

Achieving Sustainability Through Australia's New Impact Assessment Regime

Gerard Early

Head of the Approvals and Wildlife Division

Australian Government Department of the Environment and Heritage

Abstract

In 2000 the Australian Government introduced new environmental legislation, the Environment Protection and Biodiversity Conservation Act 1999, as a radical overhaul of Australia's national environmental impact assessment regime. The new legislation was designed not only to provide better protection for the environment but also specifically to assist industry by improving the efficiency and timeliness of environmental and development approval processes. The Act promotes decision-making on the basis of ecologically sustainable development, including consideration of environmental, economic and social factors. It also rationalises government responsibility for impact assessment and establishes a fully transparent process with specific statutory timeframes and upfront certainty.

The paper describes the streamlined regulatory processes of the new Australian impact assessment regime and experience over its first four years in relation to industrial and resource developments. This experience includes a major strategic assessment of Australian offshore oil and gas exploration and a series of strategic assessments of Australian fisheries.

Introduction

Achieving sustainability has been a key concern of successive Australian Governments over many years. Australia actively participated in the global debate on sustainability at its inception in the late 1980s and agreed its own National Strategy for Ecologically Sustainable Development in 1992.

The Strategy provides a broad strategic direction and framework for sustainability for all governments within Australia – the central national (Australian) government and the eight regional (State and Territory) governments. It was formally agreed through the Council of Australian Governments and signed off by the Australian Prime Minister and the Premiers and Chief Ministers of each of the Australian States and Territories.

The Strategy sets out measures for governments to direct policy and decision-making for sustainability and to facilitate a coordinated and cooperative approach to ecologically sustainable development. It encourages long-term benefits for Australia over short-term gains.

Despite sustainability being a central theme in Australian political debate in the 1990s, it was not a key feature of Australian environmental impact assessment. National environmental impact assessment laws effectively failed to recognise the newer concepts of ecological sustainability, the precautionary principle and so on. This is because Australia's environmental law regime had developed within its federal system in a somewhat piecemeal fashion without clear distinctions between the roles and responsibilities of the Australian government and the State and Territory governments. The national government's impact assessment regime had been developed in the early 1970s, prior to those of the Australian States and Territories. The subsequent evolution of State and Territory law had not been adequately recognized in the national legislative framework, thus hindering seamless and productive integration of environmental laws.

During the late 1990s there was a recognition that the rather ad hoc nature of this situation was no longer appropriate and a major review of Australia's environmental legislation was conducted through the Council of Australian Governments. The outcome of the review was formally approved by the Prime Minister and the Premiers and Chief Ministers and then fed into the development and subsequent passage through the national Parliament of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

The EPBC Act sets out a new conceptual framework for Australian environmental impact assessment and other environmental activities with clear and distinct roles for the different levels of government. Essentially the national government deals with nationally important matters (the so-called 'matters of national environmental significance') and the States and Territories deal with matters of State, regional or local significance. Obviously, on occasion, the matters coincide, in which case bilateral agreements and procedures exist to ensure only one assessment process. Consultation on approval conditions occurs where approval decisions are required of different jurisdictions.

In addition, a key objective of the new regime is to provide certainty of process for stakeholders, especially industry. This is achieved primarily through the clearer roles and responsibilities set out for the different governments in Australia, increased cooperation between those governments and a greater streamlining of processes, including the imposition of statutory timeframes for all decision-making required of the Australian Government Environment Minister.

The new legislation, which replaced or consolidated seven previous statutes¹, deals with environmental issues and sustainability in a more coherent and comprehensive way than ever before. It took effect in July 2000.

¹ Dealing with environmental impact assessment, national parks and protected areas, wildlife conservation and trade, world heritage, national heritage, endangered species and whale protection.

The New Regime

The EPBC Act represents the most fundamental reform of Australian environmental laws since the first environment statutes were enacted in the mid 1970s. The Act considerably strengthened the national environmental impact assessment system, *inter alia*, by requiring proponents to formally refer all projects likely to have a significant impact on matters of national environmental significance to the national Environment Minister for consideration and approval.

Ecologically sustainable development is a cornerstone of the legislation, which requires decision-making to take account of environmental, economic, social and equitable considerations, both long-term and short-term. The legislation provides general provisions for strategic assessments as well as specific provisions for the strategic assessment and accreditation of Australian fisheries.

A broad approach to sustainability is encouraged by the definition of 'the environment' provided in the Act, which includes:

- a) ecosystems and their constituent parts, including people and communities;
- b) natural and physical resources;
- c) the qualities and characteristics of locations, places and areas;
- d) heritage values of places; and
- e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b) or (c).

