Law Council
OF AUSTRALIA

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

Senate Environment and Communications Legislation Committee

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the valuable contributions of the Australian Environment Planning Law Group (**AEPLG**) of its Legal Practice Section, its National Human Rights Committee and the Queensland Law Society in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide input to the Senate Environment and Communications Legislation Committee (**the Committee**) for its inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (**the Bill**).

2. The Law Council commends the intent to respond swiftly to the Final Report of the Independent Review (**the Review**) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) prepared by Professor Graeme Samuel AC (**Final Report**).[1]

3. The Bill would amend the EPBC Act to establish a framework for the making, varying, revoking and application of National Environmental Standards (**Standards**). The Bill also seeks to establish an Environment Assurance Commissioner (**EAC**) to undertake monitoring or auditing of the operation of bilateral agreements with states and territories and Commonwealth processes for making and enforcing approval decisions.

4. The introduction of legally enforceable Standards is critically important and the Law Council endorses the Bill's attempt to provide for these in principle.

5. However, a framework for making Standards will only be effective if there are clear guarantees around their quality, accompanied by consistent and comprehensive application. Further, the proposed Standards should be developed, made publicly available and circulated as additional documents to the inquiry concerning the Bill, and considered in that context. Without this clarity, Parliamentarians and the public may be uncertain as to their content, strength or likely effectiveness – or the effectiveness of the Bill.

6. The need for public debate and effective parliamentary scrutiny regarding the Standards is particularly important given that Professor Samuel emphasised that they were to form the centrepiece of his recommended reforms to better protect the environment at the national level, while facilitating more streamlined approval processes. He proposed that they cover a full suite of nine areas of subject matter, and drafted the first four of the proposed Standards, while recommending the urgent development of the remainder.

7. The Bill proposes that the Standards will be developed by the Minister, with the initial Standards not to be disallowable or reviewed for two years. This may not enable adequate Parliamentary or public scrutiny of the new arrangements, noting the underlying intention to devolve environmental regulatory responsibilities to States and Territories in accordance with the Standards. The Law Council's recommendations below, which include that the initial Standards should be disallowable, are intended to address this issue.

8. The proposed audit function of the EAC responds to another recommendation made by Professor Samuel. The Law Council's recommendations regarding this role are intended to ensure that it has the intended independence, scope, powers and resources to carry out its tasks. It also recommends that clarity should be available on the Australian Government's response to the Professor Samuel's recommendations that greater regulatory compliance and enforcement powers and arrangements be provided for under the EPBC Act. This should be clear prior to the

[1] See, Professor Graeme Samuel AC, 'Independent Review of the EPBC Act – Final Report' (October 2020) ('*Final Report*'); Independent review of the EPBC Act, 'Final Report released'.

EAC role progressing, given that the Final Report recommended that the EAC's additional audit function should work in close alignment with these expanded compliance and enforcement functions.

9. The Law Council's overarching recommendation reflects the above points. This is that a full and comprehensive Australian Government response is needed to Final Report, noting that it was characterised as a 'highly interconnected suite of recommendations'. The Bill should only progress with the benefit of this full public response. While recognising that a staged response may be necessary to its implementation, it is important to understand how all the reforms pursued are likely to interact, and their overall effectiveness.

10. A full and comprehensive response will assist the public's understanding of how the Australian Government intends to take a fundamental role in protecting the environment for the benefit of future generations, as part of the common interests of all Australians, while nevertheless improving streamlining arrangements with the States and Territories.

11. A number of more detailed recommendations are included below.

Introduction

12. In accordance with its agreement on 11 December 2020, National Cabinet has chosen to progress two aspects of Professor Samuel's recommendations as set out in the Final Report.[2] These relate to the Standards and an EAC.[3] More broadly, the National Cabinet has also decided to pursue a 'single touch' approvals system for environmental impact assessment.[4]

13. The selected reforms are being progressed through the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (**Streamlining Approvals Bill**), which remains unpassed by the Federal Parliament, and the Bill which the Committee is currently considering.

14. The Explanatory Memorandum to the current Bill (**the Explanatory Memorandum**)[5] frames the Bill as a response to two of the main areas addressed by the Final Report, being a need for:

    - legally enforceable Standards; and
    - 'strong independent oversight of environmental assessment and approval systems, including accredited State and Territory systems, to provide confidence that the outcomes of the [Standards] are being achieved and the requirements for the EPBC Act are being upheld.'[6]

15. The way the Bill responds to these respective identified needs is to:

    - create a framework for Australia's Minister for the Environment (**the Minister**) to make Standards to 'underpin accredited environmental assessment and

[2] See, The Hon Sussan Ley MP, 'Review Supports Reform for Environmental Laws' (Media Release, 28 January 2021) ('*Review Supports Reform*').
[3] Ibid.
[4] Ibid.
[5] Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 ('*Explanatory Memorandum*').
[6] 5, 14.

approval processes under bilateral agreements with state and territories, as well as certain decisions or things under the [EPBC] Act'; and

- establish an EAC 'to provide strong, rigorous assurance that environmental assessment and approval systems, either under bilateral agreements with the states and territories, or under the Act, are working well and are delivering outcomes for the environment, business, and the community.'[7]

16. The Law Council considers it appropriate to evaluate the intent and effectiveness of the Bill against the findings by the Final Report and the broader context of the Commonwealth's role in environmental protection. These are described briefly below before the Bill is assessed in the remainder of this submission.

Independent Review of the EPBC Act

17. The Law Council supports the findings of the Final Report and its recommendations as the product of a broad-ranging consultative process, involving over 3,000 unique submissions. The Law Council, along with many other organisations, individuals and experts, made a number of written and oral submissions to Professor Samuel in the course of the Review and participated in a consultative group to develop and refine some of the concepts introduced by the Interim Report of the Review, including new Standards and the requirements for a strong assurance model.[8] The Law Council considers that this consultative process enhanced the Final Report and its recommendations.

18. The Final Report is a thorough and comprehensive blueprint for the much-needed reform of the EPBC Act and sets out a staged process for that reform. The blueprint addresses the issues with the text of the Act itself and some key shortcomings in its administration, including the need for improved acknowledgement and engagement of Indigenous knowledge and the need to improve the quality of data to underpin decisions made under the Act. The Final Report's recommendations are designed to address concerns held about the need to 'streamline' the environmental impact assessment and approval process in the existing EPBC Act and corresponding State and Territory legislation, without sacrificing the protection of the environment or the public's trust in the system.[9]

19. Professor Samuel described the 'new legally enforceable [Standards]' as the 'centrepiece of the recommended reforms.'[10] Professor Samuel recommended in the Final Report that the full suite of Standards be implemented immediately and that the Standards developed in detail by the Review should be accepted in full.[11] These Standards address:

    - matters of national environmental significance (MNES);
    - Indigenous engagement and participation in decision-making;
    - compliance and enforcement; and
    - data and information.12

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[7] Ibid 14.

[8] Following the release of the Interim Report of the Review in July 2020, the Law Council was pleased to accept Professor Samuel's invitation to participate in a consultative group alongside other national representative bodies, scientists and Traditional Owner representatives. The consultative group met fortnightly to develop and refine some of the concepts introduced by the Interim Report of the Review, including NES and the requirements for a strong assurance model.

[9] See, *Final Report* n 1, 'Foreword'.

[10] Ibid, Key messages viii.

[11] *Final Report* n 1, 'Executive Summary' .

[12] Ibid.

