

The existing EPBC Act provides the Minister with the ability to seek a court ordered injunction to prevent or stop environmental damage. The new Environment Protection Orders go well beyond this and lack the oversight or guardrails that a court injunction provides. The BCA understands that ‘emergency’ powers may be a necessary addition, but these must come with appropriate safeguards to prevent regulatory overreach and misuse. This is especially important given that these powers will sit with the CEO of the NEPA, who is not able to be directed by the responsible Minister, nor removed except in very limited circumstances.

Appropriate guardrails that should be implemented around these new powers include:

- A requirement to provide reasons in writing for the issuing of the order.
- The ability to seek an administrative review of the order by a court, as an alternative to a full judicial review.
- A maximum time limit on the order, after which the NEPA will need to apply for a court injunction if they require a longer or ongoing period of time.
- A clear requirement that the scope of the order only apply to the specific act that will cause the environmental damage, rather than the ability to stop a project in its entirety.
- Retention of natural justice provisions.

The lack of these types of guardrails creates significant and potentially costly powers, in terms of the ability to halt a project for an undefined time but with very little oversight. This should be remedied before these powers are legislated.

Recommendation 3

Appropriate guardrails placed on environment protection orders, including administrative appeals provisions, clear time limits with extension available via court injunction processes, and retention of natural justice provisions.

3.3 New penalty provisions

The bills introduce a new civil penalty provision formula that applies to breaches of the Act and breaches of conditions. For companies, this provides for a maximum penalty of \$825 million, based on turnover.

The Samuel Review recommended that penalties for offences under the EPBC Act should be increased substantially, to adequately deter illegal behaviour. The penalties proposed are clearly intended to respond to this, and the BCA does not oppose the introduction of new higher penalty provisions.

The Samuel Review however also made clear that penalties should be proportionate. The proposal in the bills is that the civil penalty formula sets the maximum penalty at \$825 million without quantification of how this applies to the level of environmental impact, whether the breach is technical or administrative, or whether it is intentional or accidental. The bills should provide guidance as to the level of penalties that would be appropriate. Currently this is left to the courts to decide.

It is more appropriate that the maximum penalty provisions in the bill are gradated, with separate maximum amounts available for technical or non-impactful breaches of conditions, and for unintentional breaches. The maximum penalties proposed in the bill currently should be reserved for egregious and wilful breaches commensurate with the level of environmental harm.

Recommendation 4

The new maximum civil penalty provisions in the bill should be gradated, so they are proportionate, considering technical and administrative breaches, accidental and unintentional breaches, and wilful and egregious breaches, commensurate with the level of environmental harm.

3.4 Removal of existing assessment pathways

The current EPBC Act has a number of assessment pathways for controlled actions. Some of these are delineated by the complexity of the action being assessed, the level of upfront understanding of the project's impacts, and public interest, others provide for flexibility of process:

- Assessment on referral information.
- Assessment on preliminary documentation.
- Assessment by public environment report.
- Assessment by environmental impact statement.
- Assessment by public inquiry.

In addition to these, projects can be assessed as part of bilateral or accredited processes (for example, with a state or territory).

The Samuel Review stated that “the Assessment on Referral Information, Public Environment Report and Environmental Impact Statement assessment pathways have had limited use in recent years ... the Public Inquiry pathway has never been used”. It presented the table below, with the usage rates of assessment approaches for the period 2014-15 to 2019-20:

Assessment approach	Per cent of total assessment method decisions
Preliminary Documentation, with further information	56%
Accredited Process	13%
Bilateral Process	25%
Public Environment Report	2%
Environmental Impact Statement	2%
Assessment on Referral Information	1%
Preliminary Documentation, without further information	1%
Public Inquiry	0%

The Samuel Review recommended that that assessment pathways are rationalised to enable risk-based approach to assessment, but did not make specific recommendations as to which pathways should be rationalised.

The bills before the Committee delete the preliminary documentation, public environment report, and assessment on referral information pathways, and add a new streamlined assessment pathway. The new streamlined assessment pathway, at face value, appears to mirror the assessment on referral information pathway with the ability for additional information to be requested.

The deletion of the Preliminary Documentation and Public Environment Report pathways will leave only two major assessment pathways: a low-complexity pathway (streamlined assessment), and a high-complexity pathway (environmental impact statement).

