
SUBMISSION

**Productivity Commission's study
into Resources Sector Regulation
(Issues Paper)**

November 2019

The Business Council of Australia draws on the expertise of Australia's leading companies to develop and promote solutions to the nation's most pressing economic and social policy challenges.

INTRODUCTION

The Business Council welcomes the opportunity to participate in the Productivity Commission's study into Resources Sector Regulation. The major project approval process has long been a concern of the Business Council and the federal government should be commended for tasking the Productivity Commission for undertaking this important task.

Major resources projects need rigorous and stringent environmental assessment, but we need to question whether the current system is working for all Australians.

Protecting the environment and ensuring Australia remains a competitive and attractive investment destination are not mutually exclusive. Business wants to work constructively with regulators around the nation to work out how we best strike the balance between investment, jobs and the environmental outcomes.

In terms of improving decision-making timeframes for major projects, Business Council members have advised that the situation is not improving, and in many regards, it is getting worse. It is extremely rare to get a major project approved in under two years in any jurisdiction. Most major resource projects now take between three to six years to gain approval.

Major project planning approval processes differ by jurisdiction and all fall short of best practice. They are complex, unclear and impose unnecessary cost and delay – and, despite all this, are not necessarily achieving expected environmental and community outcomes. Specifically, they are characterised by:

- long and uncertain approval timeframes
- high costs in meeting unexpected and overlapping environmental requirements (both in the assessment phase and in conditions of approval)
- inconsistent planning process steps and requirements between jurisdictions
- subjective procedures to determine major project eligibility and environmental requirements, and
- poor guidance and negligible methodologies to assess upfront environmental risks.

Over the last decade state and territory governments have embarked upon a range of significant planning system reforms to meet the demands from changing economic, social and environmental conditions.

The Business Council encourages the Productivity Commission throughout this study to consider where ultimate responsibility for project approval should fall. Overlapping, additive and duplicative processes between state and federal agencies and regulators result in significant costs for businesses without necessarily delivering expected outcomes nor achieving their desired purpose.

In undertaking this study, we recommend the Productivity Commission examine, investigate and, where appropriate, develop recommendations on the following issues:

1. Whether current regulatory settings are achieving their desired purpose and expected outcomes.
2. Where ultimate project approval responsibility should fall.
3. How Australia's regulatory approach compares with other countries.
4. Whether there is enough guidance for businesses on environmental impact statement (EIS) processes.

The Business Council has proposed a best practice approach to major project planning approvals that we encourage the Productivity Commission to consider as part of this study. While there are instances of best practice across jurisdictions, no state or territory's planning regime comprehensively follows the leading practices set out in the Business Council's model.

