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FINAL REPORT OF THE EPBC ACT REVIEW RECOMMENDS FUNDAMENTAL REFORM TO ENSURE FUTURE SUSTAINABILITY

Further to our update on 11 September 2020 regarding the introduction of a new Bill to [streamline the Environment Protection and Biodiversity Conservation Act 1999 \(Cth\) \(EPBC Act\)](#) in response to the Interim Report of the statutory review of the Act led by Professor Graeme Samuel (Review), the [Final Report](#) of the Review was publicly released by the Commonwealth Government on 28 January 2021.

The Final Report calls for ‘fundamental reform’ of the EPBC Act, after observing that Australia’s natural environment and iconic places are in an overall state of decline and under increasing threat as a result of the inadequacy of the existing statutory regime in enabling the Commonwealth to effectively fulfil its environmental management duties. Consequently, the Review has found that the EPBC Act as it stands is outdated, ineffective at protecting Australia’s environment and not fit to address current or future environmental challenges.

The Final Report offers 38 recommendations as to how the current legislative regime can and should be updated.

KEY TAKEAWAYS

Despite the many submissions made to the Review proposing new matters to be protected by the EPBC Act, the Review does not recommend any additional triggers, arguing that these would result in “a muddling of responsibilities, leading to poor accountability, duplication and inefficiency”.

The Review does recommend modification of the ‘water trigger’, which was introduced in 2013 and only applies in respect of proposed coal seam gas and large coal mining developments where they are likely to significantly impact a water resource. The Review recommends amending this ‘water trigger’ so that it applies to all types of projects (not just coal seam gas or coal mining) but also so that it only operates when the project involves water resources that span State or Territory borders. This reframing of the trigger is intended to repurpose it so that rather than mandating Commonwealth scrutiny of certain developments regardless of their location, it is used to ensure that one State or Territory does not have the power to unilaterally approve projects that can cause significant environmental damage to a water resource that another State or Territory relies upon.

Further, while climate change has become an increasing international concern, the Review has advised against the inclusion of express climate change regulation by way of the EPBC Act, concluding that the EPBC Act should not be a duplicate of the Commonwealth’s separate framework for regulating greenhouse gas emissions.

That being said, recommendation 2 proposes that developers be required to transparently disclose the full emissions associated with their development when seeking project approval. Additionally, the recommendations include a requirement that applicants for approval explicitly address the effectiveness of their actions to avoid, mitigate or offset impacts of their developments on nationally protected matters under specified climate change scenarios.

Of key interest to industry is the fact that most of the recommendations do not impose direct obligations upon project developers. Instead, the recommendations primarily focus on improving internal processes that would assist in speeding up approval processes along with increasing the public's trust in the EPBC Act through the introduction of new roles and committees, modernised regulatory practices, and increased aboriginal involvement in decision-making processes.

THE RECOMMENDED REFORMS

Key elements of the reforms recommended in the Final Report are as follows.

1. *National Environmental Standards*

At the forefront of the recommendations is the proposed implementation of the National Environmental Standards which are designed to provide clear rules to help improve decision-making. In particular, the Review highlights four high-priority issues that are to be addressed in order to provide greater clarity and consistency. They are:

- matters of national environmental significance;
- indigenous engagement and participation in decision-making;
- compliance and enforcement; and
- data and information.

The recommendations propose that a mechanism be incorporated into the Act that prevents decisions (including decisions in respect of approvals for projects and conditions attached to those approvals) that are inconsistent with the National Environmental Standards.

To that end, the proposed National Environmental Standards for matters of national environmental significance (**MNES**), included in the final report with a recommendation that they be adopted immediately, provide (among other things) that:

Actions, decisions, plans and policies that relate to MNES:

- a) are consistent with the objects of the EPBC Act and the principles of ecologically sustainable development (including the precautionary principle) and reflect a principle of non-regression;
- b) do not have unacceptable or unsustainable impacts on MNES, having regard to the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts;
- c) minimise harm to MNES, including employing all reasonable measures to avoid and then to mitigate significant impacts, and then lastly apply appropriate offsets;
- d) are not inconsistent with relevant international agreements, recovery plans, management plans and threat abatement plans.

Accordingly, the recommended National Environmental Standards appear to formalise a number of informal policies and guidelines that have commonly been applied in the assessment of proposals and the imposition of conditions in the recent past.

2. *Streamlining assessment and approval processes*

The Final Report suggests that, if applied, National Environmental Standards will support faster and lower-cost assessments and approvals of projects. Further, States and Territories will be accredited and empowered to assess the environmental impacts of a project and approve these projects on behalf of the Commonwealth.

3. *Increased indigenous engagement and participation*

Recognising that Australia has long overlooked the valuable knowledge Indigenous Australians have regarding how to best manage the Country, the Review calls for steps to better involve Indigenous Australians in decision-making processes, co-designing reforms for joint management and policy implementation activities. This would ensure both Indigenous knowledge and western science will be provided to and considered by the Environment Minister when making decisions.

4. *Ensuring compliance and building trust*

The final report found growing public distrust in the EPBC Act that originated from limited, ineffective, and non-transparent regulatory enforcement. To remedy this, it recommends additional resources and funding and the introduction of the following new independent statutory bodies:

- Environment Assurance Commissioner;
- Ecologically Sustainable Development Committee; and
- Office of Compliance and Enforcement.

NEXT STEPS

As previously noted, the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* did not include the introduction of enforceable National Environmental Standards.

However, following release of the Final Report, a Bill was introduced to Parliament on 25 February 2021 to create the office of the Environment Assurance Commissioner, together with a process for the Minister to make National Environmental Standards. The Bill does not include the specific National Environmental Standards drafted by the Samuel Review. As such, the extent to which the recommendations of the Final Report will ultimately be brought into effect is not currently clear.

If you have questions regarding the Bill or the EPBC Act, please contact:



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