



Australian Government
Productivity Commission

Major Project Development Assessment Processes

Productivity Commission
Research Report

November 2013

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The Productivity Commission

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The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

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Foreword

Major projects are a vital source of Australia's future prosperity. They lift national income, create employment opportunities, raise productivity and generate revenue for governments. However, they can also have negative impacts on community amenity, the environment, public health and our heritage assets. Australian governments regulate major projects through development assessment and approvals processes to promote an appropriate balance between economic and other impacts on a community's wellbeing.

In this study the Commission has been asked to review and benchmark assessment and approval processes for major projects in Australian jurisdictions. Our study has found that there is substantial scope, without relaxing the stringency of regulations, to improve their efficiency so that regulatory goals are achieved at a lower cost to both proponents and communities.

The study was undertaken by a team in the Commission's Melbourne office, led by Phillip Chindamo. The study has benefited from discussions and submissions from many stakeholders in the government and business sectors and from diverse peak bodies and community groups. The international insights drawn from practices in Canada, the United States of America, the United Kingdom and New Zealand were informed by our conversations with regulators, proponents and experts in these countries. We are very grateful to all those who have given their time and shared their experiences and expertise with the Commission.

Jonathan Coppel
Presiding Commissioner

Dr Warren Mundy
Commissioner

November 2013

Terms of reference

STUDY TO BENCHMARK AUSTRALIA'S MAJOR PROJECT DEVELOPMENT ASSESSMENT PROCESSES

Productivity Commission Act 1998

I, David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake a study to benchmark Australia's major project development assessment processes against international best practice.

Background

Major projects in Australia are subject to a wide range of government regulations and development controls applied at the local, state and/or Commonwealth level. These controls are intended to serve the public interest by delivering desirable regulatory outcomes in a variety of ways including protecting the public from health and safety risks and managing environmental, social and other development-related impacts that may arise from a project.

While the regulations and controls are intended to deliver specific benefits and avoid undesirable impacts, they add a layer of cost to doing business and may be particularly burdensome if they involve unnecessary duplication, or are poorly designed. To the extent that they lead to longer than expected construction times, such processes may impact on the commercial viability of some projects.

The mining boom in Australia has led to a large increase in the number of major projects seeking approval, which has highlighted the need for efficient and streamlined approvals processes. The Business Council of Australia has argued that 'one of the key factors impacting on successful investment in Australia is the efficiency of government development approvals processes, and the related impact of red tape imposed by permits and regulation'.

This was discussed at the Business Advisory Forum (BAF) and it was agreed to further test the premise about the efficiency of the development approvals processes across a broad range of development categories (for example, in industries such as

construction and resources) and across a range of locations (including urban and regional areas).

In response to a request from the Council of Australian Governments, Heads of Treasuries have considered the scope of the BAF's proposal to benchmark Australia's major project development assessment processes finding that it would be beneficial to undertake further work to measure Australia's performance relative to international best practice. In conducting further work, there is merit in assessing the effectiveness of approaches to streamline and coordinate development approvals processes which have been adopted by governments, such as a one-stop shop or Lead Agency Framework, as a means for coordinating interaction with the proponent.

Given the broader concerns in the community around the delivery of planned projects, this provides an appropriate time to consider the extent to which development assessment processes across all levels of government affect the costs incurred by business, deliver good regulatory outcomes for the public and provide appropriate transparency and certainty to facilitate business investment.

Scope of the research study

In undertaking the study, the Commission should:

1. examine the regulatory objectives and key features of Australia's major project development assessment processes at all levels of government, including the interactions between levels of government, the role of facilitation, the capacities and resources of the institutions involved and significant variations between jurisdictions
2. examine the regulatory objectives and key features of comparable international systems with respect to major project development assessment processes
3. identify critical elements of development assessment processes and compare these to assess the extent to which different decision-making approaches in Australian jurisdictions and alternative investment destinations overseas (including other federations) have a material impact on costs, timeliness, transparency, certainty and regulatory outcomes
4. examine the strategic planning context for major project approvals in Australia and in comparable international systems (including for example, the pursuit of urban and regional development policies, or broader strategic resource development plans)
5. identify best practice and against this benchmark evaluate jurisdictional approaches, such as one-stop shops and statutory timeframes, to make

recommendations to improve Australia's processes, both within and between jurisdictions, by reducing duplication, removing unnecessary complexity and regulation, and eliminating unnecessary costs or unnecessarily lengthy timeframes for approvals processes

6. assess mechanisms for 'scaling' regulatory requirements relative to project size and the expected benefits against the potential environmental, social, economic and other impacts
7. compare the efficiency and effectiveness with which Australian approvals processes achieve the protection of social, economic, heritage, cultural and environmental assets compared with comparable international systems.

In undertaking this study, the Commission should take into account the work being led by the Commonwealth Department of the Prime Minister and Cabinet to agree bilateral arrangements for accreditation of state/territory environment assessments and approvals processes. The Commission should not seek to duplicate this existing work, which COAG has agreed be finalised by March 2013.

In conducting the study, the Commission will also take into account evidence from benchmarking studies and other relevant studies, including the Infrastructure Australia 'Principles for Assessment', the COAG Reform Council's review of capital city strategic planning systems and work on development assessment processes by individual jurisdictions, such as the NSW Planning System Review.

In conducting the study, the Commission should also examine relevant domestic case studies to inform its findings.

The Commission should consult with industry, non-government stakeholders and governments in conducting the study.

The Commission will publicly release a draft report and seek submissions prior to finalising the Report. The final Report should be provided within 12 months of the receipt of these Terms of Reference.

DAVID BRADBURY
Assistant Treasurer

[Received 7 December 2012]

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The following appendixes are only available on the Commission’s website (www.pc.gov.au/projects/study/major-projects).

- B Benchmarking and good regulatory practice
- C Australian DAA arrangements
- D International DAA processes
- E Overview of international rankings reports
- F National and international use of strategic assessment

Abbreviations

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACG	Allen Consulting Group
ACTPLA	ACT Planning and Land Authority
AMEC	Association of Mining and Exploration Companies
ANEDO	Australian Network of Environmental Defender's Offices
APPEA	Australian Petroleum Production and Exploration Association
BAF	Business Advisory Forum
BCA	Business Council of Australia
BCC	Brisbane City Council
BREE	Bureau of Resources and Energy Economics
CEAA	Canadian Environment Assessment Agency
CMEWA	Chamber of Minerals and Energy of Western Australia
COAG	Council of Australian Governments
CSG	Coal seam gas
DAA	Development assessment and approval
DAC	Development Assessment Commission
DAE	Deloitte Access Economics
DAF	Development Assessment Forum
DAP	Development Assessment Panel
DSEWPAC	Department of Sustainability, Environment, Water, Population and Communities
EES	Environment effects statement
EIA	Environmental impact assessment
EIS	Environmental impact statement

EPA	Environmental Protection Authority
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999 (Cwlth)</i>
ESD	Ecologically sustainable development
GDP	Gross Domestic Product
IC	Industry Commission
ICAC	Independent Commission Against Corruption
LNG	Liquefied natural gas
MNES	Matters of national environmental significance
MOU	Memorandum of understanding
MPCO	Major Projects Coordination Office
MPMO	Major Projects Management Office
NCEA	Netherlands Commission for Environmental Assessment
NEB	National Energy Board (Canada)
NEC	National Environment Commission
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NWI	National Water Initiative
OECD	Organisation for Economic Co-operation and Development
OPGGs Act	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cwlth)</i>
PAC	Planning Assessment Commission
PC	Productivity Commission
QRC	Queensland Resources Council
RIS	Regulatory impact statement
SEA	Strategic environmental assessment
SIA	Social impact assessment
SSD	State significant development
SSI	State significant infrastructure
TOR	Terms of reference
VCEC	Victorian Competition and Efficiency Commission

OVERVIEW

Key points

- While Australia already has in place the building blocks of a sound development assessment and approval (DAA) regulatory system, there is substantial scope to comprehensively overhaul the framework in Australia for major projects.
- The DAA processes of Australian jurisdictions and select countries were benchmarked for this study. A number of leading practices were identified which should be implemented by all Australian jurisdictions.
- DAA areas that require attention include:
 - unnecessary complexity and duplicative processes
 - lengthy approval timeframes
 - lack of regulatory certainty and transparency in decision making
 - conflicting policy objectives
 - inadequate consultation and enforcement
 - regulatory outcomes falling short of their objectives.
- Specific reforms proposed include:
 - a five-point plan to move towards a ‘one project, one assessment, one decision’ framework for environmental approvals, that includes strengthening bilateral assessment and approval agreements between the Commonwealth and the States and Territories
 - limiting the use of ‘stop-the-clock’ provisions
 - States and Territories improving coordination between their regulatory agencies
 - institutional separation of environmental policy development from regulatory and enforcement functions
 - enshrining the principle that Ministerial approval — unless a deemed approval — should not be reviewable by review bodies other than on judicial review grounds
 - establishing statutory timelines, together with appropriate safeguards, for key decision points in the DAA process
 - expanding the use of Strategic Assessments and Plans where practical to do so
 - requiring that approval authorities publish reasons for their approval decisions and conditions
 - improving third party opportunity for compliance actions.
- Any regulatory system is only as good as its weakest link. Partial reform efforts are unlikely to achieve meaningful improvements.

Overview

Major projects can bring substantial economic benefits. They contribute to national income; they create employment opportunities during their construction and operation; and they can raise productivity and generate revenue for governments through royalties and taxation, thereby helping to fund government programs.

Major projects also have wider impacts on community wellbeing, which are not reflected in economic performance measures, such as national income. These impacts can include damage to the environment and heritage values, the loss of community amenity, and have consequences for public health. Governments regulate major projects through development assessment and approval (DAA) processes to manage the risks of these impacts and to promote an appropriate balance between economic and other impacts on a community's wellbeing.

The costs of developing major infrastructure, natural resources projects, and commercial and public-purpose buildings in Australia are high and rising. This is driving concerns about Australia's competitiveness, productivity and future prosperity. The sources of higher costs include: wage and other labour costs; restrictive work practices; competition for construction services from elsewhere in the economy; skilled labour shortages; the increased complexity of projects; the higher community valuation placed on protecting amenity, heritage and environmental assets; and the efficiency of DAA regulations.

It is the last of these that the Commission has been asked to review. The problems that have been highlighted include: poorly articulated or inconsistent regulatory objectives; lengthy approval timeframes; duplication of assessment processes; lack of regulatory certainty; unnecessary and poorly constructed conditions and offsets; low transparency; inadequate consultation and compliance; and regulatory outcomes falling short of their objectives (box 1).

Box 1 Participants' contrasting experiences with approval processes

The Commission received 106 submissions from governments, project proponents, industry bodies, environmental and community groups, and individuals. These outlined experiences and perspectives about different aspects of Australia's development assessment and approval regulations and processes for major projects.

Proponents argued that onerous environmental impact statement requirements, regulatory duplication, lack of coordination and poorly crafted offsets and conditions are causing an excessive regulatory burden. For example:

We estimate that approval timeframes for projects has increased from ~7 months on average (2002) up to ~18-36 months (2012). (Xstrata Coal, sub. 50)

Regulatory approvals systems suffer from unclear roles, confused accountabilities and a lack of expertise and commercial acumen. The result is unnecessary cost, time delays and uncertainty in investment decision making. (Business Council of Australia, sub. 43)

... Australia's environmental regulatory framework contains numerous overlapping, excessive and inconsistent requirements that are causing unnecessary project delays and costs. The legislation does not always clearly define or achieve its objectives, or add any additional benefit to the Australian economy. It imposes additional costs on the industry and, in some cases, delivers conflicting outcomes that extend project timeframes and costs. (Australian Petroleum Production and Exploration Association, sub. 17)

When major projects are routinely having twelve hundred or more specific conditions imposed on them — which collectively require hundreds of subsidiary assessment processes, such as the preparation of a social impact management plan — the case could be made that regulations are being made by stealth. In many cases, these quasi-regulations are blurring the boundaries of the Government's responsibility to provide basic services for growing communities by seeking to shift these costs onto major projects. (Queensland Resources Council, sub. 19)

Environmental and community groups focused on regulatory outcomes falling short of objectives and attributed this to the inadequacy of baseline environmental data; perceived consultant bias; governance and procedural gaps; and lack of appeal rights and consultation in DAA processes. Environmental groups were also concerned about the potential for changes to current processes resulting in worse environmental outcomes. For example:

There are five broad problems with environmental impact assessment (EIA) for major projects in Australia: Lack of independent assessment approaches, or comprehensive baseline data; poor cumulative impact assessment ... EIA is not linked to state-wide/catchment [natural resource management] targets, limits and requirements; inadequate consideration of greenhouse emissions and climate change impacts; limited government oversight and quality assurance of EIA. (Australian Network of Environmental Defender's Offices, sub. 14)

Across all Australia what is required of any planning system is the capacity to produce ecologically sustainable outcomes. This requires comprehensive environmental impact assessment and genuine public consultation. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest (Nature Conservation Council of NSW, sub. DR94)

About the study

The Commission was asked to benchmark Australia's DAA processes for major projects against international and domestic best practice. This is not the first report to examine aspects of DAA processes (box 2). In accordance with the terms of reference, this study examines specific regulatory practices and provides recommendations on how to improve Australia's DAA processes. The regulatory practices under examination include: the role of lead agencies and one-stop shops; the use of Strategic Planning and Assessment; statutory timeframes, and risk-based and outcome-based approaches to regulatory design. The full terms of reference are set out in the preliminary pages of this report.

To avoid any misconception, this study is not about whether the stringency of environmental and other regulations should be tightened or relaxed. It is squarely focused on identifying ways to improve the efficiency of DAA processes so that the current regulatory goals of protecting environmental, heritage and cultural assets are achieved at a lower cost to both proponents and the community.

Box 2 **Earlier reports on development assessment and approval regulation**

Over the past decade there have been a number of public inquiries, committees of parliaments, studies and departmental reviews that have examined development assessment and approval regulation in Australia. These include but are not limited to:

- Infrastructure Australia, *Building Australia's Future: A Review of Approval Processes for Major Infrastructure* (2009)
- Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011)
- COAG Reform Council's review of capital city strategic planning systems (2011)
- individual jurisdictions' work on development assessment processes, such as the New South Wales Planning System Review, the South Australian Expert Panel on Planning Reform, and the Western Australian Department of Planning's *Planning Makes it Happen: Blueprint for Planning Reform*
- work in 2012 led by the Commonwealth Department of the Prime Minister and Cabinet to negotiate bilateral arrangements for accreditation of State and Territory Government environmental assessment and approval processes
- the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the 'Hawke Review') (2009).

The Commission's approach to benchmarking

There are practical challenges in benchmarking DAA regulations and processes. These challenges relate to the very limited availability of data, which makes comparisons and drawing inferences problematic when jurisdictions have different regulatory objectives, preferences, institutional frameworks and political systems. Controlling for particular characteristics of major projects is also needed to put benchmarking results in proper context.

In light of these challenges, the Commission has adopted a pragmatic approach that involves, as far as possible, the comparison of 'like with like'. This is achieved by using largely qualitative benchmarking techniques to compare DAA processes against a set of criteria (or principles) that has been drawn from the literature relating to the good governance and conduct of regulators (box 3). Leading regulatory practices were identified, as well as 'lessons learned' from case studies of specific DAA experiences of major projects in Australian and international jurisdictions.

Box 3 The Commission's criteria for benchmarking regulatory practices

Regulator governance

- clear, well-defined regulatory objectives
- clarity in roles and responsibilities
- accountable decision makers
- appropriately independent regulators
- suitably skilled and resourced institutions
- opportunities for public participation and review of decisions
- consistency with other regulations and higher-level planning strategies
- regular review and evaluation

Regulator conduct

- clear and predictable processes
- regulatory outcomes that are consistent with objectives
- open and transparent processes
- proportionate and flexible regulatory requirements
- no unnecessary costs

For international comparisons, the Commission focused on DAA processes in Canada, the United Kingdom, the United States and New Zealand. These countries have similar political systems, are at roughly equivalent stages of development, and

face broadly equivalent challenges in making tradeoffs between commercial, environmental, societal and heritage concerns. The study has not focused on low-income countries in which the policy objectives and preferences differ greatly and the institutional arrangements are less comparable.

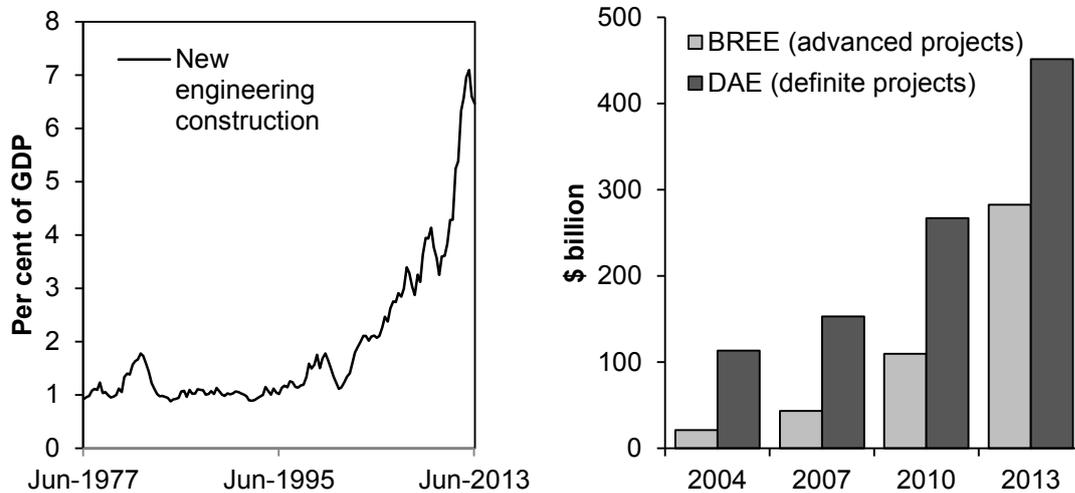
Importance of major projects to Australia

In Australia, major projects are typically natural resource developments, infrastructure projects, big hotel and resort developments, and large commercial or public-purpose buildings, such as hospitals or stadiums. They are characterised by their cost, size, complexity and long lead times. How these characteristics are used to distinguish a *major* project from a *regular* project varies, and in some jurisdictions developments of relatively small value qualify as major projects.

There are no comprehensive and consistent data on the number, value, composition and location of major projects in Australia. However, rough proxies include: data from the Australian Bureau of Statistics on new engineering construction spending; estimates from Deloitte Access Economics of the stock of committed large-scale projects; and information from the Bureau of Resources and Energy Economics on current and forthcoming projects in the resources sector that are above an arbitrary capital expenditure threshold of \$50 million.

These measures all show a surge in the value of major projects over the past decade (figure 1) and the size of the largest developments is unprecedented in Australia's history. This growth in major project investment is one of the reasons why Australia was able to weather the recent global recession and its aftermath better than other advanced economies.

Figure 1 Investment in major projects has surged^a



^a These data are used as rough proxies for investment in major projects.

Rationale for government intervention

Managing the risk of adverse impacts is the main reason why governments regulate the approval of major projects. Such projects have the potential to directly damage sites of environmental and heritage significance. They may also have effects beyond the site itself and impact on the regional environment and nearby communities. An important role for government is to define planning systems and legal rights to allow project proponents and affected parties to achieve better outcomes for the economy, the environment and the community. The government also has a responsibility to enforce these arrangements.

Governments use DAA regulations and processes to provide a way for formal consideration of the project's risks before significant capital investment takes place. This is important because some of the risks in major projects may have irreversible outcomes. Typically governments require the proponent to obtain various permits, authorisations and approvals — for example, in relation to land acquisition; use and access of land (including zoning); planning; environmental regulations (covering pollution, waste management, habitat and biodiversity, and threatened species); Indigenous and non-Indigenous heritage; native title; and public health and safety.

Scope of government intervention

The Australian and State and Territory Governments share powers for granting and determining the conditions that are attached to the approval of a major development. The States and Territories have the primary role, while the Commonwealth is responsible for matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act), as well as for projects on Commonwealth lands and in Commonwealth waters (box 4). Local governments also have a role to play through planning legislation and ‘secondary approvals’, although State and Territory Ministers can in certain circumstances call-in or declare a development to be a major project, which effectively curtails local government planning powers.

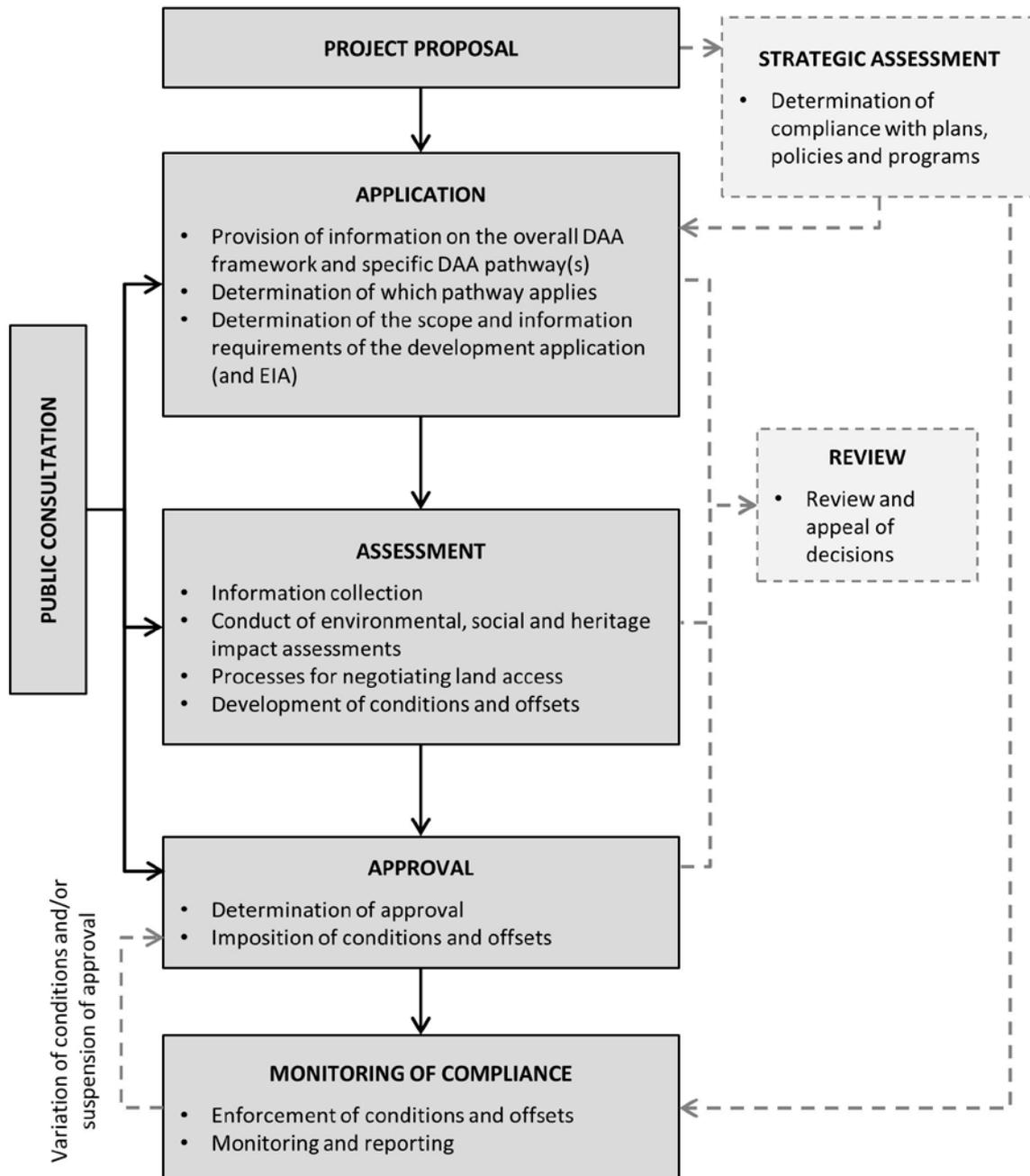
Box 4 **Matters of national environmental significance**

The matters that are protected by Part 3 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth) are:

- world heritage values
- national heritage values
- ecological character of wetlands of international significance
- listed threatened species and ecological communities
- listed migratory species
- nuclear actions (including uranium mines)
- Commonwealth marine areas
- the Great Barrier Reef Marine Park
- water resources impacted by a coal seam gas development or a large coal mining development
- actions on Commonwealth land
- actions by Commonwealth agencies.

Major projects are, by their very nature, complex developments. Further complexity arises due to the vast quantity of legislation and the number of regulatory instruments that may apply to a project, depending on its size, type, and location. Moreover, processes vary within and between jurisdictions and across the stages of the regulatory system (figure 2). Typically, a project will require multiple approvals.

Figure 2 **Regulatory stages of the DAA process for major projects**



Navigating the regulatory system can be daunting, for example:

- there were 79 policies or pieces of legislation that were pertinent to the Port Phillip Bay channel deepening project
- AngloGold Ashanti required 66 different approvals for its Tropicana Gold Project in Western Australia.

In addition, major projects are subject to different regulatory pathways depending on a variety of ‘triggers’ (box 5).

Box 5 Triggers for major project assessment pathways

- In some jurisdictions, special assessment pathways are triggered by the capital cost of a major project. For example, in New South Wales a project will be declared a ‘state significant development’ if it falls into one of 24 development classes and has a capital value greater than \$30 million.
- Other jurisdictions adopt the subjective criterion of whether the project is sufficiently ‘significant’, ‘important’ or ‘complex’. In South Australia, a project may be declared a ‘major development’ if it is of major environmental, social or economic importance. In Queensland, a ‘coordinated project’ will be declared if it has complex approval requirements; strategic significance to a locality, region, or the state; or significant environmental effects or significant infrastructure requirements.
- Some pathways are triggered by projects of a particular type. For example, in Victoria, a project will be declared a ‘major transport project’ if it comprises road, rail or other infrastructure that can be used for the movement of persons or goods; or is a port or a facility where goods can be transferred or temporarily stored.
- Ministers play a role in many of these triggers. They can determine whether certain criteria are met, and also whether a development is to be declared a major project when it meets (or even if it does not meet) the set criteria.

Substantial opportunity to improve current regulation

The building blocks of a sound regulatory system are already in place in Australia. Indeed, when the Commission compared Australia’s DAA processes with practices in Canada, the United States, the United Kingdom and New Zealand, none of these countries stood out as a better performer overall than Australian jurisdictions, although in each system there were leading practices. In fact, in some aspects of DAA regulation, other nations look to Australia as a model.

While the building blocks are sound, there is still substantial scope to improve Australia’s DAA processes. This report proposes a reform agenda that, if implemented, will help Australia secure the benefits of major projects and remain an attractive destination for international investment, while at the same time protect the nation’s environmental, heritage and cultural assets. The Commission’s proposals build on previous efforts and aim to strengthen the DAA regulatory framework by:

- achieving better outcomes against regulatory objectives and improving strategic decision making

-
- reducing regulatory overlap and duplication
 - improving regulatory certainty, transparency and accountability
 - improving timeframes and coordination
 - better targeting and enforcement of approval conditions.

Achieving regulatory objectives and improving strategic decision making

Clear and consistent regulatory objectives that encapsulate the preferences of the community are a pre-requisite for a well-functioning regulatory system. They orient regulatory agencies in their day-to-day administration of DAA processes and ensure that all stakeholders understand the intended goals. In the absence of clear objectives, decisions may lack consistency, create unnecessary regulatory burdens on proponents and ultimately erode the community's confidence in the integrity of the system.

The Commission recommends that governments take stock of their DAA processes, identify where objectives are vague, inconsistent or ambiguous and, where deficiencies are found, set about making them clearer. Where policy objectives compete with each other, governments should provide clear and publicly available guidance on how decision makers should weigh conflicting objectives. The need for guidance on how to put the principles of ecologically sustainable development into operational terms is a pressing and longstanding one, due to the divergent formulations and interpretations of its meaning.

Making greater use of Strategic Assessments

Australia's DAA regulations are largely organised around the evaluation of one project proposal at a time. This means that governments consider the incremental impacts of a project, but not the cumulative impacts of a series of developments. This limits the ability of the regulatory framework to meet policy objectives, as can be seen from the challenges that are developing in the Pilbara and the Great Barrier Reef.

Strategic Planning and Assessment can take into account the cumulative impacts that arise from multiple projects and other activities on landscape-scale ecosystems. In turn, this can result in subsequent project assessment and approval processes being less resource intensive and time consuming, since some of the issues have already been handled.

Despite these advantages, and even though Strategic Assessments have been available under the EPBC Act since 1999 (and under some state laws for lengthy periods); the use of this approach has only recently started to become more frequent. Most have been used for urban areas where the pattern of future development is reasonably predictable, the environmental risks are well understood and existing planning and assessment frameworks are well established. These few examples have been successful in significantly reducing the need for subsequent Commonwealth approvals. Indeed, the benefits of this approach in relation to land release on Melbourne's urban fringe are estimated at more than \$500 million over 30 years.

There is wider scope to tap efficiency gains and improved environmental outcomes through the expanded use of Strategic Assessments. However, governments should first draw on the 'lessons learned' from the successful experiences to date and ensure agencies are equipped and ready to embrace a different approach. Without the proper groundwork, the benefits that can be derived from considering cumulative impacts could easily be outweighed by the costs of multiple layers of regulation.

Reducing regulatory overlap and duplication

The overlap and duplication of similar regulatory processes is one obvious source of unnecessary burden for proponents of major projects. Australia's federal system of government, where responsibilities for matters (such as environmental protection) span all levels of government, gives rise to overlap and duplication, which the Commission considers can be greatly reduced without lowering the quality of environmental outcomes.

Proponents of major projects, for example, are required to undertake some sort of broadly interpreted 'environmental assessment' for the State or Territory Government in which the proposed project is located and often also for the Australian Government. Regulatory overlap and duplication arise from this cross-jurisdictional process, and the Commission has heard a range of views on its incidence (box 6).

Box 6 Views on regulatory overlap and duplication

A number of participants in this study offered what they considered to be examples of overlap and duplication in the development assessment and approval regulations governing major projects. The Urban Taskforce Australia argued:

... for certain activities (controlled activities) the EPBC Act may require an environmental assessment and approval from the Commonwealth Minister. These activities are often also subject to state planning legislation and similar assessment and approval requirements apply ... This duplication in assessment and approval is an inefficient use of resources and adds unnecessary time delay to the approval process for no real benefit. (sub. 15)

The Australian Petroleum Production and Exploration Association suggested that there are inconsistencies between Commonwealth and State and Territory agencies in relation to seismic surveying:

A recent seismic survey required extensive environmental planning with a state government agency to demonstrate that all environmental risks were managed to a level as low as reasonably practicable and acceptable. ... The approval process required the proponent to submit two environmental plans for the same activity, one for the onshore component and one for the offshore component. (sub. 17)

The Minerals Council of Australia expressed concerns about diverse approaches to biodiversity conservation:

Significant failings of the current regulatory arrangements for land use decision-making include ... the fractured nature of biodiversity conservation arrangements — Australia currently has at least six layers (Commonwealth, Interjurisdictional bodies, State government agencies, regional Nature Resource Management bodies, local governments and finally the landowner) which overlap in different ways depending on land tenure and which aspect of biodiversity is of interest ... (sub. 33)

In contrast, environmental NGOs argued that problems of regulatory overlap and duplication are overstated and, in any case, having both the Commonwealth and States and Territories involved acts as an additional safeguard to protect environmental assets. The Australian Network of Environmental Defender's Offices stated:

Contrary to industry claims and some media reports, State and federal environmental regulation is not duplicative; instead, environmental regulation by both State and Australian governments is part of the shared responsibility for the environment set up by the 1992 Inter-Governmental Agreement on the Environment. ... Federal environmental regulation therefore provides a critical role in Australia's national environmental protection regime and achieving our international obligations. (sub. DR92)

Lock The Gate Alliance questioned the ability of State and Territory Governments to adequately assess matters of national environmental significance:

There are matters of national environmental significance which state government authorities are not equipped to assess, and the assessment of which they have demonstrated they are not capable of adequately conducting, including the World Heritage Great Barrier Reef, for example, and threatened species that are not listed at the state level. Checks and balances are needed to ensure that assessment is rigorous and fulfils our international obligations. (sub. DR97)

Renewing efforts on bilateral assessment and approval agreements

The Commission regards bilateral agreements for assessment and approval on matters of national environmental significance under the EPBC Act as the best way to address directly overlapping and duplicative processes, while ensuring progressive environmental outcomes. Such agreements would go some way to promoting a ‘one project, one assessment, one decision’ framework for environmental matters. In 2012, COAG agreed to embark on this route, but the negotiations subsequently broke down for a range of reasons, including community concerns about how environmental standards would be maintained and the accreditation standards themselves. An overly ambitious timetable arguably did not make it any easier.

The Commission sees merit in renewing efforts to reach accord between the Commonwealth and the States and Territories on bilateral approval agreements, and it supports the Commonwealth Government’s recent efforts and staged approach to this end. In this context, and acknowledging the difficulties encountered in the 2012 negotiation process, the Commission has developed a five-point plan, which it sees as one way to move towards achieving a framework of broad based bilateral approval agreements (box 7).

Box 7 Five-point plan for achieving bilateral approval agreements

1. Increase the number of State and Territory assessment procedures with Commonwealth accreditation.
2. Strengthen State and Territory approval and enforcement processes, through other reforms proposed in this report.
3. Initially target concluding agreements in areas that are less environmentally sensitive and where there is better information about impacts, such as urban environments, rather than trying to secure a comprehensive nationwide agreement. The Commonwealth Government could maintain control over matters where it would be unlikely that the community would accept it exiting the field. In such cases, the States and Territories should accredit Commonwealth processes where they address the same matter.
4. COAG should publish a timetable of agreed reforms and have the COAG Reform Council report annually on key milestones and barriers to reform, together with ways to address the latter.
5. The outcomes of bilateral approval agreements should be monitored. To facilitate opportunities for learning, governments should report on the operation of the agreements.

The plan favours a targeted or staged approach, rather than trying to secure a comprehensive nationwide agreement. This might initially involve the

Commonwealth Environment Minister delegating responsibility for the assessment and granting of environmental approvals in urban areas under the EPBC Act to particular States and Territories. Urban areas have relatively mature assessment and decision-making processes in place and strategic planning tools have already been used successfully. The Commonwealth could subsequently transfer responsibility to the States and Territories for approving controlled activities in non-metropolitan areas.

The Commonwealth Environment Minister would retain the right to withdraw accreditation if national standards were not being met. The Commonwealth Government could also maintain control over matters where it would be unlikely that the community would accept it exiting the field. In such cases, the States and Territories should accredit Commonwealth processes where they address the same matter. It is recommended that this proposal be properly scoped to identify the necessary steps and appropriate safeguards. It should then be reviewed by the jurisdictions and a timetable set.

The Commission also sees substantial scope for strengthening existing bilateral assessment arrangements as an interim step towards the reforms described above. Currently less than 30 per cent of projects are assessed under bilateral assessment arrangements. By building on existing (or expired) agreements, there are a number of areas where improvements could be made. These include: agreement on standards and procedures for assessment; better utilisation of existing legislative procedures; and extending, where relevant — for example in South Australia — the number of regulatory processes that are accredited under current bilateral agreements.

The Australian Parliament's decision to exclude the option for bilateral approval agreements when it introduced a 'water trigger' into the EPBC Act is not conducive to the cooperation that the Commission regards as necessary between the Commonwealth and the States and Territories to progress reforms. The Commission has recommended that if a properly conducted regulatory impact assessment cannot demonstrate that the trigger delivers net benefits to the community, it should be repealed.

Reducing duplication within jurisdictions

A further source of overlap and duplication can be the number of regulatory agencies involved in assessing and approving a major project within a jurisdiction. For example, regulatory responsibility for oil spill contingency plans in Commonwealth waters near Western Australia is shared by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA); the

Australian Maritime Safety Authority; the Australian Government Department of the Environment; the Western Australian Department of Environment and Conservation; and potentially the Western Australian Department of Transport and the Western Australian Department of Mines and Petroleum.

Despite agencies' differing areas of responsibility, there are opportunities to work more closely together and to coordinate regulatory activities. A recent example is the Commonwealth Government's announcement that NOPSEMA will be accredited to assess and approve certain petroleum activities as meeting the environmental requirements of the EPBC Act. The Commission supports these changes and expects that, when implemented, they will materially reduce compliance costs for affected businesses.

State and Territory Governments should take a similar approach by encouraging their agencies to work together to share assessments or to accredit the processes of one agency as meeting the requirements of another agency. Memorandums of understanding (MOUs) could be used to facilitate this.

Regulatory certainty, transparency and accountability

Having predictable regulatory processes builds confidence in the regulatory agencies and reduces compliance costs for proponents. It also helps to establish trust in, and the legitimacy of, the regulatory framework. This is especially important for major projects, which usually involve stakeholders with strongly held and disparate views on the impacts of proposed developments.

A common concern raised in this study by both proponents and community stakeholders was a lack of regulatory certainty and transparency in the DAA system. However, the nature of their concerns differs:

- For proponents, the cost of undertaking assessments is lower when all the requirements are known in advance. Late requests for additional information can add to costs and lengthen the approval process.
- For community stakeholders, doubts about the rigour and legitimacy of the approval process arise when public consultation is insufficient and ministerial powers to call-in a project are exercised arbitrarily.

Importance of early stakeholder participation and guidance

Study participants frequently stressed the importance of early stakeholder participation in DAA processes and the need for guidance for project proponents on

regulatory requirements. Consultation before a project is submitted for formal approval allows regulators to explain the objectives of the regulatory framework and the broad requirements that are placed on proponents. Consultation also gives the community the opportunity to raise issues about how a development might affect them and for proponents to establish a ‘social licence’. Moreover, community feedback allows proponents and regulators to give early consideration to design modifications that avoid or limit undesirable impacts.

Given these mutual benefits, it is not surprising that consultation is often initiated by proponents. Furthermore, it is a prescribed feature at some stages of the DAA process. For instance, Queensland and South Australia organise pre-application consultation meetings between regulators and proponents. Sometimes, however, consultation is only undertaken once the process is well underway, which means that any substantive changes to the project design are potentially expensive and community views may have hardened in the interim.

The Commission considers that early engagement between regulators, proponents and community stakeholders should be undertaken more systematically than is currently the case. Pre-application meetings between proponents and a ‘Major Projects Coordination Office’ (MPCO) would improve upfront clarity around regulatory requirements. A practical way to enshrine a culture of early participation is for jurisdictions to publish draft terms of reference (TOR) for the primary impact assessments that are related to major project proposals (such as environmental impact assessments (EIAs)) and to provide an opportunity for meaningful input by key stakeholders (including local governments, the public and proponents) to inform the final TOR.

To bolster transparency and accountability, governments should also ensure that regulatory agencies provide guidance to proponents on the type of information that is required, together with the reasons for the chosen assessment pathway and the rationale for the TOR. Limiting the scope of, and setting precise criteria for ministerial discretion to call-in and intervene in DAA processes, as well as being transparent in the exercise of that discretion, would also bolster the legitimacy of approval decisions.

Separating environmental policy and regulatory functions

Good regulatory practices can only go so far in promoting certainty and transparency. Changes to regulatory governance and institutional arrangements also have a role to play. In particular, public confidence, competitive neutrality and impartiality are more likely to be established through independent regulatory

agencies. This is one of the lessons from jurisdictions that have already established such agencies.

The Commission proposes that jurisdictions pursue the institutional separation of their environmental assessment and enforcement functions from their environmental policy functions. Given similar arrangements already exist in Western Australia and Tasmania, jurisdictional size seems not to be an important consideration. The least-cost institutional form should be determined by each jurisdiction having regard to existing structures. This institutional separation should not alter the authority of the relevant Minister to make primary environmental approval decisions. For the Australian Government, this means transferring the assessment and enforcement functions required by the EPBC Act from the Department of the Environment to a new independent agency.

Review of decisions

Having review mechanisms in place helps to ensure that approval decisions are made in a robust, transparent and accountable manner, and in accordance with regulatory objectives. Reviews can seek to determine whether a decision is lawful (judicial review) or to determine whether it is the best decision (merits review).

The challenge is to deliver the right to robust and accessible review procedures, while avoiding vexatious review applications and unwarranted delays. While abuse of review processes by both proponents and opponents of major developments arises on occasion, overall the existing system works reasonably well. Nonetheless, the Commission believes that there is scope to improve current review procedures and the access to review. Such changes need to be considered in the context of the entire DAA system and also take into account their costs and benefits.

The decision to approve a major project involves the balancing of competing interests and the negotiation of trade-offs. The relevant Minister, as an elected representative accountable to the Parliament (and through Parliament to the wider community), is the most appropriate decision maker to grant primary approvals for major projects. Regardless of the applicant, it is not appropriate for a tribunal to second-guess such decisions through merits review; however it is important that their legality is safeguarded through judicial review.

This said, there is a tension between elected representatives making delicate balancing decisions and the efficient use of ministerial time. While the Commission considers it preferable for Ministers not to delegate decisions for primary approvals, if delegation does occur, provision should be made to allow for the decisions of the delegate to be personally reconsidered by the Minister. The result of such

reconsideration is the equivalent of the decisions being made by the Minister. In these circumstances, judicial review of the Minister’s reconsideration would be the appropriate type of review.

Furthermore, in some jurisdictions the Parliament has decided that a separate or independent body will make certain DAA decisions. These might be ‘preliminary’ decisions, which are made throughout the DAA process by an assessment manager, or primary approval decisions for major projects, which are made by someone other than the Minister — for example, the Planning Assessment Commission in New South Wales. In cases where the primary approval decision is not made by a Minister, it is appropriate to allow a more expansive review, such as a limited form of merits review.

Standing to bring merit and judicial review applications should be given to: the project proponent; persons and organisations whose interests have been, are or could potentially be directly affected by the project; and those who have taken a substantial interest in the assessment process. The review body should also be able to grant leave to other persons in exceptional circumstances — for example, in order to prevent a denial of natural justice.

Improving timeframes and coordination

No comprehensive information is available on the timeliness of the assessment and approval process for major projects. However, there is some evidence that there has been an increase in the average time taken for approval (box 8). It is likely that the extraordinary and sudden rise in the number of major developments over recent years, together with their scale and complexity, has put pressure on regulatory agencies’ capacity to process approvals and thus contributed to the extended delays.

Box 8 Approval timeframes can be long and variable

Administrative data and proponents' experience indicate that approval timeframes can be long and variable.

The Business Council of Australia noted that the variation in the time taken for projects to progress through the approvals process is a source of uncertainty:

One of the problems with the long time taken to make a decision and its variability is the inherent uncertainty for investors — not knowing how long the approval process will take is a deterrent to business investment. (sub. 43)

The Western Australian Department of Mines and Petroleum (2012) analysed mining approvals data in that state to determine:

It takes an average of 28 months to gain approval for a mine in Western Australia. This timeline includes the time taken by government, the proponent and required public consultation processes.

The Commonwealth Department of Sustainability, Environment, Water, Population and Communities (now the Department of the Environment), based on a sample of 17 projects of varying type and complexity, found average approval times of 37 months:

In most cases, for major projects, most of the assessment time can be attributed to the proponent undertaking studies and preparing assessment documentation. For example, proponents spent an average of 20 months (from an average of 37 months from referral to approval) preparing environmental impact statements and collecting public comments. (sub. 55)

Cost of an unnecessary delay to a major project

The efficiency of DAA processes affects the viability, location and timing of major project investment decisions. Even small changes in the process can make significant differences to the viability of a project. There may be circumstances where delays in the process — that is, beyond those that were reasonably expected — may be necessary to properly assess the project impacts and to determine the appropriate mitigation strategies. However, an unnecessary delay to the approval of a major project can cost a proponent, and the community, several hundred millions of dollars or more, depending on the size of the project and the nature of the unnecessary delay.

To improve the timeliness of approvals, the Commission proposes a greater use of statutory timeframes and institutional arrangements that can coordinate the multitude of required approvals. Furthermore, it recommends that the time taken be made transparent. Other measures, such as those that have already been discussed in relation to the reduction of overlap and duplication, would also assist in improving timeliness.

Design and setting of statutory timelines

The Commonwealth and some State jurisdictions, including Western Australia, have established statutory timelines for certain decisions in the approval process — for example, the timeframe for the government to respond to the proponent’s environmental impact assessment. Statutory timelines have proven to be a useful device that focuses regulatory agencies’ attention on critical decision points and provides certainty to proponents. However, such mechanisms typically have, for legitimate reasons, procedures that allow the process to be suspended if further information is sought — the ‘clock is stopped’.

The Commission favours the wider use of statutory timelines in DAA processes and believes that any perverse incentives that they create can be limited through good design. Specifically, once a proponent’s assessment documentation is lodged, maximum times should be set for: the assessment agency to provide its report; a recommendation on the decision to be made to the relevant Minister; and the Minister to make a decision. If the Minister does not make a decision within the specified time period, then the recommendation by the assessment body (along with their reasons and any conditions) should be deemed to be the decision. Limited merits review should be available where a Minister is not the ultimate decision maker.

To provide some flexibility, rules should be set that govern when regulators can ‘stop the clock’ and for how long. To avoid unnecessary delay and cost, such arrangements should only be available when matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated. To encourage regulators to seek time extensions only when absolutely necessary, it is proposed that they be required to disclose when they have activated a stop-the-clock provision and the reason(s) for doing so. Regulators should also specify when the clock restarts and when the assessment is deemed to be complete. This information should be provided and published in formats that allow for meaningful comparisons across jurisdictions and through time.

These principles apply to both the assessment and approval stages. However, given that there will have been an extended assessment process before the matter reaches the decision maker, it is sufficient that there is only one further opportunity to ‘stop the clock’ before a determination is made about whether the project should proceed (and if so, on what conditions).

Is there a role for a lead agency, one-stop shop or coordination office?

For most major projects, the complexity and number of approvals that are required from multiple agencies invariably involves considerable time and resources. It also calls for close coordination among regulatory agencies, as small delays by one agency may prevent another agency from advancing. To guide and facilitate a proponent through the regulatory system, some jurisdictions have established dedicated institutional structures for specific developments.

There are a variety of models and the coordination, assessment and approval functions can vary as well (table 1). Under a one-stop shop model, a number of (otherwise separate) statutory assessment and approval functions are undertaken by a single agency or Minister. This approach can be applied to *all* DAA processes for major projects (meaning only a single approval is required), or to a particular subset of major project approvals — for example, the Australian Government has committed to establishing one-stop shops for certain federal and state-level environmental approvals.

Another approach is the lead agency model, whereby a single agency is responsible for coordinating the major project regulatory processes across government, as well as providing guidance to proponents. Lead agencies have *some* responsibility for assessment and approval but cannot override the responsibilities of other agencies. Western Australia and South Australia have lead agencies for resources and some other types of major projects. The Coordinator-General arrangements in Queensland are limited to state-level environmental impact assessments (not major project DAA processes in the broad), and are therefore distinct from the lead agency model.

A further option is a coordination office (or similar) to coordinate and facilitate DAA processes. These offices perform similar functions to a lead agency; however, they are independent of the major projects regulatory system, which means that they are not a proponent and do not have any assessment or approval responsibilities.

Table 1 Major project coordination models^a

<i>Model</i>	Coordination of regulatory processes	Assessment and approval
Major projects coordination office	✓✓	✗
Lead agency	✓✓	✓
One-stop shop (single approval)	n/a	✓✓
One-stop shop (for environmental approvals) ^b	✗	✓

^a One tick (✓) indicates that the entity has partial (but not full) responsibility for particular functions; two ticks (✓✓) indicate that the entity has exclusive responsibility for relevant function; and (✗) cross indicates the entity has no responsibility for the relevant function. ^b This is the Australian Government’s policy of jurisdictional one-stop shops for environmental approvals and involves establishment of bilateral approval agreements with States and Territories under the EPBC Act.

The Commission considers that the one-stop shop approach for *all* regulatory approvals is impractical for the broad class of major projects in Australia. Major projects are not limited to a single sector or activity and a vast amount of legislation would need to be modified to give authority to a one-stop shop. Moreover, establishing a single agency with the requisite skills and expertise to assess and approve a diverse range of project types and impacts would be very challenging. It would also create overlap with agencies that regulate regular-sized developments and risk ‘regulatory capture’.

However, the Commission sees merit in each State and Territory Government establishing a MPCO, similar to Canada’s Major Projects Management Office, where it can be demonstrated that the benefits exceed the costs from a community-wide perspective. The roles of the MPCO would be to: advise proponents on their statutory requirements; coordinate and facilitate assessment and approval processes; and electronically track and report on progress against agreed timelines.

Access to MPCOs should be limited to large-scale developments. It should also be based on the development’s significance to the jurisdiction’s economy, geographic footprint and complexity. The existing capital expenditure triggers for major project assessment pathways (box 5) are generally low and should not be used alone to determine which projects are to be MPCO-managed. In practice, a MPCO is likely to manage a handful of projects at a time, while in some periods it may have none.

The costs and benefits of the MPCO approach will depend on jurisdiction-specific circumstances, such as the level and nature of major project activity, and any (similar) coordination mechanisms that are already in place. Accordingly, the Commission recommends that jurisdictions assess the case for establishing a

MPCO, or, where similar arrangements already exist, the case for refining those structures (in terms of functions and resources).

Better targeting and enforcement of conditions

The main compliance costs of DAA regulations relate to the fulfilment of approval conditions and offsets, and the administrative costs that are associated with monitoring and enforcement. In these areas, the Commission sees opportunities for risk-based and outcome-focused regulation to reduce unnecessary costs.

Approval conditions and offsets

In almost all cases, the granting of major project approvals is subject to conditions. Regulators impose conditions to avoid and mitigate any adverse project impacts that are not fully addressed by the project proposal. In principle, even after compliance with the approval conditions, a development may have significant residual impacts. Offsets are a special form of condition that counters or compensates for the adverse residual impacts of a development — for example, enhancing the condition of an area of native vegetation to compensate for clearing vegetation on the development site.

The Commission is concerned that some conditions and offset arrangements are not directed at mitigating project risks, but rather at pursuing other, often tangential, policy, individual officer or agency objectives. For example, the Commonwealth Government approval of the South of Embley mine project required that the proponent ‘provide information detailing Traditional Owner employment opportunities and mechanisms for reporting the number of local Indigenous person(s) actually employed in the implementation of this strategy’. While encouraging Indigenous employment is a legitimate policy goal, this condition did not relate to the project impacts that needed to be mitigated or to any identified matter of national environmental significance.

The number and prescriptiveness of conditions that are attached to approvals is also increasing. While it is not possible to draw conclusions just from the number of conditions, it is fair to say that prescriptive conditions are generally more onerous than conditions that are formulated as outcomes — for example, meeting a noise standard. This is because an outcome-based approach allows the major project proponent some flexibility with regard to how the constraint is met and also provides an incentive to find innovative ways to achieve the constraint at lower cost.

In many cases, setting outcome-based conditions is not feasible because well-established standards do not exist or are not appropriate for the specific project in question. However, where they are feasible — for example, the quality of waste water that might be discharged from a site — the Commission considers that they should be the default approach and advised to proponents in the early stages of the regulatory process.

Other measures that would help reduce unnecessary compliance costs and/or improve outcomes include:

- publishing all conditions that are attached to approved major projects, with an explanation of how they mitigate a risk
- refraining from imposing conditions where legislation already exists to achieve an outcome
- undertaking public consultation on the assessment agency's draft recommendation, including proposed approval conditions
- providing scope to remove, alter or add conditions when a strong case to do so exists — for example, if evidence shows that conditions are no longer meeting objectives, or that compliance with a condition would have unintended adverse consequences.

Offset policies are a useful tool to manage significant residual impacts of proposed major projects. However, the Commission is concerned by their inconsistent usage across jurisdictions and by the number of examples where the application of the instrument appears to give greater weight to environmental impacts than to social, cultural and economic matters — and hence possibly contradicts principles of ecologically sustainable development. Since environmental offsets policies have implications far beyond major projects, the Commission is recommending that COAG initiate an independent national review of offset policies and practices to assess: whether their objectives are clear and workable; the methodologies for identifying suitable offsets; the merits of a single, national offsets framework; and the role of market-based offset approaches. The review should seek to report back to COAG by the end of 2014.

Efficacy of monitoring of compliance and enforcement

Confidence in the integrity of DAA processes is influenced by how well both the regulatory requirements are applied and the approval conditions are enforced. Some participants in this study expressed concerns about inadequate enforcement, while others argued that rigid approaches to enforcement impose unnecessary compliance costs.

Several reports from Auditors General have found considerable room for improvement in Australia’s environmental compliance processes — for example, regulators could better articulate how compliance with conditions will be assessed and produce annual reports that detail how proponents have complied with conditions. The Commission supports the use of such measures.

In view of the importance of compliance with approval conditions, and the potential difficulties faced by even the most diligent and well-resourced agencies in dealing with all compliance matters, the Commission also proposes that all jurisdictions legislate (where this has not already been done) to enable third parties to bring enforcement cases on primary approvals to courts or tribunals.

Making it happen

The Commission’s proposals, summarised in table 2, put forward a suite of changes that build on previous reform efforts. Each of the Commission’s recommendations alone would only deliver a limited benefit, as a regulatory system is only as good as its weakest link. Partial reform efforts, as a rule, will not achieve meaningful and sustained improvements in DAA processes. An implementation strategy is therefore needed to prioritise and deliver the reforms.

The Commission has outlined a roadmap for implementation of its recommendations and to enhance the ongoing performance of DAA systems. The roadmap involves governments taking leadership to:

- prioritise the reforms and set timeframes and key milestones for their implementation: regulatory process reforms identified by the Commission could be implemented quite quickly, provide some ‘early wins’ and help establish momentum for further reform
- work closely with regulatory agencies in their jurisdictions, including addressing gaps in regulators’ resources and capabilities: the day-to-day administration of DAA processes is important for achieving a well-functioning DAA system:
 - the capacity of regulators to implement reform and manage new DAA approaches will depend on their ability to develop the expertise, skills and professional judgment of regulatory staff. The culture of regulatory agencies should be conducive to efficient administration of regulations, with a service orientation
 - in an environment where additional funding of regulatory agencies may not be forthcoming, the agencies should focus on the efficiency of their operations. Some of the Commission’s recommendations — for example,

taking a risk-based approach and better utilisation of Strategic Assessments — are related to improving the efficiency of regulatory practice

- work together with other governments to address interjurisdictional matters, such as duplication of assessment and approval requirements: previous efforts at working together have stalled and renewed impetus is required
- agree on monitoring and public reporting of the reforms' progress to ensure that all stakeholders have confidence in the system.

The Commission considers that there is merit in the COAG Reform Council being tasked to monitor and report on jurisdictions' progress in implementing these reforms. Furthermore, given that community preferences evolve over time, a periodic (for example, decennial) review, which examines the rationale for policy interventions and whether they are continuing to produce net benefits, is worthy of consideration. Such a review should include extensive consultation with the community and all levels of government, and could occur as part of a broader review of planning or regulatory systems.

Table 2 Summary of key reforms^a

<i>Issue</i>	<i>Proposed response</i>	<i>Expected benefits</i>
Achieving regulatory objectives and strategic decision making	Review of legislative objectives and guidance on weighting objectives.	Decision making consistent with regulatory objectives.
	In-principle support for further integration of Strategic Planning with DAA processes for individual projects.	Less costly and time-consuming DAA. Better alignment with environmental and social objectives.
	Increased use of Strategic Assessments.	Less costly and time-consuming DAA. Better alignment with environmental and social objectives.
Reducing regulatory overlap and duplication	Strengthen bilateral agreements on assessment and pursue bilateral agreements on approval processes for matters of national environmental significance under the EPBC Act.	Reduced duplication and faster decisions, through an integrated 'one project, one assessment, one decision' system for environmental matters.
	Cooperative arrangements between regulators within a jurisdiction for joint or substitute assessment processes.	Reduced duplication, faster and better coordinated decisions, and lower compliance costs.
Regulatory certainty, transparency and accountability	Enhanced engagement of stakeholders and public participation in DAA processes.	Confidence that regulatory objectives are being addressed.
	Greater transparency in the process for setting terms of reference for primary impact assessments and in-principle support for pre-application meetings.	Greater certainty for proponents on processes and requirements.
	Binding criteria for regulatory pathway determination. Limited ministerial discretion on pathway determination and call-in.	Greater certainty, transparency and accountability.
	Separate environmental policy from regulatory functions.	Enhanced independence and confidence in integrity of decisions.
	Establish separate levels of assessment that match the level of regulatory scrutiny to project risks and impacts, accompanied by strong transparency requirements.	Reduction of unnecessary compliance costs.
	Publication of guidance for proponents, including factors taken into account in approval decisions and conditions.	Greater certainty and accountability.
	Judicial review for approval decisions made by Ministers and limited merits review for decisions by others.	Greater certainty and accountability.
Improving timeframes and coordination	Support for MPCOs at the State and Territory level. Enhanced roles for these offices in jurisdictions where they already exist provided the benefits exceed the costs.	Greater certainty of process for proponents, reduced costs in seeking approvals, faster decisions.
	Time limits at the assessment and approval decision stages.	Improves timeliness and certainty.
	Clear triggers and limits for 'stop the clock' provisions for regulatory decisions.	Improves timeliness and certainty.
Better targeting and enforcement of conditions	Better-targeted and administered conditions and offsets, including enhanced reporting of compliance and enforcement procedures. COAG national review of offsets in 2014.	Proportionate and well-targeted conditions and offsets, reducing compliance costs.

^a A full list of the reforms is provided in the following section to the Overview.

Recommendations and findings

FINDING 1.1

None of the jurisdictions whose development assessment and approval (DAA) processes were benchmarked for this study stood out as performing better overall. However, leading practices were identified both domestically and internationally that could be replicated across Australia to improve outcomes from DAA processes.

Achieving regulatory objectives and improving strategic decision making

RECOMMENDATION 4.1

Governments should review legislative and regulatory objectives across major project development assessment and approval processes within their jurisdiction to ensure that they are clear, consistent and coherent.

RECOMMENDATION 4.2

Where conflicting objectives are unavoidable, parliaments and governments should provide public guidance to their regulators with regard to the priority and weighting to be given to different objectives. A range of approaches may be appropriate, from the inclusion of an overarching policy goal in objects clauses, to the provision of guidelines on how tradeoffs are to be made between objectives.

RECOMMENDATION 10.1

Governments should ensure that agency responsibilities and strategies for the monitoring of compliance and enforcement in relation to project conditions are clearly specified and communicated to stakeholders.

RECOMMENDATION 11.1

Drawing on the lessons learned to date from the use of Strategic Assessments, governments should employ the tool in circumstances where it is likely to produce a reduction in the costs of project approval, while delivering environmental and other regulatory outcomes that are equal or superior to those achieved under other processes.

RECOMMENDATION 11.2

State and Territory Governments should make more use of strategic planning, so as to reduce the number of issues that need to be considered at the project level, by:

- *expanding the scope of decisions about development at the strategic level*
- *using more effective public consultation techniques*
- *collecting and disseminating baseline environmental and heritage data*
- *using Strategic Assessments to analyse plan impacts.*

Reducing regulatory overlap and duplication

RECOMMENDATION 6.1

The Australian and State and Territory Governments should continue to strengthen and expand the scope of existing bilateral assessment agreements under the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth). Areas for improvement include agreements on standards and procedures for assessment, and extending the number of regulatory processes accredited (in full or part) under current bilateral agreements.

RECOMMENDATION 6.2

Regulatory agencies should establish cooperative arrangements — for example, memorandums of understanding — for joint or substitutable assessments to minimise unnecessary duplication between major project assessment processes within a jurisdiction.

RECOMMENDATION 6.3

The Australian Government should undertake and publish a regulatory impact assessment of the ‘water trigger’ amendment to the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth), including the exclusion of water trigger-related actions from bilateral approval arrangements. If the assessment shows that there are no net benefits to the community, the amendment should be repealed.

RECOMMENDATION 7.1

Governments should aim to establish a ‘one project, one assessment, one decision’ framework by restarting negotiations on bilateral approval agreements between the Australian Government and the States and Territories. Such agreements must ensure that environmental standards are not compromised and rights of appeal are no less than those in the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth), and provide for periodic reviews of the agreements’ effectiveness.

RECOMMENDATION 7.2

To facilitate the successful negotiation of bilateral approval agreements, governments should consider a strategy that involves:

- *increasing the number of State and Territory assessment processes with Commonwealth accreditation*
- *strengthening the approval processes of States and Territories through the implementation of other reforms proposed in this report*
- *targeting ‘easy wins’ — for example, by giving priority to approval responsibilities for activities in urban areas (other than on Commonwealth land)*
- *scoping the task of negotiating the agreements between the Commonwealth and other jurisdictions, including a published timetable of key milestones*
- *tasking the COAG Reform Council to monitor progress of development of agreements.*

Regulatory certainty, transparency and accountability

RECOMMENDATION 5.1

Governments should provide clear, upfront information and guidance on the development assessment and approval pathways that apply to major projects, including details about the processes, the generic information requirements, the assessment criteria, the standard and model conditions and the statutory timelines that apply under a given pathway.

RECOMMENDATION 5.2

Governments should establish statutory criteria that identify which projects have access to designated major project pathways. Limited ministerial discretion should be available to ‘declare’ or ‘call-in’ a project that does not meet the criteria (thereby making it subject to a major project pathway). In exercising this power the Minister must:

- *follow guidelines on when and how the power can be used*
- *publicly report the reasons for any declaration against the guidelines.*

RECOMMENDATION 5.3

To achieve greater transparency, accountability and certainty in the process for setting the scope of major project primary assessments, governments should ensure that key stakeholders (including local governments, the public and proponents) have input to the draft terms of reference for primary assessments and that such input, and how it has been addressed, should be made public.

RECOMMENDATION 6.5

Where not already the case, the Australian and State and Territory Governments should institutionally separate regulatory assessment and enforcement functions from environmental policy functions, provided that the expected benefits exceed the costs.

RECOMMENDATION 6.6

Where it is not already the case, regulators should establish measures that ‘scale’ aspects of the major project assessment requirements based on the risk and significance of expected impacts. Criteria for determining the level and scope of assessment should be identified and publicly available.

RECOMMENDATION 7.5

Ministers should be the decision makers for major project primary approvals. Governments should consider whether this is better achieved through administrative or legislative means. Legislation should establish the types of decisions that Ministers can delegate.

RECOMMENDATION 7.6

Legislative guidance should be provided for decision makers to follow when making approval decisions. The guidance should include:

-
- *the factors that decision makers need to take into account when reaching decisions*
 - *the best ways to consult with other decision makers, agencies and interested parties, and to take account of community concerns.*

RECOMMENDATION 7.7

Decision makers should be required to publish assessment reports and statements of reasons (including identification of the risks being mitigated) for their approval decisions and conditions for all major projects.

RECOMMENDATION 9.1

Judicial review is appropriate for major project primary approval decisions where a Minister is the decision maker. For decisions not made by a Minister, including those that are deemed because a Minister has not made a decision, limited merits review is appropriate (along with judicial review). Jurisdictions that do not have statutory judicial review for these decisions should provide for it in legislation.

RECOMMENDATION 9.2

Standing to initiate judicial or merits reviews of approval decisions should be limited to:

- *proponents*
- *those whose interests have been, are, or could potentially be directly affected by the project or proposed project*
- *those who have taken a substantial interest in the assessment process.*

In exceptional circumstances, the review body should be able to grant leave to persons other than those mentioned above to bring a review application if a denial of natural justice would occur if they were not granted leave.

RECOMMENDATION 12.1

Governments should undertake periodic reviews to ensure that regulatory agencies have the necessary governance frameworks, resources, capacity and skills to efficiently administer the development assessment and approval processes of major projects.

Improving timeframes and coordination

RECOMMENDATION 6.4

Where they do not exist, State and Territory Governments should establish a major projects coordination office (or similar) to:

- *advise proponents of complex, large-scale projects of state or territory significance on regulatory requirements*
- *develop project agreements that document the agreed working arrangements among regulators and the timeframes for the completion of processes*
- *electronically track and publicly report on progress against statutory and regulator-determined timeframes*
- *facilitate interactions with relevant Australian Government regulators and local governments.*

A public assessment of the expected benefits and costs of this reform should be undertaken to determine the functions and resources of these offices.

RECOMMENDATION 7.3

Governments should develop statutory timelines that specify the maximum time that may elapse between a proponent's assessment documentation being lodged and when the assessment agency provides its report and decision recommendation to the relevant decision maker.

Legislation should also set the maximum time for the decision maker to make the decision. If no decision is made within the time period specified, the recommendation (along with the reasons, advice regarding the decision and any conditions and offsets) made by the assessment agency should be deemed to be the decision by the decision maker and in the public domain.

RECOMMENDATION 7.4

Governments should provide guidance, preferably in statutory form, for the use of any 'stop the clock' mechanisms. Such arrangements should only be available to assessment agencies when significant matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated. Decision makers should only be able to stop the clock once. Proponents should be allowed to stop assessment and decision processes at any time. Any party that stops the clock should be required to disclose when these triggers are activated and the reason(s) for activation.

Better targeting and enforcement of conditions

RECOMMENDATION 8.1

Governments should ensure that regulatory agencies only set conditions that:

- *are directed at the impacts of the development to be consented*
- *are consistent with relevant regulatory objectives and broader environmental and natural resources management policies*
- *are outcome-based wherever possible*
- *deliver outcomes that are not assured by other legislation*
- *are cognisant of, and do not duplicate, the conditions imposed by other regulatory agencies*
- *are public, and identify the type of impact that the condition is seeking to address*
- *are enforceable, precise and reasonable in all other respects.*

RECOMMENDATION 8.2

COAG should commission an independent and public national review of environmental offset policies and practices to report by the end of 2014. The review should:

- *survey the consistency of offset policy objectives against the principles of ecologically sustainable development*
- *critically assess the methodologies used for measuring and valuing offsets*
- *examine the role of market-based offset approaches, including offset funds*
- *consider the case for greater national consistency and linkages between offset regimes, including the potential for a single national scheme.*

RECOMMENDATION 10.2

Governments should ensure legislation enables regulatory agencies to amend conditions and offsets, provided that there is a strong case, the proponent is consulted and the proposed change is publicly announced.

RECOMMENDATION 10.3

Regulators should produce an annual major projects compliance statement that reviews monitoring and compliance activities and identifies redundant or ineffective conditions on approvals.

RECOMMENDATION 10.4

Governments should ensure that third parties are able to initiate legal action to enforce the conditions that have been placed on primary approvals, and that legal costs do not present a barrier to legitimate actions of this type being brought by individuals or bona fide community groups.

1 About the study

Key points

- Governments regulate the approval of major projects to achieve an appropriate balance between the economic benefits they bring and the protection of the environment, heritage, amenity and the rights of citizens.
- This study focusses on how the design and implementation of major project development assessment and approval (DAA) processes can be improved so that regulatory goals are achieved at a lower cost to proponents and the community.
- The study does not define a 'major' project by the size of capital expenditure alone, but rather through their characteristics that include physical size, complexity, long lead times and potential for significant economic, environmental and social impacts on the local and broader community.
- Conclusions on the overall efficiency of the DAA system cannot be drawn solely from the patchy information on timelines and the costs and benefits of DAA processes.
- Benchmarking Australia's DAA performance against international best practice is demanding since countries have different regulatory objectives, institutional frameworks and political systems. The Commission has compared DAA processes against a set of criteria (or principles) that relate to the good governance and conduct of regulators.
- None of the jurisdictions benchmarked for this study stood out as performing better overall. However leading practices were identified, both domestically and internationally, that could be replicated in Australia to improve outcomes from DAA processes.

1.1 Why look at major project DAA regulations and processes?

Major projects contribute to national income, create employment opportunities during their construction and operation and raise productivity. Major projects also have wider impacts, which can be detrimental to environment, heritage and cultural values, as well as impinge on local communities through a loss of amenity. Although hard to quantify, the cumulative impact of major developments can be a significant source of increased pressure on environmental assets.

Governments have a role to play to promote an appropriate balance of economic and other impacts from large developments on community wellbeing. The key instruments to do this are development assessment and approval (DAA) regulations and processes of the Australian and State and Territory Governments.

The Commission received the terms of reference for this report at a time when the costs of developing major projects in Australia are high and rising. This is driving concerns about Australia's competitiveness, productivity and future prosperity. Suggested sources of higher costs of major project development include labour costs and rigid work practices; the increased complexity of projects; higher community valuation placed on protecting amenity, heritage and environmental assets; and the unnecessary regulatory burden of DAA processes.

It is the last of these that the Commission has been asked to review. Accordingly, the report focusses on how the design and implementation of regulations and processes can be improved, without weakening regulatory objectives or their outcomes. The Commission does not, nor has it been requested to review the setting of the regulatory objectives themselves.

This is not the first study to examine aspects of the processes that underpin major project DAA. Previous recent reviews include:

- the report by Infrastructure Australia, *Building Australia's Future: A Review of Approval Processes for Major Infrastructure* (2009)
- the Commission's *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011)
- industry specific reviews, such as the National Aviation Policy White Paper which resulted in changes to the *Airports Act 1996* (Cwlth) (2009)
- the COAG Reform Council's review of capital city strategic planning systems (2011)
- recent and current work on development assessment processes by individual jurisdictions, such as the New South Wales Planning System Review, the South Australian Expert Panel on Planning Reform and the Western Australian Department of Planning's *Planning Makes it Happen: Blueprint for Planning Reform*
- work in 2012 led by the Commonwealth Department of the Prime Minister and Cabinet to pursue bilateral arrangements for accreditation of State and Territory Government environment assessments and approvals processes
- the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (the Hawke Review) (2009).

There is also work underway to address duplication in assessment and approval processes between levels of government. The Australian Government has signed memorandums of understanding with the Queensland and New South Wales Governments that aim to achieve bilateral approval agreements with these States for environmental matters. The Australian Government is seeking similar agreements with other States and Territories.

1.2 Scope of the study

The Commission has been asked to benchmark Australia's major project DAA processes against international and domestic best practice and to make recommendations on how to improve processes based on an examination and assessment of:

- the objectives and key features of Australia's DAA processes at all levels of government, including the interactions within and between levels of government
- the regulatory objectives and key features of DAA processes in comparable international systems
- the efficiency and effectiveness with which Australian DAA processes achieve the protection of social, economic, heritage, cultural and environmental assets compared with comparable international systems
- the decision making approaches in Australian jurisdictions and whether they have a material impact on costs, timeliness, transparency, certainty and regulatory outcomes
- the strategic planning context for major project DAA processes in Australia and in comparable international systems
- jurisdictional and regulatory approaches, such as one-stop shops, lead agencies, statutory timeframes and risk- and outcome-based regulation.

The Commission's recommendations build on initiatives suggested by the earlier reviews and aim to enable Australia to accrue the full benefits of major projects and remain an attractive destination for investment, while protecting its environmental, heritage and cultural assets.

The study focuses on the regulatory approvals related to managing the impacts of a major development and the enforcement of conditions placed on those approvals. The DAA processes that are in scope for the purposes of this study relate to:

- land acquisition, use and access (including zoning)
- planning and development approvals

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- environment regulations (including regulations covering pollution, waste management, habitat and biodiversity, fauna, and flora and threatened species)
 - heritage (Indigenous, historical and natural) issues
 - access to water and other natural resources
 - native title
 - public health and safety.

There are other business regulations that relate to the development and operational phases of projects, such as industrial relations, foreign investment, immigration (for example, 457 visas) and local procurement requirements. These may impact on the feasibility of a major project, but they are not directly linked to a DAA approval, and are not within the scope of this study.

Key concepts and definitions

The Commission has not sought to define the term ‘major project’ by the size of capital expenditure alone, but rather through characteristics that include physical size; complexity; long lead times; and potential for significant economic, environmental and social impacts on the local and broader community. Major projects can include both public and private projects. Some of the other key concepts and definitions that are used throughout the report are explained in box 1.1.

1.3 The Commission’s approach to benchmarking

Benchmarking involves collecting data to construct indicators that enable comparisons of economic performance and of approaches to policy across jurisdictions. Indicators can either be quantitative (statistical or empirical) or qualitative (descriptive).

Benchmarking is a powerful analytical tool that helps to identify practices that work well and those that do not. It fosters accountability and can lead to improved efficiency and effectiveness of regulation by: exposing areas where improvement is needed; identifying good practice processes; setting targets for improvement; and encouraging innovation.

Box 1.1 Key concepts and definitions

- *Approval authority*: the Minister or regulatory authority that is making a decision to approve a project or a particular action within the scope of the project (also referred to as the 'decision maker').
- *Assessment authority*: the Minister or regulatory authority (for example, the government department, agency or statutory body) that is undertaking an examination of the merits and consequences of a project proposal or part thereof.
- *Conditions*: requirements on major project proponents as a consequence of a project or action being approved.
- *Fast track*: methods by which different rules of assessment and approval apply to a particular development, or if the rules are not changed, the decision maker is changed (for example, to a Minister or appointed body).
- *Major project proponent*: the individual or entity seeking regulatory approval for a project.
- *Major project development assessment and approval (DAA) regulations and processes*: the regulations and processes that proponents must adhere to in seeking the various permits, authorisations and approvals needed by law for their project.
- *Major project DAA pathways*: designated regulatory pathways for projects deemed to be 'major' or 'significant'. The pathways differ across jurisdictions and the types of permits, authorisations and approvals that apply.
- *Offsets*: measures that counter or compensate in full, or in part, for the adverse impacts of a development on the environment or local amenity.
- *Primary approvals*: decisions by Ministers or delegated decision makers about whether a project is able to be developed.
- *Secondary approvals*: the various authorisations, licences and permits required concurrently with (or subsequently to) primary approvals for a project to proceed.
- *Stages of a DAA process*: DAA processes (whether for environmental or other matters) generally consist of four stages: application; assessment; approval; and, for projects that are approved, monitoring of compliance and enforcement of approval conditions.
- *Strategic assessment*: an analytical process that systematically assesses the potential impacts of plans, policies and programs across an entire region, catchment area, activity or industry.
- *Strategic planning*: a continuous and systematic process during which people and organisations make decisions about intended future outcomes, how they are to be accomplished, and how outcomes are to be measured and evaluated.

Limitations and challenges of benchmarking

There are practical challenges in benchmarking DAA regulations and processes for major projects within Australia and internationally. These challenges relate to very limited data availability, the difficulty of making comparisons and drawing inferences when regulatory objectives and preferences differ, and of controlling for particularities in major project characteristics.

Benchmarking Australia's DAA performance against international best practice is particularly demanding, since countries have different regulatory objectives, institutional frameworks and political systems. Countries at different stages of development, or with different preferences, place different weight on policy objectives or public involvement in decision making. Such differences mean that there is not a perfect international comparator and it is not feasible to label a jurisdiction's DAA regulations as international or Australian 'best practice'.

A practical approach

In light of these methodological issues the Commission has adopted a practical approach that:

- involves as far as possible comparing 'like with like', using largely qualitative benchmarking techniques to compare DAA processes against a set of criteria (or principles) that relate to the good governance and conduct of regulators
- identifies leading regulatory practices, and lessons learnt from case studies of specific major project DAA experiences and processes in Australia and overseas.

On this basis, the Commission has selected four countries that have similar political systems, are at roughly equivalent stages of economic and legal development, and face broadly equivalent challenges in making tradeoffs between commercial, environmental and heritage concerns. These countries are Canada, New Zealand, the United Kingdom and the United States. Canada and the United States, like Australia, are significant resource producers, and all four countries have large infrastructure projects. The study has not focused on lower income countries, in which the policy objectives differ greatly and the institutional arrangements are less comparable.

The Commission has drawn on its own work on regulatory policy (2009a, 2011a, 2011c) and on a range of other sources (for example, Australian Government (2010); COAG (2007); Development Assessment Forum (2005, 2009); Government of Victoria (2011); Infrastructure Australia (2009); OECD (2010); Regulation Taskforce (2006); and the Victorian Competition and Efficiency Commission

(2009)) to develop 13 regulatory principles that constitute a benchmark of good regulatory governance and conduct (box 1.2).

Box 1.2 Commission criteria for benchmarking regulatory practices

Regulator governance

- clear, well-defined regulatory objectives
- clarity in roles and responsibilities
- accountable decision makers
- appropriately independent regulators
- suitably skilled and resourced institutions
- opportunities for public participation and review of decisions
- consistency with other regulations and higher level planning strategies
- regular review and evaluation

Regulator conduct

- clear and predictable processes
- regulatory outcomes consistent with objectives
- open and transparent processes
- proportionate and flexible regulatory requirements
- no unnecessary costs.

Where this approach has identified insights or a leading practice from an Australian or international jurisdiction that the Commission considers could improve DAA processes in Australia, it has explained why it considers this to be the case. Using this approach, the Commission has been able to pinpoint a number of leading practices that could be replicated in Australia. However, the DAA processes in none of the countries benchmarked for this study stood out as *overall* performing better than in Australia.

