



31 March 2021

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

Via email: ec.sen@aph.gov.au

Dear Committee Secretary

The Minerals Council of Australia welcomes the opportunity to provide a submission to the Senate Environment and Communications Committee inquiry to support the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (the bill).

The MCA supports the passage of the bill. The bill enables the establishment of national environmental standards and strong assurance which along with reforms to allow the effective integration of Commonwealth and state and territory processes will improve outcomes for business, the environment and enhance community confidence in environmental protection. These reforms are consistent with the independent review and represent a critical first step on the reforms journey.

The MCA represents Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society.

The Australian Minerals industry is committed to the protection of Australia's unique environment. MCA member companies are signatories to *Enduring Value – the Australian Minerals Industry Framework for Sustainable Development*, keys principles of which include continual improvement in environmental performance and contributing to biodiversity and integrated land use planning approaches. The principles of Enduring Value are consistent with the United Nations' Sustainable Development Goals.¹

Furthermore, MCA members are adopting 'Towards Sustainable Mining', a leading sustainability system for measuring and enhancing site level performance. This includes specific criteria for biodiversity conservation and management.

The MCA supports robust environmental regulation that is both efficient and effective in achieving the sustainable development outcomes expected by the Australian community.

¹ Minerals Council of Australia, [Enduring Value Framework](#), 2015 Edition, MCA, Canberra, 2015.

Reforms are urgently needed to improve the operation of the EPBC Act

The independent review led by Professor Graeme Samuel AC found the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is out dated and requires fundamental reform. Critical to project proponents, review also found:

The complexity of the EPBC Act leads to cumbersome processes, which are inefficient for both business and government. This adds to regulatory costs, without any associated environmental benefit.²

The MCA also notes the Productivity Commission in its recent study report on resource sector regulation found:

There is considerable scope to improve regulatory processes and reduce unnecessary burdens to encourage resources investment without diluting requirements to mitigate impacts on the environment, heritage, worker safety, landowners and communities.

And:

Notwithstanding recent worthwhile initiatives, regulatory processes in the resources sector remain unduly complex, duplicative, lengthy and uncertain, and may be becoming more so.³

Duplication, unnecessary complexity and uncertainty leads to increased costs and delays for minerals projects. The Productivity Commission found a one year delay to a project can reduce the Net Present Value by between 7 and 11 per cent. For large mining projects (of \$3 billion to \$4 billion), delay costs can be up to \$1 million per day.⁴ This affects investment, impacting on regional jobs, businesses and communities with little improvement in environmental outcomes.

Additionally these reviews come at a time when Australia's standing as an attractive place to invest in exploration projects has declined, according to the *Fraser Institute's Annual Survey of Mining Companies*.⁵

Numerous reviews over many years have highlighted significant issues with the EPBC Act, including overlap with state and territory laws but very little change has occurred. Accordingly, the review provides an important opportunity to progress meaningful reform.

The Bill is an appropriate first step on the reforms journey

The MCA supports passage of the bill, which alongside amendments contained in the EPBC (Streamlining Environmental Approvals) Bill 2020 fulfills the core tenets of the Samuel review recommendations. These include:

1. The establishment of national environmental standards
2. Accredited state and territory assessment and approval processes, using the standards as a benchmark to be met
3. Creation of an Environmental Assurance Commissioner (EAC) to provide independent oversight and transparency around the operation of accredited arrangements and other processes.

The Samuel review recommendations are both complex and wide-ranging and will take time to consider. In recognition of this and the urgent need to move forward with reform, the review proposes a phased approach with the immediate Tranche 1 reform priorities to 'create enforceable National

² Professor Graeme Samuel AC, Independent Review of the EPBC Act – Final Report, Page viii October 2020.

³ Productivity Commission, [Resources Sector Regulation](#), December 2020, page 2.

⁴ Productivity Commission, Major Project Development Assessment Processes: Research Report, Canberra, released 10 December 2013, p.203.

⁵ Fraser Institute's [Annual Survey of Mining Companies](#), 2020.

Environmental Standards with stable accreditation settings and independent oversight'.⁶ The bill, along with the streamlining reforms fulfills this fundamentally important first step.

Specifically, the bill will establish a head of power for the Minister to make National Environmental Standards and the statutory appointment of an independent EAC. National Environmental Standards and robust assurance will provide greater clarity on environmental expectations, set benchmarks for accrediting state and territory processes and enhance transparency for greater community confidence and trust in the operation of the Act.

National Environmental Standards will support improved operation of the EPBC Act

The MCA submits that National Environmental Standards, the centrepiece of the reforms recommended by the Samuel Review will provide clarity and certainty for the accreditation of state and territory approval process under EPBC Act bilateral agreements.

Professor Samuel found that despite efforts to coordinate state and Commonwealth requirements, significant duplication remains. Improved clarity on these requirements will enable duplication to be addressed while achieving strong environmental outcomes.

The bill provides for the standards to be made by regulation and beyond the first standards subsequent standards can be disallowed under the *Legislation Act 2003*. This provides for the full scrutiny of the Parliament and consultation under section 17 of the Legislation Act. The MCA considers these arrangements are consistent with the Samuel review.

