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

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About Us

This submission is on behalf of the **National Environmental Science Program's Threatened Species Recovery Hub** and authored by leaders and researchers associated with the hub**.** Additional author affiliations include the Centre for Biodiversity and Conservation Science at **The University of Queensland,** the Fenner School of Environment and Society at the **The Australian National University,** the Quantitative and Applied Ecology Group at **the University of Melbourne**, and the Research Institute of Environment and Society at **Charles Darwin University**.

We have extensive expertise in threatened species and ecosystem management and conservation science to inform environmental policy and decisions. Wintle and Maron were members of Professor Graeme Samuel's Consultative Group as part of his Independent Review of the EPBC Act, but the views here do not represent those of that Group. Similarly, Legge is the Deputy Chair of the Threatened Species Scientific Committee, but the views here do not represent the views of the TSSC.

Submitted to:

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Mr Stephen Palethorpe,

Thank you for the invitation to provide this submission on the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021. This submission is made on behalf of the National Environmental Science Program's Threatened Species Recovery Hub.

It is our view that the proposed Amendments are likely to result in ongoing loss of biodiversity, including threatened species. **We therefore do not support the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 in its current form**. We provide a summary of key issues and priorities for action informed by our research and expertise, followed by a more detailed assessment and reasoning.

Summary of key issues and priorities for future reform

Key issues

- The potential outcomes of the Bill are unclear, as the full Australian Government response to the review of the EPBC Act by Professor Graeme Samuel in 2020 (the Samuel Review) has not been released, and the full suite of measures that will be introduced to reform the Act or implement this Bill, including the Standards themselves, are not yet known.
- In isolation, the changes outlined in the current Bill are unlikely to benefit MNES, and could significantly exacerbate the existing problems within the Act that are leading to declines in the status of MNES and biodiversity more generally.
- This Bill seeks to *allow* for the Minister to make Standards. It does not *require* such Standards to be established, nor that these be in place, along with appropriate accountability mechanisms, as a condition of establishing bilateral agreements to devolve Commonwealth responsibilities to other entities.
- The Bill does not specify that Standards must be sufficiently robust and directed to deliver the objectives of the Act.
- The Bill does not establish sufficient mechanisms to ensure the Standards are enforced.
- This Bill allows for the first Standard (Interim Standard) to be in place for up to two years, as it is not subject to disallowance. If this Interim Standard is inadequate, this two year window could be a period of high risk for MNES.
- The Bill allows decisions or actions under the Act to take place as long as there is some belief that other, potentially unconnected, policies, programs, plans or funding would collectively render the decision or action acceptable under a Standard. This will reinforce decline and loss of biodiversity, likely lead to double-counting of mitigating factors, and vastly accelerate the persistent and pervasive problem for MNES of 'death by a thousand cuts'.
- The Bill's establishment of an Environment Assurance Commissioner addresses in part the recommendations of the Samuel Review for strengthening independent oversight, assurance and accountability within the Act. However, the remit of the Commissioner conferred by this Bill does not mandate this role to undertake broad-scale auditing as recommended by the Review. It does not provide any clear link to Standards established, nor does it provide any clear requirement for an outcomes-focused approach to assessing the consequences of actions or decisions undertaken by the Commonwealth or accredited agencies under the Act.
- The exclusion of individual actions or decisions from the Commissioner's reporting and/or auditing remit will prevent this mechanism from providing effective, independent oversight of decisions or actions that individually or collectively lead to poor outcomes for MNES.

- The Bill does not specify a clear process for addressing shortfalls in decisions or actions undertaken by the Commonwealth or accredited agencies under the Act, beyond existing mechanisms of suspending or terminating bilateral agreements.
- Resourcing for the Environment Assurance Commissioner and other compliance and enforcement mechanisms is not guaranteed under the Bill, failing to address one of the key challenges in the current operation of the Act - a lack of adequate resourcing.

Key priorities for future reform

If the EPBC Act is to deliver its objectives, any changes to the Act must address the existing fundamental shortcomings in the Act identified in the Samuel Review, which have led to ongoing loss and decline in biodiversity and MNES, and allowed the extinction of species.

