Senate Standing Committees on Communications and the Environment

Inquiry: Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

Submission by Dr Peter Burnett, ANU College of Law

About the Submission Author

Dr Peter Burnett is an Honorary Associate Professor at the Australian National University College of Law. He is a former long-serving senior executive with the Federal Environment Department, where was responsible for the administration and reform of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) between 2007 and 2012. Dr Burnett's subsequent research has focused on national frameworks for environmental law and policy in Australia, including those associated with the EPBC Act. He was a member of the advisory group established by Professor Samuel in the latter part of his Independent Review of the EPBC Act.

Summary of Submission

- The *Independent Review of the EPBC Act* found that Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat
- This review also found that the EPBC Act is outdated and requires fundamental reform; and that Australians do not trust that the EPBC Act is delivering for the environment, for business or for the community; this constitutes a deficit of trust
- The Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 represents a piecemeal approach to reform, one that responds to a deficit of trust with a proposal that the Parliament repose additional trust in the Executive
- Given that the Government has announced its intention to adopt as an initial suite of interim standards, standards that reflect the *existing* EPBC Act, despite the availability of a set of standards annexed to the report of *Independent Review of the EPBC Act,* this bill would be facilitating a retrograde step.

- I submit that various provisions of the bill represent an inappropriate delegation of legislative power
- I also submit that several provisions relating to the proposed position of Environment Assurance Commissioner should be strengthened to maintain a clear separation between this independent statutory office and the Executive Government

Submission

Context
The 2020 *Independent Review of the EPBC Act* (Samuel Review) of the EPBC Act found that Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat; that the EPBC Act was outdated and requires fundamental reform; and that Australians do not trust that the EPBC Act is delivering for the environment, for business or for the community. The reviewer, Professor Graeme Samuel AC, was also critical of piecemeal decision-making under the Act.

The Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (Standards and Assurance Bill) appears designed to respond to criticisms raised in an earlier report of this Committee on the Environment Protection and Biodiversity Conservation Amendment (Streamlining) Bill 2020 (Streamlining Bill). Specifically, it addresses criticisms that the Streamlining Bill would provide for accreditation of State environmental assessment and approval processes without accreditation being underpinned by statutory National Environmental Standards; and without independent oversight by an Environment Assurance Commissioner, both as recommended by Professor Samuel.

Overarching Comments
My fundamental criticism of the Standards and Assurance Bill is that it represents a piecemeal approach to reform.The Samuel Review provides a once-a-decade opportunity to address this major set of problems in a comprehensive manner and it is vital not to waste that opportunity. Yet the government has not released a comprehensive response to the Samuel Review. Both its policy narrative and its legislative initiatives have been confined to addressing problems of regulatory duplication and delay. While these are genuine problems they are completely overshadowed by the very serious environmental crisis acknowledged in the Samuel Review and documented in numerous reports. As a result, the Government is asking the Senate to consider one aspect of a much larger set of problems in the absence of any Government vision or plans for dealing with what amounts to an environmental crisis.

It is not necessary to legislate in this piecemeal manner. In my submission to the Committee's Inquiry concerning the Streamlining Bill (relevant extracts attached) I argued that the Government had already significantly addressed regulatory delay and further that most of the inefficiencies involved in regulatory duplication could be addressed by administrative means. This remains the case.

Should the Streamling Bill and the Standards and Assurance Bill be enacted, the Minister in her second reading speech advised of the Government's intention to adopt, as an initial suite of interim standards, standards that reflect the *existing* EPBC Act, the same Act which Professor Samuel has found to be outdated and in need of fundamental reform. This is despite the availability of a set of standards annexed to Professor Samuel's report, standards that are designed to address many of the failings identified by him concerning the current regime. Setting standards that reflect the status quo is thus a retrograde step.

As a result of the broad lack of trust in the EPBC Act identified by a Professor Samuel, in my view the Government begins the reform task with a trust deficit. Rather than address this trust deficit, the Standards and Assurance Bill takes the opposite course and asks for *additional* trust to be reposed in executive government, as outlined below.

Submissions on Proposed Provisions Concerning National Environmental Standards (Standards and Assurance Bill, Schedule 1)
Proposed s 65C asks the Senate to override its standard legislative scrutiny powers. Specifically, proposed sub-section 65C(3) would override s 42 of the *Legislation Act 2003* and remove the right of the Senate to disallow the first standards made.

