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Senate Standing Committees on Environment and Communications
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Submission to the inquiry on the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

1. The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to contribute to the review of the *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (Cth) (the Bill)*.
2. NELA is a national, multi-disciplinary, member-based association focused on environmental law and sustainability that is managed by a national Board.¹ One of NELA's objectives is to provide a forum for and to otherwise assist in the discussion, consideration and advancement of environmental law across the legal profession and the wider community. NELA serves the needs of practitioners in law, planning, natural resource management and the environmental sciences.
3. Various NELA members provided input to this submission that the NELA Board approved.²
4. NELA's view is that the Senate should not agree to the premature passage of the Bill at this time. The Australian Government's response to the 38 recommendations in the final report of the second, ten-year review of the *Environment Protection and Biodiversity*

¹ The board has a strong mix of directors from State and Territory Bars, private sector not-for profit law firms, government and academia, namely Dr Hanna Jaireth (ACT) President, Jess Hamdorf (WA) Immediate Past President and Director, Natasha Hammond (NSW) Vice-President and Company Secretary, Nadja Zimmermann (VIC) Treasurer, Matt Floro (NSW) Director, Tiphonie Acreman (VIC) Director, Dr Katie Woolaston (Qld) Director, Dr Michele Lim (NSW) Director, Matt Littlejohn (NT) Director. The profiles of board members can be accessed on NELA's website www.nela.org.au/about/board-members/

² Dr Hanna Jaireth drafted the submission with input and comments from Ms Tiphonie Acreman, Ms Sarah Flynne, Mr Jacob Higgins, Ms Lara Scott, Ms Emiko Watanabe, Mr Matt Floro, Ms Natasha Hammond, Dr Michelle Lim and Ms Lara Shirley.

Conservation Act 1999 (Cth) (**EPBC Act**), has not yet been released, nor have the review recommendations been assessed further in the light of that response.

5. Professor Graeme Samuel AC, the chair of the review, urged in his foreword to the review report (**Samuel review report**) that Governments refrain from ‘the temptation to cherry pick from a highly interconnected suite of recommendations’ in his report.³
6. Further, the national environmental standards have not yet been finalised in Regulations, with the interim standards proposed by the Minister being widely criticised for falling short of the recommendations in the Samuel review report.
7. NELA’s view is that the proposed introduction of national environmental standards is a welcome reform with significant potential for progressing the national harmonisation of ecologically sustainable development outcomes, provided the standards are enforceable and enforced. NELA is concerned that the very flexible outcomes approach that is being taken, the ‘public interest’ exception, and the weakness of the proposed national environmental standards that have been released, may prevent effective harmonisation and ecological sustainable development from being realised.
8. The Bill itself does not prescribe any time frame for the national environmental standards to be implemented. NELA considers that that draft national environmental standards should be subject to further public comment and sectoral negotiation and be incorporated into the Bill (possibly as schedules rather than regulations). The draft standards should be finalised within 12 months, as recommended in the Samuel review report.⁴
9. In NELA’s view, the Bill cannot be properly scrutinised or reviewed in the absence of the proposed national environmental standards.
10. The Bill is also premature for proposing the accreditation of State and Territory regulatory arrangements and approvals for specified decisions under the EPBC Act, without having a more considered development of the national environmental standards, a new intergovernmental environmental agreement that addresses the roles and responsibilities of all tiers of government (including local government), or a strong independent ‘cop on the beat’, the States and Territories will continue their state-focussed environmental governance that lacks consistency in commitment to ecologically sustainable development and climate change mitigation and adaptation.
11. In summary, NELA’s recommendations are that:
The Bill should not proceed unless
 - the Australian Government has released its government response to EPBC Act review and stakeholders’ views in response to that response have been considered by this Committee
 - further consultations and sectoral negotiations on the principles guiding the national environment outcome standards authorised by the Bill have been undertaken

³ Prof G Samuel AC, ‘Foreword’, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October 2020, iii.

⁴ Prof G Samuel AC, Executive summary, *Independent Review of the EPBC Act - Final Report*, October 2020, recommendation 3.

