

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

ec.sen@aph.gov.au

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

Lighter Footprints Inc welcomes the opportunity to make a submission to the inquiry by the Senate Environment and Communications Legislation Committee into the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021.

We note that the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 is intended to establish a legislative basis for the two main components of the bilateral agreements the Commonwealth plans to negotiate to cover the transfer of assessment and approval powers to the States and Territories.

These components are:

- the establishment of a framework for National Environmental Standards to underpin bilateral agreements; and
- the establishment of an Environment Assurance Commissioner to monitor and audit the operation of bilateral agreements, as well as to oversee Commonwealth processes under the Act for making and enforcing approval decisions.

### **Who is Lighter Footprints?**

This submission is from Lighter Footprints Inc, a community group with a membership and supporter base of around 2500 residents from Boroondara and Whitehorse municipalities in Melbourne. The group came together in 2006 to see what we could do to encourage a stronger response by governments to the serious challenge of climate change.

### **Our position**

We have serious reservations about the approach proposed in the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 to the negotiation and content of the bilateral agreements and the monitoring of their implementation.

In particular, we are concerned that:

- this transfer is being done on a one to one basis with a strong likelihood that there will be different outcomes for each state;
- the Bill gives the Minister significant powers in determining the content and articulation of the proposed National Environmental Standards with no obligation to consult with any of the parties affected;
- the use of National Environmental Standards that are chiefly concerned with the process rather than the achievement of good environmental outcomes is likely to lead to very different outcomes around the nation and significant degree of interpretation and judgement;

- there is a high probability that proposed interim standards will become accepted as permanent and will not be opened up to public consultation or rigorous examination;
- the placement of the office of Environment Assurance Commissioner within the existing departmental structure makes it open to Ministerial influence, subject to pressure from competing agendas and unable to fully protect its funding.

**We recommend that:**

- **the bilateral agreements be standardised for all States and Territories and contain a clearly articulated set of National Environmental Standards to be adopted by each and all parties;**
- **the power of the Minister to develop new standards should be constrained by an obligation to consult with all stakeholders and to make use of the best available scientific and expert advice;**
- **the National Environmental Standards should focus on outcomes rather than process; provide precise, clear, unambiguous and enforceable statements of the values and principles inherent in the EPBC Act, and be independently reviewed regularly;**
- **the proposed ‘interim standards’ should be abandoned and replaced with value based standards that protect the environment;**
- **the proposed Environment Assurance Commissioner should be an independent federal agency with sufficient resources to develop expert capacity.**

### **A flawed approach**

We believe that the basic premise on which this Bill is based is flawed. Our reasons include:

- the lack of any justification for the transfer of assessment and approval powers to the States;
- the potential for conflict of interest on the part of the State particularly if providing project support;
- the difficulty in handling matters that cross borders;
- the diversity in the capacity and readiness of the States to deal with this responsibility; and
- the probability that a devolution of powers would undermine the Commonwealth’s legislative authority and capacity for leadership in its duty to respond to the various threats to our environment, including in areas covered by international treaties and obligations.

We remind you of the 2020 report by the Australian National Audit Office (ANAO) into the administration of the EPBC Act; the degree of biodiversity decline that has occurred under certain State administrations; and the outcomes from the Regional Forest Agreements which demonstrate the failure of the States to effectively implement a devolved responsibility.

### **Bilateral Agreements**

The primary motivation behind this Bill is to prepare for the transfer of assessment powers to the States and Territories in an attempt to simplify and speed up project approvals. This transfer will be achieved through the signing of bilateral agreements that specify the new arrangements and how they work.

These bilateral agreements would customarily cover the establishment of mechanisms for a proper functioning bureaucracy to facilitate the transfer of assessment and approval powers to the next level of government and to monitor and audit the application of these powers. Our concerns relate to the overwhelming focus of the Bill on procedural matters and the minimal attention paid to how these new arrangements will achieve the goals and objectives of the EPBC Act.

### **National Environmental Standards**

In his final report, Professor Samuel indicates he believes the EPBC Act requires fundamental reform and that new, legally enforceable National Environmental Standards should be the 'centrepiece' of these reforms.

He states that:

*The EPBC Act does not clearly outline its intended outcomes, and the environment has suffered from 2 decades of failing to continuously improve the law and its implementation.*

We support his assessment that:

*... governments should shift their focus from individual project approvals to a focus on clear outcomes, integrated into national and regional plans for protecting and restoring the environment and plans for sustainable development.*

We support the concept of National Environmental Standards as outlined in his review as a means to gain better quality decision making and more responsive implementation:

*National Environmental Standards should be a set of binding and enforceable Regulations. They should be one set of rules that apply nationwide. The Commonwealth should make the Standards, and a formal process for doing so should be set out in the EPBC Act. This should include consultation with Indigenous Australians; science, environmental and business stakeholders; and the broader community.*

Such standards are one element in a strong and effective regime of legislation and policy initiatives to strengthen Australia's response to the critical environmental challenges currently confronting our world. A set of National Environment Standards will also be welcomed by all parties affected by the EPBC Act. A thorough and well considered set will provide:

- a clear statement of the grounds for identifying and measuring an impact thereby removing much of the opacity and vagueness present in the current approach and should make the preparation of an environmental impact assessment less onerous;
- less room for interpretation and subjective judgement which should lead to better quality and more acceptable decisions;
- greater predictability and consistency in outcomes;
- more enforceable decisions.

