

Federal environmental reforms

In December 2009 the Environment Minister Peter Garrett tabled a report in Parliament on the Independent Review of the *Environmental Protection and Biodiversity Act 1999* (C'th) (**EPBC Act**) (**Report**). There is a statutory requirement for the EPBC Act to be reviewed every ten years. This is the first such review of Australia's primary piece of environmental legislation since its introduction in July 2000. The Report makes 71 primary recommendations, which, if implemented, would have significant implications on federal environmental impact assessment practices and procedures, and would affect many development companies as well as their consultants.

On the surface, the Report recommends a redrafting of the EPBC Act to simplify and consolidate it with a host of other federal environmental and indigenous heritage legislation. The Report also outlines more specific recommendations, the most significant of which are addressed below.

1 Ecosystem trigger

Under the current EPBC Act, the requirement to refer a proposal is predominantly triggered where there is likely to be a significant impact on a specific set of 'matters of national environmental significance'. The Report recommends that 'ecosystems of national significance' be included as a new matter of national environmental significance. This would shift the focus of the EPBC Act from individual species and ecological communities to a 'landscape' based approach.

The report proposes that to be eligible for listing as an ecosystem of national significance, certain criteria must be met, for example high comparative biological diversity within its ecosystem type, or it provides critical, nationally important, ecosystem functions. Determining eligibility under such criteria will result in a more complex assessment of the referral trigger, requiring consultants to prepare more extensive environmental assessments.

2 Greenhouse gas trigger

The Report recommends the introduction of an interim trigger for greenhouse gas emissions prior to the introduction of any CPRS legislation. The Report flagged a threshold of 500,000 tonnes of carbon dioxide as the threshold trigger for referral under the EPBC Act.

Despite the government's recent decision not to progress the CPRS until 2013, implementation of this recommendation is unlikely because of its support for the market based approach embodied by the proposed Emissions Trading Scheme (ETS). The introduction of a greenhouse gas trigger may nevertheless be seen in some quarters as a viable alternative to achieve the climate change commitments made by Australia until such time as an ETS or carbon tax is implemented.

3 Merits appeal

Under the EPBC Act the Minister is required to make three decisions during the environmental impact assessment process:

- whether what is proposed is a controlled action;
- if so, the level of assessment required; and
- ultimately, whether or not the controlled action should be approved.

Under the current EPBC Act, none of these decisions are subject to a merits review and are only capable of being appealed by way of judicial review in the Federal Court.

The Report recommends that the government consider incorporating a merits review mechanism in relation to the controlled action and/or level of assessment decisions. This review mechanism would involve an external review by the Administrative Appeal Tribunal, and require the matter to be considered afresh. For proponents, this would increase the prospects of success when challenging whether or not the proposed action is in fact a controlled action and the level of assessment required.

There would, however, be implications on the timing and certainty of approvals as a consequence of the introduction of such a measure. Relevantly, the Report also recommends the right of appeal in merits review applications be extended to persons who made a formal public comment during the submission period, as well as the proponent. This is likely to result in an increase in third party appeals, particularly on the part of local action groups, and will require careful consideration due to the potential of further delay and costs to proponents.

4 Code of Conduct for consultants

As a result of some scepticism as to the quality of information submitted to the Minister for consideration as part of the approvals and referrals process under the EPBC Act, the Report recommends that the government, in consultation with the environment and planning consultant industry, develop an industry Code of Conduct for consultants providing information for the purposes of the EPBC Act.

The Report recommends that the Code be enforced by prescribing it under the *Trade Practices Act 1974* (C'th) and allowing enforcement by the Australian Competition and Consumer Commission, or by the DEHWA under a suite of new Code of Conduct audit and enforcement provisions. The Report also recommends auditing to complement the Code of Conduct. If implemented, consultants would need to familiarise themselves with the requirements and duties imposed by the Code of Conduct.

Timing and consequences of the reform

The government's response to the Report's recommendations is expected in mid 2010, however, no amendment bill is expected in the near future, so it remains unclear which of the 71 recommendations outlined in the Report will be implemented.

If the recommended changes, including the ones outlined above, are implemented, there will be significant changes to the scope of the EPBC Act and the environmental impact assessment processes required. Developers and consultants are accordingly recommended to keep abreast of any likely changes to the requirements of the EPBC Act.

If you have any queries about the EPBC and the anticipated reforms, please contact Rebecca Somerford, Solicitor, on (08) 9288 6820 or rebecca.somerford@lavanlegal.com.au.

Environmental Focus Group



Peter Beekink
Partner
Property Services
Tel +61 9288 6751
peter.beekink@lavanlegal.com.au



Paul McQueen
Partner
Planning, Environment and Land
Compensation
Tel +61 9288 6943
paul.mcqueen@lavanlegal.com.au



Tony Chong
Partner
Corporate Services, Tax
Tel +61 9288 6843
tony.chong@lavanlegal.com.au



Craig Wallace
Senior Associate
Planning, Environment and Land
Compensation
Tel +61 9288 6828
craig.wallace@lavanlegal.com.au



Bronwyn Davies
Senior Associate
Energy and Resources
Tel +61 9288 6837
bronwyn.davies@lavanlegal.com.au



Tamara Heng
Associate
Property Services
Tel +61 9288 6869
tamara.heng@lavanlegal.com.au



Mona Gill
Solicitor
Energy and Resources
Tel +61 9288 6949
mona.gill@lavanlegal.com.au



Rebecca Somerford
Solicitor
Planning, Environment and Land
Compensation
Tel +61 9288 6820
rebecca.somerford@lavanlegal.com.au