In proposing to remove the right of the Senate disallow the first standards, the explanatory memorandum offers the following explanation:

> *National Environmental Standards in force under new Part 5A will be integral to facilitating single touch approvals under accredited state and territory environmental assessment and approval processes. The disallowance of the first standard made in relation to a particular matter would frustrate this process as it would mean that no National Environmental Standards would exist for a particular matter and bilateral agreements would not be underpinned by the National Environmental Standards. As the Minister must be satisfied that the processes accredited for a bilateral agreement are not inconsistent with one or more National Environmental Standards that are in force… they are an essential prerequisite for entry into, and the ongoing operation of bilateral agreements with the states and territories. As such an exemption from the disallowance provisions of the*

> *Legislation Act for the first standard made in relation to a particular matter is required to ensure the effective operation of bilateral agreements. In addition, as a state or territory process proposed for accreditation for the purposes of a bilateral agreement will be benchmarked against the National Environmental Standards in force… The exemption from disallowance is necessary to provide certainty to the states and territories and assurance to the public generally, that those processes make the necessary standards to make environmental assessment and approval decisions in relation to Commonwealth protected matters.*

This explanation assumes that disallowance (or the threat of disallowance) would bring the accreditation process to a halt and overlooks the normal operation of the delegated legislation process, under which governments usually revise or replace legislative instruments that are threatened with disallowance, or in fact disallowed. By including this provision, the Government is attempting to ensure that the Senate does not raise the environmental policy bar by insisting that the Standards at least match those proposed by Professor Samuel. In my respectful submission the Senate should find this unacceptable.

Proposed sub-sections 65C(4) and 65D(3) would override section 14 of the *Legislation Act* to allow a standard to incorporate an external document, as amended from time to time, or even where that document does not exist. These provisions are a 'Henry VIII clause'; their effect is to give another party, including possibly a *State* minister, a *de facto* right to amend a Commonwealth legislative instrument, without legislative process or scrutiny. As a result, that other party can make or amend an instrument to which these provisions apply, such as a Commonwealth or State environmental offsets policy, in ways that may not have been envisaged by the Minister when making the Standard or, more importantly, reasonably anticipated by persons affected by the instrument concerned. Indeed, a State policy to which the Standard referred might be made or amended in a form *contrary* to Commonwealth policy.

The explanatory memorandum offers the explanation that these provisions are necessary to allow standards to remain contemporary, and gives the examples first, of a standard referring to an international convention that is amended, and second, of a standard referring to a Commonwealth instrument such as an approved Conservation Advice for threatened species. In my submission this small gain in Executive convenience is more than offset by the risks associated with a Henry VIII clause: inappropriate delegation of legislative power; loss of the Senate's scrutiny powers concerning legislative change, and for the Executive, the risk of loss of control over its own policy.

This argument applies even more strongly if the standard refers to an instrument that

does not yet exist, because this would allow a minister or even a State minister or official *carte blanche* to draft an extensive set of provisions on the topic concerned and give them the force of Commonwealth law, again without any legislative process or scrutiny, including by disallowance.

In a similar vein, there a several provisions in s 65H that give the Minister excessive discretion. This again represents a 'trust the Government' approach:

> Proposed subsection 65H(2) gives decision-makers, when considering whether a decision would be inconsistent with national environmental standards, discretion to have regard to non-statutory matters (policies, plans, programs or funding). The explanatory memorandum gives an example of impacts on a National Heritage place being regarded as not inconsistent with the Standards because they are 'balanced' by State funding of promotional activities. This creates a de facto *offset*, a 'back door' to avoiding what are meant to be hard bottom lines in the Standards, because a decision-maker can claim that physical damage to matters of national environmental significance is 'balanced' (ie offset, although not in accordance with Commonwealth Offets Policy) by some form of spending. I submit that this subsection should be removed.
>
> Under proposed subsection 65H(4), the Standards apply only to decisions determined by the Minister in the exercise of her or his discretion. That is, the *scope* of the standards, a *legislative* matter, is delegated to the Minister. This is an inappropriate and unnecessary delegation of legislative power. The explanatory memorandum gives no reason why the scope of application should be a matter for Executive discretion rather than spelled out in the bill. A more appropriate course would be for the EPBC Act to provide that the Standards apply to the decisions under the Act as specified in a list or schedule, with the list to include all powers that have a direct impact on matters of national environmental significance; this would include State decisions authorised by bilateral agreements.
>
> Proposed subsection 64H(7) gives the Minister the discretion 'in the public interest' to determine that a decision is exempt from the national standards. As the primary purpose of the standards is to draw a 'bottom line' under substantive environmental decisions, a public interest exemption should be limited to exceptional circumstances, which I would suggest should be confined to things that disrupt the normal functioning of society, ie. defence, national security or natural disasters and other emergencies, including preparation for, or recovery from, exigencies of this type (cp s 158(5)).

Proposed Provisions Concerning Environment Assurance Commissioner (Standards and Assurance Bill, Schedule 2)

Subject to my overarching comments above, I am broadly supportive of the establishment of an Environment Assurance Commissioner (EAC). I do however have a number of comments, with a common theme of the need to maintain a full separation between the Executive Government, represented by the Minister or Environment Department, and the EAC, an independent statutory officer.

Proposed section 501E provides for acting appointments to the office of EAC. I propose that the section be amended so that the power of the Minister to make an acting appointment only commences once the first substantive EAC has been appointed by the Governor General. This will ensure that any precedents and priorities set by the first occupant of the office are set by a substantive office-holder, not a short-term actor. There is no need for the Minister to make an acting appointment before the first substantive appointment as the additional time required for the Governor General to make a substantive appointment is negligible.

