

Creating Exceptional Outcomes

Consideration of the EPBC Act Final Review from a state and territory perspective

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Olivia Williamson
Senior Associate
+61 7 3024 0422
o.williamson@hopgoodganim.com.au

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LAWYERS

Introduction

On 30 October 2020 the independent reviewer of the *Environment Protection & Biodiversity Conservation Act 1999 (EPBC Act)*, Professor Graeme Samuel AC, provided the Minister for the Environment with his final report. Although dated October 2020, the report was tabled to Parliament and made publicly available on 28 January 2021. The independent review of the EPBC Act has been an ongoing process which we have written about before.

The final report concludes that the EPBC Act requires fundamental reform.

There are ultimately 38 recommendations in the review said to amount to substantial and necessary reforms to reverse the current state of environmental decline.

Contributions to the review highlighted the need to manage the environment in a strategic and systematic way.¹ Some submissions suggested that the Commonwealth take over the environmental responsibilities of the states and territories. The final review, however, concludes that is neither appropriate or necessary.

Key messages from the report have been outlined in a previous article.

This paper outlines what the recommendations could mean for the states and territories.

States and territories are likely to be required to demonstrate that their environment management systems including development assessment and approval processes deliver on the requirements of the National Environmental Standards.

New legally enforceable National Environmental Standards

National Environmental Standards are the centrepiece of the recommended reforms and are to be a set of binding and enforceable regulations applied nationwide. The Commonwealth will make these standards adopting a formal process to be set out in the EPBC Act in consultation with states and territories as well as with Indigenous Australians. The standards are not intended to be highly prescriptive processes where compliance is achieved by “ticking the box”.

National environmental standards are intended to be developed for each matter of national environmental significance (**MNES**). Of particular interest are comments made in the report with respect to the water trigger that was inserted in the EPBC Act in 2013. Currently, the water trigger MNES prohibits the Commonwealth from accrediting a state or territory to make approval decisions under that water trigger.

The review considers that it was not the role of the EPBC Act to regulate impacts of development on water users rather than the state and territories responsibility. It was concluded however that the Commonwealth should be able to step in to protect water resources to adjudicate cross-border matters (e.g. on water resources that span jurisdictions, such as the Great Artesian Basin). As such, the review recommends that the MNES should be amended to allow the Commonwealth to intervene where any activity (not just large coal mining or coal seam gas projects) is likely to have a significant impact on cross-border water resources.

The report also recommends that the current restriction preventing accreditation of others to undertake approvals of proposals under the water trigger MNES should be removed subject to the accredited party demonstrating compliance with the National Environmental Standards for the MNES. It is proposed that the Independent expert scientific committee on coal gas seam gas and large coal mining developments be retained, although the name and remit should be adjusted to reflect the amended water resource

MNES. The final review contemplates that the Commonwealth Environment Minister or the accredited party would continue to seek the advice of this committee when considering a proposal against the National Environmental Standards.

The National Environmental Standards seek to ensure that decision making is consistent and that the management of Australia’s environment is well integrated across jurisdictions. Professor Samuel states that the reforms to implement or introduce National Environmental Standards is not about the Commonwealth relinquishing its responsibilities. Rather, it is about the Commonwealth meeting its obligations in a more effective and efficient way, including accrediting others to deliver against the National Environmental Standards. The underlying intention is to lift the Commonwealth focus from processed driven project level transactions to the achievement of national level environmental outcomes.

A National Environmental Standard regarding traditional owner engagement is also to be developed. This responds to criticisms made about the lack of transparency as to how the Minister factors Indigenous matters into decision making for EPBC assessments and to ensure that Indigenous Australians who speak for and have traditional knowledge of country are empowered to participate in the decision making. The final review recognises that the state and territories play a key role in the legal framework for Indigenous heritage protection and the jurisdictional arrangements need to avoid duplication or regulatory gaps. The destruction of the Indigenous heritage in the Juukan Gorge in Western Australia is cited as an example of regulatory gaps. The National Environmental Standards is seen as an important first step and it is anticipated that the standards will be given priority. Comprehensive amendments to the EPBC Act will be pursued as a matter of priority and delivered in the next 12 months.

