Law Council
OF AUSTRALIA

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

Supplementary submission to the Environment and Communications Legislation Committee

19 May 2021

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

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.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- 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 in the preparation of this submission.

Executive Summary

1. On 4 May 2021, the Law Council appeared before the Environment and Communications Legislation Committee (**the Committee**) at a public hearing for its inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (**the Bill** and **the public hearing**).

2. This supplementary submission responds to the question which the Law Council took on notice at the public hearing, being to respond to the Government's proposed National Environmental Standard (Matters of Environmental Significance) (**the Draft MNES Standard**). This submission also briefly touches on some additional key questions raised during the public hearing.

3. The Law Council wishes to reinforce the importance of establishing strong basic settings by immediately developing for public consultation a full suite of nine National Environmental Standards (**Standards**), reflecting those put forward by Professor Samuel, before proceeding with substantive reform to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**). This can only be achieved with the benefit of the Australian Government's response to the Final Report of the Independent Review (**the Review**) of the EPBC Act (**the Final Report**) and its recommendations as a whole. It maintains its recommendations that both the full suite of recommended Standards and the full Government response to the Final Report are necessary precursors to reform.

4. The process in reaching the Standards recommended by Professor Samuel involved building a significant degree of consensus across business, environmental and community groups. While the Law Council understands the view that it is important not to lose momentum,[1] it is also essential to first achieve broad consensus on the Standards which the Department is asked to develop and implement, which set the basis for reform and are necessary to achieve public trust and confidence in the reforms pursued. Together, the nine recommended Standards were intended to work in concert to achieve comprehensive levels of consistency and certainty in national environmental protection – whether applied to approvals or decisions made by federal bodies under the federal EPBC Act, or those made by State and Territory bodies under bilateral approval agreements. The full suite was intended to cover both matters of 'content' (eg, protection of MNES) and matters of 'process' (eg, compliance and enforcement).

5. To deviate from the level of consensus achieved during the Review[2] may undermine cross-sector collaboration, which is essential to ensure public confidence in the EPBC Act and the reform process going forward. It will not be possible to achieve consensus or comprehensive application by implementing in isolation one Standard, particularly where that Standard's application and effect is narrower than Professor Samuel recommended and its level of national environmental protection significantly more

[1] See, for example, Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 4 (Jennifer Westacott). Ms Westacott noted in evidence for the Business Council of Australia (**BCA**) that the BCA 'strongly supports' the Bill on the basis that '[w]e have to make a start, because if we don't we will be here in another ten years time…', while recognising that 'it's essential that the government now lays out a road map of how the rest of Mr Samuels' [sic] report will be implemented and continues…consulting…'. She later stated that the Bill 'gives a sense of momentum': 7.

[2] Note, that participating stakeholders broadly agree around 80 to 85 per cent consensus was reached on key issues discussed during the Review. See, for example, Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 5 (Jennifer Westacott); 15 (Professor Craig Moritz); 16 (Professor Brendan Wintle); and 52 (Tania Constable).

limited. The Law Council refers here to the Draft MNES Standard recently published by the Department of Agriculture, Water and the Environment (**the Department**)[3].

6. To this end, the Law Council also recommends that:

   - sufficient time should be afforded for the Committee (pursuant to the Committee requesting an extension of reporting time if necessary) to obtain a wide range of considered views, from all stakeholders who wish to comment, as to the adequacy of the Draft MNES Standard as the basis for the Bill and subsequently any approvals bilateral agreements;

   - the Committee seek clarity from the Department, for itself and the benefit of public stakeholders, as to the current standing of the Draft MNES Standard with State and Territory governments, including whether the Draft MNES Standard has yet been provided to National Cabinet for its views; and

   - a sunset clause may be a valuable addition in relation to Standards made under the Bill. If it is included, the Bill should also incorporate the requirement for a pre-sunsetting review to ensure appropriate scrutiny of the Standards and to avoid the risk of perpetual extensions of the sunsetting period without such scrutiny occurring. Recognising that it is not, on its own, a sufficient safeguard, a sunset clause should only be adopted in line with the Law Council's broader measures recommendations in this submission.

7. Once the Australian Parliament has ensured that the full suite of Standards is appropriately framed at the outset, any bilateral approval agreements should then be independently assessed against these Standards as a national, strong and consistently applied benchmark. This will provide an important assurance to Parliament before it must consider any specific bilateral approval agreement. It will also avoid the risk of debates on individual agreements devolving to the 'negotiated agreement to accommodate existing rules or development aspirations' which Professor Samuel warned against.

Comments on the Draft MNES Standard

Process of release and consultation

8. It is important to ensure that any Standards adopted have broad support and consensus prior to proceeding with the Bill and any detailed development of approvals bilateral agreements, noting that these are the centrepiece of reforms.

9. The Law Council considers that sufficient time should be afforded for the Committee to obtain a wide range of considered views as to the adequacy of the Draft MNES Standard as the basis for the Bill and subsequently any approvals bilateral agreements. It recommends that all stakeholders should be provided the opportunity to comment on the Draft MNES Standard, prior to the Committee reaching its final conclusions. It further suggests that the Committee may wish to seek an extension of reporting time on the Bill to facilitate this consultation. This would bring the current process close to

[3] This has been called the *Final draft National Environmental Standard for MNES*. See, Parliament of Australia, 'Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021: Additional Documents'.

that recommended by Professor Samuel, who emphasised the need for consultation prior to any Standards being adopted.[4]

10. The Law Council also recommends that the Committee seek clarity from the Department as to the current standing of the Draft MNES Standard with State and Territory governments. This should also be provided for the benefit of public stakeholders. Currently, the Law Council is uncertain as to the level of National Cabinet consensus, including whether the Draft MNES Standard has yet been provided to National Cabinet for its views. This is explained further at paragraphs 53 to 59 below.