As the explanatory memorandum outlines, the streamlined assessment is intended to “generally require the person proposing the action to provide most, if not all, information that is relevant to the assessment when making the referral. This is intended to incentivise proponents to provide as much information as possible upfront if they want the benefits of a streamlined assessment”. Projects that do not meet this requirement will presumably be required to undertake an environment impact statement. It is worth noting that at face value, this does not provide new streamlined benefits as compared with the processes being removed, and in some scenarios the frontloading of an application will create new uncertainty for proponents that will need to anticipate the requirements of the regulator.

The issue raised by BCA members is that medium-complexity projects may not have access to the streamlined assessment, and without preliminary documentation or public environment report assessments, and where bilateral processes are not in place, they will be required to undertake a full environment impact statement. This concern is heightened given that over half of all assessments of controlled actions are currently undertaken using the preliminary documentation pathway which is being removed.

This leads to a concern that projects that previously had access to preliminary documentation or public environment report pathways, will instead be required to undertake an environment impact statement and likely to face longer preparation and assessment timeframes compared to the status quo, which is the opposite of the intended streamlining. It will also significantly increase the workload of the Department or new NEPA, which is already struggling with a backlog of projects, particularly in key areas of renewable energy and housing.

We are seeking clear guidance to confirm that projects with medium complexity that currently utilise the preliminary documentation or public environment report pathways will have access to the streamlined assessment pathway (including confirmation that this does not require all information to be provided upfront at referral stage) or alternatively, that these pathways are retained as options.

Recommendation 5

Clear guidance that projects which currently use the 'preliminary documentation' or 'public environment report' assessment pathways would have access to the new streamlined assessment. The explanatory memorandum to the bill however does not support this. If that cannot be provided, those assessment types should be retained, so that there are pathways to deal with medium complexity projects, particularly where bilateral assessment and approval pathway are not available.

3.5 5-year sunset for non-controlled actions

The bills will introduce a new 5-year time limit on non-controlled action determinations if the action has not been substantially commenced. This is a new proposal, that was not a recommendation of the Samuel Review nor part of the previous 'Nature Positive' Stage 2 reforms introduced into Parliament.

The explanatory memorandum states that this is intended to target "land banking". This provision will operate automatically and requires a proponent to lodge a new referral decision if they wish to receive a new non-controlled action determination.

Whilst we understand the intent, the timeframe and mechanism proposed does not take into account the potential investment timeframe for largescale projects, where a decision can take several years and a non-controlled action determination is often sought early in the investment cycle to provide certainty for a proponent. The proposed change undermines this certainty for long lead time projects.

Options to address this include:

- giving the Minister the ability to extend the expiration period on application from the proponent without requiring a new referral application being undertaken.
- extending the proposed expiration period from 5-years to a longer period. Some BCA members have suggested 10-years would be more appropriate.

Recommendation 6

The new 5-year time limit for non-controlled actions that have not substantively commenced should be able to be extended on application without requiring a new referral. The 5-year timeframe should also be increased.

3.6 National Environment Protection Agency

The Government committed to establishing a National Environment Protection Agency (NEPA) as part of its election platform in 2022 and again in 2025, with strong powers to protect nature and enforce compliance. The proposal in the bills before the Committee aims to do this, establishing an agency that will have responsibility for compliance and enforcement. The proposed NEPA will also have responsibility for assurance of accredited parties, and further will be able to undertake delegated decision making as is the case with the Department of Climate Change, Energy, the Environment and Water (the Department) today. Unlike the Department however, the NEPA will be independent, unable to be directed by the Minister, with the CEO unable to be removed for any reason essentially beyond misbehaviour, engaging in unapproved work, financial difficulty, or incapacity. While a statement of expectations is able to be issued by the Minister, this creates no obligation besides a requirement for a statement of intent response by the CEO.

This model deviates from the Samuel Review in that the independent regulator proposed in the Review was specifically responsible only for assurance (including assurance over Commonwealth agencies). In this model, it did not make sense for the assurer to be responsible also for compliance, enforcement, or delegated decision making, otherwise it would be assuring itself, and so those functions remained with the Department (with a recommended strengthening of the Department's compliance and enforcement functions).

The Government's model in the bills does away with this Commonwealth assurance function, with the focus in this area solely on monitoring and auditing accreditation and bilateral agreements.

The BCA does not oppose the establishment of a NEPA focused on compliance, enforcement, and accreditation.

We remain concerned however that providing for delegation of decision making to the NEPA, and providing it with responsibility for assessment of projects on behalf of the Minister, the critical balancing of social and economic factors that are inherent considerations in those decisions will be lost in a completely independent environmentally focused agency.

