

Major Reforms Proposed to Australia's National Environmental Laws – Will These Reduce “Green Tape” and Be Sufficient to Address the Current Trajectory of Environmental Decline?

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The proposed reforms to Australia's national environmental laws are likely to increase the effectiveness of the EPBC Act by reducing “green tape” and regulatory overlap. This will provide greater project certainty to developers and proponents in terms of approval timeframes in the long term. However, there are still significant questions surrounding how the National Environmental Standards will be implemented and if the reforms will address Australia's current trajectory of environmental decline.

EPBC Act Review Process

In February 2021, Professor Graeme Samuel AC tabled a final report in Parliament (the Samuel Report), concluding the second review into the operation of the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).

The 18-month review process involved various opportunities for stakeholders to make submissions. Our team contributed to the public submissions process through its involvement with the Property Council of Australia (PCA). Our contribution to the PCA's submissions focused on reducing regulatory overlap, which is a crucial area for reform.

Shared Legislative Responsibility, Regulatory Overlap and Green Tape

In Australia, the Commonwealth and state and territory governments share responsibility for making and enforcing laws in respect to the environment. The Commonwealth has a specified and limited role in environmental regulation, leaving the state and territories responsible for all other environmental regulation. Each jurisdiction has its own approach to environmental regulation. This leads to regulatory overlap, where multiple agencies at different levels of government are engaged in similar, if not duplicitous, environmental regulatory processes.

The EPBC Act is Australia's key national environmental legislative instrument. It operates primarily to protect nine matters of national environmental significance (MNES). The MNES cover Australia's international environmental obligations and include a range of matters including listed threatened species and ecological communities, nuclear actions, including uranium mines, and water resources in relation to coal seam gas development and large coal mining development.

Under the EPBC Act, Commonwealth environmental approval is required where an action is a “controlled action,” namely that it is likely to have a significant impact on one of the MNES. At times, this means that proponents and developers find themselves subject to multiple layers of environmental impact assessment and approval processes and requiring multiple approvals to advance the proposed project. This can be described as unnecessary “green tape” as it results in regulatory overlap, as the same project requires dual approval, often on the same or related environmental factors.

Existing Bilateral Agreements

In practice, bilateral accreditation agreements are used to assess projects that require multiple environmental assessment and approvals. Bilateral agreements are in place between the Commonwealth and state and territory governments. They allow state environmental regulators, such as the WA Environmental Protection Agency, to conduct an environmental assessment of the relevant MNES using the state process and provide its recommendations to both ministers, who then make their separate approval decisions.

However, bilateral accreditation agreements are not in place in all states and territories and vary from jurisdiction to jurisdiction. This means that there is no consistent national approach, and the current system can be ineffective. Different levels have competing approaches to the same issue or environmental concern, which can further compound this difficulty. Presently, some of the critical areas of overlap include threatened species lists, processes for determining offset regimes, government approvals and reporting requirements and national resource management programs.

Samuel Report Findings and Recommendations

The Samuel Report made drastic findings concerning the state of Australia's environment, finding that it is in an overall state of decline, is under increasing threat from, and lacks the resilience to withstand, current emerging and future threats, including climate change. Ultimately, the Samuel Report found that the EPBC Act is outdated and needs fundamental reform to reverse the current trajectory of environmental decline and to allow the Commonwealth government to fulfil its national and international environmental management responsibilities. To reach this objective, it made 38 recommendations for reform.

The Samuel Report found the EPBC Act is complex, making it difficult, time-consuming and expensive for stakeholders to understand their legal rights and obligations. This leads to confusion and inconsistent decision-making, which creates unnecessarily regulatory burdens for business while restricting access to justice. According to the Samuel Report, a systematic overhaul of the EPBC Act is required. Vital reforms are recommended, including immediately implementing legislative amendments to address known inconsistencies, gaps and conflicts and overhauling the Act to enable the delivery of the recommended policy reforms. Consistent with the Intergovernmental Agreement on the Environment (IGAE), the EPBC Act should be drafted to facilitate harmonisation with state and territory regulation to deliver the recommended standards-based accreditation framework.

Relevantly, the Samuel Report recommended that the EPBC Act is immediately amended to provide confidence to accredit state and territory arrangements to deliver single touch environmental approvals in the short term. Another critical recommendation of the Samuel Report, relevant to regulatory overlap, is Recommendation 3, which is that the EPBC Act should be immediately amended to enable the development and implementation of legally enforceable National Environmental Standards (NES). The idea behind this would be that the Act is amended to require that activities and decisions made by the minister under the Act, or those under an accredited arrangement, such as an accredited bilateral agreement, be consistent with the NES. If adopted, these reforms will likely reduce regulatory overlap and enhance national consistency.

Implementation of Recommendations

There are two EPBC Act amendments bills currently before Parliament. If the bills are passed, it will result in the implementation of some of the Samuel Report findings aimed at reducing regulatory overlap and "green tape."

1. Environmental Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (Cth)

This bill proposes to amend the EPBC Act to expand and clarify environmental approval powers to the state and territories through bilateral agreements (to create single touch environmental approvals). If these changes are passed, they could significantly reduce regulatory overlap and enhance national consistency.

However, a potential limitation of this bill is that it was introduced to Parliament before the Samuel Report was tabled; as such, it does not have the benefit of the extensive stakeholder consultation undertaken as part of the EPBC Act review process. It is unclear how these changes will fit into the other changes aimed at reducing regulatory overlap, including the development and implementation of the NES.

2. Environmental Protection and Biodiversity Conservation Amendment (Standards and Assurance Bill) 2021 (Cth)

This bill proposes to amend the EPBC Act to establish a framework for making NES and establishing an Environment Assurance Commissioner (Commissioner).

If passed, the implications will be that the NES are established as a regulation to the EPBC Act, and the Commonwealth Environment Minister will have the power to vary or revoke the NES. The effect will be that the accredited environmental assessment and approval process under bilateral agreements must not be inconsistent with the NES, and a person making a decision or doing an action under the EPBC Act must be satisfied that the decision or action is not inconsistent with the NES.

While at face value, this would reduce regulatory overlap and enhance the use of bilateral agreements, it could cause difficulties where there is a difference in approach between the Commonwealth and the state or territory environmental laws in matters where responsibility is shared, including concerning threatened species and offsets regimes. In the short term, this could lead to further project delays, and a temporary increase in "green tape" as the standards that the NES will replace could vary significantly between jurisdictions. However, once the NES are established and applied over time, it will lead to less regulatory overlap and greater certainty for project proponents.

Implications

It will be interesting to watch these bills progress through Parliament and see how the Samuel Report recommendations translate into practical reforms of the EPBC Act; and ultimately, whether these reforms will deliver the desired outcome to reduce regulatory overlap and remove unnecessary green tape. Perhaps more interesting will be to see how this is received by the many different stakeholders involved in the review process and the balance that our new EPBC Act will strike between reducing green tape and encouraging development while also protecting Australia's environment, which is in a dire state of decline.

As well as providing stand-alone strategic environmental advice, our Perth team also works closely with our Australian corporate teams to provide due diligence on environmental issues and approvals. We advise on environmental legal risks at both a Commonwealth level, including matters arising under the EPBC Act, and at a state and territory level across various jurisdictions. If you are concerned about how the proposed changes to the EPBC Act may impact your business or project in Australia, please contact our team.

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