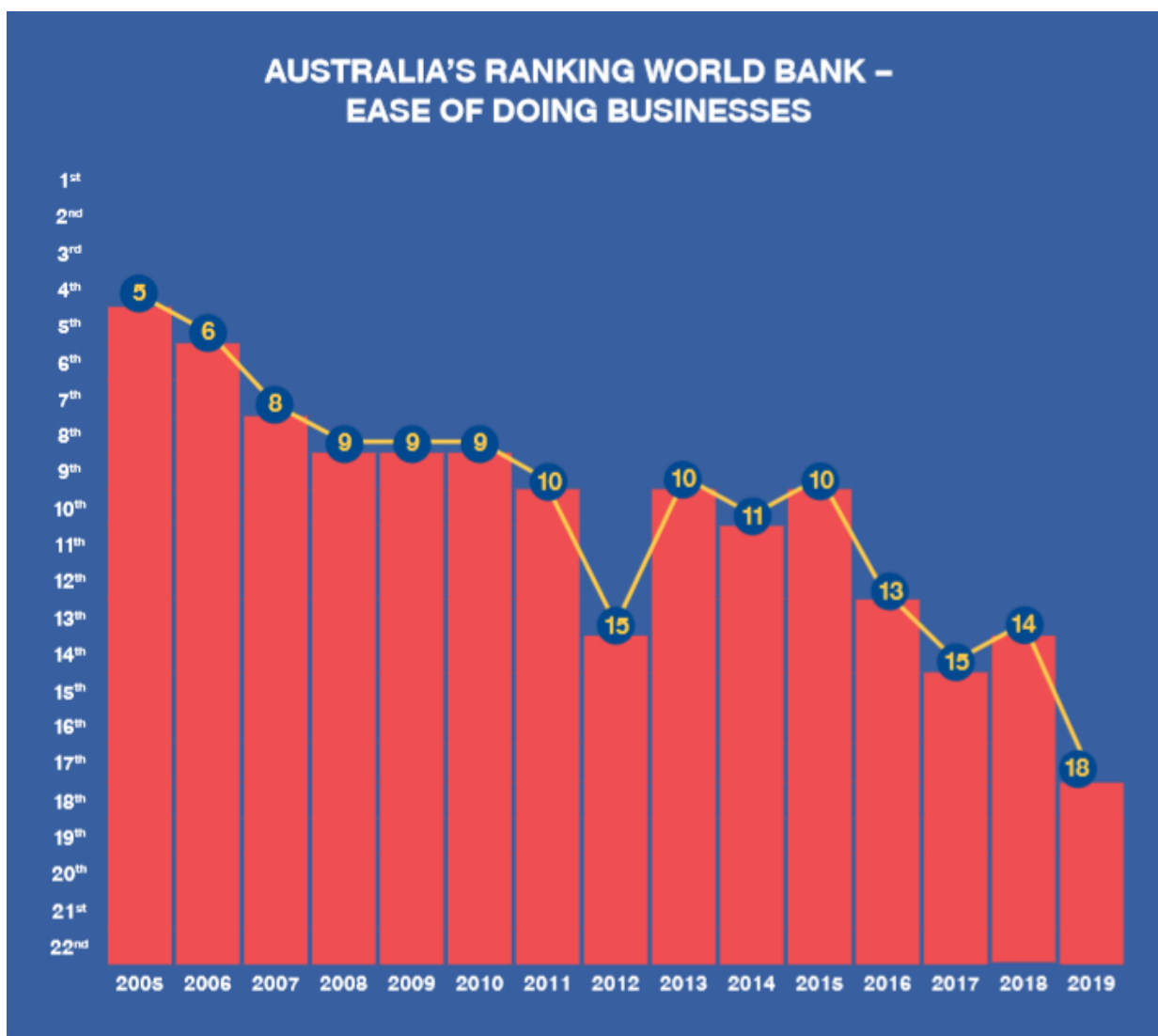
In addition to the approvals that must be obtained through state and territory processes, federal government legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) imposes another layer of regulatory complexity.

We appreciate the federal government has also recently commenced a 12-month review of the EPBC Act. However, there are mechanisms within the EPBC Act, and improvements with the administration of that Act, that could be utilised now, to create efficiencies and reduce delays. We encourage the Productivity Commission to consider this when developing its findings.

THE CASE FOR REFORM

According to various reports, Australia is increasingly being regarded as a more difficult place to do business. In 2005, the World Bank ranked Australia 5th on its *Ease of Doing Business Index*. In 2019 Australia ranked 18th (see Figure 1 below).

Figure 1: Australia’s declining international ranking



In an increasingly globalised economy, regulatory delays and costly processes will deter investment, and poses the risk of businesses relocating to take advantage of more favourable regulatory circumstances.

Data from Deloitte Access Economics on major public and private investments demonstrates the immense value of potential major projects to the Australian economy. According to the data released for the September quarter, there is \$455 billion worth of projects currently

ranked as 'possible' or 'under consideration'.¹ Nearly half of these projects (\$223 billion worth) are in the mining and energy sectors.

Delays in approving and constructing major projects in the resources sector not only damages the proponents of these major projects due to increased holding costs and investment uncertainty, the construction delays deprive Australian employees and communities of much-needed economic opportunity and job creation.

¹ Projects 'under consideration' are those where a decision whether to proceed with the project is expected in the reasonably near future. Projects with 'possible' status are those projects which have been announced but where no early decision on whether to proceed with the project is likely.

