

25th March 2021

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



Dear Committee Secretary and Members of the Committee,

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

Thank you for this opportunity to make a submission to the Senate Environment and Communications Legislation Committee Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (hereafter “the Bill”).

I am a Lecturer and Australian Research Council DECRA Fellow based at the University of New South Wales, Canberra¹. I have specific expertise in the design, implementation, and evaluation of the Australian Government’s Environmental Offsets Policy under the EPBC Act 1999. I was one of five independent academic experts invited to participate in Professor Graeme Samuel AC’s Consultative Group as part of the Independent Review of the EPBC Act in 2020.

This submission is relatively brief, as the comments I provided initially to the Independent Review of the EPBC Act² and Professor Samuel’s Interim Report³ are still relevant and on the public record. I refer you to the Final Report of the Independent Review of the EPBC Act for a summary of the current state and trajectory of Australia’s natural environment and Heritage, and of the ineffectiveness and inefficiency of the Act.

Background

I engaged in Professor Samuel’s Consultative Group in good faith, along with all other members of the group who each brought their specific interests and expertise to the table. Over a period of 3 months in 2020, between the release of Professor Samuel’s Interim and Final Reports, I provided advice and significant input into the drafting of National Environmental Standards for consideration by Professor Samuel and the Secretariat. My work as part of the Consultative Group was motivated by my passion for good public policy, and to achieve better outcomes for the environments and cultural

¹ <https://research.unsw.edu.au/people/dr-megan-evans>

² Evans M. 2020. Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act https://unsw.adfa.edu.au/sites/default/files/documents/Evans_EPBC-review-submission_final_0.pdf

³ Evans M. 2020. Submission to the Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). https://megancevans.com/wp-content/uploads/2021/03/Evans_EPBC-interim-report_submission.pdf

heritage that Australian communities hold dear. The time I dedicated to this work far exceeded what my University nominally provides for its academic employees to contribute “in kind” to policy and community engagement, and certainly came at a cost to my core work (research) performance. As an early career academic in a fixed term role, against a backdrop of thousands of my peers losing their jobs due to the impacts of COVID-19 on the University sector, this was a significant risk for me to take. I tell this story not in a misguided attempt to evoke sympathy, but rather as context to explain the depth of my disappointment, concern and frustration in the content of the present Bill.

The Bill simply “cherry picks”⁴ just two components of Professor Samuel’s “highly interconnected suite of recommendations”, seemingly to fit the Government’s pre-existing agenda to “slash green tape”⁵. I am shocked by the Government’s apparent blatant disregard for Professor Samuel’s comprehensive recommendations following a 12-month, taxpayer funded review process, for the investment of time and energy by the dozens of stakeholders consulted during the Review, and for the thousands of Australians who engaged with the Review in good faith.

The Bill contains two Schedules: one to enable the development of National Environmental Standards; and the other to establish the position of the Environmental Assurance Commissioner. I will address each in turn.

(1) National Environmental Standards are not a silver bullet, and the “interim standards” are likely to replicate, or even worsen, existing problems with the EPBC Act.

National Environmental Standards were the “centrepiece” of Professor Samuel’s report, but formed part of a “highly interconnected suite of recommendations”, and were designed to set standards for *outcomes*, rather than *processes*.

The Government’s interim standards⁶ (which were not publicly released by the Government), **are a significant backward step from what was recommended in Professor Samuel’s Final Report.** They largely repeat what is already present within the EPBC Act legislation. Given that the EPBC Act is widely accepted to be both ineffective and inefficient, simply repackaging the Act into a collection of additional statutory instrument is just lazy and poor policymaking.

The Bill contains provisions for the first set of Standards tabled by Government to not be disallowable⁷, removing the ability for Parliament to scrutinise the Standards. Such scrutiny is fundamental to a functioning democracy.

⁴ Professor Samuel explicitly warned that “Governments should avoid the temptation to cherry pick from a highly interconnected suite of recommendations”. Page iii, Independent Review of the EPBC Act – Final Report

⁵ Ley S, 2019. ‘Tis the season to slash green tape. Australian Financial Review.
<https://www.afr.com/companies/mining/tis-the-season-to-slash-green-tape-20191030-p535nf>

⁶ <https://www.smh.com.au/interactive/hub/media/tearout-excerpt/1233/Standards.pdf>

⁷ Section 65c (3): “No disallowance of first standards: Section 42 (disallowance) of the Legislation Act 2003 does not apply to each of the first standards made under this section in relation to a particular matter”

The Bill also provides the Minister with full discretion make a decision that is inconsistent with a national environmental standard if “*the Minister is satisfied that the decision or thing is in the public interest*”⁸. “Public interest” is not defined. The Bill therefore provides scope for decisions to be made that are below the existing poor standards of the EPBC Act.

(2) *The proposed Environment Assurance Commissioner is a “toothless tiger”, who will have to request resourcing from the Department Secretary, and whose role could simply be “delegated” to the APS*

Schedule 2 of the Bill introduces provisions for the establishment and functions of the Environment Assurance Commissioner. The Environment Assurance Commissioner is an independent, statutory position, which is good. But the Bill is written such that the role’s independence and capacity to function effectively could easily be undermined.