Recommendations

- **Sufficient time should be afforded for the Committee (pursuant to the Committee requesting an extension of reporting time if necessary) to obtain a wide range of considered views, from all stakeholders who wish to comment, as to the adequacy of the Draft MNES Standard as the basis for the Bill and subsequently any approvals bilateral agreements.**
- **The Committee should seek clarity from the Department, for itself and the benefit of public stakeholders, as to the current standing of the Draft MNES Standard with State and Territory governments, including whether the Draft MNES Standard has yet been provided to National Cabinet for its views.**

Recommendation for full suite of Standards

11. In the Final Report, Professor Graeme Samuel AC recommended the creation of a full suite of Standards covering nine areas of subject matter.[5] The creation of these Standards was one of the 'immediate…priority reforms' which were key to the first of three sequential 'tranches' of reform set out by Professor Samuel.[6]

12. The Final Report presented complete drafts of the first four recommended Standards and stated that these 'should be adopted in full'[7]. Professor Samuel also underlined that the remaining five Standards, on prescribed topics, should also be 'developed without delay' so that the 'full suite of 9 [legally enforceable] Standards' could be 'implemented immediately' as part of the first tranche of reform.[8] Within 12 months the Standards should, in Professor Samuel's recommendation, be 'refined'[9] – however, they were intended to be implemented together.

13. The Law Council supports the findings of the Final Report and its recommendations as the product of a broad ranging consultative process. 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, industry representatives, scientists and Traditional Owner representatives. The consultative group met fortnightly to develop and refine some of the concepts introduced by the Interim Report, including the Standards. In the

[4] Professor Graeme Samuel AC, 'Final Report', Recommendations <https://epbcactreview.environment.gov.au/resources/final-report/recommendations> ('*Final Report*'), recommendation 3.
[5] Final Report, Recommendations. For a list of each of the 'first tranche' reforms that falls under the respective priority areas see '12.2 – Staging reform' <https://epbcactreview.environment.gov.au/resources/final-report/chapter-12-reform-pathway/122-staging-reform>.
[6] Ibid.
[7] Ibid, recommendation 3.
[8] Ibid.
[9] Ibid.

Law Council's view, the input of the consultative group and the other experts involved in the drafting of the Standards included in Appendix B to the Final Report enhanced the Final Report and recommendations made by Professor Samuel.

14. One of the four Standards which Professor Samuel recommended immediately adopting in full was entitled the 'Recommended National Environmental Standards for Matters of National Environmental Significance'[10] (**the Samuel MNES Standard**). The Draft MNES Standard appears to be based upon the Samuel MNES Standard in its format, though significant differences in its content are outlined at paragraphs 39 to 52 below.

15. Together, the nine recommended Standards were intended to work in concert to achieve comprehensive levels of consistency and certainty in national environmental protection – whether applied to approvals or decisions made by federal bodies under the federal EPBC Act, or those made by State and Territory bodies under bilateral approval agreements. The full suite was intended to cover both matters of 'content' (eg, protection of MNES) and matters of 'process' (eg, compliance and enforcement). This includes the recommended Standards on Indigenous engagement and participation in decision-making,[11] compliance and enforcement,[12] and data and information.[13]

16. In contrast, the proposed MNES Standard would operate alone and unsupported by other recommended Standards. Examples below illustrate three key areas in which these broader Standards are absent and urgently needed.

Absence of Standard on Compliance and Enforcement

17. Professor Samuel found that the Department currently relies on a 'collaborative approach to compliance and enforcement' of the EPBC Act that is 'too weak',[14] and that the compliance and enforcement powers in the EPBC Act are 'outdated', due to restrictive powers and complex legislation, amongst other things.[15] The need for stronger enforcement of the EPBC Act in the event of non-compliance has also been a principal priority of the Law Council, as set out in its original submission to Professor Samuel.[16]

18. The third Standard which Professor Samuel drafted in full was the Standard 'for Compliance and Enforcement'.[17] Applicable to the Minister or any relevant Commonwealth or accredited third party decision-maker, this Standard is to be implemented by the compliance and enforcement decision-maker authorised under the EPBC Act, and is intended to achieve an outcome where:

> *The EPBC Act requirements, and those under accredited arrangements, are complied with and enforced so that matters covered by the EPBC Act are protected.*
>
> *Decisions demonstrate integrity, consistency and transparency to foster public trust in compliance and enforcement activities.*[18]

[10] See, ibid, Appendix B1.
[11] Final Report, Appendix B2.
[12] Ibid Appendix B3.
[13] Ibid Appendix B4.
[14] Final Report 21.
[15] Ibid.
[16] *LCA Review Submission*.
[17] Final Report Appendix B3.
[18] Ibid 228.

19. The Standard sets out eight elements for implementation to achieve the stated outcome, including that compliance and enforcement functions will be 'supported by legislation, legal capability and capacity that ensures a comprehensive suite of legal powers and penalties…',[19] and that they will have various monitoring, intelligence, investigations and decision-making capabilities.[20]

20. Professor Samuel emphasised that the Standard should apply to compliance with, and enforcement of, requirements under both the EPBC Act and accredited arrangements.[21] This includes where the Commonwealth Minister is in charge of an approval and where States and Territories are issuing approvals under bilateral approval arrangements.[22]

21. The Law Council highlights the risk in implementing only the proposed Draft MNES Standard, and thereby enshrining that Standard in bilateral agreements with no guarantee of an adequate system for assurance regarding enforcement, or rectification in case of inconsistencies with the Standard.

22. On its own, the proposed MNES Standard does not provide guarantees that State and Territory laws and broader enforcement responses will be sufficiently strong, should non-compliance occur. Nor does it ensure that the standards of federal enforcement with respect to federal decisions and things done under the EPBC Act will be lifted from their current state.

