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Triggering Federal Impact Assessment: Lessons from Down-Under

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Report Commented On: Expert Panel on the Review of Federal Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*

On April 5, 2017, the Expert Panel on the Review of Federal Environmental Assessment Processes released a report entitled *Building Common Ground: A New Vision for Impact Assessment in Canada* proposing major reforms to Canada's federal environmental assessment processes. Professor Arlene Kwasniak has provided some background and an overview of key aspects of the report. Professor Shaun Fluker and Drew Yewchuk have commented on the Panel's response to concerns raised by the University of Calgary's Public Interest Law Clinic on behalf of the Canadian Parks and Wilderness Society (CPAWS) Southern Alberta Chapter in relation to discretion, transparency and accountability.

The focus of this post is to comment on the Panel's recommendations relating to the first of three fundamental questions it considered – what should require federal impact assessment (IA)? In answering this question, the Expert Panel reached the overall conclusion that "[t]here should be an appropriate threshold for effects on federal interests so that a trivial impact does not trigger IA. This threshold, defined as a consequential impact, should be tied to the sustainability framework." To achieve this outcome, the Expert Panel recommends three different triggering mechanisms for projects, plans and policies clearly linked to matters of federal interest. The Expert Panel notes that Australia takes a similar approach, with environmental assessments required when a proposed action is "likely to have a significant impact on a matter of national environmental significance." This post explores the similarities and differences between the Panel's recommendations and the approach taken in Australia to ask what lessons can be learned from the Australian experience.

Background to Existing Federal Environmental Assessment Triggers

As Professor Kwasniak describes in more detail (here), the Canadian Environmental Assessment Act 2012, SC 2012, c 19 (CEAA 2012) currently uses a list approach (Regulations Designating Physical Activities, SOR/2012-147) to designate physical activities that are potentially subject to environmental assessment. The Minister retains the discretion to permit an environmental assessment for non-designated projects. The "all out unless on the list" trigger approach adopted in CEAA 2012 is one of its most controversial features, not least because it contrasts sharply with the "almost all in unless on the exclusion list" approach taken in the previous Canadian Environmental Assessment Act, SC 1992, c 37 (CEAA 1992). A key trigger under CEAA 1992 was the exercise of federal decision-making authority under legislation listed in the Law List Regulation, SOR/ 94-636, unless the project in question was specifically excluded by the exclusion list (Exclusion List Regulations, SOR/2007-108). The change in approach, not

surprisingly, saw the annual number of projects subject to some level of environmental assessment fall from thousands under CEAA 1992 to dozens under CEAA 2012 (Expert Report FN 27).

Not surprisingly, submissions to the Panel identified pros and cons with each of these approaches. Many participants favored the Project List approach adopted in CEAA 2012 on the basis that "it is predictable and clear, and places the focus on major resource projects." Industry, in particular, expressed concern about the burden and time associated with assessment for projects with minor impacts. Others advocated for the more comprehensive CEAA 1992 "almost all in unless on the exclusion list" approach to both ensure that activities under federal jurisdiction were captured and to provide certainty about what kinds of projects may go ahead without an assessment.

The Review Panel's Recommendation

1) A Focus on Projects, Plans or Policies Clearly Linked to Matters of Federal Interest

Recognizing the need to respect Canada's Constitution, the Panel recommends, "Federal IAs should only be conducted on a project, plan or policy that has clear links to matters of federal interest." Matters of federal interest are listed to include, "at a minimum": federal lands; federal funding; federal government as proponent; species at risk; fish; marine plants; migratory birds; Indigenous Peoples and lands; greenhouse gas emissions of national significance; watershed or airshed effects crossing provincial or national boundaries; navigation and shipping; aeronautics; activities crossing provincial or national boundaries and works related to those activities; or activities related to nuclear energy.

2) Three Recommended Triggers

In keeping with the federal focus, in considering what projects should require federal impact assessment, the Panel starts by defining a 'project' "as a proposed physical activity or undertaking that affects one or more matters of federal interest." Recognizing, however, that the trivial impacts should not trigger federal IA, the Panel recommends a "consequential impact" trigger, tied to the overall sustainability framework. To achieve this the Panel recommends three different triggers.