FINDING 1.1

None of the jurisdictions whose development assessment and approval (DAA) processes were benchmarked for this study stood out as performing better overall. However, leading practices were identified both domestically and internationally that could be replicated across Australia to improve outcomes from DAA processes.

1.4 Conduct of the study

The Commission has conducted this study using transparent and public processes to identify reforms that are likely to increase the wellbeing of the Australian community as a whole. In keeping with section eight of the *Productivity Commission Act 1998* (Cwlth), the Commission has considered, among other issues, the need to reduce unnecessary regulatory burdens on business, to encourage growth and competitiveness, and to ensure industry develops in an ecologically sustainable way.

The Commission has drawn on a range of information and data sources to evaluate DAA processes. This includes:

- evidence submitted by study participants in response to the Commission issues paper published in February 2013 (60 submissions) and to the Commission's draft report published in August 2013 (46 submissions)
- information gathered through stakeholder visits and roundtables including with government agencies, businesses, industry associations, non-government organisations such as community groups, and academics (the Commission has conducted meetings with governments, proponents (and their advisors and industry groups) and a wide range of environment groups)
- meetings with stakeholders in those jurisdictions selected for benchmarking (Canada, New Zealand, the United States and the United Kingdom)
- existing reviews, studies and literature. The Commission has been particularly mindful of previous reviews (described earlier) into aspects of major project DAA processes
- case studies.

1.5 Structure of the report

The structure of this report is as follows:

- chapters two and three provide, respectively, overviews of major project development in Australia and of how DAA processes are organised
- chapters four to seven examine the setting of regulatory objectives and the application, assessment and approval phases of DAA processes to identify areas where efficiency improvements could be made without weakening regulatory outcomes
- chapter eight reviews major project approval conditions and offsets

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- chapter nine analyses review and appeal rights associated with DAA processes
 - chapter ten examines compliance and enforcement activities post approval of a project
 - chapter eleven considers how Strategic Planning and Assessments can deal with cumulative impacts and manage assessments more effectively than relying solely on project-level DAA processes
 - chapter twelve provides guidance on implementation issues associated with the Commission's recommendations.
 - appendixes provide:
 - a list of participants involved in this study through submissions, visits and roundtable discussions (appendix A)
 - a description of the Commission's criteria for benchmarking regulatory practices (appendix B)
 - summaries of DAA processes in each Australian jurisdiction (appendix C)
 - an overview of DAA processes in selected international jurisdictions (appendix D)
 - a review of reports that rank either aspects of Australia's DAA processes or, more generally, the overall regulatory system (appendix E)
 - a summary of domestic and selected international jurisdictions' use of strategic approaches (appendix F).

2 Major project development in Australia

Key points

- Major projects are characterised by their scale, complexity, long lead times and potential to have significant economic, social and environmental impacts.
- Major projects are typically natural resource developments, infrastructure projects, big hotel and resort developments and large commercial or public purpose buildings, such as hospitals or stadiums.
- Major projects are drivers of economic performance and the material wellbeing of Australians. They contribute directly to gross domestic product during the construction phase. Once completed, the new productive capacity boosts domestic and often export income, creates new employment opportunities and raises productivity.
- Major developments also have impacts that are not reflected in measures of market output, such as loss of biodiversity, damage to waterways and pollution of the atmosphere. Local communities may also incur a loss of amenity value and experience noise, congestion and other impacts.
- The total value of major project investment has surged over the past decade and this activity has been one of the reasons why Australia was able to weather the recent global recession and its aftermath better than other advanced economies.
- Major project investments are concentrated in a few industries, with resource and economic infrastructure projects accounting for around 85 per cent of the total value of investment.
- The average value of major projects has also increased and the size of the largest projects is unprecedented in Australia's history.
- Western Australia and Queensland account for the bulk of major project investment, which is often located in regional and remote areas.

This chapter provides an overview of major project investment in Australia. It considers the defining characteristics of major projects, examines the importance of major project investment to Australia's economy and describes trends in the composition, type and geographic location of major project investment.

2.1 What is a major project?

There are various criteria as to what developments qualify as ‘major projects’ (box 2.1). One approach used by the Bureau of Resources and Energy Economics (BREE) and Deloitte Access Economics (DAE) is to set an arbitrary capital expenditure threshold. This has the benefit of readily enabling the collection of statistics on major projects. In practice, however, information sources are not comparable, because the choice of expenditure threshold varies over time and depends on the sector.

BREE considers a resource project to be a major project if it involves \$50 million or more in capital expenditure (BREE 2013) and DAE’s Investment Monitor uses a capital expenditure threshold of \$20 million or more (DAE 2013). However, the use of a capital expenditure threshold alone does not distinguish between large and complex projects that require dedicated assessment pathways and large, but relatively straightforward developments that do not. For this reason, the choice of capital expenditure threshold may also be supplemented by consideration of the type of project. For example, BREE defines major electricity projects on the basis of their expected capacity.

Another approach is to define major projects through their attributes. This has the advantage of directly permitting the consideration of the potential magnitude and nature of the economic, social and environmental impacts of a major project. The common attributes of a major project are usually defined in terms of their:

- *scale*: major projects are of a large physical scale and involve substantial capital expenditures
- *complexity*: major projects tend to be complex, in relation to the engineering and construction of the project, financing arrangements and ongoing operations
- *long lead times*: major projects, because of their complexity and scale, tend to face long lead times between inception, development approval and commissioning. They also tend to have a long decommissioning period
- *significant impacts*: major projects usually bear on a large number of stakeholders and often have significant economic, social and environmental impacts that can be both positive and negative.

Box 2.1 Definitions of major projects

There is no single definition of a major project. Governments and agencies adopt different terminology and may apply different criteria over time and across sectors.

- BREE currently considers a resource project to be a major project if it involves \$50 million or more in capital expenditure.
 - Before October 2012, a resource project was deemed a major project if capital expenditure was \$15 million or more in the case of gold projects or \$40 million or more in the case of all other resource projects.
 - BREE defines mega projects as resource projects that cost more than \$5 billion.
- BREE considers an electricity project to be a major project if its expected capacity exceeds 30 megawatts.
- DAE maintains the Investment Monitor database, which includes large investment projects in Australia. The threshold for inclusion in this database is a gross fixed capital expenditure of \$20 million or more.
- The Australian Government publishes the National Infrastructure Construction Schedule for government infrastructure projects. It includes all public infrastructure projects valued at \$50 million or more.
- Under the *Airports Act 1996* (Cwlth), a ‘major development’ includes a new or lengthened runway, a significant new terminal or terminal extension or a building, taxiway, road or railway exceeding \$20 million in cost or any other development having a significant environmental impact.

Sources: BREE (2012a, 2012b, 2013); DAE (2013).

Both approaches to defining a major project are likely to capture similar developments. For the purpose of this study and where feasible, the Commission favours the second approach and defines a major project as one that is large in scale, complex in nature and likely to have significant impacts.

On this basis, major projects in practice are typically natural resource developments, infrastructure projects, big hotel and resort developments and large commercial or public purpose buildings, such as hospitals or stadiums. Box 2.2 gives some examples of major projects with significant economic, social and environmental impacts.

The characteristics and impacts of a major project depend on its stage of development. The life cycle of a major project has five phases: prefeasibility, feasibility, construction, completion and decommissioning. Box 2.3 provides an overview of each of these phases.

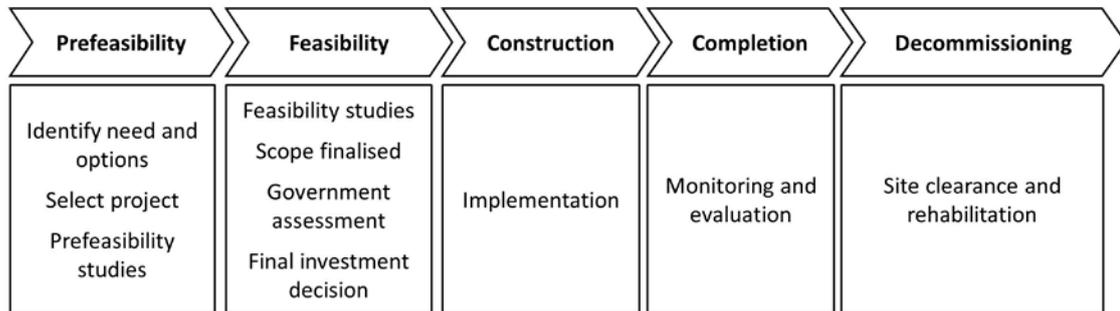
Box 2.2 Examples of major projects

Some recent examples of major projects include:

- The Perth (Kwinana) Seawater Desalination Plant, completed in 2008, now supplies approximately 17 per cent of Perth's water. As the first major reverse osmosis desalination plant in Australia, the project involved potential environmental risks. These risks were managed through extensive environmental approval procedures and ongoing monitoring of the plant's operation. The Emu Downs Wind Farm was built as an energy offset to alleviate the pressure that the desalination plant would place on the electricity grid.
- The Victorian Government is constructing the Regional Rail Link between West Werribee and the Melbourne city centre. The transport link will directly benefit the community and facilitate increased business activity in the western region of Melbourne. The project is also expected to have some favourable environmental impacts through reduced greenhouse gas emissions, as well as some adverse impacts as the project potentially disturbs protected species along the rail link corridor. Moreover, in the short term, construction of the project will have noise, vibration, air and water quality impacts on the surrounding areas.
- The Tarkine is a large wilderness area in the north west of Tasmania, parts of which have been placed on the National Heritage register (and many more recommended for inclusion by the Australian Heritage Council) for their environmental and Indigenous heritage values. A number of endangered species, most notably the Tasmanian devil, are native to the region. Currently, two mines are operating in the Tarkine, with a further ten mines proposed over the next five years. Mining groups argue that these projects will provide economic and social benefits for local communities. However, this must be balanced against any negative environmental and cultural impacts that may arise from mining in the area.
- The Brisbane Airport Corporation is building a \$1.3 billion parallel runway to ease congestion and to meet the future growth of passenger numbers and air services travelling through Brisbane Airport. Construction has had to accommodate the Lewin's Rail, a rare bird species that inhabits the project site. To mitigate and offset the ecological effects of the project, the Brisbane Airport Corporation has undertaken to convert an adjacent casuarina forest into suitable habitat for the Lewin's Rail and to put in place a research and monitoring program.
- The Western Australian Government is building the Fiona Stanley Hospital. At an estimated \$2 billion, the hospital will be Western Australia's flagship health facility, providing health care services as well as dedicated research and education resources. As part of the project, more than \$7 million will be invested in conservation programs (especially in relation to Carnaby's black cockatoo) and environmental initiatives to ensure that the project achieves 'the best possible environmental outcomes' (DoH (WA) 2013).

Sources: Brisbane Airport Corporation (2006); DoH (WA) (2013); Regional Rail Link Authority (2013); Water Corporation (WA) (2012).

Box 2.3 Life cycle of a major project



- At the prefeasibility stage, the proponent identifies the need for a project and various options for addressing that need. Of these, one project is selected and the proponent publicly announces that project. The proponent conducts prefeasibility studies, including an assessment of planned output and costs.
- At the feasibility stage, the project undergoes internal feasibility studies and the scope of the project is finalised. The project also undergoes external assessment in the form of government approval processes. The proponent then makes a final decision as to whether to invest in and proceed with the project.
- At the construction stage, the project is implemented with project management processes.
- Once the project is completed, it may be subject to ongoing monitoring and evaluation.
- The project may also eventually be decommissioned, which can involve the site being cleared and rehabilitated to something resembling its state prior to development.

Sources: BREE (2013); DAE (2013); IC (1991).

An understanding of where projects lie in the ‘pipeline’ is important because it provides an indication of future economic activity. Not all projects will proceed from one stage of their life cycle to the next. Factors potentially influencing the realisation of a major project include: availability of finance; changes in expected levels of demand for, and prices of, output; actions by competitors; increased community valuation placed on amenity and environmental assets; and the cost, timelines, transparency and conditions placed on approvals for prospective large developments.

This report focuses on development assessment and approval (DAA) regulations and processes, and the role, if any, that these play in determining the success or viability of major projects, while protecting Australia’s environmental, heritage and cultural assets.

2.2 The economic importance of major projects

Investment in major projects is critical to economic performance and the material wellbeing of Australians. Major project developments give rise to a number of direct economic benefits by adding to the capital base and contributing to gross domestic product (GDP), employment and often export demand. Indeed, Australia's economic performance over the past decade has been strongly and positively influenced by the surge in large resource and infrastructure projects. The contribution of these projects to GDP through construction and export activity is one of the reasons why Australia was able to weather the recent global recession and its aftermath better than other advanced economies.

Major projects may also contribute to economic performance indirectly. Once completed, some projects improve productivity by increasing the stock of productive assets. In particular, a higher capital stock raises labour productivity and lifts wages. Some projects may also remove bottlenecks, thereby improving the utilisation and efficiency of the existing capital stock. For example, major urban road and rail projects enhance the ability to move goods through supply chains and improve the quality of life in urban environments by reducing congestion, which has been forecast to cost Australia's major cities \$20.4 billion per annum by 2020 (BTRE 2007).

These benefits, however, will not all accrue at the same time. The long lead times and massive capital expenditure in resource and infrastructure projects, for instance, boost input growth well ahead of output growth. In the short run, major project development may suppress aggregate productivity given the lag between the investment of capital and output emerging from the project (box 2.4).

Major developments also have impacts that are not reflected in measures of market output, such as loss of biodiversity, damage to waterways and pollution of the atmosphere. Local communities may also incur a loss of amenity value and experience noise, congestion and other external impacts. Development assessment and approval regulations aim to consider these wider impacts on community wellbeing. The potential negative externalities of major projects are discussed further in chapter 3.

Box 2.4 Major project investment and productivity

Multifactor productivity (MFP) is a measure of productive efficiency. The Australian Bureau of Statistics (ABS) derives estimates of MFP using the ‘growth-accounting’ approach, whereby the annual rate of MFP growth is measured as the difference between the growth rate of output and the growth rate of inputs (labour and capital).

The latest ABS estimates show that the slowdown in market sector MFP growth that began in Australia in 2004-05 continued into 2011-12. The Commission’s industry level analysis suggests that while some temporary factors are at play, structural forces in the economy are driving up input use without a commensurate increase in outputs.

In terms of temporary factors, massive capital expenditure programs in mining (and industries such as utilities) have increased input growth well ahead of output growth. Because this is a temporary factor, MFP growth should improve as newly installed capacity is more fully utilised.

However, structural forces have raised production costs (lowered MFP) on a more enduring basis. For example, in mining, newly developed deposits are generally deeper underground, further offshore, more distant from existing infrastructure or of lower quality or grade. They require more labour and physical capital per unit of output than previously established mines, but remain profitable as long as prices for their outputs are high.

Sources: Topp & Kulys (2013); Topp et al. (2008).

2.3 The landscape of major projects in Australia

There are no comprehensive and consistent statistics on the number, value, composition and location of major projects in Australia. However, there are a number of rough proxies. These include Australian Bureau of Statistics (ABS) data on new engineering construction spending, the DAE Investment Monitor data which track the stock of committed large-scale projects and the BREE Resources and Energy Major Projects list which contains information on current and forthcoming large projects in the resource sector. Box 2.5 gives an overview of these data sources on major project developments.

Box 2.5 Data sources on major project developments

ABS Australian National Accounts

The ABS publishes quarterly statistics on the total value of engineering construction activity in Australia. The measure of 'new engineering construction' includes expenditure on fixed assets and is calculated as expenditure on new and second-hand assets, less sales of existing assets. The data are presented as an aggregate measure of all civil engineering works, regardless of size.

DAE Investment Monitor

The DAE Investment Monitor database records information on large projects being developed in Australia in all industries. The threshold for inclusion in this database is an estimated gross fixed capital expenditure of \$20 million or more.

The database includes projects at all stages of development, and hence includes projects that are in the process of construction as well as projects that may be realised in the future. In their use of this database, the Business Council of Australia distinguishes between 'prospective' investments, where a final investment decision has not yet been made, and 'definite projects', where a decision to proceed has been announced and construction may have commenced. This terminology is adopted in this chapter.

The information in the database is collected from a variety of media, government and private sources. DAE provides no guarantee as to the accuracy or completeness of the data and investment may be missing from the database if a project has not been publicly disclosed or if estimates of capital expenditure are not available.

BREE Resources and Energy Major Projects

The BREE Resources and Energy Major Projects list is a biannual publication that provides a snapshot of the 'pipeline' of current and forthcoming projects in the resources industry. The threshold for inclusion in this list has changed over time. Prior to October 2012, projects were included if capital expenditure was \$15 million or more in the case of gold projects, or \$40 million or more in the case of other resource projects. After October 2012, new projects with a capital expenditure of less than \$50 million ceased to be added to the database.

The information in this database is obtained from project and government websites, company reports and media releases, as well as directly from companies.

Sources: ABS (2013); BCA (2012), BREE (2012c, 2013), DAE (2013).

How big are major projects?

The total value and individual scale of major project investments in Australia has risen sharply over the last decade and is unprecedented in Australia's history. As at September 2013, there were over 950 definite and prospective investment projects, with a total value of \$874 billion (DAE 2013).

Woodside's Pluto Stage 1 gas development is the most expensive project ever completed in Australia at an estimated cost of \$14 billion. This compares with \$8 billion for the Snowy Mountains scheme at today's prices. There are currently seven projects under construction which exceed \$14 billion. These include the National Broadband Network, large transport infrastructure and several liquefied natural gas plants, including the Gorgon development (\$52 billion), which is Australia's largest project under construction (box 2.6). Figure 2.1 compares the size of a selection of these projects.

Box 2.6 The Gorgon liquefied natural gas plant: Australia's largest major project

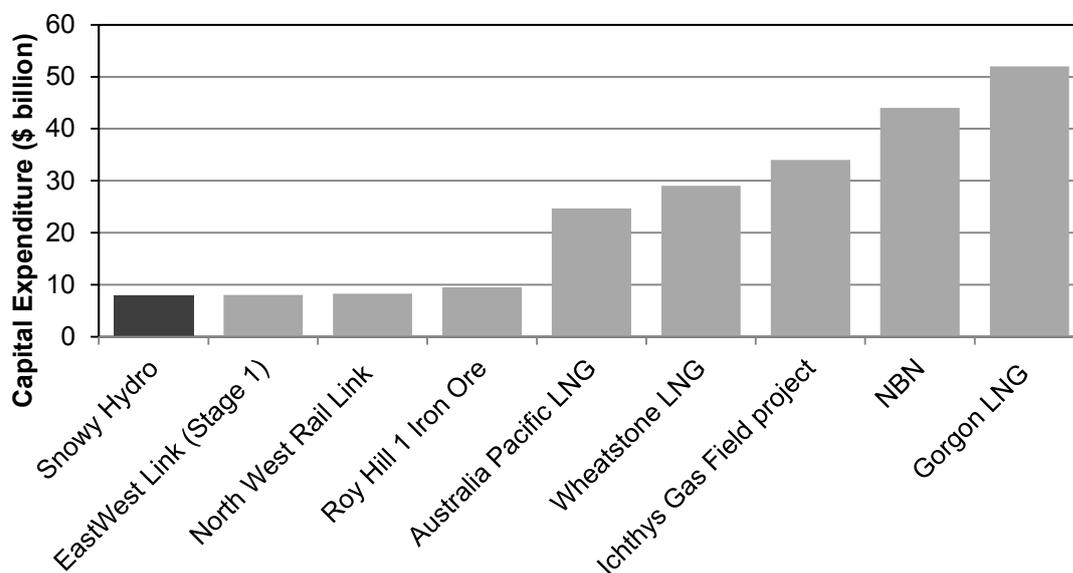
The Gorgon project is the largest major project in Australia's history and one of the world's largest natural gas projects. The \$52 billion project includes the construction of a liquefied natural gas plant on Barrow Island, a jetty for transport to international markets and a domestic gas plant and pipeline for domestic supply. The project is a joint venture of Chevron Australia, Exxon Mobil, Shell, Osaka Gas, Tokyo Gas and Chubu Electric Power.

The project has a number of economic, social and environmental impacts. According to Chevron Australia, the project will directly and indirectly generate 10 000 jobs, boost Australia's GDP by some \$64 billion and support education and training in the Karratha and Dampier region.

Barrow Island is a Class A nature reserve and is home to fauna not found on the Australian mainland. Among them is the flatback turtle, which is a vulnerable species. Environmental groups have raised concerns regarding the introduction of non-endemic species to the island and the risks associated with the geological sequestration of carbon dioxide. To manage these risks, and in response to the environmental assessment of the project, approval conditions were imposed by both the Australian and the State governments

Source: Chevron Australia (2013).

Figure 2.1 The size of Australia's largest major projects^a



^a Capital expenditure for projects is based on estimates as at September 2013. Light grey shading indicates that the project is committed or under construction. Dark shading indicates that the project has been completed.

Source: DAE (2013).

Most major projects are resource or infrastructure projects

The landscape of major project investments in Australia is dominated by a few industries. Developments in the natural resource industry and economic infrastructure — including projects in the transport and storage, energy generation, gas, water and telecommunication industries — account for around 85 per cent of all prospective and definite major projects investment (table 2.1).

Natural resource industry projects

The value of natural resource capital expenditure has steadily increased over the last decade, growing at an average annual rate of around 23 per cent between 2001-02 and 2011-12 (BREE 2012c). As at September 2013, the total value of resource projects was about \$440 billion, accounting for half of all major project investment in Australia (DAE 2013). Around 80 per cent of this amount is in ‘mega projects’, which are projects where capital expenditure exceeds \$5 billion (BREE 2013). The prevalence of major natural resource projects is to be expected given that Australia is a resource-rich country and many commodity prices are at or close to their historical peaks.

Table 2.1 Major project investment by industry
Prospective and definite projects valued at \$20 million or more

<i>Industry^a</i>	<i>Number of projects</i>	<i>Value of projects^b \$ million</i>	<i>Value as a per cent of total</i>
Mining	163	439 747	50.3
Transport and Storage	224	232 098	26.6
Communication	6	46 306	5.3
Electricity, Gas and Water	119	39 508	4.5
Community and Other services	210	38 968	4.5
Manufacturing	33	22 868	2.6
Mixed use	48	18 670	2.1
Finance, Property and Business services	66	17 179	2.0
Trade	54	11 360	1.3
Accommodation	24	4 626	0.5
Agriculture, Forestry and Fishing	2	1 220	0.1
Government	7	1 148	0.1

^a Classifications used by DAE are based on the Australian and New Zealand Standard Industrial Classification. Includes projects that are possible, under consideration, committed and under construction.

^b The 'value' of a project refers to the estimated gross capital expenditure for the project.

Source: DAE (2013).

Economic infrastructure projects

Infrastructure projects in the transport and storage; electricity, gas and water; and communication industries also represent a significant share of major project investment in Australia. In late 2013, they accounted for over one-third of the total value of capital spending on major projects (DAE 2013). The majority of these by number were in the transport and storage and the electricity, gas and water industries.

Engineering projects dominate the landscape

The bulk of major project investment is in the form of engineering construction, that is, construction of civil structures (such as dams, roads and runways) (table 2.2). The liquefied natural gas plants on Curtis Island in Queensland, the Hornsdale wind farm in South Australia and the Hunter Expressway in New South Wales are examples of current major engineering construction projects in Australia.

Table 2.2 Investment by sector

Prospective and definite projects valued at \$20 million or more

<i>Sector^a</i>	<i>Number of projects</i>	<i>Value of projects^b \$ million</i>	<i>Value as a percentage of total</i>
Engineering construction	527	828 690	89.2
Non-residential projects	383	85 398	9.2
Machinery and equipment	12	13 193	1.4
Agricultural and forestry	5	1 640	0.2

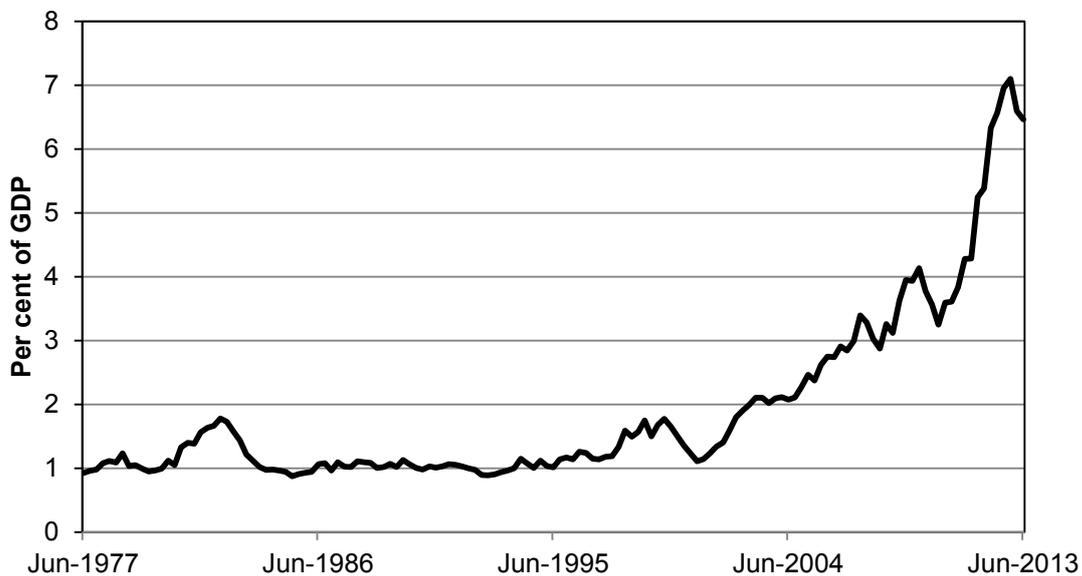
^a Classification based on the investment classification used by the ABS for engineering construction and non-residential building projects. ^b The 'value' of a project refers to the estimated gross capital expenditure for the project.

Source: DAE (2013).

The ABS measure of new engineering construction expenditure includes all expenditure on civil engineering works regardless of size, and is therefore only a proxy for the value of major project construction. Figure 2.2 indicates that new engineering construction sharply increased over the last decade, peaking in late 2013 at about 7 per cent of GDP, a seven-fold increase from the average level of the previous three decades of 1 per cent.

Figure 2.2 New engineering construction has risen sharply^a

June 1977 to June 2013 (seasonally adjusted)



^a New engineering construction includes all expenditure on civil engineering works regardless of size.

Source: ABS (Australian National Accounts: National Income, Expenditure and Product, Cat. no. 5206.0).

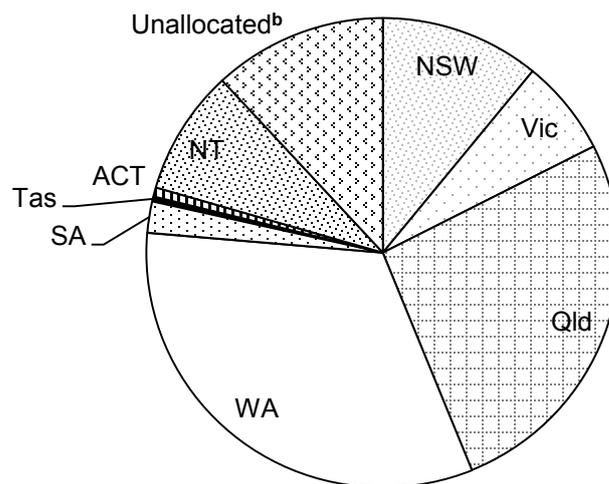
The split between public and private projects

The number of major projects is evenly split between public and private proponents (DAE 2013). However, the value of private sector led projects is more than four times the value of publicly owned projects. This disparity is largely driven by high value resource projects, which tend to be privately owned. Many projects, especially community services and economic infrastructure projects are public-private partnerships.

Where is major project investment taking place?

Nearly two thirds of investment in major projects is located in Western Australia and Queensland, reflecting the concentration of resource projects, which tend to be high-value, in these two states (figure 2.3). Indeed, investment in resource projects is largely responsible for the dramatic increase in the value of projects in Western Australia and Queensland over the last five years (figure 2.4). In this figure, the surge in the value of projects in other states and territories in March 2012 is attributable to the decision to proceed with the \$31 billion Ichthys gas field project in the Northern Territory (DAE 2012).

Figure 2.3 **Major project investment by jurisdiction**
Definite projects valued at \$20 million or more^a

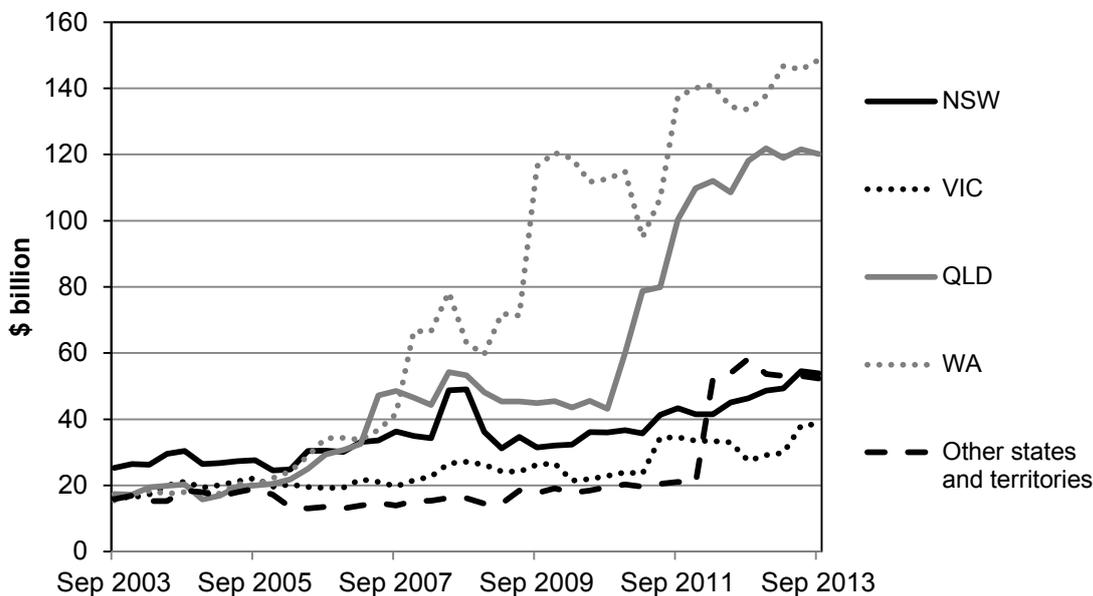


^a Includes projects listed as 'committed' or 'under construction' in the database as at September 2013.

^b Includes projects not based in a single state or territory and projects for which the location is undecided.

Source: DAE (2013).

Figure 2.4 Major projects by jurisdiction
 Definite projects valued at \$20 million or more^a



^a Includes projects listed as 'committed' or 'under construction' in the database.

Source: DAE (2013).

In contrast, investment in major infrastructure projects is concentrated in the more populous states, with New South Wales leading in the value of infrastructure investment. Investment in Victoria is concentrated in major transport projects, including \$5.3 billion of investment in the Regional Rail Link between West Werribee and the Melbourne city centre. Economic infrastructure projects also account for the majority of nationwide investment, comprising the National Broadband Network project, upgrades to telecommunications infrastructure and substantial road and rail repairs following the 2011 floods in Queensland and other states (DAE 2013).

3 Major project assessment and approval processes

Key points

- Governments regulate major projects to mitigate and manage impacts on environmental and heritage values, amenity and other aspects that bear on community wellbeing.
- Application, assessment, approval and monitoring are the four main stages of the regulatory process. The Commission has developed 'good practice' regulatory principles against which these stages are assessed.
- The building blocks of a sound development assessment and approval (DAA) system are already in place for Australia. However, there is substantial scope for improvement. The Commission has identified leading practices which, if implemented, would improve Australia's major project DAA processes.
- The powers for granting a major project approval are distributed between:
 - the Australian Government, which is responsible for assessing and approving actions that are likely to have a significant impact on matters of national environmental significance, projects on Commonwealth land and waters, and certain actions by Commonwealth agencies
 - State and Territory Governments, which have the primary role in DAA processes for major projects. (Local governments have a role in planning and secondary approvals.)
- Major project DAA legislation and regulatory processes are vast and complex. A major project proponent may need to undertake impact assessments and obtain approvals relating to environmental protection, planning and zoning, land use, and heritage, social, cultural and Indigenous issues before the development can proceed.
- Governments have established innovative mechanisms to process major project applications:
 - dedicated development assessment legislation or ministerial call-in powers that define a dedicated assessment pathway
 - specific administrative arrangements (for example, lead agency arrangements to coordinate and facilitate the approval process)
 - bilateral assessment and approval agreements between governments, and strategic assessments to create a more seamless DAA process.

Well-designed and administered legislation and regulatory processes governing the assessment and approval of major developments help promote the welfare of the community as a whole. In Australia's federal system of government, powers for granting (and determining the conditions attached to) an approval for a major development are divided across the federal, state and territory, and local levels of government. The institutional arrangements, legislative instruments and regulatory agencies involved in this framework are both extensive and complex.

This chapter provides an overview of current major project development assessment and approval (DAA) regulations and processes.

3.1 Major projects and the regulatory framework

Why do governments regulate development activity?

For resources in a market economy to be allocated to the areas where they are most highly valued, a range of conditions must be met. These include effective competition, access to information and prices that reflect the value the community places on goods and services and on non-market values, such as heritage and environmental protection. Where these conditions are not fulfilled, markets can fail to allocate resources efficiently and in the best interests of the community.

In the absence of policy interventions, the commercial assessment of major developments by the proponent would focus solely on market determined values for its outputs and inputs and the size of potential markets. For many small-scale or low-impact projects, this approach will work well to filter out unviable projects and identify projects that promise to deliver the best economic outcomes for the proponent and for the community as a whole.

However, issues arise when markets are incomplete or do not function efficiently, meaning price discovery is absent or unreliable. Markets may not exist to value community assets, such as heritage and biodiversity, that can be adversely impacted by a major development. Negative externalities — such as noise, air and water pollution and loss of amenity — are often not efficiently priced (box 3.1). Similarly, a project may deliver benefits that cannot easily be captured by the proponent, even though they are valued by the community. For example, the construction of an urban transport infrastructure project could reduce congestion, improve access to employment and services, and improve the urban environment.

Box 3.1 **Potential negative externalities of major projects**

Negative externalities refer to the costs experienced by people other than those directly engaged in a particular activity, such as where construction noise impacts neighbouring properties. In the absence of government intervention (or other means of action), the person responsible does not bear the full costs of the adverse effects and has no incentive to redress these effects.

Aspects of major projects that may have adverse effects on others include:

- emission of dust, lead or other noxious particles into the air
- clearing native vegetation, causing a loss of fauna habitat
- dredging a marine environment, causing loss of marine biodiversity
- pollution of groundwater, affecting the irrigation of surrounding agricultural land.

Participants in this inquiry cited a number of examples of negative externalities, including:

- mining impacting pristine or near-pristine waterways in drinking water catchments or waterways which are elements of significant conservation areas (Lock the Gate Alliance, sub. DR97)
- potential impacts of a mine on the community (Blue Mountains Conservation Society, sub. DR86; Nature Conservation Council of NSW, sub. DR94)
- noise pollution from coal crushing machinery (Lock the Gate Alliance, sub. DR97)
- loss of irrigation water affecting agricultural land (East End Mine Action Group, sub. 38; Lock the Gate Alliance, sub. DR97)
- unauthorised discharges of contaminated water, polluting ponds and killing native wildlife, and discharges of benzene and toluene into groundwater (ANEDO, sub. DR92)
- concerns that the Great Barrier Reef is threatened by 'pollution, climate change, acidification, and intensive coastal development, particularly of ports ...' (Jeremy Tager, sub 8, p. 3).

Development regulations are intended to correct for such market failures and promote broader economic, social and environmental objectives. Governments have historically played a role mediating how and to what extent societies use the physical and natural environment, so as to balance economic, environmental, social, heritage, aesthetic and other impacts. Efficient and effective policies in this area will be those backed by a robust rationale for intervention, clear and consistent objectives, and sound implementation.

Major project DAA processes also provide a mechanism for the public to participate in development decisions. Public participation may be sought to gather information, identify and possibly resolve differing opinions or competing objectives among stakeholders, and/or enhance public understanding, trust or support for decisions.

Some have argued that ‘the basic legitimacy of an [environmental impact assessment] process is questionable if the process does not provide for meaningful participation’ (Sinclair, Schneider and Mitchell 2012, p. 85).

How are responsibilities for major projects divided between governments?

While the precise division of responsibilities between levels of government varies between jurisdictions, broadly speaking:

- the Australian Government regulates matters of national environmental significance, certain heritage matters, developments on Commonwealth land (such as some airports and defence facilities) and waters beyond the three nautical mile limit, and certain actions by Commonwealth agencies
- State and Territory Governments have the ability to legislate on a broad range of matters, including the environment and cultural and natural heritage
- local governments normally implement and enforce much of state planning and development legislation. Major projects are usually assessed and approved at the state level, bypassing local government. However, local governments often have a range of other responsibilities, such as granting permits (including ‘secondary approvals’) within their jurisdiction.

This division of responsibilities broadly reflects the subsidiarity principle. This principle states that ‘policy development, program delivery and decision making should be the responsibility of the level of government best placed to deliver agreed outcomes’ (COAG 1997) (box 3.2).

Box 3.2 The subsidiarity principle and the governance of planning systems

Subsidiarity is the principle that decisions should be made by the lowest level of governance capable of properly doing so. The idea is that local decision makers have specific knowledge and expertise relevant to decisions, such as development approvals, and can use that knowledge to assess the competing interests at stake at a lower cost.

A decision becomes unsuited to local determination (and more suitable for, say, state determination) when the effects of the decision are felt outside the area governed by that particular body. In these cases, the local body tends to act in the interests of its constituents, even when negative consequences for other parties are 'overproduced' or positive outcomes are 'underproduced'. For example, they may allow housing development to place additional stress on public transport, reducing the facilities available to communities further out, or resist an airport being built, to avoid higher noise levels for the local community, while not taking into account the broader benefits to the whole city.

This suggests that, ideally, a decision-making body should be responsible for an area corresponding to the area affected by the decision. However, this is difficult to achieve since decisions of a given body are likely to impact on different and/or overlapping areas (and sometimes involve different levels of government). Furthermore, the costs associated with a decision may extend over a different area (or group of residents) than the benefits derived from a project (such as in the case of a waste disposal facility or public access to a beach). In practice, a workable option is to consider the spread of costs and benefits for the issue or project in question, and which level of government is most likely to fully weigh up these to make a sound decision. For example, a State Government might be better placed to assess and approve a major project affecting an entire state.

After a decision has been made, there is also the question of which level of government should implement or enforce it. Commonly, State or Territory Governments are required to monitor and enforce decisions for major projects, other than in relation to Commonwealth matters. (This may vary according to the stage of the development, for instance, when it is under construction, and when it has been completed.)

Source: PC (2011c).

As the Australian Constitution does not contain specific powers for the Australian Government to legislate on environmental or planning matters, the Australian Government has had to use other constitutional heads of power to legislate on the environment, most notably the external affairs power and the corporations power, which have been broadly interpreted (box 3.3).

Box 3.3 **The Australian Government's power to make environmental laws**

The Australian Government has no direct power to make laws with respect to the environment (except on Commonwealth land, territories and waters). As such, it relies on other Constitutional powers — particularly the 'trade and commerce' power, the 'trading, financial and foreign corporations' power, and the 'external affairs' power — to implement its environment policy.

The scope of the Australian Government's power to make laws has been determined over time by the High Court's interpretation of the Constitution.

- In the *Tasmanian Dams Case* (1983), the High Court held that the 'external affairs' power (s51(xxix)) may be used to enact domestic legislation if the subject matter of the legislation is of international concern, or if it implements an international treaty (in this case the World Heritage Convention). It also held that the 'corporations power' (s51(xx)) could be used to regulate the activities of the Tasmanian Hydroelectric Commission.
- In the *Workchoices Case* (2006), the High Court extended the application of the corporations power when it held that it may be used to regulate the affairs of corporations, including the industrial relations matters within those corporations. In dissent, Justice Kirby argued that the majority's reasoning could be extended to a broader range of matters affecting corporations, such as planning.

Sources: Bates (2010); Commonwealth v Tasmania (1983) 46 ALR 625 (Tasmanian Dams Case); New South Wales v Commonwealth (2006) 231 ALR 1 (Workchoices Case).

The incremental clarification of the Australian Government's role in regulating the environment has, in the past, created some uncertainty (Bates 2010). Two intergovernmental agreements in the 1990s were designed to clarify the role of the different levels of government in environmental regulation.

- The 1992 Intergovernmental Agreement on the Environment established the Australian Government's responsibility for safeguarding and accommodating matters of national environmental significance, including matters contained in international treaties and conventions.
- The 1997 COAG Heads of Agreement assigned specific matters of national environmental significance to the Australian Government, and matters related to state or territory regulation to the State and Territory Governments.

The matters of national environmental significance are now triggers for the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act). The EPBC Act also provides a framework for assessing and approving matters on Commonwealth land or waters (box 3.4).

Box 3.4 Matters protected by the EPBC Act

The matters that are protected by Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) are:

- world heritage values
- national heritage values
- ecological character of wetlands of international significance
- listed threatened species and ecological communities
- listed migratory species
- nuclear actions (including uranium mines)
- Commonwealth marine areas
- the Great Barrier Reef Marine Park
- water resources impacted by a coal seam gas development or a large coal mining development
- actions on Commonwealth land
- actions by Commonwealth agencies.

Source: *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth).

Development assessment and approval legislation

In addition to matters of national environmental significance, the Australian Government has jurisdiction over other specific matters on Commonwealth land or waters, including certain airports leased from the Commonwealth (*Airports Act 1996*), offshore minerals (*Offshore Minerals Act 1994*), offshore petroleum (*Offshore Petroleum and Greenhouse Gas Storage Act 2006*), historic shipwrecks (*Historic Shipwrecks Act 1976*), fisheries (*Fisheries Management Act 1991*), and Indigenous heritage and native title regulation.

The State and Territory Governments have the power to legislate on a broad range of matters that may require a project proponent to: obtain various permits, licences, and authorisations; and to comply with conditions before a project can commence. The legislation relates to: development assessment; mining and petroleum; planning and zoning; environmental protection; Indigenous and non-Indigenous heritage; land acquisition; native title; marine and coastal areas (within the three mile limit); habitat, biodiversity and native vegetation; natural resource management; pollution and waste management, among other things.

Selected features and examples from each of these areas are summarised in table 3.1. Appendix C gives a more comprehensive listing of the legislation governing major developments in Australian jurisdictions.

Table 3.1 Types of legislation affecting major project DAA processes^a

<i>Category of legislation</i>	<i>Comments</i>
Planning, zoning and development assessment	Most State and Territory Governments have multiple pathways for assessing and approving major projects. All development applications are assessed against state, regional and local strategic plans, but these can sometimes be overridden for major projects.
Mineral resources	Specific State and Territory legislation often applies to mineral resources. However, large mining projects are often, but not always, subject to development assessment under a dedicated major project pathway.
Petroleum	Specific State and Northern Territory legislation applies to petroleum developments. The Australian Government regulates areas more than three nautical miles from the coastline.
Environment and natural resource management	State and Territory environment legislation encompasses a range of matters, such as fisheries, forestry and native vegetation. This legislation might require an environmental impact assessment, an environmental management plan, and/or a works permit, among other things.
Heritage	State and Territory Governments regulate heritage matters. However, the Australian Government also has a role in heritage protection under the EPBC Act.
Indigenous heritage	State and Territory Governments regulate Indigenous heritage. However, the Australian Government has powers to intervene where state processes are deemed to have failed.
Land access and acquisition	The Australian, and the State and Territory Governments each have a role in land acquisition matters in their respective jurisdictions. In some cases, specific tenure requirements apply for development on Crown land.
Native title	Responsibility for native title matters is shared between the Australian Government and State and Territory Governments. The Federal Court has a key role in determining native title claims.
Marine and coastal	State and Territory Governments regulate marine, coastal and riverine areas. The Australian Government regulates development in areas more than three nautical miles from the coastline, and specific areas, such as the Great Barrier Reef and the Australian Antarctic Territory.
Pollution and waste management	State and Territory Governments regulate pollution and waste management. The Australian Government regulates areas more than three nautical miles from the coastline and on Commonwealth lands.
Other legislation	A range of other State and Territory legislation might also apply, covering matters such as roads, electricity permits, genetically modified organisms, and pests.

^a A list of legislation can be found in appendix C.

Sources: Commission research; Commonwealth, State and Territory websites.

Notable features of the legislation relating to major project DAA processes include:

- every State and Territory Government has legislation that sets out DAA processes for major (or ‘significant’) projects. Most State and Territory Governments have multiple pathways, depending on the type of project
- most jurisdictions have separate legislation regulating mining projects

-
- a major project proponent will ordinarily be required to conduct an environmental impact assessment (EIA). Other impact assessments (such as a social impact assessment) might also be required
 - regimes for the protection of Indigenous heritage vary significantly between jurisdictions. They differ in terms of what heritage is protected, how it is protected, whether consultation is conducted, and who decides whether an activity can go ahead when, for example, harm to an Indigenous heritage site cannot be avoided
 - when a major project proposal impacts on habitat, biodiversity or native vegetation, a range of legislation is in place to regulate these impacts. Proponents of major projects might be required to obtain a permit, enter into an environmental management plan and/or comply with other specific requirements.

Mechanisms to facilitate a major development through the regulatory process

Given the potentially significant impacts of a major development, the regulatory requirements that a proponent must meet are extensive. The complexity of the system is in part a legacy of incremental modifications to the planning laws that have accumulated over time, and is compounded by the need to obtain approvals from multiple regulators within a jurisdiction and between jurisdictions.

Understanding how the system functions as a whole, and what specific requirements are needed, can be challenging. This can still be the case for major project proponents, which are usually well-resourced companies or government agencies with significant technical expertise in managing DAA processes. To deal with this complexity, all Australian jurisdictions have put in place mechanisms designed to guide and facilitate a major project proponent through the regulatory process.

Specifically, governments have established dedicated DAA legislation that provides a streamlined assessment pathway for major project developments of particular significance (economic or other) for the State or Territory. Another approach has been to apply regular DAA processes, but to establish specific administrative arrangements and special units within government to coordinate the various licensing agencies involved in the approval process. These approaches are not mutually exclusive, and some jurisdictions use both. Bates (2010) calls these approaches ‘fast-track’ mechanisms.

3.2 How are major projects assessed and approved?

The DAA processes for major projects vary significantly within and between jurisdictions. Notwithstanding this, there are four broad stages of a major project DAA process common to all jurisdictions: application, assessment, approval and monitoring (box 3.5).

The Commission has developed ‘good practice’ regulatory principles against which the four stages of the DAA process are assessed (chapter 1).

The Commission’s assessment — set out in subsequent chapters — indicates that the building blocks of a sound major project regulatory system are in place, there is substantial scope for improvement at each stage of the DAA process. The Commission has identified leading practices which, if implemented, would improve Australia’s major project regulatory framework.

Application stage

The application stage for a major project includes: the upfront provision of information and guidance on the regulatory framework and requirements; decisions on the regulatory pathway(s) that a project will be subject to; and consultation on the scope of any assessments (such as for environmental, heritage and social impacts). Determining the regulatory pathway that a major project will be assessed under depends on whether a development is declared a major project, or is subject to special legislation, state agreements, or specific arrangements for public projects.

Declaration of a major project

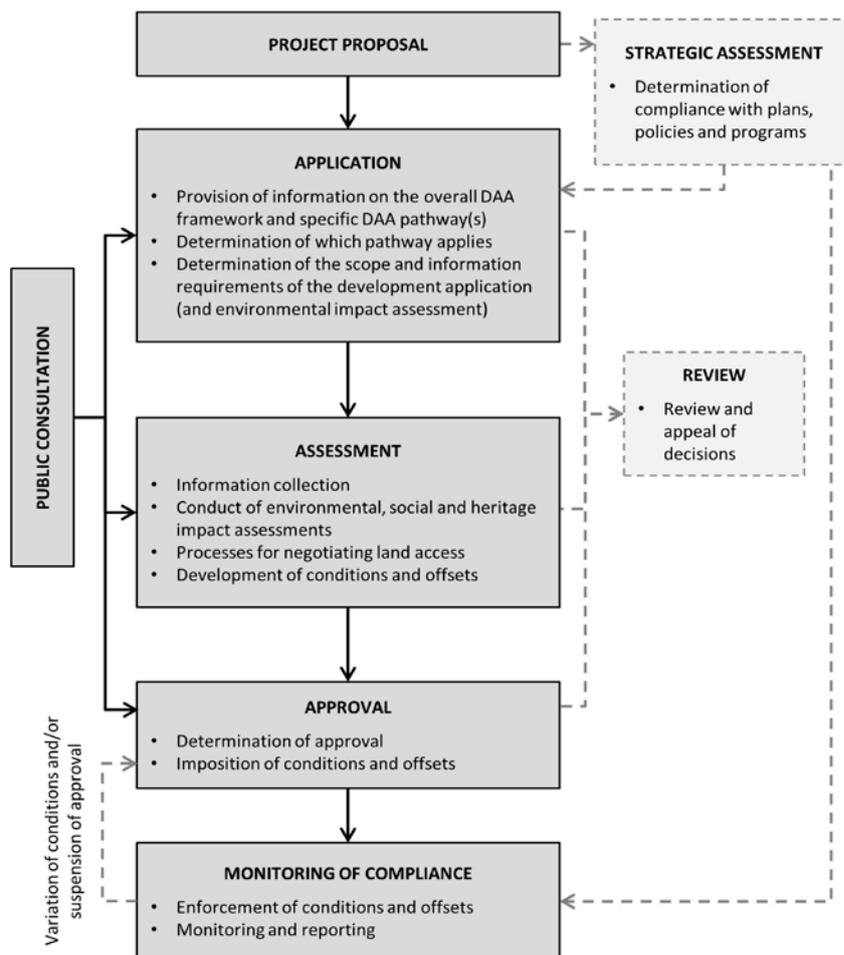
For a development to be declared a major project and assessed under a major project pathway, it must meet the criteria for a ‘major project’ as set out in the legislation. These criteria or triggers differ between jurisdictions (box 3.6).

Box 3.5 The four stages of the major project DAA process

There are four stages of the development assessment and approval (DAA) regulatory process.

- *Application*: a project needs to be declared a major project to be assessed under a 'fast-track' pathway (otherwise the regular planning and approval processes apply). The choice of pathway determines what requirements the project must meet.
- *Assessment*: the impacts of the project are assessed, public consultation is conducted, and the material provided to the regulator, which provides advice and recommendations to the decision maker on whether the project should proceed.
- *Approval*: the decision maker decides whether or not to approve the project and, if so, with what conditions.
- *Monitoring of compliance*: the regulator assesses the proponent's compliance with the conditions on an ongoing basis.

Not all of these activities necessarily apply in every Australian jurisdiction or to all assessment and approval processes.



Box 3.6 Triggers for declaring a major project

- In some jurisdictions, special assessment pathways are triggered by the capital value of the project. For example, in New South Wales, a project will be declared a 'state significant development' if it falls into one of 24 development classes and has a capital value greater than \$30 million. Similarly, Western Australia has a separate pathway for major developments (based on their size, complexity, or impact) which triggers the Lead Agency framework.
- Other jurisdictions adopt the subjective criteria of whether the project is sufficiently 'significant', 'important' or 'complex'. In South Australia, a project may be declared a 'major development' if it is of major environmental, social or economic importance. In Queensland, a 'coordinated project' will be declared if it has complex approval requirements; strategic significance to a locality, region, or the State; significant environmental effects; or significant infrastructure requirements.
- Some pathways are triggered by projects of a particular type. For example, in Victoria, a project might be declared a 'major transport project' if it comprises road, rail or other infrastructure that can be used for the movement of persons or goods, a port, or a facility at which goods can be transferred or temporarily stored.
- Ministerial discretion can play a role in many of these triggers, both in determining whether certain criteria are met, and in deciding whether to declare a project (when it meets, or even if it does not meet, the criteria). For example, Victoria and the ACT rely on the Minister 'calling in' a project to assess and approve it.
- The Australian Government does not have a dedicated major project assessment pathway. However, it has a Major Project Facilitation Program. To access this program, a project must either: significantly boost Australian industry innovation; have significant net economic benefit for regional Australia; or have an estimated investment in excess of \$50 million and make a significant contribution to economic growth, employment and/or infrastructure. Further, under the *Airports Act 1996* (Cwlth), development carried out at an airport site is generally defined as 'major airport development' if the cost of construction exceeds \$20 million, is likely to impact noise exposures or flight paths, or is likely to have a significant environmental impact.

Source: Appendix C.

Despite the establishment of a major projects pathway, the Minister may still have a reserve power to call-in a development application and decide the application in place of the nominated assessment manager, or declare that the project will be assessed under a particular pathway. For example:

- in Queensland, the Minister has broad call-in powers, which allow him or her to assess and approve the project. When the power is exercised, the Minister is required to table a report in Parliament
- in Victoria, the broad exercise of the ministerial call-in power is governed by guidelines set out in statute

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- in South Australia, the Minister has discretion to declare that a project will be assessed under one of the major project pathways.

Special legislation and state agreements

Another way for governments to facilitate major projects is to enact special legislation. This may be used in many situations, for example, where a ‘government wishes to make contractual arrangements with a developer guaranteeing capital investment and employment in return for supply of resources and infrastructure’ (Bates 2010, p. 293). This legislation constitutes the major project DAA process and contains the conditions of approval.

State agreements are a form of special legislation. For example, in Western Australia, state agreements:

... are used to foster major developments, including mineral, petroleum and related downstream processing proposals, together with associated infrastructure investments. Such proposals require long-term certainty, extensive or complex land tenure and are often located in relatively remote areas of the State requiring significant infrastructure development. (DSD (WA) 2012)

State agreements and special legislation are used for many different types of projects, including major projects. For example:

- Western Australia has 62 state agreements for a wide range of industries, including alumina, oil, salt, mineral sands, gas, uranium, iron ore, diamonds, railways, silicon, and industrial lands
- Victoria relied on special legislation for an urban road development: *Eastlink Project Act 2004*, and to facilitate creation of the Docklands precinct: *Docklands Act 1991*
- Tasmania relied on special legislation for the Bell Bay pulp mill: *Pulp Mill Assessment Act 2007*
- Queensland has at least 13 coal, aluminium and nickel mines under state agreements, as well as for other projects, such as the *Gladstone Power Station Agreement Act 1993*.

Public projects

Many jurisdictions have specific major project DAA pathways for major projects where a government agency is the proponent.

- In New South Wales, specific provisions apply to state significant infrastructure, critical state significant infrastructure, and Crown development. Reforms have

been proposed that would allow deemed approvals for public priority infrastructure identified in strategic plans in high-growth areas (NSW Government 2013).

- South Australia has different assessment tracks for Crown infrastructure (public) and major developments (primarily private).
- In Queensland, the *Transport Infrastructure Act 1994* governs certain kinds of public projects, such as ports.
- In Victoria, Major Projects Victoria has a facilitative role for public projects, and the *Major Transport Projects Facilitation Act 2009* covers some government-funded transport infrastructure projects.

Application stage processes are discussed further in chapter 5.

Assessment stage

After the major project DAA pathway has been determined, the expected impacts of a proposed major project are assessed. This involves one or more assessment processes of varying focus and scope.

For example, a project might require an EIA. An EIA is a systematic process for the examination and evaluation of the environmental effects of proposed activities that can be used to inform decision makers about the environmental impacts of the proposal and how they will be managed (Bates 2010) (box 3.7). If an EIA is required, the assessment manager will have to determine the scope of the EIA by developing terms of reference (which may involve public consultation). Other assessment processes that might apply include assessments related to heritage matters, Indigenous land rights and native title, and social impacts on local communities.

It is common practice for major project assessment processes to focus on the impacts of a proposed development on a range of matters, and options for avoiding, managing and mitigating impacts. Often, input-output modelling is used to estimate, for example, the impact of a proposed project on local and broader levels of economic activity. This is distinct from a cost-benefit analysis approach, which focuses on assessing the net benefit to the community of a project proceeding. That said, there is evidence that New South Wales is moving in the direction of greater use of economic analysis — draft guidelines have been released which include an optional cost-benefit analysis for coal and coal seam gas projects on strategic agricultural land (Economists at Large, sub. 13; Economists at Large and The Australia Institute, sub. DR83).

The way the assessment stage is managed varies between jurisdictions. For example, the New South Wales Department of Planning is responsible for conducting an integrated assessment for state significant development and state significant infrastructure. Where relatively integrated assessment arrangements apply, other agencies might participate in the process through referral arrangements. For example, the assessment authority may be required to seek input from agencies that have responsibility for particular project impacts, such as heritage issues or the management of a forest reserve. Referral agencies might provide advice, suggest conditions, or in some cases, mandate conditions.

Box 3.7 The environmental impact assessment process

An environmental impact assessment (EIA) generally incorporates most, if not all, of the following procedural steps.

- *Referral*: A referral of an activity of potential environmental significance to a decision maker for a decision as to the need for an EIA or some alternative form of documentation. This decision will be made on whether the proposed activity is likely to significantly affect the environment or whether the proposed activity is on a list of activities for which an EIA is required.
- *Terms of reference for the EIA*: A scoping procedure by which the range of matters required to be addressed in an EIA is defined in some detail with reference to the circumstances surrounding the particular proposed activity.
- *Impact analysis*: The impacts mentioned in the terms of reference are assessed.
- *Consultation with relevant government agencies and the public*: This is often connected to an obligation to revise the draft EIA so as to respond to comments received.
- *Assessment and determination*: A review of the final EIA by the assessing authority, which usually results in recommendations being made to the decision maker for the development or activities as to whether the proposal should be given consent and on what conditions.
- *Monitoring*: Monitoring of the development, which involves conditions which operate after an activity has commenced so as to measure the accuracy of predictions made in an EIA and promote adaptive management.

Source: Bates (2010).

In other jurisdictions, assessment arrangements are more disparate and a number of stand-alone assessment processes apply, such as occurs in Victoria. Governments have established various administrative arrangements to help coordinate these assessment processes (chapter 6).

Approval stage

Once the assessment process is complete, a decision as to whether to approve the project is made. Under some major project DAA pathways and for some types of projects, a project can be approved by the same agency that conducted the assessment. In other cases, the assessment authority makes recommendations to an approval body (most often a Minister or delegate), which approves the project and finalises any conditions attached to the project. The power of the approval authority to vary the conditions of the assessment authority or referral agency varies between jurisdictions. For example, in Queensland, the Coordinator-General conducts the EIA and imposes conditions which the approval authority must accept if the project is approved.

These arrangements are discussed further in chapter 7.

Secondary approvals

In addition to the primary approval for the project to go ahead, there may also be a number of licences or secondary approvals of works or management plans required, which can also contain conditions. For example:

- It is not uncommon for major projects to need 70 different primary and secondary approvals, licences, permits and authorisations (Business Council of Australia, sub. 43).
- A Productivity Commission review (2009b) of the upstream petroleum sector found a single liquefied natural gas project could require up to 390 regulatory approvals.
- Anglo-Gold Ashanti required 66 approvals (both primary and secondary) for its Tropicana Gold Mine (pers. comm., 4 June 2013).
- Dredging Moreton Bay to build a new runway at Brisbane Airport required a number of secondary approvals (table 3.2) in addition to the consent to allow the project to proceed (under the *Airports Act 1996* (Cwlth), EPBC Act, and the *Environmental Protection Act 1994* (Qld)).
- The Port Phillip channel deepening project was subject to 79 different pieces of legislation and relevant policies under which a number of primary and secondary approvals were required (DTF (Vic) 2008) — for example, some secondary approvals were required under ports and freight legislation and policy (box 3.8).

Table 3.2 Secondary approvals relevant to dredging Moreton Bay to build a runway at Brisbane Airport

<i>Approval</i>	<i>Administering agency^a</i>	<i>Legislation</i>
Permission to enter and use marine park	Environmental Protection Agency (Qld)	<i>Marine Parks Act 2004</i> Marine Parks Regulation 1990 Marine Parks (Moreton Bay) Zoning Plan 1997
Approved dredge management plan	Environmental Protection Agency (Qld)	<i>Coastal Protection and Management Act 1995</i>
Registration certificate for environmentally relevant activity	Environmental Protection Agency (Qld)	<i>Environmental Protection Act 1994</i>
Permit to occupy	Department of Natural Resources and Water (Qld)	<i>Land Act 1994</i>
Development permit for material change of use	Brisbane City Council	<i>Integrated Planning Act 1997</i> Integrated Planning Regulation 1998
Development permit for operational works	Brisbane City Council	<i>Integrated Planning Act 1997</i> Integrated Planning Regulation 1998
Development permit for operational works (tidal works or prescribed tidal works)	Brisbane City Council Environmental Protection Agency (Qld) Maritime Safety (Qld) Queensland Harbour Master Port of Brisbane Corporation	<i>Coastal Protection and Management Act 1995</i> and Regulations <i>Integrated Planning Act 1997</i> Integrated Planning Regulation 1998 <i>Transport Operation (Marine Safety) Act 1994</i> <i>Transport Infrastructure Act 1994</i>
Development permit for operational works (the removal, destruction or damage of a marine plant)	Department of Primary Industries and Fisheries (Qld)	<i>Fisheries Act 1994</i> <i>Integrated Planning Act 1997</i> Integrated Planning Regulation 1998 <i>Transport Operation (Marine Safety) Act 1995</i> <i>Transport Infrastructure Act 1994</i>
Development permit for operational works involving interference with quarry material on state coastal land in a coastal management district	Environmental Protection Agency (Qld)	<i>Fisheries Act 1994</i> <i>Integrated Planning Act 1997</i>
Placement of dredge pipeline and construction of an access track on the land and construction of a culvert under the proposed taxiway link	Department of Transport and Regional Services (Cwlth) Airport Building Controller and Airport Environment Office (Cwlth)	<i>Airports Act 1996</i> Airport (Building Control) Regulation 1997 Airport (Environmental Protection) Regulation 1997

^a Agencies current as at 2007.

Source: Based on Brisbane Airport Corporation (2006).

Box 3.8 Resource conservation and management legislation and policy relevant to the Port Phillip channel deepening project

- *Fisheries Act 1995 (Vic)*
- *National Parks Act 1975 (Vic)*
- *National Parks (Marine National Parks and Marine Sanctuaries) Act 2002 (Vic)*
- *Crown Land (Reserves) Act 1978 (Vic)*
- *Flora and Fauna Guarantee Act 1988 (Vic)*
- *Wildlife Act 1975 (Vic)*
- *Water Act 1989 (Vic)*
- *Water Industry Act 1994 (Vic)*
- *Catchment and Land Protection Act 1994 (Vic)*
- *Land Act 1958 (Vic)*
- Victoria's Biodiversity Strategy 1997
- Victoria's Native Vegetation Management: A Framework for Action 2002.

Source: Department of Treasury and Finance (Vic) (2008).

Conditions and offsets

Approval conditions are a necessary and appropriate feature of the major projects regulatory framework. Conditions are used to avoid or mitigate adverse project impacts and ensure regulatory objectives are achieved. How effectively conditions achieve their regulatory goals depends on the processes used to determine how they are set, reviewed and complied with.

Offsets are a particular type of environmental condition. Broadly interpreted, they are measures that are intended to counter or compensate for the adverse impacts of a development on the environment. For example, under the Queensland Government's offsets policy, *Offsets for net gain of koala habitat in South East Queensland*, a proponent is required to deliver the equivalent of five new koala trees for every non-juvenile koala tree removed.

Conditions and offsets are discussed in more detail in chapter 8.

Review and appeal

Review and appeal processes can allow proponents, participants in the public consultation process, and/or members of the community, to appeal a major project DAA decision. The persons that can bring a review application differ between

jurisdictions, and review rights for major projects are typically more limited than review rights for ordinary developments.

There are two types of review available. The first type is a *merits* review which allows the decision made by the original decision maker to be challenged. In this case, a review body looks at whether the decision was the ‘correct or preferable’ one. Merits review can be limited in different ways, such as by restricting the matters or materials the review body can consider (*limited merits* review).

The second type of review is a *judicial* review. It seeks to determine if a decision was lawful, but not whether a preferable decision was available. This is more restrictive in scope than a merits review because it looks at the legality of the decision-making process, rather than the outcome of the decision itself.

Review processes are discussed further in chapter 9.

Monitoring of compliance and enforcement

Monitoring of compliance and enforcement arrangements varies between projects, by jurisdiction, and depending on the type of conditions imposed on a project. Given that a project will usually be required to obtain a number of primary and secondary approvals, multiple compliance activities might be required. Regulatory agencies generally rely heavily on self-reporting by project proponents, backed up by audits required by regulators’ compliance policies or programs. In some jurisdictions, the regulatory functions are separate from the policy ones, while in others they are not. Many jurisdictions allow members of the public or other parties (such as local government bodies) to bring an action in the court to enforce conditions that have been breached by project proponents.

Monitoring of compliance with approval conditions and enforcement is discussed further in chapter 10.

Public participation

The stakeholders involved in the major project DAA process are regulators, project proponents, other businesses (such as users of infrastructure) and communities. Different forms of public participation can occur between these stakeholders. The most widely acknowledged form of public participation is public consultation with communities. Public consultation increases transparency of decision making, builds public confidence in the decision-making process, increases the information

available to decision makers, and helps regulators to balance competing interests. Participation in the public consultation process can also give rise to appeal rights.

Most commonly, public consultation occurs when a proponent has submitted the EIA to the regulator and communities have the opportunity to comment on it. Some jurisdictions also allow communities to participate in the development of the terms of reference for the EIA. In addition, it is possible for public consultation to occur outside the project-specific DAA process; for example, in the development of strategic plans or strategic assessments.

The different types of consultation at particular stages of the major project DAA process and their interactions with other parts of the process are discussed in chapters 5, 9, and 11.

Strategic assessment and planning

The stages of major project DAA processes focus on assessing individual projects, but there are also broader approaches that take a higher-level view of the development.

Strategic assessment is a tool that focuses on the potential impacts of plans, policies and programs, rather than individual projects. As such, it can reduce or even remove the need for subsequent project-level assessments. Under the EPBC Act, the Australian Government has the power to conduct strategic assessments with State and Territory Governments, or with other partners, such as mining companies. To date, five strategic assessments have been completed and a further ten are in progress, including one for the Great Barrier Reef (that is being jointly undertaken by the Queensland Government and the Australian Government Great Barrier Reef Marine Park Authority) (consultation draft released November 2013).

Strategic assessments conducted under the EPBC Act can also remove the need for further Commonwealth approval of some subsequent specified actions, meaning that, to a significant extent, the effect is the same as a limited approval bilateral (chapter 7). State and Territory Governments can also conduct strategic assessments of various types.

Strategic planning is another tool that helps to:

- improve the way major project DAA processes operate
- indicate broad community preferences for the location of particular types of developments
- consider environmental, heritage and other values.

Strategic planning is ‘a way of achieving a balance between conflicting objectives or priorities and resolving the conflicts between economic, social, environmental and cultural imperatives’ (DAF 2001, p. 8).

Strategic planning documents set out what the ground rules are for the use, development, and/or conservation of land (DAF 2001). Where such plans are underpinned by community consultation and consideration of environmental, heritage and other values, they can help proponents of major projects design proposals that are likely to be less contentious and have fewer assessment issues.

Approaches to strategic planning vary greatly between jurisdictions, but there are several common types of plans (PC 2011c):

- high-level strategic plans, which indicate goals and set the direction for development in a particular region or state
- metropolitan land use plans (often described as strategic spatial plans, because they define land uses for certain areas, as well as goals and policies)
- infrastructure plans, which are necessary to facilitate desired land uses.

Strategic assessment and strategic planning are discussed further in chapter 11.

4 Regulatory objectives

Key points

- The main aims of development assessment and approval (DAA) regulations and processes are to promote safe and orderly development while mitigating associated risks to environmental, cultural and Indigenous heritage assets.
- Clear and consistent regulatory objectives that reflect the preferences of the community are a prerequisite for a well-functioning regulatory system.
- The policy and regulatory objectives that impact major project DAA processes across jurisdictions are not always well defined and sometimes overlap. This can produce conflicting outcomes. Guidance on how decision makers are to weigh and balance objectives is also inadequate.
- Better specified objectives would provide greater certainty to proponents and help simplify DAA processes for all stakeholders.
- Better guidance about how to balance competing objectives and how to interpret ecologically sustainable development would assist decision makers and improve understanding of the DAA system among proponents and the community.

This chapter examines and evaluates the clarity, consistency and guidance provided on the regulatory objectives of planning and policy frameworks relevant to major project development assessment and approval (DAA) processes.

Regulations with clear and consistent objectives are likely to better target the policy issues at hand and be easier to understand. Clear objectives, by constraining discretion and providing a transparent base for evaluation, also improve the accountability of regulators and reduce the scope for regulatory creep.

In order to analyse objectives at a jurisdiction level, the Commission has examined objects clauses in key legislation (that is, primary planning legislation pertaining to the most utilised major project assessment pathways, and primary environmental protection legislation). The mission statement or ‘vision’ of the primary assessment agency was also examined.

The Commission has made a high-level assessment of selected jurisdictional regulatory objectives and has identified and evaluated two key issues: the level of clarity and consistency of core objectives; and the potential scope for better guidance on balancing competing objectives.

4.1 Overview of jurisdictions' DAA objectives

There is a plethora of legislation that potentially applies to major projects. As an illustration, the Victorian Government has reported that its Port Phillip channel deepening project had to comply with around 79 pieces of State or Federal legislation or policies (DTF (Vic) 2008). Much of this legislation targets multiple objectives. Against this backdrop, table 4.1 details a snapshot of selected legislative objects, to illustrate the wide range of legislative objects contained in key major project DAA legislation. The overarching objectives of planning legislation primarily revolve around ensuring safe and orderly development, while those of environmental protection legislation primarily revolve around promoting ecologically sustainable development (ESD).

Why are clear and consistent objectives important?

One of the key elements of leading practice policy making is a specific and clear statement of objectives (PC 1999). Clear objectives, roles and responsibilities signal to those who operate within the regulatory system what they need to do to achieve the government's policy goals. Further, it is difficult to evaluate regulatory outcomes without a clear statement of what the regulation was meant to achieve (VCEC 2011) — thus, measurable objectives contribute to greater clarity of purpose and accountability (PC 2005). If objectives are ambiguous or difficult to measure they may only be partially met or not achieved at all.

Most legislation contains an objects clause. Commonly, DAA regulators are required to 'have regard to' their Act's objects in framing decisions. Some objects clauses also require decision makers to 'further' the objects. Interpretation Acts across jurisdictions commonly state that an interpretation that promotes the objects is to be favoured over one that does not.

Properly drafted, objects clauses provide guidance to regulators on the interpretation of legislation, promote consistent decision making, and aid transparency, accountability and probity. Objects clauses can also support outcome-based regulation, and help promote clarity and certainty for proponents (by narrowing regulators' discretion in interpretation and reducing the risk of regulatory creep — which is where the administration of law diverges from the intent of parliament over time).

Table 4.1 Selected legislative objects applying in key DAA legislation across jurisdictions^a

<i>Objective</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>	<i>Cwth</i>
Promoting proper, safe and/or orderly development	✓	✓		✓		✓	✓	✓	✓
Supplying utilities/infrastructure and linked services	✓	✓	✓			✓			
Housing choice or affordable housing	✓		✓	✓					
Enhancing/protecting amenity or form of built environment			✓	✓			✓		
Sustainable development, ESD or Sustainable resource use	✓		✓	✓	✓	✓		✓	✓
Protecting environment/endangered species and critical habitat	✓	✓			✓		✓	✓	✓
Using precautionary principle			✓	✓	✓	✓		✓	✓
Conserving heritage		✓		✓		✓			✓
Waste management and/or minimisation			✓		✓	✓			
Avoiding climate change, urban congestion			✓						
Community participation	✓		✓	✓		✓	✓		✓
Indigenous participation			✓						✓
Protecting interests of future generations		✓	✓		✓	✓		✓	✓
Promoting social and economic welfare of the community	✓	✓		✓		✓			
Providing community services and facilities and/or land for public purposes	✓					✓			
Sharing of responsibility across levels of government/integration of policies/strategic planning at different levels	✓	✓	✓			✓	✓		
Accountable, coordinated and efficient processes		✓	✓				✓		✓
Establishing planning system elements/achieving other planning objectives		✓		✓	✓	✓			✓
Ensuring compliance and enforcement		✓		✓					
Providing for compensation on just terms		✓							

^a (✓) signifies at least one piece of DAA legislation has this objective within the jurisdiction, as assessed by the Commission. List based on key major project DAA legislation examined in table 4.2. Other objectives may or may not apply.

The study has heard from stakeholders many examples of the fundamental role that clear legislative and regulatory objectives play in DAA processes, and the consequences when clarity is absent. For instance:

Clarity and consistency of regulatory objectives is paramount to a well-functioning regulatory system. Lack of clarity and inconsistency leads to poor decision making, unnecessary regulatory burdens, lost time, increased cost and lack of confidence by the industry and community. (Master Builders Australia, sub. DR80, p. 2)

Similar concerns were expressed by the Queensland Resources Council (QRC):

Failing to articulate clear regulatory objectives is a common shortfall ... The added complexity for regulations without clear objectives is they create a tendency to over-condition to the highest possible risk. (sub. DR91, p. 2)

The Australian Network of Environmental Defender's Offices (ANEDO) also said:

A fundamental problem with Australia's planning systems is the lack of clear and consistent regulatory objectives. This reduces the likelihood of balanced, 'triple bottom line' decision making. (sub. 14, p. 13)

Further, a number of participants in this study argued that DAA regulations often tried to achieve too many objectives, and created overlapping requirements. For example, the Australian Petroleum Production and Exploration Association noted:

Australia's environmental regulatory framework contains numerous overlapping, excessive and inconsistent requirements that are causing unnecessary project delays and costs. The legislation does not always clearly define or achieve its objectives, or add any additional benefit to the Australian economy. (sub. 17, p. 2)

Xstrata Coal was also concerned about overlapping objectives:

The regulatory objectives of major project DAA processes often overlap with the objectives and controls imposed by other State legislation relating to protection of the environment and the built environment ... These overlapping objectives mean that various State Government agencies have the power to impose assessment requirements and compliance requirements in relation to the same issue but with different outcomes. (sub. 50, p. 42)

Such inconsistencies can arise where policy objectives are not well integrated, leading to objectives that conflict with one another or overlap. Alternatively, objectives that appear distinct may in practice create overlapping compliance obligations. For example, multiple regulators might require similar surveys or management plans to meet similar objectives.

When objectives are unclear, multiple, and conflicting they necessitate decisions on what objectives to prioritise and what tradeoffs need to be made to achieve these objectives (PC 2011b). This can be problematic because legislation is promulgated by parliament but interpreted and applied by regulators and by courts. When it is not clear what parliament intended to achieve, this separation of responsibility can lead to conflicting interpretations (Brown, Stern and Tenenbaum 2006), frustrate the purpose of parliament and generate uncertainty for proponents.

This uncertainty is particularly undesirable because Ministers, as elected representatives accountable to the public, should be responsible for arbitrating the tradeoffs that are inherent in the objectives of legislation applying to approvals.

Unelected bodies (such as regulators or merits review tribunals) are not appropriate bodies to decide how to prioritise objectives or what tradeoffs to make to achieve these objectives, as there is no guarantee that these tradeoffs will reflect the will of parliament (PC 2011b; Peterson 2006).

Current reforms to objectives

Against the backdrop of the *Warkworth* case (box 4.1), the New South Wales Minister for Planning has recently progressed reforms to the objectives of the State's planning system. The measures include:

- amending the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries)* to reflect that economic benefits are the 'principal' consideration when approving a mine (Clayton Utz 2013b)
- proposing to amend ESD in the planning legislation by deleting mention of the precautionary principle and intergenerational equity and renaming the concept 'sustainable development'. Clayton Utz suggests this subtle change shifts the emphasis 'towards economic development' slightly (2013a).

Box 4.1 Balancing objectives in DAA decisions — the Warkworth case

Warkworth, an April 2013 decision of the New South Wales Land and Environment Court, illustrates how material the balance struck between objectives by decision makers can be for major project approvals.

The case involved a merits review of an approval of an extension to an existing open cut coal mine. Chief Judge Preston overturned the approval and found that:

- the project's economic and social benefits were insufficient to outweigh its significant and unacceptable environmental, noise and social impacts
- mitigation strategies and proposed conditions were inadequate
- there were limitations in the benefit–cost analysis and choice modelling, including inadequate consideration of intergenerational equity — a component principle of ecologically sustainable development (a relevant legislative object).