- Ministerial discretion in the Bill and the EPBC Act is better circumscribed and linked to stronger and clearer objects provisions in the EPBC Act
 - an open standing provision enables stakeholders to challenge Ministerial decisions and decisions regarding compliance with national environmental standards, and to exempt State and Territory processes in the 'public interest' from those standards
 - the Australian National Audit Office (**ANAO**) performs the functions of the proposed Environmental Assurance Commissioner with an appropriate increase in ANAO budget funding
 - the Commonwealth Ombudsman and/or proposed Commonwealth integrity body is funded to investigate complaints concerning implementation of the EPBC Act
 - if the provisions concerning the Environmental Assurance Commissioner and reporting to the Minister are agreed, the Bill should require that the Minister to publicly respond to the Commissioner's recommendations by tabling advice, reports and government responses in the Australian Parliament within a specified timeframe
 - an independent statutory Commonwealth Environment Protection Authority (**EPA**) is established, with responsibility for administering the Commonwealth's environmental assessment and approval system, with the assessment bilaterals under the EPBC Act continuing to operate. The Commonwealth EPA should have oversight of strategic assessments and project-by-project assessments conducted by the Department rather than the proponent, at the proponents' cost, and
 - the recommendation in the Samuel review report that the Indigenous Advisory Committee's role is substantially reformed and supplemented with an Indigenous Engagement and Participation Committee that provides policy advice to the Minister on First Nations engagement and participation in decision-making under the EPBC Act has been implemented. NELA submits that this should be supported by a specific national environmental standard.
12. The nationally agreed policy and action of environmental-economic accounts also needs to be communicated widely for public education purposes.⁵
13. NELA elaborates these views in the following submissions.

NELA supports outcomes-focused national environmental standards in principle

14. In principle, NELA welcomes the prospect of the better harmonisation of environmental law and outcomes thereunder, that the proposed implementation of national environmental standards may create. However NELA is concerned that the flexible outcomes approach that is being taken, the 'public interest' exception, and the weakness of the proposed national environmental standards that have been released, may prevent more ecologically sustainable development, and effective harmonisation, from being realised.
15. NELA agrees that much more careful consideration needs to be given to the principles embodied in those standards, and to the broader reform of environmental laws and policies, given the extent of environmental decline in Australia and the breadth of

⁵ Australian Governments, 'Environmental Economic Accounting: A common national approach – Strategy and Action Plan' <<https://eea.environment.gov.au/about/national-strategy-and-action-plan>>.

Australia's international legal obligations in relation to sustainability.⁶ Enforceability is also a key issue.

16. To date the EPBC Act has not arrested a concerning decline in environmental indicators arising from land-use change, habitat loss and degradation, and feral animal and invasive plant species, with threats to sustainability increasing.⁷ Climate change is also exacerbating the risks of natural disasters, with devastating consequences for Australia's biodiversity, world heritage properties, national heritages places and wetlands of international importance.⁸
17. Scientists' concerns about the collapse of 19 ecosystems from coral reefs to territorial Antarctica are alarming, as are the findings of numerous other recent environmental assessments. Such reports highlight the need for the precautionary and non-regression principles to be applied assiduously.⁹
18. NELA endorses the technical papers that the Australian Panel of Experts on Environmental Law (APEEL) released in 2017, that recommended that the Commonwealth provide national strategic leadership in relation to environmental matters, including through national environmental standards that States and Territories would implement. APEEL suggested that national environmental standards would be developed with the engagement of scientists, legal experts, environment, industry and employer groups, Indigenous Australians and the broader Australian public with government policy-makers and regulators.¹⁰ They should include 'strategies, programs, standards and protocols and regional environmental plans comprising terrestrial, landscape-scale bio-regional plans and marine bioregional plans.'¹¹
19. A nationally agreed system of environmental-economic accounts also needs to be finalised.
20. NELA's view is that
 - There has been inadequate consultation on the proposed national environmental standards that fall short of the standards that the Samuel review report and environmental lawyers have called for,¹² and

⁶ See for example Humane Society International, 'Environment law reform fails without strong standards', 25 February 2021 <<https://hsi.org.au/newsroom/environment-law-reform-fails-without-strong-standards>>.

⁷ Prof G Samuel AC, Executive summary, *Independent Review of the EPBC Act - Interim Report*, June 2020.

⁸ Royal Commission into National Natural Disaster Arrangements, *Report*, October 2020, 354–355.