As a piece of framework legislation, the EPBC Act provides a nationally consistent approach to a wide range of biodiversity conservation matters. The environmental impact assessment regime is therefore placed within a broad environmental policy context.

Key Changes

The key changes made by the EPBC Act are essentially as follows:

- decisions are now made by the Australian Government Environment Minister rather than, as previously, by other Ministers acting on the recommendation of the Environment Minister;
- Australian Government involvement is now the result of direct environmental triggers – matters of national environmental significance. It is not based on whether a Australian Government decision is required, as previously;
- proponents now refer proposals themselves rather than relying on Australian Government Ministers or authorities to start the process;
- an integrated approach to biodiversity conservation is set out in the Act; and
- an enhanced compliance and enforcement regime applies.

Matters of National Environmental Significance

A number of matters of national environmental significance are set out in the Act. They are:

- World heritage properties;
- National heritage places;
- Wetlands of international importance (that is, wetlands declared under the Ramsar Convention);
- Nationally listed threatened species and ecological communities;
- Listed migratory species;
- Australian Government marine areas; and
- Nuclear actions (including uranium mining).

The Act provides a process of consultation with the States and Territories for the identification of new matters of national environmental significance. In any event, there must be a review of the matters of national environmental significance every five years as well as a review of the Act itself every ten years.

A comprehensive report of activities under the Act and how the objectives of the Act are being met is provided each year to the Australian Parliament. Copies of all EPBC annual reports as well as information about all decisions under the Act are available on the website www.deh.gov.au/epbc/index.html.

Environmental Assessment and Approval

The Act provides that actions likely to have a significant impact on a matter of national environmental significance are subject to a rigorous assessment and approval process. The essence of the EPBC Act framework is that a person must not take an action that has, will have, or is likely to have, a significant impact on a matter of national environmental significance except in accordance with an approval from the Australian Government Environment Minister.

The Act also provides that, without an approval, a person must not take an action on, or affecting, Australian Government land that has, will have, or is likely to have, a significant impact on the environment. Further, the Australian Government itself (including a Australian Government agency or corporation) must not take an action that has, will have, or is likely to have, a significant impact on the environment without approval.

Referrals of Proposed Actions for Approval

Any person proposing to take an action which he or she thinks may require approval under the EPBC Act must refer the proposed action to the Australian Government Environment Minister. The Minister must then make a binding decision within 20 business days on whether the Act is triggered. If the Environment Minister provides advice that an action does not require approval, a person will not contravene the Act if the action is taken in accordance with that advice.

What is an Action?

An 'action' is defined in the Act as including a project, development, undertaking, activity or a series of activities. However, a decision by a government body to grant an authorisation is *not* an action. Nor is providing government funding.

The focus of the new regime therefore tends to be on project-type activity of a nature to cause, or lead to, real physical impact. There is provision for a broader approach, however, through consideration of secondary or consequential impacts, including cumulative impacts. Strategic assessment of policies, plans and programs is also a key feature of the Act.

Assessment and Approval

An action that requires the Environment Minister's approval must be assessed. Assessment can be by the Australian Government or by a State or Territory under a bilateral agreement or accredited process. After the assessment process is complete, the Environment Minister must then decide whether to grant approval and, if so, under what conditions. Public participation is required for all forms of assessment, even the least onerous – assessment by preliminary documentation.

An important feature of the Act is the capacity of the Minister to decide an action does not require approval because it will be undertaken in a 'specified manner' that will ensure no adverse impact on matters to be protected. This is a mechanism to encourage proponents to design their activities in an environmentally sustainable manner and provides a powerful way to reward project proponents who commit to effective environmental management measures before they make a referral. The intended effect of using this provision is to encourage better project, and landuse, planning and to avoid, rather than mitigate through direct regulation, impacts on matters of national environmental significance.

Timeframes

A key feature of the EPBC Act is the introduction of streamlined assessment and approval processes, setting clear timeframes for decision-making. Statutory timeframes are included in relation to a range of decisions under the Act. They include:

- Decision on whether a referral triggers the Act – 20 business days;
- Reasons for decision – 28 days;
- Decision on the type of assessment approach to be adopted – 20 business days;
- Preparation of an assessment report – 20 business days (30 for an Environmental Impact Statement); and
- Decision as to whether or not to approve the action and, if so, under what conditions – 30 business days (40 for an Inquiry).

Conservation of Biodiversity

The Act also strengthens Australia's capacity to conserve its biodiversity through a substantially improved and integrated framework. This framework sets out measures in addition to those related to threatened and migratory species, Ramsar wetlands, world heritage and national heritage properties, nuclear actions and the Australian Government marine area. They include the requirement to establish the ecological sustainability of export industries utilising Australian native plants and animals, additional protection to species and communities in Australian Government areas, additional protection to internationally endangered species, and the establishment of management principles to apply to Australian Government reserves and other protected areas.

