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Stephen Palethorpe
Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email to: ec.sen@aph.gov.au

7 April 2021

Dear Mr Palethorpe

Re: Senate inquiry on the *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021*

Humane Society International (HSI), the world's largest conservation and animal welfare organisation, welcomes the opportunity to provide this submission to the Senate inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021* (the Bill).

HSI has a long-standing interest in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) having supported its passage through Parliament in 1999, recognising it was an improvement on the legislative regimes it replaced. HSI has since actively engaged in implementation of the EPBC Act and its reform processes including contributing to the first decadal review of the EPBC Act (the Hawke review), Senate inquiries relating to the EPBC Act, and more recently the second decadal review of the EPBC Act, the Samuel review, and the 2020 Senate inquiry on the *EPBC Amendment (Streamlining Environmental Approvals) Bill 2020* (the Streamlining Bill), currently in the Senate. We have also produced detailed policy documents outlining what reformed national environmental laws should look like to help abate the extinction crisis currently facing Australia.[1]

[1] EDO NSW and Humane Society International Australia, Next Generation Biodiversity Laws – Best practice elements for a new Commonwealth Environment Act (2018), Humane Society International Ltd, Sydney. https://hsi.org.au/uploads/publication_documents/HSI_EDO_Next_Generation_Report_WEB.pdf; EDO NSW and Humane Society International Australia, Next Generation – Best practice wildlife trade provisions in national law (2019), Humane Society International Ltd, Sydney. https://hsi.org.au/uploads/publication_documents/HSI_EDO_Best_practice_wildlife_trade_provisions_report.pdf

HSI has long called for reform to the EPBC Act to strengthen the protection it provides to the environment and has welcomed the Final Report of the Independent Review of the legislation led by Professor Graeme Samuel and released on 28th January 2021 (the Final Report). The Final Report includes 38 recommendations and three tranches of law reform to overhaul the EPBC Act.

Overview:

HSI strongly agrees with the need for legally binding National Environment Standards to guide improved decision making under the Act and to orient it towards achieving improved environmental outcomes. HSI also supports stronger independent governance and administration of the Act. That the purpose of this bill is to provide for legally binding National Environment Standards and an Environment Assurance Commissioner should be welcome, except we find the bill to have serious shortcomings in setting up these two recommendations from the Final Report. It is also very concerning that the bill incorporates a new poorly defined exemption that will significantly erode current EPBC Act protections. We particularly regret the Government is not planning to enact the set of standards proposed in the Final Report instead presenting 'standards' that are little more than a summary of existing clauses in the Act. We also remain concerned that there is still no response or commitment to other essential components of tranche 1 reforms recommended in the Final Report, nor the overall package of 38 recommendations in the Final Report, noting that Professor Samuel urged the Government to "avoid the temptation to cherry pick from a highly interconnected suite of recommendations".

Comments:

1. *Piecemeal reforms and grossly insufficient safeguards*

HSI would welcome this bill if it was genuinely establishing a set of strong National Environment Standards and robust independent assurance to improve decision making under the Act, rather than notionally providing for standards and assurance in order to facilitate the passage of the companion Streamlining Bill.

Decision making on 'Matters of National Environmental Significance' is appropriately the role of the Commonwealth Government and there are serious risks in handing these decisions to jurisdictions that are inevitably more parochial in their outlook. Devolution runs the risk of undermining the conservation of World and National Heritage sites, Ramsar wetlands, nationally threatened species and ecological communities, migratory species and water resources; jeopardising these nationally important environmental assets as well as commitments Australia has made at the international level.

We realise that devolution of environmental approvals is a policy the Morrison Government is committed to. **If devolution is to go ahead it is essential that it be robustly safeguarded with all of the interconnected recommendations set out in the Final Report.**

The bill is insufficient and inadequate to safeguard and mitigate against the risks inherent in the devolution that would be enabled by the Streamlining Bill. It is also missing the other

elements of the first tranche of reforms set out in the Final Report as pre-conditions for moving forward with devolution.