The interim standards should reflect current EPBC Act settings

The MCA agrees with the Samuel review that the first or interim standards reflect current EPBC Act settings. The reforms contained in the bill represent the most significant changes since the Act's inception. Given this, a careful, stepwise approach to implementation will avoid the potential for significant unintended impacts on regulated industries. This is important for regulatory stability while setting a strong, workable foundation on which to update and enhance the standards in the future.

The MCA supports the inclusion of a specified review period. A review of the standards within two years will allow for the assessment of state and territory approval processes and for broad stakeholder consultation to ensure changes will result in further improved environmental outcomes while avoiding unworkable requirements or uncertainty, particularly when applied across multiple jurisdictions and industries.

Sufficient time should be allowed to accredit state and territory processes, assess performance and conduct meaningful stakeholder consultation. This will be particularly important as legislative changes at a state and territory level may be required, again these changes will take time. It is noted that subsequent reviews of the National Environmental Standards are required at least every five years, the MCA supports this timeframe.

As the standards evolve and become increasingly sophisticated, so should their application. The final or future standards should be applied at a regional level focussing on the achievement of regional environmental outcomes.

The MCA considers the commencement timeframe for the final standards of 1 to 6 months could be overly ambitious given state and territory governments may need to update legislation to meet the standards. This would leave state and territory processes un-accredited and create significant uncertainty for projects under assessment. The discretion for the Minister to set a longer commencement timeframe should be preserved in the legislation, the MCA suggests a period of 1 to 12 months would be more appropriate.

⁶ Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report*, October 2020, p192.

Additionally, the reforms should avoid creating uncertainty for existing projects under assessment. Environmental assessments for major projects can take many years to complete and given this new or varied standards should not apply to processes already underway. In this regard the transitional provisions of the bill should be amended.

The MCA supports the ability for the Minister to make a decision that is inconsistent with a National Environmental Standard only if the Minister is satisfied that it is in the public interest to do so. It is noted that as soon as practicable after making the public interest decision the Minister is required to publish reasons setting out why the decision was taken.

The application of 'other writing' should be clarified or amended

The mechanics that allow the minister to vary or revoke a standard are appropriate and workable including the requirement to notify parties of relevant bilateral agreements. However, the MCA is concerned that subsection 65C(4) of the bill allows for a standard to apply, adopt or incorporate 'other writing' even if the 'other writing' does not exist when the standard is made. This diminishes the scrutiny of the parliament if the standard is able to reference 'other writing' which may not exist in the period between a standard being made and being subject to the disallowance provisions of the *Legislation Act 2003*.

If 'other writing' is applied, adopted or incorporated in a standard this 'other writing' may be updated but it would not re-enliven the disallowance provisions, meaning a legislative instrument could be changed without the scrutiny of the parliament. As such, the MCA recommends any 'other writing' referenced in a standard needs to be in place before a standard is created and cannot be updated without updating the standard.

The Explanatory Memorandum for the bill suggests 'other writing' could include conservation advices however the term is not defined. Further, whilst the Explanatory Memorandum states it is the intention 'other writing' applied, adopted or incorporated into a standard will be freely and publicly available, the MCA notes there is no legislative protection to ensure this occurs. This has the potential to undermine transparency and public accountability in the interpretation and application of the standards. Accordingly, the MCA recommends 'other writing' should be defined or removed.

The Environment Assurance Commissioner role is appropriate

The MCA supports an EAC as set out in the bill which is consistent with the model proposed by in the Samuel review.

The effectiveness of National Environmental Standards are dependent on a robust assurance regime. The establishment of the EAC with a mandate to audit and/or monitor the operation of bilateral agreements and processes under the EPBC Act will provide independent oversight needed to improve community confidence and trust in the EPBC Act.

The bill establishes the EAC as an independent statutory position but with appropriate Ministerial, Parliamentary and public oversight. The annual work plan process will provide for a disciplined and structured approach to monitoring and auditing.

The publication of audit reports within 30 business days of completion will improve transparency and will improve public confidence in the operation of the EPBC Act. As will the annual report provided by the EAC to the Minister that will be published in the department's annual report.

The MCA considers the EAC's powers to request a person to provide information or documents, or answer questions if the EAC believes the person has information or documents relevant to the performance of the EAC's functions is proportionate to the EAC's role.

The MCA acknowledges that the EAC does not have the power to monitor and/or audit an individual decision as this would duplicate the compliance auditing processes that are well established. The MCA considers this provides an appropriate balance of assurance, providing certainty for project proponents by avoiding duplicative compliance and enforcement for the same set of requirements.

The MCA has consistently advocated for an appropriately qualified and well-resourced assurance role to oversee implementation of the environmental standards. A well-functioning EAC will improve public confidence in EPBC Act processes by providing transparency on the performance of these arrangements.

The MCA would welcome the opportunity to provide further input on these important reforms. Should you have any questions, please do not hesitate to contact Chris McCombe – General Manager, Sustainability on [redacted] or via email

Yours sincerely

TANIA CONSTABLE PSM
CHIEF EXECUTIVE OFFICE