The Act contains an extensive regime for the conservation of biodiversity, a number of provisions of which are particularly relevant to impact assessment and sustainability. These include:

- the listing of nationally threatened species and ecological communities;
- the preparation of national recovery plans and wildlife conservation plans for listed species;
- the maintenance of a register of critical habitat for listed threatened species and ecological communities;
- requirements for the identification and monitoring of biodiversity;
- surveys and inventories of threatened and migratory species and ecological communities;
- bioregional planning;
- conservation agreements;
- rules about access to biological resources;
- provisions recognising the knowledge and role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- the requirement for permits to be issued in Australian Government areas, particularly those involving cetaceans in Australian Government waters.

In granting a permit for certain actions affecting listed species or ecological communities and cetaceans in Australian Government areas, the Minister must be satisfied that the particular action:

- will contribute significantly to the conservation of the species concerned, *or*
- the impact of the action on the species is incidental, not the purpose of the action; *and*
- it will not adversely affect the survival or recovery of the species; *and*
- it is not inconsistent with a recovery plan; *and*
- all reasonable steps are taken to minimise the impact.

Monitoring, Compliance and Enforcement

The EPBC Act contains a strong regulatory regime with respect to monitoring, compliance and enforcement, including the following provisions:

- a Ministerial power to 'call in' a referral of a proposed action if it is considered that it may require approval under the Act;
- a Ministerial power to 'deem' a referral to have been made (and to make a decision as to whether or not it needs approval) in cases where a person fails to refer an action after the Minister has 'called in' the action under the Act;
- evidentiary certificates that are prima facie evidence in civil proceedings;
- general provisions containing search and seizure powers;
- directed environmental audits; and
- conservation orders.

In addition the Act has wide standing for injunctions and judicial review. No undertakings as to damages are required for interim injunctions.

Penalties under the Act can also be severe. For a matter of national environmental significance, a civil penalty of up to \$5.5 million and a criminal penalty of up to seven years imprisonment apply. For a breach involving an Australian Government action or Australian Government land, the civil penalty can be up to \$1.1 million with a criminal penalty of up to two years imprisonment. Penalties apply to the provision of false or misleading information and liability extends to executive officers of corporations. The Minister has the power to publicise contraventions of the Act. A proponent in breach of the Act may also incur liability for damage arising from contravention of the Act.

Experience to Date

In almost four years of operation (that is, from the commencement of the EPBC Act in mid-July 2000 to April 2004), about 1,100 referrals were received, at a rate of about 25 per month. Of those, approximately 26 per cent were determined to require approval under the Act. About another 15 per cent were determined not to be controlled actions only because they were to be carried out in a specified manner to ensure no adverse impact on matters protected. The trend in these 'specified manner' decisions is increasing, reflecting the fact that the Act is being increasingly effective in promoting and supporting a shift to ecological sustainability by key industries.

Referrals have been received across all Australian States and Territories as well as some of Australia's external territories. They have included all sectors of the economy and have related to all of the matters of national environmental significance.²

² More information on the EPBC Act, and activities under it, is available on the website: www.deh.gov.au/epbc/index.html

There have also been about 60 strategic assessments, most of which have been in relation to commercial fisheries. *Guidelines for the Ecologically Sustainable Management of Fisheries* set out the issues to be addressed and the methodology to be used in these strategic assessments. Australia is also currently engaged in a strategic assessment of offshore oil and gas exploration.

Conclusion

Since the EPBC Act commenced on 16 July 2000, it has been delivering important benefits for the Australian community. The Act provides a much more effective national framework for environmental protection and conservation of biodiversity than the previous regime which was triggered in an ad hoc fashion by factors not necessarily directly related to the environment.

Benefits of the Act have been demonstrated in a variety of ways. The Act provides greater certainty in relation to Australian Government involvement in environmental matters, an enhanced capacity for cooperation with the States and Territories through accredited processes and the introduction of strict timeframes within which government decisions must be made. The Act also provides increased protection for Australia's rich and unique biodiversity and important conservation areas.

Through the Act focussing on protecting matters of national environmental significance, the Australian Government is now responsible for decision-making in relation to development proposals of truly national importance. Under the previous arrangements, the Australian Government was often not involved in decision-making for development proposals of national environmental significance or conversely found itself involved in the assessment of projects that raised environmental issues of only State or local importance.

The EPBC Act also provides a more integrated framework for the conservation of Australia's unique biodiversity, providing greater protection than previously for species and communities in Australian Government areas and facilitates best practice management of Australian Government reserves.