⁹ D M Bergstrom and B C Wienecke et al, 'Combating ecosystem collapse from the tropics to the Antarctic', *Glob Change Biol.* 2021, 00:1–12, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/gcb.15539>. The Samuel review report recognised the failings of current arrangements to ensure sustainable development, as have numerous other reports including the latest Australian Government *2016 State of the Environment Report (2017)* <<https://soe.environment.gov.au/>>. See also Australian Panel of Experts on Environmental Law, 'The Future of Australian Environmental Laws: Overview Paper' and Technical Paper Series, 2017 <<http://apeel.org.au/papers>>.

¹⁰ See APEEL's Technical Paper 8 on Environmental Democracy <<http://apeel.org.au/>>.

¹¹ See Australian Panel of Experts on Environmental Law (APEEL), *Blueprint for the Next Generation of Australian Environmental Law*, 4 <<http://apeel.org.au/>>.

¹² See for example, APEEL's Technical Paper, 'The Foundations of Environmental Law Paper: Goals, Objects, Principles and Norms', 2017 <http://apeel.org.au/papers> and Environment Defenders Office, 'EPBC Act reform: Can national environmental standards save our environment?', 2020 <<https://www.edo.org.au/2020/08/21/epbc-reform-national-environmental-standards/>>

- existing EPBC Act provisions are under-used and under-funded (such as regional planning and land management provisions) and other necessary reforms have not yet agreed, so it would be premature for the Senate Committee to recommend passage of this Bill.¹³

21. The Samuel review report recommended that a range of national environmental standards be established by statutory instrument – both overarching and matter specific, initially reflecting existing legal settings under the EPBC Act. Recommended future reforms would see standards evolving to deliver ecologically sustainable development more broadly.¹⁴ The Bill does propose the making of standards by legislative instrument reviewable every two years, with the first set of standards not being disallowable.

Outcomes-based national environmental standards

22. NELA supports the provisions in the Bill that focus on outcomes rather than processes as these would arguably allow for better environmental outcomes under the EPBC Act provided the standards are enforceable, and enforced effectively. In 2016 the Commonwealth released *Outcomes-based Conditions Policy* and *Outcomes-based conditions guidance*.¹⁵ Under this policy, approval conditions would need to define an outcome to be achieved by a proponent, rather than a process to be followed. Previously, actions and projects were permitted under the EPBC Act where correct processes were followed, without the need for a proponent to prove that any particular environmental outcome would be achieved.

23. A good example is a condition contained in the initial approval for capital dredging at Abbot Point. Under the approval, the proponent was required to offset the sedimentation caused by dredging and disposal of dredge spoil. Specifically, the proponent was required to offset 150% of the amount of sediments released by reducing the load of sediments entering the marine environment upstream in the Burdekin and Don catchments (referral 2011/6213). This condition focused on the action and the process, so provided that the sediment entering the water was reduced, there was no need for the proponent to prove an outcome – in this case, an actual improvement in water quality for ecosystems within the GBR region.¹⁶ Further, research showed that to offset the amount of material dredged by 150%, the proponent would have to reduce agricultural discharge by at least 5 million tonnes. The total discharge from these catchments is only 6 million tonnes so, to meet the condition, the proponent would have to effectively restore these catchments to pre-European conditions and remove all agriculture from the area. It would also cost in excess of \$1 billion.¹⁷

¹³ A more comprehensive reform process is outlined in P Burnett et al, 'Submission to the EPBC Act Review' <<https://epbcactreview.environment.gov.au/sites/default/files/2020-05/ANON-K57V-XGDG-Q%20-%20P%20Burnett.docx.pdf>>.

¹⁴ Prof G Samuel AC, above n 3, recommendations 3 and 4 and Appendix B1.

¹⁵ See <<https://www.environment.gov.au/epbc/publications/outcomes-based-conditions-policy-guidance>>.

¹⁶ Justine Bell, 'Implementing an outcomes-based approach to marine biodiversity offsets: lessons from the Great Barrier Reef' (2016) 23(3) *Australasian Journal of Environmental Management* 314–329.

¹⁷ J Brodie, 'Dredging the Great Barrier Reef: use and misuse of science', (2014) 142 *Estuarine Coastal and Shelf Science* 1–3.

24. Issues remain with project-specific approvals subject to conditions, and cumulative impacts, that a more strategic approach to regional development could address.