Proposed section 501P provides for annual work plans for the EAC, with the first step in the preparation of a work plan being for the Minister to give the Commissioner a written statement of expectations. To maintain the independence of the EAC, including the perception of that independence, it would be better and simpler to provide that the EAC should prepare a work plan (ie have the initiative as to setting priorities) and provide that plan to the Minister for comments.

Proposed section 501V provides for the EAC to provide an annual report for inclusion in the Environment Departments 'overall report'. The actuality and perception of the EAC’s independence would be enhanced by providing for the EAC to table his or her report directly in Parliament.

Proposed section 501W provides a power of delegation for the EAC. While it is appropriate for the EAC to delegate powers to senior public servants who have been made available to the EAC under proposed section 501T, it is not appropriate for the EAC to delegate powers to the Secretary of the Environment Department, as the Secretary is of course not one of these ‘made available’ staff but always reports to, and is accountable to, the minister.

Concluding Remarks

The problems identified by the Samuel Review, including the public’s loss of trust in the EPBC Act are very serious. In my view, resolving the resulting trust deficit requires a comprehensive and threefold approach:

1. Table a full draft response to the Samuel Review
2. Facilitate a national conversation about this response and the Government’s plans for addressing Australia's environment crisis; and
3. Table a finalise response and an implementation plan, including for the

enactment of a replacement for the EPBC Act. The implementation plan should include provision for an ongoing process of making policy statements, eg for environmental offsets, to ensure that the Government provides fulsome guidance to all parties on the administration of the Act

Attachment: Extracts from Previous Submission Concerning Streamlining Bill

Environmental Approvals can be Made More Efficient Without Legislation
Pending consideration of comprehensive environmental reforms, the efficiency and thus timeliness of environmental approvals can be increased significantly by administrative means, through intergovernmental cooperation and project management. This would extend actions the Government is already taking.

The Auditor General found that compliance with statutory timeframes had decreased from 60 per cent in 2014–15 to five per cent in 2018–19. However, he also found that the Government had began reversing many of these delays from 2019 by increasing budget allocations to the Commonwealth assessment process. Subsequently, in the recent October Budget, the Government announced that a further $36.6 million would be provided over two years from 2020-21 to maintain the timeliness of environmental assessments and undertake further reforms under the EPBC Act.

Some 80% of the time taken to obtain environmental approvals can be attributed to the assessment stage of the approval process. In this context, the Government has continued to enhance the existing suite of assessments bilaterals with all States and can continue to do so under current law. For example, April 2020, Minister Ley announced that a new assessments bilateral with New South Wales would deliver '… streamlined major projects assessments and improved environmental outcomes…'.

There is also potential to reduce assessment times significantly by digitising both the collection of environmental information and the assessment process itself. The Government has acted here, announcing a Digital Environmental Assessment Program in partnership with Western Australia in 2019.

These existing efforts have borne fruit. In June, Minister Ley informed Parliament that:

> Since last year, we've seen assessment time frames improve from 19 per cent of key decisions made on time to 100 per cent in May this year. We've more than halved the time taken by the Commonwealth at the final stage of these assessments down from 90 days to 40 days and we're clearing the backlog of outstanding decisions, and we're going to do even better by halving our overall time frames for major projects from 3.5 years to 21 months.

In my view, these improvements in efficiency could be taken further. The Interim

Report found that, on average, the process is with the proponent for more than there quarters of the total assessment time. The starting point therefore for further increasing efficiency is that, for every day saved by Government, a further three days can be saved by proponents.

This suggests that there is potential to save significant time by project-managing the assessment and approval of projects. The Government has already done this to an extent by establishing joint Commonwealth-State assessment teams for major projects.

This could be taken further through project management. Under this approach the two levels of government, in consultation with a proponent, would prepare an assessment plan, under which roles and responsibilities for such activities as information-gathering would be assigned, and timeframes allocated, for the various elements and stages of the assessment process. I see no difficulty with regulators working closely with proponents to manage the assessment process, provided they do not give any indication of the likely decisions at the end of the process.

While it has not been possible for me to cost the benefits of a project management approach in any formal way, an informal example is sufficient to demonstrate its potential. The Minerals Council of Australia has argued that delays in obtaining approval for large mining projects (of $3 billion to $4 billion), can be up to $1 million per day. The following example is based on such a mining project.

Example
Employing five additional public servants for 12 months to facilitate the rapid assessment of a project would cost considerably less than $1 million, but the figure can be rounded up for current purposes. If the relevant State also spent $1 million for the same purpose and the proponent mining company invested additional assessment resources of $3 million (i.e at the rate of 3:1 as per the Interim Review finding) and this investment reduced the assessment period by 12 months, the potential gain to the proponent alone would be over $360 million for a total investment of $5 million, a benefit to cost ratio of over 70:1. Even if the gain were only three months, the benefit to cost ratio would be 18:1. When the economic benefits, such as earlier employment opportunities and the bring-forward of Government revenues, are added, the benefit to cost ratio would of course be significantly higher.