Potential access to Commonwealth funds and mechanisms for restoration will be

made contingent on the state and territories implementing the National Environmental Standards.

The *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (Bill)* introduced to the Federal Parliament on 25 February 2021 contains provisions about the making, varying, reviewing, and revoking of National Environmental Standards. Notably when a National Environmental Standard is first made, it will be treated as an interim standard until it has undergone its first review within two years of the standard commencing.²

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Ecologically Sustainable Development (ESD) Committee

An underlying theme of the final review report is a distrust by industry in the EPBC Act. The final review recommends an ESD Committee is established, with an independent chair as well as chairs of other key committees, such as the Australian Heritage Council and the Biodiversity Conservation Science Committee (a recasting of the Threatened Species Scientific Committee). The ESD Committee should provide transparent policy advice to the Environment Minister, to inform decisions on the making of the National Environmental Standards and Strategic National Plans and Regional Plans. It is unclear what involvement the states and territories will have in the establishment of the ESD Committee and if states and territories will be represented on the ESD Committee.

Approval bilateral

A key criticism of the EPBC Act is that it duplicates state and territory regulatory process for development assessment and approvals. The review found this to be largely untrue with a few exceptions.

The state and territories are no strangers to assessment bilateral agreements, however, approval bilateral agreements have never been implemented. Past attempts to accredit state and territories to make approval decisions that are consistent with the EPBC Act have been unsuccessful, due to the lack of defined outcomes and concerns that decisions would be inconsistent with the national interest.

It is proposed that the Commonwealth would accredit the states and territories to undertake assessments and approvals for Commonwealth matters. It is intended the National Environmental Standards will clarify the requirements of the EPBC Act and provide confidence to support the accreditation of the arrangements of the state and territories. The Bill provides that a State or Territory process for accreditation for the purposes of a bilateral agreement

will be benchmarked against the National Environmental Standards in force and accreditation will not occur unless the Minister is satisfied that the state and territory environmental assessment and approvals processes are consistent with the National Environmental Standards.³

Accrediting state and territory arrangements would likely occur on an “opt in” basis and may require state and territories to amend legislation to meet the standards and satisfy accreditation requirements. The review suggests that the intergovernmental agreement on the environment made over 20 years ago be revisited to ensure that it provides a contemporary foundation for the shared management of Australia’s environment.

The final review finds important amendments to the EPBC Act are needed to enable the Commonwealth to complete an assessment and approval if the state and territories are unable to do so and to ensure agreements can endure minor amendments to state and territories legislation rather than requiring full bilateral agreements to be remade and reaccredited on each occasion. It is envisaged that only the Commonwealth Environment Minister can make a decision that is inconsistent with the standards.

To address some skepticism about the ability for these arrangements to achieve the objectives of the EPBC Act when there are inherent conflicts of interest at a state and territory level, the final review recommends a new, independent, statutory position of the Environment Assurance Commissioner (EAC) be created to provide this oversight. The role of this Commissioner being to ensure that accredited parties such as state and territories (and the Commonwealth Environment Minister) are adhering to the law by making correct decisions and properly implementing their commitments. It is recommended that the EAC be free from political interference and be responsible for public reporting on the performance of the Commonwealth and the accredited parties. Even where accredited arrangements are in place for state and territories, the final review contemplates that the Commonwealth will retain an

ongoing role in directly assessing and approving some developments including where:

- accredited arrangements with the state and territory are not in place or cannot be used;
- at the request of the jurisdiction, for example where conflicts cannot be appropriately managed;
- when the Commonwealth Minister exercises an unfettered right to decide;
- when the activity occurs on Commonwealth land or in Commonwealth waters; and
- when the activity is undertaken by a Commonwealth agency.

