



The Wilderness Society: Submission to the Inquiry into the
Environment Protection and Biodiversity Conservation Amendment
(Standards and Assurance) Bill 2021

Senate Environment and Communications Legislation Committee

April 2021

Dear Secretary,

On behalf of the Wilderness Society and the undersigned 5187 Wilderness Society members and 25 local community groups (see [co-signatories](#) below), I am pleased to provide this submission to the Inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Standards & Assurance) Bill 2021* (**the Standards & Assurance Bill or the Bill**).

The submission makes comment on specific issues of interest to the Wilderness Society and its members in relation to the Standards & Assurance Bill. For comprehensive and detailed comment on individual provisions of the Standards & Assurance Bill, we commend the Environmental Defenders Office submission to this inquiry to the Committee's attention.

Yours sincerely,

Suzanne Milthorpe
National Environment Laws Campaign Manager, Wilderness Society



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SUBMISSION

Reform is urgently needed

Australia is in the grip of a worsening environmental crisis. Independent reporting shows all major indicators of environmental health have declined over the two decades that the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) has been in force.

There have been major changes to the ecological context in which the EPBC Act operates since its inception, including:

- The Millennium Drought and widespread salinity crises of the early 2000s, with southern Australia's time in drought projected to increase over the next decades¹.
- A marked upswing in widespread deforestation, primarily linked to a five-fold increase in deforestation for agriculture in Queensland between 2012 and 2017².
- Major bushfire events are now occurring with unprecedented frequency, severity and intensity, and affecting areas that, for millennia, did not burn³. This includes the ongoing ecological crisis caused by the 2019-2020 bushfires, with many species and ecosystems catastrophically affected.
- Increasing impacts from climate change are widely acknowledged as one of the largest systemic threats to biodiversity in Australia⁴.
- Australia's species extinction crisis continues to escalate, with five animal species gone extinct since the EPBC Act commenced. The 2016 State of the Environment report noted that inadequate and failed environmental governance remains one of the top threats to species in Australia⁵.

A recent scathing Auditor General report highlighted an ongoing failure to administer the EPBC Act and protect the environment. The report found the Commonwealth Government is failing to assess projects on the very real risks they pose to nature and communities, it is failing to set conditions that would mitigate those risks, and it is failing to enforce and monitor whether and if companies are complying with those conditions⁶.

The Independent Review of the EPBC Act (the Independent Review), conducted by Professor Graeme Samuel AC, is the latest in a long line of warnings that our national system of environment protections is broken, and in need of fundamental reform. The Independent Review is clear:

- Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The current environmental trajectory is unsustainable;
- the EPBC Act does not enable the Commonwealth to effectively fulfil its environmental management responsibilities to protect nationally important matters; and

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<https://www.csiro.au/en/research/environmental-impacts/climate-change/climate-change-information>

² From 91,690 hectares in 2010-11 to 392,000 hectares in 2017-18 (Queensland Department of Environment and Science (2018) *Land cover change in Queensland 2016-17 and 2017-18: a Statewide Landcover and Trees Study (SLATS) Summary Report* DES, Brisbane)

³ <https://www.bushfirefacts.org/>

⁴ Jackson et al (2017) *Australia state of the environment 2016: overview* Australian Government Department of the Environment and Energy, Canberra

⁵ Jackson et al (2017) *Australia state of the environment 2016: overview* Australian Government Department of the Environment and Energy, Canberra

⁶ Auditor-General Report No.47 2019-20 *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*



- the environment has suffered from two decades of failing to continuously improve the EPBC Act and its implementation⁷.

Reform of the EPBC Act is urgently needed. The above failures of Australia’s environmental protection system and the escalating pressures on our environment clearly demonstrate the need for reformed national leadership, better oversight and more effective environmental governance and regulation to deal with escalating ecological crises.

Recommendations of the Independent Review into the current EPBC Act

The Independent Review was handed to the Government on 30 October 2020, although it was not released to public and Parliament until 22 February 2021.

The Final Report of the Independent Review included 38 comprehensive and credible recommendations and proposed a three-tranche law reform process to overhaul the EPBC Act. The Independent Review found that:

- An interconnected package of reforms is needed, including measures to:
 - provide stronger oversight of decision making,
 - ensure decision making is based on credible and comprehensive independent data, and
 - rebuild community trust in the EPBC Act, and its implementation, such as reinstatement of merits review and a binding standard to support community consultation, and that
- At the core of these reforms should be strong, *outcomes based* national environment standards and structures to enforce and measure their effectiveness and application.

Professor Samuel is clear in his final report that “(f)or 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”.

