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Compensatory mitigation and screening rules in environmental impact assessment

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ABSTRACT

Concerns about the effectiveness of environmental impact assessment (EIA) have prompted proposals to improve its performance by limiting the discretion of decision-makers in screening. To investigate whether such proposals are likely to generate the desired results, we conducted an evaluation of the screening process under the Australian government's EIA regime from its introduction on 16 July 2000 to 30 June 2013 (study period). Almost 1 in 5 'particular manner' decisions—a type of screening decision under the regime—were found to be unlawful. The extent of non-compliance is explained on the basis of convenience. The department was required to assess a large number of projects under tight timeframes and with limited resources, while being pressured by proponents to allow their projects to bypass EIA. These pressures resulted in the development of an informal custom whereby the formal compensatory mitigation restrictions were frequently ignored. The results highlight the relative significance of formal and informal institutions in EIA. Formal EIA rules typically provide a mere outline of the process. The informal institutions adopted by administrators often have a greater influence on how the process operates and what it achieves.

Introduction

Concerns about the effectiveness of environmental impact assessment (EIA) have prompted a number of reform proposals that seek to improve its performance by limiting the discretion of decision-makers. The majority of these proposals have concentrated on the final approval phase in EIA but numerous studies have also called for limits on discretion in screening (CEPA, 1994; Christensen and Kørnøv, 2011; Fowler, 1982; Kolhoff et al., 2009; Rajaram and Das, 2011; Wood, 1993).

EIA is broken into a number of discrete stages: screening, scoping, impact analysis, mitigation and impact management, review, approval decision and post-approval monitoring and auditing (Holder, 2004; Weston, 2000; Wood, 1993). Screening is where decision-makers determine whether a proposal requires formal assessment. Two general methods are used for this purpose: the input (development-centred or threshold) approach, where the decision is based on the nature and location of the project; and the output (environment-centred or case-by-case) approach, where the decision is based on the likelihood of the project having a significant impact on the environment (or a particular aspect of the environment). At times, a hybrid is used, combining aspects of both methods (Canter and Canty, 1993; Glasson et al., 2005; Rajaram and Das, 2011; Weston, 2000).

As the gateway to EIA, screening is a key determinant of its procedural and environmental effectiveness (Weston, 2000; Wood, 1993). If environmentally harmful activities are screened out, EIA is not able to perform its intended functions. Limiting discretion in screening decisions could potentially improve outcomes by increasing the likelihood of environmentally-harmful projects being subject to EIA (Christensen and Kørnøv, 2011; Kørnøv and Christensen, 2009; Wood and Becker, 2005).

The object of this study was to investigate how formal limits on screening discretions work in practice and whether they generate the desired results. To do this, we conducted an evaluation of the screening process under the Australian government's current EIA regime from its introduction on 16 July 2000 to 30 June 2013 (study period). The legislation containing this regime – the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) – has many of the design features prescribed as a way of ensuring rigor in screening, including limits on screening discretions, wide standing provisions to enable third parties to uphold the statute's public environmental rights and a requirement for the legislation to be independently reviewed at least once every decade, which was first undertaken in 2009 (known as the 'Hawke Review'). Our intent was to test whether the screening rules and complementary design features were generating the intended results.

The remainder of the article is set out as follows. Section 2 provides an overview of the EPBC Act screening process and the restrictions on screening discretions. Section 3 details the method used to evaluate the effectiveness of the screening restrictions. Section 4 provides the results and Section 5 discusses them, before a conclusion is provided in Section 6.

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The EPBC Act's screening provisions

Overview of screening process

Under the EPBC Act, proposed 'actions' that could have a significant impact on particular environmental matters specified in Part 3 of the legislation must be referred to the federal environment minister (Minister). If a proponent fails to refer an action, the Minister can deem a project to be referred. Taking an action that has or could have a significant impact on a protected matter that has not been referred and approved by the Minister is an offence and can attract criminal or civil sanctions.

The matters protected under Part 3 are split into two divisions: Part 3, Division 1 contains so-called 'matters of national environmental significance'; and Part 3, Division 2 regulates actions that could have a significant impact on the environment on Commonwealth land or on a Commonwealth Heritage place outside the Australian jurisdiction, and actions by the Commonwealth and Commonwealth agencies. The matters of national environmental significance are:

- the world heritage values of World Heritage properties;
- the national heritage values of National Heritage places;
- the ecological character of Ramsar wetlands;
- listed threatened species and communities;
- listed migratory species;
- nuclear actions;
- the Commonwealth marine environment;
- the Great Barrier Reef Marine Park; and
- coal seam gas and large coal mine developments that could have a significant impact on a water resource.