The Final Report recommended Tranche 1 reforms include:

- Implement a full suite of standards under a new head of power
- Establish Environment Assurance Commissioner
- Recast statutory committees and establish an Ecologically Sustainable Development Committee
- Establish, strong, independent Commonwealth compliance and enforcement
- Instigate priority Indigenous-specific reforms, including putting in place a standards
- Build stable State and Territory bilateral agreements (pending Streamlining Bill)
- Make repairs for known inconsistencies, gaps and conflicts in the EPBC Act
- Examine the feasibility of mechanisms to leverage private sector investment
- Revise the offsets policy

While this bill purports to deal with the first two points, and the streamlining bill also pending in the Senate deals with the sixth, the Government's intentions as to the other points for Tranche 1 reforms or the full 38 recommendations are unclear or absent. As the Final Report explains they are all interconnected and rely on each other for success. For example, in relation to the Commonwealth establishing strong independent compliance and enforcement Professor Samuel said:

> *There has been limited activity to enforce the EPBC Act over the 20-year period it has been in effect and a lack of transparency about what has been done. The Department has improved its regulatory compliance and enforcement functions in recent years. However, it still relies on a collaborative approach to compliance and enforcement, which is too weak……*
> *……Independent compliance and enforcement functions that are not subject to actual or implied political direction are needed. The functions should be properly resourced and include a full toolkit of powers and systems.* (Final Report pg 21)

Crucially, HSI is not aware of progress being made by the Commonwealth to improve its own regime for compliance and enforcement of the Act. The Government has also not included a standard for compliance and enforcement at this stage. Environmental trajectories will continue to decline without this crucial component to reforms.

2. *The Government's proposed National Environment Standards are too weak to protect Matters of National Environmental Significance*

The Interim National Environment Standards the Government proposes to enact through this bill are weak. They are essentially a summary of the existing clauses and administrative guidelines of the EPBC Act, in place for many years; clauses and guidelines which have been judged by the review as failing to "enable the Commonwealth to fulfil its environmental management responsibilities to protect nationally important matters". These are the clauses which have been criticised for their focus on process rather than outcomes, which allow broad

discretion for poor and inconsistent decision making, and which generate uncertainty for the matters they are supposed to protect, as well as for all stakeholders.

Given the findings of the review, HSI questions how the Government's proposed standards, doing no more than collating the current clauses of the Act, will suddenly enable improved decision making? The Government's proposed standards do not offer anything new to improve decision making whoever undertakes it. If approval decisions are devolved with the Government's proposed standards, the broad discretion for poor and inconsistent decision making will be passed on to state and territory decision makers, and potentially even local governments. To do this risks worsening Australia's already unsustainable environmental trajectories and **it is our strong recommendation that the Senate not allow it.**

Example: **The Threatened Species and Ecological Community Standard**

The Government's proposed standard for threatened species and threatened ecological communities largely relies on replicating an existing clause in the EPBC Act for approval decisions to "not be inconsistent with" a recovery plan for a threatened species. This clause has been inadequate at preventing the continued endangerment of threatened species listed under the EPBC Act. It is inadequate because approximately 62% of threatened species and 68% of threatened ecological communities do not have a recovery plan to not be inconsistent with and, even when they do, those plans are not actually written to give advice for approval decisions or to place limitations on them. It is true that more species and ecological communities have had Conservation Advice written for them, but the Government's proposed standard will only require that Conservation Advice be "taken into account" which is an even weaker requirement, and again Conservation Advice are also not necessarily written with approval decisions in mind.

In contrast, the set of National Environment Standards proposed in the Final Report, which were drafted following months of consultation with science, conservation (including HSI) and business stakeholders are designed to provide robust guidance and to be outcome focussed. Whilst those standards are still a compromise, they do offer guidance on interpreting the Act and do attempt to curtail the discretion for very poor decision making. As a member of Professor Samuel's Consultative Group as he prepared the Final Report, we would also make the point that he deliberately chose to limit the standards he recommended within the existing settings of the EPBC Act knowing that this was the Government's preference. It is not the case that his recommended standards go beyond the existing policy settings of the Act.