First, the Panel recommends a Project List listing projects that are "likely to adversely impact matters of federal interest in a way that is consequential for present and future generations" – with projects on this list automatically subject to federal IA.

Second, for projects not on the Project List, the Panel recommends a trigger based on statutory criteria requiring an impact assessment of projects that have the potential to impact present and future generations in a way that is consequential. By way of example, the Panel refers to a project that occurs in a sensitive area. Further guidance on defining consequential impacts is found in Panel's recommendations relating to a sustainability focus. Here, examples of impacts that are consequential to present and future generations are stated to include those that:

- affect multiple matters of federal interest;
- are of a duration that will be multi-generational; and/or

- extend beyond a project site in geographic extent.

However, this list is not exhaustive, with the Panel noting that impacts on ecologically or culturally sensitive areas, or impacts that have the potential to contribute to cumulative impacts, may also be deemed consequential impacts to present and future generations. While not settling on the ultimate criteria for this second trigger, the Panel states that these criteria "should be clear so that discretion is not required" meaning that "no decision should be required for … a project that meets the criteria of consequential impact."

Finally, the Panel recommends a third trigger that "allows proponents or any person or group to request that a project require a federal project IA." While little detail is provided about this trigger, the Panel intimate that the impact assessment authority would make a decision as to whether an impact assessment is required in this situation using "applicable statutory criteria." While the motivations of "any person or group" are easy enough to understand, it is not clear why a proponent whose project does not otherwise trigger mandatory assessment under the first two triggers would choose to request that their project require a federal project IA.

Response to the Panel's Recommendations

The Panel's recommendations are designed to find a middle ground between the CEAA 2012 "all out unless on the list" approach and the CEAA 1992 "almost all in unless on the exclusion list" approach. However, the resulting recommendation – an "all projects on the list or with the potential to impact present and future generations in a way that is consequential in and everything else out, unless any person want to request a federal impact assessment and that request is accepted" – has attracted some concern. Professor Kwasniak identifies the "undefined list plus trigger approach" as the most concerning aspect of the Panel's recommendations. She goes on to note "many smaller projects that impact matters within federal jurisdiction – e.g. fisheries – likely will not be assessed unless the mysterious trigger mechanism is activated." Professor Mark Winfield expresses a similar sentiment. Citing some "very significant gaps" in the Panel's recommendations, he is particularly concerned that smaller projects with potential cumulative impacts on important environmental features will not be subject to any review at all. Professor Fluker, on the other hand, is concerned that criteria for the second trigger cannot be drafted clearly enough to completely remove discretion from the triggering process – leaving uncertainty as to what kinds of projects may and may not go ahead without an assessment—and that the bar might be set so high so as to exclude projects in national parks from assessment.

Given the Expert Panel's reference to the fact that Australia takes a similar approach, it is worthwhile to explore the Australian framework and experience in more detail to ask both whether these concerns may be addressed and whether the experience in Australia might help inform a revised Canadian IA process.

The Australian Approach to Triggering Commonwealth Environmental Impact Assessment

1) Background to the *EPBC Act* Triggers

In Australia, the Commonwealth environmental impact assessment (EIA) regime is found in the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act). The EPBC

Act's impact assessment process is backed by a prohibition – a person who undertakes a "controlled action", meaning one that is prohibited without prior approval under the Act, commits an offence (s 67A). This starting point has important implications for the trigger/referral process discussed below.