Both the proponent and the Minister for Planning have appealed the decision, but (at the time of writing) judgment has been reserved.

Source: Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited (April 2013) NSWLEC 48.

4.2 Evaluating objectives

The Commission has evaluated the objects clauses in key planning and environment laws across Australian jurisdictions and identified the principles and approaches listed in box 4.2.

Box 4.2 **Leading practice principles for objects clauses**

There are several principles and approaches that the Commission has identified as associated with leading practice objects clauses:

- **Clarity** — objects are specified, including for major project pathways. The language used allows a reasonable person to understand the objective. Key terms are defined and consistently applied across key legislation (for example, within the main planning and environmental protection legislation).
- **Brevity** — an overarching objective is specified (with a limited number of secondary objectives); alternatively specific objectives are concise (not unwieldy). Redundant or related and overlapping objectives are removed.
- **Consistency** — objectives are broadly aligned (that is, not in obvious conflict) across significant legislation.
- **Accountability and transparency** — key administrative output criteria for relevant agencies are aligned with objectives, with associated reporting requirements in place.
- **Measurability** — where possible, objectives set out defined, measurable outcomes.

In the Commission’s judgment, no one jurisdiction stands out as leading practice against these principles — all jurisdictions have scope to improve the clarity and consistency of objectives. Specifically, not all Acts include objects or purpose clauses. For those that do, many clauses could be briefer — some cover multiple pages — and in many cases key terms are insufficiently defined. This can complicate the task of decision makers, who may have to weight tens of insufficiently defined objects. Additionally, some clauses list objects that are arguably better dealt with in other laws or regulations, or are implied in other objects. For example, objects to promote orderly economic development and the protection of the environment are implied in ESD, another common object.

Further analysis of jurisdictions against selected leading practices is detailed in table 4.2. While there is substantial scope for improvement, this analysis shows some jurisdictions approach leading practice in some aspects. For example, key legislation in Queensland has a primary objective, Tasmania specifies a consistent schedule of objects across its legislation, and in New South Wales, planning and environmental assessment processes are incorporated in one Act, promoting consistency of objects.

Table 4.2 Evaluation of key objects clauses from DAA legislation against four leading practices^a

<i>Legislation</i>	<i>Primary objective or clear order of objects</i>	<i>Key objects or terms shared across key laws</i>	<i>Agency mission broadly reflects key objects</i>	<i>Agency reports against objects in annual report</i>
NSW <i>Environmental Planning and Assessment Act 1979</i>	x	✓	x	x
Vic <i>Planning and Environment Act 1987</i>	x	x	x	x
<i>Major Transport Projects Facilitation Act 2009</i>	✓	x	x	x
<i>Environment Effects Act 1978</i>	-	-	-	-
Qld <i>Sustainable Planning Act 2009</i>	✓	x	x	x
<i>State Development and Public Works Organisation Act 1971</i>	-	-	-	-
<i>Environmental Protection Act 1994</i>	✓	x	✓	x
SA <i>Development Act 1993</i>	✓	x	x	x
<i>Environment Protection Act 1993</i>	x	x	x	x
WA <i>Planning and Development Act 2005</i>	x	x	x	x
<i>Environmental Protection Act 1986</i>	✓	x	x	x
Tas <i>State Policies and Projects Act 1993</i>	x	✓	x	x
<i>Land Use Planning and Approvals Act 1993</i>	x	✓	x	x
<i>Major Infrastructure Development Approvals Act 1999</i>	x	✓	x	x
<i>Environmental Management and Pollution Control Act 1994</i>	x	✓	x	x
NT <i>Planning Act</i>	✓	x	x	x
<i>Environmental Assessment Act</i>	x	x	✓	x
ACT <i>Planning and Development Act 2007</i>	✓	x	x	x
<i>Environment Protection Act 1997</i>	x	x	x	x
Cwth <i>Environment Protection and Biodiversity Conservation Act 1999</i>	x	x	x	✓
<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>	✓	x	✓	✓

^a (✓) yes; (x) no; (-) Act has no primary objects or purpose clause to examine. As assessed by the Commission, based on relevant DAA legislation, agency annual reports and websites.

Reflecting on international experiences, some stakeholders highlighted the *New Zealand Resource Management Act 1991* as an example of an Act with a primary object and hierarchy of related objects; although others expressed concerns about how the Act operates in practice (box 4.3).

Box 4.3 New Zealand's Resource Management Act 1991 objects

The Act has a single primary object: 'to promote the sustainable management of natural and physical resources'. In executing the Act, decision makers must then 'recognise and provide for' seven matters of national importance (including protecting Indigenous rights and historic heritage). 'Particular regard' must also be exercised in relation to 11 further matters (including the effects of climate change and the enhancement of amenity).

The Act thus specifies a hierarchy of related objects around a primary object.

New Zealand business has expressed reservations about uncertainties and costs the Act purportedly imposes. The New Zealand Productivity Commission has also criticised the Act for ambiguities around whether it:

... allows for the 'balancing' of socio-economic aspirations with environmental outcomes, or whether these provisions represent an 'environmental bottomline' that must be secured regardless of the social or economic cost. (2012, p. 150)

New Zealand courts have apparently adopted both interpretations, adding to the ambiguities. This emphasises the importance of clear and consistent objects, with guidance around how they may be applied.

4.3 Moving towards leading practice

Given the substantial scope for improvement, there are two steps jurisdictions can take to move towards leading practice objects clauses:

- review and rationalisation of regulatory objectives, so that they are more clear, concise, consistent, coherent and measurable
- providing guidance to regulators on how to balance competing objectives.

Review and rationalisation of objectives

A review and rationalisation of regulatory objectives as suggested in the Commission's draft report was supported by a number of stakeholders (Australian Local Government Association, sub. DR71; Planning Institute of Australia, sub. DR73; Chamber of Minerals and Energy of Western Australia, sub. DR85; General Electric, sub. DR89; QRC, sub. DR91; AGL Energy, sub. DR96; Origin Energy, sub. DR100; Tasmanian Department of Premier and Cabinet, sub. DR101).

In addition, many stakeholders specifically endorsed ecologically sustainable development as a primary legislative objective (Chamber of Minerals and Energy of Western Australia, sub. DR85; QRC, sub. DR91; ANEDO, sub. DR92; Nature

Conservation Council of NSW, sub. DR94; Nature Conservation Society of South Australia, sub. DR95; and Lock the Gate Alliance, sub. DR97).

Jurisdictions should also consider reviewing whether their stated legislative objectives align with intended policy outcomes. Specific methods to improve clarity and consistency include the following.

- Refining objects to include one succinct primary goal. Secondary objectives could flow from this primary goal. This would promote coherence, reduce ambiguity and increase the scope for regulators to be held more accountable for outcomes. It would also assist in reducing administrative overlap and compliance burdens.
- Where practicable, specifying consistent objectives across legislation. This might also involve considering how to manage competing objectives in interactions between different levels of government, and how, for example, planning objectives integrate with the regulatory objectives for major projects (Local Government Association of Queensland, sub. DR78, p. 2).
- Agency mission statements and key performance outcome measures could be better aligned with legislative objectives through, for example, reporting against objectives in the annual report. This requirement could also encourage further refining of objects over time, so they are more measurable.
- Use of memorandums of understanding (MOUs), where overlapping objectives result in conflicting administrative requirements across agencies, can help rationalise administration of DAA processes (South Australian State Government Departments sub. 51, p. 18). In the United States, MOUs are also used to help deal with interjurisdictional overlaps in objectives (appendix D). For example, the State of California and the United States Department of the Interior have MOUs in place.

RECOMMENDATION 4.1

Governments should review legislative and regulatory objectives across major project development assessment and approval processes within their jurisdiction to ensure that they are clear, consistent and coherent.

Provision of guidance

Guidance should be provided to decision makers (and made publicly available) on how objectives should be interpreted or how competing objectives should be balanced. Even where there is a publicly accountable ministerial decision maker, the provision of guidance helps ensure the will of parliament is achieved, increases consistency, transparency, probity and community understanding about regulation (ICAC (NSW) 2012; VCEC 2009).

The provision of guidance has been supported by a number of previous inquiries. For example, the Regulation Taskforce recommended:

Legislation should provide clear guidance to regulators about policy objectives, as well as the principles they should follow in pursuing them ... Guidance should be specific about what balance is required, where tradeoffs in objectives exist, and the need for risk-based implementation strategies. (2006, p. 161)

Similarly, the Commission's inquiry into the Urban Water Sector supported guidance:

Where conflicting objectives are considered unavoidable, regulators should be given clear guidance by government on how to prioritise objectives ...

... guidance on how to prioritise objectives should be given through a governance charter for utilities or through the inclusion of an overarching objects clause in regulatory acts. (2011b, pp. 268, 270)

A number of stakeholders supported clear guidance. For example, Xstrata Coal said:

... it is critical ... that agencies have clear guidance in relation to consistent application of relevant legislation to avoid [inconsistencies, inefficiencies and conflict between agencies in assessment and enforcement of approvals]. (sub. 50, p. 42)

The Brisbane City Council also noted uncertainty impacts:

Major projects benefit from clear guidelines on how a lead agent should manage competing or contradictory priorities ... Multiple assessment layers often leave the investor in the dark if economic, social and environmental priorities compete. (sub. 60, p. 2)

Notwithstanding the benefits of clearer guidance from elected representatives, some stakeholders expressed concern that it could result in some objects being advanced at the expense of others they favoured. The Lock the Gate Alliance noted they were:

... deeply concerned that the creation of guidelines ... will bias the major projects system even more decisively in favour of resource developments against other matters of public interest, like agricultural sustainability, biodiversity, public amenity, and health. (sub. DR97, p. 8)

Similar concerns were expressed by ANEDO, which was:

... concerned that existing assessment and approval processes emphasise short-term economic considerations over longer term social and environmental considerations. (sub. DR92, p. 11)

In the presence of multiple objectives, it is unsurprising stakeholders take differing views on the appropriate weight each should be given. Absent a clear hierarchy and guidance on weighting, this can present notable difficulties for decision makers, as is illustrated through an examination of the frequent DAA objective of furthering ESD.

Ecologically sustainable development

ESD is a widely specified objective applying to decision making on environmental impacts (box 4.4). Since the 1990s, much of Australia's environment, planning and natural resources management legislation has been amended to make ESD a key legislative object (Bates 2010; Godden and Peel 2010). Decision makers are generally required to 'encourage', 'promote' or 'have regard to' ESD.

However, the interpretation of ESD in the courts has been far from clear (Preston (NSW LEC) 2006). Given its multiple component principles and differing definitions in law, ESD appears insufficiently defined to allow a clear and common interpretation.

One potential reason for this is a lack of detailed guidance on how to apply it to decision making, and in particular, how to make tradeoffs between environmental, social and economic impacts. Justice Paul Stein (1999) usefully summarised many of the issues:

[The inclusion of ESD] principles in Australian legislation has been largely confined to objectives of statutes or agencies without any real guidance to decision makers as to whether and how to apply the core principles or what weight to give them. Moreover, some of the principles contain vague statements, some might call them aspirations, as well as ambiguities, inconsistencies and uncertainties. Difficulties of interpretation and application are manifest. There is even discussion on whether the principles are merely guiding or whether they are also operational. In these circumstances, who can blame the courts for proceeding, like the precautionary principle, with a degree of caution.

Box 4.4 **Ecologically sustainable development and related principles**

Ecologically sustainable development (ESD) and the related principles of intergenerational equity and the precautionary principle are important considerations in development assessment and approval decisions, given the role of ESD in relevant objects clauses.

When COAG endorsed the National Strategy for Ecologically Sustainable Development in 1992 it noted:

While there is no universally accepted definition of ESD, in 1990 the Commonwealth Government suggested the following definition for ESD in Australia: 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'. (1992b)

While subsequent legislative definitions applied across the States and Territories have varied, they commonly call for decision-making processes to integrate long- and short-term economic, environmental, social and equity considerations.

The four ESD implementation principles listed in the 1992 *COAG Intergovernmental Agreement on the Environment* are also commonly referenced:

- precautionary principle (where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation)
- intergenerational equity
- conservation of biological diversity and ecological processes
- improved valuation, pricing and incentive mechanisms.

Other principles, including encouraging public participation, access to information and the polluter-pays principle may also feature in development assessment and approval legislation.

Sources: Bates (2010); Australian Government (1992a, 1992b).

Consequently, there are notably diverging views on what ESD entails and how it should be operationalised. For example, one interpretational difficulty revolves around whether ESD implies a strong or weak sustainability constraint.

Strong sustainability holds that there is no (or notably constrained) substitutability between environmental and other types of capital, such as human, economic or social capital. This implies that future generations cannot enjoy increased wellbeing where there are declines in environmental capital (say through environmental degradation), even when other stocks increase. A number of stakeholders expressed views broadly consistent with this interpretation. The Blue Mountains Conservation Society, for example, argued substitution between domains is not possible:

A coal mine which destroys a town (a common proposal) can potentially develop economic capital, however it causes permanent irreversible damage to social capital.

While social and environmental capital are the foundation of all economic capital, the opposite is not true. However hard we may try economic capital can never restore social or environmental assets once they are lost. To borrow the analogy, the town is gone. (sub. DR86, p. 5)

That said, there are a range of views about strong sustainability:

Interpreted strictly, strong sustainability implies that every component of the environment and every species must be preserved indefinitely, and that it is ethically indefensible for future generations to be compensated for losses of natural capital via consumption of services from other forms of capital. This implies that a very high, potentially infinite, value is placed on these resources. Other views suggest that non-renewable and renewable forms of natural capital can be substituted for each other as long as the total stock of natural capital is maintained. (Markulev and Long 2013, p. 7)

Andrew Macintosh argues tradeoffs are necessary to make a strong sustainability approach operable:

This requires rules to be devised to determine what ecological processes and biophysical systems are ‘essential’, and what ecosystems, species and populations should be prioritised for protection. (Forthcoming)

In contrast, weak sustainability accepts that substitutability is possible between domains. For example, while environmental capital may be depleted, other forms of capital can be increased to restore the total capital stock left to future generations, and hence maintain or increase community wellbeing (Carmody 2012; Markulev and Long 2013). Stakeholder views broadly consistent with this perspective included the Business Council of Australia, which argued for ‘sustainable development’ objectives that ‘prioritise the investment and business activity needed to grow national wealth and achieve well-managed population growth’ (sub. 43, p. 13; pers. comm., 11 July 2013).

In addition, the Victorian Competition and Efficiency Commission (VCEC) has found that ESD principles can be consistent with conventional economic analysis, including the use of cost–benefit analysis. This is because cost–benefit analysis can integrate:

... economic, environmental and social (including equity) impacts, and account for the pattern of those impacts over time. Inter-generational issues can be explicitly considered and integrated where relevant through, for example, choice of discount rates and/or use of equity weights. (2009, p. 342)

Economists at Large and The Australia Institute (sub. DR83) strongly supported more robust and comprehensive use of cost–benefit analysis in major project DAA processes. They argued that such analysis should include costs and benefits accruing to all stakeholders and also attempt to quantify relevant non-market

environmental and social values. All three perspectives are broadly consistent with a weak sustainability interpretation, which does not rule out the possibility that tradeoffs can be made.

Andrew Macintosh, in examining the history and impact of ESD in Australia, concludes that some of ESD's imprecision may have even been a deliberate attempt to chart a course through such divergent views:

There have been improvements in environmental management since the advent of ESD but not because of it. ESD has been used as a rhetorical device with which governments and others have sought to nullify conflict and convey messages about their level of concern about environmental issues. When attempts have been made to institutionalise it, the principles have been kept at the highest level of abstraction. The experience with ESD in Australia is a standout example of how policy makers use ambiguity to limit conflict ... (Forthcoming).

Whatever views governments and societies take on these issues, it is likely that greater specificity and guidance around ESD would assist to clarify objectives and allow for greater accountability for outcomes. Specifically, guidance is needed on how to apply ESD to decision making, particularly in situations where tradeoffs between economic, environmental and social impacts are unavoidable.

Ideally, parliaments should outline an analytical basis to guide decision makers about making ESD tradeoffs between economic, environmental and social impacts. Guidance should also detail practical examples, as the VCEC has recommended:

... departments and agencies administering environmental regulation [should] prepare guidance for their staff on how to administer the regulation consistent with ESD principles. This guidance should include practical case studies relevant to the regulation and be released publicly ... (2009, p. 347)

Underlying the VCEC analysis was the contention that ESD canvasses high-level objectives that are hard to define for specific situations ahead of time. Thus ESD may be best incorporated into decision making by integrating it earlier into policy development or assessment processes. This is likely best achieved through practical guidance and tools to assist decision makers.

Delivering guidance

Despite the benefits of guidance on objectives, to date its use has been limited. Parliaments (or the executive) should therefore prioritise the development of guidance for regulators on how to achieve legislative objects. It is best practice for this guidance to be made public to promote transparency, certainty and accountability (PC 2005, 2011b).

It is important to note that some scope for administrative discretion should remain — the provision of guidance does not negate the need to exercise judgment (Business SA, sub. DR74, p. 2). Attempts to eliminate regulatory discretion would result in excessive prescription and remove the flexibility needed to take into account the circumstances of each case (Peterson 2006). The weight courts place on guidance varies between jurisdictions and, as a form of quasi-regulation, can also impose costs on businesses (PC 2012a). Consequently, efforts should ensure guidance is consistent with the law and periodically reviewed and updated to ensure it is accurate and complete.

There are a range of approaches that could be used to provide better guidance on balancing regulatory objectives. For instance, State and Territory Governments could consider the following.

- Implementing one succinct *primary policy goal* (or overarching legislative objective) for primary planning legislation applying to major projects.
- Promulgating an instrument which describes the framework for how decision makers are to balance development impacts across the social, environmental and economic domains.
 - The 2010 Intergenerational Report provides a possible framework, which jurisdictions could consider as a template (Australian Government, Swan and Treasury 2010).
 - Any guidance material could be complemented by practical case studies, to illustrate how balancing may occur.
- Additionally, other parts of the DAA process, such as improved strategic planning and strategic assessment (chapter 11), as well as meaningful public consultation (chapter 5), can also help provide guidance to decision makers on community preferences and how to manage tradeoffs effectively.

RECOMMENDATION 4.2

Where conflicting objectives are unavoidable, parliaments and governments should provide public guidance to their regulators with regard to the priority and weighting to be given to different objectives. A range of approaches may be appropriate, from the inclusion of an overarching policy goal in objects clauses, to the provision of guidelines on how tradeoffs are to be made between objectives.

5 The application stage

Key points

- The application stage for a major project involves the upfront provision of information and guidance on the development assessment and approval (DAA) framework and requirements, decisions on the regulatory pathway(s) a project will be subject to, and consultation on the scope of primary assessments (such as environment, heritage and social impact assessments).
- The Commission has identified at least 31 key pathways used across Australia to assess and approve major projects (26 are dedicated major project pathways, the remainder include Ministerial call-ins and regular development approval processes).
- Study participants have raised three issues regarding the application stage of the DAA process for major projects. These relate to:
 - a lack of upfront clarity and guidance on processes and requirements
 - excessive Ministerial discretion to declare a project into a regulatory pathway
 - limited early stakeholder participation in setting the scope of assessments.
- Recommendations to improve regulatory certainty, transparency and accountability at the application stage for major projects include:
 - provision of clear, upfront information and guidance on major project pathways, including on the processes, information requirements, assessment criteria, standard and model conditions and statutory timelines
 - use of statutory criteria to determine which pathway(s) apply to a given project
 - limited Ministerial discretion to declare a project into a pathway, and when used the Minister should follow guidelines and publicly report the reasons
 - early input by key stakeholders (including local governments, the public and proponents) to the draft terms of reference (TOR) of primary assessments
 - public reporting of all stakeholder input to the draft TOR, and the regulator's rationale for the final TOR of an assessment.
- A number of Australian jurisdictions have implemented (or are in the process of implementing) some of these 'leading practice' approaches to major project application.

The application stage of a development assessment and approval (DAA) process for a major project includes the upfront provision of information and guidance by governments and regulators on the policy and regulatory framework major developments face. Once a development has been proposed, the application stage typically involves decisions about which regulatory pathway(s) a project will be

assessed and approved under and the type of consultation between proponents, regulators and the public needed to inform the scope of ‘primary’ assessments (including environment, heritage and social impact assessments).

These processes assist proponents and others to understand the constraints on development activity in a particular region, and how major projects can be designed to ensure that regulatory objectives (such as those relating to the environment, heritage, health and safety and local communities) are achieved. This chapter examines the application stage processes in detail and makes recommendations to improve the certainty, transparency and accountability of the current arrangements.

5.1 Overview of the application stage

Assessment pathways applied to major projects

The Commission has identified at least 31 pathways used to assess major projects in Australia (table 5.1). These pathways typically encompass the main regulatory processes a major project is subject to (such as the primary development approval and environment assessment) but do not necessarily incorporate all assessments, approvals, authorisations, licenses and permits that may be needed (such as those relating to land access, water use and waste management).

Most jurisdictions have at least one of four types of dedicated major project pathways. These include:

- *generic pathways* applying to a range of project types — such as coordinated projects (Queensland) and major developments or projects (South Australia)
- *infrastructure pathways* designed to apply to large (predominantly public) infrastructure developments — such as major infrastructure projects (Tasmania) and Crown developments and public infrastructure (South Australia)
- *sector-specific pathways* used to assess major developments in particular sectors — such as mining and energy (South Australia) and major airport infrastructure (Commonwealth)
- *project-specific pathways* based on agreements or legislation — such as the *Natural Gas (Canning Basin Joint Venture) Agreement Act 2013* (Western Australia) and the *Adelaide Oval Redevelopment and Management Act 2011* (South Australia).

Table 5.1 Key regulatory pathways applied to major projects^a

<i>Jurisdiction</i>	<i>Pathway</i>	<i>Types of projects typically subject to the pathway</i>
New South Wales	State significant developments ^b	Projects greater than \$30 million (e.g. urban commercial and residential, resource and infrastructure projects)
	State significant infrastructure ^b	Large public infrastructure projects (e.g. road and rail)
	Critical state significant infrastructure ^b	State significant infrastructure declared as 'critical'
Victoria	Ministerial 'call-in' ^b	State significant projects requiring a planning permit or planning scheme amendment that are called-in by the Planning Minister (e.g. wind farms and urban projects such as roads, subdivisions and sports venues)
	Ministerial permits ^b	Large commercial and residential developments in the City of Melbourne, its surrounds, and Alpine areas
	Major transport projects ^b	Large public road, rail and port infrastructure
	Special legislation ^b	Large public infrastructure projects (e.g. East Link)
	Planning permits/ planning scheme amendments ^c	Major projects not called-in by the Minister or subject to a designated major project pathway (e.g. wind farms and urban developments)
	Environment effects statements ^d	Any project that is likely to have a significant environmental impact
Queensland	Coordinated projects ^b	Projects with complex approval requirements; of strategic significance; with significant environmental effects; or significant infrastructure requirements (e.g. LNG and mining projects, industrial installations and resorts)
	Prescribed developments ^b	Resource projects of major economic significance; that require provision of infrastructure which would place an excessive financial burden on the state; or significantly affect provision of services and facilities by government
	Prescribed projects ^b	Ministerial call-in of coordinated projects; projects in a state development area; or projects of economic or social significance to the state or a region
	State development areas ^b	Projects within one of the declared state development areas (e.g. Gladstone)
	Private infrastructure facilities ^b	Projects with economic or social significance; economic or social benefits to a region; or that satisfy an identified need or demand for services
	Urban developments ^b	Projects in a declared 'priority development area'
	Ministerial call-in ^b	Any project with a 'state interest'
Western Australia	Development assessment panels ^b	Projects of \$15 million or more in the City of Perth, or \$7 million or more in the rest of the state
	State agreements or special legislation ^b	Large mining projects and related processing and infrastructure (e.g. <i>Natural Gas (Canning Basin Joint Venture) Agreement Act 2013</i>)
	Public environmental reviews ^d	Any project considered likely to have a significant effect on the environment

(Continued next page)

Table 5.1 (continued)

<i>Jurisdiction</i>	<i>Pathway</i>	<i>Types of projects typically subject to the pathway</i>
South Australia	Major developments or projects ^b	Projects of major economic, social or environmental importance, and where declaration is appropriate or necessary for proper assessment (e.g. port facilities, commercial and residential buildings and mines)
	Crown developments and public infrastructure ^b	Government infrastructure projects
	Mining, petroleum, and geothermal projects ^b	Projects subject to the <i>Mining Act 1971</i> (SA) or the <i>Petroleum and Geothermal Energy Act 2000</i> (SA)
	Special legislation ^b	Decided case-by-case (e.g. Adelaide Oval)
	Environmental impact statements ^d	For the most complex projects where there is a wide range of issues to be investigated in depth
Tasmania	Projects of state significance ^b	Projects with significant impacts (including on economic development, investment, the economy and the environment), or that have complex technical processes, engineering designs, or infrastructure requirements (e.g. Basslink)
	Projects of regional significance ^b	Projects of regional planning significance; requiring high level assessment; or having a significant environmental impact (no projects have used this pathway to date)
	Major infrastructure projects ^b	Linear infrastructure such as road, railway, power and telecommunications lines
	Special legislation ^b	Decided case-by-case (e.g. Bell Bay Pulp Mill)
Northern Territory	Significant development ^b	Projects significant to future land use and development (e.g. a significant impact on strategic planning, the natural environment or existing amenity of land)
	Exceptional development permits ^c	Ministers can grant exceptional development permits for projects (major and non-major) otherwise in breach of planning schemes (e.g. Conoco Phillips gas plant, Ichthys accommodation facility)
	Development consent ^c	Projects (major and non-major) not subject to an exceptional development permit
	Environmental impact statements ^d	Any project considered likely to have a significant effect on the environment
ACT	Development applications ^c	Projects (major and non-major)
	Environment impact statements ^d	Any project considered likely to have a significant effect on the environment
Cwlth	'Controlled' actions under the EPBC Act (Cwlth) ^d	Any project that includes an action likely to have a significant impact on a matter of national environmental significance, matters on Commonwealth land or waters, or actions taken by Commonwealth agencies
	Major airport infrastructure ^b	Major infrastructure at airports covered by the <i>Airports Act 1996</i> (Cwlth) (typically more than \$20 million)

^a Key pathways include dedicated major project pathways (regulatory processes that are specifically designed to assess and approve major projects), regular development pathways and environmental impact assessment (EIA) processes where they may be conducted separately to a dedicated major project or regular development pathway. Not all possible major project pathways are listed. ^b Dedicated major project pathway. ^c Regular development pathway. ^d Highest level EIA process. Lesser environmental assessments may be undertaken where impacts are deemed to be less significant.

Source: Based on appendix C.

Some dedicated major project pathways include integrated primary impact assessments. For example, projects declared as state significant developments (New South Wales) typically undergo an environmental impact assessment (EIA). However, some dedicated pathways only include assessments if they are deemed to be required in a separate process. For example, projects subject to the development assessment panel pathway (Western Australia) require an EIA if the project is determined to have a ‘significant’ environmental impact by the state Environmental Protection Authority (EPA). Similarly, major developments under the *Airports Act 1996* (Cwlth) only require an EIA if they trigger one under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act).

Some jurisdictions assess and approve major projects using regular development approval pathways. This occurs most frequently in Victoria, Western Australia, the Northern Territory and the ACT (with the need for an EIA depending on the project’s likely environmental impact). Federally, assessment under the Commonwealth EPBC Act can be required for any project that includes a ‘controlled’ action — an action likely to have a significant impact on a matter of national environmental significance, other specific matters on Commonwealth land or waters, or actions taken by Commonwealth agencies (chapter 3).

Upfront guidance on regulatory requirements

All Australian jurisdictions provide varying levels of upfront information to proponents on the processes and requirements of their major project DAA pathways (appendix C). This can provide a degree of certainty about what is expected by proponents, reduce compliance costs and avoid delays. Generally, upfront guidance material includes:

- information on the general DAA framework (including state, regional and local development policies, strategic plans and assessments, general planning, development, environment and heritage legislation and regulations). (The use of strategic planning and assessments to provide upfront information and guidance on major project DAA processes is discussed in chapter 11.)
- the legislation establishing the dedicated major project pathways, and the associated guidelines and explanatory documents that set out how the pathways work (including descriptions of processes; criteria for accessing a pathway, Ministerial interventions, and assessment and approval decisions; environmental and technical standards; statutory timelines and requirements for consultation, public notification and reporting).

Many jurisdictions provide further guidance through the use of standardised or indicative examples of key aspects of DAA processes (such as model EIAs, conditions and offsets). Some jurisdictions also offer proponents the opportunity to formally meet with regulators to discuss a project proposal before a formal application is lodged.

Determining which pathway applies

The processes used to determine which regulatory pathway is applied to a major project differ across jurisdictions (appendix C). Key differences relate to the:

- *degree of ministerial discretion:* The most common approach among jurisdictions is to rely on ministerial discretion (guided by non-binding criteria or guidelines) to declare or ‘call-in’ a project to a dedicated pathway. Some pathways (such as state significant developments (SSDs) (New South Wales)) rely primarily on statutory criteria.
- *public reporting requirements of ministerial declarations:* Some pathways (such as major developments or projects (South Australia)) do not require the Minister to publicly explain the reasons for a declaration. Other pathways (such as environment effects statements (EESs) (Victoria)) require the relevant Minister to publish their reasons against established criteria.

The processes used to determine the type and level of assessment are discussed further in chapter 6.

Stakeholder participation in setting the scope of primary assessments

Major project DAA pathways include a variety of voluntary and mandated opportunities for stakeholder participation. These can occur at various stages in the DAA process (including pre-application, application, assessment, approval and post-approval); involve different groups (such as referral agencies, proponents, local government, land owners, Indigenous groups, and the general public); and have different aims (such as to build ‘social licence’, to identify likely environmental, heritage and social impacts, to clarify assessments requirements, and to allow appeals and reviews of regulatory decisions). Australian major project DAA processes include multiple opportunities for public participation (box 5.1).

Box 5.1 Public participation in major project processes in Australia

Opportunities for public participation in major project development assessment and approval (DAA) processes occur at various stages:

- Pre-application: Proponents often undertake voluntary public consultation at the project design phase to build social licence and gather information on community concerns and impacts. The *Airports Act 1996* (Cwlth) mandates public consultation before a development can be considered.
- Application: Some regulators consult local governments and the public when setting the scope of assessments (such as the terms of reference of environmental, social or heritage impact assessments). Some require proponents to consult the public as part of the preparation of the impact assessments.
- Assessment: Jurisdictions typically exhibit impact assessment documents to allow interested parties to review their content and provide comment. Regulators can require amendments and further work in response to the public input. A regulator's assessment report may also be exhibited for public comment (chapter 6).
- Approval: In some cases, a draft determination may be exhibited for public comment before a final decision is made (chapter 7).
- Reviews and appeals: The public has a range of appeal rights over decisions made as part of a major project DAA process (chapter 9).
- Compliance and monitoring: Some jurisdictions use consultative forums to allow the public, local government and proponents to monitor a project's ongoing operation and performance (chapter 10).

Public participation is also an integral aspect of strategic planning and assessment with public input on issues such as land use incorporated into the processes. Effective public involvement at a strategic level may reduce the level of consultation required during a project-specific assessment (chapter 11).

More generally, public participation at one stage of a project-level assessment may affect or be substituted for processes at other stages. For example, early public participation at the pre-application or application stage may impact on:

- the level of consultation required later (such as when an environmental impact assessment is publicly exhibited)
- the capacity of regulators to 'stop the clock' or request further information at later stages (chapter 7)
- the frequency with which parties exercise appeal and review rights (chapter 9).

Source: Based on appendix C.

Major project pathways offer different opportunities for stakeholder participation in setting the scope of primary assessments (appendix C). For example, key differences in participation provisions for EIAs include:

- *stakeholder participation in setting the TOR*: Most jurisdictions require the assessment authority responsible for setting the TOR to consult referral agencies

on the issues and requirements to include. Some pathways require wider consultation on draft TOR (for example, the Director General (NSW) also consults relevant local governments while the assessment authority for the EES pathway (Victoria) allows public input). In a few cases (such as with the Coordinator-General (Queensland) and state referral agencies (South Australia)), regulators also consult proponents on the TOR.

- *stakeholder participation during the preparation of the EIA*: Some pathways require proponents to undertake extensive public consultation and report on the issues raised and the proponent's responses as part of preparing the EIA. This consultation may be in addition to public input on draft TOR (for example, the Victorian EES pathway can require both). Or it may be done in place of it (for example, the NSW Director General does not allow public input on the TOR but requires proponents to undertake public consultation (and report on the outcomes) as part of the EIA). Many jurisdictions also allow ongoing contact between regulators and proponents during the preparation of the EIA to enable clarification on the scope and requirements of the TOR.
- *public reporting of the scope setting process*: The degree to which stakeholder input on the TOR of an EIA is publicly reported varies widely. Some pathways (such as major developments or projects (South Australia)) require referral agency advice to be publicly released. Others require community input on draft TOR to be made public. The extent of public reporting of consultation between regulators and proponents on draft TOR or during the preparation of the EIA is unclear. Under some pathways (such as EESs (Victoria) and SSDs (NSW)), the responsible assessment authority publishes its rationale for aspects of the final TOR (for example by listing relevant assessment criteria, legislation and policies that should be addressed in an EIA).

Appendix C provides a more detailed description of the legislation governing the application stage of DAA for major projects in Australian jurisdictions.

What are the key issues?

Study participants have raised through submissions and stakeholder consultation three issues regarding the application stage of the DAA process for major projects. These relate to:

- a lack of upfront clarity and guidance for proponents on DAA processes and requirements
- excessive ministerial discretion to declare a project into a pathway
- limited early stakeholder participation in setting the scope of assessments.

Each of these issues is examined below.

5.2 Guidance on regulatory processes and requirements

Although there is extensive guidance and information available for project proponents (section 5.1), a number of participants expressed frustration with the relevance and quality of some of this material, claiming it is a source of potential problems (for example, unnecessary delays) later in the DAA process, and that these problems could be addressed by better upfront information and guidance.

Uncertainty about regulatory requirements

The Minerals Council of New South Wales noted:

... a lack of clear and transparent assessment policy has been a concern for industry, and has led to unprecedented decisions by both the Planning and Assessment Commission and the Land and Environment Court. (sub. 23, p. 4)

The Minerals Council went on to favour a clear statement of assessment policy to improve certainty for proponents about the criteria they need to meet:

Major project proponents should be able to rely on compliance with clear policy on impacts, mitigation measures and other matters, to assess the viability of the project and determine whether to proceed, alter the project or abandon the project as unviable. (sub. 23, p. 4)

Likewise, the Business Council of Australia supported greater upfront clarity from regulators assessing major projects:

Major project assessment should require state authorities to issue upfront the standards, requirements, and the technical studies that need to be incorporated as preconditions for consent to be granted. (sub. 43, p. 4)

Improving regulatory certainty

There is an extensive literature on leading practice in this domain of regulatory policy. The Commission's 2011 study of planning and zoning focused on improving development assessment processes through the establishment of clear objectives, rules and decision making criteria (PC 2011c). Predictable processes, well defined roles and responsibilities, accountable decision makers, and open and transparent processes are all among the Commission's criteria for benchmarking regulatory practices in this study (appendix B).

The Development Assessment Forum principles are similar to the Commission's criteria of leading regulatory practice. They state that development assessment requirements and criteria should be written as objective rules and tests that are linked to stated policy intentions. In relation to the development of environmental impact statement (EIS) processes, they favour:

- clear, statutory criteria to determine which projects are subject to a pathway
- clear guidelines for applicants
- specification of timeframes for actions by regulators and public consultation processes (DAF 2009).

Infrastructure Australia, in a review of approval processes for major infrastructure projects, also favoured better documentation of assessment requirements:

Stronger scoping documents help to identify the requirements for the environmental statement more robustly at the front end of the assessment process, minimising the risk of approval authorities adding to timeframes by requiring further information and studies. (2009, p. 40)

A diverse range of study participants have supported action by governments and regulators to provide better upfront information and guidance on the regulatory processes and requirements for major project assessment (sub. DR70; 73; 76; 85; 92; 98; 100; 102; 105; 106).

Some Australian jurisdictions have developed or are developing additional guidance through the wider use of standardised or indicative examples of key DAA processes. For instance:

- The WA EPA (2013b) has developed Environmental Assessment Guidelines to better convey to proponents (and others) the EPA's expectations on the content and form of the environmental scoping document (the TOR) for public environmental reviews (EIAs). The guidelines are intended to make the EIA process more transparent, to focus it on the matters of key importance and to reduce unnecessary content.
- The Queensland Coordinator-General (2013) has developed generic TOR for coordinated project EISs that include standardisation of aspects of the scope and information requirements. The aim of the reform is to focus the EIS on the critical matters of a project's assessment.
- The WA Department of Environmental Regulation (2013) is implementing a reform program (Re-Engineering for Industry and Environment) that aims to create common template licences (including standardised conditions).

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- The NSW Department of Planning and Infrastructure (2013b) is preparing draft sets of standard and model conditions (by industry sector) to assist proponents, regulators and the community understand the types of conditions that are likely to be applied to state significant developments, should they be approved.
 - The Commonwealth EPBC Act environmental offsets calculator attempts to standardise acceptable offsets for a given project impact (DSEWPAC (Cwlth) 2012g).

The Local Government Association of Queensland (LGAQ) supported the Queensland Coordinator-General's development of generic TOR for coordinated project EISs, noting that this should provide greater clarity around the scope of impacts assessed. However, they also argued for guidance on the level of information required:

The development of generic terms of reference for the Environmental Impact Statement (EIS) is useful in this regard. However, LGAQ believes the State Government needs to take leadership in developing a shared understanding amongst stakeholders about what is sufficient information. This would help manage community expectations about the management and mitigation [of] actions. (sub. DR78, p. 3)

The Chamber of Minerals and Energy of Western Australia noted:

... the [Western Australian] State Government is [also] currently engaging with industry to improve guidance material for mine closure and environmental offsets. (sub. DR85, p. 7)

The Commission supports the provision of clear, upfront information and guidance on the DAA pathways that apply to major projects. Clarity about the regulatory processes, and where possible, the use of standardised processes and indicative examples of requirements, gives all stakeholders greater certainty about the types of projects that can be undertaken, the regulatory processes and requirements and the likely costs and timeframes involved. It helps proponents decide where to propose developments, and how to design them in ways that reduce costs and improve the chance of approval. It also increases the accountability and transparency of regulators, and can build public confidence in the process and acceptance of the outcomes. However, care must be taken to avoid oversimplification which could compromise the ability of regulators to identify, analyse and appropriately consider the impacts of major developments.

RECOMMENDATION 5.1

Governments should provide clear, upfront information and guidance on the development assessment and approval pathways that apply to major projects, including details about the processes, the generic information requirements, the assessment criteria, the standard and model conditions and the statutory timelines that apply under a given pathway.

Pre-application meetings between proponents and regulators

Some jurisdictions offer proponents the opportunity to formally meet with regulators to discuss a project proposal before a formal application is lodged (box 5.2). These opportunities can be mutually beneficial. Regulators can gain an earlier understanding of a proposal which may assist in staff resourcing and agency coordination. And proponents have an opportunity for early clarification of which regulatory processes are likely to apply and how, and explore issues that may be potentially sensitive with an agency.

These benefits were considered significant by a number of participants in this study. For instance, the Commonwealth Department of Infrastructure and Transport¹ noted:

Proponents have previously pointed to the advantages of having an open dialogue with Government agencies early in their planning processes to identify possible impediments that may then be addressed. (sub. 59, p. 15)

Likewise, the Association of Mining and Energy Companies argued:

... such an approach is extremely important in scoping the project and having a clear understanding of approval agency expectations and likely assessment timeframes. (sub. DR70, p. 16)

Infrastructure Australia in its review of major infrastructure approval processes found that the South Australian approach to pre-application information provision incorporated ‘clear identification upfront of the required government approvals and ensuring that agreed timeframes are adhered to ...’ (2009, p. 25).

There are also potential disadvantages with pre-application meetings. They could be resource intensive and pose risks to regulator transparency and independence, which could instil a perception of undue influence and compromise public confidence in the DAA system.

¹ Now the Department of Infrastructure and Regional Development.

While agreeing that pre-application meetings could be beneficial, the Chamber of Minerals and Energy of Western Australia noted that guidelines would be needed to ensure the meetings were productive and transparent:

... the benefits of pre-application meetings between major project proponents and approval agencies is also supported. Guidelines are required to ensure the scope and intent of meetings is clear and transparent. (sub. DR85, p. 7)

Box 5.2 Regulator-proponent pre-application consultation in Australia

Some jurisdictions offer major project proponents the opportunity to meet with regulators to discuss a project proposal before a development application is lodged.

Commonwealth

For major infrastructure projects granted Major Project Facilitation status the Department for Infrastructure and Regional Development may:

- advise proponents on approvals needed under Commonwealth legislation
- facilitate relationships between the proponent, and State, Territory and Australian Government agencies
- advise proponents on impediments or policy issues and forward these issues to the relevant policy areas within the Australian Government.

Queensland

Major project proponents seeking to be declared a coordinated project can request pre-lodgement meetings with the Coordinator-General (CG) where the proponent and the CG can discuss:

- likely assessment processes, content of the application, timelines, and fees
- the terms of reference for the environmental impact statement
- approvals, including any alternative approval pathways
- high risk, sensitive or contentious matters or impacts
- possible referral of the project to the Australian Government.

South Australia

The South Australian Government provides informal pre-application guidance to major project proponents. For example, a proponent may contact the Planning Department to discuss options for declaring a development a major project. Typically, the Department seeks legal advice and briefs the Minister. A suggestion is then made to the proponent on the likely assessment pathway.

Sources: DSDIP (Qld) (2013c); DIT (Cwlth) (2012); SA Government pers. comm. 22 March 2013.

There are safeguards that could limit the risks of early proponent-regulator engagement, such as public documentation and reporting of meetings and clear guidelines for regulator conduct (ICAC (NSW) 2012). Such practices have been

institutionalised by the National Energy Board of Canada, which the Commission considers to be a good model for regulator-proponent consultation at the pre-application stage (box 5.3).

Box 5.3 Pre-application meetings with the National Energy Board of Canada

The development assessment and approval process of the Canadian National Energy Board (NEB) — the federal regulator for cross-provincial energy projects — includes a ‘planning and pre-application’ phase.

Pre-application meetings give stakeholders and the regulator the opportunity to share information about processes, establish contacts, discuss filing requirements and identify resources. The NEB states that the meetings can contribute to more complete applications, facilitate the assessment process and help to avoid unnecessary delays.

Meetings are typically between NEB staff and a project proponent (although anyone may request a meeting).

Proponents can make a presentation on their project enabling NEB staff to learn about aspects of the proposal, including what pre-application public consultation has been undertaken by the proponent and what contact has been made with other regulatory agencies.

NEB staff can advise the proponent on regulatory processes and application requirements (including on which sections of the NEB Filing Manual, regulatory precedent and other guidance documents are relevant to the proposal). Staff can also refer a proponent to other government regulatory processes, advise on typical timelines and provide relevant government contacts.

The NEB is an independent regulator and a number of safeguards are in place to ensure transparency and accountability in the process.

- NEB staff are subject to a Code of Conduct and natural justice principles.
- Pre-application meetings cannot be used to promote a project or, beyond a short project description, discuss the merits of the project.
- Pre-application Meeting Guidance Notes set out the appropriate content for a meeting, and presentation materials are vetted in advance.
- Meeting notes and materials are available to the public upon request.
- Once an application has been filed, all communication with NEB staff must be directed through Legal Services or the Office of the Secretary.

Source: NEB (2013a).

The Commission believes that more systematic use of pre-application consultation meetings with major project proponents would improve certainty and the efficiency of DAA processes. However, appropriate safeguards must be in place to ensure transparency and accountability and that public trust is maintained. Moreover,

pre-application meetings should not become an alternative to existing regulatory processes (such as those for determining the DAA pathway or the TOR of the EIA) or a substitute for governments providing clear upfront information on how their regulations work. To avoid unnecessary costs, pre-application meetings should target very large, complex and state significant developments.

5.3 Ministerial discretion to declare major projects

The majority of DAA pathways used to assess major projects rely on ministerial discretion to declare or call-in a development. However, when such discretionary powers are exercised without reference to objective criteria and clear processes, which is mostly the case in Australian jurisdictions, it can impinge adversely on transparency, limit opportunities for public consultation and increase the proclivity to corrupt practices, undermining public confidence in the regulatory process (ICAC (NSW) 2010).

Excessive ministerial discretion

Several submissions focused on the potential downsides of wide ministerial discretion. For example, the Local Government Association of South Australia (LGASA) argued that ill-defined ministerial powers to call-in major projects reduce transparency and are open to misuse:

Whilst the Minister must form an opinion that the development or project is of ‘major environmental, social or economic importance’, there are no specific criteria prescribed in either the Act or Regulations to guide the Minister in forming this opinion. ...

This lack of clearly defining criteria can lead to uncertainty for a development proponent, Local Government, and the community as to when Major Project status can or should be sought. It can also lead to accusations of lack of transparency or undue influence in the development process.

Typically, but not always, no detailed explanation is given as to the basis for the decision to grant Major Project status to a particular proposal. This contributes to concerns about transparency and also leads to a lack of precedent for future projects as they are unable to assess the criteria by which other projects have been deemed a major project. (sub. 25, pp. 2-4)

Local Government New South Wales reasoned that Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (now repealed) was an example of how ministerial discretionary powers could be misused when not subject to clear criteria:

The result [of an increasing use of Part 3A] was that many residential, commercial and coastal projects were declared [by the Minister] as ‘state significant’ and ‘called in’ for

ministerial determination when in reality they were of only a regional or even local scale. The original intent may have been to speed up assessments and/or remove blockages to ‘major’ developments, but the practice became widespread and subject to ministerial discretion, and only served to alienate local communities and diminish trust. (sub. 36, p. 4)

The Nature Conservation Council of NSW argued that discretionary decision making powers reduce transparency, accountability and public confidence in the planning system:

In NSW, the Environmental Planning and Assessment Act 1979 (EP&A Act) is heavy with discretionary decision making processes that have historically led to environmental considerations losing out to development and economic interests. These discretionary processes have also contributed to inefficiencies in the system as a result of uncertainty and lack of transparency. (sub. 22, p. 4)

The Australian Petroleum Production and Exploration Association noted that arbitrary use of call-in can increase risk:

Situations where major projects can be ‘called in’ have generated significant ‘sovereign risk’ images for the Australian regulatory environment. This is particularly the case where the reasons for calling in a project are not transparent, or seem to be based on arbitrary information. (sub. DR105, p. 12)

Improving certainty and transparency

Recent reforms in New South Wales aim to redress these shortcomings. In line with some of the recommendations in an Independent Commission Against Corruption (ICAC) report into the use of ministerial discretion (ICAC (NSW) 2012) and the Development Assessment Forum best practice principles (DAF 2009), New South Wales limited ministerial discretion to declare a project as state significant by developing clear and statutory criteria for determining which developments qualify. This is similar to the practice of the Victorian Department of Planning, which lists the types of large-scale projects subject to the ministerial permit pathway, as well as the areas where any development must be assessed under that pathway (DPCD (Vic) 2013).

The Business Council of Australia supported these measures (sub. 43) and the LGASA favoured further transparency measures:

Major Project status should only be granted following an assessment of the proposal against clear and specific criteria. ... In the interests of greater transparency, a publicly available report should be prepared which identifies the reasons for granting Major Project status. (sub. 25, p. 6)

These approaches are consistent with leading practice. They provide clarity and certainty to all stakeholders about which regulatory pathway a project is subject to and transparency around how the decision is made. They also limit the opportunity for misuse of ministerial discretion. However, the exclusive use of binding criteria could limit regulatory flexibility and hamper effective assessment.

The NSW system addresses this potential rigidity by allowing limited ministerial discretion to declare projects that do not otherwise meet the statutory criteria. In line with the ICAC recommendation for public reporting requirements around the use of ‘ministerial orders’ (ICAC (NSW) 2010), the NSW reforms require that the ministerial power can only be used after an independent body (the Planning Assessment Commission) has assessed and publicly reported on the ‘state or regional significance of the development’. The Minister is also required to report on his or her reasons for using the call-in power (appendix C).

There has been widespread support from study participants for the combined use of statutory criteria to determine which projects are subject to major project processes, with a requirement that ministerial powers be subject to clear guidelines and publicly reported on (sub. DR66; 71; 73; 85; 92; 94; 96; 98; 100; 102; 106).

In particular, AGL emphasized the importance to business of the regulatory certainty that this approach would bring:

It is vital that consistent processes exist that proponents know in advance and are able to plan projects on the basis of. Exceptions to standard processes should be minimised, and to the greatest extent possible, should be based upon objective and clearly-articulated guidelines or policies as distinct from discretion. (sub. DR96, p. 3)

While the Australian Local Government Association highlighted the potential benefits of greater transparency around the exercise of Ministerial powers:

To ensure consistency, trust in the process and reduce the potential for proponents to seek preferential treatment, it is critical for Ministerial guidelines to be developed and all interested parties to understand the reasons for decisions that are made. (sub. DR71, p. 13)

The Commission considers that articulating criteria to determine which proposed developments have access to designated major project pathways is a leading practice. To provide flexibility, the appropriate Minister should be given defined and limited powers to declare projects into a pathway where there is a demonstrable benefit in doing so. However, in exercising this power, the Minister must be guided by clear guidelines and processes, and be required to report publicly at the time of making the declaration why the declaration was necessary.

RECOMMENDATION 5.2

Governments should establish statutory criteria that identify which projects have access to designated major project pathways. Limited ministerial discretion should be available to ‘declare’ or ‘call-in’ a project that does not meet the criteria (thereby making it subject to a major project pathway). In exercising this power the Minister must:

- *follow guidelines on when and how the power can be used*
- *publicly report the reasons for any declaration against the guidelines.*

5.4 Stakeholder participation in setting the scope of assessments

Study participants have raised concerns about the level of certainty, transparency and accountability in the processes used to set the scope of major project primary assessments (such as environment, social and heritage impact assessments), particularly in relation to public and proponent participation and the degree of public reporting on stakeholder input.

Late public participation

Many participants in this study argued that public consultation practices and their timing for major project DAA processes fell short of leading practices. For instance, the LGASA stated:

The relevant Council should have the opportunity to comment on its capacity to deal with a proposal prior to Major Project status being granted. This would also give the Council the opportunity to flag any potential issues that might have a negative impact on local communities or local service provision. (sub. 25, p. 6)

Local Government New South Wales also expressed the view that the first opportunity for public consultation came too late in the DAA process:

To date, concerns raised by a community [in New South Wales] have been only considered at the project approval stage. The inclusion of community concerns at this stage may be far too late; realistically, proponents may have an expectation that they will receive an approval as they have followed the agency requirements. ... Community anxiety and resistance could be reduced to a certain degree if early and genuine consultation with communities was undertaken and appropriate consultation frameworks (such as consultative committees) were established. (sub. 36, p. 6)

Similarly, Amelia Thorpe argued that consulting after the EIA is completed limits the chances of meaningful participation by stakeholders:

... since submissions are not generally sought until project proposals are well-developed, it is much harder to incorporate public suggestions and thus much harder to provide meaningful opportunities for participation. The easiest way for the public to engage in such process is to criticise project proposals, or to focus discussions on superficial issues such as managing impacts during construction. (sub. 16, p. 5)

Xstrata Coal suggested that allowing earlier public participation in the DAA process could reduce some of the problems that occur later:

[Public] input should occur at the start of the approval process (at the terms of reference, environmental impact statement or equivalent stage) rather [than] at the end of the process to avoid costly delays or de-railing the assessment process. (sub. 50, p. 2)

Likewise, NTSCORP (sub. DR104) emphasised the importance of early and genuine engagement with Traditional Owners as a way of increasing a community's acceptance of a project and avoiding delays later on.

Early opportunities for public involvement

Major projects can have multiple impacts on communities and on the environment. This generates expectations of public involvement in deciding if and how they are approved. Open and early community engagement is a leading regulatory practice that raises decision makers' awareness of public interest concerns and increases community acceptance of decisions.

The OECD emphasises the benefits of public participation in regulatory processes, stating that it can:

- bring into the discussion the expertise, perspectives, and ideas for alternative actions of those directly affected
- help regulators to balance opposing interests
- identify unintended effects and practical problems. Pre-notification makes it easier to foresee the consequences of planned policies and is a productive way to identify administrative burdens
- provide a quality check on the administration's assessment of costs and benefits
- identify interactions between regulations from various parts of government. (OECD 2013a, p. 2)

There is no unique model on how to achieve effective public participation and methods depend on the nature of the project. However, research into the strategies used in development and planning in Australia has identified some leading practices that can make consultation more meaningful and effective (box 5.4). In particular, public participation was found to be more effective where it occurred early enough to allow input to be considered and incorporated into decision making, and where

participants received feedback, including explanations where their ideas were not taken up (ACTPLA 2005).

NTSCORP agreed, noting that in the case of consultation with Indigenous groups, ‘genuine’ participation involved:

... seeking the input of Traditional Owners in matters that affect their rights and interests, including cultural heritage, at the outset of project assessment. Genuine engagement would also ensure that any feedback or input is addressed, to avoid the process becoming tokenistic. Ideally, issues raised by Traditional Owners, would be incorporated into project design to avoid, minimise, and mitigate impacts on native title rights and interests. ... [and] ensuring that persons with appropriate knowledge and authority to speak for country are consulted. (sub. DR104, p. 6)

Box 5.4 Some leading practices on public consultation

Research undertaken for the ACT Planning and Land Authority — the Edwards Report (2004) and ArtCraft Research Report (2004) — identified leading practices in community consultation on development and planning policy. They relate to:

- a need for clear, communicated reasons for each engagement exercise
- engagement techniques tailored to suit different circumstances, such as the stage of policy development and the communities participating
- all interested people having the opportunity to give their views, not just a vocal minority
- clear statements and understanding of why consultation occurs
- clarity as to the appropriate form of consultation in connection with different types of plans, such as master plans and neighbourhood plans
- processes that require community suggestions and comments to be seriously considered and, where appropriate, incorporated into policy
- giving clear reasons for policy decisions and feedback to persons involved including, where relevant, reasons for ideas not being taken up.

Source: ACT Planning and Land Authority (2005).

One of the early opportunities for public consultation in major project DAA processes is on the scope of issues to be investigated by a proponent in an impact assessment — typically referred to as the terms of reference (TOR). More extensive opportunities occur during the preparation of the assessment documentation, when proponents have more time to engage with stakeholders and respond to (and report on) the issues raised.

The Commission’s analysis found limited opportunities for early public participation on the TOR of primary major project assessments. For EIAs, for example, few of the pathways require regulators to consult the public or relevant

local governments on the TOR. A number of pathways can require a proponent to undertake public consultation while preparing an EIA and to report on the issues raised and the proponent's responses (section 5.1). However, in some cases, the first meaningful opportunity for public input into the assessment process occurs once the EIA has been completed and is publicly exhibited (chapter 6).

Notable exceptions are Victoria and Western Australia. Ministerial guidelines for the environment effects statement in Victoria (box 5.5) and the EIA process undertaken by the EPA in Western Australia include opportunities for early community input on the TOR (called the draft scoping requirements in Victoria and the environmental scoping document in Western Australia), and require proponents to undertake their own public consultation as part of preparing the environmental assessment documents (DSE (Vic) (2006); EPA (WA) (2013b)). The Commission considers that the Victorian and WA processes are leading practices in early public participation and other jurisdictions should adopt these approaches, or similar practices.

Box 5.5 Victoria's environment effects statement and public participation

Ministerial guidelines outline public participation in environment effects statement (EES) assessments undertaken under the *Environment Effects Act 1978*.

The process to set the EES scoping requirements typically includes:

- a proponent providing a list of issues to be investigated and a draft study program
- the Minister considering the information together with advice from relevant agencies and authorities and preparing draft scoping requirements (DSRs)
- the DSRs being released for public comment for a minimum of 15 business days
- the Minister reviewing public submissions, finalising the DSRs (normally within 15 business days of the close of the comment period) and making them public.

A second opportunity for public participation can occur while the proponent is preparing the EES. Generally, a proponent must develop and implement a Consultation Plan to inform individuals and groups who could be affected by the project and provide opportunities for input. This engagement helps the proponent to identify issues of concern and potential effects, as well as get feedback from stakeholders on project options or potential mitigation measures. The proponent includes this feedback and their response to the issues and concerns raised in the EES.

A third opportunity for public input occurs once the EES is completed and exhibited for public comment. The public have between 20 and 30 business days to make written submissions. The Minister may appoint an inquiry panel to evaluate the effects of the project, having regard to the EES studies and public submissions.

Source: DSE (Vic) (2006) .

There has been widespread support from study participants for requiring regulators to publicly consult on draft TOR for EIAs (sub. DR71; 76; 85; 92; 95; 98; 100; 102; 104; 105).

Allowing public input on the TOR for primary impact assessments (such as EIAs) improves transparency and accountability around the process and can increase public buy-in. It also provides an early avenue through which important community issues potentially missed by regulators can be included upfront in major project assessments, reducing the chance of ‘new’ issues arising later in the assessment process that can contribute to delays and increased costs.

Further, meaningful consultation on the TOR strengthens the case for limiting the use of ‘stop the clock’ provisions which many participants have indicated are a significant source of delay in DAA processes, and for introducing statutory time limits on approval decisions (chapter 7). However, the timeframes for public input on draft TOR are typically brief — around two weeks — which is insufficient time for full public engagement on a project’s impacts. Accordingly, it should not be seen as a substitute for the more extensive public consultation typically undertaken by a proponent as part of their investigation of project impacts and preparation of the assessment documentation.

Effective early proponent-led consultation with affected parties (including the public, local governments and others) as part of impact assessment processes builds on the benefits of public input on the TOR. In particular it provides opportunities for:

- the public to understand a development, provide information on its likely impacts and articulate their concerns
- proponents to consider the public input, incorporate it into their investigations, provide feedback and possibly adjust the project design to mitigate impacts.

Reporting on public engagement in the assessment documents also increases transparency, certainty and accountability by providing a public record of the issues raised and responses made by proponents. However, there are also potential costs from expanding early opportunities for public consultation on major projects. It could lead to delays as additional time is set aside for the process to be undertaken and it could add to the compliance and administrative costs borne by project proponents and regulators.

The Australian Petroleum Production & Exploration Association supported early public participation, but noted that it must ‘be commensurate to the circumstances of each project’ and that ‘objectives of consultation have to be clear, and the

purpose must be stated’ (sub. DR105, p. 12). They also highlighted the risk of delays, arguing:

... there have been cases in the past where public consultation processes [have been] deliberately overloaded for the purpose of slowing down the process. (sub. DR105, p. 12)

Peabody Energy Australia noted that while early consultation can be beneficial, the potential for project designs to change over time should be taken into account:

At such an early project stage, ... the level of [project] detail is often subject to change. This needs to be recognised and accepted by regulators. (sub. DR81, p. 2)

Two jurisdictions, citing the goal of shorter timelines for the DAA process, have recently moved away from public consultation on the TOR for major project EIAs. The SA Government removed it from the major project pathway (sub. 51) and the Queensland Government granted the Coordinator-General greater discretion to decide whether an EIS will be publicly notified (the *Economic Development Act 2012* (Qld)).

It is not straightforward to give an assessment of the adequacy of existing early public consultation practices and recent reforms in this area. The rationale for, and impacts of, even small changes depend critically on other aspects of the DAA regulatory system, such as the right to appeal decisions (chapter 9), the use of statutory timelines and stop the clock provisions (chapter 7) and whether strategic plans or assessments are in place (chapter 11).

On balance, the Commission believes that the gains from fostering earlier public participation at the application stage are greater than the downside risks, provided participation is effective, does not unduly delay projects or increase regulatory burdens, and that related reforms to later DAA processes (such as the introduction of statutory timeframes and limits on ‘stop the clock’) are also implemented. The form of public participation required at the project-level should also take into account consultation already undertaken as part of a strategic plan or assessment (chapter 11).

Pre-application public participation

Some overseas jurisdictions require major project proponents to undertake and report on public consultation as a pre-requisite for lodging a development application (box 5.6). Typically, the purpose of this approach is to require a proponent to engage with affected parties early enough to be able to take the input into account in a project’s design. Where a regulator is convinced that the

consultation is sufficient and the proponent has appropriately responded to the issues raised, later opportunities for public participation are limited.

In Australia, the *Airports Act 1996* (Cwlth) requires proponents of major airport developments to undertake and report on pre-application consultation with affected parties and agencies before lodging a development application. More typically in Australia, proponents voluntarily initiate pre-application consultation as a means to build social licence for a development and allay community concerns. For example, ElectraNet notes that the company:

... has a policy of active community and stakeholder engagement prior to finalising development applications for assessment and consideration by the relevant planning authority. (sub. DR63, p. 3)

Box 5.6 Overseas examples of pre-application public consultation

Nationally significant infrastructure projects (the United Kingdom)

The assessment and approval process for nationally significant infrastructure projects in the United Kingdom (typically large road, rail and water infrastructure) requires proponents to undertake extensive public consultation before lodging a development application.

Pre-application, a proponent must prepare a Statement of Community Consultation which details the project, the type of environmental assessment required, and how the applicant will publicise and undertake consultations. Once the consultation is complete, the developer lodges a report (covering the issues raised and how they have been addressed) with the development application and an environmental impact assessment (where required).

National Energy Board (Canada)

The National Energy Board of Canada — the federal regulator for cross provincial energy projects — requires a proponent to develop and conduct a consultation program prior to lodging a project application.

The objective of the process is to effectively communicate with all individuals, groups and agencies affected by the project to discover their concerns and to respond to the issues raised in the planning and design of the project.

Sources: DCLG (2013b); NEB (2013c).

The Commission considers proponent-initiated pre-application public consultation to be a good practice, especially for projects that are likely to have large or contentious community impacts. Project proponents are best placed to determine if and how such consultation should occur.

Proponent participation in setting the scope of assessments

Some participants in the study supported early consultation between major project proponents and regulatory agencies. The Queensland Resources Council, for instance, argued:

Currently proponents waste a lot of time and effort because different agency districts or regions have different expectations of what should be in a ToR and the EIS. (sub. 19, p. 5)

The Australian Uranium Association went further, calling for binding pre-application consultation between proponents and regulators being built into the formal DAA process (sub. 34).

Some major project pathways include opportunities for early consultation between regulators and proponents to begin the process of determining the scope of primary assessments (such as the TOR for EIAs) (box 5.7). Jurisdictions also allow meetings between regulators and proponents during the preparation of the assessment documents to allow for ongoing clarification and guidance on the interpretation and requirements of the TOR.

Box 5.7 Proponent-regulator consultation on the scope of assessments

Jurisdictions approach early consultation between regulators and proponents on the scope of assessments in different ways.

The South Australian Government allows proponents to enter into formal discussions with a referral body (such as the Environmental Protection Authority) before lodging a development application. A pre-lodgement agreement may result, which can remove the need for the application to be referred to the referral body when eventually lodged.

In Western Australia, the Environmental Protection Authority's process for setting the scope of an environmental impact assessment (EIA) for projects subject to a Public Environmental Review includes pre-referral discussions with the proponent, relevant decision making authorities and other government agencies.

In Queensland, the Coordinator-General can arrange meetings between proponents of coordinated projects and referral agencies during the consultation period on the draft terms of reference to:

- explain the EIA process, including the agencies' roles
- enable the proponent to outline the key elements of the project, its likely impacts and mitigation strategies
- solicit feedback from agencies on issues that should be addressed in the EIA.

Sources: DSDIP (Qld) (2013c); SA Government pers. comm. 22 March 2013; WA EPA (2013b).

Early consultation between a proponent and regulator on the TOR of a major project assessment can improve regulatory outcomes and avoid unnecessary regulatory burdens. It helps to clarify the scope and deliverables in an impact assessment, and to avoid situations where specific work is undertaken even though it is not required by any of the agencies. It can also reduce delays later in the DAA process caused by a regulator stopping the clock to request more information. However, as with pre-application meetings between proponents and regulators (section 5.2), there are risks associated with this approach.

Where consultation between major project proponents and regulatory agencies occurs, safeguards (including public reporting of meetings and clear guidelines for regulator conduct) should be in place to limit the risks of regulatory capture and to ensure transparency and accountability in the process.

Public reporting of processes to set the scope of assessments

Transparency and accountability in a regulatory process also depends on the public and other stakeholders being able to see how decisions are made. ICAC, in a review of the NSW planning system, highlighted the importance of publicly available information:

The provision of information is fundamental to ensuring transparency and generating public interest in proposals. A transparent planning system requires the provision of publicly available information so that members of the public understand what is being proposed, why decisions have been made, what has influenced those decisions, and the processes involved in making a decision. (2012, p. 12)

In this regard, the scope and detail of public reporting on the processes used to set the scope and requirements of major project assessments in Australia varies depending on the DAA pathway. In the case of EIAs:

- some pathways allow referral agencies to publicly report on the advice they give to the authority responsible for setting the TOR (for example, the NSW Director General Requirements for SSDs can be released with the referral agency advice attached)
- some pathways with public input on draft TOR publish the submissions received while others do not (for example, submissions on the draft TOR for the Victorian EES are not normally publicly released)
- in some pathways, such as for EESs (Victoria) and SSDs (NSW), the authority responsible for setting the final TOR lists the draft assessment criteria and legislation and policies that need to be addressed in the EIA. However, few

jurisdictions require the regulator to further explain the rationale for the TOR (section 5.1).

There has been widespread support from study participants for better public reporting of the processes used for setting the scope of EIAs (sub. DR71; 76; 85; 92; 95; 98; 100; 102).

A public reporting requirement on regulatory agencies involved in setting the scope of a major project assessment has multiple benefits. It can help to:

- ensure that regulators adhere to any requirements, and are held accountable when they do not
- identify where incorrect or inappropriate information is used, and reduce opportunities for undue influence
- build public trust in major project DAA processes and legitimacy in the outcomes
- provide certainty for project proponents because they understand the reasons for regulator decisions and learn from the precedent set by earlier decisions.

The Commission believes that public reporting of all advice used in setting the scope of primary major project assessments, and of the rationale used by the regulators involved, is leading practice.

RECOMMENDATION 5.3

To achieve greater transparency, accountability and certainty in the process for setting the scope of major project primary assessments, governments should ensure that key stakeholders (including local governments, the public and proponents) have input to the draft terms of reference for primary assessments and that such input, and how it has been addressed, should be made public.

Accessible public participation

Effective stakeholder participation in major project DAA processes depends on parties being able to access, comprehend and respond to the assessment documents prepared by proponents and assessment authorities. Some study participants have expressed concern that the increasing complexity and technical nature of EIAs (chapter 6), and the manner of publicly exhibiting the multiple documents involved, limits effective public participation.

The Queensland Resources Council noted that the increasing size and complexity of EISs makes it difficult for the public to effectively engage:

... the comprehensive environmental impact statement (EIS), has become so long, complex and detailed, that it is very difficult for a local community to engage in the assessment process. When EIS reports routinely run to 10,000-14,000 pages and the hard copies weigh upwards of 7-8 kilos, they are not documents that can be readily read and understood. As the EIS has become increasingly exhaustive in their coverage, the sheer volume of information has made them increasingly inaccessible to local stakeholders. (sub. 19, p. 2)

Similarly, the Lock the Gate Alliance argued that larger, more technical EISs limit public engagement and contribute to delays:

Community groups and individuals are, in our view, at considerable disadvantage in the public consultation processes as they have evolved in NSW and Queensland over the last ten years or so.

... the jargonistic, technical and voluminous character of Environmental Impact Statements has become a major barrier to community participation. Indeed, this barrier could also be seen through the industry lens as a contribution to the “costs and delays” from the proponent’s perspective, since the impenetrable prose of EISs leads to community members not noticing major problems and gaps with the assessment until late in the process. (sub. DR97, p. 12)

The Lock the Gate Alliance also pointed to the EIS for the Rocky Hill Coal Project — which consists of 55 separate PDF files some of which do not have file names describing their contents — as an example of how multiple and poorly presented documentation can act as a barrier to community participation:

... community members confronted with a wall of large PDF documents and a table of contents 15 pages long must invest considerable time and patience in just finding the information that concerns them most, let alone reading and responding to it. (sub. DR97, p. 12)

The Conservation Council SA noted that the practice (under the South Australian major developments or projects pathway) of removing assessment documents from the website at the end of a public comment period also limits community participation. They argued transparency would increase if:

... documents released for public consultation are not removed from websites when consultation periods close, and are maintained on the public record. (sub. DR76, p. 4)

To varying degrees, jurisdictions are improving public access to major project DAA documents. Many jurisdictions maintain online archives that hold key documentation (for example, the NSW Department of Planning and Infrastructure Major Project Assessment web page stores existing and past major project documentation from the first application to the final determination). Proponents are also attempting to increase the digestibility of assessment information (for example,

through the use of executive summaries for EIAs which bring together information and findings from the multitude of assessment documents).

Major project DAA documentation can be voluminous, fragmented, technical and difficult to understand. The Commission believes that maintaining an easily accessible public record of all major project assessment documentation and reports is a leading practice that facilitates effective public participation in DAA processes. In addition, where proponent assessment documentation (such as EIAs) or regulator assessment reports are released for public comment, the inclusion of a single, integrated executive summary that presents key information from a community perspective and includes links to the more detailed documents could be an effective and relatively low cost approach to improve community participation.

6 The assessment stage

Key points

- Major projects are subject to assessment processes across all levels of government depending on the nature, location and complexity of the project. Assessor institutions include government departments and statutory agencies.
- State and Territory Governments have primary responsibility for assessing major project proposals. In some jurisdictions, a single institution is responsible for managing a relatively integrated assessment process. In other cases, a potentially large number of standalone assessment processes apply.
- Australian Government assessment processes apply if proposed major projects are undertaken on Commonwealth land (or waters) or by the Commonwealth or its agencies, or if projects are likely to have a significant impact on matters of national environmental significance.
- Local governments have a limited role in major project assessment.
- Unnecessary regulatory burdens that add to timelines and compliance costs arise at the assessment stage due to:
 - duplication between assessment processes
 - uncoordinated administration of processes
 - concerns about the quality and independence of assessment analysis
 - assessment requirements that are disproportionate to project risks and impacts.
- The Commission is recommending establishment of a 'one project, one assessment' framework for environmental matters through:
 - instituting more comprehensive bilateral assessment agreements under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth)
 - greater cooperation between intra-jurisdictional regulators to conduct joint assessments, or to accredit each other's processes.
- Where such arrangements do not already exist, there is an 'in-principle' case for: establishing major projects coordination offices (or similar) at the state and territory level to better coordinate and track assessment and approval processes; and institutionally separating environmental policy from regulatory functions (including assessment and enforcement activities). Further work is required to assess the benefits and costs of these reforms.
- Scaling measures (such as establishing assessment 'tracks' and using risk-assessment tools to set the scope of an assessment) encourage targeted and proportionate assessments of major project impacts. This can reduce compliance burdens and lead to more efficient resource allocation.

Rigorous assessment of the economic, social and environmental impacts of major projects is fundamental to the achievement of broader regulatory objectives. To this end, proposed major project developments are subject to a range of regulatory assessment processes. Collectively, these processes can take several years to complete and impose a considerable burden on proponents, the community and governments. This chapter examines the efficiency and effectiveness of existing processes and proposes reforms for improving these arrangements while protecting Australia's environmental, heritage and cultural assets.

6.1 Overview of major project assessment processes

In broad terms, major project assessment processes aim to identify and assess:

- the nature and significance of the risks and impacts of a proposed major project on matters such as land use, the environment, Indigenous heritage, Aboriginal land rights and public health and safety
- options for avoiding, mitigating or managing those impacts.

Information revealed through the assessment process is used to inform decisions about the acceptability (or otherwise) of proposed projects, including any conditions that should apply. Major project *approvals* are the focus of chapter 7 and *conditions* are examined in chapter 8.

The processes in place to facilitate major project assessment in Australia cover a diverse and complex set of issues, comprise various steps (including public consultation) and require substantial information and data. Box 6.1 provides a generic description of a sample of these processes. Appendix C provides a comprehensive account of assessment arrangements in Australian jurisdictions.

In most cases, primary responsibility for assessing major projects rests with the States and Territories and regulatory approaches vary depending on the nature of the project and the assessment 'pathway' that is adopted (chapter 5).

Box 6.1 Key major project assessment processes

- *Environmental impact assessment* (EIA) is the process of identifying, predicting, evaluating and mitigating the environmental impacts of development proposals prior to decisions being taken. Key steps include:
 - preparation (by the proponent) of assessment documentation
 - public exhibition of documentation and lodgement of submissions
 - assessment (by the relevant assessment authority) of the environmental impacts of the proposed project, and of measures to avoid, mitigate and/or ‘offset’ adverse impacts (referral agencies might also provide input into the assessment process)
 - provision of recommendations and advice to the relevant decision maker.
- Some EIA processes (or similar processes, such as *sustainability impact assessments and ecologically sustainable development assessments*) also cover social and economic impacts. In other cases, a dedicated *social impact assessment* may apply.
- *Indigenous heritage* processes typically involve:
 - identification (for example, through heritage surveys) of whether the area impacted by a proposed development has heritage significance
 - assessment of the likely impacts of the development on Indigenous heritage
 - consultation with relevant Indigenous parties
 - identification of possible management options, including duty of care processes and agreed cultural management plans or land use agreements (PC 2013a).
- The assessment process for *planning matters* comprises:
 - lodgement of a planning application (as part of this, proponents are usually required to identify how the proposal is consistent with relevant planning policies)
 - registration of the planning application on the public register and provision of notice to members of the community affected by the proposal
 - consideration and assessment of the application by the planning authority.
- Where *native title* is applicable, changes to existing land uses need to be consistent with native title. Other than seeking a Federal Court determination of native title rights and interests, developers can negotiate directly with Traditional Owners to ratify:
 - Indigenous Land Use Agreements: a legal agreement between a native title group and others about the use and management of land and waters.
 - Future Act Agreements: an agreement that sets out what future acts are permitted, the effect the act will have on native title and any compensation that is to be paid for interference with native title rights.

In broad terms, assessment arrangements in New South Wales, South Australia and Tasmania can be characterised as relatively integrated (table 6.1). Under these arrangements, a comprehensive range of project impacts (ordinarily assessed by

separate agencies) are considered jointly. In Victoria, integrated assessment arrangements are in place for major transport projects only.

Table 6.1 'Integrated' approaches to major project assessment

<i>Jurisdiction</i>	<i>Major project assessment pathway</i>	<i>Key requirements^a</i>
New South Wales	State significant development and state significant infrastructure	<ul style="list-style-type: none"> • Environmental impact statement and development application • Public exhibition period of at least 30 days
Victoria	Major transport projects	<ul style="list-style-type: none"> • Comprehensive impact statement or impact management plan • Public exhibition period of 20-30 days (for comprehensive impact statements)
South Australia	Section 46 (major development or project) process	<ul style="list-style-type: none"> • Environmental impact statement or public environment report or development report • Public comment period of 3 to 6 weeks
	Section 49 (Crown development and public infrastructure) process	<ul style="list-style-type: none"> • Development application • Environmental impact statement (if required) • Public comment period of at least 3 weeks
Tasmania	Projects of state significance	<ul style="list-style-type: none"> • Integrated impact statement • Public exhibition of draft impact statement
	Projects of regional significance	<ul style="list-style-type: none"> • Project impact statement • Environmental impact assessment (if required) • 28 day public exhibition period
	Major infrastructure projects	<ul style="list-style-type: none"> • Determined on a project-by-project basis

^a Includes preparation of impact assessment documentation and public exhibition of this material.
Source: Based on appendix C.

Although an integrated approach can reduce the total number of assessment processes that are administered, in most cases other (separate) requirements still apply (for example, processes covering native title issues, mining and petroleum-related approvals, and road access and works approvals). Moreover, the undertaking of an environmental impact assessment (EIA) does not necessarily substitute for compliance with other environmental obligations.

Integrated major project assessment processes are not in place in Victoria (except for transport projects), Queensland, Western Australia, the Northern Territory and the ACT. Instead, a range of standalone development assessment and approval (DAA) processes apply (table 6.2). In some cases administrative arrangements are in place to coordinate these processes, as discussed in section 6.3.