We do acknowledge however that the model presented in the bills has evolved from the model in the previous 'Nature Positive' EPA proposal, with the Minister now retaining ultimate responsibility for decision making and that at face value the delegation for this is exercised under Ministerial direction. This is an essential change, a change that we welcome, even if the model presented is still not viewed as ideal from a business perspective.

In the BCA's view, two other changes are needed to improve the model put forward, while still delivering on the Government's election commitments. This would be:

- Retaining delegated decision making and assessment with the current Department.
- Strengthening the linkage between the Statement of Expectations and the CEO's conduct, with the CEO able to be terminated if they fail to adhere to the Statement of Expectations.

This would address concerns we have by clearly having project decision making processes (specifically assessment of new projects and variations, as well as conditioning) completely retained under a body that is subject to direct Ministerial control, while the compliance, enforcement, and assurance activities remain in the independent agency.

As the OECD's Best Practice Guidelines for Regulatory Policy states, "Where a regulatory decision involves value judgements (that may be informed by independent, expert advice) it may be most appropriate for the decision to be allocated to a minister who is directly accountable to the legislature."¹

Strengthening the Statement of Expectations ensures that, while still remaining independent in their day-to-day functions, the CEO is clearly required to action the strategic direction of the elected government and will allow for clear performance requirements to be set.

¹ OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris.

Recommendation 7

Acknowledging the Government's mandate to establish an NEPA, the body should be focused on strengthened compliance, enforcement, and assurance. The functions related to decision making (including assessments, variations of actions, and condition setting) should remain with the Department. Failure of the CEO to comply with the Statement of Expectations should allow for their removal.

3.7 Scope 1 and 2 greenhouse gas emissions disclosure

The Samuel Review recommended that proponents should disclose their project's Scope 1 and 2 greenhouse gas emissions. The Government has adopted that recommendation and gone further, also requiring that mitigation plans be presented as part of a project's documentation. The BCA supported the Samuel Review recommendation in this regard.

Australia has a separate, clear policy framework that addresses greenhouse gas emissions, with responsibility resting with the Minister for Climate Change. Following the Government setting a 2035 emissions target earlier this year, this framework will continue evolve to meet the nation's ambitions, with the recent release of six sector emissions plans, and the review of the Safeguard Mechanism in 2026.

The concern with the bills before the Committee however is that it is ambiguous whether the emissions information and mitigation plans will be subject to decision and conditioning by the Minister for the Environment under the EPBC Act. Our view remains that the Act should continue to focus on the specific matters of national environmental significance laid out, and that it would be counter productive to have multiple policy frameworks and decision makers examining and potentially conditioning the same information.

To that end, it should be made clear that the disclosures provided in respect to greenhouse gas emissions are not part of the Minister's assessment but rather are for transparency processes and to feed into the Commonwealth's separate regulatory framework for greenhouse gas emissions.

Recommendation 8

Disclosure of scope 1 and 2 greenhouse gas information and related content should be for the purposes of transparency and informing other Commonwealth regulatory processes, not to form part of assessment or conditions under the EPBC Act, to avoid conflicting policy outcomes as these matters are considered under other government mechanisms.

3.8 Ambiguity around 'Net Gain' requirements

The bills will introduce a new requirement for projects with a residual significant impact to deliver a 'net gain' for the environment. This moves beyond the current settings of the EPBC Act which requires 'no net loss'. This approach is in line with elements of the Samuel Review, and the concept is not opposed by the BCA.

Our concern is that it will be enshrined in legislation, but without any clarity on the substantive requirement being imposed on proponents. This is because what comprises a 'net gain' is not defined in the bill, and intended to be addressed in regulation. Understanding how the requirement for 'net gain' is to be achieved is central to the operation of the reformed EPBC Act, as passing the net gain test will become a necessary precondition to the granting of an approval. It is also of practical importance to the proportionality of restoration contributions and accessibility of the restoration contributions fund for most proponents.

Ideally, the basic requirement to achieve a net gain would form part of the Offsets Standard, not included in the legislation. Separate regulation would be used to set the detail of what constitutes a net gain. The Offset Standard, and in parallel to that, the regulation with the mechanisms of what a net gain involves, as well as an updated and transparent offset calculator, would all be consulted on at the same time. That would enable

industry to make informed submissions to the Government on the requirement at the time it is being constructed, rather than setting up a requirement now, in legislation without supporting detail.

Recommendation 9

The requirement to achieve a net gain for projects with a residual significant impact should be set in the Offset Standard, not in legislation, while the detail of what constitutes net gain should be set in regulation. This should be consulted on as a package together with the updated offset calculator.