Significantly, Professor Samuel specifically cautions that “(g)overnments should avoid the temptation to cherry pick from a highly interconnected suite of recommendations.”

We note and support Professor Samuel’s finding that many of the reforms recommended by the Independent Review do not go far enough to turn around Australia’s extinction and environment crises and ensure future sustainable development, and that “(t)he EPBC Act needs to be completely overhauled. This will involve both immediate and ongoing change, with sensible staging of legislative reform required.”

Nonetheless we believe that the full package of interconnected reforms recommended by the Independent Review represent a credible, cogent and achievable pathway forward to mitigate the worst destruction and establish the robust, transparent and credible regulatory framework to support much needed future reforms.

The Standards & Assurance Bill 2021

If the Standards & Assurance Bill was the first step in a comprehensive response to the Independent Review, accompanied by a firm commitment to and plan for achieving the

⁷ Samuel G (2020) *Independent Review of the EPBC Act - Final Report* Department of Agriculture, Water and the Environment, Canberra, pviii



interconnected reforms set out above, then the Wilderness Society would be in a position to welcome it.

To prevent the extinction or further endangerment or decline of Australian ecosystems, plants, animals and their habitats, the Wilderness Society strongly believes that there are some environmental values of such key importance that immediate, measurable, outcomes-focussed protections preventing their destruction or degradation must be built into the EPBC Act and its implementation.

We support the numerous Independent Review recommendations for “(s)trong, measurable and legally enforceable” National Environmental Standards that prescribe “clear outcomes” and set out “how activities at all scales, including actions, decisions, plans and policies, contribute to the outcomes under the Act”.

We further support the numerous Independent Review recommendations for the application of such National Environmental Standards equally to all proponents, developments and sectors, and for comprehensive regulatory reform of the EPBC Act to ensure transparent, consistent and robust decision-making and regulation of all sectors, including the establishment of an independent Environmental Assurance Commissioner.

The Morrison Government is yet to release a comprehensive response to the Independent Review.

We are disappointed that, at time of writing, the Government has instead chosen to undertake a piecemeal series of cherry-picked reforms aimed at reviving and passing the Abbott Government’s failed 2014 push for devolution of Commonwealth decision-making powers to states and territory governments. The Wilderness Society believes that this approach is no substitute for taking substantive action to address Australia’s extinction and ecological crises, Nor is it a substitute for ensuring that environmental decision-making is credible, transparent and supports meaningful participation by communities and experts. In fact, the current proposed reforms are inconsistent with what is required, and are against what the Independent Review has proposed.

The Bill’s provisions are weak and inconsistent with the Independent Review

The provisions of the Standards & Assurance Bill are too weak, and subject to too much Ministerial discretion, to safeguard decisions and ensure environment assessment decisions are made in a way that contributes to achieving environmental outcomes.

The Bill empowers the Minister to make National Environmental Standards—but, problematically, does:

- not require that they be made, nor
- set out the standards which should be made, nor
- set any requirements for quality, application and enforcement of standards.

Furthermore, the Bill embeds a weak test that management arrangements and authorisation processes “not be inconsistent with” national standards, rather than requiring decisions to “be consistent with” mandatory national environmental standards. It also allows broad Ministerial discretion to vary or revoke national environmental standards and to exempt decisions from the standards on the basis of a poorly defined (and currently often misused) “public interest exemption”.



The Bill also fails to provide for robust oversight by the proposed Environment Assurance Commissioner. As Professor Samuel notes “Standards alone are not enough. They need to be buttressed by strong and independent oversight of the performance of accredited arrangements.” As part of providing that, he recommends a new, independent, statutory Environment Assurance Commissioner, free from political interference.

However, under the provisions of the Bill, the proposed Environment Assurance Commissioner would not have the powers to identify and fix issues before they become a long term pattern of failure. There is no power for the Commissioner to identify individual decisions that have not been taken in line with the National Environment Standards. Other problems include that the Commissioner would be too reliant on Ministerial direction in that they are reliant on Departmental staff and the Minister sets their workplan, and there is no requirement on the Government or decision-makers to actually fix issues identified by the Commissioner.

In summary, this Bill would

None of the above are in line with the recommendations of the Independent Review, including that:

- national standards be mandatory, clear and consistently applied;
- the EPBC 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;
- an accredited State or Territory would need to demonstrate that it is adhering to the Standards in its decision-making; and that
- the Environment Assurance Commissioner should have strong audit and independent oversight powers (like “those of the Auditor General”) to give confidence that decision-makers are adhering to the National Environmental Standards and the provisions of any bilateral accreditation.