A Focus on Matters of National Environmental Significance and Commonwealth Activities

The High Court of Australia's very generous interpretation of the Commonwealth Government's s. 51 legislative powers in the *Commonwealth of Australia Constitution Act* means that the Commonwealth government could, if it chose to, essentially cover the environmental regulatory field. However, in keeping with policies on cooperative federalism, the EPBC Act's EIA regime focuses on "actions" that impact designated matters of national environmental significance (MNES) or involve Commonwealth activities that impact the environment. The focus, therefore, is on the Commonwealth's international and national responsibilities with respect to environmental issues. The EPBC Act specifies the following MNES (see Part III):

- declared World Heritage properties;
- National Heritage places;
- declared Ramsar wetlands;
- listed threatened species or endangered communities;
- listed migratory species;
- the impacts on the environment from nuclear actions;
- Commonwealth marine environment;
- Great Barrier Reef Marine Park;
- water resources as a result of coal seam gas developments or large coal mining development;
- anything prescribed in the regulations (without or without the agreement of State and Territorial governments).

In addition, the EPBC Act focuses on the following types of proposals involving the Commonwealth:

- actions on Commonwealth land actions;
- actions taken outside of Commonwealth land that impact the environment on Commonwealth land;
- actions taken outside the Australia jurisdiction that impact on Commonwealth Heritage places outside the Australian jurisdiction; and
- actions taken by the Commonwealth or Commonwealth agencies that impact the environment within and outside Australia.

Triggers in the EPBC Act

The EPBC Act is triggered when there is a "controlled action" – meaning an action that is prohibited without approval (s. 67). "Action" is defined to include a project, development, undertaking, activity or series of activities or any alteration of these (s. 527). A governmental authorization is not an "action" under the Act (s. 524) and neither is the provision of funding by way of grant from any level of government (s. 524A). And the EPBC Act does not contain a list of "controlled actions" that automatically trigger the Commonwealth impact assessment process.

Rather, an action is controlled under the Act when that action "has, will have, or is likely to have, a significant impact" on a MNES or, in the case of actions involving the Commonwealth, the specified environment ("environment" is very broadly defined in s. 528). It is important to note that most of the triggers focus specifically on the actual, potential or likely impacts on the specified MNES. For example, the trigger relating to world heritage is focused specifically on the impacts of an action on the world heritage values of a declared World Heritage property (s. 12). However, other triggers are focused on the impacts of an action on the environment more generally. For example, the trigger relating to activities undertaken by the Commonwealth or Commonwealth agencies is focused on impacts on the environment inside and outside of Australia (s. 28). And the EIA process is only triggered in relation to these specified impacts when the "significant impact" threshold is crossed.

The triggering provisions in the EPBC Act, therefore, most closely resemble the second—consequential impact—trigger proposed by the Expert Panel. However, the EPBC Act does not define criteria that obviate the need for decisions as to whether a specific action meets the "significant impact" threshold—as the Expert Panel suggests will be done in the context of its proposed "consequential impact" trigger. Rather, determinations as to whether actions are controlled under the EPBC Act are made on a project-specific, case-by-case basis. This means that the exercise of discretion—Ministerial discretion in this case—is inherent in the EPBC Act process. However, the exercise of this discretion is, at least to a certain extent, collared by mandatory considerations and several Federal Court decisions that together define the scope of "significant impact". A series of non-binding administrative guidelines also provide "over arching guidance" to proponents and decision-makers as to when an action is likely to have a significant impact on a matter protected by the EPBC Act.

With respect to mandatory considerations, when deciding whether an action is controlled under the EPBC Act, the Minister *must* consider all public comments received and all adverse impacts the action has, will have, or is likely to have on the matter protected, but *must not* consider any beneficial impacts (s. 75). And, in making this, or any other decision under the Act, the Minister *must* take account of the precautionary principle (s. 391). Having done so, the Minister is then given the discretion to decide that the action is controlled action and approval is required before it can proceed or that approval is not required (this decision may be conditioned on the action being taken in a particular manner). The Act also makes comprehensive provision for public notices, including a requirement that the Minister provide notice, with reasons, for a decision as to whether an action is controlled (see public notices relating to referrals for the previous two years here).