20. Professor Samuel further recommended that the full suite of Standards should include:

- Commonwealth actions and actions involving Commonwealth land;
- transparent processes and robust decisions, including:
  - judicial review;
  - community consultation;
  - adequate assessment of impacts on MNES – including climate considerations;
  - disclosure of emissions profile; and
  - quality regional planning;
- environmental monitoring and evaluation of outcomes;
- environmental restoration, including offsets; and
- wildlife permits and trade.13

21. As recommended in the Final Report, the Standards should underpin accreditation arrangements with States and Territories.[14]

22. The Final Report also recommended that the current outdated bilateral agreement processes be removed and replaced with robust and efficient accreditation processes based on the proposed Standards.[15] It found that the EPBC Act '*does not enable the Commonwealth to effectively fulfil its environmental management responsibilities to protect nationally important matters*' and '*governments should avoid the temptation to cherry pick from a highly interconnected suite of recommendations*'.[16] This would tend to warn against taking a selective approach to only implementing certain recommendations which were directed towards devolving Commonwealth powers to states and territories.[17]

23. Instead, all governments, via the National Cabinet, have decided to implement certain reforms first.[18] These are focussed on 'streamlining' the environmental impact assessment and approval process as it exists in the EPBC Act and corresponding State and Territory legislation.[19]

24. The Law Council reiterates its view, which it has expressed in previous submissions, that a comprehensive Australian Government response to the Final Report is important. The Law Council supports the careful consideration by all governments of the full set of recommendations in the Final Report and understands the Australian Government is intending to release a complete response in due course.[20]

25. If the Australian Government elects not to provide such a response immediately, the Law Council recommends the Australian Government provide a timetable for the release of its response, including its approach to Professor Samuel's recommendations. This will provide context for the Bill and some assurance that the Final Report will be properly considered and implemented. The Bill should not proceed until the full Government response has been published and the Standards

[13] Ibid, 'Appendix B – Recommended National Environmental Standards'.
[14] Ibid.
[15] See, recommendation 24.
[16] See, *Final Report* n 1, 'Foreword'.
[17] See, ibid.
[18] See, *Review Supports Reform* n 2.
[19] See, ibid.
[20] Environment and Communication Legislation Committee, Parliament of Australia, *Estimates Hearing* (22 March 2021).

have been drafted in full and included in a revised version of the Bill or, at the very least, made available for public and parliamentary scrutiny.

Broader context: the role of the Commonwealth in environmental protection

26. An assessment of the Bill against the recommendations made in the Final Report also requires a foundational understanding of the role of the Commonwealth in environmental protection. The Law Council's longstanding view is that the Commonwealth should be demonstrating leadership in biodiversity conservation and environmental protection having regard to its unique role sitting at the apex of government in Australia and being independent of particular State or Territory interests.[21] The Australian Government has a fundamental responsibility for giving effect to Australia's international commitments in domestic law, including, where necessary, through the exercise of the external affairs power under the Australian Constitution.[22] This includes the maintenance of a healthy environment, which has been recognised as an important part of respecting, protecting and fulfilling the internationally agreed human rights of Australians such as the right to life and the right to the highest attainable standard of physical and mental health.[23]

27. In the Final Report, Professor Samuel also emphasised the Australian Government's responsibility to set outcomes and conduct oversight of national progress made against them, noting that:

> *The EPBC Act and its operation requires fundamental reform to enable the Commonwealth to set clear outcomes for the environment and provide transparency and strong oversight to build trust and confidence that decisions deliver those outcomes and adhere to the law.*[24]
>
> *The focus of the EPBC Act should be on the Commonwealth's core responsibility for protection of the environment and conserving biodiversity.*[25]

28. Elsewhere in the Final Report, Professor Samuel observed that this responsibility stems from Australia's obligations, as signatory, to the other signatories of the many international conventions and agreements which protect the global environment.[26]

29. In addition to fulfilling its international obligations, the Australian Government's oversight role to protect the environment should also be considered by reference to the need to protect the common interests of Australia. A healthy environment is properly understood as part of the commons belonging to all Australians.[27] While recognising that State and Territory governments must continue to play their role

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[21] See also, Law Council, 'Submission to the Statutory Review of the EPBC Act 1999 (Cth)' (20 April 2020) 10.
[22] See, *Commonwealth of Australia Constitution Act* s 51(xxix).
[23] See, with respect to the right to life: Human Rights Committee, *General Comment No 36, Article 6 (Right to Life)*, UN Doc CCPR/C/GC/35 (3 September 2019) [26], [62]. See also, with respect to the right to the highest attainable standard of health: Committee on Economic, Social and Cultural rights, *General Comment No 14, The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc E/C.12/2000/4 (11 August 2000) [4], [11], [16].
[24] *Final Report* n 1 viii.
[25] Ibid 4
[26] See, for example, the commentary on Australia's responsibilities under international agreements on the environment: ibid 41.
[27] See, Australian Panel of Experts on Environmental Law, Democracy and the Environment (Technical Paper 8, 2017).

these considerations would also support the argument that strong national action is required to protect the national and long-term interest in a healthy environment.

Recommendations regarding the Samuel Report

Recommendations

- **The Australian Government should immediately provide a comprehensive response to the Final Report. If the Government elects not to provide such a response, it should provide a timetable for the release of its response, including its approach to Professor Samuel's recommendations. The Bill should not proceed without the benefit of the comprehensive response.**
- **The Australian Government's response to the Final Report, including the Bill if it proceeds, should fully reflect its fundamental role in taking strong action to protect the environment for the benefit of future generations, as part of the common interests of all Australians, and ensuring national compliance with Australia's international obligations.**

Comments on the Bill

30. The following sections of this submission assess the Bill by breaking it down into its first Schedule (which addresses Standards) and its second Schedule (which addresses an EAC). Further recommendations are then made for improving the Bill so that it realises the recommendations made in the Final Report.

Schedule 1: creation of the Standards

Test for consistency with the Standards

31. Schedule 1 of the Bill introduces the concept of the Standards and their incorporation into approval bilateral agreements. The amendments of the EPBC Act as proposed at items 1 – 5 repeatedly insert the requirement that the relevant State and Territory processes and decisions are 'not inconsistent' with the Standards.

32. Conversely, the Final Report envisaged that the Australian Government would set the Standards and the State and Territory governments would demonstrate upfront how their respective assessment and decision-making processes are consistent with each Standards as part of the bilateral agreement process.[28]

33. The Law Council considers it possible that the use of the phrase 'not inconsistent' may invite a negotiation by the State and Territory governments about whether their existing environment impact assessment processes are 'not inconsistent' with the Standards in force at any given time. Professor Samuel warned against the potential for such negotiation in the Final Report.[29] This may not provide the Australian community with the assurance that it needs that a State's or Territory's assessment and decision-making processes meet robust objective Standards. Instead, it may lead to protracted debate and public uncertainty.

[28] See, *Final Report* n 1, 3.
[29] See, for example, *Final Report* n 1, 102.

34. Proposed paragraph 46(3)(aa) has the effect that the Minister may accredit a management arrangement or authorisation process only if the Minister is satisfied that 'there are one or more national environmental [S]tandards – the management arrangement or authorisation process is not inconsistent with' those Standards. This drafting is weaker than requiring decisions to 'be consistent with' mandatory Standards. The Law Council recommends this drafting be amended to require more positively that the management arrangement or authorisation process must be consistent with the Standards.