Proposed National Environment Standards

In the Independent Review, Professor Samuel recommends a number of standards that require immediate adoption by the Government.

It is our view that the National Environment Standards recommended by Samuel are insufficient to turn around Australia’s extinction and environmental crises. However, they were developed through extensive consultation with stakeholders throughout the Independent Review, and at least represent a credible set of sufficiently robust National Environment Standards to underpin current decision making, begin to mitigate our national environmental crisis and to support future reform.

However, the Government has chosen to ignore the Review’s recommended standards and has proposed a set of vague, inconsistent National Environment Standards that would lock in the current, failed settings of the EPBC Act⁸.

These proposed standards would be implemented without Parliamentary scrutiny or oversight in the form of the power to disallow insufficient or problematic standards, with a promise of future

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action. While the Explanatory Memorandum signals that these proposed standards would be reviewed within two years, the Government also is intending to negotiate bilateral agreements with states and territories in this period based on these weak and effectively meaningless standards.

Given the difficulty in remaking bilateral agreements, we have little confidence that the Government will take action to strengthen these standards in future. The strongest possible, outcomes based standards are required at the outset of the reform process, not at some theoretical date in the future.

By locking in the current settings of the EPBC Act, via its proposed National Environmental Standards, the Government would quite simply lock in future extinctions, further decline of our ecosystems and iconic natural places, and the existing poor decision-making and implementation of the EPBC Act.

If National Environment Standards are not strong, outcomes-focussed and robustly and consistently applied, enforced and overseen, it is our very strong view that the proposal to hand the states and territories assessment and approval powers over Matters of National Environmental Significance is a very bad mistake and will inevitably be bad for the environment and communities.

Streamlining Environmental Approvals Bill

The Explanatory Memorandum for the Standards and Assurance Bill is clear that the purpose of this Bill (and by extension, the Government's proposed National Environment Standards) is to underpin accredited environmental assessment and approval processes under bilateral agreements with states and territories.

We note that the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020*, currently before the Senate, is—in its purpose, aims and in the majority of its text—materially the same as the Abbott Government's failed one-stop-shop bill of 2014.

Significantly, the independent review into the EPBC Act was not complete at the time the Streamlining Environmental Approvals Bill was drafted. It is also the case that parliamentary introduction of the Bill and that drafting instructions for the Bill were given to the the Office of Parliamentary Counsel eleven days before the Minister for the Environment received the interim report from the Independent Review⁹, and nearly five months before the Final Report was delivered to the Minister, as well as over nine months before the Independent Review was made public.

Devolution, when pursued in isolation to other reforms required to strengthen environmental outcomes, is contrary to the core findings of the Samuel Final Report. It is of great concern that the Morrison Government is consistently demonstrating that it has little intention of responding meaningfully to the Independent Review's recommendations.

Prime Minister Morrison made this clear in his National Cabinet Media Statement of 11 Dec 2020, where he declared that "the immediate priority was to pass legislation streamlining approval

⁹ Commonwealth, *Public Hearing: Australia's faunal extinction crisis*, Senate Environment and Communications References Committee, 25 August 2020 (James Tregurtha, Department of Agriculture, Water and the Environment)



processes and to develop national environmental standards reflecting the current requirements of the EPBC Act. *Subsequent phases of reform will build on these streamlining efforts and address any further changes and improvements, including to environmental standards, taking into account the recommendations of the independent review led by Professor Graeme Samuel AC.*” (emphasis added)

As a result of the Government’s persistent inaction in response to major environmental events, such as:

- the 2018-19 coral bleaching, the 2019-2020 bushfires, the ongoing wildlife extinction crisis,
- as well as major reviews (including the 2016 State of the Environment Report, the Independent Review and the 2020 Auditor General’s report showing repeated catastrophic failures to properly implement the EPBC Act)

we have little confidence that if the Standards And Assurance Bill and Streamlining Approvals Bill are passed, the Government will take the necessary further reforms demanded by the Independent Review in future.

Community expectations and ignored reforms

We note that 30,000 Australians fed into the Independent Review via public submissions, indicating high levels of community interest in the effective operation of Australia’s national environment laws. This high level of interest is hardly surprising in light of the Independent Review’s finding that “(t)he community and industry do not trust the EPBC Act and there is merit in their concerns”.

We note that the Government’s current response to the Independent Review does not include a commitment to undertake many of the reforms identified by Professor Samuel as necessary to restore community trust in decision-making, including sweeping reforms around data and monitoring, a standard to support community engagement and access to key justice provisions such as merits review to ensure governments make decisions fairly and in line with laws and regulations.