23. The recommended new, independent statutory position of Environmental Assurance Commissioner (**EAC**) does not have enforcement powers. The EAC is intended to ensure greater rigour and integrity of audit functions. It would provide advice and recommendations for action to the Minister, where issues of concern with Commonwealth decision-making and/or accredited arrangements are found.[23] In other words, the EAC would operate alongside the compliance and enforcement regime (and not in substitute for it). At the public hearing, a representative for the Department stated that there are assurance processes for reporting, evaluation and audit, but did not outline any compliance or enforcement processes under the Bill or Draft MNES Standard.[24]

24. Accordingly, the Law Council recommends the immediate implementation of the Standard for Compliance and Enforcement and the other Standards recommended by Professor Samuel. As noted in its earlier submission, the EAC's functions in the Bill should also be amended to bring them into line with those proposed at Recommendation 23 of the Final Report.[25]

Absence of Standard on Indigenous engagement and participation in decision-making

25. The Standard on Indigenous engagement and participation in decision-making was prepared by Professor Samuel, relying on contributions to the Review by Indigenous

[19] Final Report 229.
[20] Ibid.
[21] Ibid 21.
[22] Ibid.
[23] Law Council of Australia, 'Submission to the Inquiry on the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021' (16 April 2021) ('*LCA April Submission*') 99-100; Final Report, recs 23, 29.
[24] Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 72-73 (Greg Manning).
[25] *LCA April Submission* 26-27.

leaders and non-Indigenous practitioners.[26] The outcome described for the Standard is that:

> *Indigenous Australians are empowered to be engaged and participate in decision-making, and their views and knowledge are respectfully and transparently considered in the legislative and policy processes that support the protection and management of the environment under the EPBC Act.*[27]

26. The Standard sets out eleven elements for implementation to achieve the stated outcome, ranging from 'ensuring the right of Indigenous Australians to be involved in the design, implementation, monitoring and reporting aspects of the activity' to 'transparently report[ing] the views and knowledge provided by Indigenous Australians…(where approval for publication from the owners of those views has been provided)', amongst others.[28] 'Monitoring, reporting and evaluation' is another key aspect of the Standard in order to demonstrate compliance,[29] with provision made for the performance of these functions by the Indigenous Advisory Committee.[30]

27. The immediate implementation of the Standard on Indigenous engagement and participation in decision-making is one of the key reforms recommended to address what the Final Report identified as a shortfall in the EPBC Act's objectives regarding the role of Indigenous Australians in 'protecting and conserving biodiversity, working in partnership with and promoting the respectful use of their knowledge'.[31]

28. The Law Council notes that the need for the implementation of the recommended Standard has been reinforced recently. One example relates to the inquiry into the destruction on 23 May 2020 of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia. While the Law Council supports a substantial reform of the *Aboriginal and Torres Strait Islander Heritage* Protection *Act 1984* (Cth) as a key federal priority, it also pointed in that inquiry towards the need for significant review of the current National Heritage nomination and listing processes in the EPBC Act context. This would ensure that Indigenous persons, bodies and communities are well-informed and appropriately supported to make nominations for such listings.[32] In the Law Council's view, inadequate engagement is linked to barriers to Indigenous heritage sites being listed.[33]

29. Accordingly, and as the Law Council stated in its submission to the Review, it is essential to engage and consult with those Indigenous peoples with authority and

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[26] Ibid Appendix B2.
[27] Final Report Appendix B2.
[28] Ibid at cll 3, 7.
[29] Ibid cl 11.
[30] Ibid 'Monitoring and Reporting'.
[31] Final Report, 'Chapter 2 – Indigenous culture and heritage: Key points'.
[32] Law Council of Australia, 'Supplementary submission – Inquiry into the destruction of caves at the Juukan Gorge' (22 October 2020) 14-15 <https://www.lawcouncil.asn.au/publicassets/e722cfbc-301f-eb11-9435-005056be13b5/3904%20-%20SS%20Inquiry%20into%20the%20Destruction%20of%2046%20000%20Year%20Old%20Caves%20at%20the%20Juukan%20Gorge%20in%20the%20Pilbara%20Region%20of%20Western%20Australia.pdf>. The Law Council understands that the time and financial and human resources involved in engaging in the nomination process are considerable, and for prescribed bodies corporate and other groups representing Indigenous traditional owners, precious, scarce funding often needs to be focused on high risk/high return areas. Using the EPBC Act to proactively protect Indigenous cultural heritage values using the rigorous heritage listing process is unlikely to be regarded as an efficient use of funding for these bodies. Another potential barrier which the Law Council has identified is the lack of a general understanding that the EPBC Act is capable of protecting places of Indigenous cultural heritage and heritage values and that protection of sites is administered only at a State and Territory level: 14-17.
[33] Ibid 14.

knowledge of country.[34] There exists not only an intimate traditional ecological knowledge, but a cultural and spiritual obligation that Aboriginal and Torres Strait Islander peoples have to the land and waters to which they are connected. Further, appropriate engagement and consultation is required for Australia to fulfil its obligations under international law.[35]

30. The Law Council notes that during the Department's appearance at the public hearing, the Department advised the Committee that the existing 'objects and requirements' in relation to 'engagement with Indigenous people as part of the decision-making process' under the EPBC Act have been 'translated and carried over into' the Proposed MNES Standard.[36]

31. The Law Council further notes that some aspects of the Draft MNES Standard refer to supporting active Indigenous participation and engagement – such as Part 3, concerning National Heritage. However, this reference is limited to bilateral agreements.[37] This reference does not relate to Commonwealth things done or decisions under the EPBC Act. Under Part 1, there is reference to 'adequate opportunity' for the engagement and input of Indigenous Australians, consistent with the EPBC Act.[38] This does not equate to an enhanced level of engagement, as envisaged by a standalone Indigenous Standard.