35. The drafting of proposed subsection 47(2) should also be revised to require demonstration of consistency with the Standards, rather than a lack of inconsistency. The proposed section presently provides that the Minister may, 'if satisfied,' make a declaration of classes of action that do not require assessment under Part 8 where a bilateral agreement is in place and, if Standards exist, the assessment of an action in a specified manner is 'not inconsistent with' the Standards.

36. Paragraph 48A(3A) raises similar issues, also applying the 'not inconsistent' test where Standards exist. This provision requires bilateral agreements to refer to the Standards but, as described in the Explanatory Memorandum, allows for negotiation by permitting a State or Territory to argue that its processes are not inconsistent with Standards by reference to broader environmental measures.[30] The amendment suggested above to replace 'not inconsistent' with 'consistent' should be applied here.

37. The drafting approach at proposed paragraph 59(1A) inserts inconsistency with Standards as a ground for the Minister to make a declaration of suspension/cancellation of a bilateral agreement. The amendment suggested above to replace 'not inconsistent' with 'consistent' is recommended here.

38. In summary, items 1-5 of Schedule 1 of the Bill require rewording so as to ensure consistent and objective application of a comprehensive suite of national Standards, and to avoid jurisdictional negotiation of Standards.

Substance of the Standards

39. As discussed above, the Final Report proposes a complete suite of nine recommended Standards, covering not only 'technical' Standards – being those related to MNES – but also 'process' Standards for stakeholder engagement, compliance and enforcement procedures and data and information (amongst others).[31] The Final Report specifically drafts four of these recommended Standards for adoption, and recommends that the others be developed and adopted urgently.

40. The Law Council considers that the recommended Standards (including the four drafted Standards) are an important starting point. They follow substantial consultation by Professor Samuel with all stakeholders who responded to the government-initiated EPBC Act review. They are designed to provide the Australian community and businesses alike with clear guidance as to how the environment will be appropriately protected at the national level going forward.

41. The Bill and its explanatory materials do not indicate whether the recommended Standards included in the Final Report will be adopted. Under this proposed

[30] See, Explanatory Memorandum n 5, 10.
[31] See, *Final Report* n 6 at 201-235.

framework, the Minister may make Standards which will be regularly reviewed.[32] However, the first review of any Standards will not occur for two years.[33] Further, the first of each Standard made will not be subject to disallowance[34].

42. The Law Council notes that it is unclear whether the Australian Government intends to focus on 'technical' matters[35] or whether it intends to draft and implement the more substantive process Standards directed at addressing other key concerns raised by the Final Report, such as lifting the quality of stakeholder engagement, including proper consideration of Indigenous concerns, and improved compliance and enforcement processes.

43. This focus on creating a framework for the Standards, rather than providing the Standards themselves for Parliamentary and public consideration, may have the effect of consolidating existing policies and procedures for assessing potential impacts on MNES as interim Standards for two years, after which time a review will be conducted. States and Territories need only show that their processes are 'not inconsistent' with current process (which has been demonstrated as not meeting the intended environmental outcomes of the EPBC Act[36]) in order to achieve accreditation under an approvals bilateral agreement. The Law Council notes that this diverges from the positive reform approach recommended in the Final Report.

44. The Law Council has also become aware of reports that a set of interim Standards has already been privately circulated to State and Territory governments, as well as to Senate crossbenchers.[37] However, there are concerns that these are 'significantly different' from those proposed by Professor Samuel and are insufficiently strong.[38]

45. The Law Council considers that it would be preferable to immediately accept the Standards drafted by Professor Samuel in the Final Report in full, and to additionally draft Standards without delay on the other subjects recommended in the Final Report.

46. The Australian Government should make any proposed Standards (whether those developed as part of the full suite recommended by Professor Samuel or otherwise) publicly available for Parliamentary scrutiny and consultation with the Australian community, business and all stakeholders, including the States and Territories, having regard to existing environmental arrangements. This should be done before further progressing the legislative framework proposed in the Bill.

47. This recommended course of action would greatly improve public and parliamentary certainty regarding the 'centrepiece' or substance of the reform – the Standards - at this important reform juncture.

Review of the Standards

48. In respect to the timing of reviews of the Standards, proposed section 65G of the Bill provides for the first review at two years and for reviews to then occur every five years. As noted above, the Law Council is concerned that interim Standards based

[32] See, Bill, proposed s 65C(1).
[33] Ibid proposed s 65G.
[34] Ibid proposed s 65C(3).
[35] Since the interim Standards proposed by the Commonwealth have not been released, it is not yet clear what these Standards will cover.
[36] *Final Report* n 1, Foreword.
[37] Dan Jervis-Bardy, 'ACT environment minister fears new standards will lock in weak wildlife protections', *Canberra Times* (online), 28 February 2021.
[38] Ibid.

on the current settings of the EPBC Act will be in place for two years, with no parliamentary scrutiny through the disallowance mechanism. The Law Council recommends that the Minister be required to table the written review report in Parliament or publish it in some other transparent manner within a specified timeframe (eg, 15 sitting days) and to respond publicly to the report within a specified timeframe (eg, six months).[39]

49. Further, there is currently no requirement for the Standards review processes to be undertaken by persons who are independent. As with the Explanatory Memorandum states:

> *The amendments provide the Minister with the flexibility to ensure the review is conducted by a person or persons with the appropriate expertise relevant to the specific Standard. This may include, for example, the Department or members of a committee established under the Act.*[40]

50. The Law Council considers that the Bill should explicitly require review by independent expert reviewers.

Exemption from disallowance for first Standards

51. The Law Council notes that proposed paragraph 65(C)(3) exempts from disallowance 'the first Standards made in relation to a particular matter.' The Explanatory Memorandum to the Bill justifies this exemption as follows:

> *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 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 under new Part 5A (see Items 1 and 2), they are an essential pre-requisite for the 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 under new Part 5A, the exemption from disallowance is necessary to provide certainty to the states and territories, and assurance to the public generally, that those processes meet the necessary Standards to*

[39] The Bill currently requires the review report to be published 'as soon as practicable' but there is no detail regarding how/whether the Minister must respond to the report: proposed s 65G(5).
[40] Explanatory Memorandum n 5, 9.

make environmental assessment and approval decisions in relation to Commonwealth protected matters.[41]

52. The Explanatory Memorandum for the Bill states that because the 'single touch approvals' model will be 'frustrated' by a lack of Standards, interim Standards must be made as soon as possible so must not be exposed to disallowance by Parliament.

53. The Law Council considers that decision-making on significant matters should not be delegated in an open manner to the Executive, and that any delegation should be tightly confined and subject to parliamentary oversight.

54. The Law Council's concern regarding delegated legislation is heightened where an instrument is not subject to disallowance. The grounds advanced above for exempting the proposed delegated legislation from disallowance may not be regarded as reasonable or proportionate.[42]

55. In the Law Council's view, all Standards, including the interim Standards, should be disallowable, with the period for disallowance being observed prior to any single touch approval process being progressed.

Commencement time and suspension of bilateral agreements

56. Proposed section 65F in the Bill requires the Australian Government to notify States and Territories party to a bilateral agreement when a Standard is made, varied or revoked. The States and Territories are to respond to that notification and identify whether any bilaterally accredited management arrangement or authorisation process, or any assessment of a relevant action, will be 'inconsistent with' the Standard as made or varied. The Law Council repeats its recommendations made above to change this test to one for 'consistency with' the Standards.