Table 6.2 Key assessment processes in ‘non-integrated’ systems

<i>Jurisdiction</i>	<i>Environment</i>	<i>Heritage and native title</i>	<i>Other</i>
Victoria	Environment effects statement Works approval Flora and fauna permits Water licences and permits Works across waterways permits Native vegetation clearing permits	Cultural heritage management plan Heritage permits	Planning permits Exploration, mining and production permits Building permits Road works permits Use of, or access to, Crown land reservations Use or development of coastal Crown land
Queensland	Environmental impact statement Environmental authorities Water use and water extraction licences	Cultural heritage permits Aboriginal cultural heritage management plan Aboriginal and Torres Strait Islander land access permits	Social impact assessment Planning approval Exploration, mining and production permits
Western Australia	Public environmental review or assessment on proponent information Native vegetation clearing permits Flora and fauna permits Works approval	Aboriginal heritage assessment Native title agreement	Planning approval Development consent Exploration, mining and production permits
Northern Territory	Environmental impact statement or public environmental review Water licences and permits Flora and fauna permits Native vegetation clearing permits Works approval	Aboriginal sacred site certificate (authority certificate)	Land access assessment Mining approval and exploration licences Development consent
ACT	Environmental impact statement	Advice from Heritage Council	Development application Building consents and approvals Water and sewerage approvals

Source: Based on appendix C.

Regulatory processes administered by the Australian Government might also apply to major projects. In particular, if a project is deemed to involve a ‘controlled action’ under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act), the impacts of the project on matters of national

environmental significance must be assessed. Other potentially relevant Australian Government processes include:

- health, safety and environmental assessments required under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cwlth). Specifically, proponents of offshore petroleum projects may be required to prepare an Environment Plan, Safety Case, Oil Spill Contingency Plan or Well Operations Management Plan
- Indigenous heritage assessment processes under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth)
- processes for negotiating access to Aboriginal land or land held under native title as set out in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) and the *Native Title Act 1993*
- development assessment processes set out in the *Airports Act 1996* (Cwlth), including preparation of a Major Development Plan consistent with a pre-existing Master Plan.

What are the reform priorities?

The remainder of this chapter examines the design and operation of major project assessment processes in Australia and makes recommendations for improving these arrangements. In particular, the Commission considers that regulatory burdens would be reduced, and relevant environment and social objectives better achieved, by:

- removing overlap and duplication between assessment processes
- better coordinating the administration of processes
- enhancing the quality and independence of assessment work
- encouraging more proportionate assessment requirements.

6.2 Duplication between assessment processes

Participants' contrasting views on the extent of unnecessary duplication

Concerns about duplication between environmental assessment processes administered by the Australian Government and the States and Territories have been a strong theme of study submissions:

Duplication in assessment and approval is an inefficient use of resources and adds unnecessary time delay to the approval process for no real benefit. ... The State legislation is considered to be appropriate and robust, [and] able to ensure environmental protection in the decision making process. (Urban Taskforce Australia, sub. 15, p. 4)

and

The duplication and overlap of project approvals across governments is a major headache for project proponents ... one recent investment triggered four assessment processes by four separate government agencies, at both federal and state levels, all with similar information requirements. (BCA, sub. 43, p. 10)

The Australian Petroleum Production and Exploration Association (APPEA) referred to a survey study conducted by Andrew Macintosh from the Australian National University that found:

73 per cent of the respondents agreed with the statement, 'The EPBC Act process duplicated other regulatory processes without significantly improving environmental outcomes'. Further, 81 per cent of respondents whose actions were subject to conditions under the EPBC Act and state or territory planning and environment permits reported some or substantial overlap in the conditions. (Macintosh 2010, p. 408)

Some respondents considered that overlaps between state and federal environmental regulations have worsened over time due to the 'growing role' of the Australian Government:

The Commonwealth's growing assertiveness at inserting a second and subsequent layer of review on environmental grounds seems more motivated by a focus on political rather than environmental outcomes. (Queensland Resources Council, sub. 19, p. 4)

Notwithstanding these concerns, many respondents considered that state-level duplication is the most significant source of regulatory burden at the assessment stage. The Chamber of Commerce and Industry of Western Australia considered:

Numerous duplications exist [in Western Australia] ... for example, the Environment Protection Authority (EPA) and Department of Mines and Petroleum have environmental approval responsibilities, while the EPA and Department of Indigenous Affairs have Aboriginal heritage responsibilities. (sub. 44, p. 4)

Xstrata Coal pointed to areas of regulatory duplication in New South Wales and Queensland:

The objectives of the [New South Wales] *Environmental Planning and Assessment Act 1979* overlaps with the *Heritage Act 1998* and the *Water Management Act 2000*. These overlapping objectives mean that various State Government agencies have the power to impose assessment requirements and compliance requirements in relation to the same issue but with different outcomes ... In Queensland, reform is urged to consider the considerable overlap and duplication between the environmental impact statement

processes, and the subsequent Mineral Resources Act and Environment Protection Act processes. (sub. 50, pp. 42–44)

Clayton Utz (pers. comm., 13 June 2013) also highlighted overlaps within the Queensland regulatory system, particularly with respect to regulation of vegetation clearing, surface water and groundwater management, noting that as many as six separate requirements could apply in each case.

While most stakeholders gave in-principle support to measures aimed at reducing unnecessary duplication, the importance of the Australian Government’s role in assessing impacts on matters of national environmental significance was strongly emphasised by a number of participants. The Australian Network of Environmental Defender’s Offices (ANEDO) observed:

States are not legally mandated to act in the national interest; States may have inherent conflicts of interest as proponents of major projects; The Commonwealth is responsible for implementing Australia’s international environmental obligations and ... has an essential role in requiring consistent environmental standards and oversight of State processes. (sub. 14, pp. 9–10)

The Wentworth Group of Concerned Scientists noted that, in addition to concerns about environmental protection, state and territory processes may not ‘meet national standards for public participation, transparency, information, review and objective decision-making’ (sub. 1, p. 3). It was also proposed that, in particular cases, it is only through Australian Government intervention that ‘bad’ projects have been stopped:

The Traveston Crossing Dam on the Mary River was ... recommended for approval by the Queensland Coordinator-General. In 2009 the Commonwealth Environment Minister, Peter Garrett, acted under the EPBC Act to refuse the dam development on the ‘very clear’ scientific evidence that it would cause unacceptable impacts on nationally protected species: the Australian Lungfish, the Mary River Turtle and the Mary River Cod. (sub. 1, p. 1)

The case for reform

Major project assessment processes — and environmental assessment processes in particular — involve significant costs for proponents, regulators and the community (box 6.2). Despite this, study submissions have highlighted that it is not unusual for major projects to be subject to two (or more) assessment processes covering similar issues and impacts.

Box 6.2 Cost of environmental assessment processes

Environmental assessment processes involve a range of costs (including administrative costs, compliance costs, delay costs and costs caused by uncertainty) and study respondents indicated that these costs can be significant. Xstrata Coal reported:

The typical costs for a proponent in consultancy fees alone to prepare an environmental impact statement (EIS), supplementary EIS and negotiate a Coordinator-General's report in Queensland for a new coal mine, rail or port can range from \$3 million to \$15 million per development type. (sub. 50, p. 39)

A survey conducted by Andrew Macintosh of Australian National University found:

The estimated average proponent cost associated with projects that have received final approval under the [EPBC Act] environmental impact assessment regime is between \$660 000 and \$2.2 million. (2009, p. 5)

The Allen Consulting Group estimated the cost of preparing an average environment effects statement in Victoria at \$1.2 million (excluding delay costs) (2009).

The Office of the Environment Protection Authority in Western Australia estimated that in 2012-13, environment assessments involved (on average) about \$50 000 in regulator expenses (2013b).

The Commission notes that some participants regard streamlining of assessment processes as equivalent to a deterioration in regulatory scrutiny and, by consequence, environmental, heritage and social outcomes.

However, there is no theoretical or evidential basis for arguing that two assessments are necessarily better than one. The administration of two similarly-focused processes could even *compromise* regulatory outcomes if, for example, inconsistencies arise between processes or there is a lack of accountability (or 'responsibility shifting') on the part of assessment authorities.

The Commission considers that judicious streamlining of major project assessment arrangements can materially reduce regulatory overlap (and the costs, delays and uncertainty that this gives rise to), whilst ensuring that regulatory objectives are maintained. Accordingly, the Commission is recommending reform in three areas, with the primary aim of ensuring that particular project impacts are only assessed once — that is, a 'one project, one assessment' framework.

Stronger bilateral assessment agreements under the EPBC Act

As set out in chapter 3, under Australia's federal system of government the States and Territories are primarily responsible for environmental management and administer a range of regulatory processes in this context. The Australian

Government's environmental responsibilities are more limited and include matters of national environmental significance, the environment on Commonwealth land (or waters) or impacts on the environment (anywhere) caused by the actions of a Commonwealth agency. For particular major projects, this circumstance can manifest in environmental assessment processes at each level of government that cover similar (if not the same) issues and impacts.

Bilateral assessment agreements between the Commonwealth and the States and Territories are one way of reducing unnecessary duplication between processes. These agreements 'accredit' particular state and territory processes for the purposes of controlled action² assessments under the EPBC Act. (Bilateral *approval* agreements are discussed in chapter 7.)

Assessment by bilateral agreement is one of seven available assessment methods under the EPBC Act. The assessment approach decision is made by the Commonwealth Environment Minister in accordance with section 87 of the EPBC Act. Over the period that bilateral assessment agreements have been in place³, these arrangements have been used for less than 30 per cent of controlled action assessments (table 6.3).

² Not all controlled actions under the EBPC Act constitute 'major projects' — the controlled action decision is based on the expected impact of the action on protected matters.

³ For each jurisdiction, data covers the period from when a bilateral assessment agreement was first entered into, to March 2013.

Table 6.3 Assessment approach for controlled actions under the EPBC Act — from date of bilateral agreement to March 2013^a

<i>Jurisdiction</i>	<i>Start date</i>	<i>Bilateral</i>	<i>Accredit</i>	<i>RI</i>	<i>PD</i>	<i>PER</i>	<i>EIS</i>	<i>Total</i>
New South Wales	Jan 2007	19	37	9	46	12	9	132
Victoria	Jun 2009	8	3	-	47	4	1	63
Queensland	Aug 2004	98	7	9	103	10	38	265
South Australia	Jul 2008	1	1	-	15	5	2	24
Western Australia	Aug 2002	59	6	13	127	8	7	220
Tasmania	May 2011	9	-	-	5	1	1	16
Northern Territory	May 2002	29	-	-	7	2	1	39
ACT	Jun 2009	5	-	2	14	1	-	22
Total		228	54	33	364	43	59	781

^a A 'controlled action' is an action that is likely to have a significant impact on a matter of national environmental significance. Bilateral = assessment under a bilateral assessment agreement; Accredited = assessment under a state or territory assessment process accredited under the EPBC Act on a case-by-case basis; RI = assessment on referral information (the least rigorous level of assessment); PD = assessment on preliminary documentation; PER = assessment by public environment report; EIS = assessment by environmental impact statement. No controlled actions were assessed by inquiry over this period.

Source: Unpublished data provided by DSEWPAC.

One reason for this is the relatively narrow scope of bilateral assessment agreements (table 6.4). For example, in the case of South Australia, while the 'section 46' (major development or project) assessment process (under the *Development Act 1993*) is accredited, the 'section 49' (Crown development and public infrastructure) process and key mining assessment processes (under the *Mining Act 1971*) are not. This — in part — explains why only one of 24 controlled actions has been assessed under the South Australian bilateral agreement since it commenced in 2008.

In Western Australia, the EPA administers two forms of EIA — while the public environment review process is accredited, the assessment on proponent information process is not. The Government of Western Australia considered that this creates a perverse situation where complex developments are subject to a single assessment, but more straightforward proposals are required to partake in two processes:

This [assessment on proponent information] is the most common level of assessment in Western Australia and applies to less complex matters where impacts are well understood. In these cases, proponents are often required to obtain separate approvals under the EPBC Act. (sub. DR103, p. 3)

Table 6.4 Accredited State and Territory assessment processes

<i>Jurisdiction</i>	<i>Accredited processes</i>	<i>Legislation</i>
New South Wales ^a	This agreement has expired	--
Victoria	Environment effects statement Assessment by an Advisory Committee or a joint Advisory Committee/Panel Assessment by permit application Works approval application Bulk water entitlement assessment	<i>Environment Effects Act 1978</i> <i>Planning and Environment Act 1987</i> <i>Planning and Environment Act 1987</i> <i>Environment Protection Act 1970</i> <i>Water Act 1989</i>
Queensland	Environmental impact statement for coordinated projects	<i>Sustainable Planning Act 2009</i> <i>State Development and Public Works Organisation Act 1971</i> <i>Environment Protection Act 1994</i>
Western Australia	Assessment by public environmental review	<i>Environment Protection Act 1986</i>
South Australia	Environmental impact statement, public environment report or development report for 'major projects'	<i>Development Act 1993</i>
Northern Territory	Assessment by environmental impact statement or public environmental report Assessment by inquiry	<i>Environmental Assessment Act</i> <i>Northern Territory Inquiries Act</i>
Tasmania	Integrated assessment process for projects of state significance Assessment of development proposal and environmental management plan Assessment process for projects of regional significance	<i>State Policies and Projects Act 1993</i> <i>Environmental Management and Pollution Control Act 1994</i> <i>Land Use Planning and Approvals Act 1993</i>
ACT	Environmental impact statement	<i>Planning and Development Act 2007</i>

^a The New South Wales agreement expired in 2012. The Australian and NSW Governments have indicated that this agreement will be renewed in 2014.

The scope of bilateral assessment agreements should not be determined by the administrative efficiencies that would be achieved through more streamlined regulatory arrangements. Only those processes that accord with the objectives of the EPBC Act constitute legitimate candidates for inclusion in a bilateral agreement (chapter 7).

Moreover, the Commission recognises that just because two processes 'look the same' does not necessarily mean they are perfect substitutes. For example, major developments in Victoria are typically subject to multiple environment-related assessment processes. Notwithstanding areas of overlap, these assessments also cover distinct environmental issues, that is, the *Environment Protection Act 1970* (Vic) focuses on pollution control, the Commonwealth EPBC Act seeks to protect

matters of national environmental significance while the *Environment Effects Act 1978* (Vic) sets out a process to enable Victorian decision makers to make an informed decision about whether a project with potentially significant environmental effects should proceed.

Indeed, several respondents submitted that dual environmental assessments at the Commonwealth and state and territory level *are* warranted due to the substantive differences between these processes and their objectives.

Notwithstanding these issues, the Commission considers that bilateral assessment agreements can and should play a larger role in major project assessment. The overlap between Commonwealth and state environmental assessment processes (and the cost this gives rise to) is not trivial and includes duplication in information and data inputs, public consultation requirements, assessment and analysis by regulators and condition-setting processes. Further, differences in the role and nature of Commonwealth and state environmental assessment responsibilities do not preclude the development of a single, mutually-acceptable assessment process.

The incidence of case-by-case accreditation (table 6.3) of state and territory assessment processes suggests that there is more scope and flexibility to agree a single assessment process than bilateral agreements currently provide for. Indeed, a number of State and Territory Governments have indicated support for more comprehensive bilateral assessment agreements:

South Australia has previously taken advantage of informal streamlining of assessments with the EPBC Act, and has indicated a willingness to consider entering into formal assessment bilateral agreements for the *Mining Act 1971* and the *Petroleum and Geothermal Energy Act 2000*. (South Australian State Government Departments, sub. 51, p. 37)

and

The exclusion of the Great Barrier Reef Marine Park from the assessment bilateral constrains Queensland's ability to streamline a larger number of development approvals. (Queensland Government, sub. 47, p. 2)

The Government of Western Australia has also called for more expansive bilateral assessment agreements:

The Western Australian Government seeks assessment and approval bilateral agreements that accredit both of the State's levels of assessment under the Environmental Impact Assessment process, and the State's native vegetation clearing permitting process. (sub. DR103, p. 3)

The Commission recognises that it might never be practical to remove *all* incidences of duplication between Australian Government and state and territory

environmental assessment processes. However, more comprehensive bilateral assessment agreements that accredit a broader range of state and territory processes — and in particular, those most commonly used for major project assessment — offer significant potential to reduce the incidence of regulatory duplication (and the costs, delays and uncertainty that this gives rise to).

All bilateral agreements should be reviewed and renewed with the aim of instituting a ‘one project, one assessment’ framework for the significant majority of major projects requiring approval under the EPBC Act. Furthermore, where accreditation of a process to all applicable matters is not possible, consideration should be given to whether processes can be accredited for use in particular circumstances, locations or for particular types of projects (‘partial accreditation’) — this approach has been adopted in Canada (box 6.3). The outcome of this work should be public, including (where relevant) the reasons why processes are not deemed to meet Commonwealth standards.

Box 6.3 Bilateral assessment arrangements in Canada

Recent reforms in Canada provide for ‘substitution agreements’ that allow for provincial regulatory assessment processes to be used in place of federal assessment processes (in this respect, these arrangements mirror Australia’s bilateral assessment agreements).

However, it is also possible in Canada for provincial assessment processes to be ‘partially’ accredited, meaning a process can be applied in particular circumstances — for example, to assess specific classes of major projects. This approach can facilitate more streamlined regulatory processes even where ‘full’ or unconditional accreditation of processes is not possible.

Source: British Columbia Environmental Assessment Office (2013).

RECOMMENDATION 6.1

The Australian and State and Territory Governments should continue to strengthen and expand the scope of existing bilateral assessment agreements under the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth). Areas for improvement include agreements on standards and procedures for assessment, and extending the number of regulatory processes accredited (in full or part) under current bilateral agreements.

Cooperative arrangements within jurisdictions

The scope and significance of major project impacts typically means that a large number of DAA processes are relevant, irrespective of whether Commonwealth assessment processes apply.

In practice, this can mean that similar impacts are assessed by two or more regulators within a single jurisdiction. For example, mining projects often require (at least) two environmental assessments at the state and territory level — one under general environmental law and another under mining-specific law. In this circumstance, the scope for overlap is significant.

The Victorian Competition and Efficiency Commission (VCEC) considered this issue as part of its review of environmental regulation in Victoria and found that numerous agencies are involved in habitat and biodiversity regulation (including local councils, Catchment Management Authorities, multiple State Government departments, Parks Victoria and Trust for Nature), and that this is ‘contributing to concerns about the lack of effectiveness, cost, uncertainty and delays associated with the regulations’ (VCEC 2009, p. 301).

Study respondents supported greater use of practical measures to minimise duplication and overlap between assessment processes at the jurisdiction level. This includes formal cooperative arrangements (for example, memorandum of understanding (MOU) agreements⁴) between relevant agencies to undertake ‘joint assessments’, or alternatively, to accredit the process of one agency as meeting the requirements of another agency. Where feasible, these arrangements present significant potential for efficiency gains by removing the need for proponents to comply with two separate but similar and overlapping assessment processes.

The Local Government Association of Queensland advocated strongly for MOU agreements and proposed that local government regulators also be included:

In terms of reducing duplication within jurisdictions, LGAQ agrees that State agencies should be encouraged to work together to share assessments and streamline decision making. LGAQ considers there is also benefit in extending memorandums of understandings between State agencies and local governments so one process can be used to meet the decision making requirements for both levels of government. For example, in areas like transport and road infrastructure a one network approach (State controlled and local roads) to assessment and approvals makes sense. (sub. DR78, p. 3)

⁴ A memorandum of understanding (MOU) is a document that records the common intent of two or more parties where the parties do not wish to assume legally binding obligations. They are commonly used to establish formal relationships between government agencies, and between government and not-for-profit organisations (VCEC 2013).

The Queensland Resources Council supported greater cooperation between regulators and proposed that this is also relevant for the monitoring and compliance stage:

At present, CSG [coal seam gas] companies must report to three separate agencies on water and exploration drilling/fracking. The requirement for reporting is accepted, but not to three separate agencies in three formats. One agency should hold the database and share this information with the other agencies where expert advice might be needed. (sub. DR91, p. 3)

A noteworthy example of how regulators within the same jurisdiction can cooperate on assessment and approval matters is the foreshadowed changes to environmental regulations applying to offshore petroleum projects at the federal level (box 6.4). Such streamlining is consistent with the Commission's recommendation that regulators establish cooperative arrangements to minimise unnecessary regulatory duplication within a jurisdiction (recommendation 6.2).

Box 6.4 Federal environment regulation of offshore petroleum projects

A number of study participants raised concerns about overlap in federal environmental regulations administered by the Department of the Environment, and the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA):

The Woodside case study demonstrates that operational conditions made by the Commonwealth Environment Minister in granting approval under the *Environment Protection and Biodiversity Conservation Act 1999* [EPBC Act], duplicate, in identical form, permit requirements under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* [administered by NOPSEMA]. These 'dual approvals' with different timeframes and unclear objectives do not deliver any additional benefit to Australia or the environment. (APPEA, sub. 17, p. 4)

On 27 May 2013, the then Minister for Resources and Energy announced the intention of the Australian Government to accredit NOPSEMA's environmental management authorisation process under the EPBC Act (Gray 2013). The new Commonwealth Ministers for Industry and Environment and the CEO of NOPSEMA agreed to undertake a strategic assessment of NOPSEMA's process in October 2013. The Minister for the Environment will determine whether NOPSEMA's process should be endorsed under the EPBC Act in early 2014, following public consultation on a draft strategic assessment report and finalisation of the assessment (Macfarlane and Hunt 2013).

Cooperative arrangements between regulators at the state and territory level are also becoming more common:

The OEPA [Office of the Environmental Protection Authority in Western Australia] continued to work with the Department of Aboriginal Affairs (DAA) to collaborate and share information to better understand the respective agency roles in assessments of

Aboriginal sites and to be more effective in these roles. A working group has been established to progress a MOU with the DAA. (OEPA (WA) 2013b, p. 37)

and

A number of agreements exist between regulators, which are intended to avoid overlap when multiple regulators manage similar risks, interests and/or stakeholders. Of the regulators surveyed, 63 per cent reported having a formal agreement with another Victorian regulator/agency and 39 per cent reported an agreement with a Commonwealth regulator. (VCEC 2013, p. 11)

The Victorian EPA recently committed to establishing formal, cooperative arrangements with other Victorian regulators to reduce overlap and inconsistencies between DAA processes:

[The EPA will] seek to improve the coordination of approvals by working with other agencies. ... [the] EPA will hold several meetings of a working group in the first half of 2013 to formalise arrangements for improved coordination. ... Improving the coordination of EPA's approvals process with other agencies will help to reduce the cumulative impacts of regulation on Victorian industry. (EPA (Vic) 2013, p. 16)

The Commission is recommending that regulatory agencies in all jurisdictions establish formal arrangements to minimise unnecessary duplication and inconsistencies through joint, substitutable or accredited major project assessment processes.

RECOMMENDATION 6.2

Regulatory agencies should establish cooperative arrangements — for example, memorandums of understanding — for joint or substitutable assessments to minimise unnecessary duplication between major project assessment processes within a jurisdiction.

Establishing the case for regulatory intervention: the 'water trigger'

A key feature of 'best practice' regulatory process is to ensure that unnecessary regulations are not introduced in the first place. That is, ahead of undertaking significant legislative or regulatory reform, the expected benefits and costs must be assessed.

The 'water trigger' amendment to the EPBC Act passed the Australian Senate in July 2013. This amendment means that coal seam gas and large coal mining developments must be assessed and approved by the Australian Government if they are expected to significantly impact on a water resource. This requirement is in addition to assessment and approval requirements at the state and territory level.

Several participants have queried the benefits of this amendment, claiming that state and territory water protection laws are adequate and the new trigger adds to the regulatory burden unnecessarily:

The introduction of the water trigger will mean that water will be assessed by up to three different bodies on some mining projects in NSW: the independent gateway panel; the Planning Assessment Commission; and the Australian Government. This process is not efficient, will result in increased delays and costs for projects, and is unlikely to achieve commensurate gains for the environment. (NSW Minerals Council, sub. 23, p. 3)

and

The plan to introduce the [water] trigger ... is a textbook example of how regulation can increase costs to industry while delivering no environmental benefit. (APPEA, sub. 17, p. 1)

On the other hand, a number of respondents supported the water trigger amendment:

The NCSSA strongly supports the EPBC Act ‘water trigger’ amendment as the appropriate measure for national oversight of significant environmental impacts in order to meet Australia’s international obligations under the Ramsar Convention and other treaties ... State approval of projects will reduce the capacity for cross-border impacts to be effectively and objectively assessed. The Murray Darling dispute is a perfect testament to the risks in leaving decision-making regarding shared environmental assets to individual states. (Nature Conservation Society of South Australia, sub. DR95, p. 5)

and

Water resources are clearly a matter of national environmental significance that traverse state boundaries and Commonwealth oversight of water is established in law and policy. Application of the water trigger to specific activities occurred in recognition that coal mining and coal seam gas extraction are occurring at a landscape scale in NSW and Queensland and having a profound impact on this matter of national environmental significance. (Lock the Gate Alliance, sub. DR97, p. 7)

In Australia, the appropriate mechanism for weighing the expected benefits and costs of proposed regulatory reform is the regulatory impact statement (RIS) process. However, the Australian Government determined that the water trigger amendment should *not* be subject to RIS requirements, a decision that has been met with strong disapproval from stakeholders:

Exemptions from regulatory impact statement (RISs) should only be granted in exceptional circumstances, including where truly urgent and unforeseen events arise or there is a matter of budget or other sensitivity ... it is critical that this [a RIS] is undertaken to allow properly informed debate about the justification for the Bill and its costs and benefits. (NSW Minerals Council 2013b, p. 2)

and

The process by which the Bill came to be considered by the Parliament is void of satisfactory industry consultation ordinarily and reasonably afforded to regulatory amendments of such a significant nature and runs counter to the Government's recent commitment to effective, proportionate and beneficial regulations through the mandatory regulatory impact statement process. (QGC 2013, p. 2)

Several features of the water trigger amendment have also attracted criticism.

First, the water trigger amendment rules out the potential for relevant actions to be approved by State and Territory Governments under any future bilateral approval agreement (chapter 7). This is at odds with the objects of the EPBC Act (namely, to 'strengthen intergovernmental cooperation, and minimise duplication, through bilateral agreements' and 'provide for the intergovernmental accreditation of environmental assessment and approval processes' (s. 3)), and recent commitments made by the Australian Government to reduce double-handling and streamline regulatory processes.

Second, the new amendment has created an input-based (and activity-specific) EPBC Act trigger. That is, the controlled action decision is based on the nature of the development activity, not the significance of the impact. In this respect the water trigger contradicts the 'output-based' approach that underpins the EPBC Act. Moreover, the new arrangements imply that if a water resource is impacted by coal seam gas and coal mining activities, this *is* a matter of national environmental significance. However, if the water resource is impacted through some other means (say water extraction for irrigation purposes), this is not a matter of concern for the Australian Government even if the environmental consequences are the same or greater.

The Commission does not support the Australian Government's decision to exempt the water trigger amendment from a RIS process. Such exemptions should be limited to genuinely exceptional circumstances, such as emergency situations, where a clear public interest can be demonstrated (PC 2012b).

The water trigger amendment (in combination with the prohibition on use of bilateral approval agreements) imposes an extra layer of regulation on affected proponents. Further, it is not obvious that existing laws are deficient or that the particular legislative amendment adopted by the Australian Government is the best approach to deal with any identified gap in the regulatory framework. There is a strong case for undertaking a public and independent review of the water trigger amendment to determine whether the benefits exceed the costs.

RECOMMENDATION 6.3

The Australian Government should undertake and publish a regulatory impact assessment of the ‘water trigger’ amendment to the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth), including the exclusion of water trigger-related actions from bilateral approval arrangements. If the assessment shows that there are no net benefits to the community, the amendment should be repealed.

6.3 Coordination of major project DAA processes

Why is coordination important?

Even if the Commission’s proposals for a more streamlined regulatory system are adopted, the number, scope and complexity of major project assessment and approval requirements will remain significant. Moreover, these requirements are spread across multiple legislative instruments and vary depending on the nature and location of the project.

In this circumstance, effective coordination between regulators and regulatory processes is critical to guide proponents through the approvals system, reduce uncertainty, facilitate timely processing and minimise overlaps and inconsistencies.

In practice, however, regulatory coordination is often lacking. Participants have described a fragmented, confusing and uncertain regulatory system that imposes material transaction costs on proponents. Xstrata Coal noted:

State and Territory Government agency coordination [and] cooperation ... must be improved through the adoption of a ‘whole of Government’ approach to major project assessment. (sub. 50, p. 45)

The Chamber of Commerce and Industry of Western Australia pointed to a lack of ‘parallel processing’ under the current arrangements, leading to sequencing problems and unnecessary delays (sub. 44). Inadequate communication and information sharing between regulators was also raised as an issue, with many proponents noting that they often have to provide the same information twice.

A particularly frustrating issue for proponents is a lack of timely information on the progress of project approvals once assessment has commenced. The Association of Mining and Exploration Companies considered:

Wide implementation of integrated electronic lodgment and tracking systems for applications is an essential component of a more efficient approvals system ... parallel processing should be implemented at every opportunity during the assessment process

to ensure the most efficient use of time and resources, and avoid unnecessary delays. Such an approach involves multiple approval processes occurring simultaneously by differing agencies, where they are not reliant upon completion of the other. (sub. DR70, pp. 16–17)

Moreover, respondents often found it difficult to identify the relevant person within government to contact about the progress of a project application.

Options for enhancing regulatory coordination

Coordination problems are most directly (and efficiently) mitigated by ensuring that all major project assessment and approval processes are consistent with best practice regulation making principles (chapter 1). However, in practice it is not feasible or necessarily desirable to redesign the entire regulatory system ‘from scratch’, meaning a second-best solution is required. In this context, governments have adopted various institutional structures to reduce costs and achieve a more seamless and timely DAA process.

- Under a ‘one-stop shop’ model, a number of statutory assessment and approval functions (that would normally reside with other regulators) are undertaken by a single agency or Minister. Depending on the *scope* of the one-stop shop, this approach can reduce or even remove the need for coordination between separate processes and regulators.
- A ‘lead agency’ approach means that a single agency is responsible for coordinating major project DAA processes across government and providing guidance to proponents. Lead agencies have *some* responsibility for assessment and approval, but cannot override the decision making capacity of other regulators.
- A ‘coordination office’ performs similar functions to a lead agency (namely, coordination and facilitation of relevant regulatory processes) but is independent of the major projects regulatory system, meaning the office does not have any assessment or approval responsibilities and is not itself a major project proponent.

Table 6.5 characterises these models in terms of the coordination and assessment and approval functions carried out.

Table 6.5 Major project coordination models^a

<i>Model</i>	<i>Coordination of major project DAA processes</i>	<i>Assessment and approval of proposed major projects</i>
Coordination office	✓✓	✘
Lead agency	✓✓	✓
One-stop shop ^b	n/a	✓✓✓

^a Two ticks (✓✓), one tick (✓) or a cross (✘) means the entity has exclusive, partial or no responsibility respectively for relevant functions. ^b Assuming the one-stop shop covers all relevant major project approvals.

In Australia, the regulatory arrangements governing major transport projects in Victoria provide an example of the one-stop shop model. Internationally, this model has been adopted for major projects in New Zealand (the ‘board of inquiry’ process) and, to a lesser extent, for major energy projects in Canada (box 6.5).

Box 6.5 One-stop shop models for major project developments

Major transport projects — Victoria

The *Major Transport Projects Facilitation Act 2009* establishes the Minister for Planning as the responsible authority for:

- approving proposed major transport projects
- granting various ‘applicable approvals’ that are required by the proponent, but ordinarily determined by other regulators. This includes permits and approvals related to heritage, environment protection, flora and fauna, road management and water.

Board of inquiry process — New Zealand

In New Zealand, nationally significant developments seeking approval under the *Resource Management Act 1991* may be assessed and approved by a board of inquiry. Boards of inquiry are appointed by the Minister for the Environment, but are independent of the Environment Protection Agency and the Minister. Board of inquiry decisions can only be appealed to the High Court on points of law.

National Energy Board — Canada

A variation of the one-stop shop model is used for regulation of major international and interprovincial oil, gas and electricity projects in Canada. Specifically, the National Energy Board has the authority to grant approvals for relevant pipeline and power line projects to proceed, as well as some approvals required under other legislation, including environmental approvals required under national environmental law.

Sources: DPCD (Vic) (2010); EPA (NZ) (2013); NEB (Canada) (2013d).

Western Australia and South Australia have lead agency-type arrangements in place. The WA lead agency framework applies to major resource, infrastructure and transport projects, as well as large-scale land and housing proposals. One of four government departments acts as the lead agency depending on the nature of the project seeking approval (DPC (WA) 2011). For example, the Department of Mines and Petroleum is the lead agency for mining, petroleum, geothermal and carbon capture and storage proposals. For these projects, the Department would:

- assess and determine exploration and pipeline licence applications (if such approvals are required)
- coordinate and facilitate DAA processes across government.

Similarly, the South Australian Government offers a case management service to major project proponents:

The immediate benefit ... is the Case Manager, a single government contact point acting as a go between and providing leadership for the project, who has the skills to:

- Understand the approval process, regulatory considerations, and the issues a project will trigger to assist in streamlining the development approval and any licensing process;
- Navigate through and identify who within government will need to be involved in the development approval process; and
- Engage all agencies with a possible interest in the project early to identify all the issues so the project proponent has a clear understanding of the issues to be addressed, what will be required and is then able to make an early assessment as to the commercial risks in progressing the project. (South Australian State Government Departments, sub. 51, p. 26)

The South Australian case management service is managed by the Department for Manufacturing, Innovation, Trade, Resources and Energy. This agency is also responsible for various mining and petroleum-related major project approvals.

The Coordinator-General arrangements in Queensland are *not* analogous to the coordination models described here. The Coordinator-General's role is confined to the EIA process, and therefore does not include coordinating and facilitating major project DAA processes in the broad.

An example of the coordination office model is provided by the Major Projects Management Office (MPMO) in Canada. Less sophisticated versions can also be found in Australia, including the Australian Government's Major Project Facilitation Program, and the State Assessment and Referral Agency in Queensland (for ordinary development) (box 6.6).

Box 6.6 Examples of the coordination office model

Major Projects Management Office — Canada

The Major Projects Management Office (MPMO) was established in 2007 to provide over-arching project coordination, management and accountability for major resource projects (defined as 'large resource projects which are subject to either a comprehensive study or panel review under the Canadian Environmental Assessment Act'). Functions of the MPMO include:

- providing information regarding relevant regulatory requirements
- developing 'Project Agreements' that outline the roles and responsibilities of federal agencies and target timelines for each component of the process
- tracking and publicly reporting on the progress of federal regulatory processes against agreed timeframes (via the publicly accessible web-based 'MPMO tracker')
- monitoring compliance with, and reporting on performance against, the Canadian Government's Aboriginal Consultation requirements
- leading research on initiatives to improve the performance of the regulatory system.

The 2007 budget provided \$30 million over five years for the MPMO. The lead minister for the MPMO is the Minister of Natural Resources. He or she must report annually to Cabinet and parliament on progress made by the MPMO towards achievement of its objectives.

Major Project Facilitation Program — Australia

The Australian Government's Major Project Facilitation Program (administered by the Department of Infrastructure and Regional Development) provides eligible proponents with advice on relevant Australian Government approvals and facilitates relationships with key State and Territory Government agencies. Very limited resources are dedicated to this program.

State Assessment and Referral Agency — Queensland

In July 2013, the Queensland Government launched the State Assessment Referral Agency (SARA). SARA makes the Department of State Development, Infrastructure and Planning the single lodgement and assessment point for all development applications where the state has a jurisdiction under the *Sustainable Planning Act 2009*. SARA is supported by MyDAS, an online system that allows an applicant to lodge and track development applications.

Sources: Canadian Government (2012); DIRD (2013); DSDIP (2013d).

Evaluating the options

Is there a case for 'one-stop shop' arrangements?

A one-stop shop approach offers significant potential to reduce coordination costs and provide greater certainty and clarity about the regulatory framework. Several

participants favoured the establishment of a one-stop shop that covers all required major project approvals:

Governments should work together to remove all overlap and duplication in approving major projects and introduce wherever possible a single point of contact for business (or ‘one-stop shop’) that covers all project approvals requirements for major project proponents. (BCA, sub. 43, p. 3)

and

Project proponents would have a single authority with which to deal and could expect a single set of requirements. There would be no finger pointing between agencies or the various levels of Government in the case of cost blow outs or delays. (J. Spiers, sub. DR67, p. 4)

Notwithstanding the potential benefits, the costs and risks inherent in this model are significant, namely:

- the real or perceived risk of ‘regulatory capture’, and associated community concerns about the independence and rigour of the process
- the feasibility of one agency having the combined expertise to assess and grant approvals across a range of areas
- the risk that environmental (and other) law is applied inconsistently (a consequence of two regulators having responsibility for administering the same piece of law — one for major projects and one for other developments)
- the risk of the one-stop shop making decisions that have precedentiary and other impacts on the activities and decisions of the agencies that administer the laws in question on a routine basis
- the costs associated with implementing legislative changes and establishing efficient and effective referral arrangements, to the extent that input and advice from other departments is sought.

A number of study respondents expressed serious reservations about one-stop shop models:

ANEDO supports improved agency coordination but does not support centralisation of major project assessment and approval processes in a single agency ... risks of centralisation of major project assessment and approval processes in a single agency include less rigorous assessment, conflicts of duties, reduced community confidence and corruption risks. (ANEDO, sub. DR92, p. 20)

and

The proposal for a ... one stop shop ... further strips away the public consultation rights under the Sustainable Planning Act and the Planning and Environment Court ... While economic outcomes are important, all costs including externalities need to be

considered, and a fast tracking one stop shop without accounting for changes to or impacts on ecosystem services is a flawed process. (K. Faldt, sub. DR82, pp. 1-2)

On balance, the Commission considers it impractical to establish one-stop shop arrangements for the broad class of major projects in Australia. Major projects are not limited to a single sector or activity and a vast amount of legislation would need modification to give authority to the one-stop shop. Moreover, establishing a single agency with the requisite skills and expertise to assess and approve a diverse range of project types and impacts would be very challenging, create overlap with agencies that regulate regular sized developments and risk ‘regulatory capture’.

The Commission’s preferred approach

The Commission anticipates that many of the same benefits associated with the one-stop shop model could be achieved by adopting alternative (and less costly and risky) institutional arrangements in the form of a major projects coordination office (or similar).

This approach has the potential to deliver a more certain, timely and transparent approval process — with corresponding benefits for proponents and the community — by:

- acting as a single point of entry into the regulatory system (at the jurisdiction level)
- advising proponents on relevant statutory requirements, including through pre-application consultation meetings with proponents (chapter 5)
- developing ‘project agreements’ with proponents and regulators that document agreed working arrangements and timeframes for the completion of primary *and* secondary approval processes
- electronically tracking the progress of individual assessment and approval processes against timeframes, identifying bottlenecks and publicly reporting on performance against timeframes
- facilitating interaction with responsible regulators at the Commonwealth and local government level
- identifying opportunities for regulators to cooperate to reduce overlap and duplication between assessment and approval processes (section 6.2).

A number of study respondents supported the coordination office model:

There are numerous overlapping and often conflicting levels of Government in the regulatory approvals of major projects. This is particularly the case in Environmental approvals. APPEA has found that much of this issue stems from a lack of

understanding / communication between departments and agencies. A single coordinated office ... could have significant benefits to industry by making the major project application process simpler, and minimising the different points of contact within the Government. (APPEA, sub. DR105, p. 10)

and

The Association supports [the Commission's proposal] ... for jurisdictions to establish a major projects coordination office. In particular, LGAQ strongly supports the State, through a major projects coordination office, facilitating interactions between regulatory agencies and local government as well as between proponents and local government. (LGAQ, sub. DR78, p. 4)

NTSCORP considered that the coordination office model would facilitate better integration between native title and major project assessment and approval:

An office has the potential to address current system fragmentation and improve project turnaround. ... the lack of integration between native title and State project approval processes can lead to disputes, delays and added cost. ... the major projects coordination office could assist in advising proponents about their obligations under the Native Title Act. (DR104, pp. 9-10)

Evidence from operation of the MPMO in Canada suggests that the magnitude of these efficiency gains could be significant:

The Major Projects Management Office initiative has helped to transform the approvals process for major natural resource projects by shortening the average review times from 4 years to just 22 months, and improving accountability by monitoring the performance of federal regulatory departments. (Government of Canada 2013, p. 1)

Natural Resources Canada undertook an evaluation of the MPMO in 2012 and concluded that there is a strong case for retaining the current arrangements:

- The evidence clearly demonstrates a continued need for the MPMO initiative (MPMOI) ... There is a strongly articulated need for system-wide coordination and governance — with senior management involvement — that supports policy leadership, as well as performance monitoring and management.
- The integration and federal coordination of environmental assessments and regulatory reviews were found to have increased under the MPMOI. ... federal timelines were viewed by internal and external stakeholders consulted to be improving due to increased capacity and improved integration and coordination (as a result of MPMOI procedures, coordination, and legislative improvements).
- Transparency and accountability of the federal regulatory process within the federal government increased significantly through the MPMOI ... The MPMOI also led to benefits that extended beyond the Initiative, such as a 'catalyzing' effect for further process improvements within federal departments/agencies, as well as developing an exceptional level of horizontal dialogue at senior management levels.

-
- The evaluation found that operation and delivery of MPMOI activities, outputs and outcomes would be difficult to achieve at a lower cost under the current regulatory system.
 - The international comparative analysis revealed that the MPMOI performed quite well compared to similar initiatives. The MPMOI implemented several best practices and offered some unique features not identified elsewhere. (2012, pp. 1–3)

The Commission is recommending that State and Territory Governments establish a major projects coordination office, where the benefits exceed the costs. Where a similar coordination mechanism already exists, the case for refining those arrangements (in terms of functions and resources) should be considered.

While the structure and functions for a coordination office would vary across jurisdictions, the net benefits of this model are likely to be maximised where:

- coordination offices report directly to senior economic Ministers in each state and territory, for example, the Premier, Treasurer or Minister for State Development. In most cases, this would ensure that the Minister responsible for primary development approval decisions (usually the Minister for Planning — chapter 7) is not also responsible for the coordination office.
- access is limited to projects that are large scale (in terms of the scale of the activities involved and the physical or geographic footprint of the project), technically complex and ‘state significant’ (that is, make a significant contribution to the broader economic development or infrastructure requirements of the State or Territory). In practice, a coordination office is likely to manage a handful of projects at a time, while in some periods it may have none.
- the resources of coordination offices can be readily scaled up or down over time in line with the level and nature of major project investment activity.
- the Australian Government commits its regulators to actively participating in and supporting the coordination activities of these offices.

A similar body is unlikely to be justified at the federal level given the limited number of Australian Government DAA processes. That said, the case for expanding the resources and operational relevance of the Major Project Facilitation Program (box 6.6) should be considered.

Finally, the Commission notes that the new Australian Government has committed to establishing jurisdiction-based one-stop shops for particular environment approvals:

The Coalition will offer State and Territory governments the opportunity to act as a one-stop-shop for environmental approvals. Should they accept, the States and Territories would administer a single approvals process including approvals under

Commonwealth legislation such as the Commonwealth Environmental Protection and Biodiversity Conservation Act. (Liberal Party of Australia 2013)

Under this approach, State and Territory Governments would have responsibility for granting approvals under the EPBC Act (approvals that would normally be granted by the Commonwealth Environment Minister), but other statutory approval responsibilities would remain unchanged. This is consistent with the Commission's recommendation for bilateral agreements to be established between the Commonwealth and State and Territory Governments for environmental approvals under the EPBC Act (chapter 7).

RECOMMENDATION 6.4

Where they do not exist, State and Territory Governments should establish a major projects coordination office (or similar) to:

- *advise proponents of complex, large-scale projects of state or territory significance on regulatory requirements*
- *develop project agreements that document agreed working arrangements among regulators and timeframes for the completion of processes*
- *electronically track and publicly report on progress against statutory and regulator-determined timeframes*
- *facilitate interactions with relevant Australian Government regulators and local governments.*

A public assessment of the expected benefits and costs of this reform should be undertaken to determine the functions and resources of these offices.

6.4 Independent assessment agencies

Reports of substandard assessment work

Accurate and objective examination of major project impacts — and proposed avoidance and mitigation measures — is fundamental to the efficiency and effectiveness of the regulatory framework. However, study respondents have expressed scepticism about the rigour and impartiality of current assessment processes:

From East End Mine Action Group's experience ... environmental impact statement processes are often fast tracked, deficient, untrustworthy and can be marked by grossly inaccurate science. (EEMAG, sub. DR68, p. 9)

and

... agencies and decision makers rely heavily on the information in environmental impact assessment reports which are provided by the proponent, and prepared by consultants paid by proponents. This raises potential risks of conflicts of duty, and perceived or actual risks of corruption. (ANEDO, sub. DR92, pp. 22-23)

Xstrata Coal emphasised the importance of regulators closely scrutinising assessment information:

It is the responsibility of the assessing officers to critically evaluate the assessments contained in the environmental impact statement and to then provide full, frank and independent advice to the consent authority. (Xstrata Coal, sub. 50, p. 52)

However, Economists at Large and the Australia Institute considered that this does not always occur:

Given the highly technical nature of many EIS reports and the potential lack of suitably qualified and resourced reviewers in planning departments, there is great incentive for consultants to make technical assumptions which produce results favourable to their employers. Consultants know such assumptions will be difficult for most reviewers to identify or question. (sub. DR83, p. 7)

Measures to encourage high-quality major project assessment

Governments have implemented various administrative and institutional measures to encourage expert and robust assessments of major project impacts. For example, external expert groups have been established in a number of jurisdictions to advise regulators on technical matters — the statutory advisory committees and panels provided for under the EPBC Act are one example.

In other cases, peer review arrangements or ‘accreditation’ systems are used to manage quality concerns. For example, to access the Brisbane City Council RiskSMART scheme, proponents must partner with an accredited consultant. A number of participants supported accreditation schemes for major project assessments:

Accreditation could be done through an industry, government or co-regulatory body, including by building on existing voluntary accreditation mechanisms. ... Formal accreditation for major project EIA would have a range of potential co-benefits, including increased reliability and re-use of EIA information, less delays in seeking further information, continuous improvement of professional standards, and greater trust in decision making. (ANEDO, sub. DR92, pp. 22-23)

and

Best practice environmental impact assessment should remove the nexus between developers and environmental consultants by introducing a framework for the

independent appointment of environmental consultants. (Nature Conservation Council of NSW, sub. 22, p. 3)

A further way of encouraging objective and rigorous regulatory assessment is by assigning major project assessment responsibilities to ‘independent’ regulatory bodies (box 6.7) that are:

- separate from the policy making functions of government (and more specifically, the direction of Ministers)
- not themselves a proponent of major project developments.

Box 6.7 Defining independence

‘Independence’ is not a binary condition: regulators can be more or less independent in a range of ways:

- Regulation independence: The degree to which a regulator has discretion to set and adjust regulations as it thinks fit in order to achieve the objectives of regulation, how quickly and flexibly it can do this, and what sort of political process is required.
- Operational independence: The degree to which a regulator has operational independence, or a broad discretion to exercise a range of powers, to protect against interference from politicians or industry.
- Budgetary independence: The degree to which a regulator is protected from political or sector pressure through its funding arrangements.
- Institutional independence: The degree of distance in the regulator’s relationship with the executive and legislative branches of government; the rules governing the appointment and dismissal of governors or senior staff.

Source: New Zealand Productivity Commission (2013).

Assessing the options

Accreditation is unlikely to offer net benefits

The Commission does not favour accreditation schemes that dictate which consultants can provide input into major project assessment processes. These arrangements present several costs and risks, including:

- a lessening of competition amongst consultants (or ‘closed shop’), particularly if barriers to accreditation are high (for example, if accreditation requirements are unnecessarily time-consuming or costly). Any reduction in competition is likely to increase the cost of consultancy services and stifle innovation.

-
- restricted access to subject-matter experts. Major project impacts are complex, diverse and often highly uncertain. A range of technical expertise is typically required to prepare the necessary assessment documentation. It would not be straightforward (or low-cost) to design and implement an accreditation scheme that covers multiple subject-areas, industry sectors and countries. By contrast, most professional accreditation schemes are sector, occupation and jurisdiction specific.
 - a risk ‘low-quality’ consultants are accredited. It is not clear that governments are better placed (or better informed) relative to project proponents to assess the quality of services provided by consultants.

Moreover, while participants have expressed anecdotal concerns about the quality and objectivity of information supplied to regulators, specific evidence to support these claims has been limited.

In any case, while accreditation schemes may be effective in ensuring that only suitably qualified consultants prepare assessment information, so long as proponents are funding this work, the (real or perceived) risk of ‘proponent bias’ remains. More effective and efficient ways to safeguard against low-quality assessment work include:

- provision of clear, upfront guidance on the type, level and quality of information and data required of proponents (chapter 5)
- ensuring regulators have the authority to reject assessment material that is deemed to be incomplete, inadequate or invalid and to request further information (‘stop the clock’ — chapter 7). This depends critically on regulatory agencies being adequately resourced to evaluate and interrogate assessment documentation (chapter 12)
- sanctions for providing false or misleading information
- transparent and participative assessment processes, including appropriate opportunities for consultation on assessment documentation (chapters 5 and 6).

Independent regulatory assessment agencies are desirable

In order to be seen as fair and impartial, it is often desirable for regulators to be independent, both from government and from those whom it regulates. A mix of government departments and independent agencies are currently responsible for assessing proposed major project developments in Australia (table 6.6).

Independent major project assessment arrangements are perhaps most developed in Tasmania, where the Tasmanian Planning Commission (an independent statutory

body under the *Tasmanian Planning Commission Act 1997*) is responsible for conducting an integrated assessment of projects of state significance. The Commission then makes recommendations to the Minister, however it is the government that finally determines whether the project proceeds, and if so, on what terms and conditions.

In other jurisdictions, only certain aspects of major project assessment are undertaken by independent agencies. This is particularly true for environmental matters. For example, in both Western Australia and the Northern Territory an independent environment protection authority (EPA) is responsible for environmental assessment processes (box 6.8).

In some States and Territories, independent environment regulators have a more limited role in major project assessment. For example, the Victorian EPA is responsible for assessing applications for works approvals and other licences (in addition to being the general environmental law enforcement agency and undertaking some monitoring and enforcement activities in relation to major project approvals — chapter 10). Responsibility for the ‘primary’ environmental assessment process in Victoria (the environment effects statement) rests with the Minister for Planning.

A number of study participants supported more independent major project assessment arrangements:

ANEDO agrees that arms-length, independent assessment and enforcement functions would improve the effectiveness and rigour of major project regulation, and support public confidence in DAA processes. For example, relying on state Planning Departments to develop policy, set environmental impact assessment (EIA) requirements, assess EIAs, approve projects, set conditions, and enforce compliance with those conditions, is an inappropriate concentration of functions in a single office or department. (sub. DR92, p. 22)

The BCA considered:

In our view while there are benefits (e.g. independence) and risks (potentially less accountability on policy makers) from splitting functions, on balance we agree with the proposal. (sub. DR102, p. 5)

Table 6.6 Regulatory assessment agencies

<i>Jurisdiction</i>	<i>Assessment pathway or process</i>	<i>Regulator</i>
New South Wales	State significant development and state significant infrastructure	Department of Planning
Victoria	Environment effects statement Works approval	Minister for Planning Environment Protection Authority Victoria
Queensland	Major transport projects Environmental impact statement for coordinated projects	Minister for Planning Coordinator-General
South Australia	Section 46 (major development or project) process Section 49 (Crown development and public infrastructure) process Works approval	Minister for Planning Development Assessment Commission Environment Protection Authority South Australia
Western Australia	Public environmental review or assessment on proponent information Development Assessment Panel application	Environmental Protection Authority Western Australia Local government or the Western Australian Planning Commission
Tasmania	Projects of state significance Projects of regional significance Development approval for major infrastructure project Environmental impact assessment	Tasmanian Planning Commission Panel appointed by the Tasmanian Planning Commission Combined Planning Authority established by Minister Environment Protection Authority Tasmania
Northern Territory	Environmental impact statement or public environmental review Authority certificate	Northern Territory Environment Protection Authority Aboriginal Areas Protection Authority
ACT	Environment impact statement Development application	Environment and Sustainable Development Directorate; Inquiry panel may also be established by the Minister Environment and Sustainable Development Directorate
Commonwealth	Controlled action assessment under the EPBC Act Heritage listing assessments under the EPBC Act Offshore petroleum environmental and safety assessments	Department of the Environment Australian Heritage Council National Offshore Petroleum Safety and Environmental Management Authority

Source: Based on appendix C.

Box 6.8 Independent environment regulators — Australia

Western Australia

The Western Australian Environmental Protection Authority (EPA) — established in 1971 — comprises five members appointed by the Governor on the recommendation of the Minister for Environment. Functions of the EPA include:

- conducting environmental impact assessments
- preparing statutory policies for environmental protection
- preparing and publishing guidelines for managing environmental impacts
- providing strategic advice to the Minister for Environment.

The Office of the EPA (OEPA) was established in 2009 to service the EPA in undertaking its statutory functions, and to directly assist the Minister in the performance of his functions under the Act (including compliance and enforcement). In 2012-13, approximately 100 fulltime equivalent staff were employed by the OEPA and the annual cost of services totalled about \$17 million.

Northern Territory

The Northern Territory EPA — established in 2008 — consists of a Chairperson and four members appointed by the Administrator of the Northern Territory and the Chair of the NT Planning Commission. It is funded by an annual budget allocation of about \$1.5 million. Functions include:

- conducting environmental impact assessments
- issuing licences under the *Waste Management and Pollution Control Act* and the *Water Act*
- compliance and enforcement activities
- administration of the container deposit scheme.

Sources: OEPA (2013b); NT EPA (2012).

The ‘in principle’ benefits of institutionally separating regulatory functions from policy making functions are well established. The OECD Regulatory Policy Committee found:

Establishing the regulator with a degree of independence (both from those it regulates and from government) can provide greater confidence and trust that regulatory decisions are made with integrity. A high level of integrity improves outcomes of the regulatory decisions ... Independent regulatory decision-making, at arm’s length from the political process, is likely to be appropriate where:

- there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions;
- both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required; or

-
- the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality. (OECD 2013b, p. 8)

Similarly, the New Zealand Productivity Commission considered that more regulatory independence is desirable where: the issues (and costs) involved are long-term and likely to be undervalued due to a focus on electoral cycles, the regulatory functions require a substantial degree of technical expertise or expert judgment of complex analysis, and a consistent regulatory approach is required over time to create a stable environment (2013).

The VCEC has advocated for independent regulators in a range of contexts — including environmental regulation — to guard against the risks and costs of combining policy and regulatory functions, namely:

- That regulation will become more complex, where regulators have an interest in creating complex regulatory arrangements in which it becomes difficult to determine whether regulatory outcomes are attributable to the regulators' performance or the inability of regulated entities to understand and comply with regulation.
- Regulatory creep, where it is in the regulator's institutional interest to maintain and expand its role by adding new regulation and a bias towards regulatory over non-regulatory options (for example, expenditure programs).
- Reduced accountability by lessening incentives for regulators to set out clear objectives against which their performance can be assessed.
- The risk that regulators may be 'captured' by particular interest groups.
- That regulators will be drawn into political debates about policy issues, thereby compromising their actual or perceived independence. (2009, p. 293)

In the Commission's view, there is a strong 'in principle' rationale for embedding more independence in major project assessment arrangements by assigning this responsibility to an independent regulator. This is particularly the case for comprehensive environmental assessment processes, such as EIAs, which represent the primary assessment requirement for proposed major developments.

Similarly, there is merit in (related) monitoring and enforcement activities (chapter 10) residing with an independent regulator. Concentrating these responsibilities in a single regulator can ensure that insights about the practicality and enforceability of approval conditions are taken into account during the assessment process (and thus feed into the development of recommended conditions).

For environmental matters protected under the EPBC Act, adoption of this approach would mean transferring responsibility for assessment and enforcement functions

from the Australian Government Department of the Environment to a new independent federal agency (the ‘Australian Environment Protection Agency’) (AEPA). Specifically, this body would:

- determine whether assessment under the EPBC Act is required, and if so, the appropriate assessment method (including whether the assessment can be undertaken under a bilateral agreement), and the terms of reference for the assessment.
 - If necessary, the EPBC Act should be redrafted to allow the Commonwealth Environment Minister to delegate the controlled action and assessment approach decisions to the AEPA.
- conduct the assessment process (if a bilateral is not used) and provide advice and recommendations to the Australian Government Environment Minister (who would remain the approval authority — chapter 7) as to whether the action should be approved, and any conditions or offset requirements to be attached to that approval.
 - For actions that *are* assessed under a bilateral agreement (but that are not covered by a bilateral approval agreement), the AEPA would provide advice to the Minister regarding the approval decision and any relevant conditions.
 - Strategic assessments under the EPBC Act (chapter 11) would also be undertaken by the AEPA.
- undertake monitoring, audit, compliance and enforcement activities under the EPBC Act.

The Department of the Environment would continue to have exclusive responsibility for *policy* functions under the EPBC Act, including the development of legislation and subordinate legislation, the identification and management of World, National and Commonwealth heritage places, properties and values, and listing threatened species and ecological communities and managing conservation programs associated with these matters. The Department would also remain responsible for negotiating and managing (on behalf of the Minister) bilateral assessment and approval agreements with the States and Territories.

Institutional separation of regulatory assessment and enforcement functions from environmental policy at the national level is common to many federal systems (box 6.9).

Box 6.9 Independent federal environment agencies

- The *Canadian Environment Assessment Agency* (CEAA) is an independent federal body accountable to the Minister of the Environment. The CEAA is responsible for determining whether an environmental assessment is required, issuing the terms of reference, reviewing the documentation and preparing an assessment report for the Minister.
- The *New Zealand Environmental Protection Authority* (EPA) was established in 2009 to centralise and streamline the decision making process of nationally significant proposals. The EPA is responsible for assessing whether a proposal should be identified as a project of national significance, and if so, it will recommend to the Minister that he or she refer the matter to a board of inquiry (chaired by a current, former or retired Environment Judge or a retired High Court Judge) or the Environment Court for decision.
- The *Netherlands Commission for Environmental Assessment* (NCEA) was established in 1987 as an independent expert body to advise governments (national, provincial and local) on the scope and quality of environmental assessment reports (including environmental impact assessments and strategic assessments). Advisory reports prepared by NCEA are intended to provide an impartial judgment on controversial projects, increase the value of environmental assessment reports as a basis for decision making and reduce the likelihood of legal challenges to decisions.

Sources: CEAA (2012); EPA (NZ) (2013); NCEA (2011).

This proposal is also consistent with (but not identical to) the recommendation made by Dr Allan Hawke as part of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (this recommendation was not supported by the former Australian Government). The Senate Standing Committee on Environment and Communications recently noted:

The committee is persuaded by the evidence it received to indicate that Australia's interests would be well served by establishing an independent National Environment Commission and appointing a National Environment Commissioner. ... The committee is of the view that the Commonwealth should reconsider its position on this [Hawke] recommendation as the evidence in support of the recommendation is strong. (2013, p. 29)

Notwithstanding the potential benefits of this reform, establishing an independent environment regulator at the national level — and at the state and territory level where such arrangements do not already exist — would involve costs.

The Commission expects that some of these costs could be met through a transfer of staff from relevant environment departments, reducing the need for 'new' expenditure. Nevertheless, the Commission is recommending that the Australian

Government and relevant State and Territory Governments undertake a detailed assessment of the benefits and costs of institutionally separating environmental policy functions from regulatory assessment and enforcement functions. This work should:

- take into account whether independent environment authorities already exist, and the scope for expanding or refining the roles of these agencies to include a broader range of regulatory assessment functions
- identify ‘least cost’ transition pathways for implementing institutional reform, drawing lessons from similar experiences in Australia, for example, the establishment of NOPSEMA, and from overseas (such as the recently created Environment Protection Agency in New Zealand)
- be public, and undertaken in the context of the full set of recommendations made in this report.

RECOMMENDATION 6.5

Where not already the case, the Australian and State and Territory Governments should institutionally separate regulatory assessment and enforcement functions from environmental policy functions, provided that the expected benefits exceed the costs.

6.5 ‘Scaling’ assessment requirements

The importance of proportionate and targeted assessments

Economic efficiency suggests that major project assessment processes should only be as rigorous (and as expansive) as necessary to ensure that regulatory objectives are met. The UK Institute of Environmental Management and Assessment notes:

Environmental impact assessment should ... impose the minimum cost burdens in terms of time and finance on proponents and participants consistent with meeting accepted requirements and objectives of EIA ... be adjusted to the realities, issues and circumstances of the proposals under review without compromising the integrity of the process ... be applied so that the scope of review is consistent with the size of the proposal and commensurate with the likely issues and impacts. (2002, p. 128)

In practice, it is very difficult to design and administer perfectly efficient assessment processes. The complex and variable characteristics of major projects mean that the ‘optimal’ level, scope and type of assessment (including public consultation processes) can vary across projects, locations and time.

This presents a difficult balancing act for regulators at the assessment stage. If the assessment is not sufficiently rigorous, information and analysis about project impacts will be incomplete or substandard, with potentially significant repercussions for environmental and social outcomes. The risk of assessment processes being delayed, repeated or the subject of an appeal would also increase, generating costs and causing frustration for proponents.

For example, in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* (2013) NSWLEC 48, Justice Preston found that the economic analyses relied upon by Warkworth and the Minister had *not* addressed relevant environmental and social factors adequately:

At best, the two forms of economic analysis provided, the Benefit Cost Analysis and the Input-Output Analysis, provide some information about some of the relevant matters that are to be considered in the ultimate task of weighting and balancing in determining whether or not the Project should be approved ... the results of those analyses are of limited value in deciding whether I can reach a state of satisfaction as to the nature and extent of impacts in considering each and all of the relevant matters, the weight I should assign to each matter, and the balancing of the matters, to determine whether the Project should be approved or disapproved. (para. 453 and 496)

On the other hand, major project assessment is a time-consuming and expensive exercise. Excessive assessment requirements (that is, over and above what is required to ensure that regulatory objectives are achieved) impose unnecessary costs on proponents and the community. A number of study participants considered that poorly targeted and disproportionate assessment requirements are driving up regulatory costs, with no offsetting benefits:

Government agencies prefer an applicant to ‘cover the field’ of issues in the development assessment process, regardless of the substantive merits of each particular issue and its relevance to the specific project. ... A one size fits all approach ... results in devoting time, effort and expense in areas that have little or no relevance to the project. (Xstrata Coal, sub. 50, pp. 34 and 39)

and

One of the reasons terms of references (ToRs) and environmental impact statements (EISs) are so large is that some of the points needing to be responded to are beyond the scope of the legislation ... The ToR needs to request information that is within the management responsibility of the agency requesting the information, and be relevant to support an application. (QRC, sub. 19, p. 5)

Xstrata Coal referred to a case study example where a proponent was required to assess the impact of a coal mine in Western Queensland on marine species despite a river length of over 400 kilometres from the project site to the marine environment:

A marine study ... can cost a proponent tens of thousands in reporting and Government negotiation. Add this type of terms of reference (ToR) scope across multiple EIA topics (noise, air, water, ecology, visual amenity), and the cost of addressing ToR scope that has little or no relevance to the project and provides no positive environmental or social outcome, can easily exceed hundreds of thousands of dollars within months of a project EIA commencing. (sub. 50, p. 39)

A number of respondents referred to the significant costs associated with preparing assessment documentation and, in this context, emphasised the importance of ensuring that information requirements are relevant and justified. The costs associated with conducting heritage surveys and managing native title claims in Western Australia was of particular concern:

The average cost of a heritage survey has increased from \$11 000 per day in 2010 to the current approximate cost of \$15 000 per day ... [these] costs are in addition to those paid to anthropologists, archaeologists, consultants, lawyers and a lesser percentage to native title representative bodies and Traditional Owners themselves. (AMEC, sub. 42, pp. 9-10)

As well as imposing unnecessary costs, the BCA considered that poorly targeted assessments divert resources away from high-risk major projects:

Jurisdictions should adopt a risk-based approach to regulation to ensure that regulatory effort is directed to the areas of development approvals where it will have most impact and that the costs of regulation are commensurate with the risks to be managed. (BCA, sub. 43, p. 2)

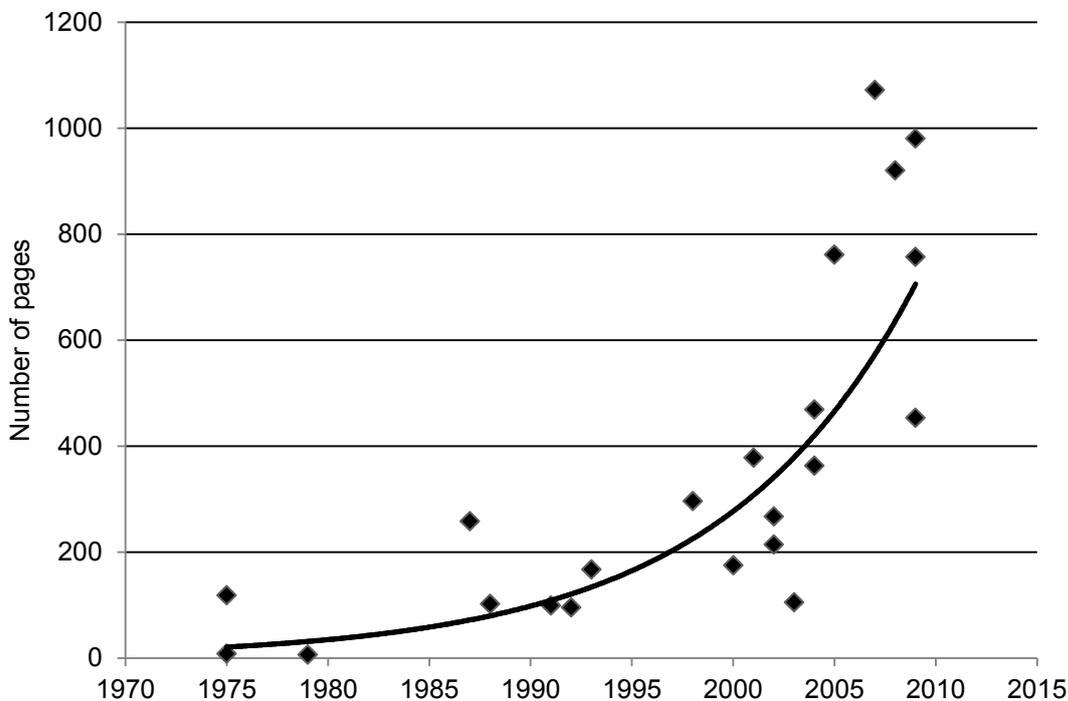
Moreover, processes that encourage overly complex and technical assessment documentation can adversely impact on the effectiveness of public consultation processes:

While we fully support the comprehensive and rigorous assessment of potential impacts of coal mine and gas projects on a range of environmental and social matters, it is clear that the jargonistic, technical and voluminous character of Environmental Impact Statements has become a major barrier to community participation. Indeed, this barrier could also be seen through the industry lens as a contribution to the 'costs and delays' from the proponent's perspective, since the impenetrable prose of EISs leads to community members not noticing major problems and gaps with the assessment until late in the process. (Lock the Gate Alliance, sub. DR97, p. 12)

On this point, several respondents considered that assessment requirements have increased unnecessarily over time, citing the length of EIA documentation as evidence. Information provided to the Commission by the EPA of Western Australia illustrates how EIA assessment documentation in that state has increased in length (figure 6.1).

Figure 6.1 EIA assessment documentation is increasing in length

Based on a sample of EIAs completed in Western Australia, 1975–2010



Data source: Based on data provided by EPA (WA).

The package of reforms set out in this report is expected to encourage a more proportionate and focused approach to major project assessment. Notwithstanding this, some participants have suggested that explicit ‘scaling’ mechanisms are required to ensure assessment is commensurate (in terms of size, scope and complexity) to the particular risks and impacts associated with individual major projects. In this way, scaling measures are analogous to a ‘risk-based’ regulatory approach (box 6.10).

Box 6.10 What is risk-based regulation?

Risk can be defined as the probability of an unfavourable event multiplied by the severity of harm if the event occurs. When a regulator employs a risk-based approach, they are recognising that different major project characteristics present different levels of risk to meeting intended regulatory objectives. Likewise, regulators can also accommodate the different *nature* of risk — some regulations seek to prevent catastrophic outcomes, such as the loss of lives, while others aim to reduce less significant adverse events such as damage to a local road.

Armed with knowledge about such differences in risk, a regulator can then tailor the delivery of regulation so that compliance costs are proportionate to the benefits of addressing those risks. Accordingly, risk-based approaches can ensure that regulatory resources are allocated efficiently and that objectives are achieved at ‘least cost’ to the community. Notwithstanding this, use of a risk-based approach requires regulators to develop the information and capacity to systematically target their effort to regulatory areas presenting the greatest risks.

Source: PC (2013b).

How can ‘scaling’ be achieved in practice?

The variable size, nature, location and complexity of major project developments (and their impacts) demands a reasonably sophisticated assessment framework — a ‘one size fits all’ approach is neither feasible nor desirable. Major project assessment arrangements must be capable of accommodating a broad range of project proposals, but have sufficient flexibility to allow for targeted and proportionate assessments of project impacts.

In this context, regulators have adopted various measures to ‘scale’ major project assessment requirements. For primary assessment and approval processes, this includes:

- allocating proposed major projects to assessment ‘tracks’, where the requirements associated with each track vary
- tailoring (to varying degrees) the scope (or terms of reference) of an assessment based on the likelihood and significance of major project impacts (table 6.7).

A further way to scale assessment requirements is by exempting certain ‘low risk’ activities from assessment requirements altogether (that is, granting ‘automatic’ or ‘standard’ approvals) (box. 6.11). In the context of major projects, this is unlikely to be appropriate for primary approvals but could apply to certain secondary approval processes.

Table 6.7 Examples of major project scaling measures

<i>Major project assessment 'tracks'</i>	<i>Measures to scale the assessment scope</i>
<p>For the environmental impact assessment in Western Australia, two levels of assessment are available:</p> <ul style="list-style-type: none"> • Assessment on proponent information • Public environmental review. 	<p>For public environmental reviews in Western Australia, the EPA applies a 'significance framework' to identify the key environmental factors that should be covered by the assessment process. This forms part of the environmental scoping document.</p>
<p>Under the 'section 46' impact assessment process in South Australia, three levels of assessment apply:</p> <ul style="list-style-type: none"> • Development report • Public environmental report • Environmental impact statement. 	<p>For coordinated projects in Queensland, generic terms of reference apply for all environmental impact statements. These include a generic requirement to assess any 'critical matters', defined as aspects of the proposal that may have 'a high or medium probability of causing serious or material environmental harm'.</p>
<p>For controlled action assessments under the EPBC Act, five tracks are available (if a bilateral assessment is not used):</p> <ul style="list-style-type: none"> • Assessment on referral information • Assessment on preliminary documentation • Environmental impact statement • Public environmental review • Assessment by public inquiry. 	

Source: Based on appendix C.

Scaling measures can deliver net benefits, but implementation is key

Measures that scale and focus assessment requirements based on expected project impacts were broadly supported by participants. King and Wood Mallesons considered that assessment tracks 'recognise different types and scales of project' and encourage 'the application of an appropriate assessment approach ... so as to reduce the prevalence of unnecessary assessment requirements' (sub. DR99, p. 1).

APPEA also favoured a hierarchy of assessment methods:

Project approvals can be subject to 'regulatory creep' where assessment creeps outside of the original intent / scope of the legislation. This drives up cost and compliance burden, not just for industry but also for Government ... APPEA supports risk-based regulation, where compliance is commensurate with the nature and scale of the activity, and the level of risk it demonstrates. Impact assessment should impose the minimum cost burdens consistent with meeting the requirements and objectives of the assessment. (sub. DR105, p. 16)

Assessment track arrangements are consistent with the Commission's *Planning, Zoning and Development Assessments* report that found 'leading practice' development assessment processes include:

Streaming development and rezoning applications into assessment ‘tracks’ that correspond with the level of assessment required to make an appropriately informed decision. This both speeds up most development assessments and rezonings, and releases assessment resources to focus on those proposals which are particularly technically complex or have significant impacts on others. (2011c, p. XLVIII)

Box 6.11 Assessment ‘exemptions’ for low-risk activities

Risk-based reforms to native vegetation regulations have been undertaken in Victoria and Queensland.

- The *Vegetation Management Framework Amendment Act 2013* (Qld) establishes self-assessable clearing codes that enable landowners to undertake vegetation clearing without the need to obtain a development permit in certain circumstances. (Queensland Government 2013b)
- Risk-based pathways for native vegetation permit applications have been established in Victoria to better match the obligations and costs faced by landholders with the biodiversity impact of clearing proposals. For example, low-risk permit applications do not need to include a ‘habitat hectares’ assessment of the native vegetation to be removed. (DEPI (Vic) 2013b)

The Queensland Government is also implementing reforms that lower regulatory assessment requirements for low-risk mining developments and exploration activities:

Low environmental risk resource activities that meet eligibility criteria can now automatically receive a standard approval containing standard environmental conditions. ... The principles of risk based assessment are being applied in developing new thresholds for assessment of resource project expansions and in determining thresholds for application of environment authorities. It is expected that this will simplify the application process for certain activities and significantly reduce the compliance burden. (sub. 47, pp. 5 and 37)

and

Queensland has instigated a substantial reform process over the last two years, which aims to provide a level of codified environmental regulation for a suite of standard low-risk exploration activities. The changes have been most marked in the area of gemfield and alluvial mining, where exploration within a bounded area can occur by certifying compliance with a standard set of environmental conditions. (QRC, sub. DR91, p. 10)

The Victorian EPA is implementing a risk-based system for assessing and approving works approvals and other EPA licences, including exemptions and fast-track approvals for low-risk proposals (EPA (Vic) 2013).

Notwithstanding broad support for scaling, participants highlighted the challenges with applying risk-based approaches, and the importance of good regulatory design:

A single bad development outcome can discredit the entire risk-based approach if the risk framework hadn’t anticipated that situation or was not flexible enough to deal with it. This is especially the case if public, media or political attention is focused on the bad decision — there tends to be an over-reaction and movement back to a very risk averse approach. (Queensland Government, sub. 47, p. 40)

and

Using risk-based approaches to regulation may have drawbacks, particularly if there are significant unknowns either with the technology proposed to be used in the project, or a lack of knowledge on the existing environmental conditions of a site. (Xstrata Coal, sub. 50, p. 57)

The Commission considers that, if properly designed and implemented, multi-track assessment arrangements and risk-based scoping methods have merit. Such measures can encourage a level of regulatory scrutiny commensurate with project impacts, thus reducing the incidence and materiality of unnecessary compliance burdens and ensuring that scarce regulatory resources are allocated efficiently.

In practice, regulators are best-placed to determine how major project assessment processes can be scaled to minimise unnecessary regulatory burdens. However, a number of guiding principles are critical:

- clear and public criteria should be identified to guide regulator decisions about the appropriate level or scope of an assessment
- regulator decisions and reasons should be public
- regulators must rely on robust, transparent and consistent methodologies and decision-making frameworks for assessing project risks and impacts
- to the extent assessment requirements are lowered for particular activities, risk-based assessment arrangements must be accompanied by a strong monitoring and enforcement regime (including material penalties for breaking environmental law and a real and credible threat of detection) (chapter 10).

Further, government has a crucial role in facilitating risk-based assessment approaches by:

- clarifying the policy objectives being sought (chapter 4), and the government's expectations on the treatment of risk (or 'risk appetite')
- providing regulators with the requisite resources to administer risk-based assessment approaches (chapter 12).

Strategic Assessment tools can also support a proportionate approach to major project regulation by reducing the need for project-specific assessment requirements. The role and impact of Strategic Approaches is considered in chapter 11.

RECOMMENDATION 6.6

Where it is not already the case, regulators should establish measures that ‘scale’ aspects of the major project assessment requirements based on the risk and significance of expected impacts. Criteria for determining the level and scope of assessment should be identified and publicly available.

7 The approval stage

Key points

- During the approval stage of development assessment and approval processes, decisions are made about whether, and under what conditions, proposed major project developments are allowed to proceed.
- The Commission has identified four areas of policy concern:
 - unnecessary duplication of processes between levels of government
 - the length of time it takes to make decisions
 - inappropriate allocation of responsibilities for making primary approval decisions
 - the quality of the process that decision makers are required to follow.
- Reducing duplication requires renewed effort to establish a 'one project, one assessment, one approval' framework for environmental matters, through bilateral approval agreements between the Australian and State and Territory Governments, underpinned by rigorous environmental standards.
- To improve the timeliness of primary approval processes, jurisdictions should set a maximum time that may elapse between a proponent's assessment documentation being lodged and when the assessment agency provides its report to the decision maker, and a maximum time for the approval decision to be made.
- There should be:
 - one opportunity for the approval authority to 'stop the clock'
 - clarity about when the clock starts, combined with clear triggers for when and for how long it can be stopped
 - public disclosure of when and why stop the clock provisions are activated.
- If the approval decision is not made within the set time period, the recommendation made by the assessment agency (along with the reasons and any conditions) should be deemed to be the approval decision. Increased tracking of performance against statutory timelines would also encourage timely decisions.
- Governments should also seek to improve the timeliness of secondary approval processes by, for example, imposing statutory timelines on them.
- Ministers should make the primary approval decisions for major projects. Guidelines should indicate the types of decisions that Ministers can delegate.
- To strengthen the decision-making process, jurisdictions should publish the steps to be followed when making approval decisions. Decision makers should publish statements of reasons for their approval decisions and conditions.

