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Environmental law reform: how much is too much?

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Would reform of Australia's key environmental law – referred to by industry as 'cutting green tape'– safeguard our natural resources for current and future generations, or put them at higher risk?

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After Australia introduced the *Environmental Protection and Biodiversity Conservation (EPBC) Act 1999*, the Australian, state and territory governments undertook to share responsibility for protecting our natural resources. The two levels of government recently began negotiations to reform the Act, providing an opportunity to address issues that some say have undermined the environmental impact assessment (EIA) process in Australia.

The EPBC Act makes the national regulator – the Australian government environment minister, acting via the commonwealth environment department – responsible for protecting eight matters of national and international environmental significance. These include World Heritage sites, wetlands of international importance, migratory species, endangered species and the Great Barrier Reef Marine Park.

Under the Act, the Australian government is charged with protecting 'nationally and internationally important flora, fauna, ecological communities and heritage places', while state and territory governments are responsible for matters of state and local significance.

Stephen Dovers, Director of the ANU's Fenner School of Environment and Society, says the bilateral arrangement hasn't always been an easy one.

'There's quite a lot of politics in the current debate over whether the Commonwealth should get its nose out of it, or the Commonwealth shouldn't control what a state does, but in a concurrent federal system such as we have, it's inevitable that there will be overlaps,' says Prof. Dovers.

'It's been 20 years since we've had that discussion about who should do what, so although it's erupted because of the

current arguments – mostly about mining – it's probably a very overdue area to revisit.'

In 2012, the Australian government signalled its readiness to negotiate the transfer of environmental approval powers (ie the level beyond assessment) to states and territories as part of its response to the Hawke review of the EPBC Act 1999. But, at the Council of Australian Governments (COAG) meeting in December 2012, the Prime Minister, Julia Gillard, indicated more work needed to be done to progress such bilateral agreements.

One reason cited by the Prime Minister for the government's hesitation is the need to ensure that high environmental standards will be consistently maintained across all jurisdictions.

Kelly Pearce, assistant secretary of the Australian government's EPBC Regulatory Reform Taskforce, says the government has been working with the states and territories to develop bilateral agreements that meet the Commonwealth's environmental standards. This will initially involve accreditation of state and territory environmental assessment and approval processes. The Australian government recently released its Draft Framework of Standards for Accreditation to allow the public to see the basis on which this accreditation is being negotiated.

Under the proposed bilateral agreements, a state or territory would both assess and approve, on the Commonwealth's behalf, projects and activities – such as land clearing – that potentially impact matters of national environmental significance. In most cases, this would relate to impacts on plant and animal species, which account for around 80 per cent of matters referred under the EPBC Act to the Commonwealth.

Environmental engineer, Gavin Mudd from Monash University, questions whether some states are in a position to bear responsibility for such important environmental matters.

'I'm yet to be convinced that the states run a very thorough process and achieve the sort of environmental outcomes that communities and others expect, based on either state legislation or the EPBC powers,' says Dr Mudd.

'If you could come up with an accreditation system where the states actually lift their game and achieve a good process that does protect those matters on behalf of the Commonwealth, then that could be a good process.'

His concerns have been echoed by environmental groups, such as Greenpeace Australia Pacific and the Australian Conservation Foundation, which have both voiced concerns that the attempt to supposedly 'cut green tape' would instead reduce environmental protection.

Greenpeace Australia Pacific CEO, David Ritter, commented in *The Conversation* that the states were 'overly dependent on royalty revenues from the extractive sector', and that the proposed bilateral agreements could mean the business sector would face an even more complex regulatory environment, due to significant variations in different states' environment regulation frameworks.

The Prime Minister reflected this concern in her December COAG press statement, saying: 'I became increasingly concerned that we were on our way to creating the regulatory equivalent of a dalmatian dog and that, for businesses, that would be the worst of all possible worlds.'

However, she added: 'We will keep working with our state and territory colleagues on further changes to make sure we achieve twin goals here of streamlining for business and high environmental standards.'

A common complaint about the EIA system is that it is short-sighted and project-based, often failing to take into account the cumulative impacts of developments. Prof. Dovers says this weakness of EIAs has been known for some time, but the mining boom – in particular the coal seam gas debate – has reignited concerns.

This is where 'strategic assessments' come into play. EIAs are designed to assess the environmental impact of a single development, whether that be a mine, housing project or railway. Strategic assessments look at the bigger picture and cumulative impacts.

Most strategic assessments are being undertaken by the Australian government, in partnership with a state – such as the strategic assessments of the Perth and Peel regions of Western Australia, and of the Gungahlin region of the Australian Capital Territory.

'Strategic assessment is meant to go above the project level to look at policies and programs, so you're actually assessing environmental impact before individual projects come out. That may be the energy plan or the transport plan or the tourism and development plan, rather than individual road or bridge or hotel development,' Prof. Dovers explains.

As well as requiring a longer-term and regional approach, strategic assessments could also streamline the assessment process, without doing away with the need for project-level EIA assessments.

‘A more strategic approach can give development interests more certainty because the parameters are better set, so potentially there is then less paperwork and effort at the project level because...we’re halfway there,’ says Prof. Dovers.

What would happen to strategic assessments under bilateral environment protection agreements? Carolyn Cameron, assistant secretary at the Australian government’s department of Sustainability, Environment, Water, Population and Communities, says they are unlikely to disappear.

‘Some states and territories have recognised that strategic impact assessments are still a useful method of looking at particular areas and particular problems,’ she says.

‘A number of states and jurisdictions have said they will sign up to bilateral agreements because it makes sense, but there are some areas where they want to undertake strategic assessments because the issues are complicated.

‘There are lots of players, it’s going to take time; [however] it’s better to do it strategically, do it once, do it properly.’

How are project proposals assessed under the EPBC Act?

If the regulator – the Australian government via its environment minister and his/her department – decides that a proposed activity or development is a ‘controlled action’ [a project or activity covered by the EPBC Act], the next step is for the minister to assess the environmental impacts of the proposal. The EPBC Act provides a range of ways for a controlled action to be assessed:

• Assessment on referral information only – for actions for which the likely impacts are ‘straightforward’.

• Assessment on preliminary documentation – for actions with few or confined impacts that are reasonably well understood.

• Accredited assessment process – the minister can refer to assessment documents prepared under other laws. If a bilateral assessment agreement [ie between the Commonwealth and state/territory government] has been signed, the assessment process accredited in that agreement will be followed.

• Public environment report (PER) – where a number of issues are raised and further information is required [by the minister] to assess the impacts of the proposed action.

• Environmental impact statement (EIS) – where a large number of issues are raised, and further information and analysis are required [by the minister] to assess the impacts of the proposed action.

• Public inquiry – for actions where the impacts are expected to be large and wide-ranging, and there is a need for extensive public involvement. A public inquiry can be used in conjunction with other assessment approaches, such as a PER or EIS.

The minister must decide which assessment approach will be used, based on information provided by the proponent, comments from the public and relevant state government agencies, and factors set out in the EPBC Act.

Edited extract from The Environmental Law Handbook