32. However, the Law Council maintains that Professor Samuel recommended that the Standard on Indigenous engagement and participation in decision-making 'should be implemented immediately, to take the first steps to improve how decision-makers listen to Indigenous Australians and respectfully harness the value of their knowledge of managing Country'.[39] For this reason, the Law Council considers that translating the current objects of the EPBC Act into the draft MNES Standard does not satisfy this recommendation. The Standard as drafted by Professor Samuel should be implemented in full.

Absence of Standard on Data and Information

33. The Final Report found that because decision-makers and other stakeholders cannot currently access 'the best available data, information and science' under the EPBC Act, what results is 'sub-optimal decision-making, inefficiency and additional cost for business, and poor transparency for the community'.[40] What is required is, in Professor Samuel's view, a 'quantum shift' to support the other recommended reforms.[41]

34. As part of this shift, Professor Samuel drafted the Standard for Data and Information.[42] This Standard 'sets the expectations' for all relevant parties 'by requiring the collection,

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[34] Law Council of Australia, 'Submission to the Statutory Review of the EPBC Act 1999 (Cth)' (20 April 2020) <https://epbcactreview.environment.gov.au/submissions/anon-k57v-xqbu-d> ('*LCA Review Submission*') 42-43, citing, for example: UNDRIP art 31; *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); *Convention on Biological Diversity,* 'Akwé: Kon guidelines', <https://www.cbd.int/traditional/guidelines.shtml>.
[35] Ibid.
[36] See, Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 76 (Greg Manning).
[37] And 'arrangements and processes' which relate to National Heritage places. These 'arrangements and processes' are state or territory arrangement or processes which are accredited for the purposes of bilateral agreements: Draft MNES Standard, Part 3, [1(d)].
[38] Ibid, Part 1, [6].
[39] Final Report 6.
[40] Final Report 22.
[41] Ibid.
[42] Ibid Appendix B4.

curation, integration, analysis, use and sharing of best available information to defined technical standards'.[43]

35. The outcome for the Standard is as follows:

> *Decisions made in the operation and evaluation of the EPBC Act are informed by the best available evidence.*
>
> *That the current and future condition and trends of matters protected by the EPBC Act and related pressures, threats, impacts and restoration outcomes, are understood and accessible to interested parties.*[44]

36. Amongst other things, the Standard provides for a 'national environmental information supply chain Custodian' (**the Custodian**) to establish, refine and oversee a National Environmental Information Supply Chain (**the Supply Chain**), being 'a system of processes and skills to convert raw data into the end products needed to inform decision-making and the implementation, evaluation, reporting and assurance of the…Standards and other aspects of the EPBC Act…'.[45]

37. The Law Council recommends that the Standard for Data and Information be immediately implemented in full to ensure that any MNES Standard is implemented using the best available data, information and science (and so as to avoid 'sub-optimal decision-making').

Remaining Standards

38. The Law Council notes that Professor Samuel further recommended that the full suite of Standards, which should be immediately developed and implemented, should also address:

- 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.[46]

Content of the Draft MNES Standard

39. As presented in the Final Report, the Samuel MNES Standard comprises one 'Overarching MNES Standard' as well as various 'matter-specific Standards' addressing each MNES set out in the EPBC Act.[47] Professor Samuel recommended that these 'elements' be read alongside each other and the other Standards that he

[43] Ibid.
[44] Ibid.
[45] Final Report Appendix B4.
[46] Final Report, 'Appendix B – Recommended National Environmental Standards'.
[47] Ibid; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Part 4 Div 1.

recommended for implementation, as well as existing requirements under the EPBC Act.[48]

40. The Draft MNES Standard appears on its face to be similar in format to the Samuel MNES Standard, although there are significant differences in its content. At Part 1, the Draft MNES Standard also provides an overarching standard with an 'Environmental Outcome' and 'National Standard', as well as individual parts addressing each MNES.

41. In substance, Professor Samuel stated that the Samuel MNES Standard serves as 'an improvement on the status quo' which 'clarif[ies] existing settings of the EPBC Act to define clear limits of acceptable impacts for MNES, while providing flexibility to enable development'.[49] The Draft MNES Standard differs from the Samuel MNES Standard in a number of substantive respects including, but not limited to, those set out below (as illustrated at Table 1 in the **Attachment**). Where the Draft MNES Standard results is a narrowing or relaxation of protection and conservation of MNES, the 'improvement on the status quo' envisaged in the Final Report may be lost.

Narrower application

42. Each element of the overarching Samuel MNES Standard applies to all 'actions, decisions, plans and policies that relate to MNES'. This has a wide application, in accordance with the overarching intent of Recommendation 3(b) of the Final Report. This recommended that 'the EPBC Act should require that activities and decisions made by the Minister under the EPBC Act, or those under an accredited arrangement, be consistent with National Environmental Standards'.

43. The elements of Part 1 of the Draft MNES Standard apply more narrowly. For example, the focus is on:

    - Bilateral agreements and 'arrangements and processes'. These are defined as a State or Territory management arrangement or authorisation process proposed for accreditation for the purposes of a bilateral agreement'.[50]
    - Environmental assessment and approval decisions. This phrase is not defined, however would appear to include some decisions made by federal decision-makers under the EPBC Act – although precisely what decisions is unclear. Unlike the Samuel MNES Standard, the Draft MNES Standard does not apply to policy making under the EPBC Act.

44. In several instances, the overarching Samuel MNES Standard employs stronger or more committed language than Part 1 of the Draft MNES Standard. Particularly, the former emphasises concrete outcomes, whereas the latter places more attention on basic processes.

