Changes to Environment Protection and Biodiversity Conservation Act - not what they first seem

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Marcus Priest[1] and Andrew White[2]

EPBC amendments:

- allow states and territories to be accredited for approval decisions on large coal mining and coal seam gas developments that are likely to have a significant impact on a water resource
- clarify that proponents do not need to make referrals to the Commonwealth for actions that are covered by an approval bilateral agreement
- provide a process to enable the Commonwealth to complete the approval process where an approval bilateral agreement is suspended or cancelled, or ceases to apply to a particular action, and
- allow approval bilateral agreements to include approvals made by any person or organisation authorised by the state or territory (such as local governments).

Draft agreements:

- to avoid unacceptable or unsustainable impacts on matters of National Environmental Significance (NES), states will apply the "avoid, mitigate, offset" hierarchy of principles for guiding the assessment and approval of a proposed action under an accredited process
- provide significant open access to information regime
- each year states will audit the agreement in line with accepted best practice audit principles
- provide an escalation procedure allowing Commonwealth to step in and approve projects, and
- require states to duplicate authorisation processes for Commonwealth environmental matters for all other actions affecting the environment performed by companies.

It may be the biggest shake-up of environmental laws in over a decade but the detail of new amendments to national environment laws and draft agreements to delegate approval powers to NSW and Queensland reveal it is not what it at first appears.

The changes are likely to be controversial as they potentially unwind the Commonwealth's involvement in environmental matters, which has grown over the last 30 years. However, they may equally provide greater transparency in environmental assessments and an opportunity to enhance state processes.

The amendments to the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC) attracted little attention in the debate over budgetary measures as they were introduced into Federal Parliament the morning after the Federal Budget.

[1] Lawyer, Sparke Helmore Lawyers
[2] Partner, Sparke Helmore Lawyers

Nevertheless, the amendments and the draft bilateral agreements promise the most significant changes to the federal environmental assessment and approvals process since the introduction of the EPBC in 1999 by the former Howard Government.

That legislation introduced for the first time a comprehensive legislative framework for the Commonwealth's involvement in environmental matters by establishing six matters of "National Environmental Significance" (NES), including World Heritage areas and nationally threatened species and communities. The list of matters of NES was later expanded to nine, incorporating such things as National Heritage places and the Great Barrier Reef Marine Park.

Under the EPBC, actions that have or are likely to have a "significant impact" on one of these matters are required to undergo environmental assessment and approval by the Commonwealth Environment Minister. Previously, Commonwealth involvement had been ad hoc, reliant on a range of constitutional heads of powers and comprised political responses to individual disputed projects, such as sand mining on Fraser Island and the Franklin Dam.

"Reform is necessary because the existing suite of Commonwealth law does not ensure high environmental standards in the areas of Commonwealth responsibility" said then-Parliamentary Secretary for the Environment Sharman Stone when introducing the EPBC into Parliament.

The EPBC was in part the result of an inter-governmental agreement between the states and the Commonwealth, which sought to establish "a cooperative national approach to the environment", reduce overlap and avoid delays. However, the operation of the EPBC was quickly met with complaints about duplication with state assessment and approvals processes and the consequent cost and delay. And it was limited by its constitutional underpinning, relying in large part on international agreements to which Australia is a signatory.

As a result, both the previous and current Governments promised to "streamline" the EPBC by referring Commonwealth approvals powers to states and territories, although Labor changed its position on that commitment in the face of protest from environment groups and resistance by the states on key conditions. The proposed amendments implement the Coalition's election promise to create a "one-stop shop" for environmental approvals and assessment.

The EPBC already provides for accreditation of state and territory environmental approval and assessment schemes. The Commonwealth has already done so to with assessment powers through bilateral agreements with most states. However, the amendments further facilitate bilateral approval agreements by removing the obligation on proponents to refer proposed actions to the Commonwealth, which may have a significant impact on NES matters, but are covered by those agreements. The result for proponents will be one assessment process and one approval for the purposes of state and Commonwealth environmental regimes. However, the prospect of litigation by green groups under the EPBC may remain. The states and proponents will still need to take care to ensure that process and assessment guard against claims a project has not been approved in accordance with the agreement and so is not covered by the exemption from Commonwealth approval.

The amendments will apply not only to future referrals under the EPBC but also to projects already referred under the EPBC and that are currently being assessed or have been assessed by states and territories. In NSW, the Commonwealth and State Government have also committed to finalising strategic assessments for coal mining in the Hunter, the result of which will provide for enhanced offsets management and other matters.

