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Submission on the *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021*

The World Wide Fund for Nature-Australia (WWF-Australia) welcomes the opportunity to contribute to the inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021* (the Bill).

WWF-Australia was deeply engaged in the development of the *Environment Protection and Biodiversity Conservation Act 1999* (the Act), and we contributed constructively to both 10-year independent statutory reviews of the Act (Hawke and Samuel Reviews). We have contributed constructively to the Samuel Review, both in our own right and as a member of the Places You Love Alliance. We participated in the Consultative Group established by Professor Samuel to address areas identified in the Interim Report and have actively engaged with the Government and a range of business and industry stakeholders to explore opportunities for comprehensive and durable reform to the Act. We do so in the interests of advancing the restoration and protection of Australia's unique environment, heritage and biodiversity.

As our views on Schedule 1 – National Environmental Standards – are represented in the separate submission from the Places You Love Alliance, this submission will primarily focus on the second part of the Bill – Schedule 2 Environment Assurance Commissioner.

The Independent Review of the Act

The Bill seeks to address two key recommendations of the Samuel Review relating to National Environmental Standards and strong independent oversight of environmental assessment and approval systems. The Bill would amend the Act to establish a framework for the making, varying, revoking and application of National Environmental Standards and to establish an Environmental Assurance Commissioner.

Both recommendations are fundamental to the highly interconnected package of reform measures recommended in the Final Report of the Independent Review. The centrepiece of this reform package is binding, outcomes based, National Environmental Standards to drive measurable and mandated improvements in the health of the natural and cultural environment and to promote a more efficient system. As stated in the Final Report, successful reform requires that:

National Environmental Standards should be a set of binding and enforceable Regulations. They should be one set of rules that apply nationwide” and that “Legally enforceable National Environmental Standards would prescribe clear outcomes, and an

accredited State or Territory would need to demonstrate that they are adhering to the Standards in their decision-making.

Along with overarching standards for sustainably managing Matters of National Environmental Significance, Professor Samuel recommended a set of detailed standards to cover Indigenous engagement, compliance and enforcement, and data and information; and nine matter specific standards for: world heritage, national heritage, Ramsar wetlands, Threatened Species & Ecological communities, Migratory species, Commonwealth Marine Environment, the Great Barrier Reef Marine Park, Protection of the environment from nuclear actions, and protection of water resources from coal seam gas development and large coal mining development.

In contrast, the Government's proposed 'standards' reproduce the existing provisions of the Act which have contributed towards Australia's natural environment being on an unsustainable trajectory. These offer no new guidance to change this trajectory and will not mitigate any of the risks posed by devolving approval decisions for Matters of National Environmental Significance to states, territories and local governments. The Government has also not included the Samuel standards for Indigenous engagement, compliance and enforcement, and data and information in their version.

An Environmental Assurance Commissioner is the other recommendation the Bill seeks to address. The Final Report is unequivocal that the National Environmental Standards must be supported by a package of other reforms, in particular strong, independent compliance and enforcement. Professor Samuel recommends three independent statutory bodies be established - an Ecologically Sustainable Development (ESD) Committee, the Environment Assurance Commissioner (Commissioner) and an Office of Compliance and Enforcement.

The ESD Committee would provide transparent policy advice to the Minister on ESD status and trends as they relate to the standards. The Commissioner would perform a monitoring, audit and reporting role for those bodies accredited under the Act. For the third element, Professor Samuel recommends independent powers be given to the Secretary of the Environment Department for compliance and enforcement who would be responsible for the Office of Compliance and Enforcement. This Office would perform a surveillance, compliance and enforcement role. In addition, the Final Report recommends that there should be a National Environmental Standard for Compliance and Enforcement and that the Commonwealth should also be required to meet this Standard. The independent Office of Compliance and Enforcement would report its adherence to this Standard to the Commissioner and be subject to audits by the Commissioner.

Overall the Final Report of the Independent Review contains much that WWF-Australia agrees with and we have welcomed it. The Final Report provides an important benchmark for effective and durable reform of the Act. Where we disagree is with the proposed regulatory model. Professor Samuel clearly states the problems with the existing situation:

Surveillance, compliance and enforcement under the EPBC Act is ineffective. There has been limited enforcement of the Act over the 20 years it has been in effect, and the transparency of what has been done is also limited.

Taking this a step further, the problem to be remedied is the failure of governments to ensure that the Department of Agriculture, Water and the Environment properly administers the Act.