The approach to Standards, and mechanisms for independent oversight, assurance, compliance and enforcement proposed in the Samuel Review, provide a clear pathway to improving the outcomes of the Act against its objectives of protecting MNES, achieving sustainable development and conserving Australia's biodiversity and heritage.

In particular, key reform issues identified in the Samuel review that need to be addressed to improve outcomes against the objectives of the Act include:

- An holistic approach rather than selective implementation or 'cherry picking'.
- Robust, outcomes-focused Standards, with clear ties to delivering the objectives of the Act, ***before*** accreditation or devolution of Commonwealth powers, decisions or actions under the Act to any State or Territory.
- Mechanisms for independent and adequately resourced accountability, assurance, compliance and enforcement processes ***before*** accreditation or devolution of Commonwealth powers, decisions or actions under the Act to any State or Territory.
- Requirements for consultation on the Standards and related assurance processes involving independent experts with appropriate and relevant scientific, legal and cultural expertise, as well as key stakeholders.
- Clear provisions for the independence of the position of the Environment Assurance Commissioner (or equivalent position).
- Clear provisions for the Environment Assurance Commissioner to audit outcomes from the operation of the Act, including a remit for broad ranging audits of the operation of the Act and accreditation agreements, and the capacity to audit individual decisions or actions undertaken by the Commonwealth or accredited agencies under the Act.
- Mechanisms to ensure adequate resourcing for all assurance, compliance and enforcement processes, including the Environment Assurance Commissioner and the Office of Compliance and Enforcement (or equivalent).
- Mechanisms to ensure oversight into accreditation processes including by the Environment Assurance Commissioner and Parliament.
- Clear mechanisms for review of the first Standard (interim standard), and the operation of any subsequent Standards, and mechanisms to intervene when any standard is not working as intended.
- Mechanisms to identify and address shortfalls where decisions or actions by the Commonwealth or accredited agencies are not consistent with the Standards or the objectives of the Act.
- Mechanisms to ensure legislated outcomes are achieved in situations where these are not being achieved by existing mechanisms and provisions.

We would welcome the opportunity to discuss these matters further with the Committee.

The importance of outcomes-based approaches and robust accountability for strengthening the EPBC Act

The EPBC Act as it stands is not achieving its objectives. The review of the EPBC Act by Professor Graeme Samuel in 2020 concluded that addressing these objectives will require a response which is comprehensive, holistic and focused on outcomes. The co-authors of this submission are broadly supportive of the full suite of recommendations made in the Samuel Review.[1] In particular, as Professor Samuel assessed, a full, comprehensive suite of reforms, implemented as a whole package rather than as individual measures, is required to avoid further extinctions and turn around the precipitous and continuing decline of biodiversity in Australia.

The number of animal species listed as threatened under the EPBC Act has increased by approximately 57% since the Act's inception, and the number of plants listed as threatened has increased by 32% (with many more data deficient unlisted plants likely to be threatened). The numbers of listed plants and animals are both continuing to rise. Extinctions of Australian animal species are continuing: in the last decades, two Australian endemic mammal species have been rendered extinct, one reptile species has been made extinct and two other Australian reptile species have been rendered extinct in the wild. This number of recent extinctions of vertebrates is exceptional by global standards.

Where recent population trajectory information is available, the overwhelming trend for EPBC Act-listed animal species is for ongoing population decline (174 species); in contrast, only three listed species are considered to be increasing. Likewise an Australia-wide analysis covering EPBC Act listed plants, plus additional plants listed under other jurisdictions, 418 plant taxa were assessed as having population trajectories indicating ongoing decline and under immediate threat, with 187 taxa declining across all populations, and considered at high risk of extinction over the next decade. A recent study found that 7.7 million hectares of likely habitat for EPBC-listed threatened species has been cleared since the Act has been in place.