During the approval stage of development assessment and approval (DAA) processes, decisions are made about whether, and under what conditions, proposed major developments are allowed to proceed, based on assessments that have previously been undertaken. This chapter proposes ways to improve the process that leads to the approval decision. Conditions and offsets attached to an approval decision are discussed in chapter 8.

7.1 Overview of major project approval processes

There is typically a primary approval decision about whether a proposed project may proceed. In addition, proponents of major projects usually require various other authorisations, licences and permits (‘secondary approvals’).

While there is not a standard approval process across Australian jurisdictions, key features include:

- an identified decision maker
- specification of the decision maker’s discretion to depart from the assessment recommendations
- the process to be followed in reaching decisions, including the matters to which the decision maker must and must not have regard
- time periods within which decisions must be made (and the consequences when these time periods are breached).

These features are not necessarily specified in legislation. For example, the *Environmental Planning and Assessment Act 1979* (NSW), the *Planning and Environment Act 1987* (Vic), the *Planning Act* (NT), and the *Planning and Development Act 2007* (ACT) do not set out the process to be followed when making decisions. In contrast, the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) sets out clearly the four features of the approval stage (box 7.1).

Box 7.1 The approval process in the EPBC Act

The *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth):

- establishes the Commonwealth Minister for the Environment (or delegate) as the decision maker under the Act, who decides whether to approve, approve with conditions, or not approve a proposed action
- specifies how much discretion the Minister has when responding to the recommendations of the assessment report provided by the relevant Commonwealth Department or State Government agency (when there is a bilateral assessment agreement). The Minister does not have to accept these recommendations. However, the Minister's decisions must be cost effective 'as far as practicable'. The Minister may impose broad conditions relating to the protection of, or repair or mitigation of damage to, any matter of national environmental significance affected by the action. Conditions that are not reasonably related to the action can only be applied with the consent of the applicant
- sets out the process that the Minister must follow when making an approval decision (box 7.2)
- stipulates time limits for decisions made under the Act that vary between 20 and 40 business days after the Minister receives the relevant report, depending on the assessment pathway. The Minister must make the decision within these time periods or within 'such longer time period as the Minister specifies in writing'. If the Minister specifies a longer period, the specification of the variation must be published
- does not specify any consequences if the time period is breached.

Source: EPBC Act, s. 130, s 134.

The identity of the approval authority

Table 7.1 shows approval authorities for selected major project pathways. In some cases, a Minister is the approval authority (for example, for the Commonwealth and Victorian pathways shown). In others, the approval authority is an agency (for example, Development Assessment Panels in Western Australia). Sometimes the entity that assesses the project is also the approval authority.

Legislation sometimes permits the Minister to delegate approval authority. For instance, Victoria's Planning and Environment Act (s. 186) enables the Minister to delegate any of his or her powers to the Secretary or employees of the Department or to the Growth Areas Authority. Under the EPBC Act (s. 515), the Minister may delegate his or her powers or functions to an officer or employee in the Department of Environment or to the Director of National Parks, although the delegate is subject to the directions of the Minister and decisions of the delegate may be reviewed by the Minister.

Table 7.1 Approval authorities^a (selected pathways, by jurisdiction)

<i>Major project assessment pathways</i>	<i>Approval authority</i>	<i>Assessor is the approval authority</i>
New South Wales		
State significant developments	Minister may delegate to the Planning Assessment Commission or Department	Sometimes
State significant infrastructure	Minister ^b or the Planning Assessment Commission or Department	Sometimes
Victoria		
Ministerial call-in	Minister for Planning	Yes
Major transport projects	Minister for Planning	Sometimes ^c
Queensland		
Coordinated projects	Department of Environment and Heritage Protection	No ^d
Urban development	Minister for Economic Development	Yes
Western Australia		
Development assessment panel projects	Development Assessment Panel	No
South Australia		
Major developments or projects	Governor (effectively the Executive). Delegation to the Minister or Development Assessment Commission is possible	Sometimes
Crown development and public infrastructure	Minister	No
Tasmania		
Projects of state significance	Minister and both Houses of Parliament	No
Projects of regional significance	Development Assessment Panel	Yes
Major infrastructure projects	Combined Planning Authority	Yes
Northern Territory		
Development permits	Development Consent Authority	Yes
Exceptional development permits	Minister for Planning	Yes
Ministerial call-in	Minister for Planning	Yes
ACT		
Ordinary development	Environment and Sustainable Development Directorate	Yes
Ministerial call-in	Minister for Planning	Yes
Commonwealth		
Matters of national environmental significance	Minister for Environment	No
Airports under a major development plan	Minister for Infrastructure	Yes ^e

^a More details can be found in table C.3 in appendix C. ^b Minister cannot delegate decision making for critical state significant infrastructure. ^c Assessment manager is either the Minister for Planning, or an assessment committee established by the Minister. ^d Even though the Department of Environment and Heritage Protection is the assessment manager under the *Sustainable Planning Act*, the Coordinator-General conducts the environment impact assessment process. ^e In certain circumstances, advice may be required from the Minister for the Environment and off-airport impacts may require separate assessment.

The approval authority's decision-making discretion

The extent to which approval authorities have discretion to depart from the recommendations in assessment reports differs between jurisdictions, although in most cases the differences are small.

- In Tasmania, the Minister is not bound by the recommendations of the Tasmanian Planning Commission.
- In Western Australia, Development Assessment Panels must have regard to, but are not bound to give effect to, the recommendations included in the assessment report.
- In New South Wales, the Minister must consider the findings of the Planning Assessment Commission, but can approve the project with modifications or conditions that the Minister may determine.
- By contrast, in Queensland, if the approval authority (ordinarily the Department of Environment and Heritage Protection) approves a project, it must impose the conditions recommended by the Coordinator-General, and any other conditions that it imposes must be consistent with the conditions proposed by the Coordinator-General.

The decision-making process

The process that decision makers are required to follow when considering assessment reports — such as the principles that should guide them, the evidence they should examine, the matters to which the decision maker must and must not have regard, and whom they should consult — affects the quality of their approval decisions. The EPBC Act specifies the process that the Commonwealth Environment Minister should follow, including the matters that the Minister must or may take into account (box 7.2). State and Territory legislation sometimes sets out matters that the decision maker is required to consider. For example:

- in South Australia, the *Development Act 1993* (s. 48) requires that before the Governor approves a major development, he or she must have regard to the objects of the general environmental duty, and any relevant environmental protection policies under the *Environmental Protection Act 1993*, among other things
- in Tasmania, a set of objectives is included in a schedule to each of the Acts within the Resource Management and Planning System, to ensure that all decisions about the use of land and natural resources within the State are made in pursuit of common objectives (*Land Use and Planning Approvals Act 1993*, schedule 1).

The Commission found few instances where decision makers are bound by good regulatory practice when reaching decisions. One example of legislation that goes in this direction is South Australia's *Petroleum and Geothermal Energy Act 2000*. The Act's objectives include an effective, efficient and flexible regulatory system, and appropriate consultation.

Box 7.2 Decision making under the EPBC Act

Factors that the Commonwealth Environment Minister must take into account include:

- the principles of ecologically sustainable development
- the assessment report relating to the action
- the relevant recommendation report from the Secretary of the Australian Government Department of the Environment
- community and stakeholder comments
- any other relevant information available on the impacts of the proposed action
- relevant comments from other Australian Government and State and Territory Government Ministers (such as information on social and economic factors).

The Environment Minister may also take into account the environmental history of the individual or company proposing to take the action.

Before reaching an approval decision, the Environment Minister:

- must inform relevant Ministers and the proponent about the proposed decision and seek comments
- must take into account any relevant comments made by the proponent
- must seek advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, when the action involves coal seam gas or coal mining
- may invite public comment by publishing the proposed decision on the internet
- may in some cases request the appropriate State or Territory Minister to provide a notice stating the method that has been used to assess the impacts of the action on other matters.

If the Minister refuses to approve the action, the proponent may request reasons for the refusal and the Minister must give them. Conditions requiring specified activities to be undertaken cannot be attached to the approval of an action if these activities are not reasonably related to the action, unless the holder of the approval has consented to the attachment of the condition.

Source: EPBC Act.

Time limits

Time limits on approval decisions vary within and between jurisdictions. Some have none, while others have statutory time limits with no scope for extension. Most jurisdictions are positioned between these extremes, with specified timelines that can be extended (box 7.3).

Box 7.3 Approaches to legislated timelines for approval decisions

The approaches to legislated timelines for approval decisions differ between jurisdictions and sometimes between pathways within jurisdictions.

- Some pathways (for example, major infrastructure projects in Tasmania) do not have legislated approval timelines.
- Some pathways have legislated approval timelines with stop the clock provisions, although there are differences between jurisdictions as to how the clock can be stopped.
 - For coordinated projects in Queensland, the approval authority must make a decision within 20 business days of receiving the Coordinator-General's report. However, this time can be extended with the written agreement of the proponent, and the proponent can choose to stop the clock in particular circumstances.
 - Other pathways stop the clock when requests for further information are made, such as for developments of regional significance in Tasmania (which require a decision to be made within one month of receiving the report on the environmental impact assessment).
- Some jurisdictions have approval timelines with no stop the clock provisions. For example, in Western Australia, Development Assessment Panels must make a decision within 60 or 90 days of receiving a development application. Information requests do not stop the clock.
- Whether or not there are consequences for breaches of timelines varies between jurisdictions and between pathways.
 - Some pathways, such as state significant developments in New South Wales, provide for deemed refusals (which can be appealed) when a timeline is breached.
 - In Queensland, the Coordinator-General can call-in a prescribed project if he or she is satisfied that the original decision maker has not complied with a notice to grant an approval within a specified time.
 - Other pathways, such as Crown developments in South Australia, do not have deemed refusals or call-in powers if timelines are breached.

Source: Appendix C.

What are the key issues?

The Commission has identified four areas of significant policy concern with the approval stage:

- unnecessary duplication of approval processes between levels of government
- the length of time it takes to make decisions
- the allocation of responsibilities for making approval decisions
- whether the process that decision makers are required to follow encourages evidence-based and balanced approval decisions.

7.2 Duplication of approval processes between levels of government

When two levels of government approve projects, there is a risk of unnecessary duplication — for example, two sets of requests for information and overlapping analysis — and of inconsistent regulatory requirements. This can increase the costs of DAA processes and delay decisions.

Accreditation of one government's approval process by another level of government would reduce these risks. In practice, efforts have concentrated on whether the Australian Government should accredit State and Territory Government processes. (This is the main focus of this section.) However, it is also possible for a State or Territory Government to accredit an Australian Government process.

Bilateral approval agreements are allowed under the EPBC Act

Chapter 6 recommended that governments strengthen and expand the scope of bilateral *assessment* agreements under the EPBC Act, including through accrediting key State and Territory major project assessment processes. The EPBC Act also enables the Commonwealth Environment Minister to enter into bilateral *approval* agreements, which would allow State or Territory authorities to approve projects that may have significant impacts on matters of national environmental significance (MNES) (s. 29 and s. 46). The EPBC Act requires a number of steps before a bilateral approval agreement can be finalised (box 7.4).

Box 7.4 **Establishing a bilateral approval agreement**

The steps to establish a bilateral approval agreement under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) include the following.

- The relevant State or Territory Government is responsible for developing a management arrangement or authorisation process. The arrangement or process can only be bilaterally accredited if they are in effect under a law of that State or Territory (ss. 46(2) and (2A)).
- The Australian Environment Minister (the Minister) tables in Parliament for 15 sitting days the State or Territory arrangement or process that the Minister is considering accrediting.
- If the arrangement or process is not disallowed by Parliament, the Minister may accredit it in writing and publish the accrediting instrument. The Minister must first be satisfied that preconditions under s. 46(3) are met.
- Before entering into an agreement, the Minister must be satisfied that it accords with the objects of the EPBC Act (s. 50). Further, ss. 51 through 55 set out things that the Minister must be satisfied of before he or she can enter an agreement against each matter of national environmental significance. These requirements can be summarised as requiring that agreements, or their provisions:
 - are not inconsistent with Australia’s obligations under each relevant international agreement
 - promote management of protected areas such as World Heritage properties, National Heritage places and Ramsar wetlands in accordance with management principles adopted under the EPBC Act
 - promote the survival and/or enhance the conservation status of any relevant threatened or migratory species and are not inconsistent with recovery plans or threat abatement plans.
- The Minister must publish the draft bilateral agreement, invite public comment on it for a minimum of 28 days and take all public comments into account in deciding whether to enter the agreement (s. 49A).
- The Minister, and the responsible State Minister, would execute a bilateral agreement after the public consultation and tabling periods.
- The Minister may declare that actions in a class specified by the agreement approved in accordance with the accredited authorisation process do not require approval under Part 9 of the EPBC Act (approval of actions under the EPBC Act) for the purposes of a specified provision of Part 3 of the EPBC Act (that sets out which actions are controlled actions requiring approval).
- As soon as practicable after entering the agreement, the Minister must publish the final agreement, a statement of reasons for entering into the agreement, and a report on any comments received on the draft.

Source: DSEWPAC (2013e).

Progress in negotiating agreements has been slow

The Sydney Opera House approval agreement, signed in 2005, is the only one that has been negotiated, and it has since expired (box 7.5). It illustrates how an approval agreement could be implemented, while satisfying the Australian Government Minister's accountabilities under the EPBC Act.

Box 7.5 The Sydney Opera House bilateral approval agreement

The Australian and New South Wales Governments entered into a bilateral approval agreement in December 2005. Its aims were to:

- protect the World Heritage and National Heritage values of the Sydney Opera House from unacceptable and unsustainable impacts
- ensure an efficient, timely, and effective process for environmental assessment and approval of actions
- minimise duplication of environmental assessment and approval processes relating to the protection of the World Heritage and National Heritage values of the Opera House.

Under the agreement, certain specified actions no longer required approval under the *Environment Protection and Biodiversity Conservation Act 1999* if they had been approved by an agency of New South Wales acting in accordance with the management plan for the Opera House that the Australian Government Environment Minister had accredited. The New South Wales Minister was required to notify the Australian Government of all proposed actions that will have or are likely to have a significant impact on the World or National Heritage values of the Opera House.

The Commonwealth Auditor-General was able to audit the operation of the Australian Government in relation to the agreement.

After the agreement expired in 2010, it was replaced by a conservation agreement for the Opera House as a World Heritage site, because that was less administratively burdensome and achieved the same outcome.

Sources: Australian Government and New South Wales Government (2005); Senate Environment and Communications Legislation Committee (2013).

COAG agreed in 2012 to expedite the accreditation of State and Territory environmental approval processes for MNES under the EPBC Act. To provide a framework within which approval agreements could be negotiated, the then Australian Government developed a *Statement of Environmental Assurance Outcomes* (DSEWPAC (Cwlth) 2012h) and *Framework of Standards for Accreditation* (DSEWPAC (Cwlth) 2012f). The outcomes that were proposed to be achieved included:

-
- productivity outcomes, such as more efficient regulation and more process certainty
 - environmental outcomes, including that Australia complies fully with its international environmental obligations and that MNES are protected as required under the EPBC Act
 - system outcomes, so that the community has confidence that systems will deliver certainty, efficiency, transparency, appropriate opportunities for public engagement and legally robust decisions.

Negotiations to increase the number of bilateral approval agreements made little progress, and were halted in late 2012. However, the incoming Australian Government has recommenced negotiations, indicating that it will:

- sign a Memorandum of Understanding (MOU) with each of the willing States that sets out key principles and confirms their cooperation on achieving a single process
- update existing bilateral assessment agreements with States
- within 12 months, sign bilateral approval agreements with willing States.

In October and November 2013, the Australian Government signed MOUs with the Queensland and New South Wales Governments. The MOUs commit both levels of government to pursuing comprehensive bilateral approval agreements to accredit Queensland and New South Wales to undertake approvals under the EPBC Act. The MOUs, which specify that the agreements are to be concluded by 18 September 2014, are similar, but not identical (box 7.6).

The arguments for and against bilateral approval agreements

Negotiations to secure bilateral approval agreements are taking place against the background of divergent views in the community about their advantages and disadvantages. Those supporting bilateral approval agreements expect reduced compliance and delay costs, while others have expressed concerns that they will reduce environmental standards. A Senate Committee inquiry reported these competing arguments, which were also evident in submissions to this study (Senate Environment and Communications Legislation Committee 2013).

In a cost–benefit analysis of proposed reforms to environmental assessments under the EPBC Act, commissioned by the Department of Sustainability, Environment, Water, Population and Communities, Deloitte Access Economics estimated that bilateral assessment and approval agreements could create a net benefit approaching \$400 million, largely from reduced delays (DAE 2011, pp. 33–36). The study did

not allocate these savings between assessment and approval agreements, but noted that delays have been experienced in both stages. Most of the benefits would accrue to project proponents. The Australian Government would have fewer approvals to process, while processing costs would rise a little for State and Territory Governments.

Box 7.6 Key features of the Memoranda of Understanding between the Australian and the Queensland and New South Wales Governments

- The purpose of the memoranda of understanding (MOU) is to set out agreed arrangements that will be pursued by the Australian and Queensland/New South Wales Governments to deliver a one stop shop for environmental approvals under the EPBC Act, removing duplication in assessment and approval processes, while maintaining environmental outcomes. They are not legally binding.
- Queensland/New South Wales will become responsible for assessing projects for the purpose of the EPBC Act and, within 12 months, for approving projects, when an approval bilateral agreement has been signed.
- Maintaining clearly articulated EPBC Act standards will be the basis for developing agreements. Any accredited process will ensure that any decisions proposed by Queensland/New South Wales will result in at least equivalent protection for matters of national environmental significance.
- The Parties will refresh the existing assessment bilateral agreement by 31 December 2013 (Queensland), and conclude a comprehensive assessment bilateral agreement within six months (New South Wales). The Parties agree the goal is to lift the use of single accredited assessment processes to 100 per cent.
- The proposed bilateral approval agreements will include a process of regular review, with the first occurring after 12 months of the operation of the agreement.
- The Queensland MOU specifies that the Parties will work to develop a common generic streamlined terms of reference for environmental impact statement processes and to utilise standard outcome-focused conditions for similar projects, based on level of risk. The New South Wales MOU specifies that the Parties will work towards publishing standard information requirements and outcome-focused conditions for high priority sectors.
- The Australian Government agrees to use the conditions proposed by Queensland/New South Wales and, to the greatest extent possible, will avoid imposing additional conditions when making approval decisions under the EPBC Act. For projects where further conditions are imposed by the Australian Government, the Parties agree to provide a single document that contains all the conditions of approval for that project imposed by both jurisdictions.

Sources: Commonwealth of Australia and Queensland Government (2013); Commonwealth of Australia and New South Wales Government (2013).

Submissions from business groups supported bilateral approval agreements, as a way to reduce the costs of approval processes and the time involved when two levels of government are involved in granting similar approvals. AGL Energy (sub. DR96), Peabody Energy Australia (sub. DR81) and the Australian Petroleum Production and Exploration Association (sub. DR105) argued that the agreements would reduce duplication. As an example of how delays can occur, Business SA (sub. DR74, p. 1) pointed out that:

... situations have arisen where Federal and State Governments become trapped in a first mover scenario and neither tier will grant approval without the other's commitment. This can be very frustrating for the project proponent and the Commission should be mindful of how it frames its recommendations to the Government so as to avoid such occurrences.

Opponents of bilateral approval agreements argued that:

- the Australian Government should retain decision-making responsibility for international conventions and other decisions that have a national impact (Australian Network of Environmental Defender's Offices (ANEDO), sub. DR92; Jeremy Tager, sub. DR72; Nature Conservation Council of NSW, sub. DR94; Lock the Gate Alliance, sub. DR97). ANEDO (sub. DR92) argued that state and federal environment regulation is not duplicative but is part of a shared responsibility, with each level of government responsible for different aspects of environmental protection
- State and Territory Governments may have a conflict of interest, given the revenue and other benefits that they secure from new projects, and their laws may not provide adequate environmental assessment and decision-making processes (ANEDO, sub. DR92; North Queensland Conservation Council, sub. DR64; Nature Conservation Council of NSW, sub. DR94; Lock the Gate Alliance, sub. DR97)
- there is no empirical evidence of unnecessary regulatory burden caused by concurrent Commonwealth and State/Territory approval processes or that approval agreements would reduce costs. Moreover, the recent negotiations indicate that bilateral approval agreements may increase regulatory complexity as States overlay their own approval processes onto the federal system (ANEDO, sub. DR92; Nature Conservation Society of South Australia, sub. DR95).

Weighing up the arguments

Other than the analysis in DAE (2011), the Commission has not seen estimates of the savings from bilateral approval agreements. This is not surprising, given that the

size of these savings will depend on the quality of future agreements. Nevertheless, savings seem possible, from:

- smaller unnecessary delay costs
- reduced compliance costs from fewer inconsistencies or overlaps between approvals (and their associated conditions) issued under the EPBC Act and State and Territory legislation. (About 80 per cent of respondents to a survey reported that there is overlap between EPBC Act conditions and conditions imposed under State/Territory permits (Macintosh 2009, p. 42)). Such overlaps could require proponents to provide similar information twice or to comply with similar but not-identical conditions in different ways.

The Commission considers that there are ways to address the concerns that have been raised about the impact of bilateral approval agreements on environmental standards.

- Countering the argument that the Australian Government should retain responsibility for international conventions and decisions with national impact, are the EPBC's Act's safeguards — such as the process outlined in box 7.4 — which help to ensure that the Commonwealth Environment Minister's obligations under international agreements are not diluted by entering an approval agreement. Concerns about whether States and Territories will act consistently with Australia's international obligations could be further reduced by:
 - requiring that the Minister does not accredit processes unless rights of appeal are no less than those in the EPBC Act. This would enable those with the right to seek a judicial review under the EPBC Act to seek a review of a decision made by a State or Territory Minister as if that decision had been made under the EPBC Act
 - requiring the Minister to publish explanations of outcomes that a proposed bilateral approval agreement is expected to achieve and of how it will do so, as well as of how it satisfies the conditions set out in the EPBC Act
 - retaining the Minister's right to withdraw accreditation if national standards are not being met under an approval agreement.
- The argument that State and Territory Governments would make less balanced decisions than the Commonwealth Environment Minister, because of their perceived conflict of interest, implies that such conflicts would be reduced or avoided if the Commonwealth Minister retained authority for primary approval decisions. Yet the Australian Government also receives additional revenue when projects are approved and so is exposed to a similar conflict. To the extent that such conflicts do exist, ensuring that assessment and approval processes are

transparent at all levels of government, with justifications for decisions published, can help to address them. Moreover, any agreement needs to be underpinned by robust environmental standards, as was pointed out by the Chamber of Minerals and Energy of Western Australia (sub. DR85) and the Queensland Resources Council (sub. DR91), and is foreshadowed in the MOUs between the Australian and Queensland and New South Wales Governments (box 7.6).

- While the cost savings from bilateral approval agreements could be eroded if the State and Territory Governments overlay their own processes on top of the federal system, the risk that this will happen can be reduced by having an effective strategy for establishing and implementing agreements. The next section sets out such a strategy.

A strategy for establishing bilateral approval agreements

A strategy with five components, focused on achieving productivity, environmental and system outcomes without unduly prescribing how to achieve them, could build on the strategy that the Australian Government has announced. It could decrease duplication while addressing concerns that bilateral agreements may reduce environmental standards.

First, working to increase the number of State and Territory assessment processes with Commonwealth accreditation, as recommended in chapter 6, would provide a firmer foundation on which to build accreditation of approval processes.

Second, strengthening State and Territory approval and enforcement processes, through other reforms proposed in this report, would facilitate Commonwealth accreditation.

Third, a targeted and staged approach, initially concluding agreements in areas that are less environmentally sensitive and where there is better information about impacts, such as urban environments, is likely to be more effective than trying to secure a comprehensive nationwide agreement. The Australian Government would continue to control matters where it considers that the community would not accept it exiting the field.

Fourth, the process for negotiating bilateral approval agreements needs to be carefully designed. COAG should publish a timetable of agreed reforms and have the COAG Reform Council report annually on key milestones, barriers to reform and how to address them. The time allowed for completing the negotiations needs to match the complexity of the task.

Finally, close monitoring of the outcomes, as bilateral approval agreements are progressively negotiated, would:

- provide early warning of any problems
- confirm that agreements are reducing duplication without risking environmental harm
- identify lessons for new agreements.

The MOUs between the Australian and Queensland and New South Wales Governments provide for comprehensive reviews after 12 months of the operation of the agreements and periodic review after that. These reviews could examine how well the agreements are working, and make suggestions for improving them. As more agreements are negotiated and reviews undertaken, lessons will probably emerge that have implications across jurisdictions. To facilitate the opportunities for learning, governments should prepare annual reports on the operation of the bilateral approval agreements.

Implementation of bilateral approval agreements

The failed attempt to negotiate bilateral approval agreements in 2012 indicates that negotiating new agreements will be challenging. This section describes approaches to increase the likelihood of successful implementation.

Avoid excessive prescription

The Government of Western Australia considers that the previous approach to negotiating the agreements involved the Australian Government setting out standards in prescriptive detail, requiring State and Territory Governments to deliver these standards at their own expense, and requiring demonstration of the achievement of Commonwealth outcomes through exacting accreditation requirements. It suggested that instead the objective should be a co-regulatory arrangement whereby:

- COAG agrees to high-level strategic outcomes for matters of National Environmental Significance and principles for balancing these with other objectives;
- The Commonwealth accepts a formal agreement from the State to seek to meet the agreed National Environmental Significance outcomes through State approval processes and does not seek to prescribe or monitor requirements in detail; and
- There is an agreed process for ‘call in’ and negotiated dispute settlement where the Commonwealth believes that there is failure to address a significant national threat. (sub. DR103, p. 3)

Success in future negotiations is more likely if both levels of government aim for agreements that achieve well-defined outcomes, but without prescribing how to achieve them. The MOUs between the Australian and Queensland and New South Wales Governments commit the Parties to ensuring that wherever conditions of approval are imposed, they are outcome focused and strictly necessary to maintain environmental standards.

Agree on environmental standards and outcomes

While undue prescription needs to be avoided, negotiations need to be conducted within a framework that sets out desired outcomes and accreditation standards. An early task is, therefore, to confirm or revise the existing framework, set out in the *Framework of Standards for Accreditation* and the *Statement of Environmental Assurance Outcomes*.

Effective targeting

Participants made constructive suggestions about how to target negotiating effort.

- The Chamber of Minerals and Energy of Western Australia suggested that ‘individual states are likely to have different priority activities/areas to negotiate ... and this flexibility should be accommodated’ (sub. DR85, p. 3).
- The Queensland Resources Council suggested negotiations should focus initially on those MNES connected with existing State processes and capacity, such as Ramsar wetlands, threatened species, migratory species, and national heritage (sub. DR91).
- King & Wood Mallesons suggested that projects suitable for approval agreements include those involving well known and proven technologies (sub. DR99).

A targeted approach might initially involve the Commonwealth Environment Minister delegating to particular States and Territories the responsibility for assessing and granting most environmental approvals under the EPBC Act in urban areas, where relatively mature assessment and decision-making processes are in place and strategic planning tools have already been used successfully. The Commonwealth could subsequently transfer responsibility to State and Territory Governments for approving controlled activities in non-metropolitan areas.

Where there are different reform options, choose ones that facilitate approval agreements

This report proposes reforms to State and Territory Government DAA processes. In some cases, governments may consider that there are different ways to give effect to these reforms. Choosing options that are consistent with agreed accreditation standards would facilitate progress towards bilateral approval agreements.

Pick up synergies with strategic assessments

Strategic assessments can be worthwhile in their own right (chapter 11). They might also help pave the way for bilateral approval agreements in two ways.

- Issues that are settled through strategic assessments are removed as potential sticking points for bilateral approval agreements.
- In the course of undertaking strategic assessments, States and Territories may learn more about Australian Government requirements in relation to MNES, and the Australian Government may learn more about the adequacy (or otherwise) of State and Territory policies, plans and programs for addressing MNES. This improved understanding may facilitate negotiation of bilateral approval agreements.

Recognise that agreements may involve a State or Territory accrediting an Australian Government approval process

As noted above, a targeted approach is likely to lead to the Australian Government continuing to control matters where it considers that the community would not accept it exiting the field. In such cases, the States and Territories should accredit Commonwealth processes where the processes address the same matter.

RECOMMENDATION 7.1

Governments should aim to establish a ‘one project, one assessment, one decision’ framework by restarting negotiations on bilateral approval agreements between the Australian Government and the States and Territories. Such agreements must ensure that environmental standards are not compromised and rights of appeal are no less than those in the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth), and provide for periodic reviews of the agreements’ effectiveness.

RECOMMENDATION 7.2

To facilitate the successful negotiation of bilateral approval agreements, governments should adopt a strategy that involves:

- *increasing the number of State and Territory assessment processes with Commonwealth accreditation*
- *strengthening the approval processes of States and Territories through the implementation of other reforms proposed in this report*
- *targeting ‘easy wins’ — for example, by giving priority to approval responsibilities for activities in urban areas (other than on Commonwealth land)*
- *scoping the task of negotiating the agreements between the Commonwealth and other jurisdictions, including a published timetable of key milestones*
- *tasking the COAG Reform Council to monitor progress of development of agreements.*

7.3 Unnecessary delay in approval decisions

The timeliness of DAA processes as a whole

The timeliness of DAA processes has been a central issue in this study. Business participants contended that the process is too slow and has been lengthening, without any improvement in regulatory outcomes:

Processes take too long or are highly uncertain: a Business Council of Australia member told us it took 10 years to get some basic service centres approved in Western Australia. Another said it took over five years to have a relatively straightforward mine deepening application approved ... not knowing how long the approval process will take is a deterrent to business investment. (Business Council of Australia, sub. 43, pp. 9–11)

Xstrata Coal (sub. 50) suggested that it took about 7 months on average to secure approval for major projects in 2002 and between 18 and 36 months in 2012. The Minerals Council of Australia (sub. 33) stated that the average period for approval-related activities for a thermal coal project was just over three years, compared with 1.8 years for the rest of the world.⁵ The Association of Mining and Exploration Companies referred to a Gantt chart prepared by the Department of

⁵ This comparison is based on a sample of the 50 or so major global coal mines that are part of research firm Wood Mackenzie’s international database covering regions primarily within Canada, China, Colombia, Indonesia, Russia, Southern Africa, the United States and Venezuela (Minerals Council of Australia, pers. comm., 30 July 2013).

Mines and Petroleum in Western Australia that shows the minimum time to get an approval to explore for uranium is 358 days, and the total time that it takes to get approval (from exploration to production) is 1135 days (sub. 42).

Queensland Conservation, on the other hand, suggested that Australian approval processes are not slow by international standards:

... international mining reports such as the Behrens Dolbear Index routinely assess Australian approval process as the most efficient and timely in the world (based upon an assessment of the top 35 resource nations). (sub. DR77, p. 2)

Much of the time required for DAA processes is taken up by the early stages, when the proponent is preparing assessment documentation and collecting public comments (DSEWPAC, sub. 55). The South Australian State Government Departments (sub. 51) and the North Queensland Conservation Council (sub. DR64) suggested that delays in these stages are largely caused by proponents.

Assessments of major projects are complex tasks and can be expected to take a considerable time to complete. The length of time required will depend on the project itself, the degree of rigour used and the technical capability of the proponent. It is difficult to disentangle these factors from how much time is taken as a result of the conduct of regulators and inefficiencies in the structure of DAA processes. Nevertheless, recommendations in earlier chapters — including providing more guidance about DAA pathways, improving the process for setting terms of reference, and establishing major project coordination offices — should help to reduce unnecessary delays. Additional measures could streamline the assessment and approval stages. The next sections consider the evidence on the time taken in these two stages and propose further measures to avoid unnecessary delays.

The time taken to prepare assessment reports and determine approval decisions

In order to build on the largely anecdotal evidence about delays, the Commission reviewed publicly-available data about the time taken by regulators to prepare assessment reports and by decision makers to determine approvals. It also approached regulators in several jurisdictions for information. However, there is limited information about the time taken in these two parts of the DAA process. Agencies generally do not publicly report on (and are not statutorily required to report on) assessment and approval timeframes in a meaningful and comprehensive way.

Assessment

There are little data on the total number of days between the proponent's assessment documentation being 'accepted' by regulatory authorities, and their recommendation report being finalised, *including* stop the clock periods that may expand the total elapsed time before an approval decision is made. To the best of the Commission's knowledge, this information is not publicly documented in any jurisdiction. Some agencies indicated that this information could not be collated without investing considerable resources to sift through hard copy files. The Business Council of Australia noted that 'a better approach would be to ask agencies to record data and report on timeliness performance as they go' (sub. DR102, p. 6).

Aggregate measures of regulator performance against target timeframes are available in some jurisdictions (box 7.7), while in other jurisdictions regulators do not have statutory time limits to report against.

Box 7.7 Timeframes on assessment processes

Controlled action assessments under the EPBC Act

For controlled action assessments on preliminary documentation, by public environment report or by environmental impact statement, the Secretary of the Commonwealth Department of the Environment (the Secretary) is to provide the relevant recommendation report to the Minister within 40 business days of receiving the finalised documents from the proponent. The Secretary must provide a copy of a recommendation report to a person who requests it (s. 135A).

In 2011-12, 13 per cent of preliminary documentation recommendation reports did not meet this timeframe. A single environmental impact statement recommendation report was completed over this period and did not meet the 40 day timeframe. The Secretary is required to publish on the internet every week a notice of all finalised recommendation reports given to the Minister under Division 3A of Part 8 and each recommendation report given to the Minister under sections 95C, 100 or 105. In 2011-12, 91 per cent of preliminary documentation and environmental impact statement recommendation reports were *not* published within this timeframe.

Major project assessments in New South Wales

State significant development and infrastructure projects are assessed by the Department of Infrastructure and Planning in New South Wales. Under this process, the Director-General is required to complete the assessment report within 90 days of the end of the public exhibition period. For projects assessed in 2009-10, 71 per cent of recommendation reports were finalised within 90 days, and 90 per cent within five months.

Sources: DSEWPAC (2012b); Department of Planning (NSW) (2011).

Approval

Published information about compliance with statutory timelines during the approval stage, where it exists, is patchy.

- In 2011-12, 42 out of 73 decisions under the EPBC Act were held up by administrative delays and requirements for further consultation. However, the amount of time that this added to the approval process is not reported (DSEWPAC (Cwlth) 2012b, p. 290).
- In New South Wales and South Australia, determinations are often signed within a few days of assessment reports being signed (or even on the same day). This suggests either that the decision-making stage is extremely short or that the data do not fully separate the assessment and decision-making stages in these jurisdictions.
- The Department of Mines and Petroleum in Western Australia publishes more information than most regulators, through a quarterly approvals performance report, and is moving to extend the range of approval processes on which it reports. However, it does not separate the assessment and approval stages (box 7.8).

Box 7.8 Approvals performance in Western Australia

The Department of Mines and Petroleum (DMP) in Western Australia has established an online Environmental Assessment and Regulatory System to track the progress of mining-related approvals, including exploration licences, mining leases, native vegetation clearing permits, pipeline licences, environment plans and radiation management plans.

Target timelines (excluding stop the clock periods) apply to each approval process (ranging from 20 to 120 business days) and performance against timeframes is published quarterly. These timeframes are not specific to approvals (as assessment and approval processes are integrated). For the first quarter of 2013, the proportion of environmental applications and approvals for the minerals and petroleum and geothermal sectors that were finalised within timeline targets ranged from 51 to 98 per cent.

As part of Western Australia's lead agency framework, DMP coordinates resource project approvals with other approval agencies. It is automating notification of certain applications with other agencies in order to improve interagency communication and to more effectively track interagency timelines for project approvals.

Source: DMP (WA) (2013a).

In summary, the availability and value of published information about the timeliness of DAA processes is limited. It generally does not reveal:

- the time taken to prepare assessment reports and reach approval decisions for individual projects
- average or median timeframes for all assessments and approvals
- the materiality of delays when target timeframes are not met
- detailed explanation of the reasons for delays.

Data limitations make it difficult to interpret: the key drivers of the time taken to complete the assessment and approval stages; the incidence, materiality and reasons for ‘unnecessary’ delays; and how assessment and approval timeframes have changed over time.

The cost of an unnecessary delay to a major project

While the evidence does not indicate how much time could be shaved off DAA processes without reducing the quality of approval decisions, the size of the costs caused by delays to major projects points to potentially substantial gains if efficient ways to save time can be found.

For example, the Commission estimates that the indicative cost of a one-year delay to a major offshore liquefied natural gas project is in the order of \$500 million to \$2 billion, depending on assumptions made (box 7.9). The central estimate of \$1.1 billion represents a reduction in the net present value of the investment by about 9 per cent. The equivalent cost of delay for a major project of more average size (with capital expenditure of \$473 million) might be around \$26 million to \$59 million.

By representing the cost in terms of a one-year delay, the Commission is not suggesting that this is the typical length of unnecessary delay caused by the DAA process as a whole or by any of its component stages. These examples do, however, indicate that the benefits of measures to reduce unnecessary delays may be substantial.

Box 7.9 **Calculation of indicative costs of delay**

The Commission has calculated indicative costs of a one-year delay to:

- an offshore liquefied natural gas (LNG) project of an investment size commensurate with the large projects currently being developed in the sector
- a generic major project of an investment size roughly equivalent to the average of all other current major projects in Australia.

The cost of delaying major projects is hard to estimate. Many simplifying assumptions have been made in calculating the following estimates and so they are indicative only. The estimates relate to the cost of an unnecessary delay and so it is assumed that the environmental and social outcomes (and related costs and benefits) are unchanged by the delay.

Offshore LNG project

Adapting previous Commission discounted cash flow methodology (PC 2009b) and utilising new data from the Australian Petroleum Production and Exploration Association (APPEA) and other sources, it is estimated that a one-year delay to a major offshore LNG project could reduce its net present value (NPV) by between \$0.5 and 2.0 billion, with a central estimate of \$1.1 billion (or around 9 per cent). These estimates relate to costs borne by the project proponent (from delayed profits) and the wider community (through delayed royalty and tax revenue). Delay may also result in higher financing costs and commercial risks.

These estimates were developed from an illustrative project with construction costs of \$11.3 billion (within the \$4.4 billion to \$52 billion range for the eight oil and gas projects under construction in the September quarter of 2013 (DAE 2013)). Cash flows for the project were constructed using: output volume, and construction, operating and decommissioning cost data supplied by APPEA; and prices based on those producers are currently receiving (adjusted over time by an energy price growth assumption).

These baseline cash flows were discounted to the present day using an assumed cost of capital of 8–12 per cent per year. Delay was modelled by assuming construction commences one year later, thus all cash flows are delayed one year. The delay scenario cash flows were also discounted to the present. The cost of delay was calculated as the difference between these two NPVs.

(Continued next page)

Box 7.9 (continued)

The cost estimates are sensitive to the assumed profile of the project's income stream and the discount rate. To test the sensitivity of the estimates, both the discount rate and price assumptions were varied. Table 7.2 presents the range of estimated costs that result from this analysis.

Table 7.2 Sensitivity analysis — simulated offshore LNG project^a
Change in NPV (\$ million) for a one-year delay

<i>Energy price growth^b</i>	<i>Discount rate^c</i>			<i>IRR^d</i>	<i>Baseline NPV^e</i>	
	<i>%</i>	<i>12.0</i>	<i>10.0</i>			<i>8.0</i>
	0.0	-500	-600	-800	18	7 000
	2.0	-900	-1 100	-1 300	22	12 500
	4.0	-1 500	-1 800	-2 000	26	19 800
<i>Impact on NPV (%)</i>		<i>-10.7</i>	<i>-9.1</i>	<i>-7.4</i>		

^a Capital investment of around \$11.3 billion occurs over five years, with a subsequent 24 year effective production life. ^b Assumed annual nominal growth rate. ^c Per cent discount rate. ^d Internal rate of return. ^e Baseline NPV without delay, based on a 10 per cent discount rate.

Sources: Commission calculations based on simulated project production and cost data provided by APPEA.

These estimates are different from those in the draft report because they rely on more up to date and disaggregated cash-flow data. The new estimates also include some costs that accrue to the wider community as well as to the project proponent.

There are a range of other factors not considered in the analysis that could influence the actual cost of a delay brought about by DAA processes. For example, an increased difficulty in financing the project or reduced flexibility to respond to market conditions could push costs higher and/or threaten the viability of the project. In contrast, any ability to accommodate the delay within the planned project schedule or use the delay to improve project design could lower costs.

Generic major project

To illustrate potential delay costs for a major project of more average size, a stylised cash-flow profile for a project with an average investment cost and similar features to the above project was constructed.

This suggests a one-year delay could result in societal costs in the order of \$26 million to \$59 million for a project with a construction cost of \$473 million (this being the average size of the non-oil and gas projects that were under construction in the September Quarter 2013 (DAE 2013)). This estimate assumes the same range of internal rates of return as for the LNG project, a discount rate of 10 per cent and a similar cash flow profile as for the LNG project (though scaled down to reflect the smaller investment and a shorter (20 year) operating life).

Sources: DAE (2013); PC (2009b).

Improving timeliness

Reforms that could improve the timeliness of the assessment and approval stages of DAA processes include:

- increased use of statutory timelines
- tighter specification of stop the clock provisions
- using deemed decisions in combination with statutory timelines.

Statutory timelines

The use of timelines has been an issue in Australia and internationally.

In New Zealand, when the Minister refers assessment of a matter to a board of inquiry, the board must make its final decision within nine months of the public notification of the Minister's decision to call-in the matter. However, the Minister can extend this timeframe to 18 months if special circumstances exist (appendix D).

In Australia, several submissions supported increased use of statutory timelines.

Statutory timelines create discipline within regulatory agencies, deliver certainty and promote openness and transparency of the decision-making process. They also provide a mechanism for government and industry to monitor the regulatory agencies' performance. (Association of Mining and Exploration Companies, sub. 42, p. 17)

The Commission expects that more use of statutory limits on the time allowed for the assessment and approval phases of DAA processes would sharpen incentives for regulators to respond promptly and give proponents certainty about when decisions will be made. Increased certainty would support project planning and may assist with securing project finance.

Specifically, jurisdictions should specify the maximum time, after a proponent's assessment documentation is lodged, for:

- the assessment agency to provide its report and decision recommendation to the relevant Minister
- the Minister to make the decision.

Imposing statutory timelines on secondary approval processes would also help to prevent delays. The Major Projects Coordination Office (chapter 6) could also assist through, for example, developing 'project agreements' with proponents and regulators, and electronically tracking the progress of individual processes against timeframes, identifying bottlenecks and publicly reporting on performance against timeframes.

Stop the clock provisions

When there are statutory timelines, regulators are frequently allowed to suspend the process ('stop the clock') if further information is needed.

Requests for further information during the assessment process may be viewed by proponents as a cause of unnecessary delay, yet to the authority assessing the project, and often the community, the information may be viewed as critical to ensuring an adequate assessment can be made. (Northern Territory Government, sub. 46, p. 4)

There is less need for such procedures when there is effective early consultation between the public, proponents and regulators about the scope of an assessment (such as through stakeholder input on the terms of reference for an environmental impact assessment or during preparation of the related documentation), as this will help to ensure that the assessment focuses on the significant issues (chapter 5).

Excessive use of stop the clock procedures can cause significant delays:

As just one example, the statutory timeframe for the approval of one mine in WA in 2013 was extended on three occasions by the Minister with no specific actions required of the project proponent, amounting to an additional 90 days over the original statutory timeframes. (Chamber of Commerce and Industry of Western Australia, sub. 44, p. 5)

These delays may be worsened if stop the clock arrangements apply to secondary as well as primary approvals. To avoid this problem, the Association of Mining and Exploration Companies suggested that there should not be any opportunity to stop the clock when applications are referred to other agencies, and that timelines should be specified on a 'whole of government' basis (sub. DR70).

The Commission's view is that to allow some flexibility while avoiding unnecessary delay and cost, regulators should only be permitted to stop the clock during assessment and approval when significant matters emerge that were not covered by the terms of reference or could not have been reasonably anticipated, and not simply because the decision maker or assessment agency wants more time. Regulators should be required to disclose when and why they are stopping the clock, when the clock is re-started and when the assessment has been completed. This information should be published in formats that allow meaningful comparisons across jurisdictions.

Regulators should be permitted to stop the clock more than once while they are preparing assessment recommendations, provided that they can demonstrate publicly that they are complying with the conditions identified in the previous paragraph. However, one further opportunity to stop the clock is sufficient during the approval stage, given that there will have been an extended assessment process before the matter reaches the decision maker.

Using deemed decisions in combination with statutory timelines

Business SA pointed out that statutory timelines need to be enforced (sub. DR74). In the Commission's view, if the relevant Minister makes no decision within the specified time period, the recommendations made by the assessment body (along with its reasons and any conditions) should be deemed to be the decision of the Minister. This would encourage compliance with timelines and may, as Richard Clowes (sub. DR65) suggests, encourage approval authorities to focus on higher-impact proposals.

The Chamber of Minerals and Energy of Western Australia does not support deemed decisions, on the basis that only the Minister can take into account the full range of sustainable development principles when approving, conditioning or not approving a project. The Chamber considers that statutory timeframes are likely to have the largest impact if systems and reporting arrangements are in place to monitor agencies' performance and hold them accountable to these timeframes (sub. DR85).

The Commission agrees that better reporting arrangements would be helpful, but considers that they are unlikely to provide a sufficient incentive for compliance with timelines, without the added pressure of deemed decisions.

RECOMMENDATION 7.3

Governments should develop statutory timelines that specify the maximum time that may elapse between a proponent's assessment documentation being lodged and when the assessment agency provides its report and decision recommendation to the relevant decision maker.

Legislation should also set the maximum time for the decision maker to make the decision. If no decision is made within the time period specified, the recommendation (along with the reasons, advice regarding the decision and any conditions and offsets) made by the assessment agency should be deemed to be the decision by the decision maker and in the public domain.

RECOMMENDATION 7.4

Governments should provide guidance, preferably in statutory form, for the use of any ‘stop the clock’ mechanisms. Such arrangements should only be available to assessment agencies when significant matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated. Decision makers should only be able to stop the clock once. Proponents should be allowed to stop assessment and decision processes at any time. Any party that stops the clock should be required to disclose when these triggers are activated and the reason(s) for activation.

7.4 Responsibility for making approval decisions

As table 7.1 illustrated, there are examples in Australia of Parliaments, Ministers, departments and independent agencies having approval authority for major projects. This raises the question of which allocation of approval authority will lead to the most balanced approval decisions.

When approval decisions can be made by applying objective, measurable rules, experts in those rules are well placed to make decisions. (Code assessable development decisions are an example.) Similarly, it is sometimes suggested that technical experts, such as the Threatened Species Scientific Committee and the Australian Heritage Council, should have decision-making authority. However, primary approval decisions about whether and how major projects should proceed often involve tradeoffs between competing environmental, social and economic values that a technical body is not equipped to assess. On this issue, the Hawke Review concluded that:

It is appropriate that these decisions continue to be made by an elected representative of the people. In the vast majority of cases, it is expected that the Minister will follow expert advice. Retaining the Minister as the primary decision maker under the Act also means that the Minister can be held publicly accountable for those decisions and it creates a context that motivates experts to ensure their reasoning is careful, well supported and convincing. (Hawke 2009, p. 231)

The Commission agrees with this conclusion, and considers that the case for Ministers being responsible for major project primary approval decisions applies equally in the States and Territories, given that a requirement to make comparable balancing judgments is involved and there are similar implications for public accountability.

Because Ministers’ time needs to be used efficiently, approval legislation may permit them to delegate some or all of their powers. However, some legislation is

imprecise about the circumstances under which authority can be delegated and how that delegated authority should be exercised. In other cases, for example, in New South Wales, the *Environmental Planning and Assessment Act 1979* (s. 23) requires the publication of instruments of delegation in the Government Gazette that report the planning Minister's delegation of approval decisions.

While Ministers' time is scarce, the Commission considers that they should not delegate decisions on primary approvals for major projects. If it was considered necessary to make this a legislative prohibition, as opposed to relying on Ministers choosing not to delegate, this would be relatively easy to implement in the case of legislation that is restricted to major projects. When the approval legislation within a jurisdiction applies to smaller, as well as major projects, implementing this approach would require defining in the legislation those major projects for which delegation of authority would not be permitted.

Should governments decide to retain the capacity for Ministers to delegate decisions with respect to some major projects, the Commission considers that the types of decisions Ministers can delegate should be specified in legislation. For example, this could be limited to decisions that do not require balancing of different values or where the Minister has a potential conflict of interest. Further, as is the practice in New South Wales, delegations should be published.

RECOMMENDATION 7.5

Ministers should be the decision makers for major project primary approvals. Governments should consider whether this is better achieved through administrative or legislative means. Legislation should establish the types of decisions that Ministers can delegate.

7.5 Improving the process that decision makers are required to follow

The quality of approval decisions, and the conditions attached to them, will be influenced by the process that decision makers are required to follow, such as whether they are required to take expert advice and consult with affected parties. This process could be strengthened by:

- clarifying and publishing the process, where this is not done already
- publishing the justification for approval decisions.

Clarifying and publishing the process

The EPBC Act specifies factors that the Minister must consider when making decisions, and the extent of consultation required (box 7.2). While this approach may not suit all approval frameworks, it indicates the types of factors that are likely to populate well-designed decision making processes.

Adding a requirement that approval decisions are consistent with principles of good practice regulation, such as the ones outlined in chapter 1, could improve the quality of decisions. For example, requiring approval decisions to aim at achieving regulatory outcomes that are consistent with objectives would require the Minister to consider how this can be given effect. This would focus attention on whether the conditions attached to the approval are likely to achieve the regulatory objectives. This in turn would depend on whether the conditions are capable of being enforced (chapter 10).

There is unlikely to be a single leading practice process for reaching approval decisions that all jurisdictions should implement, and it is important that specifying the process more clearly does not lead jurisdictions to increase regulatory burden or time requirements. However, each jurisdiction should publish its process. This would increase confidence that decisions are being made within a consistent framework, and with regard to relevant factors made on the basis of expert advice and suitable consultation. A properly constructed and transparent process can also increase public accountability and encourage evidence-based decisions.

Making publication a legal requirement, as suggested by ANEDO (sub DR92) would help to ensure that this practice is observed over the long term.

RECOMMENDATION 7.6

Legislative guidance should be provided for decision makers to follow when making approval decisions. The guidance should include:

- ***the factors that decision makers need to take into account when reaching decisions***
- ***the best ways to consult with other decision makers, agencies and interested parties, and to take account of community concerns.***

Publishing the justification for approval decisions

It is common for jurisdictions to require that the reports and recommendations of assessment bodies are published. The Commission considers that this is a good practice that all jurisdictions should implement.

It is also common for approval authorities to publish decisions, including information that has guided those decisions. For example, the EPBC Act (s. 131AA(2)) requires that if the Minister proposes not to approve an action, he or she must give the proponent:

- a copy of the assessment and recommendation reports
- any information relating to economic and social matters that the Minister has considered
- any information about the history of the proponent in relation to environmental matters that the Minister has considered.

This requirement is subject to exemptions, including that the Minister believes it is not in the national interest to provide the information. Information prepared for the Minister by the Secretary of the Department is excluded from this requirement.

The EPBC Act does not, however, require the Minister to explain why conditions are being imposed. Similarly, some State and Territory legislation also does not require decision makers to provide such explanations. The Hawke Review favoured the publication of statements of reasons for all decisions made by the Minister, or a delegate under the Act, at the time the decision is made (Hawke 2009, pp. 240–241). The Australian Government agreed in principle with this recommendation, but noted that:

Statements of reasons can be complex legal documents and are resource intensive to prepare. Requiring a statement of reasons for every decision under the amended Act, including those that are not controversial or are of an administrative nature, would unduly divert resources for little public benefit.

The government supports providing the public with clear and accessible explanations for all significant decisions taken under the amended Act in a resource-efficient manner. (2011, p. 82)

The Australian Government indicated that it would give effect to its decision by publishing reports from expert committees and from the Department of the Environment that contributed to the approval decision. It noted that this advice would not constitute a statement of reasons for the purposes of litigation, but that:

People considering a legal challenge to a decision under the amended Act will still be able to make an application for a more comprehensive statement of reasons for any decision taken under the amended Act in accordance with the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth). Similarly, those who are entitled to seek merits review of a decision may apply for a statement of reasons under the *Administrative Appeals Tribunal Act 1975* (Cwlth). (2011, p. 82)

ANEDO supports a more comprehensive approach, arguing that all of the information that informed the decision maker should be published (sub. DR92).

The Hawke Review covered a much wider range of decisions under the EPBC Act than are the subject of this study. As such, the costs of publishing reasons for all significant major project decisions would be less than the costs that were of concern to the Australian Government. In the Commission's judgment, these costs would also be less than the benefits that would accrue to the community from increased transparency about major project decisions.

Similarly, the Commission considers that States and Territories, as well as the Commonwealth, should publish statements of reasons for their major project primary approval decisions.

RECOMMENDATION 7.7

Decision makers should be required to publish assessment reports and statements of reasons (including identification of the risks being mitigated) for their approval decisions and conditions for all major projects.

8 Conditions and offsets

Key points

- Conditions and offsets are a key feature of the various approvals, permits and licences required by major project proponents. They are intended to ensure that major project proposals are implemented in a manner consistent with regulatory objectives.
 - Conditions refer to avoidance and mitigation measures that proponents are required to undertake to protect environmental, heritage and social outcomes.
 - Offsets are environmentally beneficial activities that seek to counterbalance or compensate for the *residual* adverse environmental impacts of a development.
- Unnecessary regulatory burdens arise when conditions are:
 - not targeted at project impacts
 - impractical to comply with or unenforceable
 - excessively prescriptive
 - duplicative, overlapping and inconsistent.
- Environmental offset policies may be imposing unnecessary costs on the community, and failing to deliver on their objectives, due to:
 - confusion and uncertainty about the outcomes being sought
 - a lack of transparency and scientific rigour in decision-making processes
 - inconsistencies between offset policy objectives and higher-order legislative requirements.
- The Commission is recommending that major project regulators adopt a ‘leading practice’ framework for setting conditions. Key principles include: limiting conditions to the impacts of the development being consented, outcome-based requirements where possible and greater alignment between project-specific conditions and broader policy frameworks.
- A dedicated and independent review of offset arrangements is warranted to examine: offset policy objectives, the quantitative methodologies used to identify suitable offsets, the merits of offset markets and the case for establishing a single, national offsets framework. The Commission is recommending that COAG commission a national and public review of offsets, to report by the end of 2014.

Approval conditions are a necessary and appropriate feature of the major projects regulatory framework. Conditions are developed through the assessment and approval process and are intended to avoid or mitigate the adverse impacts of a proposed development on environmental, heritage and social outcomes. In this way,

approval conditions can ensure that project proposals are implemented in a manner consistent with regulatory objectives.

Environmental offset measures constitute one form of approval condition. In broad terms, offsets refer to environmentally beneficial activities that counterbalance or compensate for the adverse impacts of a development on the environment.

This chapter describes how major project condition-setting processes could be improved through greater uptake of ‘leading practice’ approaches (section 8.1). The use of environmental offsets in the conditioning process presents some specific conceptual and practical challenges. Further work is required to resolve these issues, and to improve environmental offset practices (section 8.2).

8.1 Approval conditions

Role and nature of major project approval conditions

Conditions are a prominent feature of the various environmental and non-environmental approvals, consents, permits and licences typically required of major project proponents. Compliance with conditions can involve a broad range of activities of varying significance, duration and origin:

- Conditions might be proposed by the proponent as part of the approval application, or developed and imposed by the regulator as a condition of approval.
- Conditions can include specific, ‘one-off’ requirements (for example, to install a water filter) as well as longer-term, ongoing activities (such as water quality monitoring).
- Conditions are often classified as prescriptive or outcome-based in nature. Prescriptive conditions are akin to a ‘command and control’ regulatory approach and identify a specific action that needs to be performed by proponents. Outcome-based conditions specify the required outcome or objective, but leave the proponent to determine how best to achieve it.
- Sometimes approval conditions involve ‘embedded’ requirements. For example, if a proponent is required to prepare and implement an approved environment management plan.
- In some cases, contingent conditions might also feature in approval decisions. For example, the regulator might specify that particular activities be undertaken if pre-determined triggers are met.

Current approaches to setting conditions

Regulatory framework for major project approval conditions

In most States and Territories, major project assessment and approval responsibilities are relatively fragmented and decentralised (chapters 6 and 7). Under these systems, proponents obtain a number of ‘matter-specific’ approvals, each of which is likely to include approval conditions. For example, in Western Australia conditions can be imposed as part of the environmental impact assessment (EIA) process (the ‘primary’ environmental approval), as well as for approvals to clear native vegetation, take water from a river system and transport waste.

In other cases, condition-setting responsibilities are more concentrated, owing to the relatively integrated nature of the development assessment and approval (DAA) process. For example, for state significant developments in New South Wales, the majority of applicable conditions are contained in a single approval. That said, if Australian or local government approvals are required, separate sets of conditions may be relevant. Moreover, centralised systems often require regulators to seek input or advice on conditions from various referral agencies.

Generally speaking, conditions are expressly provided for in the legislative and regulatory instruments governing major project development. However, these provisions impose few restrictions on — or guidance about — the scope of allowable conditions.

Table 8.1 describes the current legislative provisions for major project approval conditions in terms of whether:

- the decision maker has broad power to impose any conditions as it ‘may determine’, ‘thinks fit’ or ‘wishes’
- conditions are required to be connected to or relevant to the development
- conditions are required to be reasonable
- certain conditions must be imposed on the approval
- conditions must be consistent with or not inconsistent with other legislation.

In most instances, regulators are afforded considerable discretion as to the nature and severity of approval conditions. Further, the requirement to ‘have regard to’ or ‘further’ the objects of an Act is unlikely to materially constrain decision makers in practice if objects clauses are ambiguous or inconsistent (chapter 4).

Table 8.1 Legislative restrictions on condition-setting

For key major project processes

		<i>Broad power^a</i>	<i>Relevant^b</i>	<i>Reasonable^c</i>	<i>Mandatory conditions^d</i>	<i>Consistent^e</i>
NSW	State significant development	✓	✗	✗	✗	✗
	State significant infrastructure	✓	✗	✗	✗	✗
	Heritage permit	✗	✗	✗	✗	✗
Vic	Ministerial call-in (planning applications)	✓	✗	✗	✓	✓
	Major transport projects	✓	✗	✗	✗	✗
	Mining and resource projects	✓	✗	✗	✓	✗
	Environment effects statement assessment	✗	✗	✗	✗	✗
	Heritage permit	✓	✗	✗	✓	✓
Qld	Coordinated projects	✗	✓	✓	✗	✗
	Prescribed projects	✗	✗	✗	✗	✗
SA	Major developments	✗	✗	✗	✗	✗
	Crown developments	✓	✗	✗	✗	✗
	Heritage permit	✓	✗	✗	✗	✗
WA	Environmental assessment	✗	✗	✗	✗	✗
	Heritage permit	✗	✗	✗	✗	✗
Tas	Projects of state significance	✗	✗	✗	✗	✓
	Projects of regional significance	✗	✗	✗	✓	✗
	Major infrastructure developments	✗	✗	✗	✗	✗
	Works approval (heritage)	✓	✗	✗	✗	✗
NT	Exceptional development	✓	✗	✗	✗	✗
	Work approval (heritage)	✗	✗	✓	✗	✗
ACT	All development tracks	✗	✗	✗	✓	✓
	Ministerial call-in	✗	✗	✗	✗	✓
Cwth	Environmental assessment (EPBC Act) ^f	✗	✓	✗	✗	✗
	Major airport infrastructure	✓	✗	✗	✗	✗

^a Decision maker has broad power to impose any conditions as it 'may determine', 'thinks fit' or 'wishes'.
^b Conditions are required to be connected to or relevant to the development. ^c Conditions are required to be reasonable. ^d Certain conditions must be imposed on the approval. ^e Conditions must be consistent with or not inconsistent with other legislation, plans and so on. ^f Conditions must only be relevant to a matter protected under the EPBC Act, not to the impacts of the action being consented (s. 134).

Key stages in condition-setting processes

Condition-setting practices vary across regulatory processes and jurisdictions. However — for primary approval processes at least — some generic stages can be identified.

First, as part of the application for approval and preparation of relevant assessment documentation, proponents typically commit to a series of avoidance and mitigation

activities. For example, a wind farm operator might commit to turning off turbines at certain times to reduce the impacts on birds and bats. (Offset measures may also be proposed by the proponent, as discussed in section 8.2.)

These commitments demonstrate to regulators how a proponent intends to manage the anticipated adverse impacts of a development. Often, these actions are ultimately drafted into project approvals (that is, proponents are obliged to follow through on these commitments as a condition of approval). These upfront assurances can also influence the assessment pathway of a proposed major project development. For example, if *net* impacts can be demonstrated to be minor, a lower level of assessment may be appropriate (chapter 6).

In some cases, regulators publish guidance to assist proponents in proposing conditions for particular types of project impacts. For example, the NSW Department of Planning and Infrastructure has prepared (draft) sets of ‘model conditions’ for state significant development projects across seven industry sectors (including mining, urban development, linear infrastructure and wind farms). These conditions cover a range of project impacts including noise emissions, biodiversity offset strategies and transport management.

Upon receipt of relevant assessment documentation from the proponent, the assessment agency will consider whether the proposed development (inclusive of proposed avoidance and mitigation measures) is consistent with regulatory objectives. That is, whether the commitments made by the proponent are sufficient to make the development environmentally and socially acceptable.

If not, the assessment agency will devise a series of additional conditions that it considers are necessary to ensure that objectives are met. These conditions form part of the recommendation put forward to decision makers. Proponents may be consulted throughout the development of these conditions; however, in some cases conditions are not disclosed until the time an approval is granted. Proponents can usually apply to have conditions ‘varied’ if required. (Processes for varying conditions are discussed in chapter 10.)

The decision maker (frequently a Minister — chapter 7) is ultimately responsible for determining the final set of approval conditions. In most cases these conditions emanate from advice provided by the assessment agency, but they need not (that is, the decision maker usually has discretion to add, subtract or alter conditions). The Coordinator-General arrangements in Queensland are noteworthy, in that — if the decision maker decides to grant the approval — the conditions recommended by the Coordinator-General *must* be applied, and any additional conditions must not be inconsistent with these conditions.

Broad support among participants for improving condition-setting arrangements

Major project approval conditions have been a prominent theme of study submissions. While participants' views varied, there was support for reform that encourages more efficient and effective major project conditions.

Proponents suggested that the number, complexity and severity of conditions has increased over time without any commensurate benefit, imposing significant costs on developers and the community:

... the three LNG projects currently under construction in QLD have approximately 1000 state conditions and more than 300 federal conditions each ... the compliance cost of excessive conditions can be a lot higher than the initial costs associated with gaining project approval. The unnecessary costs of duplication, inefficiencies, uncertainties and onerous conditions are ultimately born by governments through reduced revenue, and by shareholders and the communities in which these projects occur. (APPEA, sub. DR105, p. 18)

The Business Council of Australia (BCA) (sub. DR102, p. 7) considered that approval conditions 'is the area of greatest cost and interference in project productivity' and favoured introducing an impact assessment test to properly assess the costs and benefits of proposed conditions.

More generally, participants expressed concerns about the practicality, enforceability and effectiveness of approval conditions in meeting their objectives. The Australian Network of Environmental Defender's Offices (ANEDO) noted:

... conditions must be measurable and enforceable (with appropriate resources and agency culture); and must emphasise proactively preventing environmental damage, rather than risking that damage and reacting when it happens. (sub. DR92, p. 28)

It is not feasible to assess the efficacy of individual major project approval conditions as part of this study. However, evidence provided through submissions coupled with the Commission's own analysis suggests that there are systemic problems with current condition-setting processes. Moreover, given the important role of conditions in ensuring that regulatory objectives are met, and the substantial costs incurred by proponents in complying with conditions, the potential benefits from improving these arrangements are significant.

In this context, the Commission favours developing a clear and practical principles-based framework for the setting of major project approval conditions. Key components of this framework are considered below.

Improving condition-setting practices

The Commission considers that there is scope to improve condition-setting arrangements for major project-related approvals in a number of areas.

Better aligning conditions with broader policy frameworks

Proposed major projects are often expected to impact on matters or outcomes covered by broader environmental and resource management policies (such as those dealing with air pollution, water use and the clearing of native vegetation).

There are good reasons for dealing with environmental problems and resource management considerations through high-level policy and legal frameworks. This approach ensures that the cumulative impacts of *all* activities impacting on the environment are taken into account, and provides for a more integrated and strategic response to environmental problems (chapter 11). By contrast, project-based assessment and approval processes primarily focus only on the adverse impacts of a particular development.

There are limits to the extent that broader policy frameworks can be relied upon to condition major projects — some amount of project-specific conditioning will generally be required. However, there are clear advantages from better aligning major project DAA processes with prevailing environmental and resource management policies. Accordingly, the Commission is recommending that major project regulators ensure that approval conditions draw upon — and are consistent with — these policies. This is expected to:

- deliver more effective and efficient avoidance and mitigation measures
- reduce the regulatory burden on regulators and proponents (by avoiding the need to examine and assess particular issues and impacts as part of project approvals)
- improve regulatory certainty and predictability
- ensure all impacts (and stakeholders) are treated consistently.

On the latter point, conditions have been imposed on major projects that are more stringent than general environmental standards encountered by, say, a farmer, even though both parties are causing equivalent environmental damage (for example, through clearing native vegetation). This is *not* appropriate. Better aligning major project conditioning processes with general environmental law will help guard against this.

Similarly, it is not efficient for regulators to impose conditions on project approvals that amount to ‘do not break the law’. These practices increase administrative costs

and create confusion without a substantial benefit. The Environment Assessment Guidelines published by the Environmental Protection Authority (EPA) in Western Australia explicitly safeguard against this practice:

Conditions should not be imposed where legislation exists to ensure an outcome, such as requiring approval for the removal of any flora or fauna protected under the *Wildlife Conservation Act 1955*. (2009, p. 4)

Similar provisions should be adopted by all regulators with responsibility for setting major project approval conditions.

Targeting conditions at project impacts

Current legislative provisions governing key major project approvals give decision makers very broad authority to impose conditions on developments (table 8.1).

A number of study respondents expressed concern about the linkages (or lack thereof) between project impacts and the outcomes being sought from approval conditions. For example, the Queensland Resources Council suggested that conditions are sometimes used as a means of funding public infrastructure:

When major projects are routinely having twelve hundred or more specific conditions imposed on them — which collectively require hundreds of subsidiary assessment processes, such as the preparation of a social impact management plan — the case could be made that regulations are being made by stealth. In many cases, these quasi-regulations are blurring the boundaries of the Government's responsibility to provide basic services for growing communities by seeking to shift these costs onto major projects. (sub. 19, p. 4)

Only rarely is there a legislative requirement for a connection between a project's impacts and the conditions imposed. Exceptionally, the *Sustainable Planning Act 2009* (Qld) s. 345 stipulates that a condition must be 'relevant to, but not an unreasonable imposition on, the development ...' or 'reasonably required in relation to the development ...'.

At the Commonwealth level, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) permits the Minister to impose conditions that are necessary or convenient for protecting, or repairing or mitigating damage to, a protected matter for which the approval has effect (s. 134). However, there is no requirement that those actions be targeted at the impacts of the proposed development itself. The Federal Court recently held that, where a proposed action posed risks to wild populations of the Tasmanian devil, the EPBC Act permitted approval conditions aimed at bolstering the *ex-situ* (or off-site) conservation of the species (box 8.1).

In the Commission's view, conditions that impose requirements on proponents that are *unrelated* to the impacts of the development do not constitute good public policy.

On the one hand, the Commission recognises that, even if a particular condition is unrelated to the impacts of the development being consented, it may effectively contribute to the furtherance of certain environmental, social or economic objectives. Moreover, in many cases proponents may be willing and able to bear the cost of complying with these conditions, particularly if it provides for a more expedient approvals process, or helps to build a 'social licence' to operate.

However, if governments seek to extract 'rents' from major project developers through the imposition of approval conditions, they risk imposing significant efficiency costs on proponents and the community. There are several reasons for this:

- Rent extraction is directed solely at transferring benefits from proponents to the government (or wider community), rather than the creation of wealth.
- There are more direct, transparent and efficient ways to extract rents from proponents (for example, via a tax or royalty payment).
- It is not clear that major project regulators have the information, skills or incentive to evaluate the costs and benefits of alternative investments to the community as a whole, or identify the least-cost or most efficient way of delivering certain benefits.
- If the costs imposed on proponents exceed pure economic rents, this practice can deter investment in major projects, meaning benefits to the proponent and to the public (from the provision of goods and services) are forfeited.

Box 8.1 **Conditions and project impacts — Shree Minerals case**

In December 2012, Shree Minerals obtained an approval from the Commonwealth Minister administering the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) for the development and operation of an iron ore mine in North West Tasmania (EPBC 2011/5846). Attached to the approval were a number of conditions, including:

- Condition 14, requiring Shree Minerals to donate \$350 000 to the Save the Tasmanian Devil Program Appeal, for the purpose of ‘maintenance of the Tasmanian devil Insurance Population’.
- Condition 20(c), which required additional contributions of \$48 000 for each Tasmanian devil killed on roads within a defined area in excess of two devils within any 12 month period.

In *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities & Anor [2013] FCA 694*, the Tarkine National Coalition (TNC) challenged the validity of this approval.

One of the grounds for the challenge was the validity of Conditions 14 and 20(c). Section 34 of the EPBC Act authorises conditions necessary or convenient for protecting, repairing or mitigating damage to, a ‘matter protected’. TNC argued that the ‘matter protected’ in this instance was the wild population of the Tasmanian devil and hence conditions such as Conditions 14 and 20(c), which related to *ex-situ* conservation, were not permitted under the EPBC Act.

Marshall J rejected this submission, on the basis the ‘matter protected’ referred to the listed threatened species (that is, the Tasmanian devil) generally, and that measures to improve the robustness of an insurance population also mitigated the risk of extinction of the species.

Source: DSEWPAC (2012c).

To safeguard against the practice of setting unrelated or poorly targeted conditions, the Commission recommends that — where necessary — relevant legislative provisions be redrafted to require that there is a connection between approval conditions and the expected impacts of the major project being consented. Further, to bolster public confidence in the condition-setting process, decision makers should explain how individual conditions relate to project impacts, and to the achievement of regulatory objectives.

Outcome-based conditions where possible

Outcome-based approval conditions require the proponent to achieve particular performance standards or measurable outcomes, but do not prescribe *how* to do so. Where feasible, this allows proponents to use innovative approaches and

improvements in technology to meet relevant objectives at ‘least cost’. It can also reduce the role of the regulator in the condition-setting process.

There was broad support for outcome-based conditions amongst study respondents:

LGAQ [Local Government Association of Queensland] supports outcome-based conditions that are based on established standards, proportionate to the level of risk, measurable and legally enforceable. ... Outcome-based conditioning should also cover the project lifecycle (including decommissioning and site rehabilitation), not just the construction and early stages of operation. (Local Government Association of Queensland, sub. DR78, p. 5)

Further, the COAG principles of best practice regulation note:

Regulation should have clearly identifiable outcomes and unless prescriptive requirements are unavoidable in order to ensure public safety in high-risk situations, performance-based requirements that specify outcomes rather than inputs or other prescriptive requirements should be used. (2007, p. 5)

Participants acknowledged that certain regulators have made notable progress in terms of adopting outcome-based conditions:

In Queensland, it was not until recently that the objectives were clarified for environmental conditioning of mining projects with the development of a set of ‘outcomes focused’ model mining conditions. ... Critically, Queensland’s model mining conditions do not prescribe how objectives are to be met, which enables industry creativity and drives innovation in environmental management. (Queensland Resources Council, sub. DR91, p. 2)

Outcome-based conditions are particularly appealing where the adverse impact — and the outcome or objective being sought — is readily quantifiable and measurable, such as emission levels or water quality. Regulators might also prefer outcome-based conditions when the desired outcome is known but the means to achieve it is not.

In contrast, prescriptive conditions focus on ‘how’ to achieve the objective, and less on the objective itself. Prescriptive conditions — which might dictate use of a particular form of technology, or piece of equipment — do not permit proponents the flexibility to determine how the desired outcome will be achieved, and can have the effect of discouraging a proponent to go beyond compliance (Keating 2002). This can be particularly significant when conditions are in place over many years, and technological improvements might be significant.

Notwithstanding the Commission’s broad preference for outcome-based conditions, caution is required. This is particularly the case where the desired environmental outcome is not well defined or easily measured (for example, visual amenity or biodiversity), or where there is significant uncertainty about the nature and severity

of project impacts. In these circumstances more prescriptive conditions may be warranted, but should be regularly reviewed and updated if necessary.

There is also merit in regulators making greater use of contingent conditions. For example, if monitoring shows that certain project impacts have reached (or exceeded) some pre-determined trigger level, the proponent would be required to undertake corresponding contingency actions. This *adaptive* approach to major project conditioning can avoid imposing burdensome requirements unnecessarily (or prematurely), whilst still ensuring that regulatory objectives are achieved.

Ensuring conditions are practical and enforceable

Respondents have suggested that approval conditions are often unrealistic or impractical to comply with, and difficult for regulators to measure, monitor and enforce (chapter 10). This increases costs for proponents and regulators — with no associated benefits — and erodes public confidence in the approval and conditioning process.

Xstrata Coal considered:

[There has been a] dramatic increase in ad hoc regulatory interventions on top of the existing regulatory or assessment processes (e.g. strategic cropping or land use legislation, aquifer interference policies or agricultural land impacts) which increases the regulatory burden, often for no material environmental gain. Many of these new regulatory requirements lack clarity in terms of practical implementation with ambiguities and are often left to the project proponent to resolve. (sub. 50, p. 4)

Macintosh (2010) observed that enforceability can be problematic for outcome-based conditions if there are disagreements between proponents, regulators and third parties about what the obligations of the proponent are, and whether the steps taken by the proponent are sufficient.

Governments and regulators have instituted various measures to guard against impractical and unenforceable conditions. For example, the EPA in Western Australia consults with proponents and key decision-making authorities as it develops proposal-specific implementation conditions:

Consultation will ensure that the conditions the EPA recommends to the Minister for Environment do not contain technical errors or unnecessary difficulties with implementation. Consultation will be limited to matters of fact, technical issues and implementation. It will not involve negotiation over the application or content of recommended conditions. (EPA (WA) 2010, p. 1)

In addition, the EPA (WA) monitors and draws lessons from the success (or otherwise) of previously recommended approval conditions. This includes taking into account how conditions fare in the appeals process:

... [in 2012-13] of the 24 assessments whose appeal period closed during the year, 25 per cent (or 6 assessments) were the subject of an appeal. Of these, two required 'significant' changes to the conditions and three had not yet received an appeal determination (OEPA (WA) 2013b, p. 19).

Practical and measureable conditions can also be encouraged through greater use of 'model' conditions, and by establishing a formal 'feedback loop' from compliance monitoring activities (chapter 10) to condition-setting processes. These experiences provide important insights about the achievability and measurability of conditions, thereby facilitating a process of continuous improvement. The Commission's proposal for environmental assessment and enforcement functions to be consolidated in a single independent environment regulator (chapter 6) would facilitate this information sharing.

Governments should ensure that all major project regulators only set conditions that are realistic, possible to comply with and readily measureable and enforceable. For outcome-based conditions, this includes consideration of whether the desired outcome is within the proponent's control, and how other factors potentially contribute to the outcome.

