

National Review of Environmental Regulation: a serious catalyst for reform?

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Originally published 2 April 2015

Brad Wylynko, Damien Gardiner, Kathryn Pacey and Nick Thomas¹

The Interim Report on the National Review of Environmental Regulation – released on 19 March 2015 by the Australian Government on behalf of Environment Ministers across the country – provides a snapshot of current reforms across Australia on three key issues (biodiversity, chemicals and waste) and recommends further work on four strategic reforms based on existing initiatives in various parts of the country (some of which are noted below).

Why the review?

According to the Interim Report, despite decades of focus on regulatory reform, the consequences of Australia's complex and inconsistent environmental regulations include confusion over compliance requirements, duplication, delay, regulatory burdens that are disproportionate to environmental outcomes, unnecessary costs (estimated \$500 million per annum) and a negative climate for investment.

The solution

The Interim Report outlines four key strategies:

1. Risk-based regulation

Risk-based regulation, as the name suggests, is based on the level of risk associated with particular actions. In other words, the level of regulation is proportionate to the level of risk of occurrence and impact. According to the Interim Report, this means minimising regulatory processes and costs for low-risk actions and directing resources towards actions with a high-risk of occurrence or a potentially high-impact environmental outcome.

NSW will take this approach from 1 July 2015 with risk-based EPA licensing. The reform aims to ensure that the NSW EPA can target high risk and poor performing licensees, and because risk ratings are tied to fees, there will be an incentive to reduce risk.

2. Harmonisation

According to the Interim Report, many existing reform processes have a focus on harmonisation and removing duplication both within and between jurisdictions.

The Australian Government's one-stop-shop policy for environmental assessments and project approvals reflects this approach. A number of states have now signed up to assessment bilateral agreements (which accredit the State assessment of a project so that parallel Commonwealth assessment of that project is not required). The Commonwealth has introduced the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 to allow the Commonwealth to facilitate state assessment approval decisions and pave the way for approval bilateral agreements (which would accredit the State approval of a project so that parallel Commonwealth approval of that project is not required). The Bill is currently before the Senate.

¹ Each of the authors is a Partner at Clayton Utz. For more information regarding their areas of expertise, or to contact them, click [here](#).

3. Strategic and landscape scale approaches

The Interim Report suggests that landscape or regional scale assessments have the potential to deliver greater savings for business than improvements to the efficiency of project-by-project assessments. Other benefits of this approach include effective consideration of cumulative impacts, reduction of regulatory burden and cost, and improved project certainty in strategic assessment areas.

The use of strategic assessments has been gaining momentum in recent years. Typically, they take more time and resources than single project assessments, and are therefore most effective when prepared in anticipation of several projects in a particular region.

Following the development of strategic assessments in NSW (Western Sydney Growth Areas), Victoria (Melbourne Urban Growth Boundary) and the ACT (Molonglo Valley Urban Development), the Western Australian and Commonwealth Governments are currently preparing a strategic assessment of the Perth and Peel regions of WA, and the NSW and Commonwealth Governments are working on the Upper Hunter Valley Strategic Assessment.

4. Market-based instruments

The final strategy proposed in the Interim Report is market-based instruments (probably the most widely known examples of which are carbon credit trading and water trading). These instruments are in contrast to the traditional "command and control" regulatory approach.

The Interim Report notes NSW's biodiversity banking and offsets ("bio-banking") scheme, which uses a formal market to facilitate the trade of biodiversity conservation credits. Under that scheme:

- landowners generate biodiversity credits by establishing bio-bank sites to enhance biodiversity on their land; and
- developers can purchase credits to offset the biodiversity impacts from their developments.

The Interim Report also refers to other market-based approaches to environmental regulation in other jurisdictions, such as the Queensland government's market-based approach to nutrient management, and reverse auctions that have been trialled around Australia.

The Interim Report recommends a review of Australia's Biodiversity Conservation Strategy to consider its implementation through, amongst other means, market-based instruments.

What now for the Interim Report and reform process?

In its 27 February 2015 Agreed Statement, Commonwealth, State and Territory Environment Ministers noted the Interim Report, and committed to "considering removing unworkable, contradictory or incompatible environmental regulation, and identifying opportunities for collaboration between jurisdictions." Given numerous efforts along these lines in the past, it is hoped that the National Review will garner some success.

In the meantime, there are some relatively easy administrative fixes that could be done immediately and make a big difference to project delivery.² These include:

- ensuring early Commonwealth involvement in State processes;
- continuous communication between different levels of government, with consistent project managers;

² The one-stop shop and options to streamline approvals are discussed in greater detail in Pacey, K. 2015. [As the one-stop shop turns into a mall, some quick fixes now can streamline environmental approvals](http://www.claytonutz.com/publications), available at www.claytonutz.com/publications

- alignment of information requirements and conditions between different regulators to ensure ease of administration for both regulators and project proponents;
- using existing processes to minimise regulatory duplication and "front load" approvals, such as strategic assessments.

Other actions that do not require statutory amendments include:

- providing clear guidance to applicants through pre-lodgement meetings and non-regulatory publications;
- ensuring terms of reference are tailored to project risks, and avoid detailed studies on topics that are low risk or irrelevant for the project;
- ensuring conditions align with project outcomes, respond to project risks, require monitoring and reporting that is proportionate to project risk and accommodates a degree of flexibility in project delivery and design;
- for applicants - having a clear approvals strategy and complete application documents that respond to mandatory application requirements and the decision-maker's assessment criteria. Where a bilateral assessment process is used, the application should address both sets of decision making criteria; and
- proactive and upfront involvement by assessing agencies (Commonwealth and State) in identifying whether assessment documentation is adequate, so that the risk of "stop the clock" information requests is minimised. This is already provided for in the current assessment bilateral agreements.