This problem has been identified in numerous Parliamentary,¹ Australian National Audit Office,² and Productivity Commission³ reports, by the Australian Panel of Experts on Environmental Law,⁴ and most recently by the Samuel Review.⁵

In addition, the NSW Independent Commission Against Corruption has identified development processes and lobbying by regulated interests as major corruption risks in NSW.⁶ The Australian Public Service Commission has acknowledged that “the Australian Government faces corruption risks, particularly in the regulatory and law enforcement fields, [however] due to the nature of functions performed by state public services (for example, land planning approvals and mining licences) state activities are often inherently more susceptible to corruption.”⁷ The routine environmental regulatory functions of the Commonwealth, particularly those under the Act, involve activities that determine whether “land planning approvals and mining licences” are granted or not. The Commonwealth faces identical corruption risks as State and Territory governments do in this respect.

Under the model Professor Samuel outlines, all three bodies he recommends are still located within the Department so are not structurally or institutionally independent. Although the Final Report notes the need for institutional arrangements that “should ensure sufficient independence from the Commonwealth Environment Minister”, it still recommends arrangements that are not truly institutionally independent. The Final Report states that although:

Lack of trust is an underlying driver behind calls for independent authorities or commissions to make decisions. This solution is not supported by the Review. It is entirely appropriate that elected representatives (and their delegates) make decisions that require competing values to be weighed and competing national objectives to be balanced.

We disagree and contend that the evidence of governmental failure is overwhelming. Although his recommendations are heading in the right direction, the problems with the implementation of the Act will not be remedied through Professor Samuel’s regulatory model.

¹ Commonwealth of Australia (2009), Senate Standing Committee on Environment, Communications and the Arts, [The operation of the Environment Protection and Biodiversity Conservation Act 1999, First Report](#) (see for example, Recommendation 4 *The committee recommends that the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, complaint investigation, compliance, auditing of projects approved under Part 3, and enforcement action*).

² Auditor-General Report No 38 2002-03, [Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999](#); Auditor-General Report No 31 2006-07, [The Conservation and Protection of National Threatened Species and Ecological Communities](#); Auditor-General Report No. 43 2013–14, [Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval](#); Auditor-General Report No. 7 2015–16, [Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999](#); Auditor-General Report No. 36 2016–17, [Monitoring compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit](#); Auditor-General Report No. 47 2019–20 [Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999](#).

³ Productivity Commission 2013, [Major Project Development Assessment Processes, Research Report](#), Canberra.

⁴ Australian Panel of Experts on Environmental Law (2017), [Blueprint for the Next Generation of Australian Environmental Law](#). See also Australian Panel of Experts on Environmental Law (2017), [Environmental Governance \(Technical Paper 2\)](#).

⁵ Samuel, G 2020, [Independent Review of the EPBC Act – Final Report](#), Department of Agriculture, Water and the Environment, Canberra, October CC BY 4.0. See also Samuel, G 2020, [Independent Review of the EPBC Act—Interim Report](#), Department of Agriculture, Water and the Environment, Canberra, June. CC BY 4.0.

⁶ Independent Commission Against Corruption (2007), [Corruption risks in NSW development approval processes](#); Independent Commission Against Corruption (2007), [Investigation into the corruption risks involved in lobbying](#).

⁷ Australian Public Service Commission (website), [Managing corruption risks in the APS](#).

The Bill – Schedule 2

As noted, and despite Professor Samuel’s specific caution in the Final Report that “(g)overnments should avoid the temptation to cherry pick from a highly interconnected suite of recommendations”, the Bill seeks to establish only one part of the Independent Review’s proposed regulatory model, the Commissioner. As it is not explicit in the Explanatory Memorandum or the Minister’s Second Reading Speech, we can only speculate as to the reasons why the Government has chosen only the Commissioner element of Professor Samuel’s regulatory model.

The provisions in Schedule 2 establish the role of Commissioner with a degree of independence and general audit functions focused primarily on the implementation of bilateral agreements with the states and territories. When compared to the ‘strong cop on the beat’ recommended in the Interim Report of the Independent Review or the full regulatory model recommended in the Final Report this is a very weak model, and a long way from an independent Environment Protection Authority model called for by WWF-Australia, the Places You Love Alliance and a range of other stakeholders.

As drafted the Commissioner’s audit powers are not comprehensive. The States and Territories would be primarily responsible for ensuring actual compliance with, and enforcement of, national environment standards. There is no National Environmental Standard for Compliance and Enforcement proposed in association with this Bill, despite the Final Report stipulating this as critical to ensure a consistent approach to implementing standards and a pre-condition to any accredited arrangements.