45. For example, paragraph 1(a) of the overarching Samuel MNES Standard makes an outcome-based prescription by stating that the applicable 'actions, decisions, plans and policies' must be 'consistent with…the principles of ecologically sustainable development (**ESD**) (including the precautionary principle) and reflect a principle of non-regression'. The Law Council's original submission to the Samuel Review supported giving weight to these principles as part of reforms to the EPBC Act.[51]

46. By contrast, at clause 3, the Draft MNES Standard simply states that as part of the process, the principles of ESD (including the precautionary principle) must be 'take[n]

[48] Ibid Appendix B1.
[49] Ibid.
[50] Government MNES Standard, Part 1, 2.
[51] *LCA Review Submission* 23.

into account' (and then, only in respect to relevant 'environmental assessment and approval decisions', and without any explicit requirement to reflect the principle of non-regression). To 'take into account' means that these principles will be one of a number of factors considered as part of the decision-making process. This clearly differs from a required outcome of consistency with such principles and forms a lower threshold.

47. Similarly, at paragraph 1(c) of the overarching Samuel MNES Standard, the relevant 'actions, decisions, plans and policies' must 'employ all reasonable measures to avoid and then to mitigate significant impacts' in order to achieve the outcome of 'minimis[ing] harm' to MNES.

48. By contrast, Part 1 of the Draft MNES Standard states that the relevant 'environmental assessment and approval decisions' need only 'seek to' minimise harm to MNES. This is a subjective requirement, rather than the objective threshold described above. It also focuses on the intention, rather than the outcome. Further, 'all reasonable measures' need only be 'tak[en] into account' under the Draft MNES Standard, whereas in the Samuel MNES Standard such measures must actively be 'employ[ed]'.

49. By way of final example, the overarching Samuel MNES Standard requires that relevant 'actions, decisions, plans and policies…':

> *[m]aintain and improve conservation, recovery and sustainable management, address detrimental cumulative impacts and key threatening processes and fill information gaps that impede recovery and appropriate management, including…*
>
> *i) use all reasonable efforts to prevent actions contributing to detrimental cumulative impacts or exacerbation of key threatening processes.*[52]

50. The Draft MNES Standard makes no reference to cumulative impacts or the need to prevent such impacts where they are detrimental. The Law Council consistently identified the importance of addressing cumulative impacts in its submission to the Samuel Review and supports their inclusion in the Samuel MNES Standard.[53]

51. Table 1 in the **Attachment** provides a broader comparison of the overarching Samuel MNES Standard and Part 1 of the Draft MNES Standard. The Law Council considers that deviating from the Samuel MNES Standard risks undermining the product of what participating stakeholders appear to broadly agree was a holistic, consultative, thorough and independent Review.[54]

52. The implementation of a strong framework under the EPBC Act is relevant to Australia's adherence to its obligations or commitments in environmental protection under international agreements. The Law Council notes its longstanding view that the Commonwealth should be demonstrating national 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. The Australian Government has the power to enter into treaties on behalf of Australia and is ultimately responsible ensuring that Australia's international commitments are observed. Australia is a signatory to some 33 key treaties and

[52] cl 1(e).
[53] *LCA Review Submission.*
[54] Note, participating stakeholders broadly agree the Review was a consultative process, with around 80 to 85 per cent consensus reached on key issues discussed. See, for example, Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 5 (Jennifer Westacott); 15 (Professor Craig Moritz); 16 (Professor Brendan Wintle); and 52 (Tania Constable).

protocols in relation to the environment[55] and it is the Australian Government that is responsible for ensuring that relevant State obligations are met.[56]

Recommendation:

- **In accordance with Professor Samuel's recommendations in the Final Report, the five recommended Standards should be developed and implemented as a full package, alongside the four Standards drafted in the Final Report, as part of the first tranche of reform.**

Justification for current approach

National Cabinet decision

53. At the public hearing, the Department gave evidence that it had drafted the Draft MNES Standard as a way of 'codify[ing] the existing requirements' of the EPBC Act pursuant to 'the national cabinet decision and the Prime Minister's comments afterwards'.[57]

54. The Law Council notes that the only publicly available record of the National Cabinet decision which has formed the basis of the Department's approach is the following excerpt from the media statement issued by the Prime Minister on the day of the National Cabinet's meeting, 11 December 2020:

> *Streamlining Approvals*
>
> *National Cabinet reaffirmed its commitment to implement 'single touch' environmental approvals under the Environment Protection and Biodiversity Conservation Act (EPBC Act) to speed up projects, support economic recovery and create jobs.*
>
> *Leaders agreed the immediate priority was to pass legislation streamlining approval processes and to develop national environmental standards reflecting the current requirements of the EPBC Act.*
>
> *Subsequent phases of reform will build on these streamlining efforts and address any further changes and improvements, including to environmental standards, taking into account the recommendations of the independent review led by Professor Graeme Samuel AC.*[58]

55. The Law Council notes that based on this record, it is difficult to discern what precisely was agreed at the meeting and what information informed that decision. For example, it is unclear in which order or manner it is intended that 'legislation streamlining approval processes' should be passed or Standards 'reflecting the current requirements of the EPBC Act' should be developed, other than that these should both occur as an 'immediate priority'. It is also unclear whether the National Cabinet had before it, when discussing the issue and reaching its decision, the Final Report and its proposed Standards. As noted, whether National Cabinet agreed on the specific Government

[55] See the list at Department of Foreign Affairs and Trade, 'Environment and sea law' <https://www.dfat.gov.au/international-relations/themes/environment-sea-law/Pages/environment-and-sea-law>.
[56] See also *LCA Review Submission* [21].
[57] Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 78 (Greg Manning).
[58] See, Prime Minister, 'National Cabinet' (Media Statement, 11 December 2020) <https://www.pm.gov.au/media/national-cabinet-3>.