After a project has been referred, the Minister can immediately reject it on the grounds that it would have unacceptable impacts on the matters protected under Part 3. If it is not rejected outright, the Minister moves to the standard screening decision (called the 'controlled action decision') and has three options:

- if the Minister decides that the project is likely to have a significant impact on a protected matter, the project is declared a 'controlled action' and must undergo formal assessment and approval;
- if the Minister decides that the project is not likely to have a significant impact on a protected matter, the project is declared not to be a controlled action and can proceed without undergoing further assessment; and
- if the Minister decides that the project it is not likely to have a significant impact on a protected matter if it is carried out in a 'particular manner', the Minister can decide that it does not have to be formally assessed and approved if carried out in the manner specified (Fig. 1).

Although the legislation refers to the Minister as the decision-maker, in practice, most relevant regulatory functions are performed by delegates in the federal environment department (department). Due to this, hereafter we refer to the department as the primary regulator.

Particular manner decisions

Where a project has been declared a particular manner action, the legislation requires proponents to adhere to the manner specified. Carrying out the action in an alternative way can lead to the imposition of fines, or criminal sanctions if the breach is found to have had a significant impact on a protected matter. These provisions have not lain dormant: in 2010, a proponent was prosecuted and fined AU$40,000 because two lagoons (the construction of which constituted part of the particular manner) did not hold the required volume of water (FCA, 2010).

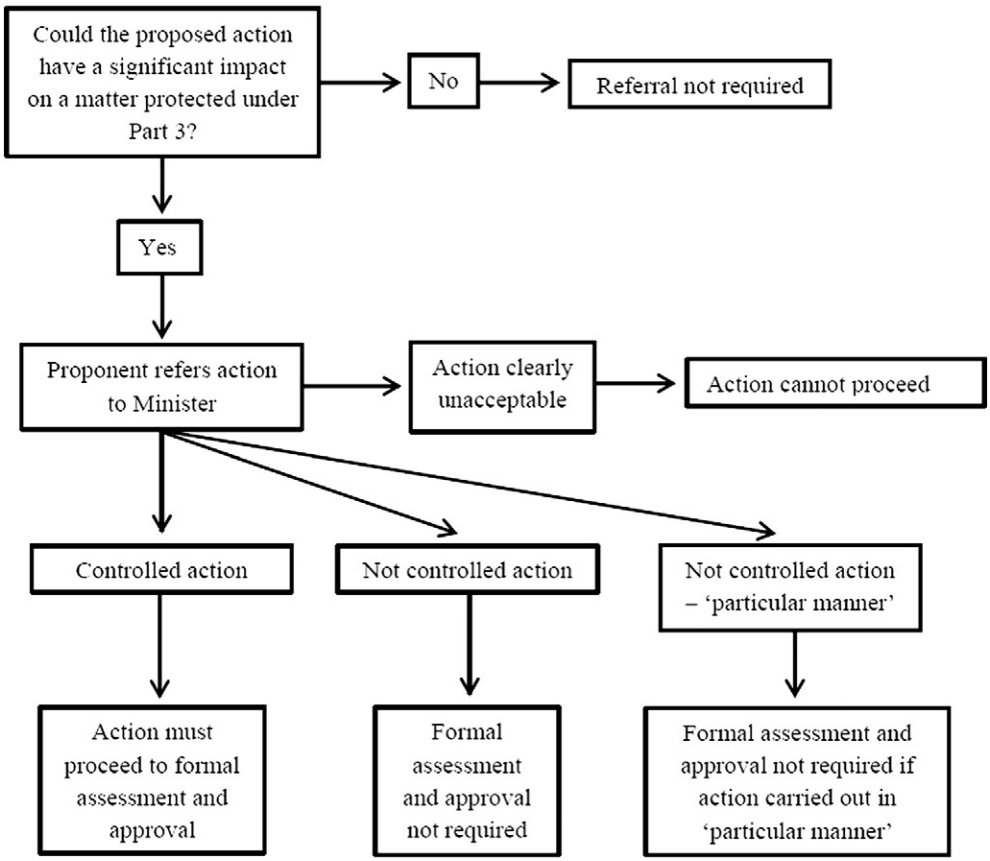

Fig. 1. EPBC Act screening process.