

“It’s the Feds” - EPBC Act compliance and enforcement

Environment Institute of Australia and New Zealand seminar, 9 March 2011

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- Key legal issues
- SEWPaC investigation and enforcement powers
- Incident response
- Conclusions

- 'significant impact' on 'matter of national environmental significance' (MNES)
- Key MNES - threatened species and ecological communities, migratory species, RAMSAR wetlands
- Referral to Commonwealth Environment Minister for determination on 'controlled action' - will or likely to have a 'significant impact' on MNES (what if not likely?)
- Note internal review of controlled action decision available (s.78), judicial review and injunctions in Federal Court - actions by environmental interest groups (but undertaking as to damages and costs may be awarded)

EPBC Act – key legal issues (cont.)

- ‘Principal’ under contract is person responsible for referring action / compliance with the Act (s.68A)
 - party to contract etc for whose benefit the action is proposed to be taken
 - person who requested, procured, etc the contract and is to be responsible for controlling and directing the taking of the action
- If controlled action and approval, it is a condition of the approval that the principal must ‘take all reasonable steps’ to ensure contractors are aware of approval conditions **and comply** with conditions that restrict or regulate the way in which the action is undertaken (s134(1A))

EPBC Act – key legal issues (cont.)

- Penalty provisions / offences
 - significant impact on MNES (s.18, 18A, etc)
 - taking action before decision made on a referral (s.74AA)
 - breach of particular manner notice (s.77A)
 - non-compliance with condition of approval (s.142)
 - breach of conditions on approval – recklessness and significant impact (s.142A)
 - strict liability for breach of conditions (s.142B)
- Significant maximum civil and criminal penalties (up to \$5.5M for corporation; \$500,000 for an individual, up to 7 years imprisonment)

EPBC Act – key legal issues (cont.)

- **Executive officer liability** – civil and criminal (s.495, s.495), ‘all reasonable steps to prevent the contravention’ (s.496)
 - regular professional assessments of compliance
 - implements recommendations from assessments
 - appropriate system for managing effects of activities on environment
 - employees, agents and contractors have reasonable knowledge and understanding of requirements for compliance
 - action taken by officer when non-compliance discovered
- **Liability of landholders for other peoples actions** – civil and criminal (s.496B, s.496C), ‘all reasonable steps to prevent the contravention’ (s.496D)
 - action taken to ensure that actor (e.g. lessee or licensee) had appropriate system for managing effects of activities on environment
 - action taken when landholder became aware that there is a substantial risk that the acting was not complying

Investigation and enforcement powers

Investigation

- Notice to produce information, documents, etc (s.486F)
- Notice to attend interview (s.486G)
- Modified privilege against self-incrimination (s.486J) – note ‘invitation’ to attend an interview cf. notice
- Written request seeking consent for officers to enter premises, often accompanied by ecologists (s.405), production of written identification – if consent not provided or revoked, then monitoring and search warrants from magistrate (again cooperation important)
- Powers when entering premises - inspect, photo, video, copy documents, take samples, seizure

Investigation and enforcement powers (cont.)

Enforcement

- Administrative measures - e.g. cautions, warning letters, infringement notices, suspending/revoking approvals, enforceable undertakings
- Civil remedies – civil pecuniary penalties (lower burden of proof), fines, injunctions, courts orders to repair or mitigate damage
- Criminal penalties - criminal record, fine and/or imprisonment
- Note *Compliance & Enforcement Policy* (1 December 2009) - factors to determine response
 - nature and severity of harm
 - the law (evidence collected, precedent)
 - integrity of regulatory system (prevalence of contravention, public concern, efficacy of proposed response)
 - any aggravating or mitigating circumstances (malice, culpability, commercial value, record, self-report, cooperation)

Immediate response

- Proactive response – quickly engage an expert to understand potential damage, mitigation, remediation options (assessment of ‘significance’)
- Consider self-reporting, cooperate with inspectors / officers

Internal investigation

- Who should be involved in investigations? Consider legal professional privilege (LPP)
- What happened to EMS / EMP?
- Engage experts to ‘shadow’ regulator investigations / site inspections
- Consider LPP in engaging expert (also ‘common interest’ privilege if more than one party – e.g. employee, executive officer, related company)

Request for documents and interview

- Carefully review requests for documents / information – notice legally correct, comply with timelines, review and assess documents for LPP
- Consider potential individual liability of executive officers and employees - do they need separate legal representation? Consider common interest privilege
- ‘Invitation’ to interview – is a notice required? Consider privilege against self - incrimination
- Legal representation during regulator interview - fair questions, within knowledge/expertise, privilege

Due diligence

- For any project, **early and quality due diligence** is essential
 - If a significant impact is likely, then refer (even if not likely, consider referral)
 - Can make a significant difference in project approval and construction timing
 - Proper and early understanding of limitations arising from existence of protected matters, can influence design, staging of works and encourage innovative outcomes
 - Avoid breach - investigation and enforcement process can be expensive and time consuming

Investigations and enforcement

- SEWPaC, DSE and Councils not taking breaches lightly
 - active and resourced investigations and enforcement
 - need to properly advise and supervise contractors (breaches / incidents may also result in contract delay claims)
 - If breach, ensure **rapid and quality investigation and remedial response** and cooperation with regulators (while exercising and protecting legal rights)

Questions and contact



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