KEY AREAS OF CONCERN

Delays are worsening

Approval delays often stem from a lack of coordination within government and insufficient transparency of the approval process and decision-making timeframes.

Business Council members noted the below as key sources of delay:

- Decision making process slows down when the 'clock stops' and this delays approval.
- The right of appeal in some situation is too broad and this allows for 'lawfare' to be used by environmental activists to delay approvals through vexatious legal challenges.
- Court decisions are taking far longer and this adds to the time taken to resolve challenges.
- Foreign Investment Review Board decision-making timeframes is a source of uncertainty for overseas investors, with delays specifically noted in the oil and gas sector.
- Inefficient visa processes delays access to critical staff and essential skills that are needed from overseas.

Post-approvals

The post-approvals process has also been identified by some members as a serious problem. The post-approval stage in the process is highly discretionary and there are few, if any, avenues for appeal at this stage. This means proponents have little scope to challenge unreasonable conditions.

The management plans that flow from conditions are too detailed and unmanageable. Inspections are often performed by multiple agencies in an uncoordinated manner and a lack of coordination of those agencies creates significant delays.

Offsets are another area for concern for Business Council members:

- The differences and complexities across state and federal regulations make it difficult to predict or plan for.
- Proposed emissions offsetting regimes in certain jurisdictions are distorting investment decisions.
 - For example, the Western Australian EPA (WA EPA) is consulting on greenhouse gas assessment guidance. The WA EPA, like all environmental protection authorities across Australia, has an important role to play in promoting and protecting the environment. However, the Business Council contends that it is not the role of the Western Australian EPA to attempt to substitute national climate change policy with project assessment guidelines that target a small subset of projects in a single state. The Business Council has encouraged the EPA to develop guidelines that complement the policy approach adopted by the Australian Government and the Western Australian Government.
- There is a trend for more conditions to be imposed on all projects due to a one-size-fits approach, rather an impact-based analysis.

Red tape imposes unnecessary costs

Regulations that do not achieve their desired purpose, while also imposing compliance costs, are regarded as red tape. Below is an example where an unnecessary cost is imposed due to a regulation that is no longer fit for purpose.

Under the federal government's *Environment Protection and Biodiversity Conservation Act 1999* applicants are currently required to publish preliminary documentation for community consultation. The legislation requires the applicant provide multiple hard copies at physical locations for public perusal.

These documents can be over 4000 pages, and they are not allowed to be removed from the specific physical location.

This rigid and out of date approach leads to outcomes that are not only undesirable from an environmental perspective (the printing of large documents), it likely to not be the most effective way to foster community engagement. Very few members of the public will likely read through material presented in such a format. Better community engagement will likely result if digital copies are provided, which allow for word search functions to be performed.

BEST PRACTICE MODEL

In November 2016, the Business Council released its Competitive Project Approvals report. The report proposed a best practice approach to major project planning approvals by drawing upon the findings and recommendations in the Productivity Commission's report on Major Project Development Assessment Processes and from best practice in Australian and international jurisdictions.

The principles that underpin this model are:

- transparent and participatory – encourage participation by both project proponents and the community, and have credibility with all stakeholders
- certain and predictable – reduce complexity, remove red tape and approach decisions consistently
- integrated – ensure all environmental, heritage and amenity regulatory requirements are integrated into assessments and decisions
- productive – facilitate effective and efficient planning assessments and decisions; and
- competitive – promote domestic and international investment.

An overview of the Business Council's Best Practice Model for Major Projects is provided at [Appendix A](#).

Below is an overview of key elements of the best practice approach to managing major project approvals.

Strategic Planning

Strategic plans help to ensure a lot of the work that currently needs to be done by a project proponent each time they submit a project application is done upfront, in particular, community consultation and determination of environmental targets. Strategic plans can deliver the following benefits:

- Communities will have earlier and more substantive participation in decisions about permissible land uses.
- Environmental targets can achieve better environmental outcomes, because the cumulative impact of all development in the area can be considered, rather than on a case-by-case basis.
- Communities and project proponents will have more long-term certainty about the types of permissible development in each area.

