WENTWORTH GROUP
OF CONCERNED SCIENTISTS

Dr Emma Carmody, Mr Peter Cosier AM, Prof Tim Flannery FAA, Mr Mike Grundy, Dr Terry Hillman AM,
Prof Lesley Hughes, Prof David Karoly FAA, Prof Richard Kingsford, Prof Martine Maron, Prof Jamie Pittock,
Mr Robert Purves AM, Prof Fran Sheldon, Ms Anna Skarbek, Prof Bruce Thom AM, Mr Martijn Wilder AM.

SUBMISSION TO THE INQUIRY INTO THE *ENVIRONMENT PROTECTION & BIODIVERSITY CONSERVATION AMENDMENT (STANDARDS & ASSURANCE) BILL 2021*

The Wentworth Group welcomes the opportunity to provide a submission to the Senate inquiry into the *Environment Protection & Biodiversity Conservation Amendment (Standards & Assurance) Bill 2021*. Established in 2002, the Wentworth Group is an independent group of Australian scientists, economists and business people with a long standing interest in the conservation of Australia's land, water and marine resources. The Wentworth Group has built a national reputation for advising communities, businesses and governments of all political persuasions on national reforms for the long term conservation and sustainable use of Australia's natural resources.

Reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) offer an opportunity to bend back the curve of biodiversity decline in Australia, while simultaneously simplifying and streamlining assessment and approval processes for business. The recommendations in our 2020 submission to the EPBC Act review describe the suite of reforms that in our view are needed to effectively deliver the objectives of the Act (see attached).

In January this year, the *Final Report of the Independent Review of the Environment Protection & Biodiversity Conservation Act 1999* by Professor Graeme Samuel was released. We endorse the recommendations of this report. Importantly, Prof Samuel stated "the full suite of National Environmental Standards recommended should be implemented immediately. The Standards developed in detail by the Review should be accepted in full, and other necessary Standards should be developed and implemented without delay."

In August 2020, the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals)* Bill 2020 was introduced to Parliament. The Wentworth Group did not support this Bill because it did nothing to improve the protection and conservation of matters of national environmental significance, and evidence suggested it could weaken existing protections. The Bill was referred to the Senate Standing Committee on Environment and Communications. Our submission to the Inquiry is attached.

The *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021* has now been introduced to Parliament. This Bill provides the powers to make legally enforceable national environmental standards and to establish an Environmental Assurance Commissioner. These were important pillars of the reform package proposed by Prof Samuel.

While this Bill is an important step forward, we have three outstanding concerns:

1. The Bill fails to prescribe clear requirements for the quality and application of national environmental standards. Consequently, it is impossible to guarantee that States and Territories would protect matters of national environmental significance in the national interest or that the poor environmental outcomes currently occurring under the EPBC Act would be addressed.
2. The Environmental Assurance Commissioner does not have sufficient powers or resources to undertake independent compliance and enforcement of Commonwealth, states and territories.

Suite 4, 3B Macquarie Street, Sydney NSW Australia 2000
Telephone: +61 2 9251 3811 Email: information@wentworthgroup.org ACN 128 963 431

3. There is no public commitment that all the urgent reforms identified by the final Report will be implemented to deliver comprehensive improvement to the Act.

In light of these concerns, we suggest that the Committee recommends that the Senate oppose the Bill unless the following is in place:

1. A requirement that national environmental standards must be developed for all MNES in a scientific, evidence-based manner by appropriate experts, and a requirement that national environmental standards must be consistent with the objectives of the EPBC Act, including:
    a. 'Maintain or enhance' the absolute outcomes for all matters of national environmental significance; and
    b. Address cumulative impacts, at all scales (e.g. national, state, regional and individual project levels).
2. An Environmental Assurance Commissioner who holds adequate powers and resources to provide effective and independent assurance and compliance with the national environmental standards, by:
    a. Removing the limit on monitoring and auditing individual decisions and actions;
    b. Clarifying powers to compel production of information;
    c. Requiring the Minister to respond publicly to audit reports;
    d. Clarifying that any person can refer a complaint to the EAC;
    e. Requiring a mandatory compliance and enforcement standard be developed as a precondition to any accreditation or devolution; and
    f. Ensuring adequate funding for effective operation.
3. Legislation should be drafted incorporating all the elements recommended by the Final Report for immediate reforms, and a comprehensive legislative package should be presented to the Parliament.

Key issues and recommendations

1. **The Bill fails to prescribe clear requirements for the quality and application of national environmental standards. Consequently, it is impossible to guarantee that States and Territories protect matters of national environmental significance in the national interest or that the poor environmental outcomes currently occurring under the EPBC Act would be addressed.**

The Bill does not require states and territories to sign on to standards that are consistent with the requirements of the EPBC Act. Instead, the Bill uses weak clauses such as ‘not inconsistent with’ (e.g. ss46(3)(a), 47(2) and 48A(3)) and discretionary terms such as the Minister “may” not make standards (e.g. s65C(1)). This is inconsistent with Prof Samuel’s recommendations that “The full suite of National Environmental Standards recommended by the Review (Appendix B) should be adopted in full and immediately implemented.”