Only 13 animal species and 147 plant species have been delisted since the Act's inception, and only one of these (Muir's corella) may be considered a case of genuine improvement (the remainder being due to taxonomic review or new information becoming available). The conservation status of only five animal species and 27 plant species has been down-listed (i.e. to a less threatened status) since the Act's inception, mostly due to taxonomic review or new information indicating that the species was not as imperilled as originally thought. In contrast, 46 animal species and 44 plant species have had their conservation status up-listed, mostly because of ongoing and severe deterioration in their conservation outlook. The evidence is clear: recovery – the goal of the Act to conserve and recover threatened species and Australian biodiversity – is not being achieved for the vast majority of listed species.

In a submission to the review authored by several TSR Hub researchers, we recommended a series of options for improving the capacity of the Act to conserve and recover Australia's biodiversity and achieve sustainable development, including greater use of outcomes-focused and strategic

[1]Samuel, G 2020, Independent Review of the EPBC Act – Final Report, Department of Agriculture, Water and the Environment, Canberra, October. CC BY 4.0. https://epbcactreview.environment.gov.au/resources/final-report

approaches underpinned by robust accountability mechanisms. This Bill engages primarily with those aspects of reform.

In particular, the Samuel Review recommended that binding, outcomes-focused National Environmental Standards be adopted as a "centrepiece of the recommended reforms". The Review set out draft standards and recommended them for immediate adoption. Professor Samuel further recommended establishing a "new, independent, statutory position of Environment Assurance Commissioner (EAC)" which reports on the performance of all accredited jurisdictions and provides "recommendations for action to the Environment Minister where there are issues of concern." In addition, he emphasised the immediate priority of implementing a robust compliance and enforcement standard along with a fully independent Office of Compliance and Enforcement within the Commonwealth Department of Agriculture, Water and the Environment with "modern regulatory powers and tools to enable it to deliver compliance and enforcement of Commonwealth approvals" (Samuel 2020, Key Messages). We strongly support these recommendations.

This Bill gives the Minister for the Environment the power to make National Environmental Standards under the EPBC Act, and sets out how they would operate, particularly in the case of delegation of the Commonwealth's power to approve actions under the EPBC Act to the States and Territories via bilateral agreements. It also establishes an Environmental Assurance Commissioner (EAC), responsible for monitoring and auditing certain processes and agreements under the EPBC Act, including bilateral agreements.

These changes give *partial effect* to some of the recommendations made in the Samuel Review. However, without seeing the full Government response to the Samuel Review or the measures that will be used to address the gaps in this Bill (including the standards to be adopted themselves), it is not possible to know the implications of this Bill for Matters of National Environmental Significance (MNES) in Australia (and therefore whether the reforms will be effective in stemming major declines and extinctions in Australia's biodiversity). The Samuel Review recognised this, and warned of the risk of 'cherry-picking' from among his recommendations. In particular, Professor Samuel noted that "All the Standards [recommended in his review] are necessary to improve decision-making by the Commonwealth and to provide confidence that any agreements to accredit States and Territories will contribute to national environmental outcomes not just streamline development approvals" (Samuel 2020, Key Messages).

In isolation, the changes outlined in the current Bill appear unlikely to benefit MNES, and indeed could significantly increase the risk of poor environmental outcomes. They would allow devolution of Commonwealth powers to the States and Territories without specifying the content of the standards to be adopted against which these jurisdictions would have to deliver. The Bill proposes an independent Environment Assurance Commissioner, but does not make clear provisions for the Environment Assurance Commissioner to do more than report, and even prevents them from scrutinizing individual decisions under the Act. There are also important unresolved questions as to the independence of the operation of this position. We address these shortfalls and concerns below, with reference to the relevant recommendations of the Samuel Review. For further context, we also attach the submission made by several authors of the current submission in response to the interim discussion paper released by Professor Samuel as part of his review.

National Environmental Standards

National Environmental Standards were a centrepiece of the Samuel Review. We endorse the approach to standards proposed in the final Review. Such standards provide the opportunity to set out the required outcomes for MNES and ensure that decisions and things affecting them help achieve, or do not detract from, those outcomes. This Bill seeks to allow for the Minister to make standards. However, it does not *require* such standards to be established, nor does it establish sufficient mechanisms to ensure auditing and enforcement.