It is our view that if environmental decision making is to be delegated to state and territory governments, it should be done so on the basis of the standards contained in the Final Report as the starting point, not the substantially weaker version proposed by the Government which fail to add any value or guidance for improved decision making. HSI would be happy to provide further detailed elaboration on the problems with the Government's standards.

3. The proposed regime for setting standards is inadequate

While the Bill represents a critical first step to establish a power to make legally enforceable national environmental standards, the proposed requirements for quality, application and enforcement of standards are weak. As drafted, **the Bill does not reflect the fundamental**

recommendation in the Final Report that national standards be clear and consistently applied. There is considerable discretion in how the standards may be applied to achieve the overall outcomes. The legislation should require that national environmental standards must be made for the following matters: matters of national environmental significance, Indigenous participation and engagement, compliance and enforcement, and data and information. The Government's proposed set of standards are missing these crucial elements.

There should be a requirement for bilateral agreements or decisions under the Act to always "be consistent with" national environmental standards. The requirement to "not be inconsistent with" is weaker and less direct. It means these standards will only be very weakly binding. The legislation should specify the processes to which national environmental standards will be applied including to individual projects and actions.

HSI is extremely concerned by the lack of accountability that would be opened up through proposed Division 3 section 65H, which effectively exempts project level approvals from meeting the standards if the 'system' can promise to balance out the impacts and in broad and vague terms. This approach will not address the current failure of the EPBC Act to address cumulative impacts and will likely make it worse.

However, HSI does support the development of regional plans as tools for dealing with conservation planning and cumulative impact. We give support to the draft National Environment Standard for Regional Planning that is proposed in the submission to this inquiry from Birdlife Australia. HSI recommends that regional plans according to a National Standard are the appropriate mechanism for achieving outcomes at a 'system' level rather than the vague application of standards to a system level the bill expressly allows for in Division 3 section 65H.

There should be requirements for reviews of the standards to be conducted by independent scientific experts and requirements for the Minister to respond publicly to the reviews. HSI would note that the environment is often a politically contested policy area and we are under no illusion as to the challenge a federal environment minister would face in raising the bar with National Environment Standards, particularly once bilateral agreements are signed. This is why the review process must be robust, and is also why a strong set of standards are required at the outset.

HSI gives full support to the critique and recommendations on the proposed new Chapter for National Environmental Standards in the submission from the Environmental Defenders Office.

4. Exemption from standards is too broad and ill defined

Subsections 65H(7)-(9) of the bill establishes an exemption from standards in the "**public interest".** An exemption for 'national interest' is already provided for in the Act (section 158), and HSI has held significant concerns over the broad manner in which this exemption has already been interpreted, including for political purposes.

While there is a requirement that a statement of reasons be published, there is no definition of what "public interest" means in the bill. The EM states:

> *For example, in the context of the public interest, it may be necessary to balance environmental considerations with the social and/or economic impacts of a project, or where a Standard may not be met due to the need to balance multiple protected matters.*

It should also be noted that the Act already provides for a balance between socio-economic factors and the environment in the objectives of the Act. Section 3A defines ecologically sustainable development in the Objects of the Act as decision making that integrates both long term and short term economic, environmental, social and equitable considerations and section 136(a) which requires the Minister to take into account the principles of ecologically sustainable development (ESD) in decision making. The additional exemption for the public interest is unnecessary. Rather than seeking to balance environmental concerns with socio-economic considerations as per the principle of ESD, its true intent appears to be to allow environmental considerations to be overridden.

The potential for misuse of this power is significant remembering how the current "national interest" exemption has been already been misused for political reasons, and noting that an exemption in the public interest is an even lower bar than national interest.

The Final Report recommendation 3(c) specified that the Minister's statement of reasons should specifically detail the environmental implications of the decision. The bill does not reflect this important requirement.

In our view a definition to constrain the misuse of the existing national interest exemption is needed and a new exemption with a lower bar is unnecessary.