Further, the standards do not include key recommendations made by Prof Samuel to (1) 'maintain or enhance' the absolute outcomes for all matters of national environmental significance; and (2) prevent cumulative impacts, at all scales (e.g. national, state, regional and individual project levels) in the Overarching MNES Standard 1(e). Without this requirement, Prof Samuel stated that “the overall result for the nation is net environmental decline, rather than protection and conservation.”

The interim national standards obtained by the Sydney Morning Herald[1] fall alamingly short of any acceptable standard, including the standards proposed by Prof Samuel in his final report, underlining the need for strong requirements for the quality, application and outcomes focus of standards to be specified in the Bill. If the first set of standards fall short of what is required, the Bill prevents those standards from being disallowed by Parliament, leaving the potential for poor standards to be locked in, undermining the effectiveness of the Act.

Recommendation: We recommend that the Bill includes a requirement that national environmental standards must be developed for all MNES in a scientific, evidence-based manner by appropriate experts, and a requirement that national environmental standards must be consistent with the objectives of the EPBC Act, including requirements that they:

a. 'Maintain or enhance' the absolute outcomes for all matters of national environmental significance; and
b. Prevent cumulative impacts, at all scales (e.g. national, state, regional and individual project levels).

2. **The Environmental Assurance Commissioner does not have sufficient powers or resources to undertake independent compliance and enforcement of Commonwealth, states and territories.**

The Australian Parliament and the public need confidence that the Commonwealth, states and territories are abiding by legislation and are making lawful decisions and properly implementing their commitments. This is particularly important in a devolution model where inherent conflicts of interest exist.

We welcome oversight by a Commissioner. As proposed, the Commissioner has a degree of independence and general audit functions focused primarily on bilateral agreement implementation. However, the proposed audit powers are not comprehensive and state that the Commissioner can only audit and/or monitor "generally" – they cannot monitor/audit individual decisions. The annual work plan approach potentially prevents the Commissioner from performing an unscheduled audit in response to non-compliance. There is a blurred line between the Commissioner and the Department in terms of operational work. Finally, it is not clear who can refer complaints to the Commissioner, and importantly, it is unclear what action would result from Commissioner's audits, should unsatisfactory processes or outcomes be identified.

There is no national 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. Adequate funding for this function is also essential, however, we are not aware of any funding commitments which have been specified for this role.

Recommendation: We recommend the role of the Environmental Assurance Commissioner is amended to hold adequate powers and resources to provide effective and independent assurance and compliance with the national environmental standards. This requires:

a. Removing the limit on monitoring and auditing individual decisions and actions;
b. Clarifying powers to compel production of information;
c. Requiring the Minister to publicly respond to audit reports;
d. Clarifying that any person can refer a complaint to the EAC;

[1]Available online at www.smh.com.au/environment/conservation/proposed-environment-standards-fall-far-short-of-recommendations-20210211-p571k5.html

e. Requiring a mandatory compliance and enforcement standard be developed as a precondition to any accreditation or devolution; and
f. Ensuring adequate funding for effective operation.

3. **There is no public commitment that all the urgent reforms identified by the final report will be implemented to deliver comprehensive improvement to the Act.**

Prof Samuel's final report emphasised that "governments should avoid the temptation to cherry pick from a highly interconnected suite of recommendations." Yet the Government has provided no formal response to the Samuel review outlining their intent to deliver on the recommendations of the report and address the fundamental shortcomings of the EPBC Act and its implementation. Instead, the Government response, based on the Bills presented to Parliament so far, does indeed cherry pick the recommendations from the report, and falls far short of what Prof Samuels recommended for "immediate" implementation in his final report (see Table 1).

Table 1. Summary of the elements of the Final report, and the Government response based on the Bills presented to date (based on EDO, 2021).

Final Report – Tranche 1 elements for immediate implementation	**Government Response based on the Bills**
TRANCHE 1	
Implement the full suite of Standards under a new head of power.	The Government has proposed standards that reflect existing weak processes under the Act only. There are critical standards missing.
Establish Environment Assurance Commissioner.	The Standards & Assurance Bill establishes an EAC, but with limits on their powers to audit individual decisions and operational independence.
Recast statutory committees and establish Ecologically Sustainable Development Committee.	Not in Bill.
Establish strong, independent Commonwealth compliance and enforcement.	Not in Bill or otherwise established yet.
Instigate priority Indigenous-specific reforms, including putting in place a Standard.	Not in Bill.
Build stable State and Territory bilateral agreements.	Streamlining Environmental Approvals Bill focusses on this, but stability undermined by lack of resourcing or supporting improvements to the operation of the Act.
Make repairs for known inconsistencies, gaps and conflicts in the EPBC Act.	Streamlining Environmental Approvals Bill focusses on this where relevant to devolving powers only.
Examine the feasibility of mechanisms to leverage private sector investment.	Not in Bill or otherwise addressed.
Revise the offsets policy.	Not in Bill or policy amendment.

As such, the reforms proposed will not contribute to addressing the currently very poor national environmental outcomes and instead will pave the way for the devolution of Commonwealth development and assessment approvals to states and territories without adequate standards for assessment. Prof Samuel foresaw this when he stated in his final report “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.”

Recommendation: Legislation should be drafted incorporating all the elements recommended by the Final Report for immediate reforms, and a comprehensive legislative package should be presented to the Parliament.