57. Further, this provision appears to assume that the State or Territory will then amend its process to avoid inconsistency with the Standards by the date on which the new or amended Standard takes effect. The Law Council agrees with the intent that appropriate Standards commence promptly, however it notes that if a State or Territory requires legislative amendments to accommodate a new or varied Standard this could take longer than the maximum six month period contemplated by the proposed subsection 65D(2), in the case of variations (or indeed the minimum of one month contemplated by the proposed subsection 65C(2) in the case of new Standards). This means that an accredited process in an approvals bilateral agreement could operate while inconsistent with one or more Standards, contrary to the intention of the Bill.[43]

58. The Law Council recommends a reconsideration of whether the current timeframes for commencement of Standards are appropriate and achievable (including through consultation with States and Territories).

59. Further, as noted in the Explanatory Memorandum, the Minister has a discretion to suspend and/or cancel the operation of a bilateral agreement in the case of inconsistency.[44] Under items 4 and 5 of the Bill:

[41] See, ibid 6-7.
[42] Ibid 7.
[43] See, Ibid 7.
[44] Ibid 11.

- section 58 is amended (through new paragraph 58(1)(c)) so that the Minister must consult with the relevant State or Territory minister if the Minister believes that the State or Territory has given effect, or will give effect, to an approval bilateral agreement in a way that is inconsistent with a Standard; and
- section 59 is amended (new 59(1A)) so that after the above consultation, the Minister has the discretion to give written notice of the suspension or cancellation of all or part of the approval bilateral agreement to the relevant State or Territory minister, if satisfied that the State or Territory has given effect, or will give effect, to the agreement in a way that is inconsistent with a Standard.

60. The Minister may exercise this power where, for example, following a request to a State or Territory minister under new section 65F, the Minister believes that the State or Territory will give effect to an approval bilateral agreement in a way that is inconsistent with a new or varied Standard.[45]

61. However, the efficacy of this process depends on the State or Territory self-identifying whether its bilaterally accredited arrangements or authorisation processes, or assessments of any relevant actions, are inconsistent with the Standard in response to a section 65F request. There is no obligation on the Minister to independently assess whether this is the case. Such an obligation should be included in the Bill, as part of reinforcing the Commonwealth's role in ensuring that Standards are met at the national level.

62. The Law Council considers that where the Minister independently assesses, under this obligation, that a State or Territory's bilaterally accredited arrangements or authorisation processes, or assessments under bilateral agreements, fall short of a Standard, the Minister should be required to consult with the State or Territory under section 58. Where such consultation is unsuccessful after a defined consultation period, the Bill should separately provide that the Minister must then suspend the bilateral agreement while the inconsistency with the Standard remains unresolved (rather than having the discretion to cancel or suspend it).

63. There is an emergency suspension power under section 60, where as a result of non-compliance by a State or Territory with a bilateral agreement, a significant impact is occurring or imminent on a Part 3 protected matter. This could be altered to provide that the Minister also has the discretion to suspend the bilateral agreement, without needing to first observe the requirement of prior consultation, should the Minister be satisfied that there is a relevant inconsistency with a Standard, and significant impact is occurring or imminent as a result.

64. Further, the Explanatory Memorandum states that delayed commencement of variation to a Standard 'will not be necessary' where such variation is 'minor in nature and does not substantially affect the operation of a National Environmental Standard' (or where the Standard is revoked).[46] Similarly, the requirement for a State or Territory minister to advise the Commonwealth Minister on whether inconsistency has arisen will not apply if the Minister is satisfied that the variation is 'minor.'[47]

65. The Bill does not define 'minor variations.' The explanation in the Explanatory Memorandum that a variation is 'minor if it does not involve a significant change in

[45] Ibid 12.
[46] See, Explanatory Memorandum n 5, 8.
[47] See, proposed s 65F(3).

the effect of a National Environmental Standard'[48] should be clarified in the Bill. This should include clarification that the 'no significant change' test has regard to the effect of the Standard 'with respect to the operation of the specific bilateral agreement' rather than to its overall national effect.

Incorporation of instruments 'or other writing' not yet made

66. The Law Council notes that proposed subsection 65C(4) would allow a Standard to apply, adopt or incorporate 'an instrument or other writing' as it exists at a particular time, or as in force or existing from time to time, even if the instrument or other writing does not yet exist when the Standard is made. Subsection 65D(3) has a similar effect with respect to variation of a Standard. These subsections specifically override subsection 14(2) of the *Legislation Act 2003* (Cth).[49]

67. The Explanatory Memorandum offers the following rationale:

> *...For example, a National Environmental Standard may make reference to Australia's obligations under international conventions, or may refer to Commonwealth instruments, such as conservation advices. It is necessary to allow instruments or other writings to be applied, adopted or incorporated into a National Environmental Standard either as in force or existing from time to time to ensure the environmental outcomes of a Standard are able to be met, and [to] ensure the Standard remains contemporary as documents are updated or created over time. It is the intention that any instruments or other writings applied, adopted or incorporated into a National Environmental Standard will be freely and publicly available. For example, section 266B of the Act requires the Minister to publish conservation advices on the internet within 10 days of approval.*

68. The Law Council recognises that it may be desirable for Standards to refer to updated conservation advices and best-available information (for example in relation to international obligations) as they become available. However, the scope of this provision should be clarified and narrowed to reflect this purpose, noting that the scope of what may be incorporated (eg, 'other writing') is open-ended. Such a clarification could explicitly permit incorporation of updated and best practice conservation advice or references to updated international obligations, for example.

69. Otherwise uncertainty may arise, including in circumstances where the relevant 'other writing' is not finalised or made public in a timely manner, and it may be difficult for the Minister to be satisfied that arrangements or processes are not inconsistent (or, as recommended, are consistent) with Standards when relevant details and documents are not yet in existence, or where other people are affected by such decisions (which may arise where, for example, the suspension provisions are enlivened by referral by 'a person'[50]).

Power to vary or revoke Standards

70. Proposed section 65D provides Ministerial power and discretion to vary or revoke Standards. The Law Council endorses the fact that consultation requirements for legislative instruments under section 17 of the *Legislation Act 2003* (Cth) would

[48] See, Explanatory Memorandum n 5, 8.
[49] Subs 14(2) provides that 'unless the contrary intention appears, the legislative instrument or notifiable instrument may not make provision in relation to relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time'.
[50] See EPBC Act s 57.

apply[51] and an instrument varying or revoking a Standard would be disallowable. However, it repeats the potential issues raised above regarding the possibility for incorporation of an instrument or writing that does not yet exist.

71. The Law Council recommends that the Minister should only be able to exercise the power to vary or revoke a Standard, as set out under proposed section 65D, based on a threshold test requiring that the variation or revocation will not lead to a detrimental impact on a matter of national environmental significance or lessen the protections set out in the EPBC Act. Similarly, the Bill should clarify what exactly the Minister can consider when deciding whether to vary or revoke a standard, through listing specified criteria. For example, it is unclear whether a Standard could be revoked due to socio-economic impacts alone.

72. These amendments will address concerns, reflected in the Final Report, that the EPBC Act currently provides unfettered Ministerial discretion.[52] They will ensure there are limits as to how the Minister's power should be exercised and will avoid situations where, for example, a Standard could be amended for reasons which are unrelated to the protection of MNES and could even detrimentally impact these matters.