Key concerns with Schedule 2 of the Bill include:

- a. The Commissioner does not have a compliance and enforcement role. Enforcement of standards will be a matter for states and territories and the Commissioner is limited to monitoring their compliance monitoring processes. The Commissioner can only monitor and/or audit actions taken to monitor compliance with Parts 3, 7 and 9.
- b. The Commissioner cannot monitor or audit individual decisions – just “generally” audit and/or monitor. The Commissioner would not be able to respond to issues as they arise and would need to wait for a pattern of inconsistency or non-compliance before being able to audit or monitor projects.
- c. There is no requirement for the Minister to publicly respond to audit reports.
- d. Although the Commissioner is given powers to request information or documents or ask questions of a person to assist in the carrying out of its functions, there is no detail on what happens if a person refuses to comply with a request. If there is no power to compel production of relevant information, this has the potential to further limit audit functions.
- e. The process for developing annual work plans provides a clear and active role for the Minister to input and shape annual work plans. The Commissioner must have regard to the Minister’s written ‘statement of expectations’ when preparing a work plan identifying priorities for the year. The Minister is to respond to the work plan by agreeing or requesting changes in writing, with reasons.
- f. The annual work plan requirements potentially prevent the Commissioner doing an unscheduled audit in response to non-compliance – it is not explicit in the Bill if the Commissioner would need to make a variation to a work plan in order to divert resources to an unplanned audit.

- g. Apart from the annual work plan and requests from the Minister, there is no reference to third parties being able to refer concerns to the Commissioner. Therefore it is not clear who can refer complaints to the Commissioner; and it is unclear what action would result from Commissioner audits.
- h. Although there is a provision – 501R – that the Commissioner is not subject to directions by the Minister, the provisions in Division 4 relating to work plans contradicts this. The Minister has a close involvement in the annual work plan process and in practice, it is unlikely that the Commissioner will make plans inconsistent with Ministerial expectations. This, in addition to the limitation on examining individual decisions, has the potential to unduly constrain the ability of the Commissioner to be responsive in auditing issues as they arise.
- i. s.501S enables the Minister to request in writing the Commissioner perform specific functions. Whilst the Commissioner may refuse the request, there is a danger of this process being politicised and impacting on the independence of the Commissioner. How this provision operates in practice will be highly dependent on the personality of the appointed Commissioner.
- j. Although independent in law, the Commissioner will also have a close relationship and dependency on the Department that is subject to Ministerial direction. s.501T states that the Departmental Secretary “may make department staff available” to assist the Commissioner. To ensure actual independence of the Commissioner, these staff would need to be answerable to the Commissioner and not the Secretary – a distinction the Bill does not make explicit.
- k. s. 501V appears to give the option that the Annual Report of Commissioner activities can be given to the Minister *or* be part of the overall Departmental annual report for the year. The second option raises questions about the true operational independence of the Commissioner.
- l. s. 501W provides that the Commissioner may delegate all or any functions or powers to the Secretary or Departmental staff, apart from finalising annual plans, responding to Ministerial requests and annual reporting. This potentially blurs the line between an independent Commissioner and the Department.
- m. s.501U provides that the Commissioner may disclose information and documents to the Minister, Secretary, Departmental staff, specific committees, or other people as defined in regulations, but is not clear if this would include bodies such as the Audit Office.
- n. The Financial Impact Statement estimates the cost of the Commissioner to the Commonwealth of “no more than \$9 million over the next four years”. At Additional Budget Estimates on 22 March 2021, the Department was unclear as to the number of staff to be allocated to the Commissioner, whether the funding sought would be sufficient and if it was guaranteed; and whether the greater cost burden would sit with the States and Territories under the bilateral agreements.

It is WWF-Australia’s view that the Bill will result in a watered-down Assurance Commissioner who will not have the necessary independence, powers and resources to perform his or her duties to scrutinise both the actions of the Commonwealth or any agreements reached with State and Territory Governments. It is clear that the focus of the Bill is to facilitate devolution – i.e. to have the bare minimum of standards and a nominal assurance Commissioner in place – in order to justify handing over approval powers under the current framework.