Importantly, the amendments allow for the accreditation of state and territory approval processes in relation to all NES matters, including nuclear and world heritage, as well as large coal-mining and coal seam gas developments likely to have a significant impact on a water resource. The last of these was only introduced in 2013 by amendments – commonly known as the "water trigger" – which prevented the referral of approval powers in relation to such matters to states and territories.

However, the removal of this restriction does not remove the requirement for the assessment and approval of actions that have a significant impact on water resources in relation to large coal mining or coal seam gas developments. And states will still need to refer such projects to the Independent Expert Science Committee and its advice will then need to be considered as part of the approval process.

Another significant change is that the amendments enable a broader range of entities and processes to be accredited for the purposes of approvals. As a result of the amendments, local councils and expert panels could be accredited, along with authorisation processes established by non-legislative means, such as procedures and guidelines.

States and territories will also be able to make "minor amendments" to those arrangements or processes without needing to go through a new accreditation process if the Minister is satisfied on matters including that it will not will "not have, or is not likely to have, a material adverse impact" on an NES or detract from public participation provided for under the state scheme.

In deciding whether to accredit a state or territory management arrangement or authorisation process, the Minister will also be able to consider a broader range of matters than is presently the case including any "relevant matter", such as the terms of the bilateral agreement or state policies or plans.

However, it is the detail of the draft bilateral agreements with Queensland and NSW that provides a few surprises.

For example, the agreements contain an extensive open access to information regime, including making clear to proponents supplying information for environmental assessments of an "intention to apply an Open Licence, preferably a Creative Commons Attribution licence, to their information so that it will become Public Sector information" and also requiring the provision of "high quality, understandable metadata" so that it can be easily found and used. These provisions go further than legislative regimes for public participation and information availability than the one presently in the current EPBC or state schemes, and acknowledge that the way the public looks for and uses publicly information has changed in the last 10 years since the EPBC was introduced.

The extent of the assessment conducted by a state on NES matters will be "proportionate to the level of likely environmental risk" and will be required to ensure there is sufficient information on the relevant impacts of the proposed action to allow the decision maker to make an "informed decision". Decision makers will need to apply the "avoid, mitigate, offset" hierarchy of principles when deciding whether to approve the action. If there remains a residual adverse significant impact on a matter of NES after applying this hierarchy, they must notify the Commonwealth.

Perhaps in response to arguments that the Commonwealth is ignoring its international obligations and leaving the responsibility for environmental protection to state governments with a vested interest in encouraging new revenue sources from resource projects, the draft bilateral agreements provide "an escalation process". That process ultimately leads to the Commonwealth Minister being able to step in and take approval of a project out of a state's hands. However, the Queensland and NSW draft agreements notably differ in relation to this escalation process.

In Queensland, a state decision maker must notify as soon as practicable the Commonwealth where they are considering or proposing to make a decision that is likely to result in "serious or irreversible" environmental impact on a matter of NES and when the "assessment of social and economic factors for the relevant action could result in the decision being inconsistent with the requirements for decision making under the agreement. The factual circumstances where this escalation process could eventuate is made clear by clause 16.7, which states that a decision may substantially meet the requirements for decision maker if it is "affected by bias, such that the decision maker could not give genuine consideration to matters". In other words, where a state considers that the economic benefits of a project – say a coal mine – justify its approval without fully

avoiding, mitigating or offsetting the associated adverse environmental impacts, the Commonwealth has the power step in. However, the practical ability of the Commonwealth to make these assessments will be limited by the reduction of government resources and staff in Canberra for this function.

The NSW draft agreement is not as explicit in this regard and only provides that the Commonwealth Environment Minister can step in where satisfied an "action is likely to cause serious or irreversible environmental damage".

But the real hidden nugget in the agreements is that they require states to duplicate authorisation processes for Commonwealth environmental matters for all acts undertaken by "constitutional corporation", a "person for the purposes of trade or commerce" or "whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more countries". In many cases, this may require states to actually increase the level of protection currently afforded by their own environment laws by introducing new requirements of decision makers in the assessment process. So, while the delegation of powers to states has been widely seen as the Commonwealth vacating the field on environmental protection, the intent appears to be coax some states to lift their environmental approval processes. And although the Commonwealth has stepped away, it retains a "watching brief" and reserved the right to step back in.

However, the agreements are not yet done deals. When finalised, there is the potential for disallowance motions in the House of Representatives and the Senate, which if successful will prevent the agreements being accredited under the EPBC. No doubt, the role of Clive Palmer's Palmer United Party in the Senate in relation to these agreements will be watched closely.