73. These amendments also mean the regime will better reflect the aims and recommendations of the Samuel Report, noting its perspective, with which the Law Council agrees, that:

> *The activities of government should be consistent with the Standards, noting that an elected government should always retain the ability to exercise discretion in individual cases. Such discretion should be a rare exception, demonstrably justified in the public interest, with reasons and environmental implications transparently communicated.*[53]

Requirements for decisions or things under the Act

74. Proposed section 65H sets out how Standards will apply to decisions made, or things done, under the Act.

75. New subsection 65H(1) requires a person making a decision, or doing a thing, that is determined by the Minister in an instrument made under new subsection 65H(4), to be satisfied that the decision or thing is not inconsistent with a Standard.[54] As above, this should be replaced with a more positive requirement to be 'consistent with' a Standard.

76. Proposed subsection 65H(2) sets out considerations for a person to be satisfied that making a decision or doing a thing is 'not inconsistent' with a Standard. The person may take into account:

- *… policies, plans or programs of the Commonwealth, a State or self-governing Territory;*
- *funding by the Commonwealth, a State or self-governing Territory of activities related to the environment; and*

[51] See, Explanatory Memorandum n 5, 6.
[52] See, *Final Report* n 1, 2-3.
[53] Ibid ii. See also, Recommendation 3.
[54] This determination will be a legislative instrument and subject to disallowance.

- *funding by the Commonwealth, a State or self-governing Territory of activities related to the promotion, protection or conservation of heritage.*

77. The Law Council notes that this list creates a broad range of matters to be considered when deciding if an accredited process or management arrangement, decision or thing is 'not inconsistent' with a Standard. This risks 'opening the door for negotiation' with the relevant State or Territory, instead of providing for a straightforward decision to be made about whether a specific standard is being met or implemented with respect to the specific decision or thing under consideration.

78. For example, it may be submitted by a State or Territory that while the strict terms of a Standard are not met for a particular development (for example, because there will be significant impacts on a MNES), there will be funding or 'promotion' of conservation elsewhere that will balance out the specific inconsistency. Room is left for decisions to be endorsed on the basis of collective regional outcomes broader than a specific project. While the Law Council acknowledges the importance of regional outcomes, this approach will not address cumulative impacts of individual projects (another issue identified in the Final Report[55] and contrary to its recommendations).

79. In providing a non-exhaustive list of considerations, proposed section 65H is ambiguous as to what other general issues may be considered. The Law Council recommends clarification of these matters through specific criteria, to ensure Standards are applied consistently in accordance with the Final Report and with the intent, as stated in the Explanatory Memorandum, that Standards 'will be specific, and provide clear rules, giving upfront clarity and certainty for decision-makers and proponents.'[56] These criteria should refer to the objects of the EPBC Act and the intention that the Standards provide a consistent safeguard and benchmark to protect the environment at the national level.

80. Proposed subsection 65H(2) should be deleted. If this recommendation is not accepted, it should be improved as follows:

- after 'the following matters', add 'only to the extent that they are directly relevant to the decision or thing under consideration'; and
- at the end of subsection 65H(2), add a note stating 'for clarity, the above matters, where they are not directly relevant to the decision or thing under consideration, should not be taken to offset any detriment caused by the decision or thing itself'.

Ministerial discretion regarding application of the Standards

81. Subsection 65H(4) as proposed by the Bill empowers the Minister to determine, by legislative instrument, a list of decisions or things that must not be inconsistent with the Standards – in other words, to decide the decisions and processes under the EPBC Act to which the Standards will apply. In the Second Reading speech for the Bill, the Minister explained:

> *The bill will also allow the minister to determine which decisions under the EPBC Act the national environmental standards will apply to. This*

[55] *Final Report* n 1, 127.
[56] See, Explanatory Memorandum n 5, 5.

> *mechanism will allow the standards to apply to a range of different decisions under the act over time…*[57]

82. The determination in question gives the Minister discretion to exclude a large number of decisions or things under the EPBC Act from the requirement to not be inconsistent with Standards.

83. This extends beyond an exemption for processes commenced before Standards are made It is unclear how or when such a determination is proposed to be used. While determinations, as legislative instruments, are usually subject to parliamentary scrutiny and disallowable unless stated otherwise, the Law Council submits that there is uncertainty regarding the potential for certain processes and decisions to be excluded from the application of Standards under this power.

84. The Law Council considers that the starting point should be, as recommended by Professor Samuel, that all activities of government under the Act must be consistent with the Standards. The Executive discretion to depart from this requirement should be tightly confined – 'a rare exception, demonstrably justified in the public interest, with reasons and environmental implications transparently communicated'.[58] This is reflected in Recommendation 3 of the Final Report. The Law Council also notes that there is a 'public interest' exception in the Bill, as discussed below.

85. To ensure that this starting point is reflected in legislation, the Law Council considers that the following should be deleted from the Bill:

- in proposed subsection 65H(1), the words 'being a decision or thing that is determined in an instrument under subsection (4)'; and
- subsection 65H(4).

86. The Law Council recognises that consequential amendments will also be necessary, eg, with respect to subsection 65H(5), which refers to an instrument 'under subsection (4)'.

Transitional matters

87. Subsection 65H(5) provides that 'an instrument under subsection 65H(4) may specify the circumstances in which subsection (1) does not apply in relation to the making of the decision or the doing of the thing.' Subsection 65E(1) makes a similar provision with respect to application of a new Standard or variation to a Standard.

88. Subsection 65H(6) states that 'without limiting subsection 65H(5), the circumstances may relate to one or more processes begun before the commencement of the instrument.' Subsection 65E(2) makes a similar provision with respect to application of a new Standard or variation to a Standard.

89. The Explanatory Memorandum states that:

> *…it is anticipated that the circumstances will relate to one or more processes that have begun under the Act before the commencement of the determination under new subsection 65H(4) (new subsection 65H(6)).*[59]

[57] See, Commonwealth, *Parliamentary Debates*, Senate, 25 February 2021 (Sussan Ley).
[58] See, *Final Report* n 1, ii.
[59] Explanatory Memorandum n 5, 12.

90. However, subsection 65H(6) expressly provides that the power to exclude matters from the scope of subsection 65H(1) is not limited to these kinds of matters. It may extend to matters relating to processes commenced after the instrument's commencement. The Law Council considers that this power should be amended and narrowed to reflect the stated purpose of acting as a transitional amendment.

91. Subsections 65E(1) and (2) should be similarly amended.

'Public interest' exception

92. The Law Council notes that the Bill's proposed subsections 65H(7)-(9) provide for the Minister to determine a 'public interest' exception to the requirement that a person be satisfied that an applicable decision or thing is not inconsistent with a Standard. It commends the fact that the determination making such an exception will be disallowable.

93. Recommendation 3(c) of the Final Report recommended that:

> *The Act should include a specific power for the Minister to exercise discretion to make a decision that is inconsistent with the National Environmental Standards. The use of this power should be a rare exception, demonstrably justified in the public interest and accompanied by a published statement of reasons which includes the environmental implications of the decision. It is observed that the Bill's provisions do not define what the 'public interest' may entail in this context.*[60]

94. The Law Council recommends that the public interest exception list non-exhaustive criteria to which the Minister must have regard in making this decision. These would which include having regard to the objects of the Act, and the intention that the Standards provide a consistent safeguard and benchmark to protect the environment at the national level. It further recommends that the power should be exercised personally by the Minister.