NELA does not support implementing a ‘one-stop-shop policy’ at this time

25. The amendments in the Bill proposed for subsection 47(2) of the EPBC Act continues the Commonwealth’s attempts since at least 2012¹⁸ to implement a ‘one-stop-shop’ for environmental approvals, and to step back from national leadership in relation to ecological sustainable development. This is a policy that the Australian Senate has not approved at least twice previously in recent years, despite the EPBC Act including some provisions for bilateral agreements concerning State and Territory approvals of controlled actions.¹⁹ Environmental law stakeholders have serious reservations about the ‘one-stop-shop’ policy.²⁰
26. Approving various State and Territory regulatory arrangements without necessary reform of State and Territory legislation and policies will likely lead to inconsistent decision-making and lesser environmental protection without any inevitable improvements in risk-abatement, efficiency or cost-effectiveness, or recognition of national interest considerations. International legal obligations that the Commonwealth bears as the national government will not necessarily be complied with. This policy also returns Australia to the inter-governmental responsibilities in place before the EPBC Act was introduced but with proposed changed oversight arrangements – when the States and Territories were primarily responsible for environmental management in their jurisdiction, leading to community protests and litigation in many jurisdictions.²¹ The EPBC Act was developed in part, to foster more ecologically sustainable development after the 1992 Earth Summit and the various multilateral environmental agreements that Australia then signed and ratified, and has done since.
27. Some jurisdictions have pursued more ecologically sustainable development than others, such as the Australian Capital Territory. This inconsistency is unsurprising in circumstances where each State and Territory jurisdiction approaches approvals based on its own state laws and policies, and the interests of the individual jurisdiction. There is a conflict inherent in a ‘one stop process’ which requires a jurisdiction to assess an application

¹⁸ L Godden, J Peel and L Caripos, ‘Commonwealth should keep final say on environment protection’, *The Conversation* <<https://theconversation.com/commonwealth-should-keep-final-say-on-environment-protection-11047>>.

¹⁹ See for example the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* (Cth), *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* (Cth).

²⁰ H Jaireth and M Figg, ‘Dispute resolution and the ‘EPBC Act bilaterals’’ (2014) 19 *Local Government Law Journal* 197–209; EDO, ‘EPBC Act reform: National environmental law reform on a knife edge’, 4 September 2020 <<https://www.edo.org.au/2020/09/04/epbc-independent-review-vs-fasttrack-bill/>>; L Cox ‘Coalition prepared transfer of environmental powers to states months before EPBC review reported’, *The Guardian*, 10 November 2020 <<https://www.theguardian.com/environment/2020/nov/10/coalition-prepared-transfer-of-environmental-powers-to-states-months-before-epbc-review-reported>>.

²¹ A Morton, ‘Changes to Australia’s environmental laws would risk return to ‘confusion’ inquiry told’, *The Guardian*, 23 November 2020 <<https://www.theguardian.com/environment/2020/nov/23/changes-to-australias-environment-laws-would-risk-return-to-confusion-inquiry-told>>.

wearing two hats – those of the state’s own interests, and the national interest.²² These interests and government policies in relation to them are not necessarily aligned and, it can be expected, have the potential to be in conflict regularly. The consequences of this conflict are heightened if there is no strong, clear overarching national environmental standards that clearly require compliance with, and are informed by, best practice implementation standards under international environmental law.