Schedule 2 of the Bill outlines additions to the EPBC Act to establish the EAC and specifies arrangements governing the Commissioner’s appointment, functions, and powers.

States and territories are likely to be required to demonstrate that their environment management systems including development assessment and approval processes deliver on the requirements of the National Environmental Standards. Further, that the states and territories transparently track, monitor and report on how different elements contribute to delivering an overall system that is consistent with the standards. Again, the recommended accreditation model is not an all or nothing concept. The Commonwealth will retain its capability to conduct assessments and approvals in certain circumstances. Accreditation is not about the Commonwealth devolving responsibility to the states and territories. Transparent pathways will enable the Commonwealth Environment Minister to intervene in a proportionate and escalating way when accredited arrangements are not performing well, are failing, or where there is a serious risk of environmental harm. The EPBC Act does not currently allow the Commonwealth Minister to step in and make a decision where an accredited arrangement is in force and the final review recommends that an amendment to the Act be made in this regard, but until that can be achieved provisions should be made for this to occur in the accreditation agreements.

The final review acknowledges that understanding of the EPBC Act and its requirement is strained when state and territory rules change.

Planning and restoration

Given the current state of Australian environment, the final report concludes that broad restoration is required to address past loss, build resilience, and reverse the current trajectory of environmental decline. The final review contemplates national and landscape scale plans being developed in a way that allows national outcomes to be fully integrated into the land use and environmental planning systems of the state and territories. It is envisaged that there will be ecologically sustainable development plans developed by state or territories that seek to balance competing activities in a way that is consistent with the National Environmental Standards and any Strategic National Plans or Regional Recovery Plans.

The Commonwealth could collaborate with the state or territory to develop ESD plans in priority areas or a jurisdiction could propose its own plan to be considered and accredited by the Commonwealth. Existing plans such as those by local councils or natural resource management organisations could potentially be accredited to avoid duplication of planning efforts.

In the longer term, the report recommends that offsets should be enshrined in the EPBC Act or a specific standalone Commonwealth Act to require:

- offsets to be ecologically feasible and deliver genuine restoration in areas of highest priority;
- offsets that encourage restoration offsets to enable a gain for the environment to be delivered before the impact occurs; and
- a public register of offsets for Commonwealth, state and territory offsets sites designated as a national interest environmental dataset.

Compliance and enforcement

It is proposed that there will be a National Environmental Standard compliance and enforcement and that the Commonwealth should establish an office for compliance and enforcement with a full suite and regulatory powers and tools and adequate resourcing.

It appears from the final report that an accredited party such as a state or territory should be primarily responsible for compliance and enforcement of actions approved under an approval bilateral agreement subject to the National Environmental Standard for compliance and enforcement and a need to report to the EAC.

The final review acknowledges that understanding of the EPBC Act and its requirement is strained when state and territory rules change. For example, the final report refers to changes to the Queensland land clearing rules in recent years resulting in confusion about whether activities that could be legally conducted under the new state requirements were consistent under the EPBC Act even though the EPBC Act requirements had not changed.

For more information and discussion, please contact our [Environment](#) team.

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End notes

- 1 30,142 people and organisations made written submissions to the review and more than 100 stakeholders shared their views, experience, insights, and expertise with Professor Samuel.
- 2 Clauses 65B – 65H of the Bill
- 3 Clauses 1-5 of the Bill

Author



Olivia Williamson
Senior Associate

+61 7 3024 0422

o.williamson@hopgoodganim.com.au

Brisbane

P +61 7 3024 0000
F +61 7 3024 0300
contactus@hopgoodganim.com.au
Level 8, Waterfront Place
1 Eagle Street
Brisbane QLD 4000

Perth

P +61 8 9211 8111
F +61 8 9221 9100
contactus@hopgoodganim.com.au
Level 27, Allendale Square
77 St Georges Terrace
Perth WA 6000