95. The Law Council also notes that under the terms of the current 'public interest' exception, the Minister is not obliged to explain what environmental impacts may occur as a result of an exception being made. It recommends that such an obligation be inserted in accordance with Recommendation 3(c) of the Final Report above.

Application of provisions in Schedule 1

96. The Law Council notes that item 8 of Schedule 1 of the Bill specifies which amendments made by Schedule 1 apply to bilateral agreements made before, on or after the commencement of the relevant item. However, where Standards do not apply to existing assessment bilateral agreements made prior to the Bill, there is no explicit requirement in the Bill for those agreements to be updated. It appears that there is an assumption the agreements would be updated should the relevant jurisdiction pursue an approval bilateral agreement. The Law Council recommends that the requirement to update such agreements be clarified.

[60] However, the Explanatory Memorandum 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': 13.

Recommendations regarding the Standards

97. A power to make legally enforceable Standards is critically important and the Law Council endorses the Bill's attempt to do so in principle. However, a framework for making Standards will only be effective if there are clear requirements around the quality, consistent and comprehensive application of Standards. The proposed Standards themselves must also be available for public and parliamentary scrutiny. They should be subject to disallowance, and the scope for potential departure from the Standards should be narrowed in the Bill.

Recommendations

- **The full suite of nine Standards recommended in the Final Report should be fully developed, made publicly available, and circulated as additional documents to the inquiry concerning the Bill.**
- **Neither the Bill nor the Streamlining Approvals Bill should proceed without the full suite of Standards being first made available for public and Parliamentary scrutiny. Any interim Standards developed for consultation with State and Territory Governments should be similarly released.**
- **Alternatively, if these recommendations are not followed, then as part of the first stage of legislative reforms recommended by the Final Report, Schedule 1 of the Bill should be strengthened to incorporate the following:**
  - **a non-exhaustive list of Standards to be made following full public and stakeholder consultation occurring, including, as a minimum, Standards with respect to:**
    - **MNES;**
    - **Indigenous participation and engagement (with appropriate acknowledgement and utilisation of Indigenous Traditional Ecological Knowledge, as well as consultation with leaders in Aboriginal and Torres Strait Islander communities);**
    - **compliance and enforcement;**
    - **data and information;**
    - **Commonwealth actions and actions involving Commonwealth land;**
    - **transparent processes and robust decisions;**
    - **environmental monitoring and evaluation of outcomes;**
    - **environmental restoration, including offsets; and**
    - **wildlife permits and trade.**
  - **a requirement that reviews of the Standards be conducted by independent experts, with their reports to be tabled in Parliament within a specified timeframe (eg, 15 sitting days). The Minister should further be required to respond publicly to reviews of the Standards within a specified timeframe (eg, six months);**
  - **a requirement that all Standards made under the Bill are disallowable, including the first set of Standards;**

- **a requirement that relevant matters (eg, bilateral agreements, decisions or things under the Act, as well as contingent amendments) be 'consistent with' Standards (rather than 'not inconsistent');**
- **clarification in the Bill that:**
  - **the Minister has an obligation to independently assess, following a subsection 65F(2) request for advice to State and Territory Ministers whether the operation of a bilateral agreement, (including any accredited arrangements, authorisation processes, or assessments of any relevant actions under such agreements) will be inconsistent with a new or varied Standard, having regard to any advice received;**
  - **having fulfilled this obligation, the Minister must consult with the State or Territory where the Minister is satisfied that there is inconsistency with a Standard;**
  - **should the State or Territory not rectify the inconsistency issue within a defined period, the Minister must suspend the bilateral agreement while it remains unresolved; and**
  - **the Minister may exercise their discretion to make a section 60 suspension without prior consultation where the Minister is satisfied that a significant impact is occurring or imminent as a result of the relevant inconsistency with a Standard;**
- **further, with respect to bilateral agreements:**
  - **a reconsideration of whether the current timeframes for commencement of Standards are appropriate and achievable (including through consultation with States and Territories);**
  - **clarification when bilateral agreements should be updated to reflect Standards; and**
  - **clarification in section 65F(3) of the circumstances in which a variation is 'minor' (ie, where it does not involve a significant change in the effect of a Standard with respect to the operation of the specific bilateral agreement);**
- **a requirement that measures providing for transitional arrangements (eg, proposed sections 65E and 65H) should be limited to circumstances in which processes were begun before the commencement of the standard or variation;**
- **proposed subsections 65C(4) and 65D(3), concerning the incorporation of instruments or 'other writing' not yet made into Standards, should be narrowed (eg, to permit incorporation of updated and best practice conservation advice or references to updated international obligations);**
- **an amendment of proposed 65D, enabling variation or revocation of Standards, so that the Minister may only exercise the power based on a threshold test requiring that the exercise will not lead to a detrimental impact on a matter of national environmental significance or lessen the protections set out in the EPBC Act. The specific criteria to which the Minister should have regard in exercising this power should also be listed;**

- **a reframing of proposed section 65H to:**
  - **provide that all relevant activities under the Act must be consistent with the Standards as the starting point, rather than only those decisions or things determined by the Minister via legislative instrument;**
  - **contain specific criteria for decision-making, which include having regard to the objects of the Act, and the intention that the Standards provide a consistent safeguard and benchmark to protect the environment at the national level;**
  - **delete proposed 65H(2). In the alternative, this subsection should be significantly narrowed, to ensure that Commonwealth, State and Territory policies, plans, programs or funding may only be taken into account to the extent they are directly relevant to the decision or thing under consideration, and indirect matters may not be taken to offset any detriment caused by the decision or thing itself;**
  - **reframe the public interest exception at proposed 65H(7)-(9) to include specific criteria for decision-making, which include consistency with the objects of the Act, and the intention that the Standards provide a consistent safeguard and benchmark to protect the environment at the national level. This power should be exercised personally by the Minister; and**
  - **require the Minister to explain what environmental impacts may occur as the result of a public interest exception being exercised as part of the required public statement.**

Schedule 2: creation of the Environment Assurance Commissioner

Recommendations in the Final Report: audit, compliance and enforcement

98. The Final Report found that past attempts to accredit the approval processes of States and Territories had not been successful due to community concerns that 'decision-making would be too discretionary and inconsistent with national obligations and the national interest.'[61] To augment the legally enforceable Standards, it further found that the Australian Parliament and the public needed confidence that accredited parties – and the Commonwealth Environment Minister – were adhering to the law by making correct decisions and properly implementing their commitments.[62]

99. As such, the Final Report recommended that a new, independent statutory position of EAC should be created to provide this oversight.[63] The position should be free from political interference and responsible for publicly reporting on the performance of the Commonwealth and accredited parties. It would report to the Australian Parliament through the Minister, with reports tabled within a prescribed timeframe.[64]

[61] Final Report n 1, 14.
[62] Ibid.
[63] Ibid.
[64] Ibid.