Mine rehabilitation conditions

The enforceability of mine site rehabilitation-related conditions was identified by respondents as a particular area of concern:

The law re: open cut mining requires rehab and containment of polluted water; and clean up at taxpayer expense in the future is neither intended by the law, and not good for productivity. ... There is an estimated \$10 billion owing by mine owners for rehab not yet completed. Why has there not been rehab? (Jim Leggate, sub. DR61, p. 3)

The East End Mine Action Group noted:

... there has been no independent audit of adverse environmental impacts of mines in Australia ... what areas are rehabilitated? what areas are not rehabilitated? what is the incidence of abandoned legacy mines? will these be funded to be rehabilitated? (sub. DR68, p. 2)

Governments have generally used security (or bond) payments to ensure that proponents comply with relevant rehabilitation conditions, and to protect the government (and community) from having to fund rehabilitation in the case of

non-compliance or insolvency. However, a number of disadvantages with these arrangements have been identified:

- Security payment systems tie up significant amounts of capital unnecessarily, imposing efficiency costs on proponents and the community (as funds are quarantined for the duration of the project rather than producing income).
- Security money can only be used to rehabilitate the particular mine for which the security is held. This leaves the problem of abandoned legacy mines⁶ unaddressed.
- There are no discounts or incentives offered for (past or future) good performance or compliance.

To address some of these issues, the Western Australian Government has replaced the security payment system with a Mining Rehabilitation Fund (MRF) scheme. From 1 July 2014, mining operators will be required to pay a levy into a pooled government-administered fund. These funds will be used to meet rehabilitation costs in the event a miner does not comply with rehabilitation obligations. The size of the MRF levy for any particular mine is calculated by reference to several factors, including the number of hectares disturbed and the type of disturbance.

Governments must ensure that efficient and effective measures are in place to guard against the risk that a mine operator might default on their obligations, and to protect the community from the cost of rehabilitating mine sites (including abandoned legacy mines). Experience with operation of the new MRF system in Western Australia is expected to offer valuable insights for other jurisdictions.

Better coordination of condition-setting processes

It is commonplace for multiple regulators to have responsibility for imposing conditions on major project implementation. In this circumstance, the risk (and cost) of duplicative, overlapping or inconsistent approval conditions is material.

The Australian Petroleum Production and Exploration Association (APPEA) referred to a 2009 survey conducted by the Australian National University that found:

... 81 per cent of respondents whose actions were subject to conditions under the EPBC Act, as well as state and territory planning and environment permits, reported some or substantial overlap in the conditions. (sub. 17, p. 8)

⁶ Mines that impose some environmental or safety burden (legacy) on the community as a consequence of abandonment and/or inadequate rehabilitation by the proponent.

If adopted, the reforms proposed in this report are expected to substantially reduce the incidence of redundant and contradictory conditions. In particular, the Commission is recommending:

- streamlining of environmental assessment and approval processes (between and within levels of government) to reduce the number of agencies with responsibility for condition setting (chapters 6 and 7)
- explicit provisions be included in bilateral assessment agreements, and intrajurisdiction memorandum of understanding agreements, regarding cooperation and collaboration between regulators on conditions (chapter 6)
- establishment of a major projects coordination office (or similar) — where the benefits outweigh the costs — to coordinate regulatory processes and facilitate better communication and information sharing between regulators on proposed conditions (chapter 6).

Notwithstanding this, ‘leading practice’ condition-setting processes should — as a matter of course — include collaboration with relevant regulatory agencies to identify potential overlaps and inconsistencies ahead of approvals being granted.

RECOMMENDATION 8.1

Governments should ensure that regulatory agencies only set conditions that:

- *are directed at the impacts of the development to be consented*
- *are consistent with relevant regulatory objectives and broader environmental and natural resources management policies*
- *are outcome-based wherever possible*
- *deliver outcomes that are not assured by other legislation*
- *are cognisant of, and do not duplicate, the conditions imposed by other regulatory agencies*
- *are public, and identify the type of impact that the condition is seeking to address*
- *are enforceable, precise and reasonable in all other respects.*

8.2 Environmental offsets

The economics of environmental offsets

The offsets concept is well established in Australia and has proved to be an increasingly utilised policy instrument. The primary appeal of offsets is their potential to meet environmental and economic development objectives in tandem.

Specifically, offset tools can provide alternative beneficial environmental outcomes in situations where social and economic growth is sought at some detriment to the environment (EPA (WA) 2006). Permissible offsets might include setting aside an area of land for conservation, restoring degraded habitat or protecting areas where there is imminent or projected loss of biodiversity.

For example, suppose a proponent proposes to build a coal mine that could cause environmental damage, but it is also expected to deliver significant economic and social benefits. If prevailing regulations prohibit such a reduction in environmental quality, the mine would not be allowed to go ahead and the foregone economic and social benefits would represent the ‘opportunity cost’ of maintaining environmental quality.

In contrast, if the proponent were able to undertake (or purchase from another) a separate action (‘offset’) that increases the quality of the environment by a sufficiently large amount (so as to ensure that relevant regulatory objectives are met), the development would be able to proceed. In this way, environmental offsets can allow economic and social benefits to be realised without compromising the achievement of relevant environmental objectives.

Historically, the offsets instrument has been applied in an ad hoc and relatively unsophisticated way. For example, a proponent seeking to clear conservation estate land for development may have been required to add another comparable area of land into the conservation estate.

Over time, offsets have been used more extensively and applied to a broader range of environmental (including air pollution, habitat and biodiversity, wetlands management, native vegetation and marine environments) and other (for example, heritage) policy domains. In turn, offsets have played a larger role in major project assessment and approval processes.

Moreover, to support these new applications — and to address some of the inherent challenges associated with offset design and implementation (box 8.2) — more formalised and complex offset frameworks and methodologies have emerged.

Box 8.2 Common challenges with offsets

The design and implementation of environmental offsets poses a number of challenges.

- *Identifying net loss*: identifying the net environmental impacts of a proposed development may not be straightforward. Regulators must make judgments about how environmental quality should be measured and undertake assessments of the expected environmental losses associated with a proposed development, as well as any environmental gains.
- *Fungibility*: the use of offsets presumes that the lost environmental values are exchangeable, in whole or in part, with other environmental or non-environmental assets. Because environmental values are heterogeneous, an offset cannot perfectly replicate the ecosystem adversely affected by the development. Policy makers and regulators must decide how much dissimilarity between the primary and the offsetting environment will be tolerated.
- *Additionality*: in order to be meaningful, an offset must improve, restore or secure environmental assets over and above the status quo (that is, in the absence of the offset). An offset would not meet this requirement if, for example, the activity is required by law or regulation, or if the activity would have been undertaken by the proponent or another party anyway. Uncertainty about future activities can make it difficult to determine whether an offset is ‘additional’ to the status quo.
- *Accounting for risk*: due to information constraints, the environmental outcomes of developments and offsetting activities are accompanied by a residual level of risk. This includes the risk of impermanence, whereby offsets are reversed as a result of future activity or natural disasters. Offsets and policies may need to be designed to reduce and account for these risks, which may make offsets more costly for proponents.

Sources: McKenney (2005); Middle and Middle (2010).

How do offset policies bear on major projects?

Offset requirements — in the context of major projects — generally come about in one of two ways.

First, offsets may be required if applicable laws and regulations stipulate that adverse environmental impacts must be ‘offset’ or ‘counterbalanced’ in some way. For example, to obtain consent to clear native vegetation under the New South Wales *Native Vegetation Act 2003* (and associated regulations), an applicant may be required to undertake ‘natural resource management action or work’ (an offset) to ensure that the proposed clearing activity ‘improves or maintains environmental outcomes’.

Second, offset measures may be included in the set of conditions attached to other approvals ('offset conditions') — that is, the legal basis for imposing offsets is the same as for conditions more generally. In this instance, decisions on offset conditions are typically informed by associated policy guidance.

Offset policies vary significantly across and within jurisdictions, although there are some common features (table 8.2). Most notably, offset policies are usually characterised by an objective that there is 'no net loss to the environment' (or some aspect of the environment), once offset measures are taken into account. To achieve this, liable parties are required to deliver environmental gains (offset measures) 'equivalent to' the residual environmental losses associated with a proposed development, thereby leaving the environment unchanged or better off.

In practice, the *scope* of the no net loss objective directly impacts on the operation of offset regimes, and some objectives are defined more narrowly than others. For example, the Australian Government's Offsets Policy aims to 'deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action' (DSEWPAC (Cwlth) 2012g, p. 6).

By contrast, native vegetation clearing regulations in Victoria are governed by an objective that there is 'no net loss in the contribution made by native vegetation to Victoria's biodiversity'. Generally speaking, as the offset policy objective narrows, the scope of actions that qualify as valid offset measures also reduces.

A related issue is the flexibility of offset policies — that is, whether offset liabilities are to be met entirely through 'like' offset measures, or whether some amount of 'unlike' measures are permitted. While most policies allow for unlike offset measures (often on the proviso that some 'like for like or better' test is met), the amount and circumstances vary, as do approaches to determining 'likeness'. Regulators have adopted non-uniform nomenclature for describing different types of offsets, including direct and indirect offsets, in-kind and out-of-kind offsets and other compensatory actions.

The mitigation hierarchy is a further feature of many offset policies — this means that offsets must be a 'last resort', and only applied after appropriate efforts have been made to avoid adverse impacts, and then to minimise and mitigate the unavoidable impacts.

Table 8.2 Environmental offset policies

<i>Offset policy or scheme</i>	<i>Scope</i>	<i>Objective</i>
New South Wales		
<i>Principles for the Use of Biodiversity Offsets</i>	General	Net improvement in biodiversity over time
<i>Offset Principles for Major Projects</i>	State significant development and state significant infrastructure	Improvement or maintenance of biodiversity values is preferred, but flexibility is permitted for projects providing significant social or economic benefits
<i>Biodiversity Banking and Offsets Scheme</i>	General	Improve or maintain biodiversity values
Victoria		
<i>Biodiversity assessment guidelines</i>	General	No net loss in the contribution made by native vegetation to Victoria's biodiversity
Queensland		
<i>Queensland Government Environmental Offsets Policy</i>	General	Equivalent or better environmental outcome
<i>Biodiversity Offset Policy</i>	General	To increase the long-term viability of the State's biodiversity
<i>Policy for Vegetation Management Offsets</i>	General	Conserve certain vegetation, ensure clearing does not cause land degradation and prevent loss of biodiversity
<i>Marine Fish Habitat Offset Policy</i>	Developments that impact on fisheries resources or fish habitats	No net loss of marine fish habitat
<i>Koala Offset Policy</i>	Developments within the South East Queensland Koala Protection Area	Net gain in bushland koala habitat in South East Queensland by 2020
Western Australia		
<i>WA Government's Environmental Offsets Policy</i>	General	Protect and conserve environmental and biodiversity values for present and future generations
Tasmania		
<i>General Offset Principles Biodiversity Offset Policy</i>	General Development and tree removal in Kingsborough Council	Maintain or improve conservation outcomes No long-term net loss of biodiversity and environmental values
Commonwealth		
<i>EPBC Act Environmental Offsets Policy</i>	Actions that impact on one or more matters of national environmental significance	Deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action

Sources: DEH (NSW) (2013); DECC (NSW) (2008); DEHP (Qld) (2008); DPIPW (Tas) (n.d.); DSEWPAC (2012g); EPA (WA) (2011); DSE (Vic) (2012).

Are current offset arrangements leading practice?

The efficiency and effectiveness of offset arrangements has been a key theme of study submissions. The Commission has heard that offset processes are inconsistent, non-transparent and failing to deliver on their objectives. To address these shortcomings, participants have advocated for comprehensive reform of current offset practices.

In the Commission's view, there is significant potential to improve the design and application of offset policies in Australia. (That said, based on meetings between the Commission and regulatory officials in Canada, the United Kingdom and the United States, Australia's offset policies are regarded favourably by the international community.) However, the scope and complexity of offset-related issues are such that it is not feasible or appropriate to undertake this work within the context of this study; environmental offset policies have implications far beyond the major projects context.

Accordingly, the Commission is recommending that COAG commission a dedicated and independent review of offset policies and practices at the national level, to report by the end of 2014. Such a review should:

- assess and compare current offset regimes, including offset policy objectives and methodologies for identifying suitable offsets
- identify priority areas for reform, and a framework for implementing reform
- examine the case for greater national consistency and, where appropriate, linkages between jurisdictional offset schemes.

Most parties agreed that a public review of offset policy objectives would be helpful. The remainder of this section identifies issues arising in this study that would benefit from a fuller examination and as part of a national offsets review.

Is 'no net loss' being achieved?

Participants' views on the meaning, merit and practicality of the 'no net loss' objective were mixed.

Several parties considered that 'no net loss' is not being achieved because prescribed offset measures are often ineffective, or never properly implemented and enforced:

The use of 'offsets' to allow irreversible damage to be inflicted on threatened species and other biodiversity values is a growing scandal that has not received adequate attention. Our Alliance can provide detailed evidence of offset rorting, including

examples where coal mine proponents have gone back on offset arrangements to mine areas previously set aside as offsets (in Ravensworth, for example), where proponents have falsely mapped offset areas (in Maules Creek ...) and where proponents have applied for further stage approvals without delivering previously agreed offsets in the specified timetable, as has occurred with the Stage 3 expansion of New Hope Coal's Acland mine and the Stage 2 expansion of Newcastle Coal Infrastructure Group's coal export terminal. (Lock the Gate Alliance, sub. DR97, p. 5)

Similarly, ANEDO considered that the environmental benefits of offsetting actions are sometimes undermined by 'legislative loopholes':

The intent of 'in perpetuity' protection for offsets is not matched by legal protections. The normal policy intent is that offsets should endure as long as the impact that it is designed to offset (for example, an open cut mine). In practice, this may require protection of the offset site 'in perpetuity', as the original site is either very unlikely to be fully rehabilitated to accommodate the original ecosystems, or may be used for a different purpose (such as conversion to a landfill site). However, there are several ways in which biodiversity offsetting agreements can be overridden (for example, by mining tenement rights), or revoked (for example, by the minister who made the agreement). (sub. DR92, p. 31)

The effectiveness of offset measures in delivering on their objectives is a legitimate concern and ought to be explicitly considered as part of a national offsets review. That said, the Commission expects that many of the reforms proposed in this report regarding approval conditions (section 8.1) and monitoring and enforcement activities (chapter 10), would help ensure that outcomes sought via the conditioning process (including offsets) are actually achieved.

Is a 'no net loss' objective realistic?

Questions have also been raised about the feasibility of *ever* achieving a 'no net loss' objective. Some respondents considered that no quantity of offsite remedial activity can legitimately offset particular environmental impacts:

The UNESCO World Heritage Committee rejected the view that offsets were possible in relation to areas assessed as having world heritage values that were affected by a project development. Certainly, it is true that an objective of 'no net environmental impact' would be difficult to realistically achieve in the context of World Heritage areas such as the Great Barrier Reef Marine Park. (Queensland Resources Council, sub. DR79, p. 3)

The North Queensland Conservation Council argued:

... destroying area A while protecting area B results in a net loss of habitat. There is no getting away from the fact that the concept of offsets is flawed. (sub. DR64, p. 5)

While some environmental assets are unique, the Commission does not agree that ‘no net loss’ is an unattainable policy goal. That said, this outcome will not be achieved if offsets do not deliver legitimate and equivalent environmental gains (relative to what is being lost). It is in this context that the use of ‘indirect offset measures’ has attracted considerable criticism from stakeholders. (Box 8.3 provides some examples of indirect offsets under the EPBC Act.)

Box 8.3 Offset conditions under the EPBC Act

South of Embley Bauxite Mine and Port Development — Queensland

The South of Embley mine project was approved in May 2013. As a condition of approval (EPBC 2010/5642), the proponent must implement a Feral Pig Management Offset Strategy and the strategy must ‘provide information detailing Traditional Owner employment opportunities and mechanisms for reporting the number of local Indigenous person/s actually employed in the implementation of this strategy’. Similar employment requirements apply to the Inshore Dolphin Offset Strategy (DSEWPAC (Cwlth) 2013a).

Australian Pacific LNG Project — Queensland

Construction of a multi-train LNG plant at Curtis Island was granted approval in 2011 (EPBC 2009/4977). Indirect offset measures include that the proponent provide funding of \$200 000 per annum for the life of the project and \$100 000 per annum, for each operating LNG train, to support implementation of a strategy for field management and visitor awareness of the Great Barrier Reef World Heritage Area (DSEWPAC (Cwlth) 2011).

Southern Sydney Freight Line — New South Wales

A proposal by the Australian Rail Track Corporation to construct a 30 kilometre rail track in Sydney was granted approval under the EPBC Act in 2008 (EPBC 2005/2393). Offset conditions include provision of street furniture, public art, landscaping and tree planting, lighting and other measures to the value of \$2 million or more (DSEWPAC (Cwlth) 2008a).

Fiona Stanley Hospital — Western Australia

Approval to construct the Fiona Stanley Hospital in Murdoch was obtained in 2008 (EPBC 2008/3970). Conditions include:

- provide a minimum of \$275 000 toward the Research Project on Carnaby’s Black Cockatoo, and \$575 000 towards funding community and stakeholder environmental initiatives in the provision of care and rehabilitation for Carnaby’s Black Cockatoo
- establish areas of open space within the Fiona Stanley Hospital including urban plaza, internal gardens and roof gardens planted with at least 70 per cent native species (DSEWPAC (Cwlth) 2008b).

Participants have argued that most indirect measures do not exhibit the ‘basic characteristics’ required of an environmental offset, and that it is misleading — and damaging to the offsets brand — to describe these obligations as offsets, or to claim that no net loss is being achieved as a result of their delivery.

The North Queensland Conservation Council referred to a case where it considers that the indirect offset did *not* adequately compensate for the environmental damage incurred:

[The] Queensland Government’s Coordinator-General considered the provision of the Port of Townsville Limited offer of lands for boat ramp facilities ... in South Townsville an acceptable offset for loss of fisheries habitat as part of the approval process for development of the Townsville Marine Precinct Project. (sub. DR64, p. 5)

Jim Leggate also questioned whether indirect measures genuinely offset environmental losses:

Offsets to substitute for mine rehabilitation is a fudge. Toxic and hazardous wastes on disused mine sites, no matter what offsets are agreed, are required to be contained via proper rehab and decommissioning, and even then, if there is no sequential land use, mining has to be seen as permanent land use. This is why the ‘offset’ never completely offsets the rehab requirement. A lot of this is just trickery. (sub. DR61, p. 4)

Queensland Gas Company suggested that governments may be using indirect offset requirements as a way to secure goods and services that would otherwise be publicly funded:

Offsets should be directly relevant to the activity which is creating the environmental impact and should not be allowed to become a ‘de facto’ process of achieving broader community outcomes. (sub. DR79, p. 3)

Similarly, the Association of Mining and Exploration Companies (AMEC) queried the motivation of regulators in prescribing indirect offset requirements:

Whether by design or accident, regulatory agencies appear to be using offsets to bolster or supplement their revenue for core business activities in the face of declining government appropriations. AMEC is aware of offsets that have been conditioned where agencies present wish lists of conservation/environmental management or research programs from which proponents choose one loosely based on their environmental impact. (sub. DR70, p. 15)

The use of indirect offset measures is attractive as it provides for a more flexible approach to meeting offset liabilities. However, there is an inherent tension between broadening the scope of allowable measures and achieving a policy objective of ‘no net loss’ — particularly where this objective is relatively narrow. This issue should be explicitly considered as part of a national offsets review.

Are regulatory objectives internally consistent?

A further area of concern relates to the consistency (or lack thereof) between an objective of ‘no net loss’ and higher-order regulatory objectives governing development decisions and environment protection.

As discussed in chapter 4, the legislation underpinning major project DAA processes often identifies sustainable development or ecologically sustainable development (ESD) as a key objective. A common definition for ESD is ‘using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased’ (Australian Government 1992b). In turn, decision-making processes under an ESD framework should ‘effectively integrate both short- and long-term economic, environmental, social and equity considerations’ (Australian Government 1992b).

However, pursuing an objective of ‘no net loss’ through the conditioning process (assuming an offset policy applies) implies that *no* amount of environmental loss is acceptable for any individual major project. That is, the approval decision is subject to a binding constraint that the development has a ‘net zero’ (or positive) environmental impact. This has important implications.

First, pursuing this net zero outcome may come at a significant cost, including the cost of foregone consumption of other goods and services.

Second, embedding this requirement in the major project approval decision-making process prioritises (or gives more weight to) the impacts of the project on environmental matters *over all other impacts* (including economic and social impacts that might be highly valued by society (box 8.4)). In some cases, an even narrower set of outcomes may be prioritised; for example, if the ‘no net loss’ objective is defined with reference to particular aspects of the environment.

In the Commission’s view, it is not clear that this is consistent with the principles of ESD, and by consequence, the objectives of much of the legislation governing major project approval decisions. It also appears to be an impractical way to regulate development activity.

This is not to say that ESD-based approval frameworks preclude (or even discourage) decisions that involve leaving the environment (or some element of the environment) unchanged or better off. Such decisions may be entirely appropriate, particularly where the economic and social costs of legitimate offsetting activities are low, and the benefits significant. In other cases, however, the economic and

social costs of environmental offsetting measures may lead decision makers to approve a major project despite some anticipated ‘net loss’ in environmental values.

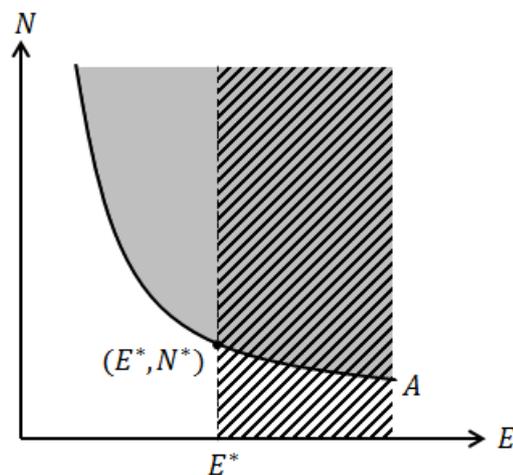
The New South Wales Government’s offsets policy appears to be *more* consistent with an ESD-based decision-making process than other strict ‘no net loss’ schemes:

Offsets can be discounted where significant social and economic benefits accrue to NSW as a consequence of the proposal. While an outcome in which biodiversity values are improved or maintained is preferred, it is acknowledged that in some circumstances flexibility may be required, especially in the context of a project providing significant social or economic benefits to NSW. (OEH (NSW) 2013, p. 1)

Box 8.4 The implications of complying with no net loss

The figure below maps the amount of environmental assets (E) against the amount of non-environmental assets (N). The point (E^*, N^*) represents the existing level of environmental and non-environmental assets, and the curve A traces out combinations of E and N that are *equally as valuable* to society as the current stock of assets, (E^*, N^*) — that is, social welfare is constant at all points on A . Curve A is downward-sloping by assumption to capture the fact that both environmental and non-environmental assets are valuable to society.

The combinations of E and N *above* curve A (denoted by the grey-shaded area), yield higher social welfare than (E^*, N^*) , while all points below curve A are strictly inferior.



Under a ‘no net loss’ framework, the only permissible outcomes are those that lie to the right of E^* (as indicated by the hatched area in the diagram). This means:

- certain welfare-enhancing outcomes are prohibited (the grey, unhatched area)
- outcomes that *reduce* social welfare might be acceptable so long as the stock of environmental assets increases (the hatched area below curve A).

Christensen, Burge and Lloyd examined the role of biodiversity offsets in the resource consent process in New Zealand and found that sustainable development does not necessarily imply ‘no net loss’:

It is important to recognise that biodiversity offsets and environmental compensation are not ends in themselves. ‘No net loss of biodiversity’ or ‘net biodiversity gain’ may be one outcome of a resource consent process, but it is not the only outcome possible. That is because the overall objective must still remain the sustainable management of natural and physical resources as defined by s 5 of the Act — whether or not that involves the use of biodiversity offsets or environmental compensation. (2010, p. 27)

The inconsistency between ‘no net loss’ and sustainable development has been explicitly acknowledged in recent New Zealand approval decisions, including the Transmission Gully road project approval:

... while we recognise the desirability of achieving a situation of no net loss of biodiversity from a project, we do not believe that it is a requirement of RMA [the *Resources Management Act 1991*] that no net loss be achieved in any given case. The principle of sustainable management requires a broad consideration of a range of sometimes competing factors. A consent authority is entitled to conclude that consent ought to be granted to the proposal notwithstanding that all adverse effects of the proposal have not been avoided, remedied or mitigated. In other words there may be a net loss of some values or aspects of the environment. The significance of that loss and its weighting against the benefits of any given proposal is a matter to be determined by a consent authority applying s5(2) RMA. (Board of Inquiry into the Transmission Gully Proposal 2012, p. 113)

Participant views on this issue have been mixed — some stakeholders agreed that a no net loss requirement for every project may not align with ESD, while others considered that the two objectives are consistent:

ANEDO strongly disagrees ... that giving fundamental consideration to environmental protection and improvement – including in the context of offsets – is inconsistent with ‘ecologically sustainable development’ (ESD) or its principles ... rejecting an ‘improve or maintain’ or ‘net environmental benefit’ standard, implies that our policymakers should prescribe (and society and communities should accept) a gradual but definite deterioration of environmental qualities over time. (ANEDO, sub. DR92, pp. 27–8)

The Nature Conservation Society of South Australia noted:

The underlying principles of ‘no net loss’ and ‘maintain or improve’ are critical to ensure that the environment is given due consideration in relation to the impact of major project developments. (sub. DR95, p. 6)

Economists at Large and The Australian Institute considered that, despite having ‘reservations about many aspects of offset systems’, a no net loss approach can be economically efficient:

The use of offsets to internalise environmental damage does not give greater weight to environmental impacts. If the project is economically efficient, it should be able to pay for all costs and damages, either through compensation or internalisation. (sub. DR83, p. 9)

The Commission does not disagree with the premise that economic efficiency is enhanced where proponents face the total social cost of development decisions (that is, private and external costs). One way to achieve this is to impose a tax (often referred to as a ‘pigouvian tax’) on activities that generate negative externalities, such as environmental pollution. Appropriately set, a pigouvian tax on the polluting activity ensures producers face the total social cost of their production decisions, and the socially optimal amount of development activity (and environmental pollution) is achieved.

In some applications, environmental offset policies impose a liability on proponents that is broadly equivalent to a pigouvian tax. Macintosh and Burnett considered:

A practice has developed amongst federal and state regulators of relying on cash and other indirect offsets. By definition, these are not offsets. Offsets involve the provision of an environmental benefit that offsets, or replaces, what has been lost. There must be equivalence between the harm and benefit, hence the notion of ‘fungibility’. Cash and indirect offsets are a form of hypothecated Pigouvian tax, involving the imposition of a price on an environmentally harmful activity and the dedication of the revenue to specific expenditures, typically associated with the relevant harm. (2013, p. 2)

If offset regulations impose a monetary penalty on proponents that is equal to the external (damage) cost of development activity, this would be:

- equivalent to a pigouvian tax
- economically efficient (or ‘welfare maximising’).

However, under a ‘no net loss’ approach, the offset liability facing proponents is usually determined by the nature, amount and location of expected environmental damage (at least for direct offsets). For example, if a project is expected to damage threatened species habitat, the proponent may be required to provide comparable areas of habitat in some contiguous region. The compliance cost associated with the offset policy is therefore determined by the cost of delivering ‘equivalent environmental gains’, not by the external cost of the development activity on the community. It is unlikely, therefore, that current offset policies and practices efficiently internalise the external costs associated with development activity.

The Commission is recommending that consistency between offset policy objectives and relevant, higher-order legislative objectives be explicitly considered as part of a national offsets review. Where these objectives are not aligned, alternative offset policy objectives should be identified.

Further examination of the various ‘quasi-objectives’ common to offset policies is also warranted, including the requirement that offset measures *only be considered after avoidance and mitigation measures* (the ‘mitigation hierarchy’). At first glance, this practice risks imposing high efficiency costs if it prevents ‘least cost’ compliance with environmental regulations, and means forgoing higher-value environmental outcomes (from a landscape or ecosystem level). The Victorian Competition and Efficiency Commission (VCEC) reached a similar conclusion:

... [the mitigation hierarchy] implies that on site avoidance, and reduce and reuse options must be considered before offsets can be applied. This approach, however, appears inconsistent with the objective of minimising the cost of achieving environmental targets, as lower cost options may be available off-site. (2008, p. 327)

The New Zealand Environment Court found that, for projects seeking consent under the *Resources Management Act 1991* (the key objective of which is sustainable management), there is no requirement for the mitigation hierarchy to be followed:

In *Winstone Aggregates Ltd v Auckland Regional Council* EC Auckland A49/2002, 26 February 2002 ... the Court stated that it was a matter of judgment as to whether in a particular case the adverse effects are such that the cost of avoidance should be totally internalised. The Court stated that there were many cases where mitigation measures to reduce adverse effects were all that was required, particularly in the case of noise and dust mitigation. The Court went on to say that ... whether emphasis is given to avoidance, remedying or mitigation will depend on the facts of a particular case and the application of section 5 to those facts. A judgment is required to be made which ‘allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome’. (Christensen, Burge and Lloyd 2010, p. 29)

Are offset-setting processes robust and transparent?

The predictability, rigour and transparency of offset-setting processes has been discussed at length by participants. AMEC noted:

The cash offset framework and monetary multipliers have had no industry consultation, have not been substantiated by the Environmental Protection Authority, nor has there been any methodology released on how ‘good to excellent’ is determined. (sub. 42, p. 13)

Xstrata Coal expressed similar concerns:

Biodiversity offsetting requirements are unnecessarily excessive. In our experience agencies often rigidly apply a set ratio rather than assessing the need for offsets on a case by case basis ... [and] there is a lack of scientific rigour in determining ratio offsets and this results in uncertainty and unpredictability. (sub. 50, pp. 39–40)

For offset mechanisms to work effectively — and to engender public support — the robustness and transparency of underlying processes is critical (irrespective of the particular objective being sought).

First, regulators must adopt scientifically rigorous, consistent and predictable methodologies to quantitatively measure and *value* the expected environmental losses caused by development (and equally, to measure and value the expected environmental gains from available offset measures).

In particular, the measurement and valuation process must recognise and address the ‘additionality’ problem (box 8.2) — that is, do gains from proposed offset measures present a true addition to what would have occurred otherwise? This requires establishing a baseline or counterfactual scenario to estimate what would have happened without the offset. For example, conserving and maintaining an area of biodiversity should only be regarded as an offset if that area would otherwise have been damaged or cleared.

Second, decision makers must follow a transparent and evidence-based process for determining whether offsets are appropriate (given prevailing regulatory objectives), and the type and quantity of offset measures required (the offset ‘liability’).

The process of valuing environmental gains and losses is an essential element of offset policy frameworks, but it is also inherently contentious and subjective. Commendable progress has been made by a number of jurisdictions (box 8.5). However, it is imperative that work in this area continues. The Commission expects that a national offsets review would encourage and facilitate this, as would better environmental data, and greater adoption of strategic approaches (chapter 11).

Box 8.5 Measuring and valuing environmental losses and gains**Victorian Government — NaturePrint**

In Victoria, if the removal of native vegetation is permitted, an offset is required as a condition of permit approval. The NaturePrint framework is used to make decisions about biodiversity offset requirements. This tool provides quantitative information about the strategic value of biodiversity assets across Victoria, by ranking each pixel (75 X 75 metre cell) between 100 and 0. Strategic Natural Values maps have also been developed to highlight areas that contribute most to biodiversity conservation.

Australian Government — Offsets calculator

The Australian Government's 'Offsets Assessment Guide' (or calculator) encourages greater consistency and predictability by using a balance sheet approach to the quantification of impacts and offsets (where the impacted matter is a threatened species or ecological community). While broadly supportive of the intent and direction of these reforms, several stakeholders have queried the methodology underpinning the offsets calculator and suggested that greater transparency is required to verify the robustness of this tool.

Sources: DSE (Vic) (2012); DSEWPAC (2012g).

The case for greater uniformity between offset frameworks within and between jurisdictions should also be examined. A number of stakeholders considered that prevailing inconsistencies may be generating unnecessary compliance costs:

Within a project a single environmental impact can require two separate, sometimes conflicting, actions as an offset. For example, Federal procedures could require a direct offset of offsite habitat protection, while the state might mandate scientific research in response to the same impact, effectively double counting the impact and its costs to the business. (Chamber of Commerce and Industry of Western Australia, sub. 44, p. 4)

Xstrata Coal noted:

The Commonwealth approval required the Ulan coal mining project to create biodiversity offset areas that are different to the biodiversity offset areas required by the NSW approval, which has made ongoing management of those biodiversity offset areas more difficult. (sub. 50, p. 9)

The recently published Great Barrier Reef Strategic Assessment draft report included an evaluation of offset practices in Queensland. These arrangements were found to be only 'partially effective', in part because five separate offset policies apply at the state level:

... [the] Queensland Government's existing specific issue offset policies have been developed separately over a number of years and are not well integrated ... and may not deliver strategic outcomes in all instances. (DSDIP (Qld) 2013b, p. 264)

Finally, the reforms proposed in this report are expected to ensure that offset decisions (for major projects) are transparent and evidence-based. In particular, consistent with recommendation 8.1, decision makers should be required to:

- identify the adverse environmental impact (loss) being targeted
- explain how the offset is expected to counterbalance that impact, and how this contributes to the achievement of regulatory objectives.

What is the appropriate role for offset markets?

Historically, offsets have either been delivered by the proponent directly, or procured from third parties on an ‘as needs’ basis. As the demand for offsets has increased, however, more formalised markets have developed (box 8.6).

Offset markets can lower transaction costs by facilitating efficient exchanges between purchasers of offsets (developers) and offset providers (for example, land holders able to restore or protect environmental assets). In the absence of markets, these exchanges are often impeded by information problems and high transaction and coordination costs.

Offset markets present genuine opportunities for efficiency gains and there is a strong ‘in-principle’ argument for using these approaches to deliver cost-effective offset opportunities. A previous Commission study found:

Markets promote achievement of native vegetation and biodiversity conservation at least cost and promote innovative solutions over time as individuals have an incentive to identify cost-effective solutions. In this way, markets also deal with site-specific environmental problems and with variations in the benefits and costs of supplying conservation services across the country. In addition, as new information about supply and demand is continually revealed through prices, individuals can respond quickly to changing circumstances and to new understanding of native vegetation benefits or of the costs of supplying it. (2004, p. 196)

That said, designing and administering efficient offset markets can be challenging. The Victorian Government noted:

Issues identified with the offset market include high and volatile prices, and the inability to meet demand for certain offsets. ... offset prices are considerably higher than the cost of similar permanent environmental outcomes purchased through tender programs. Volatility in offset prices has also been observed in the market. For example, since 2006, BushBroker offset average prices for bioregions ranged from \$34 000 to \$370 000 per Habitat Hectare. (2012, p. 19)

Box 8.6 Market-based offset approaches

Victoria — BushBroker

The *BushBroker Scheme* provides a mechanism for sourcing, generating and allocating 'Native Vegetation Credits' (NVCs). A NVC is a gain in the quality and/or quantity of native vegetation that is subject to a secure and ongoing agreement. If a developer seeking to clear native vegetation is required to obtain an offset, NVCs purchased via the BushBroker program can be used to meet this requirement. The Victorian Government trialled an online Native Vegetation Exchange (NVX) in 2012 to facilitate the trading of NVCs by automating the offset matching process. The NVX is under evaluation to determine whether it should be used on an ongoing basis.

A national biobanking scheme?

Dr Allan Hawke examined the role of market-based mechanisms in delivering biodiversity outcomes as part of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*. Hawke found that biodiversity banking schemes have merit and that a systematic approach to biobanking could bring considerable benefits to biodiversity conservation in Australia. Hawke recommended:

- COAG develop a national biodiversity banking system and standards
- the Australian Government, in the interim, accredit State and Territory biobanking schemes, subject to their meeting acceptable standards
- the EPBC Act be amended to facilitate and promote the use of biobanking as part of project approvals and facilitate the operation of a national biobanking scheme.

Sources: Victorian Government (2012); Hawke (2009).

Similar problems have been experienced with the New South Wales BioBanking Scheme:

Some developers and assessors are concerned about the availability of biodiversity credits at a reasonable price ... A main cause is the reluctance of landowners to pay for the assessment and establishment of a biobank site without the certainty of a buyer for their credits. Landowners are tending to lodge expressions of interest only, which does not create a ready or guaranteed supply of credits in the market ... The other key issue is the range of ecosystem credit types Ecosystem credit types are determined by five criteria – vegetation type, vegetation formation, catchment region, surrounding vegetation cover and patch size. This complexity fragments the credit market and limits trading opportunities. (OEH (NSW) 2012, p. 4)

The VCEC found that offset market transactions can be complex and costly because nature is complex (meaning sophisticated trading rules and site assessments are required), markets are thin, there are package/synergy problems on both sides of the market and assets are lumpy (2009).

Offset ‘funds’ or fee in-lieu arrangements present a further way to support the cost-effective delivery of offset measures. Under this approach, developers are able to meet their offset obligations by making a payment into a dedicated fund that finances offsetting activities. The fund administrator (typically either a government agency or not-for-profit body) takes on the financial and legal responsibility for the delivery of offsets under this model.

The New South Wales Government has committed to replacing the biobanking scheme with a biodiversity offset fund, while the Australian Government recently announced the establishment of a Great Barrier Reef offsets trust (box 8.7).

Box 8.7 Offset funds

New South Wales biodiversity offset fund

In July 2013, the New South Wales Environment Minister announced that a new biodiversity offsets fund would be established to enable major project proponents to contribute money to the fund, instead of locating and purchasing offsets themselves.

The new fund will direct money to large-scale environmental improvement programs or to ecological stewardship payments made to farmers who elect to manage parts of their land to higher environmental standards. The objective of the fund is to create greater connectivity across the landscape, protect strategically important areas and reduce the amount of time lost in seeking suitable offset sites for large development and infrastructure projects, including mining.

Great Barrier Reef Trust

The Australian Government has established a Reef Trust to improve coastal habitat and water quality along the Great Barrier Reef. The fund will be jointly co-ordinated by the Queensland Government and the Australian Government, with advice provided by the Great Barrier Reef Marine Park Authority and other agencies. The trust will be funded through offset payments made by project proponents seeking approval under Commonwealth environment law. The Australian Government has made an initial funding commitment of \$40 million.

Sources: Parker (2013); Hunt (2013).

Relative to other approaches, offset funds can reduce transactions costs for proponents, deliver larger-scale offset measures, achieve more strategic and high-value offsets (for example, if the fund manager is more specialised and informed about environmental management than project developers) and reduce the risk of non-delivery (by requiring payment prior to development commencing). Macintosh and Burnett observed:

Offset programs often involve considerable transaction costs due to the complexity of devising and implementing offset methods, and in establishing and maintaining offset projects. Further, as offsets are ‘project driven’, they are unlikely to lead to an allocation of resources that maximises environmental returns. ... [an environmental impact charge] would allow for the pooling of conservation resources and facilitate their strategic application, thereby increasing the cost-effectiveness of conservation and recovery actions. (2013, pp. 1–2)

Notwithstanding this, good governance and institutional arrangements are important. For example, governments (as offset fund administrators and responsible approval authorities) might have a (real or perceived) incentive to allow unacceptable developments to proceed because of the cash flow implications (‘financial capture’). A third-party offsets fund manager might be desirable to guard against this risk (and the consequent undermining of scheme credibility). The Commission’s proposal for the establishment of separate environment assessment and enforcement agencies (chapter 6) would also bolster these arrangements and provide an entity to independently monitor the environmental compliance of the fund. Good regulatory design is also important to address the monopsony power risks inherent in a single offsets fund approach.

A number of study participants favoured offset funds over direct provision or offset markets:

One approach currently used allows proponents to contribute funding into a Government trust for offset projects rather than individually purchasing land (and potentially competing for the same parcel) and carrying out offset projects themselves. This model would simplify the process greatly and reduce compliance costs for proponents whilst still meeting regulatory objectives. (Xstrata Coal, sub. 50 p. 40)

That said, some respondents highlighted that offset funds might make it more difficult for developers to obtain ‘social licence’ — for example, if offsets are not connected to the damage caused by development, or are not visible to the local community.

Offset markets and offset funds are complex and contentious, and the efficiency benefits of such arrangements are contingent on a number of design and implementation issues. A comprehensive national offsets review is the appropriate forum to consider these tools in more detail.

Finally, notwithstanding concerns about current offset policy objectives and practices, it is important to emphasise that the merits of environmental offsets as a policy instrument are undisputed. It is the Commission’s strong preference that efficiently designed and administered offset policies continue to play a role in the major projects regulatory framework.

RECOMMENDATION 8.2

COAG should commission an independent and public national review of environmental offset policies and practices to report by the end of 2014. The review should:

- *survey the consistency of offset policy objectives against the principles of ecologically sustainable development*
- *critically assess the methodologies used for measuring and valuing offsets*
- *examine the role of market-based offset approaches, including offset funds*
- *consider the case for greater national consistency and linkages between offset regimes, including the potential for a single national scheme.*

9 Regulatory decisions: review and appeal rights

Key points

- Review mechanisms help ensure that development assessment and approval (DAA) decisions are made in a robust, transparent and accountable manner in accordance with regulatory objectives.
- An effective review process needs to be designed in the context of the entire DAA system and take into consideration the costs and benefits of review.
- Reviews can seek to determine whether a decision was lawful (judicial review), or to determine whether it was the best decision (merits review).
- Reviews are a potential source of uncertainty and additional costs for proponents. Other stakeholders, such as non-government organisations, regard the degree to which they can participate in, and have rights of review, as a measure of whether DAA processes are serving the public interest.
- Whether and what kind of review of DAA decisions are allowed needs to balance these competing views. The balance should depend on the context, particularly on who the decision maker is:
 - If the decision maker is a Minister, judicial review is appropriate.
 - In most other cases, limited merits review will be appropriate.
- Standing (who can seek judicial or merits review) should be granted to proponents, those who are directly affected or could potentially be directly affected by the decision, and those who have taken a substantive interest in the assessment process. In exceptional circumstances, where natural justice would otherwise be denied, leave should be able to be granted to persons who are not included in the above categories.

This chapter considers the provisions that exist for review of decisions throughout the major project development assessment and approval (DAA) process.

Review mechanisms can help to ensure that DAA decisions are correct and are made in a transparent and accountable manner and in accordance with regulatory objectives. In practice, the degree to which review mechanisms contribute to transparency and accountability of decision making without incurring unnecessary costs depends on:

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- what review rights apply to decisions made by a Minister, such as major project primary approval decisions
 - what review rights apply to decisions that are not made by a Minister, such as decisions made by government departments or independent bodies
 - procedural matters, including who has ‘standing’ for the purposes of bringing a judicial or merits review application; how vexatious review applications should be treated; and how costs associated with reviews are allocated
 - what other mechanisms exist for ensuring transparency and accountability, such as public participation during the assessment phase (chapter 5) and the publication of the justification for decisions (chapter 7).

9.1 Overview of review processes

Types of review

A number of parties could be affected by a DAA decision and may seek to challenge it. When a DAA decision is made, it is important to identify whether it is reviewable and if so:

- what is the scope of the review?
- who can seek review?

Jurisdictions’ practices vary as to what type of review, if any, is allowed for decisions about major projects, and whether ministerial decisions are reviewable.

What is the scope of the review?

There are two types of review: merits review and judicial review.

Merits review allows a re-examination of the decision (box 9.1). The merits review body generally exercises all the power and discretion of the original decision maker (‘stands in their shoes’) to determine what is the correct or preferable decision (Bates 2010).

Box 9.1 Challenging decisions through merits review

In two recent cases in the New South Wales Land and Environment Court, the decision maker's judgments about the precautionary principle and ecologically sustainable development were overturned on merits review.

In the first case, *Warkworth*, the approval for an extension of a mine was overturned because the judge found the social and environmental costs outweighed the economic and social benefits of the project. The judge criticised the modelling submitted to the development assessment and approval process, finding that:

- the offsets were not scientifically proven to be effective
- some of the social impacts on the community had been overlooked
- the input–output analysis overstated the employment gains of the project
- the non-market valuation study was flawed in its design
- the benefit–cost analysis failed to take into account issues of equity, distributive justice, and intergenerational equity (a component of ecologically sustainable development, which is an objective of the relevant planning legislation).

In the second case, *Boral*, the judge overturned the approval for the extension of a mine, because of the lack of data on the impacts on a nearby river, which:

- meant the impacts could not be appropriately dealt with by an environmental management plan
- meant the adaptive management regime did not meet the required standard of imposing precise limits on the cumulative operations of the mine
- meant the precautionary principle had not been satisfied, because the proponent had not demonstrated the risk of environmental harm would be adequately mitigated.

In both cases, appeals have been heard but, at the time of writing, judgment has been reserved.

Sources: Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48 (15 April 2013); SCHCAG Pty Ltd v Minister for Planning and Infrastructure and Boral Cement Limited [2013] NSWLEC 1032 (27 February 2013).

The right to merits review does not exist at common law and must be specifically conferred by statute. This means the statute determines whether or not merits review exists at all and if so, whether it is limited in some way — for example, the merits review body might only be able to consider certain things, or might be required to remit the decision back to the original decision maker (box 9.2).

Box 9.2 Limited merits review of decision making in the electricity and gas regulatory frameworks

The COAG Standing Council on Energy and Resources recommended that a form of limited merits review be introduced for Australia's electricity and gas regulatory frameworks, where the review body must:

- only consider information that was available to the original decision maker
- acquire expert advice as needed and consult with relevant stakeholders
- remit more complex decisions back to the original decision maker.

To obtain review, an applicant must demonstrate that the decision maker made an error of fact, an incorrect exercise of discretion or was unreasonable in its original decision, and also make a prima facie case that addressing this would lead to a materially preferable outcome in the long-term interests of consumers.

Source: COAG Standing Council on Energy and Resources (2013).

By contrast, judicial review generally does not allow the conclusions of the original decision maker to be challenged — it only looks at the legality of the decision making process (Cane 2010). In other words:

... judicial review is limited in that it may only assess the lawfulness of a decision, not its merits. It is not for judges to question whether the decision was 'good, bad or indifferent', which is often what is sought in challenges to environmental decision making, nor can a judge substitute his or her opinion for that of an administrative decision maker. If the decision was within the power of the decision maker, then judicial review will not provide a remedy. (Cabarrus 2009, p. 114)

The right to seek judicial review exists at common law, but some jurisdictions have passed judicial review statutes. In general, statutory judicial review has codified the grounds for judicial review (box 9.3), simplified the procedures required to seek judicial review, created a uniform test for standing and allowed flexible application of judicial review remedies (DJAG (NSW) 2011).

Box 9.3 **Grounds for statutory judicial review**

The grounds for statutory judicial review listed in s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) are:

- a breach of the rules of natural justice occurred in connection with the making of the decision
- procedures that were required by law to be observed in connection with the making of the decision were not observed. For example, a failure to properly consult might breach procedural fairness
- the person who purported to make the decision did not have jurisdiction to make the decision
- the decision was not authorised by the enactment in pursuance of which it was purported to be made
- the making of the decision was an improper exercise of the power conferred by the enactment (which includes *Wednesbury* unreasonableness — see box 9.4, later)
- the decision involved an error of law
- the decision was induced or affected by fraud
- there was no evidence or other material to justify the making of the decision
- the decision was otherwise contrary to law.

Sources: *Administrative Decisions (Judicial Review) Act 1977* (Cwlth), s. 5; Preston (2008).

Further, judicial review by the High Court is guaranteed by the Commonwealth Constitution for Commonwealth matters and cannot be removed by statute, but the States and Territories can remove judicial review in relation to decisions made under legislation, at least in part (for non-jurisdictional error).⁷

Who can challenge the DAA decision?

Not everyone is allowed to bring a merits or judicial review application before the tribunal or court. The people who can are specified by law (this is referred to as having ‘standing’). Standing can be expanded or narrowed by legislation, and hence it varies depending on the jurisdiction and the type of review application being brought.

In general, to have standing, a person is required to have a ‘special interest’ in the impugned decision greater than the concern of the general public (greater than a mere intellectual or emotional concern), but this can be modified by legislation. The

⁷ Jurisdictional error refers to the decision maker exceeding the authority or powers given by the relevant statute — that is, the decision maker did not have the authority to make the decision that was made (Robinson 2012).

different legislation across jurisdictions affects which ‘third parties’ (that is, a person other than a proponent) are able to bring a review application. A third party could be:

- an ‘aggrieved person’ or someone who has a ‘special interest’
- an environmental group with conservation objectives, or
- an objector (that is, a person who made a properly-made submission to an assessment process).

What decisions can be reviewed?

There are a number of different stages throughout the DAA process — for example, State and Territory Government major project DAA processes generally involve decisions:

- to declare the project a major project or to ‘call-in’ the project
- to decide whether or not an environmental impact assessment (EIA) should be conducted and if so, what level of assessment is required
- to set the scope of the terms of reference of the EIA
- to make a recommendation to the decision maker after the EIA is completed
- to refuse the application or approve it (with or without conditions).

Australian jurisdictions vary on which decisions preceding the approval decision (‘preliminary decisions’) are reviewable. In general, only decisions that are final and substantive will be subject to review (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; ARC (1999)).

- A recommendation made by an assessment agency to a decision maker will generally not be reviewable as it is not a final decision. (One notable exception is the ability to seek merits review of the recommendations of the Western Australian Environmental Protection Authority.)
- A decision that is procedural and does not have any substantive effect will generally not be reviewable. For example, the Australian Government (2011) rejected the Hawke Review’s (2009) recommendation that the assessment approach and controlled action decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) be merits reviewable on the basis that these decisions are preliminary ‘filtering’ decisions, and allowing merits review would slow down the process unnecessarily. (Internal reconsideration of the controlled action decision can still be sought.)

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- Not all preliminary decisions will fall into the above categories, particularly where the judicial review legislation allows for review of both ‘decisions’ and ‘conduct’. To remove doubt, legislation might explicitly exclude review of decisions other than the approval decision (for example, the Victorian *Major Transport Projects Facilitation Act 2009*).

The approval decision is the most important in the DAA process. Such decisions are usually reviewable, although review rights vary between jurisdictions (table 9.1).

Costs and benefits of review

An effective review process needs to be designed in the context of the entire DAA system and consider the costs and benefits of review. In practice this is difficult and, not surprisingly, there are divergent views on how well existing review processes in Australian jurisdictions promote transparency and accountability of major project decision making.

Potential for costs and delay

Submissions to this study and past reviews of DAA processes have noted that review processes can delay and add to the implementation cost of projects and that very few challenges result in projects being refused (for example, King & Wood Mallesons, sub. 39; NSW Minerals Council, sub. 23; Queensland Resources Council, sub. 19).

The NSW Minerals Council (2013a, p. 8) has argued that ‘appeals cause very long delays, frequently of more than 12 months’. Examples from study participants of where court challenges have extended the time for an approval being granted mainly focus on coal mine cases in New South Wales and Queensland (NSW Minerals Council sub. DR93, 2013a; Xstrata Coal sub. 50) (figure 9.1). Little or no evidence from other jurisdictions was provided.

Table 9.1 Review rights for key major project primary approval decisions

<i>Jurisdiction</i>	<i>Decision maker</i>	<i>Proponent review rights</i>	<i>Third party review rights</i>	<i>Standing for third parties</i>
New South Wales				
State significant development	Planning Assessment Commission or Department	Merits and judicial review (common law) ^b	Merits and judicial review (common law)	Objectors (merits) ^c Any person (judicial)
State significant infrastructure	Minister, Planning Assessment Commission or Department	Judicial review (common law)	Judicial review (common law)	Any person (judicial)
Critical state significant infrastructure	Minister for Planning	Judicial review (common law)	Judicial review (common law)	Common law judicial review ^d
Victoria				
Planning permits	Responsible authority	Merits and judicial review	Merits and judicial review	Objectors, but affected persons may seek leave (merits) Person affected (judicial)
Ministerial call-in	Minister for Planning	Judicial review	Judicial review	Person affected (judicial)
Major transport projects	Minister for Planning	Judicial review ^e	Judicial review ^e	Person affected (judicial)
Queensland				
Coordinated projects	Department for Environment and Heritage Protection ^f	Merits and judicial review (but excluded for some parts of the decision) ^f	Merits and judicial review (but excluded for some parts of the decision) ^f	Objectors (merits) Person aggrieved (judicial, but excluded for some parts of the decision) ^f
Priority Development	Minister for Economic Development	Merits review (conditions only), judicial review	Judicial review	Person aggrieved
South Australia				
Major developments or projects	Governor, or delegate	Excluded by statute ^g	Excluded by statute ^g	.. ^o
Crown Development	Minister	Judicial review (common law) ⁱ	Judicial review (common law) ^h	Common law standing ^b

(Continued next page)

Table 9.1 (continued)

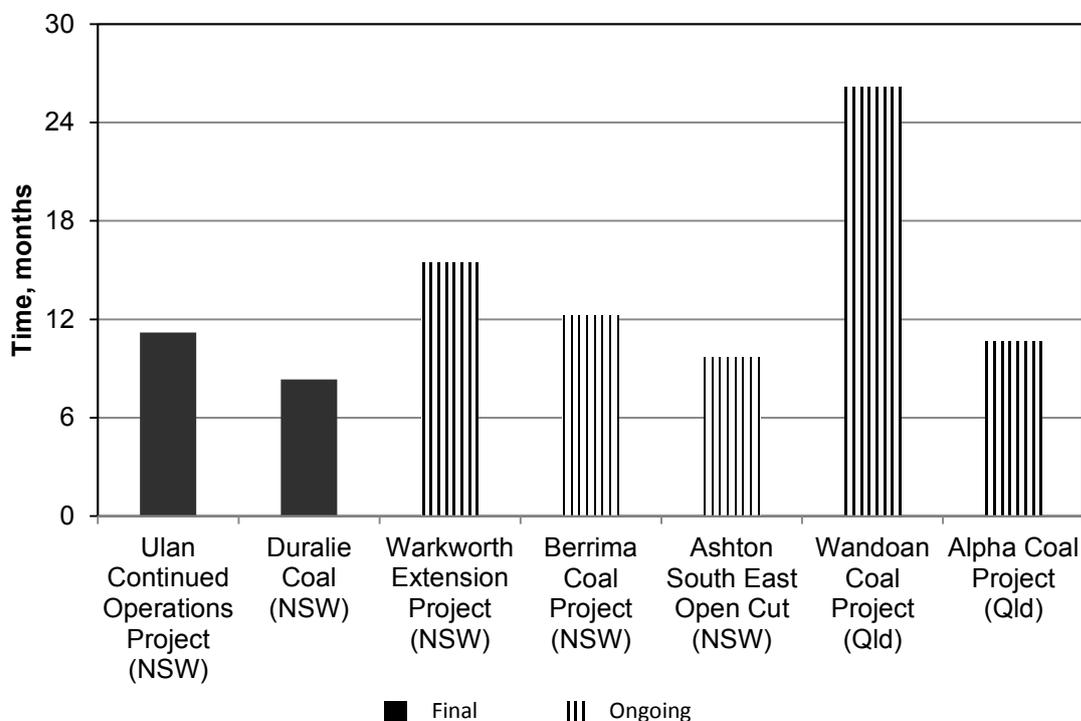
<i>Jurisdiction</i>	<i>Decision maker</i>	<i>Proponent review rights</i>	<i>Third party review rights</i>	<i>Standing for third parties</i>
Western Australia				
Development assessment panel decisions	Development Assessment Panel	Merits ⁱ and judicial review (common law)	Judicial review (common law) ^j	Common law standing ^b
Tasmania				
Projects of state significance	Minister and both Houses of Parliament	Excluded by statute ^k	Excluded by statute ^k	.. ^o
Projects of regional significance	Development assessment panels	Judicial review	Judicial review	Person aggrieved
Major infrastructure projects	Combined planning authority	Merits and judicial review	Merits and judicial review	Objectors (merits) Person aggrieved (judicial)
Northern Territory				
Ordinary development	Development Consent Authority	Merits and judicial review (common law)	Judicial review (common law) ^l	Common law standing ^b
Significant developments	Minister for Planning	Judicial review (common law)	Judicial review (common law)	Common law standing ^b
ACT				
Ministerial call-in	Minister for Planning	Judicial review	Judicial review	Person aggrieved
Ordinary development	Environment and Sustainable Development Directorate	Merits ^m and judicial review	Merits ^m and judicial review	Objector plus material detriment ⁿ
Commonwealth				
EPBC Act	Minister for the Environment	Judicial review	Judicial review	Person aggrieved (engaged in conservation activities) ^a

^a Persons who could be directly affected or persons or organisations who have been engaged in conservation activities in the preceding two years. ^b Standing for common law judicial review varies between remedies sought. ^c Only for state significant development that would have been designated development had it not been declared. ^d Only mandatory requirement is to make EIS public. ^e Only approval decisions reviewable, restrictions on orders that can be sought. ^f Decisions and conduct of the Coordinator-General are excluded from review. ^g Section 48E likely to exclude common law judicial review. ^h Section 49(17) may not exclude common law judicial review: *Hockey v Yelland* (1984). ⁱ Minister can call-in the review. ^j If third party has a sufficient interest, may submit to an existing review process, or seek leave to intervene in the public interest. ^k Judicial review excluded. ^l Third party appeals only permitted for development near residential zones. ^m Internal reconsideration also allowed for certain approvals. ⁿ Person who made a representation and may suffer material detriment. ^o .. not applicable.

Source: Based on appendix C.

Figure 9.1 Time between approval being granted and court challenge being determined^a

Selected projects, New South Wales and Queensland^b



^a Timeframes are calculated as the time elapsed between the approval decision being granted and the most recent appeal being determined (where that has occurred). For proceedings which are ongoing or the judgment has not been handed down (Warkworth, Berrima, Ashton, Wandoan and Alpha), the end date is taken to be 13 November 2013. Time indicated on graph does not necessarily reflect continuous court action — it may reflect multiple actions. ^b Indicative data set. Wandoan Coal project includes objections on mining lease (December 2011 to March 2012), compensation claim (July 2012 to June 2013), and judicial review application (commenced November 2012 and is ongoing).

Sources: Commission analysis of data provided by Xstrata Coal, sub. 50; EDO NSW (2013).

There are, as well, concerns that appeals may be used to undermine the DAA process and reduce confidence in the system. The NSW Minerals Council noted that third party merit appeals add delay, cost and risk to the development assessment process, and have rarely been successful against mining projects in New South Wales:

Merit appeal causes crippling delay and uncertainty for major projects. A proponent of a major mining project may have expended hundreds of millions of dollars on the acquisition of an exploration licence, its exploration program, a mine design, and environmental assessment, and then face the risk of being exposed to the cost, delay and uncertainty of third party merit appeal. (sub. DR93, p. 7)

However, other participants have emphasised that care is needed to avoid attributing ‘unnecessary delays’ to court challenges:

... the proponent of [Alpha Coal] has added years to the timeline for its development due to its failure to meet the basic standards very clearly laid out for its assessment ... to blame the Alpha mine ‘delay’ on the assessment process, or the community members that advocate against the clearing of 7000 hectares of habitat for a threatened bird species is, frankly, perverse. For the proponent to push the system ... to the point where an approval is issued without adequate threatened species surveys being undertaken, and a condition imposed to do them once the habitat in question is already condemned is ... symptomatic of the problems with the major projects assessment process. (Lock the Gate Alliance, sub. DR97, pp. 11–12)

Similarly:

The ... wording [of the Commission’s draft report] suggest that delays only impose costs on projects which are desirable. In fact they impose significant costs on communities and other stakeholders when the projects turn out to be undesirable. Of the seven projects in figure 9.1, three of them have at some stage in the DAA process, been found to be unwarranted, Warkworth and Berrima (hardly a ‘major’ project) by the Land and Environment Court, and Ashton SEOC by a Planning and Assessment Commission. Considerable costs have been incurred by these communities to ensure the rejection of potentially undesirable projects. (Economists at Large and The Australia Institute, sub. DR83, p. 6)

Further, the Australian Network of Environmental Defender’s Offices (ANEDO) suggests that, from what limited data are available, the majority of development appeals are brought by proponents (sub. DR92). Further, the number of cases brought, at least under the EPBC Act, appears to be low:

... there is little litigation initiated under the [EPBC] Act — either by third parties, proponents of actions, or permit applications. In approximately eight years since the Act commenced, there have been just eight applications to courts for injunctions, 21 applications for judicial review of decisions, and 12 applications for merits review of decisions. When it is considered that this is Australia’s main national environmental legislation ... this appears to be an extremely low level of litigation. (Senate Standing Committee on Environment, Communications and the Arts 2009, p. 82)

Accountability and participatory democracy

The benefits of major project DAA review processes have also been emphasised — for example, improved decision making, accountability, and exposure of poor decisions:

Citizens and businesses that are subject to the decisions of public authorities should have ready access to systems for challenging the exercise of that authority ... reviews can act as an accountability mechanism and can improve the quality of the regulator’s decision making and internal review processes. (OECD 2013b, p. 52)

Similarly:

It is important that development assessment and approval processes incorporate robust checks and balances to ensure that decisions are lawful, impartial and based on best practice planning principles; and that laws are properly enforced. There are well-documented benefits of having court-based review rights in planning systems. (Nature Conservation Council of NSW, sub. 22, p. 5)

Further:

Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision making is absent from the planning system. (ICAC (NSW) 2012, p. 22)

ANEDO argued that review rights ‘are a fundamental access to justice issue’, and:

... third party appeals often raise significant public interest matters, clarify what the law means in practice, and provides essential access to justice for communities, provides an important check on executive power, and in doing so, reduces the risk of corruption. ... these benefits accrue despite the fact that third party appeals rarely overturn major project approvals. ... merit appeals by local communities often result in better and clearer conditions, rather than a refusal. (sub. 14, p. 49)

Overall, while certain views contend that third party appeal rights create ‘uncertainty’, ANEDO is strongly of the view that such rights promote access to justice, expose poor procedures that may otherwise go undetected, and encourage better and more accountable decision making. (sub. DR92, p. 38)

Third party appeal rights can also foster participatory democracy, by allowing members of the public to influence the outcomes of issues that affect them. For example, Millner comments:

... an essential part of attaining social justice is enabling the members of the community who will be adversely affected by these [environmental] impacts to participate in, influence, and have rights of review in relation to the making of environmental laws, decisions about land use, and development and enforcement of environmental laws. (2011, p. 190)

The Department of Communities and Local Government in the United Kingdom argues that allowing proponent appeals results in better decision making:

The main impact of the reinstatement of appeal rights where local authorities fail to validate planning applications is considered to be behavioural. The threat of challenge, via a potential appeal against non-determination, is considered likely to result in a positive influence on the behaviour of local authorities. (2013c, p. 27)

In summary, while abuse of review processes, by both proponents and opponents of major developments arises on occasion, overall there is broadly no evidence that the

system is performing badly. Nonetheless, the Commission believes that there is scope to improve review procedures and access to review. Changes to review processes need to be considered in the context of the entire DAA system and take into account their costs and benefits.

9.2 What review rights should proponents and third parties have?

Designing effective review processes requires a balance to be struck between competing interests. Review can increase the accountability and integrity of the decision-making process and contribute to participatory democracy, but can also increase costs, delays, and uncertainty about the project. The review rights in each jurisdiction determine how easy it is to bring a review application, and hence how frequently they are brought (PC 2011c).

Major project primary approval decisions require the decision maker to balance environmental, heritage, social and economic values. Chapter 7 recommends that Ministers — who are accountable to constituents in a way that unelected officials are not — are the most appropriate officials to make these values-based decisions. Given this, the question becomes whether it is appropriate for merits review tribunals — who are not accountable to constituents — to reconsider the decisions of a Minister, or whether this risks creating a duplicate approvals process.

The Administrative Review Council (ARC) (1994, 1999) considered that, as a general rule, policy decisions of a high political content made by a Minister, including environmental decisions that involve major political controversies, should not be merits reviewable. Similarly, a range of literature has noted that courts and tribunals are better suited to adjudicating between competing individual rights rather than decisions dealing with many different public rights and interests (such as major project primary approval decisions). For example, Edgar argued:

The cases suggest that environmental decisions have ‘political’ characteristics which indicate that a restrained approach to judicial review is appropriate. ... Moreover, the final decision is generally made by the Minister for the Environment, a politician, and this is likely to be recognised as meaning that the public interest assessments are primarily a matter of political responsibility. (2011, pp. 460–1)

It is for this reason that approval decisions under the EPBC Act are subject to judicial, not merits review.

A small number of the [EPBC Act] ... decisions require careful balancing of competing interests and judgments. The Government considers that where these decisions are sufficiently important to be taken by the Minister as an elected representative, those

judgment calls should not be able to be overturned by an unelected tribunal (DEH (Cwlth) 2006)

The UK Government's reforms (under the *Localism Act 2011*) reached a similar conclusion (appendix D).

Divergent views on appropriate review rights

A number of participants favoured restricted review rights, although suggested models varied. The Queensland Resources Council preferred judicial review, irrespective of the decision maker, in order to discourage actions 'which seem more motivated by the opportunity to delay and frustrate major fossil fuel projects than ... with debating the merits of a project' (sub. 19, p. 6). Similarly, the Australian Petroleum Production and Exploration Association (APPEA) (sub. DR105) supported judicial, but not merits review, for major project decisions. By contrast, the Association of Mining and Exploration Companies (sub. DR70) opposed review altogether because even judicial review can allow ministerial decisions to be challenged.

The NSW Minerals Council adopted a different approach:

Merit appeals by third parties should only be necessary and provided for by the legislation where the Minister makes a decision in conflict with the recommendations of an independent panel, or where an independent panel has not reviewed the project ... Merit appeal ... should only be available where there is a high risk that the decision does not have merit and the decision should be considered afresh. (sub. DR93, p. 8)

Other stakeholders supported broader review rights and in particular, a greater role for merits review. ANEDO:

... strongly supports equitable third party merits review and judicial review rights for major projects – *including* where the Minister is the decision maker. ... ANEDO submits that judicial review and enforcement rights [for major infrastructure projects] are a fundamentally important accountability measure. (sub. DR92, p. 7)

Advocates of merits review considered that it is critical to provide a mechanism to remedy flawed decisions. ANEDO (sub. DR92) noted one of the key benefits of community rights to court-based merits review (as shown by many public interest cases) is that it allows poorly defined or inadequate conditions to be rectified. For example:

Ministers and agencies are equally capable of erring in the merit of their decisions, and the complexity of impacts associated with many major coal and unconventional gas projects requires merits review avenues, including through third party appeal, to ensure that the system is robust and capable of retaining the confidence of the community at large. (Lock the Gate Alliance, sub. DR97, p. 7)

Similarly, the East End Mine Action Group noted that the absence of merits review means third parties are unable to challenge conditions in the courts and the scientific evidence they are based on (sub. 38).

The Commission's view

Ministerial decisions

Chapter 7 sets out the Commission's recommendation that primary major project approval decisions should be made by Ministers. Ministers are accountable to Parliament and the public in a way that an independent body is not. Allowing merits review of ministerial primary approval decisions would allow the decisions of an elected official to be challenged by an unelected body, potentially undermining parliamentary accountability. (The same argument applies to decisions that have been ratified by Parliament.) However, ensuring the legality of, and public confidence in, the decision-making process is important and hence judicial review should be allowed. This is consistent with most existing review rights for primary approval decisions in major project DAA pathways where a Minister is the decision maker (table 9.1).

Further, the Commission does not consider that proponents and third parties should have different review rights. The same considerations apply regardless of who is bringing the review application — that is, unelected merits review tribunals should not be allowed to challenge major project primary approval decisions of the Minister, even where a proponent is bringing the review application.

Correction of perverse ministerial decisions

One disadvantage of only allowing judicial review is that it prevents proponents and third parties from challenging perverse ministerial decisions (Willey 2005). This concern was raised by ANEDO (sub. DR93) and Lock the Gate Alliance (sub. DR97), who argued Ministers are as likely to make poor decisions as independent decision makers, making limited merits review more appropriate. Limited merits review is argued to be preferable as it can allow the reconsideration of perverse decisions while preserving the integrity of the Minister's decision-making role (for example, by requiring the merits review body to remit the matter back to the original decision maker) (Brown, Stern and Tenenbaum 2006).

Another limitation of judicial review is its inability to remedy an inadequate assessment — *Prineas v Forestry Commission of NSW* (1984) 49 LGRA 402 established that, as long as the environmental impact assessment is not superficial,

subjective or noninformative, it will not be invalid merely by failure to cover certain issues. There is also generally no obligation on the decision maker to make inquiries or request further information, unless it is obvious that material is readily available which is centrally relevant to the decision (*Prasad v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550).

Although *Wednesbury* unreasonableness (a ground for judicial review that ‘no reasonable decision maker could ever have made the decision’), can help correct the most egregious decisions, courts have been reluctant to let *Wednesbury* arguments succeed to avoid potentially trespassing into the realms of merits review (Weeks 2007, 2008). Thus, despite a recent High Court case which suggested a modification of the *Wednesbury* test, findings of *Wednesbury* are likely to remain rare (box 9.4).

Box 9.4 **Judicial deference and *Wednesbury* unreasonableness**

In considering *Wednesbury*, judges tend to defer to the original decision maker.

In *Minister for Immigration and Citizenship v Li*, the High Court found that it was *Wednesbury* unreasonable for the Migration Review Tribunal to deny Li’s visa application because Li could not demonstrate a skills assessment. The Tribunal knew the skills assessment was being reviewed and the review’s outcome was likely to be favourable.

- Importantly, the High Court in *Li* suggested a modified test for *Wednesbury* that incorporates illogicality. This test has been used in subsequent cases.

However, *Minister for Immigration and Citizenship v Li* has not been used to broaden *Wednesbury* — Justice Gaegler in *Li* emphasised it should be rarely used. This has been applied in subsequent cases.

- For example, in *Tarkine National Coalition v Minister for SEWPAC (Shree Minerals)*, the Federal Court emphasised Justice Gaegler’s view that it was inappropriate for the Court to use *Wednesbury* to look at the merits of the Minister’s broad power to impose certain conditions (a condition that money be paid into a fund when a Tasmanian Devil was killed, despite the Act’s objective of protecting the Tasmanian Devil).

Sources: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; Sibley (2013); *Tarkine National Coalition v Minister for SEWPAC (Shree Minerals)* [2013] FCA 694.

On the one hand, it is not desirable for perverse ministerial decisions to remain in force. On the other hand, it is generally desirable to preserve the integrity of decisions made by elected representatives. The tension between these competing considerations is ‘one of the most contentious and problematic areas of administrative law’ (Blackwell 2003, p. 182).

Considerations of preserving the integrity of ministerial decisions would seem to indicate that a limited form of review, such as judicial review, is the most appropriate for primary major project approval decisions. The Commission notes that most jurisdictions already have judicial review of major project approval decisions made by Ministers. Further, *Wednesbury* provides an important safeguard on the exercise of ministerial decision-making power.

However, the Commission considers the scope of the *Wednesbury* test to be an important issue. The ARC (2012) recently released a report on federal judicial review which concluded that the grounds for judicial review in the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) should not be expanded. However, this ARC report was before the High Court decision in *Minister for Immigration and Citizenship v Li*. Given recent case law developments, there is scope for the ARC to do further work in this area. In the meantime, States and Territories could, at a minimum, include a judicial review ground equivalent to improper exercise of power (as per the *Administrative Decisions (Judicial Review) Act*) in the relevant legislation. (This would encompass *Wednesbury*.)

In addition, ensuring the assessment is adequate can safeguard against perverse ministerial decisions. This can be achieved by explicitly requiring the decision maker to be satisfied that the information contained in the assessment report was sufficient to make an informed decision.

Non-ministerial decisions

In practice, there are many primary and non-primary decisions in the major project DAA process that are not made by Ministers:

- *Delegates*: Although the Commission considers it is preferable that Ministers do not delegate major project primary approval decisions, delegation might occur because there is a tension between elected representatives making delicate balancing decisions themselves, and the efficient use of Ministerial time.
 - However, where a person makes a decision (either by statute or under a delegation) and a Minister can review and replace that decision (for example, the ability to seek ministerial reconsideration of a delegate's decision), then judicial review of the decision is appropriate as the aggrieved person has the option, in effect, to have the decision made by the Minister.
- *Independent bodies*: Parliament might decide that some major project primary approval decisions should be made by independent bodies — for example, New South Wales has moved towards this model by requiring the Minister for Planning to delegate approval authority for particular state significant

development and state significant infrastructure projects to the Planning Assessment Commission.

- *Deemed decisions of the assessment manager where a Minister fails to make a decision:* Chapter 7 recommends that if the relevant Minister does not make a decision within a designated statutory time period, then the recommendations of the assessment body should be deemed to be decisions of the Minister.

The argument for limiting review rights to judicial review does not apply when the decision is made by a delegate (and the decision is not able to be reconsidered), or made by an independent body or an assessment manager, since these bodies are not elected officials and are not accountable to Parliament in a way that a Minister is. Thus, there is no in-principle reason why another independent body (such as a tribunal or court) should not be able to review these decisions through limited merits review (box 9.5). Limited merits review (along with judicial review) is a desirable way of holding decision makers to account. Allowing limited merits review for deemed decisions would also strengthen the incentive for Ministers to make decisions within the required time.

However, not all decisions made by delegates, independent bodies or assessment managers should be subject to limited merits review. As discussed earlier, some preliminary decisions are procedural in nature and do not have any substantive effect, and thus should not be subject to review (ARC 1999). There is also the risk that making multiple preliminary decisions reviewable leads to overlapping review rights — for example, review of both the controlled action and the assessment approach decisions could lead to the same issue being reviewed twice (Hawke 2009).

Box 9.5 The Commission's preferred limited merits review model

The Commission considers it is preferable that merits review be limited for major project primary approval decisions not made by Ministers. Limited merits review emphasises the primacy of the assessment and approval process. It allows the review body to provide an accountability mechanism (where parliamentary accountability does not operate), and, by limiting the role of the merits review body, ensures that the decision maker's role is not supplanted.

While there is no single form of limited merits review, the Commission considers, as a general rule, the review should be limited to the material that was available to the original decision maker. The only additional material that should be allowed to be introduced (and only by leave of the review body) should be material that could not have been reasonably available to the original decision maker and if it had been, there would be a significant prospect of a different decision. This would encourage participation in the public consultation process and give the decision maker an opportunity to consider issues of importance before they are raised on review.

The East End Mine Action Group (sub. DR68) expressed concern that prohibiting evidence that was not raised at the public consultation stage from being raised on review would unduly disadvantage inexperienced participants and prevent issues from being raised on review that only emerged after the project was operational. The formulation of 'could not have been reasonably available' takes this into account, allowing matters that arose subsequent to the consultation process to be brought before the merits review body.

Jurisdictions should also consider whether or not it is appropriate for more complex decisions to be remitted back to the original decision maker.

In summary, the Commission favours judicial review of decisions personally made by a Minister (or ratified by Parliament), as it strikes an appropriate balance between accountability and timeliness. Limited merits review is appropriate for major project primary approval decisions not personally made by Ministers.

However, where jurisdictions do not have judicial review statutes (New South Wales, South Australia, Western Australia and the Northern Territory), or where statutory judicial review is excluded, applicants have to rely on common law judicial review. Common law judicial review has complex procedural requirements and varying standing provisions, which can be difficult for applicants to navigate (although some jurisdictions have made procedural reforms to address this).

Jurisdictions that do not have judicial review legislation (and have not made procedural reforms) should harmonise standing requirements and simplify procedural requirements to facilitate access to judicial review for major project DAA primary approval decisions. This will facilitate the operation of judicial review as a 'safety valve' in the system and ensure equal access to justice across

jurisdictions. The Commission also considers there are benefits to including the grounds for judicial review of major project DAA decisions in legislation.

Finally, consideration should be given to using less formal review bodies such as tribunals, as this can help reduce costs and delays for parties to review applications. While the Commonwealth Constitution requires judicial review to be conducted by courts, similar prohibitions do not apply at the state level. Thus, State and Territory Governments should consider less formal review mechanisms in place of judicial review by courts. However, jurisdictions should ensure review bodies (particularly generalist tribunals) have the capacity, resources and expertise to review environmental decisions effectively and efficiently.

RECOMMENDATION 9.1

Judicial review is appropriate for major project primary approval decisions where a Minister is the decision maker. For decisions not made by a Minister, including those that are deemed because a Minister has not made a decision, limited merits review is appropriate (along with judicial review). Jurisdictions that do not have statutory judicial review for these decisions should provide for it in legislation.

Other factors that might influence review rights

Strategic approaches

Some respondents considered that, where strategic processes have been conducted (chapter 11), the review rights available under subsequent project-specific DAA processes should be truncated. For example, the Business Council of Australia argued:

If the system is working well then we do not see the case for extending third party appeals. Where there is good practice strategic planning, compliance with planning codes and high quality project assessment processes then we do not see where there are grounds for contesting the permissibility of a project. (sub. DR102, p. 5).

Other participants, however, opposed any limitation of appeal rights. For example, ANEDO said:

Reducing or limiting third party appeal rights reduces the incentive for proponents to address communities' legitimate concerns, because the proponent is confident that their project approval is beyond challenge. ... The absence of such rights would significantly reduce oversight and quality assurance ... (sub. DR92, pp. 38–9)

Review rights have been curtailed for certain developments in South Australia where strategic processes have been undertaken (box 9.6), and proposed reforms in

New South Wales include similar arrangements for public priority infrastructure (appendix C).