Example: National interest exemption to cause significant impact to threatened species

In May 2016 the existing exemption for the National Interest (s158(3)) was used to avoid environmental impact assessment and approval under the EPBC Act for the dispersal of a grey-headed flying-fox colony at Batemans Bay. This took place in the marginal seat of Gilmore ahead of the federal election in July 2016. A spotted gum flowering event saw an influx of grey-headed flying-foxes in the camp, with in excess of 100,000 animals arriving for a feed—potentially 25% of the entire species. The grey-headed flying-fox is a listed threatened species. Undoubtedly noisy and smelly when they congregate in large numbers, local residents were not happy. The National Interest exemption was used in time for the election in July to bypass the usual environmental impact assessment and approval process to approve 'significant impact' to this threatened species and crucial forest pollinator by dispersing the colony. A political flyer promoting the local member's ability to secure approval to relocate the colony was sent to constituents (**see attachment**). The merits of the decision could not be challenged because the National Interest clause is not sufficiently defined allowing for very broad considerations and for the Government to get away with such politically convenient discretion.

5. Assurance Framework

The bill proposes the establishment of a National Environmental Assurance Commissioner. Whilst this may appear to be in line with the recommendation in the Final Report for an Environment Assurance Commissioner to at least provide some independent oversight over the quality of decision making, we believe that this doesn't go far enough to tackle the persistent problems underlying decision making under the EPBC Act.

The focus of the proposed Environmental Assurance Commissioner is assurance at the system level. HSI is very concerned that the Commissioner will not have a role in monitoring or auditing individual decisions. As such it will not be until there has been systemic problems, apparent over a period of time, causing long term deleterious impacts on MNES, that the Commissioner is able to respond. HSI is further concerned that the Environmental Assurance Commissioner will effectively perform the role that has been undertaken by the Australian National Audit Office in relation to the environment portfolio but with less independence and less powers.

HSI has long been a supporter of a fully independent Environmental Protection Authority to be the decision maker for approvals under the Act. We are aware of the introduction of the Private Members Bill, the *Commonwealth Environment Protection Authority Bill 2021*, introduced to the House of Representatives on 22 March. This remains our preferred approach as opposed to the Environment Assurance Commissioner model in the bill. An independent EPA would assist with removing short-sighted politics from decision making under the EPBC Act.

Whilst we welcome the Final Report recommendation, it is HSI's view that the National Environmental Assurance Commissioner at the bare minimum must be truly independent and sit external to the federal department within a well-resourced Commission, safe from political interference and without any constraints on their work. HSI supports the critique and recommendations for this Schedule contained in the submission from the Environmental Defenders Office.