The Commissioner would have the function to monitor or audit (or both) the operation of bilateral agreements, and Commonwealth environmental assessment and approval processes. But the Bill does not permit the Environment Assurance Commissioner to monitor or audit a single decision⁹. The Bill even notes that monitoring or auditing “*must be more general*”. What does this even mean? Is the Environment Assurance Commissioner simply monitoring the general vibe of things?

I fail to see how an independent Environment Assurance Commissioner can function effectively if it is unable to scrutinise individual decisions. As emphasised by Professor Samuel, the EPBC Act must be judged according to the *outcomes* it delivers, not simply by its *processes*.

Incredibly, **the Bill provides for the Environment Assurance Commissioner “delegate all or any of the Commissioner’s functions or powers”** to the Department Secretary or SES employee¹⁰. Conceivably, an appointed Environment Assurance Commissioner could simply delate all their work (other than the workplan and Ministerial reporting) to the APS, which is hardly independent.

Summary of broader issues

The Bill has been put forward by Government as a “first phase of reform”¹¹, but as **the Government has not to date provided a formal response to Professor Samuel’s final report** – including its 38 recommendations or detailed reform roadmap - there is absolutely no clarity over what the second and third phases of reform might be. **The Government appears to be asking the Australian community and Parliament to simply “trust us”**. After observing the Government move the “Streamlining Environmental Approvals” Bill in August 2020, while my colleagues and I were in the middle of working many late nights on draft Standards as part of Professor Samuel’s

⁸ Section 65H (7)

⁹ Section 501C (3)

¹⁰ Section 501W (1)

¹¹ Ley S, Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 Second Reading Speech, Thursday, 25 February 2021

consultative group, I am not confident that future phases will be seriously entertained if the current Bill is passed in its current form.

I am no stranger to policy and legislative processes, and I am well aware that good public policy usually involves disappointing all stakeholders to some degree. **But this Bill, if passed in its current form, will at best maintain the unsustainable state of decline of Australia's unique biodiversity, World Heritage, Indigenous heritage, and other Matters listed under the EPBC Act.**

I am also **highly sceptical that the Bill will “streamline” environmental approval processes or provide greater certainty for businesses**, given that the National Environmental Standards largely summarise what is already contained in the EPBC Act (and in some parts step back from it¹²).

The Bill assumes that bilateral approval agreements underpinned by National Environmental Standards, and overseen by an Environmental Assurance Commissioner, will ensure consistent interpretation and application of the EPBC Act by each of Australia's eight State and Territory regulators. But my research has shown that environmental offsetting under the EPBC Act (just one of the Act's many accompanying policies) isn't even applied consistently within or across Branches of the Department of Agriculture, Water and Environment¹³.

I believe this problem will likely exacerbated eightfold if bilateral approval agreements are entered into with the States and Territories without addressing the other elephants in the room:

- I. Chronically insufficient resourcing, capacity, and totally inadequate regulatory infrastructure: e.g the Department still relies on hard copy documentation, and still has no central register of where and what its own offsets are¹⁴.

¹² A/Prof Peter Burnett notes (<https://sustainabilitybites.home.blog/2021/03/16/standards-in-name-only>) that the Bill's Explanatory Memorandum introduces the concept of '*balancing mechanisms*' which a decisionmaker could consider to ensure a "*decision will not be inconsistent with a relevant National Environmental Standard*" (Section 65H(1) and 65H(4) of the Bill). A/Prof Burnett rightly points out **that this is simply an offset in everything other than name**, and opens ample scope for decisions to be made that are inconsistent with the existing Environmental Offsets Policy (e.g like for like, no more than 10% of impact to be compensated with "other compensatory measures" including research. The Explanatory Memorandum even gives the example of a decision-maker approving impacts on the values of a National Heritage place if those impacts are "*balanced by mechanisms that promote those values (which may, for example, be delivered through funding of activities by a state relating to the promotion of those values)*" – **clearly signalling the Government's intention to use this avenue to further relax environmental offsetting under the EPBC Act**, which is already a significant problem.

Note that the EPBC Act currently only permits offsets to be considered under Part 8 (Assessments) once a referral has been deemed a Controlled Action. The Bill's proposed amendments could open the door for '*balancing mechanisms*' to be considered at under Part 7 of the Act (Referrals), which is currently unlawful but nevertheless still happens, especially in times of declining Departmental budgets or with actions from particular sectors (e.g urban development) or proponents (large companies with power and influence), see: Macintosh, A., Waugh, L., 2014. Compensatory mitigation and screening rules in environmental impact assessment. *Environmental Impact Assessment Review* 49, 1–12. <https://doi.org/10.1016/j.eiar.2014.06.002>

¹³ Evans M. 2020. Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act https://unsw.adfa.edu.au/sites/default/files/documents/Evans_EPBC-review-submission_final_0.pdf

¹⁴ "...the department has not established an appropriate system to map offsets for internal or external use" Australian National Audit Office. 2020. Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999. Auditor-General Report No.47 of 2019–20 <https://www.anao.gov.au/work/performance-audit/referrals-assessments-and-approvals-controlled-actions-under-the-epbc-act>

- II. Legislative complexity, duplication, and lack of clarity:
- III. Strategic coordination and leadership from Government

This Bill addresses none of these things, nor any of the other broader issues that go beyond the referrals, assessments and approvals Parts of the EPBC Act.

