The EPBC Survey Project: An overview of the results

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The federal Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) is an omnibus piece of environmental legislation that aims to provide protection for, and promote the conservation of, matters of national and Commonwealth environmental significance. While the legislation contains a number of elements concerning such things as Commonwealth reserves and wildlife trade, its centrepiece is its project-based environmental impact assessment (EIA) regime. This regime is supposed to play a central role in protecting important environmental assets like World Heritage Areas and threatened species, and is often the regulatory lever that draws the Commonwealth into controversial environmental disputes. The Bell Bay pulp mill in Tasmania, the Gorgan Gas project in Western Australia, the dredging of Port Phillip Bay, the McArthur River mine in the Northern Territory, the Traveston Dam in Queensland – these are just some of the controversial projects that have been through the EIA regime.

Previous research has identified a number of problems with the functioning of the federal EIA regime. In particular: the regime has only captured a small proportion of the activities that pose the greatest threat to the Australian environment; where actions have been regulated, there is evidence the regime is not adding significant environmental value; there appears to be a significant amount of overlap between the EIA regime and other regulatory processes; and there is evidence that the Commonwealth has struggled to effectively monitor and enforce the regime. To further investigate these issues, the Australian Centre for Environmental Law at the Australian National University, in collaboration with the Australia Institute and the Minerals Council of Australia, recently conducted a survey of proponents who had referred projects under the EIA regime over the period July 2000 to June 2009.

The objective of the survey was to capture proponents' feedback on whether the EIA regime has improved the environmental outcomes of referred projects, the costs incurred by proponents, and the fairness of the regime. The survey focussed on proponents of projects that were approved (either as final approvals or so-called 'particular manner actions') under the EIA regime over the study period. The survey was conducted using an online format where questions were asked in relation to environmental effectiveness, proponent costs, fairness and other procedural and substantive issues. Proponents were also given an opportunity to provide open-ended comments on the regime and how it could be improved. Phone interviews were conducted in a small number of cases for proponents that had difficulty accessing appropriate internet services.

The results

The survey was particularly successful with an unusually high rate of response for an online survey – responses were received in relation to almost 20% of all projects that were approved over the study period. And the results were illuminating, revealing new information on the regime. Six main issues stand out from the results.

Proponent costs are substantial

Based on the responses to the survey, the estimated proponent costs associated with approved and particular manner projects over the first nine years of the EIA regime is between $270 million – $820 million. When administrative and other proponent costs are added, the total direct cost of the regime between July 2000 and June 2009 very likely exceeds $500 million, and could possibly be greater than $1 billion.

Duplication of regulatory effort

The results suggest that the EIA regime has, to a large extent, duplicated the regulatory effort that has been applied under other federal, state and territory processes. For example, 73% of the respondents agreed with the statement, 'The EPBC Act process duplicated other regulatory processes without significantly improving environmental

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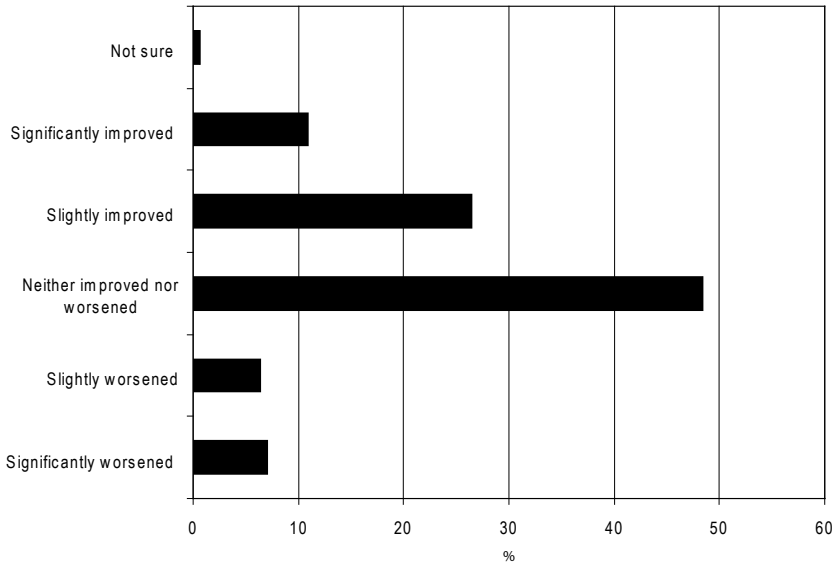
outcomes'. When asked how the EPBC Act process could be improved, 57% of respondents to the question made reference to the need to address the degree of duplication and overlap between the EPBC Act and other federal, state and territory processes. Similarly, 81% of respondents whose actions were subject to conditions under the EPBC Act and state/territory planning and environment permits reported some or substantial overlap in the conditions.