The Ministerial exercise of discretion is also constrained by several Federal Court decisions, which have defined key terms relating to the "significant impact" trigger and the scope of the mandatory considerations imposed under the Act. Notably, in Booth v Bosworth [2001] FCA 1453 (AustLII), the Federal Court of Appeal interpreted "significant impact" to mean an impact that is "important, notable or of consequence having regard to its context and intensity" and "likely to have" to mean not a 50% chance but a real or not remote chance or possibility. These interpretations are now found in the Significant Impact Guidelines, which also recognize the applicability of the precautionary principle where there is scientific uncertainty about the potential impacts of an action. Justice Branson's judgment in *Booth v Bosworth* is also important because it accepts that indirect impacts on MNES are relevant considerations. In *Booth* this meant that the actions of a lychee fruit farmer in Queensland who was electrocuting a substantial

number of spectacled flying foxes to stop them from eating his fruit was having a significant impact on the world heritage values of the nearby Wet Tropics World Heritage Area (for background on this case, see here).

The scope of the "impacts" the Minister is required to consider in exercising her discretion under the EPBC Act was also of central importance in Minister for the Environment and Heritage v Queensland Conservation Council Inc, [2004] FCAFC 190 (AustLII) (the *Nathan Dam* case). In that case, the Full Federal Court held that the "impact" of an action included "effects that are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequence of the action on the protected matter." The Full Federal Court further held that the reference to "all adverse impacts" in s. 75 includes "each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not " and must be considered by the Minister in determining whether a proposed action is controlled. At issue in *Nathan Dam* was whether the proposed dam, intended to provide water to irrigators for agricultural and industrial purposes, was likely to have a significant impact on the World Heritage listed Great Barrier Reef (a MNES), located several hundred kilometers downstream. The Full Federal Court held that in coming to a determination on whether this action was controlled, the Minister had to consider the indirect impacts that the downstream water use, including the release of agricultural chemicals and nutrients, might have on the reef. Following the *Nathan Dam* decision, the EPBC Act codified the definition of "impact" to include both direct and indirect consequences. However, the approach to indirect or "secondary consequences" of actions was slightly narrowed, as the secondary action must be facilitated to a major extent by the primary action and the consequential events must be within the contemplation of the primary person or a reasonably foreseeable consequence of the secondary action (s. 527E). Nevertheless, the definition still requires consideration of the direct and indirect impacts of an action, including impacts associated with connected secondary actions, before a decision is made as to whether the "significant impact" threshold is crossed.

Referrals under the EPBC Act

As the EPBC Act does not list projects that automatically trigger the EIA process, or attempt to prescribe criteria that make that determination, a referral and decision making process is necessary. In this respect, the EPBC Act requires a person, including a state, territory or federal agency, proposing to take an action that they think may be, or is, controlled to refer it to the Minister for determination (s. 68). It is also open to a proponent to refer even if they think the action is not controlled—and the fact that it is an offence to proceed with a controlled action without approval provides incentive to do so. The state, territory or federal authority with administrative responsibility for the action may also refer it to the Minister to determine whether or not it is controlled (ss. 69, 71) and the Minister herself may also request that a project be referred (s. 70). A current list of referrals, including details of the proposed actions, is publicly available.

Notably absent from the list of persons who may refer an action to the Minister for determination is the public. However, the EPBC Act makes two important concessions to allow for public involvement in the referral process. First, the Act allows any person to request that the Minister reconsider a decision as to whether an action is controlled and which provisions are the controlling provisions (s. 78A). The Minister must then reconsider the decision and give notice,

with reasons, of the decision (s. 78C). Second, if a person is contravening the EPBC Act, including by undertaking a controlled action without referral to the Minister, "an interested person" or "a person acting on behalf of an unincorporated organization that is an interested person" may seek a prohibitory injunction to stop the action (s. 475). And the Act defines "interested person" or "unincorporated organization that is an interested person" very broadly, to include any person or organization who during the two years prior engaged in activities, or had objects, directed at the protection or conservation of, or research on, the environment.

Exemptions

It is finally worth noting that some "controlled actions" that would otherwise trigger the EIA process are exempt under the EPBC Act. This includes proposed activities undertaken in accordance with a Regional Forest Agreement, a Conservation Agreement (see here for a list of conservation agreements currently in place), an approved Strategic Plan (see the list of strategic assessments currently underway), or for which bilateral agreements are in place (see the list of draft and approved bilateral agreements).