4. Outcomes for the environment and for business

4.1 Additional major changes delivered by these bills

The bills before the Committee make wide ranging changes to the way the EPBC Act and Federal environmental approvals operate. In addition to the major changes outlined in the previous section, the following are other significant new elements that the bills are introducing.

4.1.1 National Environmental Standards

The centrepiece of the Samuel Review was the introduction of new National Environmental Standards. These Standards are intended to provide clarity for both decision makers and proponents in the outcomes being sought by the EPBC Act. The bills provide the ability for the Minister to make Standards. Implemented correctly, these Standards will strengthen environmental protection, with projects required to be tested for consistency with the Standards to achieve approval. The BCA supports the Standards making power, including the proposed framing of the consistency test.

The Standards are subject to a non-regression clause, and in this context, it is important that there is at least a period to allow for implementation issues to be resolved. To that end, the BCA acknowledges that an 18-month period is allowed for in the bills to facilitate this. The Government will need to ensure it takes the opportunity to test the Standards fully during this period.

The Standards also are intended to play an essential role in supporting the accreditation of states and territories, by clearly outlining requirements for their decision-making processes. It will be vital that the Standards are drafted with this in mind.

The ability for the Minister to approve a project in very limited circumstances if it does not meet the Standards, where doing so is in the National Interest, implements the mechanism as proposed by the Samuel Review and is entirely appropriate.

We note that the first two draft Standards, on Matters of National Environmental Significance, and on Offsets, have been released by the Government, and are subject to a separate consultation process.

4.1.2 Regional planning

Regional planning is intended to deliver benefits for both businesses and the environment, by working with states and territories to plan areas with anticipated environmental and development conflicts. The planning process will likely take some time, acknowledging that there are initial pilots underway. The BCA believes these should be a priority, and supports their advancement, with appropriate consultation, in a timely manner.

If delivered as described, the new development priority areas have the potential to facilitate faster approvals for select priority industries, providing the registration process is well conceived. Meanwhile, the conservation zones will establish clear no-go zones of environmental protection. These plans will also see bioregional restoration measures developed, facilitating a regional and prioritised approach to environmental restoration. Regional plans were a central element of the Samuel Review.

4.1.3 Environment Information Australia

This new dedicated body will improve available information on the state of the environment, to lift the level of quality information available for all stakeholders including businesses, assessors, governments, and the general public. Greater amounts of high-quality information will help inform better project planning and decision-making all round.

Appropriate resourcing of Environment Information Australia will be essential to achieving the anticipated benefits.

4.1.4 Creation of protection statements

Protection statements will provide a new tool to consolidate important information related to a specific protected matter, to provide clarity on what must be protected in order to ensure its survival. We understand that this is intended to provide upfront clarity on the key considerations as part of any assessment of impacts to the relevant protected matter. In principle, this should be an improvement in the system, but we have not seen the detail of these statements as yet. We will be better placed to assess whether they will achieve their objective or create additional regulatory burden once they are developed. Quality consultation will be a critical component to the development of these statements.

4.1.5 New rule making powers

A common issue faced by proponents is the lack of consistency between different individual assessors in their assessment of an EPBC application. The rule making powers are intended to provide a tool to address this by allowing the Minister to set clear parameters for how an assessment is undertaken, and similarly allow the CEO of NEPA to do the same for compliance and enforcement. In principle, this should provide increased clarity and consistency to the process. The success of this tool will depend on how the rulings are developed and utilised in practice.

4.1.6 Restoration contribution fund

In line with the recommendations of the Samuel Review, the bills will establish a restoration contribution fund as an optional means of acquitting offset requirements for a project. The detail of the implementation of the fund will ultimately determine its success, as will clarity with how it will complement existing state funds for proponents that are paying into those as well.

4.1.7 Ability to undertake minor and preparatory work

The ability for a proponent to request to undertake minor or preparatory work as part of a larger referral is a welcome added improvement, and addresses the practical challenges of undertaking projects.

4.1.8 Improved state and territory accreditation processes

The existing EPBC Act allows for bilateral agreements to be established between the Commonwealth and a state or territory to undertake assessment or approvals. Because states and territories already undertake their own environmental assessment processes, this is an important streamlining measure for business by allowing for a 'single desk' approach to approvals.

To date, there has not been an approval bilateral agreement established, meaning the current Act has never achieved this fully streamlined outcome. The bills introduce new flexibility to the accreditation process for states and territories, while layering additional protections around this process through the new National Environmental Standards. This provides a practical way to progress state accreditation and lift the capabilities of the states to administer the Act. The creation of a single handling process is critical.