100. The EAC as recommended was intended to ensure the rigour and integrity of the audit function. They would provide advice and recommendations for action to the Minister, where issues of concern with accredited arrangements are found. Moreover, the Final Report stated that the EPBC Act should require the Minister to publicly respond to the EAC's advice and recommendations, 'within a reasonable time frame specified in the Act.'[65]

101. Recommendation 23 relevantly provides for:

> *Immediately establish[ing], by statutory appointment, the position of Environment Assurance Commissioner with responsibility to:*
>
> *a) oversee audit of decision-making by the Commonwealth under the EPBC Act, including the Office of Compliance and Enforcement;*
>
> *b) oversee audit of an accredited party under an accredited arrangement;*
>
> *c) conduct performance audits, like those of the Auditor General and set out in the Auditor-General Act 1997; and*
>
> *d) provide annual reporting on performance of Commonwealth and accredited parties against National Environmental Standards. This report should be provided to the Environment Minister, to be tabled in the Australian Parliament in a prescribed timeframe.*

102. The EAC's audit role was further intended to operate alongside a much more robust compliance and enforcement regime under the EPBC Act, as the current regime was 'weak and ineffective'.[66] This position was also adopted in the Law Council's submission regarding the EPBC Act review.[67]

103. The Final Report's Recommendation 29 recommended that 'immediate reforms are required to ensure that compliance and enforcement functions by the Commonwealth, or an accredited party are strong and consistent'. In this regard, it recommended that:

- *The recommended Standard for compliance and enforcement should be immediately adopted.*
- *Commonwealth compliance and enforcement functions and those of any accredited party should be required to demonstrate consistency with this Standard.*
- *The Commonwealth should retain the ability to intervene in project-level compliance and enforcement, where egregious breaches are not being effectively dealt with by the accredited party.*

[65] Ibid.
[66] Final Report n 1, 147.
[67] Law Council of Australia, 'Submission to Statutory Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)r' (20 April 2020).

104. Further, Recommendation 30 stated that 'the Commonwealth should immediately increase the independence of and enhance Commonwealth compliance and enforcement'. This requires:

- *Simplified law and a full suite of modern regulatory surveillance, compliance and enforcement powers and tools, including targeted stakeholder resources to build understanding and voluntary compliance.*

- *Assigning independent powers for Commonwealth compliance and enforcement to the Secretary of the Department, with compliance functions consolidated into an Office of Compliance and Enforcement within the Department. This office should be provided with a full suite of modern regulatory powers and tools, and adequate resourcing.*

- *An increase in the transparency and accountability of activities, including clear public registers of activities, offsets and staff conflicts of interest.*

105. The diagram at page 120 of the Final Report makes clear that the EAC's audit functions were intended to be complemented by these broader enforcement powers and arrangements.

106. The Law Council notes that at this stage, the Bill only deals with the proposed EAC. There is no current indication regarding how the Australian Government intends to respond to the broader Recommendations 29 and 30. While it is possible that the Bill will enable the making of a Standard for compliance and enforcement, the Law Council considers that this proposed Standard should be made publicly available prior to the Bill's passage.

107. Implementation of Recommendation 30 should also be sought – including with respect to the proposals to provide a broader suite of regulatory surveillance, compliance and enforcement powers, independent compliance and enforcement functions for the Secretary, and a consolidated Office of Compliance and Enforcement. Such measures would greatly assist analysis of the likely effectiveness of a proposed EAC and its audit functions.

Powers of the Environment Assurance Commissioner

108. Proposed section 501B at Schedule 2 of the Bill establishes the EAC under the EPBC Act as an independent, statutory position within the Department.

109. While the EAC is given powers to audit compliance,[68] he or she has no powers to compel the making of changes to ensure that any failures identified in the audit are addressed.[69] Enforcement of Standards will be a matter for States and Territories; the EAC is limited to compliance monitoring processes.[70]

110. The Law Council suggests that to ensure a robust and consistent approach to compliance and enforcement of decisions under the EPBC Act or accredited arrangements, as proposed in the Final Report,[71] the Bill should be amended to provide for strong standard compliance and enforcement powers in line with

[68] See, proposed s 501C.
[69] See also, Explanatory Memorandum n 5, 15.
[70] Ibid.
[71] *Final Report* n 1, viii.

Recommendations 29 and 30 of the Final Report above, to augment the role of the EAC.

111. The Minister should also be required to publicly respond to the EAC's audit reports (in accordance with the Final Report's recommendations).[72]

112. Further, proposed section 501C is limited to monitoring or auditing of the operation of bilateral agreements, and certain specified processes. Without appropriate enforcement, it is unclear what changes the EAC's role will lead to in practice should it identify concerns.

113. The audit functions set out in new section 501C are also more limited than those proposed by the Final Report. As outlined above, Recommendation 23 recommended that the EAC should 'oversee audit of decision-making by the Commonwealth under the EPBC Act, including the Office of Compliance and Enforcement', 'oversee audit of an accredited party under an accredited arrangement', 'conduct performance audits' akin to the Auditor-General, and report against the performance of the Commonwealth of Commonwealth and accredited parties against Standards.

114. Section 501C does not, for example, appear to enable the auditing of decision-making by the Commonwealth under the EPBC Act generally, or to provide for reporting on the performance of the Commonwealth and accredited parties against the Standards. The Law Council considers that the EAC should be afforded the full range of audit functions as proposed in the Final Report.

115. The Law Council also notes that the EAC cannot audit or monitor single decisions, as provided at new subsection 501C(3). This is a particular limitation. In this regard, the Law Council also notes the following potential inconsistencies between the following statements in the Explanatory Memorandum:

> *As the Commissioner will provide oversight and assurance of environmental assessment and approval systems, new subsection 501C(3) makes it clear that the Commissioner's functions do not include the monitoring or auditing of single decisions…;*[73] *and*
>
> *the EAC can monitor or audit 'the processes for the assessment of the relevant impacts of controlled actions under Part 8 and the processes for the approval of the taking of controlled actions under Part 9 (including decisions to attach conditions to an approval)'…*[74]

116. The limit on auditing single decisions should be removed to improve the EAC's responsiveness to issues as they arise, so that he or she is not required to wait for a pattern of inconsistency or non-compliance before being able to audit/monitor a decision maker.

117. In addition, as well as monitoring and/or auditing bilateral agreements, the proposed functions for the EAC also include a diverse range of powers to audit and/or monitor actions including:

- providing foreign aid;
- managing aircraft operations in airspace;

[72] See, ibid, 1.
[73] See, Explanatory Memorandum n 5, 17.
[74] Ibid 16.

- adopting or implementing a major development plan for an aircraft; or
- actions authorised by a sea dumping permit (under the Environment Protection (Sea Dumping) Act 1981) or a Basel permit (granted under the Hazardous Waste (Regulation of Exports and Imports) Act 1989).[75]

118. The Law Council notes that this could result in the EAC receiving requests to divert resources to these areas and recommends keeping the scope of the EAC's functions to those recommended in the Final Report.[76]

119. The Law Council considers that the EAC's functions should be amended to bring them into line with those proposed in Recommendation 23 of the Final Report.

Information gathering powers

120. Subsection 501C(4) provides that the Commissioner may request a person to provide information or documents, or answer questions, if the Commissioner reasonably believes that the person has information or documents relevant to the performance of those functions. The Law Council endorses this power in principle, but it is unclear whether it could extend to proponents of individual projects given the limitation at new subsection 501C(3), as discussed above.

121. Further, it does not place any obligation on any persons to assist the Commissioner in response to such requests, such as the Minister, Secretary, or Departmental staff, or a power to compel production of relevant information. This may hamper the Commissioner's audit functions significantly in practice.

122. In contrast, the *Auditor-General Act 1997* (Cth) provides for information gathering powers, including to ensure appropriate confidentiality of information disclosed.[77]

123. The Law Council recommends that appropriate information gathering powers should be provided to the Commissioner, to ensure that he or she can perform the role independently. These should have regard to any confidentiality and whistleblowing protections required.

124. The Law Council also recommends the inclusion of detail on the consequences of a person refusing to comply with a request from the EAC.