The Minister may also declare under the EPBC Act that a specified class of actions is approved in accordance with an accredited management plan or an accredited authorization process, in which case the impact assessment process will not be triggered (s. 33). Such a declaration can only be made if it accords with the objects of the EPBC Act and any prescribed criteria (s. 37B). Ministerial discretion to make such a declaration is further constrained if it relates to World Heritage properties, declared Ramsar, listed threatened species and ecological communities, or listed migratory birds, largely to ensure that international obligations under relevant Conventions are respected (ss. 37C – 37H).

Lessons from the EPBC Act Experience for the Expert Panel's Recommended Triggers

The EPBC Act experience helps answer, at least in part, the concerns raised in response to the Expert Panel's recommended consequential impact trigger.
First, using a properly defined impact-based threshold—the "significant impact" threshold in the case of the EPBC Act—does mean that some actions will not trigger the federal IA process. But what is important, at least to meet the objects of the EPBC Act, is ensuring that "actions" that have the potential to cause a significant impact on a MNES is at least referred into the process. This should include all projects—whether small or large—with potentially significant direct and indirect impacts on important environmental features. It is true that not every decision made by a Commonwealth decision-maker or specified in a list-based approach triggers an assessment. However, this does not mean that smaller projects with the potential to cause significant impacts on sensitive receiving environments will fall through the cracks. By way of example, of the five referrals made under the EPBC Act in the past 7 days (from May 2, 2017), one relates to the proposed residential development of 41 hectares of land in Western Australia (The Trustee for ARD No.7 Discretionary Trust/Residential Development/Lot 11 and 74 Beenyup Road, Banjup/Western Australia). The referral has been made because the proposal may impact members of listed threatened species—in this case the Carnaby's Black Cockatoo—and a listed and threatened ecological community, the Banksia Woodlands of the Swan Coastal Plain. A project list trigger would be unlikely to single out this kind of small project in the abstract. Indeed, even if the EPBC Act employed the CEAA 1992 decision-making trigger approach, this

proposal would fall through the cracks, as no Commonwealth decision-making authority is otherwise engaged.
It is worth noting that triggers which focus on impact (whether significant impact or consequential impact) can also avoid cracks created by decision-making or list based triggers. A submission to the Expert Panel, referring to the CEAA 1992 Law List trigger, demonstrates the point:

> But realize the old CEAA process also indirectly led, in my view in some cases, to non-optimal environmental planning and decisions.
>
> A common mandate for an environmental lawyer such as myself working for a proponent was to figure out ways to avoid the federal EA process altogether. Hence, to avoid federal EA triggers, projects were reconfigured and redesigned, not to make them better projects but to avoid the old CEAA triggers. For instance, longer circuitous roads were used to access a project site for the sole purpose of avoiding to have to build a bridge over a small fish bearing stream, and thereby avoiding CEAA, but causing a potentially greater disturbance to the environment.

The recent decision in *Fort Nelson First Nation v British Columbia (Environmental Assessment Office*), 2016 BCCA 500 (CanLII) also serves to highlight this point. An issue in that case was whether the "production capacity" of a proposed frac sand mine project fell above or below that specified in the *Reviewable Projects Regulation*, BC Reg 370/2002 so as to trigger the BC *Environmental Assessment Act*, SBC 2002, c 43. The decision turned on the reasonableness of the interpretation given the term "production capacity" by the Environmental Assessment Office (EAO)—the amount of sand and gravel sold or used in the operation—versus the interpretation asserted by the Fort Nelson First Nation: the total amount of sand and gravel that would be excavated or dug out of the ground in the production process. The BCCA provides clarity on what projects trigger the assessment process in BC (and in this case the court accepted the interpretation of the EAO) but in drawing the line the significance or consequence of the impacts associated with the project are irrelevant.

