



Removing EPBC Act exemptions for legacy actions with significant impacts

Summary

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) includes a provision that allows the indefinite continuation of ongoing legacy actions that have ongoing significant impacts on Matters of National Environmental Significance (MNES), despite never being assessed under the EPBC Act. The current reform of the EPBC Act provides an opportunity to sunset this provision (section 43B).

The Issue

EPBC Act s. 43B (Actions which are lawful continuations of use of land etc.) states:

(1) A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if the action is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act.

This exemption to assessment under the EPBC Act is ongoing unless there is an enlargement, expansion or intensification of use or any change in the location or nature of the activities that results in a substantial increase in the impact of the action.

In consequence, s. 43B provides for the indefinite continuation of activities that are having a significant impact on MNES without ever having been assessed under the EPBC Act. The EPBC Act has now been in force for over 20 years, and community values and expectations in relation to environmental management have strengthened significantly over that period. It is no longer appropriate to provide activities with an ongoing exemption to consideration under our national environmental laws.

One example of an action relying on s. 43B for a continuing exemption to assessment under the EPBC Act is the NSW Shark Meshing Program. Over the last decade, the Program has caught over 3,800 animals, killing over 2,000. Data from the 2021-22 program showed that 71% (162) of wildlife caught were threatened or protected species, including the critically endangered grey nurse shark.

Recommendation

The current review of the EPBC Act provides the ideal opportunity to remove the s.43B exemption from assessment and require any legacy actions with ongoing significant impacts on MNES to be assessed under national environmental legislation. This could be done by amending s. 43B to introduce a requirement for legacy projects to obtain approval under the modernised Act within a specified timeframe.