MNES Standard currently under circulation, or on the framework set out in the Bill, is also unknown.

56. The Law Council accepts that the Commonwealth should consult on the Standards in close consultation with States and Territories before they are implemented to ensure their workability. However, it is also important that all levels of government explain clearly to all Australians their position, having careful regard to the detailed proposals put forward by Professor Samuel following his Review and to explain why any different views or directions are being proposed.

57. It is currently difficult to conclude that the National Cabinet decision provides sufficient justification for the Bill or the interim Standards approach (which appear to comprise solely of the Draft MNES Standard).

58. The Law Council further suggests that that National Cabinet decision does not displace the need for careful levels of scrutiny and satisfaction by the Australian Parliament itself as to the strength of federal legislation in meeting the national challenges laid out by Professor Samuel.

59. Given the uncertainty about the details of the National Cabinet's decision on which the Bill and the Draft MNES Standard appear to be based, and recalling Professor Samuel's emphasis on a holistic reform package, the Government should deliver a complete, cohesive and public response to the Final Report before proceeding with the Bill.

Current legal settings

60. The Law Council also notes that there has been a view expressed by some submitters and witnesses that adopting interim standards for two years based on the Draft MNES Standards is necessary to implement Professor Samuel's recommendations that Standards be initially made 'within current legal settings'.

61. However, it is evident from the Final Report that Professor Samuel's proposed Standards were intended to operate under the current settings of the EPBC Act. Professor Samuel stated, in Recommendation 3, that:

> *…Standards should be first made in a way that takes account of the current legal settings of the Act. The National Environmental Standards set out in detail in Appendix B should be adopted in full. The remainder of the suite of Standards should be developed without delay to enable the full suite of 9 Standards to be implemented immediately. Standards should be refined within 12 months.*[59]

62. The Law Council considers that this interpretation is reinforced by other references made to 'current settings' in the Final Report. In relation to the Standard for Indigenous engagement and participation in decision-making, for example, Professor Samuel stated that this Standard 'has been prepared to reflect the current settings of the EPBC Act'.[60] Similarly, Professor Samuel noted that the Standard for Data and Information 'represents a step change in expectations but is consistent with the current settings in the EPBC Act, which is largely silent on data and information'.[61]

63. In the Law Council's view, Professor Samuel's reference to 'the current settings' in these instances served to acknowledge those of his recommendations which deal with

[59] Final Report recommendation 3.
[60] Final Report 63.
[61] Ibid 169.

the further reform of the EPBC Act in tranches two and three – including to increase the effectiveness and reach of the Standards – by clarifying that the recommendations made for tranche one, such as the implementation of Standards, will be implemented before those subsequent amendments take place.

64. The Law Council notes the Department's evidence at the public hearing that its senior representatives did not consider that Professor Samuel's recommended Standards were non-compliant with the EPBC Act.[62] In light of this, the Law Council is unaware of a reason for not following Professor Samuel's recommendations in respect to the Standards, as the product of widely praised consultative process, other than the apparent decision of National Cabinet which refers to implementation of the Samuel Report recommendations in 'subsequent phases of reform'.[63]

Other issues raised at the public hearing

Parliamentary scrutiny of the Bill and draft Standards

65. At the public hearing, Law Council representatives were asked for their perspective regarding the level of legislative scrutiny of any standards adopted under the Bill. In response, Ms Robyn Glindemann referred to the Senate Standing Committee for the Scrutiny of Bills (**the Bills Scrutiny Committee**), which has made some key comments on the Bill.[64] She noted that the position of the Bills Scrutiny Committee was well aligned with several issues raised by the Law Council, reinforcing its importance with respect to principles of good-lawmaking.

66. The Bills Scrutiny Committee raised a number of outstanding concerns in Scrutiny Digest 6 of 2021.

67. The Law Council supports the issues raised by that Committee in relation to the Bill's provision regarding determination by legislative instrument of decisions or things that must be consistent with a Standard, and of exemptions.[65]

68. On this subject, the Law Council reiterates its earlier submission to this Inquiry, which stated its view that under the rule of law, decision-making on significant matters should not be delegated in an open manner to the Executive.[66] The Law Council also expressed this view in its submission to the Inquiry into the *Exemption of delegated legislation from parliamentary oversight*, noting that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation.[67] In this regard, the Law Council hopes that, in order to fulfill this

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[62] See, Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 78 (Greg Manning). Mr Manning stated: '…I don't think I'm suggesting that [Professor Samuel's] standards were not within [the] framework [of the 'existing standards of the EPBC Act'].

[63] See, Prime Minister, 'National Cabinet' (Media Statement, 11 December 2020) <https://www.pm.gov.au/media/national-cabinet-3>.

[64] See, Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2021 (17 March 2021) ('*17 March Digest*'). Note, the Committee used the 17 March Digest to pose a number of questions to the Minister. On 21 April, the Committee commented on the Minister's response to its questions. See, Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 6 of 2021 (21 April 2021) ('*21 April Digest*').

[65] See, *21 April Digest* [2.13]-[2.16].

[66] *LCA April Submission* [53].

[67] Law Council of Australia, 'Submission to the Inquiry into the Exemption of delegated legislation from parliamentary oversight' (2 July 2020) [13].

responsibility, the Australian Parliament will safeguard against the unnecessary delegation of unfettered law-making authority to the Executive.[68]

69. The Law Council's concern regarding delegated legislation is heightened where an instrument is not subject to disallowance,[69] as discussed below.