Appointment and independence of Environment Assurance Commissioner

125. The Law Councill notes possible concerns about the practical level of independence of the EAC given that he or she will hold an independent statutory position within the Department.

126. The scope for the EAC to independently direct his or her work is also limited. Proposed section 501P provides that the Minister must provide a written 'statement of expectations' for the EAC for each year, to which the EAC must have regard when preparing a work plan identifying priorities for the year. The Minister is to then respond to this work plan by agreeing or requesting changes in writing, with reasons. The EAC must have regard to any requests for changes from the Minister and then provide the Minister with a finalised plan. The finalised plan, statement of expectations, and any requests are to be published after the plan is finalised.

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[75] See, the Bill, Schedule 2, proposed s 501C(1)(b)(iv), referring to the giving of advice under Subdivision A, Division 4, Part 11.
[76] See in particular Recommendation 23, and also the proposed role and functions of the EAC at page 119.
[77] *Auditor-General Act 1997*(Cth), Divs 1 and 2.

127. As neither the statement of expectations nor the work plan (or variations to it)[78] are legislative instruments which would be subject to parliamentary scrutiny and disallowance, this Division provides a clear mechanism for the Minister to shape annual work plans of the EAC which is contrary to the express freedom of the EAC set out in section 501R.

128. Further, aside from the annual work plan and requests from the Minister, there is no reference to the ability of third parties to refer concerns to the EAC.

129. The Law Council commends the intention for the EAC to be an independent position, but notes the possibility that this is undermined by the Minister's capacity to influence the content of work plans and potentially the work of the EAC.

130. The Law Council further notes that it is unusual for statutes establishing the independent role of a Commissioner to provide for annual work plans determined with regard to a 'statement of expectations' by the Minister. This is particularly the case where a Commissioner's functions include auditing the decisions of the Minister him or herself, and the intent of the role is to ensure Parliamentary and public reassurance that all parties act in accordance with the law.

131. This is reinforced by section 501R, which separately provides that the EAC is not subject to the directions of the Minister in relation to the Commissioner performing the Commissioner's functions.

132. The Law Council recommends that the EAC should be free to set his or her own annual priorities, within the scope of the specified functions, and the intended independence of the role. Accordingly, references in section 501P, as currently drafted, to the Minister providing a 'written statement of expectations' and agreeing with or requesting changes to the EAC's work plan should be deleted.[79]

133. Further, as currently envisaged the EAC will have a close relationship with and dependency on the Department that is subject to Ministerial direction. Intuitively, freedom to refuse requests by the Minister will best be achieved if the EAC has adequate practical independence from the Government, but this can only arise if the EAC is allocated sufficient resources to perform his or her functions. Proposed section 501S should be amended to ensure that if the Minister requests the EAC to carry out additional work and the EAC agrees to do so, the EAC must be additionally resourced to carry out the work over and above the EAC's identified priorities.

134. In addition, proposed section 501W provides that the EAC may delegate all or any of his or her functions or powers to the Secretary or a Senior Executive Services (**SES**) employee or acting SES employee whose services have been made so available.[80]

135. This may undermine the EAC's independent audit role, which may include auditing Departmental staff. It may further create conflicts for Departmental staff being afforded audit functions at the same time as carrying out their operational roles. The Law Council considers that it would be preferable to ensure that the EAC is fully resourced, without needing to delegate across the Department.

136. The Law Council recommends that proposed section 501W be deleted.

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[78] See, proposed s 501Q.
[79] See, ss 501P(1), (3), (4)-(5), (7)(c).
[80] Certain functions may not be delegated under s 501P(5) (work plan), or ss 501S(3) or (4) (responding to a Minister's request to perform functions) or s 501V (reporting).

Complaints

137. The Law Council notes that independent audit functions frequently include a complaints process, by which the public may highlight possible concerns about the standards of compliance with legislation in specific circumstances. There is no current procedure by which this will occur set out in the Bill. Similarly, there is no mechanism by which the Departmental staff may raise 'whistleblowing' concerns with the EAC, or mechanism to protect for those who do.

138. The Law Council considers that the Bill should make clear provision for these kinds of processes.

Recommendations regarding the EAC

139. In summary, the Law Council recognises that the Bill proposes to establish an EAC with a degree of independence and general audit functions focused primarily on bilateral agreement implementation.

140. However, the audit powers as currently drafted are not comprehensive and fall short of the standard for the EAC contemplated in the Final Report. The EAC cannot monitor or audit individual decisions and, while the EAC has a 'general' power to audit and/or monitor:

- the annual work plan requirements potentially prevent the EAC from conducting an unscheduled audit in response to non-compliance, thereby limiting the EAC's ability to conduct his or her functions in a responsive and targeted way;
- there is a blurred line between the EAC and the Department in terms of operational work, thereby potentially jeopardising the EAC's independence; and
- it is unclear what action would result from EAC audits (if any), noting that the EAC is being progressed in the absence of the broader compliance and enforcement mechanisms proposed by the Final Report.

141. The Bill thereby places the burden of ensuring actual compliance with, and enforcement of, any Standards predominantly on States and Territories. No Standard for compliance and enforcement is proposed, despite the Final Report stipulating this as critical to ensuring a consistent approach to implementing Standards and a pre-condition to any accredited arrangements.[81]

Recommendations

- **The proposed EAC audit mechanism should not be progressed without accompanying legislative measures which implement the Final Report's corresponding recommendations to significantly strengthen compliance and enforcement mechanisms in the EPBC Act, under Recommendations 29 and 30. These include:**
  - **Standards for compliance and enforcement to be immediately adopted and circulated as additional documents to the inquiry concerning the Bill;**
  - **provision of a full suite of modern regulatory surveillance, compliance and enforcement powers and tools; and**

[81] See, *Final Report* n 1, 139.

- **assigning independent powers for Commonwealth compliance and enforcement to the Secretary of the Department, with compliance functions consolidated into an Office of Compliance and Enforcement within the Department. This Office should be provided with the suite of regulatory powers and tools mentioned above, and adequate resourcing.**

- **Proposed subsection 501C should be amended to provide the EAC with the full range of monitoring and audit functions envisaged under Recommendation 23 of the Final Report.**
- **Proposed subsection 501(3) should be amended to ensure that the EAC can audit or monitor single decisions.**
- **Appropriate information gathering powers should be provided to the EAC, to ensure he or she can perform the role independently. This should have regard to any confidentiality and whistleblowing protections required, and should include detail on the consequences for a person of refusing to comply with a request from the EAC.**
- **References in proposed section 501P to the Minister providing a 'written statement of expectations' and agreeing with or requesting changes to the EAC's work plan should be deleted.[82]**
- **Proposed section 501S should be amended to ensure that if the Minister requests the EAC to carry out additional work and the EAC agrees to do so, the EAC must be additionally resourced to carry out the work over and above his or her identified priorities.**
- **The provisions regarding the EAC should provide for an independent complaints mechanism, by which the public, and Commonwealth public servants, including in the Department, may highlight concerns to the EAC about the standards of compliance with the EPBC Act. This should provide for appropriate protections for complainants, including 'whistleblowing' protections.**
- **The provisions regarding the EAC should require the Minister to publicly respond to the EAC's audit reports within specified timeframes.**
- **Proposed section 501W (delegation) should be deleted.**
- **The EAC should be fully resourced to carry out his or her functions.**

[82] See, ss 501P(1), (3), (4)-(5), (7)(c).