Lead agency framework

Major project assessments are made significantly more efficient for proponents using a lead agency and concierge service.

A lead agency provides a single point of contact to manage the entire approval and post-approval process. The lead agency coordinates with other parts of government to minimise unnecessary delays and avoid duplication.

Industry-based assessment teams should be implemented so that agencies develop industry sector knowledge and skills (e.g. mining, energy) and have a better understanding of how best to assess major resource projects.

Application and Assessment process.

A legislated, maximum umbrella timeframe for decision-making, ideally set at no longer than 12 months should be introduced. The timeframe applies to the pre-application, application, assessment and approval stages. We recommend abolishing the use of stop-the-clock (except where the proponent requests it).

Jurisdictions should maintain online planning application and tracking systems (as previously agreed at COAG). This will benefit all parties by clearly showing what stage the approval process is up to and which government agency has responsibility for each stage in the process.

Approval process and legal challenges

Jurisdictions should ensure there is only one approval required, and ministers have final accountability for planning approvals.

Jurisdictions should amend, where required, provisions on legal standing so that judicial review is the appeal mechanism. Standing should be available to project proponents and those directly impacted by the decision.

Performance reporting

All jurisdictions should report on their adherence to statutory timeframes. Performance reporting enables for the identification of approval bottlenecks and incentivises governments to address the delays by improving internal processes or where required, deploying more staff.

Post-approval coordination

The post-approval process needs to be coordinated and managed in the same way as the approval process is managed. A central case manager would help to ensure coordination between agencies.

CONCLUSION

The Business Council would welcome the opportunity to discuss the Best Practice Model for Major Projects further with the Productivity Commission and looks forward to continuing to participate in this study and responding to the draft report early next year.

APPENDIX A

BEST PRACTICE MODEL FOR MAJOR PROJECTS

BEFORE A PROJECT APPLICATION

1

STRATEGIC PLANNING

- ▶ Greater use of strategic planning to direct future land uses and conditions of approval for all major industry sectors.
- ▶ Extensive community participation, including businesses.
- ▶ Streamlined, risk-based approval for individual projects that comply with strategic planning.

2

LEAD AGENCY FRAMEWORK

- ▶ Major projects dedicated assessment track.
- ▶ Lead agency established as point of contact for proponents and to manage track within government.
- ▶ Legislated maximum umbrella timeframe for all stages – pre-application, application, assessment and approval. 12-month timeframe should be the goal.

PROJECT APPLICATION ASSESSMENT AND APPROVAL

3

PROJECT APPLICATION

- ▶ Single project application for eligible projects, following pre-application consultation with the community.
- ▶ Online portal for application lodging/tracking, guidance materials, baseline environmental/heritage data.
- ▶ Standardised terms of reference, Environmental Impact Statements (EIS) and conditions of approval. Objective and performance-based assessment of project risks. Codes of conduct for EIS specialists and consultants.

4

PROJECT ASSESSMENT

- ▶ EIS displayed for community consultation.
- ▶ Lead agency coordinates inter-agency project assessment, within the umbrella timeframe. Industry-based assessment teams with sector knowledge and skills.
- ▶ No stop-the-clock (other than at request of proponent), referrals or concurrences.

5

PROJECT APPROVAL

- ▶ Minister makes a single project approval, which incorporates all secondary approvals.
- ▶ Conditions attached to approvals are targeted and directly linked to improved environmental outcomes.
- ▶ Judicial review only available to project proponents and those directly affected by the decision.

AFTER THE PROJECT APPROVAL

6

COMPLIANCE AND ENFORCEMENT

- ▶ Proponents provide performance-based project reporting.
- ▶ Administration and compliance is streamlined, for example, through better information-sharing and coordination between agencies.

7

PLANNING SYSTEM PERFORMANCE MONITORING

- ▶ All agencies in the planning process report on performance indicators relating to timeliness and adherence to best practice, and identify areas for improvement.

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