28. As discussed further below, NELA is concerned that by accrediting State and Territory regulatory arrangements and approvals for specified decisions under the EPBC Act, without having a more considered development of national environmental standards, a new intergovernmental environmental agreement engaging all levels of government, or a strong independent ‘cop on the beat’, the States and Territories will continue their inconsistent, state-focused approaches to environmental governance.
29. Bilateral agreements and declarations under [s 46](#) and several other sections of the EPBC Act provide for State and Territory management arrangements and authorisation processes to apply rather than approval under Part 9 of the EPBC Act.
30. The Bill provides that if there are one or more national environmental standards in place, such agreements and declarations will have no effect unless the Minister is satisfied that appropriate impact assessments will occur on matters specified in Part 3 of the EPBC Act (including matters of national environmental significance and matters involving the Commonwealth) and that decisions or authorisation processes taken under the agreement would be consistent with one or more of the new national environmental standards.
31. NELA notes that the Bill does not expressly specify which decisions and things must be consistent with the national environmental standards. For example, s 65B of the Bill states that certain decisions or things under this Act must not be inconsistent with a national environmental standard, not *all* decisions and things. It is unclear whether *decisions* are limited to decisions made by the Minister to enter into bilateral agreements under Chapter 3 of the EPBC Act, or whether they will also apply to decisions under Chapter 4 concerning assessments and approvals of controlled actions. NELA recommends that the Bill amend s 65H(4) to expressly prescribe which *decisions* or *things* must be consistent with the national environmental standards.
32. While s 65H refers to a person making a decision, or doing a thing under the Bill, being a decision or thing that is determined by the Minister in a legislative instrument under subsection (4), the Bill does not define ‘decision’ or ‘thing’.
33. The Bill notes the matters that the Minister may consider in order to be ‘satisfied’ that decisions or things are not inconsistent with national environmental standards, amongst others in their discretion. These include Commonwealth, State or Territory policies, plans or programs, and environmental and heritage funding.
34. The Bill requires the Minister to consult with the relevant state or territory and give appropriate written notices unless the situation is an emergency.

²² Australian Network of Environmental Defender’s Offices (ANEDO), Objections to the proposal for an environmental ‘one stop shop’, 2014 <http://d3n8a8pro7vnmx.cloudfront.net/edonsw/pages/1235/attachments/original/1387519201/131216_A_NEDO_opposition_one_stop_shop.pdf?1387519201>.

35. In NELA's view, the matters that the Minister may consider are too broad and flexible. The meaning and scope of the term 'public interest' is sometimes ambiguous in administrative²³ and environmental law. What public interest means is the subject of case law and is constantly evolving, and may not be interpreted consistently across jurisdictions. NELA is concerned that the 'public interest' exception could be interpreted to prioritise anthropogenic considerations (i.e. the welfare of the current public) rather than the need for ecologically sustainable development and to mitigate climate change, to protect the environment for its intrinsic and ecosystem values, and the welfare of future generations and ecologies.
36. It would be preferable for the public interest test in the EPBC Act to be tightly linked to an improved and clearer objects provision in that Act and to the principles of the relevant national environmental standard(s).
37. While the Samuel review report acknowledges that the Minister should have the discretion to make a decision that is inconsistent with the national environmental standards, it states that this discretion should be a rare exception.²⁴
38. The current provisions of the Bill do not provide assurance, nor are likely to engender stakeholder confidence, that decisions will be made appropriately about State or Territory government compliance with one or national environmental standards in relation to actions those governments approve that concern matters of national environmental significance.
39. NELA is also concerned that the Bill does not ensure that national environmental standards will be 'relevant to activities and decisions at all scales, including policies, plans and programs'²⁵ as suggested in the Samuel review report.
40. There is also no cross-reference to any standing provisions that enable a stakeholder to challenge a Minister's 'satisfaction' that the public interest warrants lifting the requirement for a State or Territory to comply with a national environmental standard.

Role of the Environment Assurance Commissioner

41. The Samuel review report recommended the establishment of the Environment Assurance Commissioner (**Commissioner**) as an independent statutory position to promote confidence, both from Parliament and the public, in the decisions made by approved parties and the Minister under the EPBC Act.²⁶
42. Schedule 2 of the Bill provides for the establishment of a Commissioner on a full-time or part-time basis, whose functions include:
 - monitoring or auditing (or both) the operation of bilateral agreements
 - monitoring or auditing (or both) various processes under Chapter 4 of the Bill when enacted and in operation

²³ See for example, C Wheeler, 'The public interest: we know it's important but do we know what it means', AIAL Forum No 48, 2006.

²⁴ Prof G Samuel AC, above n 3, 2.

²⁵ Prof G Samuel AC, above n 3, 53.

²⁶ Prof G Samuel AC, above n 3, 14.

- monitoring or auditing (or both) the actions taken to monitor compliance with Parts 3, 7 and 9 of the EPBC Act.