Conclusion

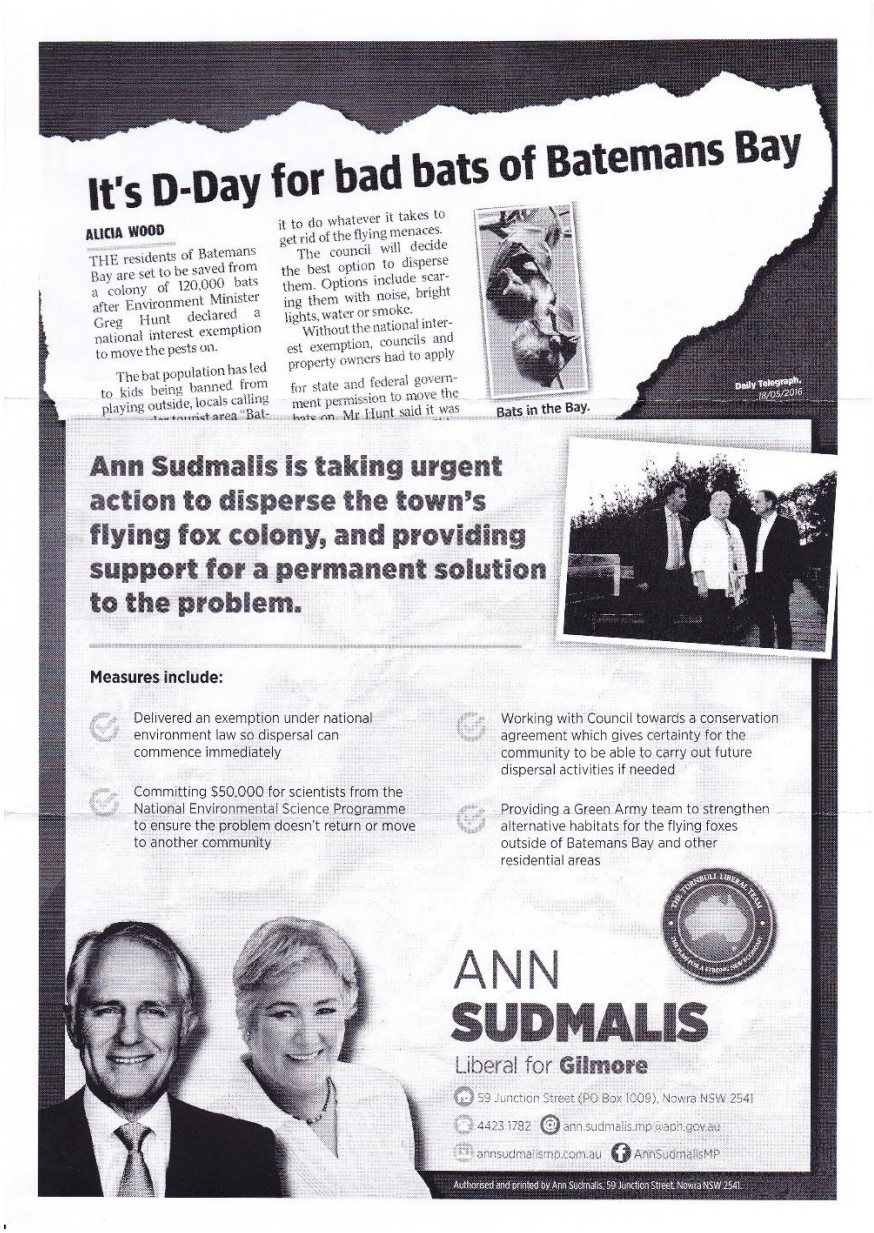
In conclusion, HSI would like to reaffirm our position that we do not support the delegation of the federal government's environmental approval powers to the states and territories or local governments, particularly on the basis of inadequate, weak standards that can only continue to perpetuate environmental decline. HSI does support the establishment of legally binding National Environment Standards to improve decision making under the Act and to orient decisions towards outcomes. The Government's proposed standards will achieve neither. We would support the elements of this bill if they established a more robust process for standard setting and review, and if the intent was to begin with the stronger standards from the Final Report already developed with consultation from stakeholders. HSI recommends the private members bill for an independent EPA be supported. Whereas, if this bill is to be supported, the provisions for the independence of the Environment Assurance

Commissioner should be considerably strengthened. HSI strongly requests the senate to delete the dangerous provision for a public interest exemption from this bill. HSI does not recommend that this bill be supported in its current form.

Yours sincerely

Nicola Beynon
Head of Campaigns

Attachment 1 – flyer issued following use of the National Interest exemption to disperse a colony of threatened flying-foxes in a marginal seat ahead of the 2016 federal election.



It's D-Day for bad bats of Batemans Bay

ALICIA WOOD

THE residents of Batemans Bay are set to be saved from a colony of 120,000 bats after Environment Minister Greg Hunt declared a national interest exemption to move the pests on.

The bat population has led to kids being banned from playing outside, locals calling

it to do whatever it takes to get rid of the flying menaces.

The council will decide the best option to disperse them. Options include scaring them with noise, bright lights, water or smoke.

Without the national interest exemption, councils and property owners had to apply for state and federal government permission to move the

Bats in the Bay.

Daily Telegraph, 18/05/2016

Ann Sudmalis is taking urgent action to disperse the town's flying fox colony, and providing support for a permanent solution to the problem.

Measures include:

- Delivered an exemption under national environment law so dispersal can commence immediately
- Committing $50,000 for scientists from the National Environmental Science Programme to ensure the problem doesn't return or move to another community
- Working with Council towards a conservation agreement which gives certainty for the community to be able to carry out future dispersal activities if needed
- Providing a Green Army team to strengthen alternative habitats for the flying foxes outside of Batemans Bay and other residential areas

ANN
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Liberal for **Gilmore**

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