The Government has also ruled out any provision of resourcing to the States and Territories to carry out these new approval responsibilities, **I emphatically disagree with the Government's assertion that bilateral approval agreements will result in no increase in the regulatory burden of the State and Territory regulators**¹⁵. The most likely outcome is that the workload will increase, there will be continued pressure on staff to push actions and projects through the system, and more and more issues will slip through the cracks. An Environment Assurance Commissioner can only "audit" what's present in the system, not what hasn't been captured.

So on paper, it might appear that assessments and approvals have been "streamlined" if projects are getting through the system quicker, but this masks the environmental impacts that are not being dealt with adequately at each state of the process¹⁶. **The most likely effect of this Bill**, if passed, and of any bilateral agreements entered into on the back of this Bill – which will likely take years – **is that risks to environmental and Heritage matters under the Act will simply build and worsen**.

This is a truly remarkable proposition in light of the recent destruction 46,000-year-old piece of Indigenous heritage at Juukan Gorge, and the most recent scientific evidence pointing to broadscale ecosystem collapse in Australia ¹⁷ **These risks will remain unmitigated, and likely worsen under this Bill**.

Fast-tracking a collection of 15 major projects to go through EPBC Act assessment and approval processes does nothing to resolve the often-legitimate concerns from small and medium sized enterprises, including agricultural producers, about regulatory burden and complexity.

Recommendations

In conclusion, I suggest that the following should occur:

1. The Federal Government should respond to the full suite of 38 Recommendations presented to it by the Independent Review of the EPBC Act, and communicate how it intends to advance its planned reforms to the Act beyond the "first phase",

¹⁵ Exchange between Senator Green, Mr James Tregurtha (First Assistant Secretary Environment Protection Reform Taskforce) and Mr Dean Knudson (Deputy Secretary, Major Environment Reforms Group, Environment and Heritage Group) in Senate Estimates, Environment and Communications Legislative Committee, Monday 22nd March 2021, pp 72-75

¹⁶ The ANAO (2020) found: *"Departmental documentation does not demonstrate that conditions of approval are aligned with risk to the environment. Of the approvals examined, 79 per cent contained conditions that were non-compliant with procedural guidance or contained clerical or administrative errors, reducing the department's ability to monitor the condition or achieve the intended environmental outcome."*

¹⁷ Bergstrom et al. 2020. 'Existential threat to our survival': see the 19 Australian ecosystems already collapsing <https://theconversation.com/existential-threat-to-our-survival-see-the-19-australian-ecosystems-already-collapsing-154077>

2. The Government's should publicly release its "interim environmental standards" for scrutiny by the Australian community and Parliament to enable proper scrutiny of the Bill. National Environmental Standards must be free of "weasel words"¹⁸ to ensure clarity and ease of interpretation by public administrators and proponents.
3. The Bill should be amended such that any National Environmental Standards clearly outline what *outcomes* should be achieved, rather than summarising existing *processes* under the EPBC Act. Professor Samuel emphasised that the "*tendency to focus narrowly on highly prescriptive processes and individual projects must become a thing of the past*", and I agree. The EPBC Act's focus on prescribing processes, not outcomes, is failing the environment, and we don't even understand the extent of it as compliance is judged simply by whether an action has happened, not what it did¹⁹. **This Bill does nothing to address this fundamental problem.**
4. Provisions in the Bill that do not permit the first National Environmental Standards to be disallowed by Parliament, that allow the Minister to permit decisions that are inconsistent with the Standards if in the "public interest", and the concept of "balancing mechanisms" should all be removed. the Loopholes that let ministers or industries get out of having to meet National Environmental Standards should be removed.
5. The proposed National Environmental Assurance Commissioner should be truly independent, not rely on requesting resources from the Secretary of the Department, be able to delegate "all or any" of their functions or powers to the Department Secretary or SES employee, and should have the power to scrutinise individual decisions.
6. The Bill should establish an Independent Environment Protection Authority.

I welcome the opportunity to provide further information or to discuss my submission in more detail.

Yours sincerely,

Dr Megan Evans
Lecturer, Public Sector Management
Australian Research Council DECRA Fellow
School of Business
University of New South Wales, Canberra

¹⁸ For discussion of the problem of "weasel words" and how they actually achieve the opposite of "streamlining" see comments in my submission to the Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). https://megancevans.com/wp-content/uploads/2021/03/Evans_EPBC-interim-report_submission.pdf

¹⁹ Lindenmayer, D., Maron, M., Evans, M.C., Gibbons, P., 2017. The plan to protect wildlife displaced by the Hume Highway has failed. The Conversation. <http://theconversation.com/the-plan-to-protect-wildlife-displaced-by-the-hume-highway-has-failed-78087>