Complaint handling

43. NELA notes that the Samuel review report recommended that the Commissioner also have the function of investigating complaints, including from the public, regarding the performance of accredited arrangements or decision-makers.²⁷ However, the Bill does not provide the Commissioner with the ability to investigate complaints.
44. NELA submits that the Bill should provide the Commissioner with specific powers to investigate complaints as recommended in the Samuel review report, or this may be a role of the Commonwealth Ombudsman if the ANAO is agreed as more appropriate and expert for exercising most of the proposed Commission's functions.²⁸

Transparency and independence

45. NELA is concerned that the role of the Commissioner is insufficiently independent with transparency ensured. The Bill does not provide sufficient assurance that the Commissioner's role is independent of government and free from real or perceived political interference, as recommended in the Samuel review report.²⁹
46. While s 501R of the Bill provides that the Commissioner must not be subject to the direction of the Minister in performing its functions, it must finalise work plans for each financial year setting out their annual priorities in consultation with the Minister, whose views the Commissioner is required to consider in finalising work plans (s 501P). The Samuel review report provides that the Commissioner should have regard to the audit priorities of the Minister when identifying their priorities.³⁰
47. Further, s 501S provides that the Minister may, in writing and with reasons, request the Commissioner to perform certain functions. The Commissioner may refuse to agree to this request however.
48. The Samuel review report also recommends that the Commissioner have the ability to provide advice and recommendations to the Minister where material issues of concern are found³¹ (for example, complaints are substantiated) and that the Minister should be required to publicly respond to the Commissioner's advice and recommendations, within a reasonable time frame specified in the Act.³² However, the Bill does not contain any requirements relating to this recommendation.
49. While the Bill requires the Commissioner to give annual reports to the Minister, these reports only relate to the Commissioner's activities, rather than the performance of Commonwealth and accredited parties against national environmental standards as recommended in the Samuel review report.³³

²⁷ Prof G Samuel AC, above n 3, 141.

²⁸ Prof G Samuel AC, above n 3, 119.

²⁹ Prof G Samuel AC, above n 3, 119.

³⁰ Prof G Samuel AC, above n 3, 124.

³¹ Prof G Samuel AC, above n 3, Box 24.

³² Prof G Samuel AC, above n 3, 119, 124.

³³ Prof G Samuel AC, above n 3, 31.

50. Further, while the Bill requires the annual report to be presented to Parliament, it does not require this to be done in a prescribed timeframe as recommended in the Samuel review report.³⁴
51. NELA submits that the Bill should contain provisions that enable the Commissioner to provide advice and recommendations to the Minister and require the Minister to publicly respond to this advice and recommendations including by tabling advice, reports and government responses in the Australian Parliament within a specified timeframe.

Staffing

52. The Samuel review report recommended that the Commissioner should be supported by a standing, well-resourced audit function within the Department of Agriculture, Water and the Environment (**DAWE**). This recommendation is reflected in the Bill's provision in s 501T that the Secretary may make the services of Departmental employees available to assist the Commissioner to perform their functions.
53. NELA is concerned that there is an apparent lack of independence created by the agency support for the Commissioner whose role seems to be more like an internal audit function rather than an independent audit function. A likely effect of the creation of the Commissioner's role is that the ANAO's auditing of environmental agency matters may decrease.
54. NELA has previously suggested that the ANAO would provide a stronger independent audit and oversight function with less appearance of a compromised location and possibly compromised staff providing its funding is increased appropriately.³⁵ A position equivalent to that of the Commissioner, with the appointee highly qualified in fields of science and independent audit, could be created under amendments to the *Auditor-General Act 1997* (**Auditor General Act**), and their reports could be submitted to the Parliament rather than to the Minister, for consideration initially by the most appropriate Parliamentary Committee.
55. NELA regards the functions of the independent statutory ANAO, and the additional scrutiny work done by the Joint Committee of Public Accounts and Audit (**JCPAA**) and other parliamentary committees, as essential features of good governance in Australia. The ANAO reports to the Australian Parliament on its financial statement audits of Australian Government entities, and its performance audits of Australian Government programs and prescribed entities. The ANAO also produces publications and other communications, makes submissions to Parliament and corresponds with numerous entities. The ANAO's audit recommendations focus on economy, efficiency, effectiveness, ethicality, and statutory and policy compliance. Such independent scrutiny enhances public sector integrity, transparency and accountability, and contributes to better public sector performance.³⁶

³⁴ Prof G Samuel AC, above n 3, 31.

³⁵ NELA, [Submission to the Parliamentary Joint Committee of Public Accounts and Audit's review of the Auditor-General Act 1997 \(Cth\)](#) and later oral submissions in a public hearing.