Although this Bill appears to respond to the headline Recommendation 3 of the Samuel Review - that "*The EPBC Act should be immediately amended to enable the development and implementation of legally enforceable National Environmental Standards*" (Samuel 2020, Recommendations) - it does not align with several key elements of this recommendation, as follows:

a) *"The Act should set out the process for making, implementing and reviewing National Environmental Standards. The Act should include specific provisions about their governance, consultation, monitoring and review."*

The Bill's provisions regarding the governance, consultation, monitoring and review of standards need to be more specific to meet this recommendation and ensure standards achieve the objects of the Act, notably to protect MNES and promote ecologically sustainable development and the conservation of biodiversity.

Consultation on the standards and the review process should set out requirements to involve independent experts with appropriate and relevant scientific, legal and cultural expertise, as well as key stakeholders. The Bill currently allows for this, but does not require it.

The Review further states that: "*As the centrepiece of recommended reforms, National Environmental Standards should set clear requirements for those operating or accredited under the EPBC Act, and clear outcomes and limits for decision-makers. National Environmental Standards should prescribe how activities at all scales, including actions, decisions, plans and policies, contribute to the outcomes under the Act*" (Samuel 2020 Chapter 1.4). There is nothing in the Bill that requires standards to meet these core requirements, or even that they be aligned with achieving the objects of the EPBC Act. This is a key weakness of this Bill.

b) *"The Act should require that activities and decisions made by the Minister under the Act, or those under an accredited arrangement, be consistent with National Environmental Standards."*

The Bill does not require that activities and decisions are consistent with the Standards. Instead, it requires only that the person making the decision or undertaking the action be *satisfied* that their decision is *not inconsistent* with the Standard. This has a weaker legal meaning, and increases the degree of subjectivity and uncertainty in assessments of whether a decision or thing complies with a Standard.

Further, the Bill allows almost anything to be taken into account in meeting the criteria for satisfaction that a decision or activity undertaken under the Act is not inconsistent with the Standard, presumably as mitigating factors. This allows for a risky situation in which any decision or action under the Act could be considered "not inconsistent" with a standard as long as there is some belief or assumption that other, potentially unconnected, actions, decisions, or plans (including those not under the control of the decision maker or the proponent) would collectively render the decision or action acceptable under the Act. For example, it would allow for an impact on an MNES

that is significant and unmitigated, as long as the decision maker is satisfied that some other potential future source of funding or action would lead to an overall acceptable outcome - even if that other funding or action is not under the direct control of either the decision-maker or the proponent. This is an unacceptable situation that would reinforce decline and loss of biodiversity rather than improve it.

Furthermore, there is no specified requirement or mechanism for ensuring that matters taken into consideration in assessing a decision or undertaking an action are not double-counted for the purposes of assessing their mitigation on controlled actions. This will likely exacerbate and entrench the problem of both one-off impacts and cumulative impacts, whereby many smaller impacts are considered individually acceptable, but collectively result in significant damage.

To reverse the severe shortfalls that the existing Act faces in achieving its objectives, only directly connected actions (or components of larger actions, like investment in a restoration program that would not otherwise have been undertaken), that are fully under the control of the decision maker and/or proponent AND accounted for to avoid double-counting, should be considered in decisions about whether a particular decision or action complies with a Standard.

c) *"The Act should include a specific power for the Minister to exercise discretion to make a decision that is inconsistent with the National Environmental Standards. The use of this power should be a rare exception, demonstrably justified in the public interest and accompanied by a published statement of reasons which includes the environmental implications of the decision."*

The Bill includes the power for the Minister to make a decision that is inconsistent with the Standards. It allows a wide discretion, which arguably could be modified to align with the Review recommendation that these ought to be rare exceptions. It does require a statement of reasons to be published, which is important for transparency.

d) *"National Environmental Standards should be first made in a way that takes account of the current legal settings of the Act. The National Environmental Standards set out in detail in Appendix B should be adopted in full. The remainder of the suite of Standards should be developed without delay to enable the full suite of 9 Standards to be implemented immediately. Standards should be refined within 12 months."*

This Bill does not embrace the recommended standards nor has the Government indicated it will adopt those standards or anything similar. As such, it is impossible to know whether the Standards will be effective or outcome-based, as recommended by the Samuel Review. It is also not possible to know whether the full recommended suite of standards would be included. A process that leads to inadequate standards being made and adopted could worsen the current biodiversity crisis.