Box 9.6 Wind farms in South Australia

South Australia adopted the Statewide Wind Farm Development Plan Amendment which explicitly envisages wind farms in certain sparsely populated rural zones in the State. In these zones, third parties will not have notification, comment and appeal rights for wind farm developments. However, there will be third party notification, comment and appeal rights where there is a proposal to install a turbine within two kilometres of dwellings, tourist accommodation, or zones that could be adversely affected such as airfield, residential, settlement and township zones.

The Development Plan Amendment also requires wind farms to comply with a number of conditions, including avoiding or minimising: excessive noise; interference with television and radio signals; striking of birds or bats; and shadowing, flickering, reflection or glint.

Source: RenewablesSA (2012).

The Commission does not consider that the undertaking of strategic processes should affect the availability of merits and judicial review at the project-specific stage. As noted earlier, access to merits review should depend on whether or not the development approval decision was made by a Minister. Whether or not this decision is made in the context of a completed strategic assessment does not change this principle. That said, where merits review is available at the project-specific stage, it is important that these processes are not used to reopen earlier decisions taken at the strategic level, and only deal with project-level issues.

Moreover, judicial review focuses on the legality of the decision-making process. It is appropriate that judicial review is available for strategic and project-specific decisions. The undertaking of a strategic process should not diminish or otherwise affect judicial review rights for project-specific DAA decisions.

Project-specific public consultation

A further question raised by study participants is whether ‘early’ public consultation on proposed major projects (chapter 5) in the project-specific process should curtail review rights.

Early consultation as part of the project approval process can help alleviate stakeholder concerns about adverse project impacts. However, there are limitations to the effectiveness of public consultation processes:

- Reliance on submissions might not give a representative picture of the community's view on a particular project, as certain interest groups might be over or under-represented in the process.
- The period for consultation on the environmental impact assessment may not give participants sufficient time to respond to a very lengthy document. (There are explicit measures in the United Kingdom to guard against this risk — box 9.7.)
- There can be significant delays between granting the approval and the operationalisation of the project, which means issues can arise subsequent to the consultation process that were not able to be raised at that stage.

While the Commission has proposed various measures to improve the effectiveness of public consultation (chapter 5), these reforms will not be sufficient to overcome the inherent limitations of consultation processes. In this context, and taking into account the important role of merits review in holding unelected decision makers to account, the Commission does not consider that review rights for project approval decisions should be reduced or otherwise impacted by the undertaking of early consultation.

Box 9.7 Consultation and review rights for major projects in the United Kingdom

In the United Kingdom, substantial consultation is conducted at the strategic planning and pre-application stages for nationally significant infrastructure projects. There are a number of requirements for this consultation.

- The European Union Directive on Strategic Environmental Assessment requires that the public are to be consulted during the strategic assessment process and that adequate time for consultation is allowed.
- The European Union Directive on Environmental Impact Assessment requires public participation to be 'fostered', particularly participation of non-governmental organisations promoting environmental protection.
- A proponent is required to prove the adequacy of pre-application consultation before an application can be submitted (appendix D).

After the consultation is conducted, only those directly impacted by the project can object. All others can only object at the stage when the Statutory Policy Plan is being developed and open for consultation.

Judicial review of the process and the approval decision is available in the High Court. (In the United Kingdom, *Wednesbury* is more expansive than in Australia).

Sources: ARC (2012); Barclay (2011); Department for Communities and Local Government (2013c); European Union (2001, 2012).

9.3 Standing: who should be able to bring a review application?

Those persons allowed to bring a judicial or merits review application are said to have ‘standing’. Standing varies between jurisdictions, and depends on the relevant legislation and (particularly for common law judicial review) what remedy is being sought. Generally, a person cannot bring a judicial review application unless they have a ‘special interest’ in the matter (box 9.8).

Box 9.8 Who will have standing?

Generally, a person is required to have a ‘special interest’ to be granted standing — this needs to be more than a ‘merely intellectual or emotional concern’ (*ACF v Commonwealth 1980*). For example:

- an organisation will not demonstrate a special interest in the environment by simply formulating objects that demonstrate a commitment to preserving the environment. However, ‘peak’ regional conservation groups that are government funded and invited by the government to participate in advisory committees have standing (*North Coast Environment Council Inc v Minister for Resources 1994*)
- the mere fact that a plaintiff is a local property holder is insufficient. What is required is an impact on the property. For example, in *ACF v Minister for Resources (No. 2)*, the applicant owned a property near a State Forest that was proposed to be logged. The Court held that having an objection to logging and its aftermath was not sufficient to grant the applicant standing. The objections needed to be concerned with the effect of logging on the applicant’s property. In the absence of this, the applicant’s interest was no more than an ordinary member of the community.

Canada has extended the ‘directly affected’ test to persons who could potentially be affected by the project, for example, people who live in an area (6 kilometres downwind of an oil and gas well) where outdoor pollutant concentrations may result in life-threatening or serious and possibly irreversible health effects (depending on which way the wind was blowing). The applicants were granted standing even though no gas had actually escaped (*Kelly v Alberta 2009*).

The United Kingdom has taken a broader approach to standing for judicial review (for the writs of prohibition and certiorari). Provided the person is not a ‘mere busybody’, any member of the public whose interests are affected have standing in the case of a flagrant and serious breach of the law by a government authority which is continuing unchecked (*R v Greater London Council; Ex parte Blackburn*).

Sources: *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGR 200; *Day v Pinglen* (1981) 148 CLR 289; *Kelly v Alberta (Energy Resources Conservation Board)* (2009) ABCA 349; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492; Preston (2006); *R v Greater London Council; Ex parte Blackburn* [1976] 3 All ER 184.

The standing rules can create uncertainty, particularly for environmental groups:

Environmental groups have difficulty with the private rights and interests model [of standing] since their concerns are largely outside of its parameters. The interests that they seek to advance are commonly referred to as public interests. Their objectives in bringing litigation — such as to prevent environmental impacts, raise issues for legislative attention and improve decision-making processes — reflect public rather than private concerns, such as protecting property and financial interests. (Edgar 2011, p. 448)

Determining appropriate standing rights requires a balance to be struck between allowing those who have a legitimate interest in the decision to bring an application, while discouraging undesirable and vexatious reviews and appeals. As noted earlier, proponents are usually given standing, but standing for third parties (particularly representative organisations) can be more limited (table 9.1).

Participants' contrasting views on standing rights

A number of arguments supporting broad standing were put forward by participants:

- Regardless of who the decision maker is, there is a general public interest in ensuring decision makers lawfully comply with procedures. Open standing for judicial review provides public confidence that the laws will be adhered to (ANEDO, sub. DR92; Nature Conservation Council of NSW, sub. DR94).
- Broad third party standing for merits review is supported, irrespective of whether or not the decision is made by the Minister. There are important benefits from third party appeal rights (Nature Conservation Council of NSW, sub. DR94).
- Standing limitations mean that scarce community resources must be first spent to demonstrate standing before proceeding to the issue of whether the law has been breached. Open standing ensures that limited resources are directed to arguing substantive issues (ANEDO, sub. DR92; Nature Conservation Council of NSW, sub. DR94).
- There could be circumstances where groups and individuals not meeting the standing criteria should still be allowed to seek review. Standing should be granted to any community group whose objects and missions accord with the matter of public interest at stake in the project (Lock the Gate Alliance, sub. DR97).
- Standing is about deciding whose benefits and costs count. Whether the net benefits of a project are positive or negative often depends on how narrow or broad this scope is. Proponents of projects tend to overstate the benefits and understate the social costs (Economists at Large, sub. 14).

Although other participants (such as AGL, sub. DR96 and APPEA, sub. DR105) supported standing for proponents and those directly affected by the decision, they pointed to the potential costs of broadening standing to allow third parties to bring a review application. Other points raised by these participants included:

- Extending standing to third parties could be ‘extremely dangerous’ (Queensland Gas Company, sub. DR79, p. 2), ‘costly and counterproductive’ (BCA, sub. DR102, p. 2), and risks substantially raising costs and project approval timeframes for proponents, with consequent flow on effects on project development and investor confidence (AGL Energy, sub. DR96).
- In particular, many participants opposed extending standing to those who had a substantive interest in the assessment process (BCA, sub. DR102; Origin Energy, sub. DR100), arguing this could potentially enable vexatious appeals by those who are not directly impacted by the approval decision (AGL Energy, sub. DR96), and this test would not effectively constrain the standing of people to initiate review (Queensland Gas Company, sub. DR79; Origin Energy, sub. DR100). APPEA (sub. DR105) noted that what constitutes a ‘substantive interest’ should be carefully considered to ensure that review processes cannot be hijacked by vexatious claims.
- AGL Energy supported allowing the court to grant leave to persons other than those directly affected by the decision if not doing so would amount to a denial of natural justice. ‘This protection would avoid a miscarriage of justice in situations where a person whose interests are not directly impacted by an approval decision has legitimate grounds for review or appeal’ (sub. DR96, p. 3). However, the Queensland Gas Company (sub. DR79) criticised this test for being vague and open to interpretation by courts.

Striking a balance on standing rights

Standing is a fundamental access to justice issue, because it allows parties with an interest in proceedings to access the court while preventing court resources being occupied by parties with no interest in the outcome of a dispute (ARC 2012).

In general, standing provisions for major project review applications are limited for third parties, although a number of reviews have recommended nearly open standing in order to allow third party judicial review applications which are brought in the public interest (box 9.9).

Box 9.9 Recommendations on standing from previous reviews

- The Australian Law Reform Commission (1985, 1996) supported open standing to commence litigation to sue for public remedies, subject to the suitability of the litigant to represent the interests of a section of the public, and considerations as to whether the proceedings would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.
- The Queensland Electoral and Administrative Review Commission (1990) also supported liberalised standing rules for judicial review, but proposed a number of criteria be used to determine whether or not a party who claims to be representative is suitable to represent those interests.
- The Administrative Review Council (2012) recommended that the Administrative Appeals Tribunal standing rules (giving standing to organisations where the decision relates to a matter included in the objects of the organisation, unless the organisation was formed after the decision was made) be used for Commonwealth judicial review.
- The Law Reform Commission of Western Australia (2002) supported judicial review standing for those who were directly affected by the decision, but providing for leave to be granted if the proceedings were in the public interest.

The Commission considers there is a public interest in allowing third parties to bring judicial review applications, as it allows the legality of the process to be enforced, providing an important ‘safety valve’ in the system. This suggests the need for broad standing provisions, but completely open standing is not appropriate — having some restrictions on standing provides a means for managing unmeritorious review applications (ARC 2012). (Courts also have the inherent ability to strike out vexatious claims — this is discussed later.)

Proponents have an interest in major project DAA decisions and should be given standing, but persons other than proponents should also be able to seek review. In accordance with the findings of the New South Wales Independent Review Panel (2012), it is important to give standing to those who are, or could potentially be, directly affected by the project, such as neighbouring landowners. This is consistent with the existing standing provisions in most jurisdictions.

However, the effects of major projects can be felt beyond neighbouring landowners (chapter 3), which implies that broader standing is warranted. For example, limiting standing to those who have a ‘special interest’ might exclude a decision that affects the entire community, but does not affect any one person to a greater extent than any other (Law Reform Commission of Western Australia 2002).

A number of organisations have supported participation in the assessment process as grounds for standing (‘objector standing’), including the World Bank (2006). The

Commission considers there are benefits in granting standing to those who made a submission to the consultation process. It encourages individuals and interest groups to raise their issues in a submission to the decision maker, which helps prevent issues being brought before a review body that the original decision maker did not have a chance to consider (Brown, Stern and Tenenbaum 2006). Further, it also recognises that there are representative organisations that might have a legitimate interest in the major project DAA process that may not be granted standing at common law (for example, species protection groups).

However, there might be situations where a nominal submission is made to the DAA process for the sole purpose of securing standing. To counter this, the Commission considers standing should only be granted to people or organisations that have shown a ‘substantial interest’⁸ in the assessment process, by lodging a substantive submission.

As the ARC (2012, p. 146) noted, ‘standing is not the only barrier to access to review. Costs and other issues also play a role’. The existence of appropriate costs provisions (discussed later) and the courts’ inherent power to strike out vexatious litigation are important additional safeguards that would prevent the ‘substantial interest’ provision being misused.

Further, it is never possible to foresee all circumstances where review ought to be allowed. Thus, the Commission considers that, in exceptional circumstances, the review body should be able to grant leave to persons seeking review if a denial of natural justice would occur if they were not granted standing. (‘Leave’ refers to the ability to apply to a court to seek an exception to a general rule, in this case, standing.) Given the additional cost of initiating an application for leave, the Commission anticipates this provision would be rarely used.

Finally, the standing rules for judicial and merits review should be aligned as it will provide greater clarity and consistency in the system. This accords with the recommendation made by the ARC (2012). Given that most jurisdictions have different standing rights for judicial and merits review, implementation of this recommendation would require many jurisdictions to amend their standing requirements.

⁸ Substantial is commonly defined as being ‘real or of substance, as distinct from ephemeral or nominal’: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 27 ALR 367.

Standing to initiate judicial or merits reviews of approval decisions should be limited to:

- *proponents*
- *those whose interests have been, are, or could potentially be directly affected by the project or proposed project*
- *those who have taken a substantial interest in the assessment process.*

In exceptional circumstances, the review body should be able to grant leave to persons other than those mentioned above to bring a review application if a denial of natural justice would occur if they were not granted leave.

Vexatious and commercially-motivated applications

Review processes can ensure accountability but they can also delay projects through vexatious review applications. What constitutes a vexatious application is not well defined, although objections which have little basis in planning regulations would likely be included (PC 2011c):

... [vexatious litigation is] legal proceedings started with malice and without good cause. Vexatious litigation is meant to bother, embarrass, or cause legal expenses to the defendant. A plaintiff who starts such litigation either knows or should reasonably know that no legal basis for the lawsuit exists. (Legal Information Institute 2010)

For example, vexatious reviews and appeals might be used as a deliberate strategy to delay a project, as the following excerpt from *Stopping the Australian Coal Export Boom* illustrates:

Legal challenges can stop projects outright, or can delay them in order to buy time to build a much stronger movement and powerful public campaigns. ... We will lodge legal challenges to the approval of all of the major new coal ports, as well as key rail links (where possible), the mega-mines and several other mines chosen for strategic campaign purposes. (Hepburn, Burton and Hardy 2010, p. 6)

Some stakeholders expressed concern about vexatious litigation:

Using third party merit appeal provisions as a tactic to delay development is simple and low risk ... (NSW Minerals Council, sub. DR93, p. 7)

Similarly:

Vexatious appeals by third parties can be deliberately undertaken in order to create delays, increase costs and risk to the development assessment process. Third party considerations should instead be covered by rigorous approvals processes (including consultation mechanisms). (APPEA, sub. DR105, p. 15)

Further:

Vexatious submissions and unfounded complaints are a regular feature of any public consultation in regard to major projects and to more general public enquiries relating to major project development. (QGC, sub. DR79, p. 2)

However, litigation that imposes costs on participants is not, by definition, vexatious:

Proponents are quick to dismiss any court action taken against their projects as ‘vexatious’ and advocate for ‘certainty’ to be entirely one way in its flow: towards approval of controversial mining projects. And yet, communities need certainty as well. ... mining proponents consider any decision against their interests as a temporary but outrageous infringement on their freedom, and considerably overstate the impacts of community-initiated court actions, out of all proportion to the overall costs of their projects. (Lock the Gate Alliance, sub. DR97, pp. 14–15)

The courts already have the ability to summarily dismiss an action due to it being frivolous, vexatious, or an abuse of process. Under the EPBC Act, there are no examples of summary dismissal for vexatious litigation (Edgar 2011), and no data has been provided for other jurisdictions. Courts can also award legal costs against vexatious applicants, which can help discourage vexatious applications (PC 2011c). (Appropriate costs provisions to discourage vexatious applications are discussed later.) Thus, it does not appear that the existing protections against vexatious litigation need to be strengthened.

Review processes might also allow ‘gaming’ of the system, to prevent or delay a development by a would-be competitor (PC 2011c). Some jurisdictions have provisions designed to limit commercially-motivated reviews and appeals. For example, in South Australia, competitors must disclose their interest when bringing proceedings, and if the competitor’s case is unsuccessful, they will have to compensate the proponent for any economic loss caused by delays if the competitor’s sole or predominant purpose was to delay or prevent the development in order to obtain commercial benefit. Where commercially-motivated reviews and appeals are a problem for major project DAA applications, the provisions in South Australia are a good practice for combating them.

9.4 Costs and time of review processes

When legal action relating to a major project is brought, legal costs are incurred by the parties to the action. In most jurisdictions, the unsuccessful party in a review or appeal is required to pay both their own legal costs, and the costs of the successful party. In general, costs orders are made so that the winner does not suffer financially from vindicating their rights, but this can result in unfairness if the

losing party had a good legal argument and acted reasonably (*Ruddock v Vardalis* [2001] 115 FCR 229). In some jurisdictions, legislation dictates how courts must award costs to parties, whereas other jurisdictions allow courts discretion to determine this (table 9.2).

Table 9.2 Default rules for major project DAA costs arrangements

<i>Jurisdiction^a</i>	<i>Merits review^a</i>	<i>Judicial review^a</i>
New South Wales	Each party bears their own costs unless 'fair and reasonable' to order otherwise	Unsuccessful party bears the successful party's costs. Discretion to order otherwise where cases are brought in the public interest
Victoria	Each party bears their own costs	Unsuccessful party bears the successful party's costs
Queensland	Costs are at the court's discretion, but various factors the court may take into account (such as success, or improper purpose)	Costs at court's discretion
South Australia	As a general rule, the unsuccessful party bears the successful party's costs, subject to a number of exceptions.	Unsuccessful party bears the successful party's costs
Western Australia	For most types of proceeding, each party bears their own costs although rejecting a settlement offer must be taken into account when making the order	Unsuccessful party bears the successful party's costs, unless the claim is unreasonably excessive
Tasmania	Each party bears their own costs, discretion to award costs against unsuccessful party if fair and reasonable to do so	Costs at court's discretion
Northern Territory	Each party bears their own costs unless ordered otherwise	Costs at court's discretion
ACT	Each party bears their own costs, with some exceptions	Costs at court's discretion
Commonwealth	No general power to award costs. Generally, each party must pay their own costs	Costs at court's discretion

^a Not all pathways allow review applications for major projects to be brought. Merits review bodies are the New South Wales Land and Environment Court, the Victorian Civil and Administrative Tribunal, the Queensland Planning and Environment Court, the South Australian Environment Resources and Development Court, the Western Australian State Administrative Tribunal, the Tasmanian Resource Management and Planning Appeal Tribunal, the Northern Territory Lands and Mining Tribunal, the ACT Administrative Appeals Tribunal, and the Commonwealth Administrative Appeals Tribunal. Judicial review bodies refer to the supreme courts in each State or Territory, except for the Commonwealth, which refers to the Federal Court of Australia.

Sources: Robinson (1996); Australian Government and State and Territory Government legislative websites; ANEDO, sub. DR92; King & Wood Mallesons, sub. DR99.

These costs can be funded in a number of ways. Where private individuals or organisations have sufficient financial resources, they can fund the costs out of their own pocket. However, legal costs can be prohibitively large (Watters 2010),

reaching several hundred thousand dollars, so funding them personally may not be possible for a number of private individuals or community groups. As Watters noted, ‘... the impact of the ‘costs follow the event’ rule is, quite simply, to price the vast majority of ordinary people and environmental groups out of the courts’ (2010, p. 6).

In recognition of this problem, governments provide funding for legal cases considered to be in the public interest. For example, the Australian Government Attorney-General’s Department provides financial assistance for cases that are of public importance — those that settle an uncertain area or question of Commonwealth law, or resolve a question of Commonwealth law that affects the rights of a disadvantaged section of the public (AGD (Cwlth) 2013). Similarly, the Australian Government and some State and Territory governments provide ongoing funding to the Environmental Defenders Offices for public interest environmental advocacy.

Despite these funding mechanisms, the possibility of an award of costs can be prohibitive for many community or ‘public interest’ litigants (McGrath 2008). For example:

Prudent litigants must always consider the possibility of an adverse cost award being made against them should they lose in the court. Recently we have seen clear examples that the NSW government ... by pursuing costs against the Fullerton Residents Action Group Inc (September 2013) in what is arguably a public interest case, is demonstrating ... a punitive approach to deter other would-be stakeholder litigants. (East End Mine Action Group, sub. DR68, pp. 9–10)

For this reason, a ‘public interest’ exception to the general rule that costs will be awarded against an unsuccessful party (box 9.10) could be important:

Costs should not act as an artificial barrier to access to justice, especially where proceedings are demonstrated to meet a ‘public interest’ test. Merits review, judicial review and third party enforcement should be ‘own costs’ proceedings, by default. At a minimum, courts in all jurisdictions should be empowered to grant ‘no costs’ or ‘own costs’ orders to protect public interest applicants. (ANEDO, sub. DR92, p. 41)

Box 9.10 Public interest costs orders

- In *Oshlack*, a majority of the High Court held that the usual rule (the unsuccessful party bears the costs of the successful party) can be displaced in public interest litigation if 'special circumstances' are shown, for example, where the case raised 'significant issues' as to the interpretation of statutory provisions.
- However, interpretation of this decision, and the courts' willingness to grant public interest costs orders, varies between jurisdictions. It also varies depending on the circumstances of the case. For example, in the first *Blue Wedges* case, the court granted a public interest costs order because the matter was of high public interest, and the application 'raised novel questions of general importance as to the approval process'.
- By contrast, in the *Blue Wedges (No. 2)* case, the court declined to grant a public interest costs order — despite finding that the litigation dealt with a matter in the public interest — because there were no 'special circumstances' in the case (the applicants had not raised a significant question of statutory construction), and the applicants had continued a case that they knew could not be justified.
- In *Fullerton Cove Residents Action Group*, a resident action group was unsuccessful in challenging the validity of a decision by the NSW Department of Trade and Investment to approve a pilot coal seam gas exploration program consisting of two wells for a period of 50 days. As a consequence, the Department sought an order that the resident group pay the Department's legal costs. The Land and Environment Court rejected the Department's claim. It found that the proceedings had been brought in the public interest. The Department was criticised for pursuing a costs order and was instead ordered to pay the costs of the resident group.
- Thus, the approach to public interest costs orders in the courts differs between jurisdictions, which can give rise to uncertainty. The Hawke Review recommended that a public interest costs order (determined at a pre-hearing), be introduced into legislation, but the Australian Government rejected this recommendation.

Sources: Australian Government (2011); *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 165 FCR 211; *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts (No. 2)* [2008] FCA 1106; *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No. 3)* [2013] NSWLEC 152; Hawke (2009); *Oshlack v Richmond River Council* (1998) 193 CLR 72, Public Interest Law Clearing House (2011); Watters (2010).

However, allowing costs to be awarded against third parties can create an important disincentive for vexatious applicants, and also allow successful parties to recoup their legal costs against unsuccessful parties (Xstrata Coal, sub. 50; ANEDO, sub. DR92). For example, King & Wood Mallesons argued that it is important to provide certainty for costs (through criteria governing the exercise of the court's discretion) and to allow cost recovery:

... in our view, the [Sustainable Planning] Act model, with its greater specificity regarding relevant costs considerations may provide parties with more certainty ...

[and] deter vexatious or commercially motivated litigants as well as unmeritorious cases being run to the door steps of the Court, but also promote access to justice for parties with legitimate issues of concern. ... [For costs in the NSW Land and Environment Court], there is no cost recovery in circumstances where the person seeking the review, such as a third party objector, has not engaged in disintitling conduct. This is ... the overwhelming majority of cases. (sub. DR99, pp. 3–4)

It is important that litigation in the public interest is not discouraged through allowing public interest costs orders to be made in appropriate circumstances. The decision in *Oshlack* allows this to occur. However, this must be balanced against a range of other considerations, such as creating a disincentive for vexatious litigation. It is not possible to be prescriptive in legislation about all of the circumstances in which a public interest costs order will or will not be appropriate, and the decision in *Oshlack* allows the courts to award public interest costs orders on a case-by-case basis.

Allocation of legal costs will be considered in greater detail by the Commission as part of the Access to Civil Justice Inquiry.⁹

Should timelines be imposed on proceedings?

Timelines also play an important role in review processes. Timelines are commonly imposed on the review application — for example, a proponent or third party might only have 90 days to apply for review. Statutory timelines can also be imposed on the duration of court or tribunal proceedings — for example, s. 44ZZOA of the *Competition and Consumer Act 2010* (Cwlth) imposes a statutory timeline of 180 days for the Australian Competition Tribunal to make a decision.

The Queensland Resources Council argued that even informal statutory timelines can reduce unreasonable delays:

In terms of applying timeframes for decisions, the Supreme and District Courts have processes to consider whether judges are taking too long to issue a decision. Whilst they are not prescriptive timeframes, they are a valuable tool in judging accountability. The Land Court performs a critically important function ... but that does not mean that its members should not be accountable for unreasonable delays. Independence is not lost and the quality of work to be performed is not deteriorated by benchmarking performance and examining whether a reasonable or excessive period of time is being taken to deliver a judgment. (sub. DR91, p. 9)

However, given the resource constraints of courts, it is also possible that timelines could have unintended consequences (such as inappropriate prioritisation of court

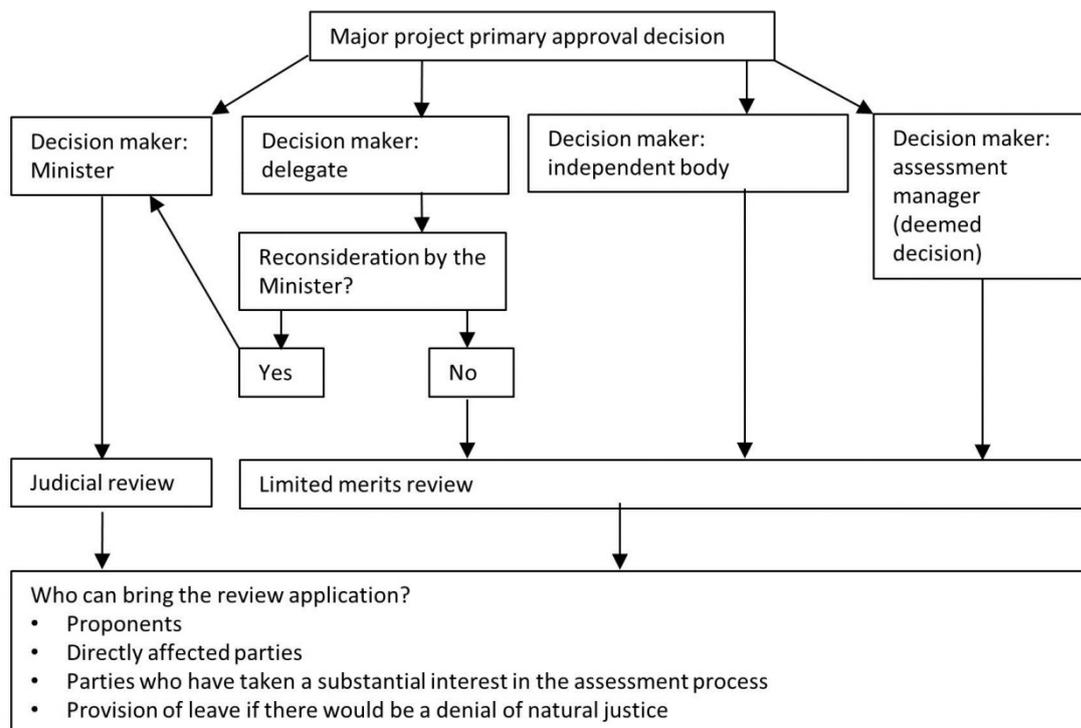
⁹ <http://www.pc.gov.au/projects/inquiry/access-justice>

resources) and actually delay decisions by leading to poor decisions that will only be appealed at a higher level. In the absence of further evidence, the Commission does not consider that court decisions should be subject to timelines. There may be scope for courts and tribunals to look at administratively improving their processes and giving consideration to forms of alternative dispute resolution — these issues are currently being considered by the Commission’s Inquiry into Access to Civil Justice. A number of jurisdictions, such as the New South Wales Land and Environment Court, are already moving in this direction. In a practical sense, administrative improvements are likely to create larger efficiency gains than imposing rigid timelines.

9.5 Implications of the proposed reforms

The Commission has proposed a number of changes to review rights for major project primary approval decisions (depending on who the decision maker is) and to standing rights (figure 9.2).

Figure 9.2 **Summary of the Commission’s review recommendations**
Proponents and third parties



The review rights for major project primary approval decisions vary significantly between jurisdictions and pathways. Table 9.3 compares these arrangements to the Commission’s recommended approach to review. In most cases, review rights are broadly consistent with the Commission’s recommendations — namely, where the primary approval decision is made by a Minister, judicial review should be allowed, and where the decision is not made by a Minister, merits review (along with judicial review) should be allowed.

For some pathways, however, more substantial reform would be required to align review rights with the Commission’s proposed approach. This is particularly the case for pathways that do not currently allow any review, such as:

- major developments or projects in South Australia
- projects of state significance in Tasmania.

Similarly, merits review rights for proponents under the priority development pathway in Queensland would need to be removed if consistency with the Commission’s model is sought.

Table 9.3 Comparing current review rights for major project primary approval decisions with the Commission’s recommended approach

<i>Jurisdiction</i>	<i>Minister as decision maker?</i>	<i>Merits review</i>	<i>Judicial review</i>
Productivity Commission recommendations			
Minister decision maker	✓	✗	✓
Minister not decision maker	✗	✓ ^a	✓
New South Wales			
State significant development	✗	✓	✓ (common law)
State significant infrastructure	Seldom	✗	✓ (common law)
Victoria			
Planning permits	✗	✓	✓
Major transport projects	✓	✗	✓
Ministerial call-in	✓	✗	✓
Queensland			
Coordinated projects	✗	✓ ^b	✓ ^b
Priority development	✓	✓ (proponents only)	✓
South Australia			
Major developments or projects	Governor	✗	✗
Crown development	✓	✗	✓ (common law)
Western Australia			
DAP decisions	✗	✓ (proponents only)	✓ (common law)
Tasmania			
Projects of State significance	Parliament	✗	✗
Major infrastructure projects	✗	✓	✓
Northern Territory			
Significant or exceptional development	✓	✗	✓ (common law)
ACT			
Ministerial call-in	✓	✗	✓
Commonwealth			
EPBC Act	✓	✗	✓

^a Commission has recommended limited merits review. ^b Excluding Coordinator-General’s conduct and decisions.

Source: Commission analysis.

Existing standing rights are summarised in table 9.4 — while most jurisdictions exhibit elements of the Commission’s proposed standing test, none have all elements for both merits and judicial review.

Table 9.4 Comparing current standing rights for selected major project primary approval decisions and the Commission’s proposed reforms

<i>Jurisdiction</i>	<i>Standing for proponents</i>		<i>Standing for directly affected or person aggrieved</i>		<i>Standing for objectors</i>	
	Merits	Judicial	Merits	Judicial	Merits	Judicial
Productivity Commission’s recommendations^a	✓	✓	✓	✓	✓	✓
New South Wales						
State significant development	✓	✓	x	✓ ^c	✓ ^d	✓ ^c
State significant infrastructure	x	✓	x	✓ ^c	x	✓ ^c
Victoria						
Planning permits	✓	✓	Leave	✓	✓ ^c	x
Major transport projects	x	✓	✓	x	x	x
Ministerial call-in	x	✓	x	✓	x	x
Queensland						
Coordinated projects	✓ ^e	✓ ^e	x	✓ ^e	✓ ^e	x
South Australia						
Major developments or projects	x	x	x	x	x	x
Crown development	x	✓	x	Common law	x	Common law
Western Australia						
DAP decisions	✓	✓	x	Common law	x	Common law
Tasmania						
Projects of State significance	x	x	x	x	x	x
Major infrastructure projects	✓	✓	x	✓	✓	x
Northern Territory						
Significant/exceptional development	x	✓	x	Common law	x	Common law
ACT						
Ministerial call-in	x	✓	x	✓	x	x
Commonwealth						
EPBC Act	x	✓	x	✓ ^b	x	✓ ^b

^a Commission has recommended standing be granted to proponents, those who are directly affected or could potentially be directly affected, and those that have taken a substantial interest in the assessment process. Leave if a denial of natural justice would occur has not been included in the table because no jurisdiction currently has it. ^b Person or organisation engaged in conservation activities in the preceding two years ^c Any person may bring proceedings to remedy or restrain a breach of the Act. ^d Only designated development. ^e Excluding Coordinator-General.

Source: Commission analysis.

The Commission is recommending harmonising standing for merits and judicial review, consistent with the ARC's (2012) recommendation. In practice, this is not generally the case:

- Where merits review is available, proponents and objectors (that is, a person who made a submission to the assessment process) are generally given standing.
- Where statutory judicial review is available, the legislation generally provides that a 'person aggrieved' or a person with a 'special interest' is given standing.
- Where a jurisdiction relies on common law judicial review, standing varies depending on the remedy sought. Some remedies have more limited standing, other remedies have close to open standing.
- Additionally, although some jurisdictions allow standing to be granted by leave in particular circumstances, no jurisdictions currently allow a leave application to be brought on the basis that a denial of natural justice would otherwise occur.

10 Monitoring of compliance and enforcement

Key points

- Compliance with, and enforcement of, project approval conditions are essential to effective development assessment and approval (DAA) processes that protect social, economic, heritage and environmental assets. If compliance is inadequate, the integrity of DAA processes is undermined. If compliance arrangements are excessive they can add unnecessarily to project costs and weaken the viability of projects.
- The ability of regulators to monitor compliance and enforce approval conditions in a way that is not excessive and does not add unnecessary costs while protecting Australia's environmental and cultural assets depends on the:
 - clarity of regulatory agency responsibilities for monitoring compliance
 - transparency and effort put into compliance and enforcement activities by agencies
 - use of proportionate (risk-based) approaches where possible
 - practicality and enforceability of the approval conditions.
- Drawing on various audit reports across agencies and jurisdictions, the Commission has identified a number of ways in which compliance and enforcement processes can be improved:
 - Agency responsibilities for compliance and monitoring activities are generally clear in legislation, but confusion can emerge, particularly for projects that are approved by various 'fast tracking' mechanisms or through special legislation. Governments should ensure agency responsibility for monitoring and compliance with project conditions is transparent and communicated to stakeholders.
 - At times, conditions placed on approvals have been impractical to comply with and difficult to monitor. Agencies should fully consider the practicality of monitoring compliance at the time of developing conditions, and governments should ensure there are transparent mechanisms for agencies to amend conditions where appropriate.
 - To ensure that compliance is feasible when conditions are initially set, and to promote transparency of regulatory oversight, agencies tasked with monitoring and enforcement of major project approval conditions should publish an annual compliance statement.

This chapter examines the monitoring and enforcement of compliance with conditions placed on major project approvals. These arrangements are essential for the approvals process to be effective. If they are inadequate, the integrity of development assessment and approval (DAA) regulatory processes is undermined. If they are excessive, compliance and monitoring arrangements can add unnecessarily to costs and weaken the viability of projects. Striking the appropriate balance is always a challenge, but leading practice regulatory processes help to make it possible to achieve an appropriate balance.

Ensuring compliance with conditions is not simply about maintaining the integrity of the approvals process. Non-compliance with project conditions can result in adverse outcomes for the environment, heritage and public health and safety. It can also lead to significant financial losses for other members of the community, and loss of amenity.

10.1 Approaches to monitoring of compliance and enforcement

Policies for monitoring of compliance and enforcement are fairly standard across jurisdictions and agencies. Agency responsibilities are generally set out in legislation and usually rest with the agencies that recommend or impose the approval conditions or grant a licence (exceptions might be, for example, where central agencies impose conditions but leave monitoring or compliance responsibilities to specialised agencies). Appendix C summarises, by jurisdiction, the compliance responsibilities for the main development activities requiring an approval.

While agencies typically take similar policy approaches, specific requirements for monitoring compliance with, and enforcement of, approval conditions vary between projects, agencies, jurisdictions and with the type of conditions imposed on a project. Conditions are generally set out at the approval stage as part of the requirements under which a project is permitted to proceed. Regulatory agencies rely heavily on self-reporting by project proponents, backed up by audits and inspections, and reports from members of the public or the media.

Common methods for monitoring compliance include:

- site visits and inspections (both scheduled and unannounced)
- audits
- sample collections

-
- use of agency websites
 - seeking information from the public
 - investigations
 - media monitoring
 - observations by agency staff or from other agencies
 - analysis of information, data and reports.

The Commonwealth Environment Department's approach is set out in its *Compliance and Enforcement Policy*, and is typical of those used across jurisdictions. The Department:

... monitors compliance with, and detects potential contraventions ... by analysing information from sources such as the general public, the media, industry, non-government organisations and other government agencies. [It also undertakes] regular monitoring and auditing of projects that have been referred under the EPBC Act to ensure that any requirements placed on those projects are being adhered to. (DSEWPAC (Cwlth) 2012d, p. 10)

Non-environmental agencies take a similar approach. For example, the Queensland Petroleum and Gas Inspectorate, a health and safety regulator located within the Department of Natural Resources and Mines, monitors compliance through a combination of routine inspections, audits and investigation of complaints and incidents. Noncompliance is assessed 'in accordance with the legislation, the analysis of facts and evidence, and the significance and severity of the level of total risk identified by the department's petroleum and gas inspectors' (DEEDI (Qld) 2011, p. 4).

Proposed reforms to Aboriginal heritage protection in Tasmania are also designed to allow for risk-based enforcement. Authorised officers will have powers of entry, search and seizure to enforce permit conditions. They will also be able to initiate Aboriginal Heritage Audits, issue Interim Stop Orders when heritage is under immediate threat, and issue infringement notices for minor offences. For serious offences, more significant penalties (including imprisonment) can apply (DPIPWE (Tas) 2013).

A risk-based approach is now commonly used to prioritise cases and identify those that warrant further investigation. For instance, the NSW Department of Planning and Infrastructure, which has responsibility for monitoring compliance regarding projects approved by the NSW Planning Minister, prioritises the monitoring of projects in sensitive environments or with a high risk of noncompliance. Inspections and audits generally fall into one of four categories:

-
- Strategic – to inform the Department’s assessment of proposed modifications to approved projects
 - Campaign – groups of projects based on industry type, geographical location or impact type
 - Ongoing – as part of the Department’s regular inspection program
 - Reactive – in response to reports or complaints alleging non-compliance. (DoP (NSW) 2010, p. iii)

10.2 Monitoring of compliance and enforcement activities in practice

The Australian National Audit Office (ANAO) states that a good monitoring policy:

- is risk-based
- can be implemented with available resources and with an acceptable level of residual risk
- recognises the costs it imposes on regulated entities
- is responsive to changing regulatory risks
- is documented. (ANAO 2007a, p. 52)

While much basic information is available from agencies about their monitoring of compliance activities (for example, the Commonwealth Environment Department provides information on audits undertaken and their outcome, and on court decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)), there is limited public information provided by agencies that would enable the Commission to draw conclusions about the appropriateness of these activities.

Some agencies provide limited information about priorities. The Commonwealth Environment Department noted that during 2011-12, its strategic risk-based audit program (which operates alongside a random audit program and focuses on specific areas such as industry sectors, geographical areas and protected matters) focused on 13 projects, seven in the mining and exploration industries, a residential development, an industrial development and a review of four approvals that included conditions requiring the establishment and management of habitat reserves and offsets (DSEWPAC (Cwlth) 2012b).

The WA Office of the Environmental Protection Agency (OEPA) noted that during 2012-13 it audited 7 per cent of approved projects overall, but 100 per cent of ‘high

priority' approved projects, with some guidance provided in the agency's annual report about why some proposals are considered a priority (OEPA (WA) 2013a).

Overall, however, there is little detailed information across agencies on why some projects were chosen for audit, while others were not, or about whether the approach of particular agencies is encouraging compliance. Similarly, while successful prosecutions for breaches of conditions and civil penalties are a matter of public record (box 10.1), there is inadequate information to place these prosecutions in context to make overall judgments about performance.

There have been a number of reports from Auditors-General looking at agencies' monitoring of compliance and enforcement activities. Reports of relevance to this study include:

- the ANAO's 2007 report *The Conservation and Protection of National Threatened Species and Ecological Communities*
- the NSW Auditor-General's 2010 report *Protecting the Environment: Pollution Incidents*
- the NSW Auditor-General's 2006 report *Regulating the Clearing of Native Vegetation*
- the Victorian Auditor-General's 2012 report *Effectiveness of Compliance Activities: Departments of Primary Industries and Sustainability and Environment*
- the WA Auditor-General's 2011 report *Ensuring Compliance with Conditions on Mining*.

These (and other) audit reports have raised some doubts about the efficacy of the compliance and enforcement processes of regulatory agencies. However, most of these reports have assessed these processes generally (or for particular activities), rather than those specifically related to development approval conditions. One report specifically assessing monitoring of compliance with approval conditions, and focused on the mining industry, was the 2011 report of the WA Auditor-General (box 10.2).

Box 10.1 Examples of enforcement of approval conditions by government agencies

In 2008, Coalpac was fined \$200 000 in the New South Wales Land and Environment Court for exceeding a mining lease condition limiting production of coal to 350 000 tonnes per year. The mine produced 635 277 tonnes in one year. The case was brought by the Planning Minister (NSW LEC 2008).

In 2009, V/Line paid out \$188 010 after an enforceable undertaking was agreed between it and the Commonwealth Department of Environment, Water, Heritage and the Arts following destruction without approval of 38 spiny rice-flower plants by contractors widening an access track next to the railway line near Bendigo (DEWHA 2009).

In 2010, Moolarben Coal was fined \$70 000 for breaching planning laws by clearing vegetation, including endangered native species, without planning approval. The company's mine approval was subsequently modified, requiring the company to conserve 6.6 hectares of land (a larger area than the 4.1 hectares illegally cleared) (Kelly 2010b).

In 2012, LQ Management Pty Ltd, manager of Laguna Whitsundays Resort, and its director, David Marriner were fined a total of \$90 000 after pleading guilty to two counts of wilfully breaching a development approval condition and one count of wilfully causing environmental harm in the Mackay Magistrates Court after the resort's sewage treatment system discharged raw effluent into nearby waterways. LQ Management was fined \$70 000 and David Marriner was fined \$20 000 (DEHP (Qld) 2012).

In 2012, Barwon Region Water Authority was fined more than \$6000 by EPA Victoria for failing to get a works approval before building a water reclamation plant in Birregurra. The company admitted to EPA Victoria their failure to get the required approvals for the plant (EPA (Vic) 2012).

In 2013, the NSW Environment Protection Authority (NSW EPA) fined AGL \$1500 for breaching the licence conditions at its Rosalind Park Gas Treatment Plant after emissions of nitrogen oxides were recorded above the limits permitted by its Environment Protection Licence. The NSW EPA noted AGL self-reported the incidents and the emission monitoring data, including the exceedances, were published on the AGL website as required by the NSW EPA (NSW OEH 2013).

In 2013, Cougar Energy was fined \$75 000 in the Brisbane Magistrates Court after pleading guilty to three breaches of the *Environmental Protection Act 1994* (Qld) following the rupture of a production well near Kingaroy in 2010. The well was not built to the standard required by its environmental conditions, and the rupture led to the release of the contaminants benzene and toluene to groundwater (Powell 2013).

In 2013, OM Manganese Limited was fined \$150 000 in the Darwin Magistrates Court for one count of desecration of, and one count of damaging, the Two Women Sitting Down sacred site at their Bootu Creek manganese mine on Banka Banka station, 170 kilometres north of Tennant Creek. The site collapse totalled 10 000 cubic metres of ore, soil and vegetation (AAPA 2013).

The ANAO also made specific findings on compliance and enforcement processes relating to project approval conditions in two broader audits of the EPBC Act. The ANAO stated in the second audit:

The department did not have sufficient information to know whether conditions on the decisions are generally met or not. There has been insufficient follow up on compliance by the department for those individuals or organisations subject to the Act and little effective management of the information that has been provided. Consequently, the department has not been well positioned to know whether or not the conditions that are being placed on actions are efficient or effective. This is not consistent with good practice and does not encourage adherence to conditions set by the Minister. (2007b, p. 25)

**Box 10.2 The Western Australian Auditor-General's 2011 report
Ensuring Compliance with Conditions on Mining**

In 2011, the Western Australian Auditor-General undertook an assessment of compliance with conditions placed on project approvals in the mining industry. The Auditor-General concluded:

The legislation and powers are in place to enable agencies to monitor and enforce compliance with mining conditions. However, the way agencies have implemented this framework means they do not provide assurance on the overall levels of compliance with conditions, or whether the conditions deliver the desired outcomes. Responsibility for monitoring and ensuring compliance with conditions rests with several agencies, and performance varies significantly across these agencies, and across key conditions. (2011, p. 7)

With regard to the WA Department of Mines and Petroleum (DMP), the Auditor-General stated:

DMP's inspection regime does not deliver adequate coverage or assurance that mines meet their conditions ... significant weaknesses in information management make it difficult for DMP to analyse and demonstrate the effectiveness of its inspections, or report accurately on how well operators comply with conditions. Information that is kept is inconsistent and the systems used to manage information are inefficient. (2011, p. 8)

The review also found that the enforcement policies of DMP were theoretically sound, but let down by weaknesses in their implementation:

DMP's approach to environmental enforcement is appropriate and potentially successful. It establishes a hierarchy of actions based on the severity of the non-compliance and the response of the operators involved ... However, two weaknesses decrease DMP's ability to demonstrate that its environmental enforcement is consistent:

- there are no clear established criteria for determining the severity of non-compliance.
- DMP does not monitor the outcomes from inspections in a coordinated or comprehensive manner. (2011, p. 29)

The findings of these audit reports have had an impact on agencies. For example, in response to the ANAO findings, the Australian Government allocated substantially

more resources to compliance and enforcement activities, and in 2007 established a dedicated Compliance and Enforcement Branch within the Commonwealth Environment Department to undertake a range of monitoring, audit, compliance and investigative functions. The Department has since achieved a number of successful investigative outcomes, including a successful criminal prosecution and several civil prosecutions. Use of administrative remedies has also increased (Hawke 2009).

In the case of Western Australia, there have also been efforts made to improve monitoring and compliance in the mining sector, most particularly under the banner of *Reforming Environmental Regulation*. This includes the Department of Mines and Petroleum (DMP) moving to a risk- and outcome-based regulatory framework, improving interagency collaboration and information exchange, increasing transparency and improved agency resourcing to better perform regulatory functions (DMP (WA) 2013b).

While there are signs of improvement in these, and in a number of other agencies, there is still room for further improvement. The following discussion relates to the major factors affecting the ability of regulators to implement monitoring of compliance and carry out enforcement activities that are not excessive or do not add unnecessary costs while meeting DAA regulatory objectives. These factors are the:

- clarity of regulatory agency responsibilities for monitoring compliance
- resources allocated for compliance and enforcement activities
- use of proportionate (risk-based) approaches to monitoring of compliance and enforcement activities
- practicality and enforceability of approval conditions.

10.3 Clarity of regulators' responsibilities

For compliance and enforcement activities to be effective, it is important that agency responsibility for these activities is clearly assigned. It is also important that all approval conditions have an agency explicitly responsible for ensuring monitoring and compliance with them, and that overlap of these responsibilities is avoided to prevent confusion and duplication (or where some overlap is inevitable, that arrangements are in place to enable coordination).

It has been suggested to the Commission that some misunderstanding about compliance and monitoring responsibilities can emerge when projects are approved through special legislation or fast tracking methods. For example, the audit report looking at the mining industry in Western Australia found that the Department of

State Development (DSD) and DMP seemed unclear about their respective roles in terms of monitoring conditions for projects taking place under State Agreements:

There is a risk that non-compliance with environmental requirements will not be identified or addressed on all 26 State Agreement mines because DSD and DMP have clear but differing views of their roles. DSD does not conduct active monitoring and enforcement, and expects that DMP will do so. DMP considers that it does not have the legislative powers to fulfil a monitoring and enforcement role on State Agreement projects where the Mining Act is not specifically applied. (WA Auditor-General 2011, p. 9).

The Commission understands that DSD and DMP have since reviewed environmental compliance monitoring and enforcement policies and practices for State Agreement projects (Government of Western Australia 2012).

There is mixed evidence about how clearly defined are agency compliance and enforcement responsibilities. In areas where there is potential overlap within jurisdictions, such as, for example, between the environment protection agency and the environment department, legislation generally spells out the specific areas of responsibility. However, as highlighted in the example above from Western Australia, the allocation of responsibilities is not always clear.

To ensure the monitoring of compliance with approval conditions does not ‘fall through the cracks’ when approvals are centralised, governments need to ensure that the responsibilities of their regulatory agencies are clearly defined. This is particularly important given that projects approved centrally are usually the most contentious and those perceived to have the most ‘downside risk’ to the community. To further ensure accountability, leading practice suggests there are benefits from making information about monitoring and enforcement responsibilities publicly available.

The Office of the Coordinator-General in Queensland¹⁰ and the NSW Department of Planning and Infrastructure have dedicated compliance units to monitor and enforce conditions they place on projects. While these agencies liaise widely, and sometimes rely on other agencies to perform some monitoring tasks, they are still actively involved in ensuring compliance with approval conditions and are ultimately responsible for compliance outcomes (box 10.3).

The Commission considers that the existence of centralised compliance units in coordinating agencies or planning departments could reduce the risk of non-compliance over a sustained period. However, as noted by the NSW

¹⁰ The compliance unit for the Office of the Coordinator-General in Queensland is located in the Department of State Development, Infrastructure and Planning.

Department of Planning and Infrastructure in box 10.3, the creation of such units can also lead to a lack of clarity about the role of other agencies. It is important, therefore, for the lead agency to be proactive in coordinating with the other agencies with compliance responsibilities to avoid duplication of effort, or noncompliance continuing unchecked.

Box 10.3 Approaches to compliance with approval conditions in Queensland and New South Wales

The Queensland Office of the Coordinator-General — while able to nominate another agency such as the Department of Environment and Heritage Protection to take responsibility for monitoring conditions — maintains responsibility for the auditing and enforcement of the conditions it imposes. The Department of State Development, Infrastructure and Planning contains a unit specifically tasked to monitor and enforce compliance with conditions imposed by the Coordinator-General and ensure that any non-compliance is addressed. The unit works collaboratively with other administering authorities. Project proponents are required to engage independent parties to conduct third-party audits of compliance with imposed conditions, and to submit the audit reports to the Coordinator-General for review (DSDIP (Qld) 2013a).

The NSW Department of Planning and Infrastructure also has an active compliance unit. The unit conducts inspections and audits of approved projects, responds to concerns of other State agencies, local councils and members of the public, investigates potential breaches and takes enforcement action where considered necessary. The Department also publishes monthly compliance activity reports. The Department's compliance and enforcement policy highlights the importance of working with other agencies:

In identifying matters for compliance attention, the Department works closely with its regulatory 'partners', in particular local councils and State agencies administering environment protection legislation to ensure information about non-compliances is shared and investigations are not duplicated. (DoP (NSW) 2010, p. iii)

The Chamber of Minerals and Energy of Western Australia (CMEWA) agreed with the need to clearly articulate agency responsibility for compliance, noting there were also opportunities for agencies to work together to reduce the compliance burden associated with conditions:

CME is not aware of a standardised approach across agencies in reporting on compliance and enforcement with project conditions and would support work to achieve alignment of these. As companies are required to report against project conditions in varying formats and frequency inefficiencies are created. (sub. DR85, attachment, p. 1)

The Queensland Resources Council noted that duplication could take place where responsibilities were not clearly articulated:

Processes that don't tend to have a 'home' are found to lead to duplication. One such example of this duplication is the reporting of CSG water and drilling. At present, CSG companies must report to three separate agencies on water and exploration drilling/fracking. The requirement for reporting is accepted, but not to three separate agencies in three formats. One agency should hold the database and share this information with the other agencies where expert advice might be needed. (sub. DR91, p. 3)

The Australian Local Government Association was also supportive of clarifying enforcement responsibilities:

ALGA supports this recommendation. Local governments understand that making decisions on development applications is futile if the approval authority does not monitor or enforce the subsequent approval conditions. (sub. DR71, p. 8)

The Planning Institute of Australia also agreed, but highlighted that it was important that agencies ensure project conditions are actually enforced:

PIA supports this recommendation, however, it could be strengthened to ensure that monitoring of compliance and enforcement of conditions is actually implemented by the responsible agencies as well. (sub. DR73, p. 3)

NTSCORP stated there were significant issues with monitoring and compliance of Aboriginal cultural heritage approval conditions, with responsibility for monitoring them falling back on Aboriginal organisations:

Aboriginal Cultural Heritage Management Plans are often created but not implemented or fully complied with, throwing into question the efficacy of project approvals designed to establish appropriate safeguards ... These issues are exacerbated by a lack of both self-monitoring by proponents, and oversight ... by regulatory agencies ... monitoring of conditions regarding Aboriginal cultural heritage often falls back on Aboriginal organisations with limited resources and capacity. NTSCORP considers this a case of regulatory failure. (sub. DR104, pp. 4–5)

RECOMMENDATION 10.1

Governments should ensure that agency responsibilities and strategies for the monitoring of compliance and enforcement in relation to project conditions are clearly specified and communicated to stakeholders.

10.4 Resource allocation for compliance and enforcement activities

Many participants in this study identified resourcing as limiting the capacity or willingness of agencies to prioritise their enforcement responsibilities. For example, the Australian Network of Environmental Defender's Offices (ANEDO) highlighted

‘evidence and submissions to the NSW CSG Inquiry ... noted the limited resources available to monitor activities and enforce regulatory compliance’ (sub. 14, p. 22).

King & Wood Mallesons saw resourcing issues as the main problem with monitoring of compliance, while also suggesting a reallocation of resources would be appropriate:

In our view, it is not the lack of enforcement mechanisms themselves that reduces the effectiveness of the current DAA processes, but rather the lack of resources with which to effectively monitor and enforce. At all levels, we suggest that greater direction of resources towards monitoring and enforcement of conditions and less focus on detailed assessment would increase the effectiveness of conditions imposed on major projects. (sub. 39, p. 3)

The Australian Local Government Association also highlighted resourcing issues:

Given the life span and scale associated with major development projects, it is critical that both the State and Commonwealth Governments properly resource their monitoring and enforcement responsibilities. This includes regular liaising with local councils to ensure that major developments adhere to agreed environmental, social and economic approval conditions. (sub. DR71, p. 8)

Other participants identified competing pressures for resources and the nature of approval conditions as factors that may act to compromise enforcement. For example, the WA Auditor-General made the following comment:

We found throughout our audit that individual staff and agencies had separate roles competing for their effort. Individual staff had to assess project proposals for approval, as well as monitor and enforce compliance in existing projects. The same challenge faces agencies in balancing the use of resources between approvals and compliance ... This can impact on the extent of agency activity in monitoring compliance with conditions. (2011, p. 17)

The issue of agency resourcing — which potentially affects all aspects of the approvals process — is discussed more comprehensively in chapter 12.

10.5 Risk-based approaches to enforcement

In addition to concern about resourcing levels, there have been concerns about how resources are allocated within agencies. Some audit reports have questioned the efficacy of agencies’ monitoring of compliance and enforcement activities due to the lack of a framework to adequately determine those projects most likely to be appropriate for audit. For example, the Victorian Auditor-General’s Office (in a report looking at agency compliance processes generally, not just with regard to

approval conditions) said of the Department of Sustainability and Environment in 2012:

DSE's regions rarely use a transparent, risk-based approach or any other clear rationale to inform the decisions they make about which compliance issues they will address, and how they will do it — even though its statewide compliance strategies have included a risk-based process for doing this since 2008. Instead, it conducts a series of largely reactive, one-off investigations and operations rather than adopting a targeted approach. (2012, p. xi)

On the other hand, the WA Auditor-General was complimentary about the approach of Western Australia's OEPA towards compliance with Environmental Protection Agency imposed-conditions:

The OEPA is responsible for monitoring Ministerial conditions placed on projects as a result of environmental impact assessments by the EPA ... In planning its compliance program the OEPA scans all reports it receives from operators, and uses this information as part of its risk assessment. This in turn drives the selection of sites for desktop audits which include assessing reports against approved conditions ... With increasing numbers of projects, the OEPA believes it is unlikely to ever be able to audit or inspect all projects with Ministerial conditions. To mitigate this, the EPA has recently required managing directors of operating companies to formally approve reports submitted to the OEPA. The OEPA believes that this increases accountability and responsibility for compliance and non-compliance. We support this decision. (2011, p. 25)

A number of participants in this study support moving towards risk-based approaches (box 10.4) to compliance and enforcement, and for DAA regulation and processes generally. For example, the Business Council of Australia (BCA) said:

Jurisdictions should adopt a risk-based approach to regulation to ensure that regulatory effort is directed to the areas of development approvals where it will have most impact and that the costs of regulation are commensurate with the risks to be managed. (sub. 43, p. 2)

Box 10.4 Risk-based approaches to enforcement

Agencies adopting a risk-based model will base their compliance requirements, incident responses and enforcement priorities on the likely risk of adverse outcomes, and the potential seriousness of adverse outcomes. Enforcement resources are targeted to those areas where the biggest difference can be made.

A 2011 review of compliance and enforcement for EPA Victoria, for example, defined risk as a combination of two elements: consequence (the risk of harm to health and the environment) and likelihood (the chance that non-compliance will occur). Therefore, when EPA Victoria starts the enforcement process following an incident of risk or non-compliance, it considers risk or harm and also the circumstances and culpability of the offender. Culpability considers the offender's history, how long the incident or non-compliance continued, whether or not the harm is still occurring or has been reduced, whether the risk was foreseeable and whether the act or omission was intentional (Krpan 2011).

The Office of the Environmental Protection Agency in Western Australia states that it 'applies a priority rating to all proposals based on the condition of the receiving environment, potential environmental impact and level of stakeholder interest' (2013a, p. 41).

Under a risk-based approach, proponents with poor compliance records would be likely to be seen as more high risk than other proponents undertaking similar projects, and therefore be potentially subject to greater regulatory focus and more severe sanctions in the event of a breach.

The Queensland Government noted benefits of a risk-based approach:

By better managing risk, additional resources can be shifted from [less complex] applications to more complex high risk-high impact applications such as those that typically are major development applications. (sub. 47, p. 15)

South Australian State Government Departments highlighted that they had moved to a risk-based approach to monitoring and compliance:

Another initiative is the adoption of high and low level surveillance classifications that divides regulated activities carried out under the Act into those requiring a high level of regulatory oversight and those for which the licensee has demonstrated its competence and capability in achieving compliance with the Act and the [Statement of Environmental Objectives] through the implementation of effective management systems. Consequently the focus of agency resources is on compliance monitoring and proponent strategies to maintain compliance. (sub. 51, p. 29)

While risk-based approaches can have significant benefits, there are challenges associated with their implementation. One area of concern is that regulators, by changing behaviour, will do some things less than previously and this could have

negative consequences. Cliff and Johnstone note, however, that this might be less of an issue depending on how risk-based regimes are implemented:

If risk-based approaches are properly implemented, the firms that are not being inspected as frequently as they were in the past can be justified by their status of having achieved ‘earned autonomy’ through their past commendable compliance efforts resulting in good OHS performance. (nd, p. 10)

Xstrata Coal highlighted that risk rating could be counterproductive if too many projects were rated as being of high risk:

A major potential drawback of adopting a risk-based approach is that it will lead to even further delays due to a large number of projects being classified as high risk and being bogged down in further scrutiny and reporting requirements. In order for a risk-based approach to regulation to function properly, staff at the relevant government departments and agencies need to be properly qualified and trained in order to make accurate risk assessments. Furthermore, there should be clear guidelines as to how projects are classified on the risk scale. (sub. 50, p. 57)

The Commission notes that many regulatory agencies are moving in the direction of developing better risk-based approaches to monitoring of compliance and enforcement activities. It is therefore important that agencies, in line with leading practice, ensure that their audit processes are also based on their determinations of risk.

This is not always the case. For example, the WA Auditor-General suggested in 2011 that although the WA DMP had adopted risk ratings, time between inspections was still used to guide where inspections should take place:

Under DMP’s approach, how recently a site was inspected influences the assessment of the site risk. Thus, if a site has been given a high rating but was inspected recently it may be downgraded to medium and inspected less frequently. This is not sound risk assessment practice. How recently a site has been inspected does not change its intrinsic risk. In a fully risk based system this should not change how often a site is inspected. (2011, p. 27)

Leading practice also suggests that agencies should ensure that their risk ratings are realistic to avoid the problem highlighted by Xstrata Coal of unnecessarily increasing the regulatory burden by inappropriately classifying projects as high risk. As noted by Xstrata Coal, this means agencies must ensure that their staff are appropriately qualified and trained to be able to accurately make these risk assessments.

Given that there will always be limited resources for monitoring of compliance (and therefore some element of ‘rationing’), realistic risk ratings represent the most

effective way for these resources to be allocated, and would help assure the community that the downside risks associated with projects are properly managed.

10.6 Practicality and enforceability of approval conditions

The Association of Mining and Exploration Companies (AMEC) highlighted the importance of writing conditions in a manner that they could be complied with and enforced:

Licence conditions are a necessary part of an approval. However they must only be used to manage the highest level of risk that the project has to the objectives of the regulatory agency. That is, risk-based conditions. They also must be written in a way that not only allows the proponent to be able to comply but for enforcement to occur. (sub. 42, p. 17)

There is also a risk that agencies will impose an excessive number of conditions if they do not believe they will have to monitor compliance with them. Stakeholders have suggested that, in some cases, there are too many conditions for effective monitoring to occur. The BCA stated:

There are too many conditions: too many ad hoc conditions are being attached to project approval, which not only add significant costs to proponents – which can be prohibitive – but also can be simply unmanageable and unable to be properly monitored by regulators, resulting in high cost from red tape for no real benefit. This is multiplied across jurisdictions. The approval of one large project came with more than 1,500 conditions – 1,200 from the state and 300 from the Commonwealth. Those conditions have a further 8,000 sub-conditions attached to them. (sub. 43, p. 10)

Some agencies appear to be changing their approach with regard to condition setting. For example, the Western Australian Department of Environment Regulation has moved to a system called REFIRE (Re-engineering for Industry Regulation and Environment), which seeks to employ similar conditions for similar facilities. The system involves use of common templates containing a series of draft conditions to guide regulators in choosing the most appropriate conditions for any particular plant. It is expected that standardised conditions would also facilitate more efficient monitoring of compliance and enforcement activities.

Not every project would lend itself to common, template conditions but where this is feasible it should be encouraged. For projects where unique features make such an approach impractical, it is still important to ensure conditions can be both complied with by proponents and monitored and enforced by agencies. The CMEWA expressed support for this:

CME supports the PC's observations on the benefits of a risk based approach to compliance and condition setting, in particular the observation the use of standardised conditions may facilitate more efficient monitoring and enforcement. (sub. DR85, attachment, p. 8)

Should conditions be able to be varied over time?

Even where leading practice condition-setting practices have been adopted, situations will emerge where approval conditions will subsequently need to be varied, removed or bolstered (for example, if compliance with a condition turns out to have unintended and adverse consequences or if unexpected circumstances arise that justify stricter conditions).

In some jurisdictions, proponents can apply directly to the responsible Minister or regulator for conditions to be varied. For example, under section 143 of the EPBC Act, the Minister can 'by written instrument, revoke, vary or add to any conditions'; division 1A of the *Planning and Environment Act 1987* (Vic) enables planning permits to be amended by the approval authority; and section 46 of the *Environmental Protection Act 1986* (WA) enables Ministers to vary conditions. In other cases, variations may be sought via merits review of the original approval decision (chapter 9). However, straightforward mechanisms for revisiting conditions are not always available.

Given the time and cost involved with merits review processes, mechanisms within agencies to allow conditions to be varied ('internal variation') are considered to be the most efficient way of varying conditions. Where this is not already the case, governments should amend relevant legislation to codify mechanisms for internal variation of approval conditions.

A further way to ensure that conditions remain fit for purpose is for regulators to undertake periodic evaluations of approval conditions. However, this would generate significant regulatory uncertainty for proponents and is only likely to be efficient in a limited set of circumstances (for example, for very long-lived assets where the risk of out of date conditions emerging is high). However, the compliance statements discussed in section 10.7 would represent a suitable mechanism for identifying cases where there is a strong case for a review of conditions.

The Conservation Council SA expressed concern about any mechanism that enabled conditions to be changed without adequate consultation:

Such a loophole can undermine the integrity of the entire Project Development Approvals framework. For example, it could mean the changes of transfer from a closed conveyer system to an open conveyer system without any new EIS. Where is the

consultation with the environment sector or community with such amendments?
(sub. DR76, p. 8)

The Commission agrees that this is a legitimate concern, and envisages that any mechanism for varying conditions would only be used where there was a very strong case for change. Any variation to conditions should also be publicly announced.

ANEDO saw a need for safeguards in any measure allowing for variation of conditions, but saw benefits of allowing conditions to change over time:

First, safeguards must apply to modifications of conditions, to ensure these processes are not ‘gamed’ to reduce compliance obligations, avoid community transparency, or weaken environmental standards in favour of profitability ... Second, regulators should have powers to reasonably increase environmental protections in project conditions over time. For example, in the pollution context, this may include requirements that operators adopt ‘best available technology’ when licences are renewed, to ensure continuous improvement ... In sum, modification of conditions must allow for both genuine adaptive management and continuous improvement. (sub. DR92, pp. 29–30)

The Commission also notes the Conservation Council SA’s concern that, in practice, agencies seem to quietly decide to no longer enforce some decisions:

Currently, conditions of approval are often not met or enforced where no compliance penalties are identified. Environmental regulators appear to select only some environmental standards to be maintained during the life of the project, whilst many others can be quietly dropped. (sub. DR76, p. 7)

The Commission considers this an inevitable consequence of the current practice of keeping conditions ‘in place’ long after they have ceased to be relevant (for example, those that might relate to a project’s construction phase). Having a mechanism that enabled agencies to remove such redundant conditions (in a public way) could improve transparency, while also highlighting that other conditions were still in place and proponents were expected to comply with them.

RECOMMENDATION 10.2

Governments should ensure legislation enables regulatory agencies to amend conditions and offsets, provided that there is a strong case, the proponent is consulted and the proposed change is publicly announced.

10.7 Improving agency performance on compliance

In view of the poor current reporting of compliance activities, and that there are legitimate concerns about the efficacy of performance of agencies with regard to

compliance and enforcement, the Commission considers regulatory agencies should publish an annual compliance statement. The statement should report the agency's monitoring of compliance and enforcement activities relating to the major projects approved (in whole or part) by the agency, and identify redundant or ineffective conditions that no longer need to be enforced.

To provide enough information to enable conclusions about performance to be drawn, the statement should identify activities by an agency relating to all conditions attached to a project for which the agency has compliance and enforcement responsibilities. This does not imply agencies would be expected to actively enforce all conditions annually through means such as inspections or audits: this would not be consistent with a risk-based approach.

The Commission considers that such a statement would help to achieve four outcomes:

- reduce the possibility of adverse impacts stemming from noncompliance
- oblige agencies to give more consideration to the conditions placed on projects
- provide transparency about the compliance and enforcement activities of agencies, and thereby assist government and the community in determining agency performance
- demonstrate to the community that enforcement is a priority for agencies.

While there might be concerns that a requirement for such a compliance statement could increase the regulatory burden for proponents and put further resource pressures on agencies, the Commission does not consider that this would be a major issue. The statement should not unduly burden proponents as it only describes whether they are complying with conditions they are already obliged to meet. Much of the information required would also be already retained by proponents for risk management purposes. Moreover, the Commission considers proponents would be less likely to be faced with impractical, ill-considered and onerous conditions were a requirement for such statements introduced.

A number of stakeholders have expressed support for the Commission's recommendation of an annual compliance statement, including the Local Government Association of Australia (sub. DR71), AMEC (sub. DR70), the CMEWA (sub. DR85), Origin Energy (sub. DR100) and the Conservation Council SA (sub. DR76). The Planning Institute of Australia noted the role such statements could play in providing the public with confidence in the approvals process:

PIA strongly supports this recommendation and believes this will assist greatly in guiding strategic planning for the future of these projects as well as assist in public

consultation activities by demonstrating how the ‘system works’ and give them confidence that monitoring and compliance is undertaken. (sub. DR73, p. 9)

RECOMMENDATION 10.3

Regulators should produce an annual major projects compliance statement that reviews monitoring and compliance activities and identifies redundant or ineffective conditions on approvals.

A range of enforcement options is preferable

Leading practices with respect to enforcement point to the benefits of employing a graduated approach to non-compliance. Advantages of this approach have been highlighted by the ANAO (box 10.5).

The Commission has also previously noted the benefits of maintaining a range of regulatory responses:

The greater the range of enforcement instruments available to a regulator, the greater the scope for a more proportionate approach to dealing with businesses in breach of their requirements. (2010, p. xxii)

A range of enforcement options also allows for changes of strategy. A regulator, for instance, might be initially cooperative and adopt a ‘soft’ approach to compliance, with the option to adopt more severe enforcement options if businesses fail to comply (Ayres and Braithwaite 1992). Such changes in strategy are likely to be appropriate from time to time, as a strong enforcement focus can meet resistance, while a cooperative approach can degenerate into laxity (Cliff and Johnstone nd).

Conflicts of duty and the risk of industry capture

Some participants raised the issue of conflicts of duty, where those agencies regulating an activity were also given the responsibility of promoting that activity. ANEDO stated:

Questions of regulatory independence and ‘conflicts of duties’ have also been raised, particularly where agencies are responsible for ‘promoting and facilitating’ an industry, as well as licensing and enforcement action. (sub. 14, p. 22)

Box 10.5 **Benefits of a graduated approach to compliance**

The Australian National Audit Office has highlighted the benefits of taking a graduated approach to compliance:

A set of graduated responses enables a regulator to:

- impose a response that is proportionate to the risk
- escalate regulatory action
- de-escalate regulatory action
- minimise costs associated with a response. (2007a, p. 64)

In determining the most appropriate measures to be employed in the event of breaches, agencies would typically take account of a number of factors. For example, the Commonwealth Environment Department considers factors such as:

- the level of potential environmental damage or harm
- the requirements placed on referred projects
- changes to obligations (for example, the inclusion of new threatened species or the 'up listing' of existing ones)
- changes to enforcement measures or penalties
- new scientific knowledge
- emerging environmental issues
- new industries
- new developments or areas experiencing rapid growth
- expectations of different members of the regulated community
- international trends (DSEWPAC (Cwlth) 2012d).

In a 2008 report into the Queensland Mines Inspectorate (QMI), the Queensland Ombudsman, while not finding any evidence of the agency being inappropriately influenced, found a number of reasons for the perception of industry capture:

There is a reasonable perception that the QMI is subject to inappropriate influence from the mining industry and from officers in the DME responsible for promoting and supporting mining in Queensland. The main reasons for the perception are:

- lack of organisational autonomy having regard to its position within the administrative framework of the DME;
- its compliance practices, especially the preference for informal compliance options, which are not recorded in a way that can be publicly reported on;
- regional factors, leading to the development of social relationships and reliance on mine operators' hospitality; and
- staffing issues, including a high degree of mobility between the QMI and the mining industry. (2008, p. 127)

These factors apply equally to the agencies involved in compliance and enforcement activities. Agencies should be cognisant of those areas where there is potential for capture, and put mechanisms in place to minimise these risks. These measures could include review of regulatory decisions by peers or more senior agency staff, and regular rotation of inspectors. The latter measure, however, could be counterproductive at the approval stage, where officer continuity is important to prevent regulatory delays.

Where conflict of duty within agencies is seen as a major problem, consideration should be given to separating the policy and regulatory functions of agencies. This has driven the decision to set up the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) as a statutory authority, independent from the Department of Industry (previously the Department of Resources, Energy and Tourism) which has a focus on growing the offshore petroleum industry.

While NOPSEMA was initially set up solely to regulate offshore petroleum safety, environmental regulation has recently been added to NOPSEMA's areas of responsibility. Just as there are likely to be benefits of NOPSEMA being independent of the department promoting the offshore petroleum industry, it might also be the case that the agency could deal with environmental regulation more dispassionately than the Department of the Environment.

The Commission's proposals in chapter 6 to separate regulatory assessment and enforcement functions from environmental policy functions would also assist in dealing with potential conflicts of duty.

10.8 Third party enforcement

In addition to enforcement of conditions by agencies, there is also scope for third parties¹¹ to undertake enforcement. One way this can be done is for aggrieved parties to initiate litigation to enforce common law or statutory rights. While common law torts (such as public or private nuisance) may provide a limited cause of action for some matters, the major third party enforcement issue for this study relates to the statutory rights of third parties to bring an enforcement action, including for the enforcement of approval conditions.

¹¹ There are various statutory definitions of third party. It is not limited to individuals or organisations and can also encompass local councils or assessment or referral agencies in some jurisdictions.

A role for third parties in enforcement is generally accepted

The Australian Law Reform Commission (1996) in their report *Beyond the Door-keeper - Standing to Sue for Public Remedies* concluded that third party enforcement has a role to play in enforcement of legal obligations:

Political, bureaucratic and financial constraints mean the Attorney-General and other government plaintiffs cannot adequately represent the public interest in all matters. There is an important role to be played by private plaintiffs in the maintenance of the rule of law through the review of government decisions and the enforcement of statutory rights and obligations. (1996, para. 4.15)

Such rights exist to some degree in most jurisdictions (table 10.1). For example, in New South Wales there is the potential for members of the community to seek rulings from the Land and Environment Court regarding whether approval conditions are being breached. The Victorian *Planning and Environment Act 1987* also enables ‘any person’ to apply to the Victorian Civil and Administrative Tribunal for an enforcement order in the event that a use of land contravenes a condition of a permit.

The 2013 NSW Planning White Paper re-iterated a continuing role for the community in ensuring compliance:

The community needs its own right to ask an independent umpire to review the activities of developers, neighbours and planning authorities where there has been a breach of the planning legislation or where a breach appears likely. (NSW Government 2013, p. 147)

Others have noted that even when the law might allow for third party enforcement, individuals might still face major problems. For example, in 2011 the Victorian Environment Defenders Office noted the difficulties for individuals in bringing a court action:

[Taking] enforcement proceedings is not usually possible for community groups unless they can get legal representation ... Furthermore, there is almost always a significant resource-imbalance between developers and government on the one hand, and members of the community trying to participate in decision-making processes on the other. (Millner 2011, pp. 200–201)

Table 10.1 **Statutory third party enforcement of conditions, by jurisdiction^a**

	<i>Who can bring the action?</i>	<i>What can be enforced?</i>	<i>Remedy</i>
Commonwealth			
Environment Protection and Biodiversity Conservation Act	An interested person or a person acting on behalf of an unincorporated organisation that is an interested person	Act or conduct consisting of an act or omission that constitutes an offence or other contravention of the Act or regulation	Injunction
New South Wales			
Planning and Assessment Act	Any person	A breach of the Act	An order to remedy or restrain the breach
Protection of the Environment Operations Act	Any person	A breach of the Act	An order to remedy or restrain the breach
Victoria			
Planning and Environment Act	Any person	A breach of the Act, a planning scheme, a condition of a permit or an agreement	Enforcement order
Queensland			
Nature Conservation Act	A person	A matter that has been, is to be or should have been done for this Act, the construction of a license or permit, or the lawfulness of an activity	Court may make orders and declarations
Environment Protection Act	The Minister, the administering authority, someone whose interests are affected by the subject matter of the proceeding or someone else with the leave of the Court (even though the person does not have a proprietary, material, financial or special interest in the subject matter of the proceeding).	An offence against this Act, or a threatened or anticipated offence against this Act	An order to remedy or restrain an offence
Sustainable Planning Act	Any person or assessment manager (in certain circumstances)	A matter done, to be done or that should have been done for this Act (other than about the lawfulness of land use or development)	Declaration

(continued next page)

Table 10.1 (continued)

	<i>Who can bring the action?</i>	<i>What can be enforced?</i>	<i>Remedy</i>
South Australia			
Development Act	Any person	An order to remedy or restrain a breach of this Act or a repealed Act	An order to remedy or restrain the breach
Environment Protection Act	The EPA, an administering agency, a person directly affected by the subject matter or another person with the permission of the court	Contravention of the Act or failure to do something required by the Act	An order
Tasmania			
Environmental Management and Pollution Control Act	A council or a person who has a sufficient interest	If a person is breaching the Act, failing to do anything required by the Act, or causing environmental harm	An order
ACT			
Environment Protection Act	The EPA or any other person with leave of the court	Contravention of the Act	An order
Planning and Development Act	The planning and land authority or anyone else	Contravention of a controlled activity order or prohibition notice	Injunction
Heritage Act	The council or any other person with leave of the court	Contravention of the Act	A heritage order

^a There are no statutory third party enforcement provisions in Western Australia or the Northern Territory.