³⁶ Australian Government, Australian National Audit Office (hereafter ANAO), *Auditor-General's mid-term report, 2020, 2* and *ANAO Corporate Plan 2020–21*.

56. In recent years the ANAO has conducted several performance audits that are relevant to the portfolio primarily responsible for federal environmental matters.³⁷ As noted below, in response to the recommendations in those reports, programs were developed to strengthen the environmental agency's regulatory compliance framework and capabilities. Progress was not to the standard that the ANAO expected however.³⁸ In 2019–20 the ANAO issued a very critical report on the implementation of the EPBC Act.³⁹
57. The ANAO has also reported that the delivery of services to Indigenous Australians, along with regulatory activity, procurement and cyber security, is a governance area with the highest number of negative audit conclusions in recent years.⁴⁰ NELA regards recognition of the central role that Indigenous Australians can and should play in managing country in Australia, including natural and cultural heritage, as an ongoing challenge to good governance in Australia.
58. The value of independent monitoring, audit and compliance assessment in relation to the EPBC Act has been recognised in the two 10-yearly reviews of the EPBC Act, and ANAO reports. Professor Graeme Samuel AC's Interim Report on the EPBC Act invited feedback on a proposal to include independent monitoring, reporting and assurance of compliance with national environmental standards.⁴¹
59. The 2009 Hawke review of the EPBC Act made numerous recommendations about the need for performance audit and oversight of the implementation of various sections of the EPBC Act.⁴² Those recommendations, and a very critical ANAO audit report in 2014, saw some strengthening of the environment department's regulatory capability and compliance activities, with various compliance policy documents developed, including a framework, a plan, a policy and independent audit and audit report guidelines.⁴³
60. NELA considers that a strong and effective independent monitoring, compliance and audit capability for development assessment and approval, and the implementation of other

³⁷ ANAO, *Management of Commonwealth National Parks* (2019), ANAO, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*, ANAO Report No. 43 2013–14 (2014), ANAO, *Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999*, ANAO Audit Report No 7 2015–16 (2016); ANAO, *Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on Audit: Report No 36 of 2016–17*. See also: ANAO, *Government Advertising: June 2015 to April 2019: Report No. 7 of 2019–20* (2019); *Commonwealth Resource Management and the Clear Read Principle: Report No. 14 of 2019–20* (2019); ANAO, *Probity Management in Rural Research and Development Corporations: No. 21 of 2019–20* (2019); ANAO, *Bilateral Agreement Arrangements Between Services Australia and Other Entities: No. 30 of 2019–20* (2020); ANAO, *Design and Establishment of the Regional Investment Corporation: No. 41 of 2019–20* (2020).

³⁸ ANAO, *Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit*, above n 37.

³⁹ ANAO, *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999: Report No. 47 of 2019–20* (2020)

⁴⁰ ANAO, *Auditor-General's mid-term report*, above n 36, 3–4 (online pagination).

⁴¹ G Samuel AC, *Independent Review of the EPBC Act – Interim Report*, June 2020, 15, 56–7, 81.

⁴² Australian Government, Department of the Environment, Heritage and the Arts, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Dr Allan Hawke AC: Chair, 2009). See for example recommendations 4, 6, 24, 38, 44.

⁴³ Australian Government, Department of Agriculture, Water and the Environment, 'Compliance auditing' <https://www.environment.gov.au/epbc/compliance-and-enforcement/auditing>

domestic and international environmental responsibilities is essential to good governance whether or not national environmental standards are devolved to the States and Territories.

61. Various sections of the Auditor-General Act provide for the statutory independence of the ANAO. The Auditor-General is an officer of the Parliament, has a fixed term appointment of ten years, and can only be removed by the Governor-General at the request of both Houses of Parliament.
62. Independent audits of compliance and enforcement should be undertaken by a specialist section within the ANAO that supports the proposed Commissioner. NELA considers that consistent with the principle of ANAO independence, the ANAO should have discretion as to how it conducts its audit of national environmental legislation, but the Auditor-General Act should be amended to give the ANAO that responsibility, with its funding increased commensurate with that significant responsibility.
63. If the ANAO role is not agreed, NELA recommends that the Committee consider the role and functions of New Zealand's Parliamentary Commissioner for the Environment as a possibly better model to follow.