An independent Commonwealth Environment Protection Authority

Given this, it is WWF-Australia's position that an independent Commonwealth Environment Protection Authority should be established instead. The Interim Report of the Independent Review proposed that:

A strong, independent cop on the beat is required. An independent compliance and enforcement regulator, that is not subject to actual or implied political direction from the Commonwealth Minister, should be established. The regulator should be responsible for monitoring compliance, enforcement and assurance. It should be properly resourced and have available to it a full toolkit of powers.⁸

The Final Report weakened this proposal by instead recommending that an Office of Compliance and Enforcement be created within the Department of Agriculture, Water and the Environment, reporting to the Secretary, which was purportedly independent of Ministerial direction (Recommendation 30). In practice, this recommendation will result in compliance and enforcement continuing to be subject to political direction by the Minister through the Secretary. The Secretary of a Commonwealth department is one of the most politicised positions within the Australian Public Service and beholden to the directives of the government of the day. The concept that an individual could be a truly independent statutory office holder, whilst also being the head of a government department, may sound good in theory, but will be highly problematic in practice. Having this office within the department and headed by the Secretary does not provide the institutional independence needed to build the community confidence and trust in the Act and the associated regulatory system.

WWF-Australia supports the model proposed in the *Commonwealth Environment Protection Authority Bill 2021* introduced into the House of Representatives by the Member for Clark, Andrew Wilkie, on 22 March 2021⁹. The Wilkie Bill addresses the weaknesses in both the Samuel regulatory model and the Government's Standards and Assurance Bill as well as the broader issue of governmental failure in environmental regulation by providing for the establishment of an independent statutory authority. It inserts a new Chapter 4A into the Act to constitute and make provision for a Commonwealth Environment Protection Authority that will:

- i) Exercise the functions of the Environment Assurance Commissioner proposed by the Independent Review (Recommendations 14, 23, and 24);
- ii) Exercise the functions of the Office of Compliance and Enforcement (Recommendation 30);
- iii) Exercise other routine administrative environmental regulatory functions under the *EPBC Act*, namely referral or application, assessment, approval/granting of permits, monitoring, and compliance.

The Wilkie Bill will help address the corruption risks referred to above by separating policymakers and the exercise of the routine environmental regulatory functions of the Commonwealth.

⁸ Samuel, G 2020, [Independent Review of the EPBC Act—Interim Report](#), Department of Agriculture, Water and the Environment, Canberra, June. CC BY 4.0, [Chapter 9 - Compliance, enforcement and assurance](#).

⁹ Commonwealth Environment Protection Bill 2021.

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6691

With variations, this is a strategy successfully adopted in a variety of similarly contentious regulatory contexts, including audit of government finance and performance (Australian National Audit Office), charities (Australian Charities and Not-for-profits Commission), communications and media (Australian Communications and Media Authority), competition and consumer protection (Australian Competition and Consumer Commission), crime (Commonwealth Director of Public Prosecutions), securities and investments (Australian Securities and Investments Commission), and the Reserve Bank of Australia.

Given the above, it is our view that the Government's Standards and Assurance Bill represents yet another attempt to cherry-pick one part of the Independent Review findings without consideration for more integrated reform that would address the rapidly declining state of Australia's natural environment and the views of all stakeholders. The Committee once again has an opportunity to look more deeply at the problems with the Act, its effectiveness and operation, and to seek a full Government Response to Professor Samuel's Final Report and enable a transparent process of consultation with all stakeholders on his findings and comprehensive reform of the Act. Failure to do this will result in the weakening of environment laws and further species extinctions.

Recommendations

WWF-Australia submits:

1. That the Committee recommend that the Bill not proceed.
2. That the Committee recommend that an independent Commonwealth Environment Protection Authority, modelled on the *Commonwealth Environment Protection Authority Bill 2021*, be considered to ensure strong, independent compliance and enforcement.
3. That the Committee recommend that the Government provide its Response to the Independent Review's Final Report and that a public consultation process for considering both the Final Report and Government Response should be established.
4. That the Committee recommend the Government provide a timeline to address the findings of the Independent Review, including assurances that the process will be rigorous and would include the types of preconditions that would need to be in place for negotiation with States and Territories to commence.
5. That the Committee recommend that a comprehensive package of reforms to the Act be introduced and considered by Parliament together, including a full suite of strong legally enforceable National Environmental Standards based on the Standards recommended in the Final Report; an independent regulator modelled on the *Commonwealth Environment Protection Authority Bill 2021* for compliance and enforcement; and robust accountability and transparency requirements.

Should the Committee consider accepting proposed amendments to the Bill, WWF-Australia submits that Schedule 2 should be strengthened by:

1. Deleting ss. 501C(3) – i.e. the limit on monitoring and auditing individual decisions and actions.
2. Clarifying powers to compel production of information.
3. Requiring the Minister to publicly respond to audit reports.
4. Clarifying that any person can refer a complaint to the Commissioner.

5. Requiring a mandatory compliance and enforcement Standard be developed as a precondition to any accreditation or devolution.