If this Bill succeeds, it will lead to a series of bilateral agreements that transfer assessment and approval powers from the Commonwealth to the States and Territories. It is essential that each agreement contains an explicit statement of the National Environmental Standards that set out both the process and the values and principles that should be followed by all decision makers.

The statement of standards in the bilateral agreements should:

- spell out the goals, objectives and criteria that drive the implementation of these powers;
- shift the focus in the EPBC Act away from transactional matters towards the achievement of good environmental outcomes; and
- provide the basis for consistency and enforceability nationwide.

**We recommend that the Bill should require that each bilateral includes:**

- **the same set of National Environmental Standards as every other agreement;**
- **a requirement that each State and Territory participate in regular reviews of these standards and an obligation to adopt new standards as they are developed**

### *An appropriate set of National Environmental Standards*

To ensure standards satisfy the requirements of all stakeholders and are legally enforceable, they need to:

- be based around an agreed understanding of the purpose of the new arrangements;
- offer a clear and detailed articulation of the values and principles that guide decision making; and
- be the subject of thorough consultation with all affected parties.

It is on these grounds that we oppose the use of interim standards which have not been the subject of public consultations. The proposed interim standards are primarily a reformulation of what already applies in the existing EPBC Act. They are mainly concerned with prescribing the process to be followed, and provide insufficient detail as to the nature and characteristics of desirable environmental outcomes.

We are concerned that the proposed Bill ignores Professor Samuel's insights or recommendations on the coverage and format National Environmental Standards. The Bill pays little heed to the range of consultations he undertook on this topic nor his work in formulating the content and format of these standards. While Samuel's proposed standards are not perfect and reflect his desire to reconcile conflicting interests, they are a better starting point than the interim standards and can be built on and strengthened over time.

### *What should be covered by the National Environmental Standards?*

The existing EPBC Act outlines a number of principles to guide decision makers when applying the Ecologically Sustainable Development concept. We believe these principles should be formulated as standards and seen as the basis for mandatory criteria for the consideration of all proposals and actions. They should also be made more explicit and/or reframed to cover climate change.

The principles currently identified in the EPBC Act include:

- integration of long term and short term considerations;
- the use of the precautionary principle;
- inter-generational equity;
- conservation of biodiversity and ecological integrity;
- promotion of valuation, pricing and incentive mechanisms;
- sustainable use;

- intra-generational equity; and
- the internalisation of external environmental costs.

In addition to the above, other important principles that we consider should be recognised in the standards include:

- prevention of harm;
- achieving a high level of environment protection;
- respect for scientific knowledge; and
- the application of Best Available Techniques.

### **Regular review and updating of the National Environmental Standards**

We recognise that this is a complex and rapidly changing area of policy. As such, decision makers and legislators must ensure that they have the means to monitor and keep well informed of changing circumstances and new knowledge, and are capable of responding quickly. This requires the establishment of adequately resourced review and policy development mechanisms at both levels of government.

An independent Environment Assurance Commissioner would be central to the monitoring and review process. The Commissioner would be in a position to keep the policy Department well informed and advise matters such as the need to develop new standards, compliance matters or proposals raising questions of public interest.

The Commissioner should also have the authority to audit particular projects as part the office's duty to monitor implementation of the Act. This power should be underpinned by compliance and enforcement provisions that ensure cooperation by the affected parties.

### **We recommend that the Bill include:**

- **a provision that any subsequent review of the National Environment Standards be conducted by independent scientific experts and a requirement that the minister responds publicly to reviews;**
- **a definition of 'public interest' and mandate if the minister decides to override environmental standards on the basis of public interest any such decision must be published with a statement of reasons for making this decision.**

### **We need to act urgently**

The Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 is intended to establish a process for negotiating bi-lateral agreements and a system to monitor the operation of these agreements. Past experience of such negotiations has shown that they can be significantly delayed if the parties involved are unwilling to compromise or have substantial differences of opinion over what is to be achieved. The end result will always represent a compromise which can be less than fit for purpose.

The immensity of the climate crisis which is currently confronting humanity will not allow us the luxury of being able to go back and fix up past mistakes. We ask the Senate Standing Committee to approach this review with a view to creating a robust and durable system that gives priority to the need to protect our environment. This requires a focus on environmental values and outcomes that look to the long term security of our beautiful planet and all its rich diversity.

Thank you for this opportunity to contribute to this inquiry. We would welcome the opportunity to contribute further.

Lynn Frakes and Michael Nolan  
Co-convenors  
Lighter Footprints Inc

Joy Mettam  
Member  
Lighter Footprints Inc

25 March 2021