Further, the Bill allows for the first Standard (interim standard) to be in place for up to two years, as it is not subject to disallowance. If this Standard is inadequate, this two year window could be a period of high risk for MNES.

Environment Assurance Commissioner

Independent oversight, reporting and accountability are essential to ensure legislated outcomes are achieved in situations where these are not being achieved by existing mechanisms and provisions. As the Samuel Review notes, this is the case with the current operation of the EPBC Act. Such independent oversight becomes particularly critical where powers to achieve the objectives of an

Act, including in this case protection of MNES, sustainable development and conservation of biodiversity and heritage, are devolved to other jurisdictions.

Recommendation 23 of the Samuel Review calls for the Act to "*Immediately establish, by statutory appointment, the position of Environment Assurance Commissioner*" (EAC) with responsibility to audit Commonwealth decision-making and accredited parties, conduct overall performance audits and report on performance of Commonwealth and accredited parties against National Environmental Standards.

This proposed Bill gives effect in part to the recommendations surrounding the position of the EAC, and several of the responsibilities recommended by the Samuel Review. The review outlines that the EAC should be "*independent of government*" and "*free from real or perceived political interference*" (Samuel 2020 Chapter 7.2). This independence is essential to ensure the robust accountability and assurance processes that are required to turn around the situation for Australia's biodiversity and MNES. It is unclear from the wording of the current Bill that this independence would be guaranteed.

There are also key limitations in the Bill as it currently stands in its description of the remit of the EAC, accountability mechanisms, resourcing and role in bilateral accreditation processes, notably:

(1) No clear remit for EAC to audit and report on outcomes

The Review recommends that the EAC have a remit to audit Commonwealth decision-making under the Act and that of any accredited party under accredited arrangements, as well as to conduct wide-ranging performance audits against the National Environmental Standards.

The Bill is unclear about the role of the EAC in providing assurance that the actions of the Commonwealth and accredited States and Territories will achieve the outcomes of protecting MNES and conserving biodiversity and heritage. The Bill's sections on the role of the EAC does not include provisions for broad performance audits, but limits the scope of assessments to Commonwealth processes under various parts of the Act, and to "*the operation of bilateral agreements*". It does not provide any clear remit to the Commissioner to assess overarching impact or outcomes arising from these Commonwealth processes or bilateral agreements, nor does it provide any clear connection to the implementation of National Environmental Standards. This is a significant weakness in the overarching assurance role of the EAC, as it perpetuates the inputs and processes-based focus of the current Act, which has overseen precipitous declines in biodiversity and MNES.

Furthermore, the wording of the Bill as it stands attenuates the central auditing function of the EAC, enabling an interpretation of the function as being fulfilled providing 'monitoring' takes place without mechanisms for assessing problems or providing accountability. This risks perpetuating the problem that MNES and other matters protected under the Act may be 'monitored to extinction', with the monitoring of processes providing neither transparency of the impact of these processes on the matters that the Act intends to protect, nor mechanisms to address why the monitored processes are assessed as compliant or otherwise, nor in-built triggers for action.

Third, although the Samuel Review recommended that the EAC oversee audit of decision-making by the Commonwealth under the EPBC Act, including the Office of Compliance and Enforcement, and the accredited parties under accreditation agreements, this Bill stipulates that "*This section does not permit the Environment Assurance Commissioner to monitor or audit a single decision.*" This prohibition against the EAC monitoring or auditing any particular decision under the Act or agreements would allow decisions that are not compliant with the National Environmental

Standards, accreditation agreements or the objects of the Act to take place, without any mechanisms for accountability or even transparency beyond those inadequate mechanisms (such as legal challenges) that already exist under the Act. This, combined with a lack of focus on assessing and assuring outcomes under any National Environmental Standards, will perpetuate the long-standing and pervasive problems of 'death by a thousand cuts' identified in the Hawke Review a decade ago.