However, if the Expert Panel's recommendation to focus on projects, plans and policies that are linked to matters of federal interest is accepted, an important piece of making sure that projects of consequence to the environment—whether large or small—do not fall through the federal IA cracks will be to pay careful consideration to which matters of federal interest are included. An obvious example of a missing MNES in the EPBC Act is a greenhouse gas trigger, meaning that projects such as large coal mines which are not otherwise likely to have a significantly impact on a MNES and are not undertaken on Commonwealth lands do not trigger the Commonwealth EIA process (Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors, [2006] FCA 736 (AustLII)). In the Canadian context, while the Expert Panel recommends a greenhouse gas trigger as a matter of federal interest, some other candidates that have not been mentioned include Ramsar listed wetlands, World Heritage Sites and National Parks.
Second, ensuring that the threshold trigger includes possible impacts and that terms such as "likely", "consequential", and "impact" are used and defined broadly will go some way towards addressing concerns that cumulative and successive direct and indirect impacts are integrated into the assessment process. As commentators such as Godden and Peel have noted in their book *Environmental Law Scientific, Policy and Regulatory Dimensions*, the manner in which the

EPBC Act defines "impact" gives it "an enhanced potential to adopt a more integrated assessment framework that can contemplate successive and incremental changes that may cumulatively constitute 'death by a thousand cuts'." And it must be remembered that the project approval process is not doing all the work when it comes to addressing cumulative assessment. A strategic planning process, which has been incorporated into the EPBC Act framework and is recommended by the Expert Panel, also plays a role in addressing cumulative impacts. Adopting a precautionary and expansive approach to the definition of these terms will also help address concerns that the bar might be set too high to trigger activities, such as those undertaken in national parks, that have potential ecological significance and are "consequential for present and future generations."
Third, it is true that it is difficult to provide criteria for an impacts-based trigger (whether based on significant impacts or consequential impacts) that determine with certainty when the impact threshold is exceeded. Given that the focus is on the specific impact to the receiving environment, it is arguable that such an approach is not even desirable. This means that concerns about uncertainty as to which projects must require assessment before proceeding are valid. And the uncertainty exists in two places—whether any given project needs to be referred into the process and whether a decision-maker will determine that an assessment is required.

In relation to the referral process, the techniques adopted in the EPBC Act—prohibition backed mandatory referrals by proponents who think their proposals might trigger the assessment process—are an effective approach to ensuring proponents undertake the self-assessment and referral process seriously. Several tools are available to assist proponents in doing so, including pre-referral meetings, protected matters search tools, a species profile and threats (SPRAT) database, together with policy statements, guidance notes, and environment assessment manual (a full list of resources is available here). While undoubtedly not practically the case, this self-assessment process should be undertaken for every action an Australian citizen proposes to undertake to avoid committing an offence under the Act. As the self-assessment is undertaken in the context of the specific action in the specific receiving environment, when properly done it should provide a proxy for the department desk-top screening processes that CEAA 1992 triggered. And if an action is not referred that should have been, the potential for an interested person or organization to seek an injunction is a powerful tool (see Booth v Bosworth, [2001] FCA 1453 (AustLII)).

And finally, concerns relating to the introduction of discretion into the triggering process can be addressed, at least in part, by 'collaring' that discretion with mandatory considerations. The EPBC Act does this to an extent. Significantly, however, it does not require the Minister to determine that an EIA is required, even if satisfied that the action has, will have, or is likely to have a significant impact on a MNES. This is a deficiency in the EPBC Act. However, the EPBC Act does require that all decisions, including decisions relating to referrals, together with reasons if requested, are publicly available. It also provides persons and individuals working in environmental protection, conservation, and scientific research with the right to appeal referral decisions. It extends the standing rules under the *Administrative Decisions (Judicial Review) Act 1977* to these same parties (s. 487 and s. 488) to allow judicial review of this and any other decision, or any failure to make a decision, under the Act. A similar approach in Canada would go some way to address the concerns expressed in the CPAWS submission in the context of the discretionary decision-making exercised by Parks Canada under CEAA 2012.

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