Low to moderate level of environmental effectiveness

The results suggest that, where actions have been subject to direct control under the EPBC Act, the regime has struggled to generate significant environmental improvements. For example, 62% of respondents reported that the EPBC Act did not improve the environmental outcomes of their project, with only 11% reporting significant improvements (see Figure 1). There were, however, notable differences between industry categories. The oil, gas and mining sectors reported the lowest levels of environmental effectiveness – 86% of mining respondents and 72% of exploration respondents (i.e. oil and gas) reported that the EPBC Act did not improve the environmental outcomes of their project. Better results were received in the transport and urban development categories, where 53% and 46% of respondents respectively reported that the EPBC Act did improve the environmental outcomes of their project.

Figure 1 Were the likely environmental outcomes of your project improved or worsened by the EPBC Act Process – responses of proponents of approved and particular manner projects



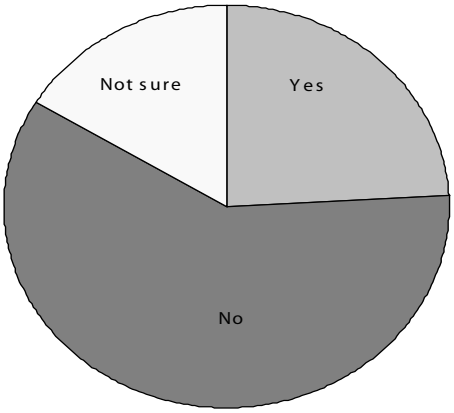
Positive and negatives on the fairness of the process

The results on the fairness of the process were mixed, although the general picture was positive. 80% of respondents reported that the Environment Department treated them fairly or very fairly during the process. However, when more specific questions were asked about the process, equity issues arose. For example, 36% of respondents whose projects were subject to EPBC Act conditions disagreed with the statement, 'The EPBC Act conditions were devised in a transparent manner that allowed me to understand their basis and purpose'. The comments provided by respondents also indicate that a small number of people feel particularly aggrieved by their treatment under the EIA regime.

Difficulties with monitoring

The responses suggest the Environment Department has struggled to monitor compliance with the conditions imposed under the EIA regime (see Figure 2). Only 24% of respondents whose projects were subject to conditions under the EPBC Act reported that a site visit had been conducted by the Federal Government to monitor compliance with the conditions.

Figure 2 Proportion of 'conditioned' approved and particular manner actions that were subject to a site visit, 2000 to 2009



Source: A Macintosh, *The EPBC Survey Project: Final Data Report*, Australian National University – Australian Centre for Environmental Law, September 2009.

General support for the EPBC Act's participatory processes

The EPBC Act provides members of the public with a number of opportunities to make comment on, and participate in, the decision making processes under the legislation. These participatory provisions are arguably 'best practice'. Undoubtedly, they ensure third parties have greater participation opportunities than under a number of EIA processes in the states and territories.

These participatory provisions appear to be accepted amongst most proponents. 71% of respondents reported that other interested parties had 'reasonable' opportunities to participate in the EPBC Act decision making process. A further 2% reported that there were insufficient opportunities for third parties to participate. Only 17% believed third parties had too many opportunities to participate.

Conclusion

The results support the hypothesis that the EIA regime has not been a cost-effective policy instrument. The substantial administrative and proponent costs associated with the regime do not appear be matched by commensurate improvements in environmental outcomes. Clearly there is scope for changes to be made to improve the process. The EPBC Act is currently being reviewed by Dr Allan Hawke and a four person expert panel comprising Hon Paul Stein, Professor Tim Bonyhady, Professor Mark Burgman and Rosemary Warnock. The review is due to hand down its final report in late October 2009. Following the review, it is anticipated that the Federal Government will amend the EPBC Act, possibly early in 2010. The review provides a once-in-a-decade opportunity to produce a more cost-effective and equitable federal EIA regime.

Although the survey revealed interesting new data on the federal EIA regime, several issues warrant further research. These include whether the results accurately reflect the actual outcomes and costs from the EPBC Act process. Additional research on this issue would help in the evaluation of the cost-effectiveness of the legislation and shed light on whether proponent surveys provide a reliable basis on which to evaluate the outcomes and costs of EIA regimes. However, until there is additional research, the survey and other related research provides the best-available evidence to guide policy reform.

Similarly, there is a need for further research on the indirect effects of the EIA regime (i.e. to what extent has the EIA regime changed proponent behaviour?). The surveys provide some evidence that the indirect effects of the EIA regime play an important role in improving environmental outcomes. However, the evidence is weak. Further research to explore this issue would help in the evaluation of its cost-effectiveness and provide insights into the way in which environmental regulations shape the behaviour of governments and the private sector. The Australian Centre for Environmental Law intends to pursue these and other issues related to the federal EIA regime in the near future.