4.2 Mismatch between business benefit and environmental protections

The way the current bills are designed, many of the strengthened environmental protections will come online with clear timeframes. For example:

- Initial National Environmental Standards have been drafted, with the intention of them being ready once standard making powers commence.
- The new net gain requirements and unacceptable impact tests will also come into effect at most 12 months after Royal Assent.
- The new NEPA will be stood up with a clear 1 July 2026 timeframe and will receive its new enforcement tools and increased penalties at most 12 months after Royal Assent.

Conversely, the biggest business benefits are subject to further work with the states and territories, and, while heavily signalled and intended by Government, are not yet guaranteed:

- Approvals accreditation will require negotiations between the Commonwealth and states and territories, and there is no guarantee that agreement will be reached to deliver an outcome.
- Regional plans with their development zones (as well as conservation zones) will need to be finalised between the Commonwealth and the relevant state or territory.

In the spirit of the reform process, our view is that it will be important that both stronger environmental protections and business benefits are delivered. Given that the most important business benefits are not guaranteed, the best way to ensure that is to tie these outcomes together.

Given the importance to business of a streamlined, single desk approach for assessment, this should be achieved by linking the commencement of the new National Environmental Standards, net gain requirements, and unacceptable impacts tests to the accreditation of at least one state or territory for approvals. Further, the Federal Government should aim to accredit all the major states within six months of the legislation coming into effect.

Recommendation 10

The commencement of the new net gain requirements, national environmental standards test, and unacceptable impact test should be contingent on at least one state or territory being accredited for approvals. The Government should aim to have accreditation in place for all the major states within six months of the legislation coming into effect.

5. Additional areas

5.1 Variations to proposals

Several BCA members have raised the fact that unlike most state and territory environment and planning permitting processes, the EPBC Act does not provide the ability to amend or modify the scope of an action without a new referral, only to vary conditions. This is a particularly pertinent issue given the scale and timeframe of both the assessment and approval processes under the Act.

The ability for modifications to an action would be a significant productivity benefit from a business perspective. As at state and territory level, these modifications would only be for non-significant amendments (i.e. provided environmental outcomes are materially the same).

For the EPBC Act this is relevant to 'non-controlled action' decisions, 'non-controlled action - particular manner' decisions, and for approvals. For example, where changes to project design or more refined understanding of impacts have been quantified, including to be responsive to landholder requests to minimise impacts.

The bills include a proposed section which enables a proponent to apply to vary their proposal where they have a 'non-controlled action - particular manner' decision. This should be replicated for 'non-controlled action' decisions where the varied proposal has been assessed as still not involving any significant impact on a protected matter. A new provision should also be created to allow for variation of approved actions (i.e. beyond solely variation to conditions) where environmental outcomes are materially the same.

Recommendation 11

Add modification processes to the EPBC Act, to allow proponents to apply to modify the scope of a project under both a non-controlled action decision, and a controlled action approval.

5.2 National Interest Exemption

The bills update the National Interest Exemption provisions. It is important to note that the EPBC Act as it stands today already includes National Interest Exemption provisions.

The proposed bill is more prescriptive in terms of the National Interest Exemption, rather than less, compared with what currently exists. For example, when an exemption is granted under the bill, the Minister will be able to set conditions on that project if necessary or convenient to protect any matter, or to repair or mitigate the damage caused by the action with the exemption. The amendment proposed by the bill allows the Minister to prescribe how, and the extent to which, a proponent can carry out an action that is in the national interest. This will limit the opportunity for the exempted action to have an adverse impact on protected matters. That power is not expressly available under the current system, so there is improved certainty in the Minister's power to impose conditions on exemptions which provides an increase in protections.

The statutory test under the bills for a National Interest Exemption is not being changed from the existing position in relation to the scope of the matters the Minister can consider when determining the 'national interest'.

6. Conclusion

The reform of the EPBC Act is a critical task for both the effective protection of the environment and to deliver efficient assessment and permitting processes for businesses. The BCA supports the passing of legislation that will deliver these improvements for both the environment and business, as is the Government's stated intent with the laws. The bills as drafted however do not achieve that objective, and overall as a package they will be a net-negative for business if they are not amended.

As we have outlined in this submission however, there are fixes that address each of the issues identified. We believe these amendments will retain the improved environmental outcomes sought to be achieved from the reforms, whilst also delivering on the promised business improvements.

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