70. The Law Council also shares the concerns raised by the Bills Scrutiny Committee in relation to the proposed exemption under the Bill of the first set of Standards from disallowance.[70]

71. The issues with exempting the first set of Standards from disallowance as identified by the Bills Scrutiny Committee align with the Law Council's first submission to the Inquiry, which outlined the importance of parliamentary scrutiny.[71] It is the Law Council's position that there should be strict limits on when delegated legislation can be exempted from disallowance, to ensure adequate parliamentary control.[72] Whether it is appropriate to exempt a legislative instrument from disallowance will often be a matter of context and proportionality.[73] It requires consideration of the tension between the need to enable effective, often urgent decision making on the one hand, and the importance of scrutiny and oversight on the other.[74] Some parliamentary oversight mechanisms may be better suited to a particular situation than others (for example, in emergency situations where a high degree of Executive power is being exercised).[75]

72. The Law Council considers that where the need for certainty is the only ground for exemption, this need could equally be met by having delegated legislation come into effect after the disallowance period has expired.[76] This is not typically a long period: under the *Legislation Act 2003* (Cth) once a disallowable instrument has been tabled in each House of Parliament, a notice of motion to disallow the instrument may only be given within 15 sitting days after tabling.[77]

73. As a separate point, the fact that bilateral approval agreements themselves are disallowable will not resolve problems with the lack of parliamentary scrutiny of the broader framework, including the interim Standards, which is created by the Bill.[78] It is preferable to ensure that the Australian Parliament is satisfied that the Standards are appropriately framed at the outset. Any bilateral approval agreements should then be independently assessed against these Standards as a national, strong and consistently

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[68] Law Council of Australia 'Legislative Standards' <https://www.lawcouncil.asn.au/policy-agenda/humanrights/legislative-standards>.
[69] Law Council of Australia 'Legislative Standards' <https://www.lawcouncil.asn.au/policy-agenda/humanrights/legislative-standards>.
[70] *21 April Digest* [2.7]-[2.11].
[71] *LCA April Submission* [25], [48], [83]-[86], [97].
[72] Law Council of Australia, 'Supplementary Submission to the Inquiry into the Exemption of delegated legislation from parliamentary oversight' (11 September 2020) <https://www.lawcouncil.asn.au/publicassets/bd407444-56f9-ea11-9434-005056be13b5/3882%20-%20SS%20Inquiry%20into%20the%20exemption%20of%20delegated%20legislation%20from%20parliamentary%20oversight.pdf> ('*Supplementary Submission*').
[73] Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 1 (Pauline Wright).
[74] Ibid.
[75] *Supplementary Submission* 14-15.
[76] Ibid 19.
[77] See, ss 38 and 42. Note, the minimum timeframe of 15 sitting days assumes the Office of Parliamentary Counsel arranges for a copy of each registered legislative instrument to be delivered to each House of Parliament on the same day as registration and that this is a sitting day (when they have up to 6 sitting days to do so); and that no events occur to restart the period of 15 sitting days required to permit a notice of motion for disallowance to be made
[78] Note, this was a possibility raised at the public hearing: Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 41 (Senator David Fawcett).

applied benchmark, providing an important assurance to Parliament before it must consider any specific bilateral approval agreement. Otherwise, debates on individual agreements risk devolving to the 'negotiated agreement to accommodate existing rules or development aspirations' which Professor Samuel warned against[79], noting that more immediate considerations may take precedence in this context. The Law Council also notes that delegated legislation has reportedly doubled in recent years.[80] This undermines the Australian Parliament's ability to scrutinise individual bilateral approval agreements without sufficiently strong Standards in place.

74. Further, the Law Council notes that the Standards made under the Bill would apply not only to bilateral approval agreements, but also relevant decisions or things made under the EPBC Act.[81] This again reinforces the need to get the upfront settings right in the Standards.

75. Lastly, the Bills Scrutiny Committee raised issue with the failure to require reports from the required reviews of the Standards to be tabled before Parliament as this impacts upon parliamentary scrutiny.[82] The Law Council refers to the recommendation in its earlier submission that if the Bill is to be pursued, it should be strengthened to incorporate 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).[83] The Minister should further be required to respond publicly to reviews of the Standards within a specified timeframe (eg, six months).[84]

76. The Law Council notes in this regard comments made on 13 May 2021 by Chair of the Senate Standing Committee for the Scrutiny of Delegated Legislation, Senator Fierravanti-Wells, as follows:

> *Parliament cannot perform its democratic role if primary legislation continues to leave significant matters to delegated legislation that is exempt from disallowance. There is a concerning increase in the number of laws which are made by the executive via delegated legislation. And even more concerning is that approximately one in five of these laws are not subject to disallowance.*

Sunset clause

77. The Law Council supports the suggestion by the Chair at the public hearing that it may be appropriate to apply a sunset clause to the interim Standards.[85]. A sunset clause would ensure that the interim Standards would cease and would offer an imperative for environmental and business groups to complete the process that was started by Professor Samuel after a two-year period.

78. The Law Council has in some instances advocated for the inclusion of sunset clauses in respect to laws proposing to confer extraordinary powers.[86] It has also

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[79] Final Report 2.
[80] Christopher Knaus, 'Australian Ministers increasingly bypassing parliament to create laws, study finds', *The Guardian* (online), 28 September 2020.
[81] See, the Bill at proposed s 65H.
[82] Ibid at proposed s 65G; *21 April Digest* [2.22], [2.25]-[2.26].
[83] *LCA April Submission* 21.
[84] Ibid.
[85] Evidence to Environment and Communications Legislation Committee [uncorrected proof copy], Parliament of Australia, Canberra, 4 May 2021, 77-78 (Senator David Fawcett).
[86] See, for example, Law Council of Australia, 'Submission to the Inquiry into the Security Legislation Amendment (Critical Infrastructure) Bill 2020 and Review of the Security of Critical Infrastructure Act 2018 (Cth)' (17 February 2021) <https://www.lawcouncil.asn.au/publicassets/e3fce7e8-9e71-eb11-9439-005056be13b5/3964%20-%20SCI%20Bill.pdf> 104.