Finally, the Samuel Review outlined that part of the function of the recommended role of EAC would include "*investigation of complaints about the performance or operation of decision-makers*" (Samuel 2020, Chapter 7.2). This accountability mechanism is vital to ensure expert, stakeholder and Traditional Owner buy-in to the Act, accreditation processes and decision-making processes, and to give public confidence in the operation of the Act and any accreditation arrangements. However, the Bill does not stipulate this role of investigating complaints, either regarding particular decisions nor the overall operation of the Commonwealth or accredited agencies against National Environmental Standards and the objects of the Act.

(2) No in-built mechanisms for assurance or avenues to address shortfalls in Commonwealth processes, accreditation processes or the operations of accredited agencies.

To ensure the Act achieves its objectives, outcomes-focused standards must be paired with explicit triggers and/or mechanisms for accountability, assurance and enforcement when shortcomings in processes or shortfalls in outcomes are identified. The Samuel Review recommends that this take place through having the EAC provide public and transparent "*recommendations to the Commonwealth Environment Minister where adverse findings are made*" (Samuel 2020, Chapter 7.2), and that the Minister must respond, publish their response to recommendations, and outline publicly the reasons for their response. The Bill as it stands gives no stipulation that recommendations be part of the process for addressing non-compliance, nor does it specify any other mechanisms (other than suspension or revocation of bilateral agreements) through the EAC or elsewhere for ensuring the accountability or improvement of Commonwealth, State and Territory decisions, processes and actions against any National Environmental Standards, the legislation as a whole or the objectives of the Act. It therefore fails to address one of the greatest concerns identified in the review: that there are currently few mechanisms relating to transparency, reporting or assurance to ensure the Act achieves its aims (Samuel 2020, Chapters 9-11).

(3) No in-built resourcing for assurance, compliance and enforcement functions

The Review recommends that the EAC must be "*supported by dedicated Department resources*" (Samuel 2020, Chapter 7.2) and further that Commonwealth processes be resourced through a new "*Office of Compliance and Enforcement*" (Samuel 2020, Chapter 9). These recommendations would address one of the critical current shortfalls of regulation and enforcement under the Act: a lack of adequate resourcing for regulators to make well-informed decisions, assure accountability, enforce decisions and assess compliance and outcomes.

Under the proposed Bill, resourcing to ensure adequate support to undertake key responsibilities is not guaranteed, but rather is at the discretion of the Departmental Secretary. Under the provisions of this Bill, it appears that the EAC would have sole responsibility for monitoring compliance, processes of environmental decision-making and the operation of bilateral agreements. The Bill stipulates that *"The Secretary may make the services of APS employees in the Department available for the purposes of assisting the Environment Assurance Commissioner perform the Commissioner's functions."* There is no provision in the Bill for a new "*Office of Compliance and Enforcement*" and

therefore no resourcing. Given the central role the Commissioner and this Office need to play in ensuring processes and decisions undertaken both at Commonwealth level and under bilateral agreements are compliant with the Act, and that they achieve the necessary outcomes to meet the objectives of the Act, the lack of mandated resourcing is likely to perpetuate the ongoing decline of biodiversity, MNES and other protected matters under the Act.

Conclusions

The urgency and scale of the challenge Australia faces in conserving its threatened species and ecosystems, and natural and cultural heritage is vast. Urgent priority actions set out by the Samuel Review would help to address this challenge. However, without clarity on the Government response to the Review and its comprehensive set of recommended reforms, there can be little confidence that this opportunity to make major improvements in the conservation of Australian biodiversity will be achieved. Indeed, this Bill risks significantly worsening the situation. As presented, and in isolation from other reforms (other than the devolution of Commonwealth approval powers to the States and Territories), this Bill will not help turn the tide on species extinctions and environmental decline in Australia, but on the contrary, could further exacerbate biodiversity losses, declines in MNES and extinction risk for our most imperilled species.

Sincerely,

Professor Martine Maron, on behalf of the above named co-authors and the National Environmental Science Program's Threatened Species Recovery Hub