In November 2020, the Wilderness Society commissioned YouGov to survey a nationally representative sample of Australian voters on how they feel the Government engages communities in protecting nature. The results show a massive gulf between community expectation and Government actions, with 85% of respondents believing that it is important for the Federal Government to retain their environmental approval powers over projects that may impact or destroy threatened wildlife habitats or protected environmental areas¹⁰.

Conclusion

The Federal Government has a fundamental obligation and responsibility to ensure the protection of Matters of National Environmental Significance, including significant international obligations.

It is our strong view that the Standards & Assurance Bill, the Streamlining Approvals Bill and the Government’s proposed National Environment Standards are:

- not line with the recommendations of the Independent Review;
- insufficient to support robust National Environment Standards and the accreditation and oversight processes recommended by the Independent Review; and

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<https://www.canberratimes.com.au/story/7063169/massive-gulf-over-plans-to-hand-environmental-approval-powers-to-the-states/-news/>



- would ensure neither robust environmental outcomes, nor robust, transparent decision-making, are embedded in the implementation of the EPBC Act.

Without strong, outcomes based standards, and a firm and detailed commitment to the broader reform package recommended by the Independent Review, the Morrison Government's focus on enabling devolution via these bills and policy is disingenuous and:

- does not constitute a meaningful response the Independent Review;
- does not constitute a meaningful response to Australia's worsening environment crisis, nor to the ecological catastrophe of the 2019-20 bushfires;
- represents a fundamental failure of leadership; and
- is out of line with community expectations.

Professor Samuel is clear in the Final Report of the Independent Review: "To shy away from the fundamental reforms recommended by this Review is to accept the continued decline of our iconic places and the extinction of our most threatened plants, animals and ecosystems. This is unacceptable."

On this basis, we strongly recommend that the Standards And Assurance Bill should not proceed.

We also recommend that the Senate reject the Streamlining Approvals Bill.

The evidence is that, in isolation from significant legislative and policy changes, the passage of these Bills will further weaken environmental protections and further diminish the role of the national parliament in delivering improved environmental outcomes.

We strongly recommend that the Commonwealth should commit to fully reform the EPBC Act in line with the interconnected suite of reforms recommended by the Samuel Review, including:

- **Immediate adoption and implementation of the National Environment Standards as recommended by the Independent Review, with the full suite of standards recommended by the Review developed within 12 months; and**
- **A commitment to create strong and independent institutions to ensure the laws are implemented and environmental outcomes are significantly improved.**



Appendix 1

About the Wilderness Society

The Wilderness Society is an independent environmental advocacy organisation. We are membership-based, and we know that everyday Australians want governments to take action to protect species and act on climate change. For over 40 years, we've engaged Commonwealth and state governments to ensure Australia's natural environment is healthy, biodiverse and resilient to the growing impacts of climate change.

Our interaction with federal environment law stretches from the Franklin Dam campaign and our core role in the Franklin Dam High Court case upholding the constitutional power of the Commonwealth to protect Australia's globally important ecosystems, through campaigning for the creation of a national environment act in the 1990s, to being a founding member of the Places You Love Alliance advocating for national environmental law reform to deliver national leadership, achieve environmental outcomes and enshrine community rights.

We have interacted with the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), and various statutory processes under it, for the 20 year life of the Act.

Over the last decade, we have stood side by side with local communities around Australia in winning protections for some of our globally important natural places. We are currently engaging a new generation of environmental leaders through a sophisticated community organising program in campaigns to safeguard important areas of terrestrial or marine biodiversity in every state around Australia

Community and individual co-signatories to this submission

The following 25 local Wilderness Society community groups, representing communities in four different states, have co-signed this submission:

- Bayside, Albert Valley, Gold Coast, Toowoomba, Brisbane Metro North, Brisbane Northern Suburbs, Brisbane Inner South, Brisbane Southern Suburbs (Queensland)
- Sydney Eastside Community Group, Illawarra, Sydney Inner West, Sydney Northern Beaches, Homebush, Sydney North, Sutherland, Charlestown, Central Coast, Merewether (NSW)
- Melbourne North East, Melbourne West Side, Bayside (Goldstein), Melbourne East Group, Mornington Group (Victoria)
- Fremantle, Victoria Park (Western Australia)

A further 5187 individual Wilderness Society members have also co-signed this submission, representing individuals in every state and territory in Australia. A detailed list of individual co-signatories to this submission is attached in Appendix 2, provided alongside this submission.

Appendix 2 (provided alongside this submission)