recommended including a statutory requirement for a 'pre-sunsetting review' to inform decision-making about whether the applicable law remains necessary.[87]

79. The Law Council recommends that if a sunset clause is deemed appropriate in relation to Standards made under the Bill, the Bill should also incorporate the requirement for a pre-sunsetting review to ensure appropriate scrutiny of the Standards and to avoid the risk of perpetual extensions of the sunsetting period without such scrutiny occurring. Pre-sunsetting review requirements assist in providing transparency and assurance to the public about the commencement and conduct of reviews, and may also assist in the prioritisation of these reviews, and the allocation of resources to them.[88]

80. However, the Law Council adds that a sunset clause should not be considered, on its own, a sufficient safeguard. It should instead be adopted, in line with measures to address the Law Council's recommendations made above.

Recommendation:

- **A sunset clause may be a valuable addition in relation to Standards made under the Bill. If it is included, the Bill should also incorporate the requirement for a pre-sunsetting review to ensure appropriate scrutiny of the Standards and to avoid the risk of perpetual extensions of the sunsetting period without such scrutiny occurring. Recognising that it is not, on its own, a sufficient safeguard, a sunset clause should further only be adopted in line with the Law Council's broader measures recommendations in this submission.**

[87] Law Council of Australia, 'Submission to the Inquiry into the Security Legislation Amendment (Critical Infrastructure) Bill 2020 and Review of the Security of Critical Infrastructure Act 2018 (Cth)' (17 February 2021) <https://www.lawcouncil.asn.au/publicassets/e3fce7e8-9e71-eb11-9439-005056be13b5/3964%20-%20SCI%20Bill.pdf> 104.

[88] Law Council of Australia, 'Submission to the review of AFP powers (control orders, preventative detention orders, stop, search and seize powers and continuing detention orders)' (17 September 2020) <https://www.lawcouncil.asn.au/publicassets/5ce7e9b3-50f9-ea11-9434-005056be13b5/3883%20-%20Review%20of%20Australian%20Federal%20Police%20powers.pdf> [50].

Attachment

Table 1 – Text in bold is material in the Samuel Standard that is not replicated in the Government's standard

Samuel MNES Standard (overarching)	Draft MNES Standard (overarching)
1. **Actions, decisions, plans and policies** that relate to MNES: a) Are **consistent with** the objects of the EPBC Act and the principles of ecologically sustainable development (including the precautionary principle) **and reflect a principle of non-regression** b) **Do not have unacceptable or unsustainable impacts on MNES, having regard to the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.** c) **Minimise harm** to MNES, **including employing** all reasonable measures to avoid and then to mitigate significant impacts, and then lastly apply appropriate offsets. d) Are not inconsistent with relevant international agreements, recovery plans, management plans and threat abatement plans, and have regard to and **ensure decisions** reflect any approved conservation advice where relevant. e) **Maintain and improve conservation, recovery and sustainable management, address detrimental cumulative impacts and key threatening processes and fill information gaps that impede recovery and appropriate management**, including i) use all reasonable efforts to prevent actions contributing to detrimental cumulative impacts or exacerbation of key threatening processes. f) **Are based on the best available information. Data and information should be stored and shared consistent with best practice data and information management**. 2. **Engagement is undertaken with governments, the community, landholders and Indigenous peoples, consistent with the EPBC Act and National Environmental Standards**. 3. Monitoring, reporting and evaluation demonstrates compliance with National Environmental Standards [Monitoring and Reporting…] [Review…]	Bilateral agreements relevant to matters of national environmental significance (MNES): 1) Accord with the objects of the EPBC Act. Bilateral agreements and arrangements and processes: 2) Promote management of protected areas in accordance with the management principles adopted under the EPBC Act. Environmental assessment and approval decisions relevant to MNES: 3) Take into account the principles of ecologically sustainable development (including the precautionary principle). Bilateral agreements, arrangements and processes, and environmental assessment and approval decisions relevant to MNES: 4) Are not inconsistent with relevant international agreements. 5) Are not inconsistent with any relevant management plans, threat abatement plans or recovery plans, and have regard to any approved conservation advice where relevant Environmental assessment and approval decisions and arrangements and processes: 6) Provide adequate opportunity for the engagement and input of governments, the community, land-holders and Indigenous Australians, consistent with the EPBC Act. 7) Demonstrate compliance with the EPBC Act and EPBC Regulations, or relevant bilaterally accredited management arrangement or authorisation process. 8) Are subject to adequate assessment of the impacts that the EPBC Action or actions have or will have, or are likely to have on matters of national environmental significance, including: a) assessment based on adequate information about relevant impacts of all relevant components of the EPBC Action on matters of national environmental significance to enable an informed assessment and decision on whether or not to approve the EPBC Action b) public comment, including provisions for particular needs groups

Samuel MNES Standard (overarching)	Draft MNES Standard (overarching)
	c) transparent and accessible publication of assessment documentation d) where relevant, advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, and e) conditions of approval where these are necessary or convenient to protect a matter of national environmental significance, or repair or mitigate damage to a matter of national environmental significance for which the approval has effect (whether or not the damage may or will be, or has been, caused by the EPBC Action). 9) Seek to minimise harm to MNES, taking into account all reasonably practicable measures to avoid and then to mitigate significant impacts, and then lastly apply appropriate offsets. 10) Consider, in so far as they are not inconsistent with any other requirement of the EPBC Act: a) matters relevant to any MNES to which the assessment and approval relates, and b) economic and social matters. Arrangements and processes: 11) Will not have unacceptable or unsustainable impacts on MNES