Clarification of statutory powers needed

64. NELA is also concerned that the Commissioner lacks the statutory powers to give effect to their role.
65. The Bill broadly provides the Commissioner with the power to audit processes under the EPBC Act but does not specify that this includes the power to oversee audits and conduct performance audits as recommended in the Samuel review report.⁴⁴ The Bill also does not distinguish between different types of audit that the Commissioner could undertake, such as recurring audits and special audits.
66. The Samuel review report recommends that the Commissioner should have the ability to audit all arrangements made under the EPBC Act, regardless of jurisdiction or decision-maker.⁴⁵ However, while the Bill provides the Commissioner with a broad range of powers to audit decision-making processes under the EPBC Act as a whole, s 501C(3) provides that the Commissioner is not permitted to monitor or audit a single decision.
67. The Commissioner has powers to request assistance but does not have powers to compel the provision of information, documents, or answers to questions, conduct interviews or access premises as recommended in the Samuel review report. There may be constitutional limitations here in relation to investigating State and Territory government processes in the absence of an incentive-based agreement amongst the States, Territories and the Commonwealth.⁴⁶
68. NELA submits that the power to audit and report on single decisions is crucial to the Commissioner's ability to effectively audit decision-making processes under the EPBC Act. This ability would also form the basis of any power to investigate complaints regarding the performance of decision-makers discussed above. Without the power to monitor or

⁴⁴ Prof G Samuel AC, above n 3, recommendation 23, 120–122, 125.

⁴⁵ Prof G Samuel AC, above n 3, 124.

⁴⁶ Prof G Samuel AC, above n 3, 124.

audit single decisions, the Commissioner is likely to become closer to an advisory body rather than a key oversight and audit body as the Samuel review report recommends.⁴⁷

Need for a Commonwealth Environment Protection Authority (EPA)

69. NELA further recommends that an independent statutory Commonwealth Environment Protection Authority (EPA) be established, with responsibility for administering the Commonwealth's environmental assessment and approval system, with the assessment bilaterals under the EPBC Act continuing to operate.
70. The Commonwealth EPA should also be responsible for ensuring appropriate enforcement and compliance under the Act – a function that the Commissioner would audit in accordance with their annual work plan.
71. As well as assessment and approval powers, the Commonwealth EPA should also be tasked with overseeing compliance and enforcement of the EPBC Act, with appropriate investigative powers akin to those in the NSW *Protection of the Environment Operations Act 1997* and the *Environmental Planning and Assessment Act 1979*. Such oversight would be subject to ANAO audits.
72. There are egregious examples of non-compliance with procedures under the EPBC Act. The exercise of governance responsibilities for native forest industries by the States and Territories for example, has been accompanied by instances of inadequate compliance, recently confirmed by the Federal Court of Australia,⁴⁸ and the five-yearly reviews of Regional Forest Agreements have been either not been done or completed late.⁴⁹

Greater First Nations Involvement in Decision-making

73. The Indigenous Advisory Committee's current role under the EPBC Act is limited to providing advice to the Minister.
74. NELA supports the recommendation in the Samuel review report that the Indigenous Advisory Committee's role be substantially reformed and supplemented with an Indigenous Engagement and Participation Committee that provides policy advice to the Minister on First Nations engagement and participation in decision-making under the EPBC Act.⁵⁰
75. NELA submits that this should be supported by a specific national environmental standard.

⁴⁷ Prof G Samuel AC, above n 3, 14.

⁴⁸ Justice Mortimer in *Friends of Leadbeater 's Possum Inc v VicForests* (No 4) [2020] FCA 704 at [943]–[949] found that logging operations in certain areas of forest in Victoria's Central Highlands breached the applicable Regional Forest Agreement by failing to comply with the Victorian Code of Practice for Timber Production, resulting in the abrogation of an exemption under the EPBC Act. The Commonwealth has since proposed to restore the statutory status quo ante across Australia through the *Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020* (Cth).

⁴⁹ Tasmania completed the mandatory reviews, but the Commonwealth and NSW rolled NSW's second and third reviews into one: New South Wales and Australian Governments 2017, <<https://www.epa.nsw.gov.au/your-environment/native-forestry/about-public-native-forestry/regional-forest-agreements-assessments/review-regional-forest-agreements>>.

⁵⁰ Prof G Samuel AC, above n 3, 7.