Source: Commission analysis.

It was also suggested individuals might find gaining expert opinion difficult:

Finding experts willing to do work that may involve them giving evidence against large developers, mining companies, operators of industrial facilities and government bodies can be very difficult, because experts do not want to prejudice future opportunities for obtaining work from these companies and entities ... In one instance, it was so difficult that in the end the client retained an expert from the USA. Obviously, this is usually not a feasible option for community groups. (Millner 2011, p. 201)

Participants views on the role of third party enforcement

A number of participants supported a role for third parties in enforcement, including the Australian Local Government Association (sub. DR71), the Planning Institute of

Australia (sub. DR73), the Nature Conservation Council of NSW (sub. DR94), Jim Leggate (sub. DR61), Amelia Thorpe (sub. DR98) and the Local Government Association of Queensland (sub. DR78). The Conservation Council SA envisaged an ongoing role for third parties with regard to enforcement, while seeing it as no substitute for the role of regulatory authorities:

The Conservation Council strongly supports [a role for third party enforcement] but cautions that third party access should not be at the expense of adequate supervisory and enforcement controls for the authorities ultimately responsible for managing the approval and licence process. We could not accept any situation where the responsible agencies could be seen to be abrogating their responsibilities. (sub. DR76, p. 7)

ANEDO saw third party enforcement provisions, with open standing (that is, all persons or organisations able to bring an action), as helping to redress areas of regulatory failure:

Open standing for enforcement of major project compliance is most appropriate, as the number, size and complexity of such projects all increase the potential for non-compliance to go undetected or unaddressed by the relevant state agency. The general importance of open standing for environmental justice is evident from successful third party enforcement actions addressing non-compliance that would have otherwise gone unenforced by regulators. This includes community actions under Queensland and Commonwealth legislation preventing the electrocution of flying foxes, and against pollution of the Coffs River in the NSW Blue Mountains (sub. DR92, p. 51)

Other stakeholders were opposed to third parties having an enforcement role, including the Queensland Resources Council (sub. DR91), the BCA (sub. DR102), the Australian Petroleum Production & Exploration Association (sub. DR105) and AMEC (sub. DR70). The Queensland Gas Company saw it as delaying approval processes:

[The Commission's draft recommendation] appears to entertain a broad right for anyone to initiate legal action to enforce conditions on primary approvals. It goes further to suggest that legal costs should not be allowed to present a barrier to any such action. QGC would be concerned that this could be an extremely dangerous outcome to the approval process in Australia. There are a number of recent court decisions that would support this view. (sub. DR79, p. 2)

The CMEWA highlighted the importance of having an enforcement hierarchy, and thought third party enforcement was inconsistent with this:

Any action on non-compliance should be the responsibility of the regulator. Third party concerns should be brought to the attention of the regulator to ensure the regulator can take a 'graduated approach to non-compliance' and utilise a range of regulatory responses as identified by the PC as best practice. (sub. DR85, attachment 1, p. 9)

Origin Energy supported a role for third party enforcement, although they saw no reason to extend the current arrangements for standing:

Origin does not support [the Commission’s draft recommendation] that Governments should ensure that third parties can initiate legal action to enforce conditions on primary approvals. Whilst we agree that third party enforcement is an important part of the regulatory framework, again we are of the view that there are already sufficient provisions for this in the current rules. The Commission has raised the issue of legal costs acting as a barrier to third party enforcement – however it is also crucial that there is a reasonable threshold for those who wish to engage in this activity. Otherwise project proponents are likely to [be] subject to an increasing number of vexatious claims. (sub. DR100, p. 3)

A number of other participants also commented specifically about who should have standing for third party enforcement actions. The Lock The Gate Alliance saw open standing arrangements as leading to better outcomes:

We believe that open standing has been a crucial component of the NSW planning system, and the lack of standing in, for example Queensland, has contributed to poor outcomes and considerable imbalance in the system. We agree that in addition to allowing people directly affected by noncompliance to take enforcement action standing for both merits and judicial appeals should be available to people or organisations that have participated in the initial approval process for a project, interested persons that are affected by a project and any organisation whose objects and mission are consistent with matters of public interest at stake. (sub. DR97, p. 15)

AGL noted that they had encountered few problems with standing being defined broadly for third party enforcement purposes:

We support broad ‘standing’ arrangements for third party enforcement cases in relation to non-compliance by project proponents with conditions attached to project approvals. We note that this is the case in many jurisdictions in which AGL operates, and we have no concerns with the way this functions. (sub. DR96, p. 4)

An ongoing role for third party enforcement

Compliance with approval conditions is essential to ensure the credibility of approval processes and to prevent adverse outcomes. However, in practice, not even the best resourced and most diligent and competent of regulatory agencies could realistically be expected to deal with, or even be aware of, every significant act of noncompliance. The Commission therefore sees an ongoing role for third parties with regard to enforcement of primary approval conditions, and considers that this role, where not already the case, should be enshrined in legislation.

While concerns about third parties using enforcement powers mischievously are understandable, in view of the difficulties for third parties in bringing court action highlighted above the Commission sees these risks as being overstated by some

participants. The role the Commission envisages for third party enforcement is to reinforce approval processes by ensuring conditions are complied with.

Further, while use of measures such as injunctions can delay projects, these will only be provided where the court sees a strong reason to do so. Courts consider the potential damage to all parties when deciding whether to grant an injunction. For example, a recent application for an interlocutory injunction to stop work at the Maules Creek Coal development in New South Wales (*Northern Inland Council for the Environment Inc v Minister for the Environment, Heritage and Water*) was rejected in the Federal Court. In his judgment, Justice Griffiths highlighted that the potential financial impact on the project proponent weighed heavily in his decision:

The consequence of that is that any delay occasioned by an interlocutory injunction which impacts upon Aston's capacity to meet its contractual obligations to supply coal from the project as at 1 January 2015 will result in it incurring a cost of \$4.48 million per month. That is a sizable financial prejudice ... In my view, that prejudice is sufficient of itself to weigh heavily with the court, when it comes to assessing the hardship caused to the proponent by the grant of an interlocutory injunction. In fact, Aston also claims that it would suffer other prejudices of a commercial nature ... Taking all ... matters into account, I consider that the balance of convenience is weighed, comfortably, in favour of Aston. In those circumstances, on condition that the proffered undertaking is amended to reflect the revisions that were identified by its counsel before me today, I would dismiss the application for interlocutory relief and order that the costs of, and incidental to, the interlocutory application be costs in the cause.

Third party enforcement should be seen as a last resort

The Commission agrees that in some cases third party enforcement is inconsistent with the graduated approach to enforcement typically pursued by agencies, but notes that third party enforcement is likely to be limited to cases where agencies have failed to take action. The Commission thinks there is a strong argument for third party enforcement to be seen only as a last resort, available where parties can demonstrate they have previously taken their concern to regulators or where the court or tribunal is not satisfied that the regulator has dealt with the matter appropriately. (An exception to this would be interlocutory injunctions, where the possibility of immediate damage would make problematic the requirement to first speak to a regulator before being able to take legal action.)

Further, if project operators have good ongoing consultative processes in place, potential for third party litigation should be diminished. Where third parties do feel it is necessary to take action, the Commission sees a role for mediation before any prospect of matters becoming enmeshed in prolonged legal action except in cases of immediate substantial harm. If third party enforcement was ever to become

commonplace in any jurisdiction, the Commission considers an inquiry into the reasons for this would be appropriate.

Standing should be applied broadly

The Commission considers that standing should be applied broadly in the case of third party enforcement because of the number of parties potentially adversely affected by breaches of conditions. Parties directly affected by noncompliance, such as property owners incurring property damage, should be given standing. However, the potentially diffuse impacts of noncompliance mean non-government organisations, such as environmental or heritage protection groups also have a role.

In view of this, the ‘interested person’ arrangements for taking enforcement action under the EPBC Act, or similar arrangements, are seen as representing an appropriate basis for determining who should be able to take enforcement action. These arrangements would allow any person or group involved with ‘protection or conservation of, or research into, the environment’ (EPBC Act, s. 475) at any time in the past two years to take enforcement action (in addition to any person or organisation directly affected by a project).

The Commission also considered extending provision of standing for third party enforcement cases to ‘any person’, as is already the case in some jurisdictions (table 10.1). On balance, the Commission does not consider the extension of standing to ‘any person’ is necessary once standing is extended to all interested persons as defined in the previous paragraph. However, the Commission considers legislation should enable courts to extend standing more broadly where it is likely in the view of the court that an injustice would otherwise take place. It is envisaged that such provisions would be used rarely.

Allocation of costs is also important

The allocation of the costs associated with third party enforcement actions is also important. As discussed in chapter 9, generally when legal action is brought the unsuccessful party is required to pay both their own legal costs and those of the other party. This is to ensure that successful parties are not financially penalised as a result of having their rights vindicated.

In the case of third party enforcement, awarding costs to the successful party (and therefore potentially against the third parties bringing the action) provides an incentive for third parties to only bring actions with a high probability of success (and a strong disincentive against vexatious litigation). On the other hand, these

arrangements can also discourage litigation with a strong chance of success (and a ‘public interest’ component) because the third party may not be able to risk losing the case. It is also sometimes argued that it is unfair for unsuccessful parties to be financially penalised where they have acted in good faith and had a strong case.

Third party enforcement provisions will be ineffective if cost arrangements cause affected parties to be unwilling to exercise their rights for fear of losing and receiving a strong financial penalty. To ensure third party enforcement provisions are effective, governments need to develop cost arrangements that do not provide a barrier for legitimate enforcement actions, while simultaneously maintaining disincentives for cases with little merit.

There are a number of mechanisms for reducing the costs associated with third party enforcement actions, including use of mediation, use of relatively informal tribunals, provision of legal aid or government assistance for environmental groups, or provision for courts to vary costs on ‘public interest’ grounds. The Commission will explore these issues further in its current Access to Justice inquiry.

RECOMMENDATION 10.4

Governments should ensure that third parties are able to initiate legal action to enforce the conditions that have been placed on primary approvals, and that legal costs do not present a barrier to legitimate actions of this type being brought by individuals or bona fide community groups.

11 Strategic approaches

Key points

- Development assessment and approval processes (DAA) in Australia predominantly involve project-level assessment. Strategic planning and assessment are not being used to their full potential at present.
- The Commission considers greater use of strategic (or higher-level) approaches would be beneficial. Strategic assessment and strategic planning are tools for doing this.
- While the term 'strategic assessment' is most commonly used within the planning sphere, assessments of a strategic nature are also important to the development of sound environmental and resource management policies. Such policies can improve the operation of DAA systems and there are examples of this occurring.
- Both environmental and business groups participating in this study generally favour giving strategic assessment an enhanced role in the DAA system.
- Strategic assessment and strategic planning can take into account the cumulative impacts of projects and have the potential to reduce the scale and cost of subsequent project-level assessment of major projects. They can also improve environmental outcomes by considering cumulative impacts at the appropriate scale.
- However, strategic assessments can also be time consuming and costly. And benefits are only achieved where there is integration with planning and project-level processes. Without such integration, strategic assessments can increase, rather than reduce, regulatory burdens.
- Strategic assessments under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) have become more widespread. These have removed the need for Australian Government approval of some subsequent projects and reduced costs for proponents, and have the potential to lead to improved environmental outcomes.
- State and Territory Governments should continue to improve the quality of their strategic planning by placing greater emphasis on: strategic decision making; effective community consultation; gathering and disseminating baseline environmental and heritage data; and analysis of the environmental and other impacts of plans.

Development assessment and approval (DAA) processes in Australia predominantly involve project-level assessment and previous chapters have highlighted a number of shortcomings with these processes. While many of these problems can be

remedied through the reforms proposed elsewhere in this report, it is worthwhile also considering whether greater reliance on strategic (or higher-level) approaches would be beneficial.

The main way to do this is to undertake strategic assessment prior to the assessment of individual projects. Strategic assessments focus on the potential impacts of plans, policies and programs, rather than individual projects. Strategic assessment can reduce or remove the need for subsequent project-level development assessment and approval.

Strategic planning is another tool that can help to improve the way DAA regulations and processes operate. Strategic plans can indicate broad preferences for the location of particular types of developments. Where such plans are underpinned by community consultation and consideration of environmental, heritage and other values, they can reduce the number of issues that need to be considered at the project level, and the bounds of appropriate review processes on project approvals. Strategic assessment can inform the development of strategic plans, and so the two approaches are related.

11.1 What is strategic assessment and how can it help?

Strategic assessment means different things to different people. In Australia, it is often used to refer specifically to a procedure that can be used under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act) to facilitate the concurrent consideration of the environmental concerns of different levels of government. There is also an international literature that focuses on strategic environmental assessment (SEA) as a means of incorporating environmental factors into planning frameworks. But ‘strategic assessment’ can also refer more broadly to assessments that take place above the individual project level, including those done in the normal course of developing environmental and resource management policies.

In the Commission’s view, strategic assessment is best understood as a broad concept that covers assessments of the potential impacts of plans, policies and programs across an entire region, catchment area, activity or industry. The scope and complexity of a strategic assessment depends on the plans, policies and programs involved. Strategic assessment of a particular environmental policy would generally be a much simpler exercise than strategic assessment of the broad range of plans, policies and programs that influence development across a region.

Table 11.1 outlines some of the key differences between project-level assessment and strategic assessment. However, it should be noted that the differences are not always clear-cut. For example, some recent project-level impact assessments have required the consideration of cumulative impacts, such as for the Arrow Energy LNG project (formerly known as the Shell Australia LNG project) in Gladstone (Coordinator-General (Qld) 2010b).

Table 11.1 Differences between project-level assessment and strategic assessment

<i>Project-level assessment</i>	<i>Strategic assessment</i>
Is reactive to development proposals and typically begins at a late stage of decision making	May proactively inform development proposals and typically begins at an early stage of decision making
Is narrowly focused	Is broadly focused
Assesses the impacts of a development	Assesses the impacts of one or more policy, plan or program
Focuses on a specific project at a specific location	Focuses on regions, catchments, activities or industry sectors
Assesses the direct impacts and benefits of a development	Assesses cumulative impacts and identifies implications and issues for sustainable development
Focuses on the mitigation of impacts	Focuses on achieving policy objectives or targets
Has a well-defined beginning and end	Can be a continuing process

Source: adapted from Parliament of Victoria (2011).

As noted by the OECD (2006, p. 34), there is no ‘recipe approach’ to strategic assessment, with the diversity of applications reflecting the need to adapt the concept to the need being addressed and the circumstances in which the assessment is being applied. Common elements of the strategic assessment process include:

- consulting stakeholders
- identifying likely effects (be they environmental, economic and/or social)
- evaluating the significance of impacts
- determining measures to mitigate adverse impacts or enhance positive ones
- reporting the findings to decision makers (Sadler 2011).

Strategic assessment has been used in a range of countries (appendix F). Much of this experience relates to the European Union, where SEAs have been mandatory for certain types of plans and programs since 2001. Some lessons that can be drawn from the international experience are given in box 11.1.

Environmental and business groups favour strategic assessment

Environmental and business groups participating in this study generally favour giving strategic assessment an enhanced role in the DAA system. Most submissions that discussed this topic focused on the role of strategic assessment in dealing with overlapping Commonwealth and State environmental concerns under the EPBC Act, but there was also support for strategic assessment more generally.

Box 11.1 Lessons from the international use of strategic assessment

The Commission has examined the use of strategic assessment in the European Union (focusing mainly on the United Kingdom), Canada and the United States. Lessons relevant to Australia that can be drawn from the use of strategic assessment in these countries are as follows.

Consultation is important to achieve stakeholder ‘buy-in’

It is important that communities are engaged in the strategic assessment process from an early stage. By ensuring adequate consultation, both with the broader community and with planning experts, feedback may be incorporated into the assessment of policies, plans and programs. Without proper engagement with the community and incorporation of feedback, strategic assessments are unlikely to lead to more efficient development assessment and approval processes for major projects, as stakeholders lack ‘buy-in’ to decisions.

Need to consider alternative options

Strategic assessment provides an opportunity to evaluate and compare the impact of alternative options in the development of a new policy, plan or program. This might involve, for example, examining the impacts of locating key infrastructure in a number of alternative locations. For the proper consideration of alternatives it is essential that strategic assessment be undertaken in the early stages of the planning process. The consideration of alternative options is assisted by the availability of high quality baseline data on environmental, heritage and other assets.

Benefits come from integration with the broader planning process

Rather than running strategic assessment as a parallel but separate process, which can lead to duplication of effort, it should be integrated with the planning process. This will help to ensure that environmental, cultural and economic impacts are properly considered, which should help to ensure better outcomes for the community. To avoid wasting time and resources, it is critical to ensure that strategic assessment focuses on the key issues early in the process. By integrating strategic assessment into the planning process, efficiencies may be generated through the pre-assessment of certain types of development. Where there is a lack of integration, stakeholders may view strategic assessment as a burden with little or no added value.

Source: Appendix F.

The Nature Conservation Society of South Australia (NCSSA) commented:

The NCSSA supports the proposal to enhance the efficiency and effectiveness of the DAA processes through the use of strategic assessments. ... The NCSSA considers the current arrangements, in relation to assessments of the cumulative impact of major projects on protected species, grossly inadequate. (sub. 37, p. 3)

The Wentworth Group of Concerned Scientists argued that strategic assessments could be used to consider all environmental values together:

Strategic assessments can be used to identify matters of both national and state environmental significance therefore streamlining and simplifying development planning by enabling all environmental values to be considered together. (sub. 1, p. 7)

The Australian Network of Environmental Defender's Offices (ANEDO) argued that strategic assessment presented both opportunities and risks:

ANEDO is concerned that the Australian Government's intent to increase the use of strategic environmental assessment (or SEA) may place emphasis on 'streamlining' approvals, without the additional safeguards recommended in the Hawke Review. As an emerging field with a variety of implementation options, SEA presents new opportunities, but also a number of risks. (sub. 14, pp. 26–7)

Further, in response to the draft report, ANEDO stated:

SEA should not replace individual project assessment. The use of SEA in conjunction with project assessment will still lead to efficiencies because major environmental issues are identified and considered upfront. (sub. DR92, p. 8)

A number of business groups pointed to the potential for strategic assessments to reduce regulatory burdens. The Chamber of Minerals and Energy of Western Australia stated that it:

... support[s] the use of strategic assessments where these approaches reduce regulatory burden and provide for positive environmental outcomes. Ideally, these strategic environmental approaches should be integrated with strategic planning at the landscape scale. (sub. 18, p. 5)

The Business Council of Australia supported strategic assessments, but also argued that they can have a downside:

Strategic assessments, as are occurring in environmental regulation, are also a good alternative [to project based assessment], and should be prioritised. The strategic assessments can, however, take a long time to complete, sometimes many years, and would need to be regularly updated to incorporate new information or changed circumstances. (sub. 43, p. 15)

Advantages and disadvantages

There can be significant advantages in undertaking strategic assessments. As discussed below, they can lead to improvements in policies, plans and programs that in turn produce better environmental outcomes. They can also enable project-level DAA processes to be cheaper, faster and more certain. But there are some potential disadvantages, mainly associated with the time and cost of conducting a strategic assessment and problems that arise where there is a lack of integration with planning and project-level processes. Ultimately, how a strategic assessment is designed and conducted, and how it is integrated with the overall DAA process, will determine whether it is beneficial.

Better understanding and management of cumulative impacts

The ability of strategic assessments to consider cumulative environmental (and other) impacts is widely recognised. For example, the Hawke Review found that:

... strategic assessments and other landscape-approaches offer feasible, equitable and cost-effective ways of addressing the cumulative impacts of actions in an area or region. (Hawke 2009, p. 78)

Macintosh (2013) argued that project-based assessment was incapable of dealing adequately with cumulative impacts and that an important benefit of strategic assessment was that:

... it can capture the cumulative impacts of multiple actions and ensure that there is an alignment of objectives at all levels of government decision making (ie. policy, planning, program and project). (2013, p. 543)

Noble (2008, p. 68) also noted that it is difficult to properly assess cumulative impacts within the constraints of the individual project approval process, and that having a strategic assessment framework is useful to 'address the nature and underlying sources of cumulative change'.

There are two main elements to this advantage. First, strategic assessments can consider all sources of cumulative effects on the environment. For example, the Great Barrier Reef strategic assessment draft report has found that activities contributing to a decline in water quality (which has a range of impacts on the reef) include agriculture (very high effect), urban and industrial development (high effect) and tourism development and use (low effect) (Queensland Government 2013a). Such information can be used to develop an integrated policy response focused on achieving better outcomes in a cost-effective manner. Project-level assessment, by focusing only on one new development at a time, can

lead to higher cost mitigation actions that may be insufficient to properly address the problem.

Second, strategic assessments can focus attention on overall effects, sensitivities, and capacities of the receiving environment (Dales 2011). For example, a strategic assessment of a groundwater resource might determine that a certain quantity of water can be extracted sustainably, but that above this threshold the ecological health of wetlands will begin to deteriorate. Such an assessment can lead to the setting of an overall extraction limit that strikes a balance between the benefits from extraction and the benefits from conserving groundwater. By contrast, project-level assessments may be unnecessarily duplicative because the effect of extraction on wetlands needs to be revisited for each new project. Also, due to time and other constraints, they may fail to identify important thresholds or properly assess costs and benefits.

However, it should be noted that the assessment of cumulative impacts is an area where methodology is still developing, and it can be challenging even within a strategic assessment framework (Stoeglehner 2010). For instance, it may be difficult to assess cumulative impacts where there are a range of individual projects (either planned or completed) with uncertain impacts, or where future development is uncertain. One potential solution to this problem, as suggested by the Queensland Coordinator-General, is to use a scenario-based approach to cumulative impact assessment:

In this approach certain defined scenarios, based on the current portfolio of projects, and making reasonable estimations for known projects, are developed for alternative analysis to determine a range of credible impacts. This would be used as a more reliable guide to impact mitigation and conditioning. (2010a, p. 72)

In the view of the Commission, considering cumulative impacts is a leading practice appropriate for major project assessment and approval processes. In most cases this is best done as part of a strategic assessment process. Where this is not feasible, project-level assessment should attempt to consider cumulative impacts to the extent possible. As more robust frameworks for cumulative impact assessment are developed, these should be incorporated into the assessment process.

More streamlined project-level DAA processes

Strategic assessments can lead to greater certainty, lower costs and shorter timeframes for project-level DAA processes in three main ways. First, strategic assessments conducted under the EPBC Act can remove the need for Australian Government assessment and approval of some subsequent projects (section 11.2).

Second, strategic assessments used to guide planning (conducted either under the EPBC Act or by individual jurisdictions) can help to resolve tradeoffs between development and environmental and other values, and provide more certainty about which areas are suitable for development. By raising the discussion above the individual project level, the appropriate level of development can be considered from a strategic perspective.

In some cases, this could lead to pre-approval for some developments. For example, the Melbourne Urban Growth Boundary strategic assessment (discussed later) delivered a single environmental approval for both Victorian and Commonwealth environmental regulations (DEPI (Vic) 2013a). In others, project-level DAA processes would still apply, but may be less extensive. This streamlining of DAA processes would create efficiencies for proponents, community stakeholders and governments.

The extent to which project-level assessment can be reduced will depend on the scope and nature of the strategic assessment, as well as the specific nature of the proposed development. Where the range of possible future developments in a region being strategically assessed is more predictable, it may be easier to generate efficiency savings through pre-approval. For example, within and around Australia's capital cities, planners can have reasonable confidence that there will be continued growth in housing stock, as well as of roads, airports, public transport, hospitals, schools and other infrastructure necessary to facilitate urban development. Accordingly, in these regions strategic assessment can be used to provide pre-approval for the more predictable and planned elements of urban development.

In regional and remote areas, the type and location of possible developments may be less certain. For instance, the location, size and nature of future resource projects may be difficult to predict, particularly as new extraction technologies such as coal seam gas develop. In addition, government plans for infrastructure in regional and remote areas may be less developed. As a result, strategic assessment may be less likely to provide opportunities to pre-approve activities in some cases. However, strategic assessment may be able to be usefully employed in the lead up to a series of identified resource-related projects in a region.

Third, strategic assessments conducted in the development of environmental and resource policy can establish clear requirements that projects need to meet, and remove the need for detailed assessment of particular issues at the project level. For example, strategic assessment of biodiversity values can reduce the need for on-site assessment, lead to greater certainty about which areas of native vegetation can be cleared, and the likely cost of any compensating actions (such as providing offsets). These issues are discussed further in section 11.2 and appendix F.

Better outcomes due to early consideration of issues

The potential environmental benefits from the early consideration of issues were recognised by the Wentworth Group of Concerned Scientists:

Rather than leaving the assessment until after a plan, policy or program has been finalised and actions set in place, strategic assessments completed either before, or even at the same time as, the development of a major plan or policy are more likely to deliver better environmental outcomes. (sub. 1, p. 7)

Macintosh (2013, p. 544) also refers to the potential for strategic assessments to provide benefits because ‘environmental issues, and less environmentally damaging alternatives, are considered throughout the decision making chain’.

By incorporating the consideration of project alternatives at an earlier stage in the decision-making process, strategic assessment potentially allows for a broader consideration of development options than project-based assessment. Significantly, strategic assessment allows for assessment of alternatives to a project, rather than just of alternative options for a project. This may allow environmental problems to be avoided through planning and design, rather than relying on mitigation measures to reduce the impact of development on the environment.

Provision of better baseline data

To manage environmental and other assets well, it is necessary to understand the effect of development and other processes on their condition. This gives rise to a need for baseline data on the condition of assets in the absence of new development. Preferably, this dataset would cover not just natural assets, but also economic, historical and cultural assets where present. In many cases, monitoring programs already exist at national, regional and local levels, but there are often important gaps in the information collected through these processes.

Donnelly, Prendergast and Hanusch (2008) found that it is not always clear what data are required to monitor and manage environmental assets, or who should be responsible for collecting data. In these cases, the strategic assessment process can be useful for identifying information gaps and establishing processes to collect the relevant data to establish an environmental baseline. For strategic assessments under the EPBC Act, the availability of information and data requirements are generally considered at an early stage (DSEWPAC (Cwlth) 2012a).

Without strategic assessment, data gaps may only be identified during the assessment of an individual project, and surveys to collect data at this stage can be costly and time consuming. For example, some environmental data are best

collected at a particular time of year and this can add to delays. A further issue is that data collected for a project may not be available to subsequent project proponents, leading to a duplication of effort. In outlining their support for strategic assessment, the Business Council of Australia stated:

... baseline environmental data that can be shared and which can avoid costly new research is useful if it is robust and independent and updated. (sub. 43, p. 15)

The Commission considers that the collection of baseline data is an important leading practice for both improving environmental outcomes and improving the efficiency of DAA processes. Strategic assessment can be a useful means for improving baseline data and making it available to both governments and proponents to assist them plan for the future. That said, the cost and benefits of data collection need to be considered and strategic assessments can still be worthwhile even where environmental baseline data are not comprehensive.

Costly and time consuming process

One of the potential disadvantages of strategic assessment is that it can be costly and time consuming. For example, more than five years after agreement was reached to conduct the Browse Basin LNG Precinct strategic assessment, the Australian Government has not verified whether the requirements of the strategic assessment have been met (DSEWPAC (Cwlth) 2012j). The Australian Government's Department of Sustainability, Environment, Water, Population and Communities (DSEWPAC) reported that a number of factors have contributed to the delays and that the foundation proponent has now withdrawn (sub. DR88). Some other more recent strategic assessments have been completed in under two years (table 11.2).

Strategic assessment may also be problematic for project development. As previously noted by the Commission (PC 2011c), the benefits of strategic assessment to all stakeholders are likely to be highest if it is undertaken in conjunction with the broader strategic land use planning for an area and completed before anyone seeks to commence development in that area. However, an assessment that takes several years to complete may end up costing more than allowing the relevant area to be developed through individual project approval processes if development is delayed while the assessment takes place.

Governments can, therefore, face a difficult choice when considering how to manage development during a strategic assessment process. One option is to place a moratorium on development during the assessment process, which is likely to maximise the potential environmental benefits of the assessment but potentially delay the development of specific projects. An alternative option is to allow

development to continue, subject to project-by-project approval while the strategic assessment takes place. However, this may diminish the value of the strategic assessment process as it limits its capacity to consider cumulative effects and alternative development options.

Additional layer of regulation

There is a risk that where strategic assessment is not undertaken with a focus on reducing the unnecessary regulatory burden of the DAA process for major projects, that it may lead to an additional layer of ‘green tape’. For instance, a government that undertakes a strategic assessment while retaining all the requirements of its existing project-based DAA process may increase costs for both project proponents and the government itself, while not necessarily producing better outcomes.

Some participants were generally supportive of strategic assessments, but retained concerns about the possibility of them increasing regulatory burdens. For example, the Metropolitan Redevelopment Authority of Western Australia stated:

There is a concern that strategic assessment may create another layer of regulatory control, further reducing the efficiency of development assessment without providing significant benefit. (sub. DR66, p. 2)

The Queensland Government submitted:

Few of the strategic assessments undertaken to date have delivered significant classes of action and most have taken years and years and delivered little benefit. In many ways, strategic assessments simply duplicate the existing state and local planning processes. (sub. 47, p. 3)

However, DSEWPAC (sub. DR88) reported that this does not reflect its experience with strategic assessments. Evidence presented later in this chapter demonstrates that at least some strategic assessments under the EPBC Act have delivered significant benefits.

Limited potential to reduce the need for subsequent consultation

Strategic assessments often entail broad community consultation, and this enables stakeholders to be engaged in the decision-making process at an early stage. However, this may not substantially reduce subsequent consultation regarding individual projects. For example, Runhaar and Driessen in an analysis of four Dutch case studies found that:

The cases did not provide any evidence of SEAs making project environmental impact assessments redundant in subsequent decision-making. In all cases, the struggle with stakeholders will start or continue in the implementation stage of the plan. (2007, p. 11)

One possible reason for this occurring is that members of the public may regard strategic assessments as being abstract, and so may prefer to engage with the more concrete nature of project-level issues (Shi 2011). More generally, evidence suggests that this outcome most commonly occurs where stakeholders lack ‘buy-in’ to the strategic assessment process. This can result in limited community acceptance of the strategic assessment, and also poor integration of the assessment into the decision process. Commenting on the use of SEA in Ireland, the Irish Environmental Protection Agency found:

Many people perceive SEA as being time- and resource-intensive, and a check list to be completed in order to advance a plan. Where this happens, the SEA and plan-making processes may run in parallel but there is no meaningful integration of SEA and plan-making. Getting buy-in from managers and decision-makers is crucial to SEA integration and effectiveness. (2012, p. 51)

Cost recovery can be impractical

As a general rule, cost recovery for government products and services is desirable where: it can be achieved efficiently and cost effectively; the beneficiaries of the product or services are a narrow and identifiable group; and charging is consistent with policy objectives. Under a project-by-project assessment process it is relatively simple to identify the party from which costs can be recovered, as the proponent is clearly the party receiving the private benefit. However, it is more challenging to identify the beneficiaries of a strategic assessment as these assessments apply to future actions and may be carried out by proponents that are not yet known.

Given the nature of strategic assessment, it is often undertaken by government on behalf of the community. As such, the strategic assessment process shifts the cost of environmental assessment from individual project proponents to the government. This may be partially justified on efficiency grounds — one holistic assessment for a potentially large region as opposed to a number of individual assessments that may duplicate the same information, and may not consider cumulative impacts of development.

The Hawke Review suggested that it was challenging to identify the beneficiaries of a strategic assessment and that:

While it is possible to charge State, Territory or local governments for the assessment of plans, there is a real chance that introducing cost recovery would be a disincentive to undertaking strategic assessments. If the Australian Government decides that encouraging strategic assessment is a policy objective, cost recovery may not be appropriate at this stage. (Hawke 2009, p. 288)

In the view of the Commission, while it may be appropriate for governments to seek to recover some of the costs of strategic assessments where they generate a private benefit for developers, implementing cost recovery in an efficient and cost-effective manner may be difficult. The process of determining the shares of benefits accruing to developers and the community more broadly from a successful strategic assessment, and then allocating that proportion of the total cost across developers is likely to be impractical in most cases.

11.2 Strategic assessments in practice

The variety of terms used to describe strategic assessment-type processes is broad and there are a number of policy frameworks at the Commonwealth, state and territory level that allow for different strategic assessment approaches. However, as noted by a number of commentators, there are few mechanisms for formal strategic assessment in Australia, and those that do exist tend to be discretionary rather than a compulsory part of the planning process (Ashe and Marsden 2011; Kelly, Jackson and Williams 2012).

Strategic assessment under the EPBC Act

The main avenue for strategic assessments to occur under Commonwealth jurisdiction is through the provisions of the EPBC Act (box 11.2). This provides an alternative pathway to project-level assessment for considering matters of national environmental significance. Strategic assessments conducted under the EPBC Act can remove the need for further Commonwealth approval of some subsequent projects in a defined region. They may also reduce the need for project-level assessment and approval by State and Territory Governments.

A number of reviews have highlighted how strategic assessments can provide a benefit to the community. These include the Hawke Review, which recommended that they play an expanded role, finding that:

Compared to project-specific assessment, these [strategic assessment] approaches have the capacity to address multiple impacts on matters of national environmental significance by different parties or projects, and consider impacts over longer temporal or larger spatial scales. (Hawke 2009, p. 162)

The Australian Government's response to the Hawke Review noted:

... strategic approaches will better protect matters of national environmental significance, while supporting sustainable development. Strategic approaches also have significant benefits to proponents by increasing certainty and improving investment

opportunities at an early stage, and by reducing the need for individual project referrals. (Australian Government 2011, p. 10)

Box 11.2 Strategic assessments under Commonwealth law

The *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act) provides the opportunity for an assessment of policies, plans and programs (commonly referred to as a strategic assessment). It does this through the operation of s.146 of the Act, whereby the Minister may agree with a person responsible for the adoption or implementation of a policy, plan or program that an assessment be made of the impacts of actions under the policy, plan or program on a matter protected by Part 3 of the EPBC Act (that is, a matter of national environmental significance). Section 146(1A) of the Act also allows for the assessment of the impacts of actions not protected by Part 3 which are to be taken in a state or territory, provided there is agreement between the Environment Minister and the appropriate State or Territory Minister to do so. While s.146 allows for a strategic assessment, its use is discretionary.

In addition, there are some other mechanisms available under Commonwealth law that allow for certain types of developments to be assessed in a strategic manner. These include the airport Master Plans required under the *Airports Act 1996* (Cwlth). An airport Master Plan is a blueprint for the future coordinated development of an airport, and must be approved by the Minister for Transport. The Minister has access to expert independent advice in the assessment of airport Master Plans, particularly in relation to the alignment of a plan with other plans for the region, and other technical advice relating to areas such as environmental issues (especially noise), traffic, economic or urban planning impacts.

EPBC Act strategic assessment process

Strategic assessments under the EPBC Act are typically undertaken by the Department of the Environment and the relevant State or Territory Government. However, the Australian Government can also partner with local governments, members of the urban development industry and mining and resource companies. For example, two strategic assessments have commenced in which resource companies are the partners (table 11.2).

Before a strategic assessment begins, a scoping exercise is generally undertaken to develop a common understanding on expectations of the assessment, the availability of information, data requirements and other matters. Following scoping, the terms of reference for the strategic assessment report is negotiated between the partners and may be put out for public comment before being finalised. The terms of reference forms part of the strategic assessment agreement, along with other elements, such as the process for preparing the policy, plan or program to be

assessed and governance arrangements for the assessment (DSEWPAC (Cwlth) 2012a).

Next, there is an assessment and endorsement of the policy, plan or program. A requirement for endorsement is that adequate monitoring, reporting and enforcement provisions are in place to demonstrate that commitments to protect and manage matters of national environmental significance will be met.

Following endorsement, the Commonwealth Minister for the Environment may approve actions (or classes of actions) that are associated with the endorsed policy, plan or program. It is this step that potentially allows development to proceed across a large area without further need for individual developments to be referred to or approved by the Commonwealth Minister. The approval of actions may be iterative, with different classes of actions approved over time, as science or management evolves (DSEWPAC (Cwlth) 2012a).

As of November 2013, 16 strategic assessments had been commenced, six of which have been endorsed and had at least some classes of action approved (table 11.2). DSEWPAC (sub. 55) reported that the number of strategic assessments had doubled over the past two years. This increase followed the Hawke Review's recommendation for greater use of strategic assessments.

Outcomes of EPBC Act strategic assessments

DSEWPAC reported that over 850 EPBC Act referrals have been avoided through the strategic assessments completed to date (sub. 55, p. 14). According to Access Economics (2011), the strategic assessment undertaken for Melbourne's Urban Growth Boundary removed the need for referral of approximately 252 individual projects over the life of the approved program, and also reduced the monitoring and compliance costs for those individual projects. The Victorian Department of Environment and Primary Industries reported that these cost savings were in the order of \$500 million (box 11.3). The assessment process was also reported to have provided a useful framework to consider cumulative environmental impacts, as well as facilitating community participation in the planning process (DSE (Vic) 2009).

Table 11.2 Strategic assessments under the EPBC Act

<i>Commenced</i>	<i>Jurisdiction</i>	<i>Strategic assessment</i>	<i>Status</i>	<i>Approval of classes of action</i>
6 Feb. 2008	WA	Browse Basin LNG Precinct	In progress	..
16 Sep. 2008	ACT	Molonglo Valley Plan	Endorsed: 7 Oct. 2011	20 Dec. 2011 ^a
4 Mar. 2009	Vic	Melbourne Urban Growth Boundary	Endorsed: 2 Feb. 2010	11 Jun. 2010 ^b , 8 Jul. 2010 ^c , 5 Sep. 2013 ^d
11 Nov. 2009	NSW	Western Sydney growth centres	Endorsed: 20 Dec. 2011	28 Feb. 2012
15 Jan. 2010	SA	Fire management policy	In progress	..
5 Feb. 2010	Tas	Midlands Water Scheme	Endorsed: 11 Apr. 2011	31 May 2011 ^e , 18 Apr. 2012 ^f , 13 Nov. 2012 ^g
25 Feb. 2010	Qld	Mount Peter Master Planned Area	In progress	..
18 Aug. 2011	WA	Perth and Peel Region	In progress	..
16 Nov. 2011	NSW	Heathcote Ridge, West Menai	Endorsed: 30 May 2013	24 Jun. 2013
16 Feb. 2012	Qld	Great Barrier Reef (marine & coastal)	In progress	..
14 Aug. 2012	NSW	Lower Hunter (sustainable regional development)	In progress	..
18 Sep. 2012	WA	BHP Billiton Iron Ore Expansion for the Pilbara Region	In progress	..
20 Sep. 2012	NSW	Upper Hunter (biodiversity plan for coal mining)	In progress	..
2 Oct. 2012	ACT	Gungahlin Urban Development	Endorsed: 20 Jun. 2013	17 Jul. 2013
18 Dec. 2012	WA	Hammersley Iron Pty Ltd (Rio Tinto) iron ore expansion for the Pilbara	In progress	..
16 Aug. 2013 ^h	Cwlth	Offshore petroleum activities	In progress	..

^a East Molonglo component. ^b Regional rail link project. ^c 28 precincts within Melbourne's urban growth boundary. ^d Western, North-western and Northern growth corridors (approvals are still outstanding for the South-eastern growth corridor and the Ring Road) ^e Lower South Esk component. ^f Arthur's Pipeline Irrigation Scheme component. ^g Water Access System component. ^h Date that the draft terms of reference were released for public comment. .. Not applicable.

Sources: DSEWPAC (2013c, 2013d).

Box 11.3 **Melbourne Urban Growth Boundary strategic assessment**

The Commonwealth Environment Minister signed an agreement with the Victorian Government in 2009 to undertake a strategic assessment of the expansion of Melbourne's urban growth boundary. The assessment covered impacts on matters of national environmental significance covered by the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) for a number of 'small' site-based actions across a large urban area, as well as two large infrastructure projects: the Tarneit section of the Regional Rail Link; and the Outer Melbourne Ring/E6 Transport Corridor (these actions are referred to collectively as the Program).

The goal of the assessment was to cut red tape and streamline environmental assessments in implementing the Program. The strategic assessment approach also provided a framework to account for long-term and cumulative environmental impacts and facilitate community participation in the planning process.

Assessment process

The assessment considered a broad range of environmental assets within the study area. All listed threatened species and ecological communities that could potentially occur within the study area and surrounds were considered. A total of 25 fauna species and 32 flora species listed or nominated for listing under the EPBC Act were identified as potentially occurring within the Program area. Most of these were considered to have a low likelihood of occurrence, while the impact of the Program on others was not considered to be significant. However, for two ecological communities and six threatened species, a significant impact was considered likely.

Both the potential impacts of the Program and mitigation options were considered as part of the assessment process. The mitigation of impacts was based on a hierarchy of avoidance, minimisation, rehabilitation, re-establishment, and offset.

The assessment process also involved substantial public participation. This included the establishment and regular meetings of an environmental reference group, letters being sent to 15 000 landowners and occupiers affected by the Program and the holding of eight public information sessions, with participation by over 2000 people.

Outcomes

In February 2010, the Commonwealth Environment Minister endorsed the Program covering the expansion of the Urban Growth Boundary and the alignments for the Regional Rail Link and the Outer Metropolitan Ring. To enable urban development to occur, actions for the development of section 2 of the Regional Rail Link and the 28 precincts within the current Urban Growth Boundary were approved.

The Minister also approved prescriptions for seven separate matters of national environmental significance (covering the six species identified as likely to experience a significant impact, and a separate prescription for migratory species).

(Continued next page)

Box 11.3 (continued)

These prescriptions set out the requirements for protection that must be followed in preparing precinct structure plans and for individual developments. Approvals are still outstanding for the South-eastern growth corridor and the Ring Road.

The Victorian Government states that the key outcomes of the strategic assessment have been:

- a single, simplified approvals process under State and Commonwealth legislation applied early in the planning cycle
- increased certainty and reduced cost for development proposals that meet the approval conditions (with estimated cost savings of \$500 million over 30 years, arising from reductions in holding costs, information costs and administrative burden)
- a supply of native vegetation and species offsets that developers in the growth areas can purchase from the Victorian Government
- creation of 15 000 hectares of new grassland reserve west of Melbourne and a 1200 hectare grassy woodland reserve north-east of Melbourne, to offset clearing for Melbourne's growth
- adherence to the principles and standards required under Victoria's Native Vegetation Management Framework and species regulations.

The Victorian Government has committed to monitoring and full public reporting on the implementation of the Program and its approval conditions under the EPBC Act. Implementation has been progressed through the *Biodiversity Conservation Strategy for Melbourne's Growth Corridors*. Habitat compensation arrangements and fees relating to this strategy were published in August 2013.

Sources: DEPI (2013a); DSE (Vic) (2009, 2013); DSEWPAC (2012i).

A strategic assessment may also be undertaken to investigate the adequacy of existing policies, plans and programs, as is the case for the Great Barrier Reef strategic assessment that is currently underway (box 11.4). This assessment is considering matters of national environmental significance in the Great Barrier Reef World Heritage Area and adjacent coastal zone. The strategic assessment will be used to identify, plan for and manage existing and emerging risks to assist in the ongoing management of the Great Barrier Reef and adjacent coastal zone. The assessment also addresses the UNESCO World Heritage Committee's recommendation of July 2012 that the Australian Government undertake a comprehensive strategic assessment of the Great Barrier Reef World Heritage Area (GBRMPA nd).

One challenge that this assessment faces is that some projects have commenced in and around the Great Barrier Reef, and approval decisions for further developments on a project-by-project basis will continue while the strategic assessment is

undertaken. There are also long-established activities, such as grazing and cropping, that can have environmental impacts that need to be considered. Another challenge is integrating the coastal and marine components of the assessment.

Box 11.4 Great Barrier Reef strategic assessment

In February 2012, the Australian and Queensland Governments agreed to undertake a strategic assessment of the Great Barrier Reef World Heritage Area (GBRWHA) and adjacent coastal zone. The assessment has a marine component and a coastal component. The marine component is being undertaken by the Great Barrier Reef Marine Park Authority (GBRMPA), and looks at arrangements to manage and protect the Great Barrier Reef. The Queensland Government is leading the coastal component, which looks at coastal development (such as planning for urban, industrial and port development).

According to the Department of Sustainability, Environment, Water, Population and Communities (2013b), the assessment will:

... help identify, plan for and manage existing and emerging risks to ensure ongoing protection and management of the unique environmental values of the Great Barrier Reef World Heritage Area (GBRWHA) and adjacent coastal zone. This will be achieved by:

- investigating the adequacy of the existing management arrangements for the GBRWHA
- assessing current and future development policies and planning in the GBRWHA and the adjacent coastal zone and analysing likely direct, indirect and cumulative impacts.

The Queensland Government has suggested that the assessment has the potential to streamline decision making for development within and adjacent to the GBRWHA by removing the need for Commonwealth approval of individual projects.

In February 2012, the Queensland Government and GBRMPA sought public comment on the draft terms of reference for the assessment. The Queensland Government noted that many of the submissions did not address the terms of reference directly but instead argued for a moratorium on development while the strategic assessment was completed. In response, the Government stated that proponents would not be prevented from referring individual projects for assessment under the existing processes while the strategic assessment was underway. However:

Proponents who refer an action during this period will be expected to meet a high standard of assessment in terms of the level and rigour of information provided, including the consideration of cumulative impacts. (Queensland Government 2012, p. 18)

A final terms of reference was approved by the Commonwealth Environment Minister in August 2012. Draft Program and Strategic Assessment reports were published for each component of the assessment in November 2013. These reports examine the effectiveness of measures that are currently in place to protect matters of national environmental significance, and set out new (or revised) measures and a range of forward commitments (such as the development of a long-term sustainability plan for the GBRWHA). Consultation on the draft reports will run until 31 January 2014.

Sources: DSEWPAC (2013b); GBRMPA (2013); Queensland Government (2012).

The Commission notes that only a small number of EPBC Act strategic assessments have so far been completed. This makes it difficult to fully evaluate the role that they can play in improving the approval process for major projects. One observation is that, of the strategic assessments under the EPBC Act successfully approved so far, all except one (the Midlands Water Scheme) have been of urban areas, or areas of proposed urban development. This supports the Commission's earlier observations on the importance of baseline data (as data on environmental assets within or near urban areas is at a relatively high level of resolution), and that future developments are usually more predictable in an urban context. However, this is not to suggest that strategic assessment is not worthwhile in a rural or remote context, but the process may take longer to complete.

Since the Hawke Review was completed, DSEWPAC has published a guide to undertaking strategic assessment (DSEWPAC (Cwlth) 2012a). This is a positive development, but it will be important that this document is further developed as experience is gained and new issues arise. For example, the NSW Minerals Council has identified what they see as the need for guidelines specifically addressing issues for strategic assessments in brownfield areas (sub. DR93).

Overall, early results, while limited, would suggest that EPBC Act strategic assessments can play a positive role in improving social, economic and environmental outcomes and help create a more efficient DAA process. Similar to the Hawke Review, the Commission considers that strategic assessments are more likely to generate positive outcomes when they are integrated with the early stages of the planning process.

State and Territory Government approaches to strategic assessment

The use by jurisdictions of strategic assessments as an input to planning, and as an input to environmental and resource management policy, is considered below.

Use in planning

The application of strategic assessment by State and Territory Governments to help factor environmental considerations into strategic land-use and development plans is limited and uneven (table 11.3). While environmental and heritage issues are often considered in strategic planning processes, this is usually done in a partial way. Some formal mechanisms exist for strategic assessment, but these are generally infrequently used. Consequently, project-level assessment remains the cornerstone of DAA processes in Australia.

Table 11.3 Use of strategic assessment in Australian States and Territories

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Jurisdiction has been involved in a completed strategic assessment under the EPBC Act	✓	✓	x	x	x	✓	x	✓
Jurisdiction is currently involved in a strategic assessment under the EPBC Act	✓	x	✓	✓	✓	x	x	✓
Jurisdiction has a legislative mechanism that compels the use of strategic assessment	x	x	x	x	x	x	x	x
Jurisdiction has a formal, discretionary mechanism to initiate a strategic assessment or SEA	x	x	x	x	✓ ^a	x	x	✓
Jurisdiction incorporates some aspects of strategic assessment into its DAA process	✓	✓	✓	✓	✓	✓	x	✓

^a In Western Australia, this is referred to as a ‘strategic proposal’, undertaken by the Western Australian Environmental Protection Agency.

Western Australia and the ACT are the only jurisdictions that have a formal mechanism for initiating a strategic assessment. In Western Australia, the Environmental Protection Authority can assess a ‘strategic proposal’ (compromising a number of individual projects) as an alternative to project-by-project assessment. In the ACT, a strategic assessment may be undertaken when a major policy matter is proposed, such as a major variation to the Territory Plan. Appendix F provides further details.

Use in environmental and resource management policy

While most of the focus on strategic assessment relates to planning, it is also important for the development of sound environmental and resource management policies. Often, the type of assessment required is not commonly termed ‘strategic assessment’, but rather is simply considered part of best practice policy making. Assessments of this kind have been used to improve regulations that impact on the assessment and approval of major projects.

For example, through the National Water Initiative (NWI) considerable effort has been put into increasing the number and quality of water plans across Australia, which has required a strategic approach to assessing water resources. High-quality water plans can ensure an appropriate balance between economic, social and environmental outcomes, and reduce the need for detailed assessment of the water-related impacts of individual projects (particularly for resource-related projects). The Minerals Council of Australia stressed the importance of the NWI:

... adequate resources must be provided to fully implement the NWI, including the development of ‘fit for purpose’ planning and entitlement arrangements for the minerals industry where these are not adequately addressed by the existing generic water policies and practices. (sub. 33, p. 30)

Another example is the ‘strategic assessment’ conducted for the review of Victoria’s native vegetation clearing regulations (which involve the use of offsets, as discussed in chapter 8). This assessment resulted in the development of a model that brings together information about species presence, habitat quality and connectivity, to determine relative environmental value across the landscape. While the Commission has not independently evaluated the model, it would appear that it has enabled the regulations to be reformed in ways that are likely to improve the predictability and speed of decision making and ensure that offsets more cost-effectively target environmental benefits. This has the potential to provide benefits to proponents of major projects and to the wider community.

Appendix F provides more information on strategic approaches to both water planning, and native vegetation clearing regulations.

The Commission’s assessment

While strategic assessment is still a developing area of policy, there is evidence to suggest that it can be a valuable tool for improving DAA processes for major projects. It has the potential to reduce the scale and cost of subsequent project-based assessments of major projects. Strategic assessment can also improve environmental outcomes by considering cumulative impacts at the appropriate scale. Consistent with the Hawke Review, the Commission acknowledges that there are potential risks, but if properly managed these are likely to be outweighed by the benefits of strategic assessment in many circumstances.

The use of strategic assessment under the EPBC Act has increased over recent years, which is a positive development. It is important to learn from this experience to enable strategic assessment to more fully realise its potential in Australia. As discussed in chapter 7, there is merit in pursuing both strategic assessments and bilateral agreements so as to reduce duplication between State and Commonwealth processes.

Under the EPBC Act, strategic assessments are used to try to reconcile the overlapping objectives of different levels of government. This gives them a particular character and adds to the difficulty of the task. Strategic assessments conducted solely under State and Territory Government jurisdiction are freer of this type of political tension and may, in time, prove to be highly worthwhile.

While strategic assessment and strategic environmental assessment are terms most commonly used within the planning sphere, assessments of a strategic nature are also important to the development of sound environmental and resource management policies. Such policies can improve the operation of DAA systems by

establishing clearer and more predictable requirements for projects and by reducing assessment times.

RECOMMENDATION 11.1

Drawing on the lessons learned to date from the use of Strategic Assessments, governments should employ the tool in circumstances where it is likely to produce a reduction in the costs of project approval, while delivering environmental and other regulatory outcomes that are equal or superior to those that are achieved under other processes.

11.3 Strategic planning

Government planning systems guide decision making about the future allocation and development of land. Strategic planning gives structure to this process by identifying long-term goals and targets, and then determining the best approach for achieving them (PC 2011c). The Development Assessment Forum offered the following perspective:

Strategic planning, the level at which long-term objectives, policies and directions are chartered, precedes development planning and operational planning ... [It is] a way of achieving a balance between conflicting objectives or priorities and resolving the conflicts between economic, social, environmental and cultural imperatives. (2001, p. 8)

Strategic planning is relevant to this study because it can assist in streamlining and strengthening major project DAA processes. Strategic planning can also facilitate major projects where it safeguards corridors for future use (for transport or green space for example), or where it prevents encroachment around strategic infrastructure (for example, by providing a buffer zone around ports and airports).

What is strategic planning and how can it help?

Typically a project proponent must have ‘regard’ to the relevant strategic plans in their project application or environmental impact statement. To illustrate, Centrex’s public environment report concerning a proposal to develop a port at Sheep Hill in South Australia included discussion of how the project was consistent with the objectives of the SA Strategic Plan, the Regional Plan of the Eyre Peninsula and other related plans (Golder 2012). The South Australian Government’s subsequent assessment report on the project included similar assessments on consistency with these plans (DPTI (SA) 2012).

Comparable requirements operate in other jurisdictions. For example, the Queensland Government (sub. 47) reported that proponents in that State are required to incorporate and respond to strategic planning objectives in their environmental impact statement.

This process of considering the consistency of a project with strategic plans can be a positive one. In some cases, proponents may be able to use strategic plans to help them design projects that are likely to be less contentious and have fewer assessment issues than otherwise. Business SA stated:

Transparent strategic planning by governments could assist some proponents of major projects, particularly in terms of knowing where their project fits in terms of broader economic growth and development goals, as well as possible constraints. (sub. 4, p. 5)

Similarly, ElectraNet argued:

Greater use of pre-planning and infrastructure corridor / site reservation through strategic land use planning processes should reduce the level of uncertainty and risk for both proponents and other stakeholders in respect to final assessment and approval processes. (sub. DR63, p. 3)

NCSSA (sub. DR95) and ANEDO (sub. DR92) pointed out that strategic plans can also be used to establish protected areas where certain types of development are prohibited, and set environmental limits on development in other areas.

There is the possibility that strategic planning can result in some types of development not needing to go through DAA processes (so called ‘as of right’ development). While this is less likely to be feasible or desirable for major projects, there may be aspects of such projects that, if consistent with strategic plans, could be made exempt from the need for assessment and approval.

However, strategic planning does not always lead to more efficient DAA processes for major projects, as pointed out by South Australian State Government Departments:

Strategic planning is a statutory requirement of the *Development Act 1993* in South Australia, however this does not necessarily assist in reducing the time and cost of major development processes. (sub. 51, p. 27)

Further, the potential for strategic planning to assist with subsequent DAA processes can be lower for resource-related major projects. The Northern Territory Government observed:

In the case of mining projects, and to a lesser extent mineral processing projects the site of development is driven by the location of the resource to be developed, which cannot be predicted and planned for ahead of discovery and appraisal. (sub. 46, p. 5)

This assessment was shared by Xstrata Coal:

Whilst strategic plans have the potential to provide more certainty and ensure that land uses are appropriately located, the primary limitations of such plans are that they can take many years to prepare and can never fully contemplate or predict the likely demand for or use of land.

... economically-mineable resources of coal and other mineral resources are contained in a limited number of fixed locations across Australia. A mining company cannot simply pick up its project and take it elsewhere. This is one of the reasons that strategic land-use plans must be flexible in their application and should not prohibit land uses in particular areas. (sub. 50, p. 22)

Sometimes a major project may conflict with a strategic plan, but still be found to be in the public interest. Resolution commonly involves rezoning or amendment to the relevant development plan (often a lengthy process, usually requiring initial and final ministerial agreement to the changes).

Strategic planning in practice

Strategic planning is significantly more developed for urban than rural areas, with all jurisdictions having strategic plans for their capital city regions. Commonly the capital city strategic plan forms the apex of the planning hierarchy, with a range of more specific plans sitting underneath (which are meant to be consistent with the goals and targets established by the overarching strategic plan). Some jurisdictions also have a statewide plan, while many have strategic plans for certain regional areas (though coverage varies).

South Australia, for example, has a statewide plan, a 30-year plan for greater Adelaide and plans for regional South Australia. The SA State Government Departments described South Australia's strategic planning process as follows:

South Australia's Strategic Plan (SASP) is the state's primary directional document. SASP has 100 specific targets grouped under six interrelated pillars. Progress against SASP targets is reported every two years and the plan is updated every four years.

'Beneath' SASP sit specific 'action' plans which facilitate achieving SASP targets, including the Strategic Infrastructure Plan for South Australia and the South Australian Planning Strategy. The Department for Planning, Transport and Infrastructure has lead responsibility for both of these documents. (sub. 51, p. 26)

The full range of strategic policies, plans and programs that apply to activities in most jurisdictions is vast. Box 11.5 illustrates the complexity of this strategic planning context by outlining the hierarchy of plans applying to the key regional city of Townsville.

Box 11.5 **Strategic planning is complex: the case of Townsville**

Townsville, with a population over 180 000 people, is the largest city in north Queensland. A major service centre and the main centre for government administration outside Brisbane, the city is also a key port and rail transport hub for the region's agricultural and mining industries (including sugar, copper, zinc and nickel). It also hosts significant numbers of Defence personnel at Lavarack Barracks and Royal Australian Air Force Base Townsville.

A selection of strategic plans that may influence project planning in and around the city are outlined below. The selection illustrates the wide array of geographic and sectoral plans and strategies that can comprise a region's strategic planning context.

Australian Government

- National Ports Strategy
- Townsville Airport 20 year Master Plan (under the *Airports Act 1996* (Cwlth))
- Great Barrier Reef Marine Park heritage strategy 2005
- 2013 Defence White Paper: Australian Defence Force Posture (covering base expansion)
- Mount Isa–Townsville Corridor Strategy 2007 (covering transport)
- National Cycling Strategy

State and/or Local Government

- Townsville State Development Area Development Opportunities Strategy and Development Scheme
- Northern Economic Triangle Infrastructure Plan 2007–2012 (for the Mount Isa, Townsville and Bowen area)
- Great Barrier Reef ports strategy (2012–22)
- Townsville City–Port Strategic Plan 2007
- Port of Townsville Master Plan
- Townsville–Thuringowa Strategy Plan
- Townsville Economic Gateway Strategy 2007
- Townsville City Plan 2005
- Townsville North Queensland Region Destination Tourism Strategy (2012–16)
- Townsville Digital Economy Strategy
- Townsville Coastal Hazard Adaptation Strategy

Other

- Mount Isa to Townsville Economic Zone (MITEZ) 50 year freight infrastructure plan (MITEZ is the peak regional development organisation)

Findings of previous studies

Three previous studies have recommended wider (or better) use of strategic planning (COAG Reform Council 2011; LGPMC 2009; PC 2011c).

In 2011, the COAG Reform Council reviewed capital city strategic planning systems across Australia. This involved assessing each city's system against a set of criteria agreed by COAG. The Council reported mixed results across jurisdictions (table 11.4). Adelaide was assessed as consistent with most of the criteria, on the evidence presented. Melbourne received no fully consistent assessments, and one 'not consistent' assessment (although Melbourne's results were affected by it being in the process of revising its metropolitan plan following a change of government).

While noting progress in improving strategic planning systems, the Council suggested more work needed to be done:

To differing degrees, all State and Territory Governments have long term, whole-of-government and goal-oriented strategic plans, and all have exhibited strengths and weaknesses in their capital city strategic planning systems. No system has been found wholly consistent with the criteria, which means that further work is needed on the institutional arrangements to deliver integration. (COAG Reform Council 2011, pp. 3–4)

One notable criterion on which consistency was generally low was 'accountabilities, timelines and performance measures'. On this criterion, the Council found:

Most jurisdictions were either partially or not consistent ... In many cases, governments only had partial forms of accountability, timelines and performance measures. This was particularly the case for performance measures. (COAG Reform Council 2011, pp. 51–2)

The Commission's 2011 report on Planning, Zoning and Development Assessments advocated determining as much planning policy as possible early in the planning-to-approval chain. Some key elements towards achieving this were having strategic land-use plans that are:

- not just aspirational but also make broad decisions about where future urban growth will occur, alternative land uses, timing, infrastructure and the provision of services (to contribute to social, economic and environmental objectives)
- integrated across different levels of government and across different government departments and agencies to make consistent decisions about relevant matters, ranging over infrastructure, environment, housing and human services (PC 2011c, p. XLIV)

Table 11.4 Consistency of capital city strategic plans with COAG criteria, COAG Reform Council findings^a

<i>Criterion</i>	<i>Syd</i>	<i>Melb</i>	<i>Bris</i>	<i>Perth</i>	<i>Adel</i>	<i>Hobart</i>	<i>Canb</i>	<i>Darwin</i>
Integration across functions & agencies	✓ ^R	✓	✓✓	✓✓	✓✓✓	✓ ^R	✓✓	✓ ^R
Consistent hierarchy of plans	✓	✓	✓✓✓	✓✓✓	✓✓✓	✓ ^R	✓✓✓	✓✓
Nationally significant infrastructure	✓	✓	✓✓	✓✓	✓✓✓	✓✓	✓✓✓	✓✓
Nationally significant policy issues	✓✓	✓	✓✓	✓✓	✓✓	✓	✓✓	✓
Strengthen networks between capital cities	✓✓	✓✓	✓✓✓	✓✓	✓✓✓	✓✓✓	✓✓✓	✓✓✓
Planning & sequencing for future growth	✓✓✓	✓✓	✓✓✓	✓✓✓	✓✓✓	✓ ^R	✓✓✓	✓✓
Investment priorities & frameworks	✓	✓	✓	✓	✓✓	✓	✓	✓
Urban design & architecture	✓✓	✓✓	✓	✓	✓✓✓	✓ ^R	✓✓	✓
Accountabilities, timelines & performance measures	✗ ^R	✗	✓	✓ ^R	✓✓✓	✓ ^R	✓	✓ ^R
Intergovernmental cooperation	✓	✓✓	✓✓✓	✓	✓✓✓	✓✓	✓✓	✓✓
Evaluation & review cycles	✓	✓	✓✓✓	✓ ^R	✓✓✓	✗ ^R	✓✓	✓ ^R
Consultation & engagement	✓	✓	✓	✓	✓✓✓	✓	✓✓✓	✓✓

✗ = not consistent; ✓ = partially consistent; ✓✓ = largely consistent; ✓✓✓ = consistent; ^R indicates that a reform is pending that may lead to a system that the Council would consider more consistent than the current finding indicates.

^a The COAG Reform Council noted its assessments should be interpreted with caution, as they primarily measured consistency with criteria not system outcomes. It considered that consistency with the criteria is necessary but not sufficient for successful strategic planning to achieve productive, liveable and sustainable cities. The Council also noted that its assessments had not been adjusted for the scale of the challenges facing each city and that this was a limitation on comparing results across cities.

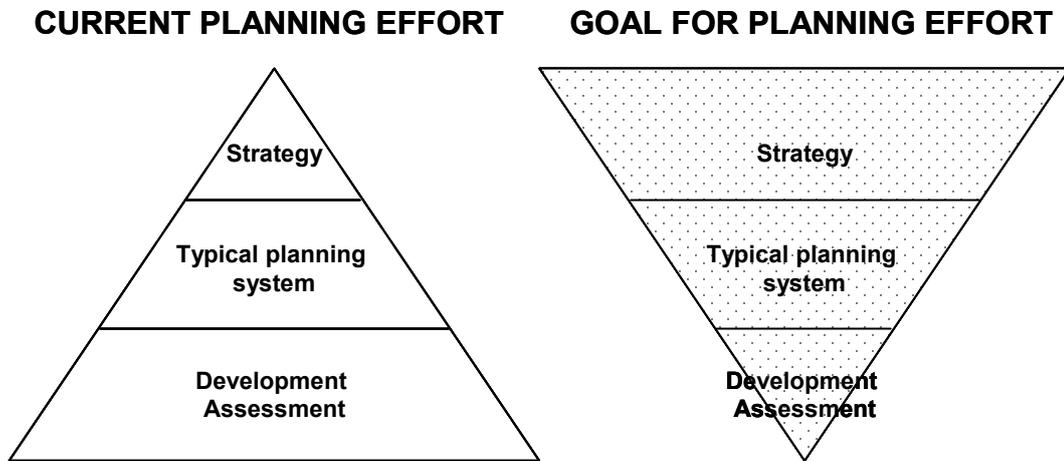
Source: COAG Reform Council (2011).

The approach advocated by the Commission would tend to reshape resource allocation across the planning system towards the goal shown in figure 11.1, with greater emphasis on strategic planning. The Commission noted that the States and Territories had indicated that their reform efforts had been directed at focusing more on the earlier stages of planning, including strategic planning.

The Local Government and Planning Ministers' Council has noted a long list of weaknesses across the planning system. These ranged from a lack of understanding of planning's role, through to governance, coordination and harmonisation issues, to capacity, skills and knowledge issues and a lack of well-structured community engagement (LGPMC 2009). A further weakness identified by the Council was:

Lack of consensus on appropriate planning horizons to deal with key planning issues, leading to either a short-term focus aligned with political cycles, or a lack of clarity and focus due to unrealistically long planning horizons and commitments to outcomes far in advance of need. (2009, p. 5)

Figure 11.1 **Changing the focus of planning efforts**



Source: PC (2011c, p. XLIII).

The Commission's assessment

The Commission considers that the COAG Reform Council review was a significant milestone in efforts to improve all aspects of strategic planning for capital cities, and that its findings should be used to help guide reform efforts. In one sense, the current study has a narrower perspective, because the primary interest is in how strategic planning influences major project DAA processes. For this reason, the areas for improvement considered here focus on this concern as it relates to both urban and rural/remote areas. In identifying and analysing possible improvements to strategic planning, the Commission has drawn on the above studies, submissions, overseas experiences with strategic planning (box 11.6) and a range of other sources.

Greater emphasis on strategic decision making

There is widespread agreement that planning systems should have greater emphasis on strategic decision making. When decisions are made at the strategic level this can improve the timeliness of project-level DAA processes because more of the important and difficult decisions have already been resolved. Good strategic planning can also 'provide prospective proponents with greater clarity and understanding of the issues pertaining to their development proposal' (Planning Institute of Australia, sub. DR73, p. 4).

To achieve this change in emphasis, there are difficulties that need to be overcome. Some of these relate to institutional arrangements and politics, as illustrated by the

challenges of finding new airport sites in Sydney since the 1970s. Infrastructure Australia argued:

Planning agencies tend to be outside the central part of government, and their influence on reform is modest. Metropolitan plans get changed when it suits the political interests of the government of the day or the policy interests of another part of the government. New governments often feel obliged to distance themselves from their predecessor's plans, even though there may be elements in those plans that are worthwhile. This calls into question the long-term integrity and durability of the metropolitan planning process. (2012, p. 49)

There are also challenges in better integrating strategic planning with the rest of the planning process, so that strategic decisions are reflected in lower-level decisions. The sectoral approach to infrastructure policy and plan development used in the United Kingdom has potential to assist in this regard (box 11.6).

As pointed out by a number of participants, moving to more streamlined DAA processes may not be desirable if this increases the risk of poor environmental or social outcomes (for example, ANEDO, sub. 14). This insight leads to the remaining two areas for improvement, which are in part about reducing these risks.

Improved consultation

Genuine engagement and consultation with the community and business is essential for effective strategic planning. The finding of the COAG Reform Council suggests that there is considerable scope for improvement, at least in relation to capital cities (table 11.4). Other research suggests that the breadth and depth of consultation in some other countries, particular parts of Canada, substantially exceeds that typically conducted in Australia (Kelly 2010a). It is evident in cities, such as Vancouver, that this can help produce better outcomes by promoting broad community support for decisions made at the strategic level.

The effectiveness of consultation was a theme addressed by Amelia Thorpe from the University of New South Wales (sub. 16), who argued that there is a need for research into effective consultation methods. Specifically, Thorpe highlighted Western Australia's 'Dialogue with the City' consultations for praise, noting the wide range of techniques it deployed.

Box 11.6 **Lessons from international strategic planning experiences**

Public participation is important to developing enduring plans

A Grattan Institute report examined city governance in eight cities in North America and Europe that were considered to have been successful in meeting residents' needs (Kelly 2010a). One of the aims of the research was to identify the kinds of decision-making arrangements associated with sustained success in cities. The report highlighted the importance of public participation:

Those cities that made tough choices and saw them through had early, genuine, sophisticated, and deep public engagement. This level of engagement is an order of magnitude different from what happens in Australia today. (Kelly 2010a, p. 4).

For example, Kelly (2010a) found that extensive public engagement that asked people 'what they wanted' had been critical to developing a well-supported vision and plan for Vancouver. It was also reported that having only limited opportunity to appeal against planning decisions made it much easier for Vancouver to set a direction and follow it through.

Sectoral plans can help streamline approval processes for major projects

Planning reforms established in the United Kingdom since the passage of the *Planning Act 2008*, provide lessons of direct relevance to major project DAA processes. These reforms launched National Policy Statements, which provide guidelines for the assessment of nationally significant infrastructure projects in specific sectors.

These statements provide clear guidance to authorities (such as the Planning Inspectorate) on how the national Government considers assessment should occur (for example, how to assess and balance impacts), and outline relevant policies for consideration. For example, the Energy National Policy Statement identifies a need to invest over £100 billion in the electricity sector by 2020 and outlines the United Kingdom's climate change emissions reduction targets (DECC (UK) 2011).

They also indicate, at a high level, the Government's predisposition for assessment, in light of its overall policy direction. Examples include:

[The Planning Inspectorate] should start with a presumption in favour of granting consent to applications for energy [related] nationally significant infrastructure projects. (DECC (UK) 2011, p. 44)

[The Planning Inspectorate] should start with a presumption in favour of granting consent to applications for ports development (DfT (UK) 2012, p. 17).

Additionally, the application of conditions to projects is restrained:

[The Planning Inspectorate] should only impose requirements in relation to a development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. (DECC (UK) 2011, p. 45)

The sectoral model used in the United Kingdom has the potential to increase certainty and understanding in the community, and usefully guide development assessment authorities.

Thorough analysis of impacts

For strategic planning to produce good results it must be based on the best possible information, including about the environmental impacts of different development scenarios. ANEDO (sub. 14, p. 24) argued that environmental matters were given insufficient attention in strategic planning and that ‘independent baseline studies of catchments’ environmental qualities, such as water, soil, vegetation, biodiversity, minerals, [and] air quality’ should be undertaken for strategic planning purposes.

In the Commission’s view, environmental issues are often not adequately considered in strategic planning. Strategic assessment (which is discussed extensively in the earlier sections of this chapter) is a promising tool for analysing environmental and other plan impacts.

RECOMMENDATION 11.2

State and Territory Governments should make more use of strategic planning, so as to reduce the number of issues that need to be considered at the project level, by:

- ***expanding the scope of decisions about development at the strategic level***
- ***using more effective public consultation techniques***
- ***collecting and disseminating baseline environmental and heritage data***
- ***using Strategic Assessments to analyse plan impacts.***

12 Implementation of reform

Key points

- The Commission has recommended in this study a suite of measures that would improve development assessment and approval (DAA) processes and, in turn, contribute to the facilitation of investment and the protection of environmental and other standards.
- Each of the Commission's recommendations alone would have only a limited impact, since any regulatory system is only as good as its weakest link. Partial reform efforts are, therefore, unlikely to achieve meaningful and sustained improvements.
- Careful and deliberative implementation of reform will be needed to successfully deliver more timely, cost-effective, rigorous and transparent regulatory decision making. To do this, all governments in Australia should:
 - prioritise the reforms and set timeframes and key milestones for their implementation
 - build momentum by pursuing immediate 'early win' reforms while laying the groundwork for more challenging reforms
 - work closely with regulatory agencies in their jurisdictions, to address gaps in regulator resourcing, capabilities, performance and culture
 - work together with other governments to address interjurisdictional matters, such as duplication of assessment and approval requirements on proponents while also fostering intrajurisdictional cooperation among regulatory agencies
 - agree on monitoring and public reporting of the progress of the reforms.

Without careful and considered implementation planning, leading practice development assessment and approval (DAA) processes will not be achieved and the problem areas identified in this report would persist. This chapter provides guidance on how to develop a roadmap for the broad implementation of the Commission's recommendations.

12.1 The importance of ‘making it happen’

Capturing the reform dividend

Implementing the Commission’s recommendations should deliver benefits for all stakeholders. Improved major project DAA processes would enable new projects that are viable under current arrangements to come to fruition in a more timely and cost-effective manner, and potentially facilitate additional major developments. At the same time, improved DAA processes for major projects should promote the protection of environmental, heritage and other assets as well as providing greater confidence in the regulatory system (box 12.1).

Box 12.1 **Broader benefits of the Commission’s reforms^a**

Protection of environmental, heritage and other assets

Protection of environmental, heritage and other assets would be promoted through greater use of strategic approaches (plans and assessments) (recommendations 11.1, and 11.2); separation of environment policy from regulatory functions (6.5); better targeted project approval conditions and offsets (8.1 and 8.2); risk-based approaches (6.6), together with improved compliance and enforcement activities by regulators, including legislated third-party rights for enforcement (10.2, 10.3 and 10.4).

Accountability and transparency of decision making

Decision makers would be more accountable through, for example, binding criteria for regulatory pathway determination; limited ministerial discretion (5.2); publication of reasons for decisions and conditions and offsets (7.7, 7.3 and 5.2). Data publication (for example, timelines for decision making) would help accountability, and potentially drive greater efficiency in delivering robust outcomes (7.3 and 11.2).

Social acceptance

Greater social acceptance and cohesion for communities directly impacted by a major project could be promoted by clarification and guidance on regulatory objectives (4.1 and 4.2); public participation (5.3); and greater use of strategic approaches that examine broader impacts of major projects and alternative uses of natural and other resources (11.1 and 11.2).

Confidence in the regulatory system

Appropriate resourcing and improved capabilities of regulatory agencies (12.1 and 6.4); introduction of meaningful compliance statements for major projects (10.3); transparency in setting conditions and offsets (8.1 and 8.2); and clarity of review rights (9.1 and 9.2) could result in more consistent decisions and improve confidence of all stakeholders in the regulatory system.

^a Recommendation numbers in parentheses.

Delivery of previous reform efforts has been patchy

While governments across Australia have often pursued reform of major project assessment and approval processes, outcomes have not always matched ambition. Some of the issues identified in this study, such as duplication and unnecessary costs of approval processes, have been previously identified. For example, in 1991 the Industry Commission examined construction costs of major projects and stated:

Despite frequent reviews and commitments by governments to change, approval processes continue to impose an unnecessary cost burden on proponents of major projects (1991, p. 4)

Since this 1991 finding, numerous other public inquiries, Parliamentary committees, studies and departmental reviews have attempted to address the efficiency and efficacy of aspects of major project regulatory requirements and processes. These include:

- the report by Infrastructure Australia, *Building Australia's Future: A Review of Approval Processes for Major Infrastructure* (2009)
- the Commission's *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011)
- work led by the Commonwealth Department of the Prime Minister and Cabinet during the course of 2012 to negotiate, through COAG, bilateral arrangements for accreditation of State and Territory Government environmental assessment and approval processes
- the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) ('the Hawke review') (2009).

The recurring identification of similar deficiencies with major project regulatory processes, together with the complexity of the underlying regulatory systems themselves, suggests successful delivery of reform in this area is difficult. This reinforces the importance of efforts to drive implementation.

The Commission's recommendations provide an agenda to raise Australia's major project DAA frameworks toward leading practice. They build on the direction of previous reviews and reforms initiated by different jurisdictions (some of which are currently being implemented).

Consequences associated with not pursuing reform

There are negative consequences for Australia in not pursuing reform, including potentially putting into jeopardy worthwhile investment with high community-wide

net returns and failing to provide regulatory systems that will deliver the high environmental and other standards the Australian community expects of DAA processes.

Other countries, notably Canada, have improved their regulatory framework for resource project assessment and approval. Broader changes in the economic and technological basis of the energy sector have also driven change. The boom in natural gas extraction in the United States has led to calls for the lifting of US LNG export restrictions. These developments mean Australia's position as a preferred destination for major resources projects can no longer be taken for granted.

12.2 A roadmap for implementation

The Commission has framed its recommendations taking into consideration existing DAA practices and recognising that jurisdictions' histories and starting points will influence how they assess and approach reform. This section covers the factors that may impinge on reform prioritisation and delivery, as well as the key impediments to implementation and options to address them.

Prioritising and sequencing the reforms

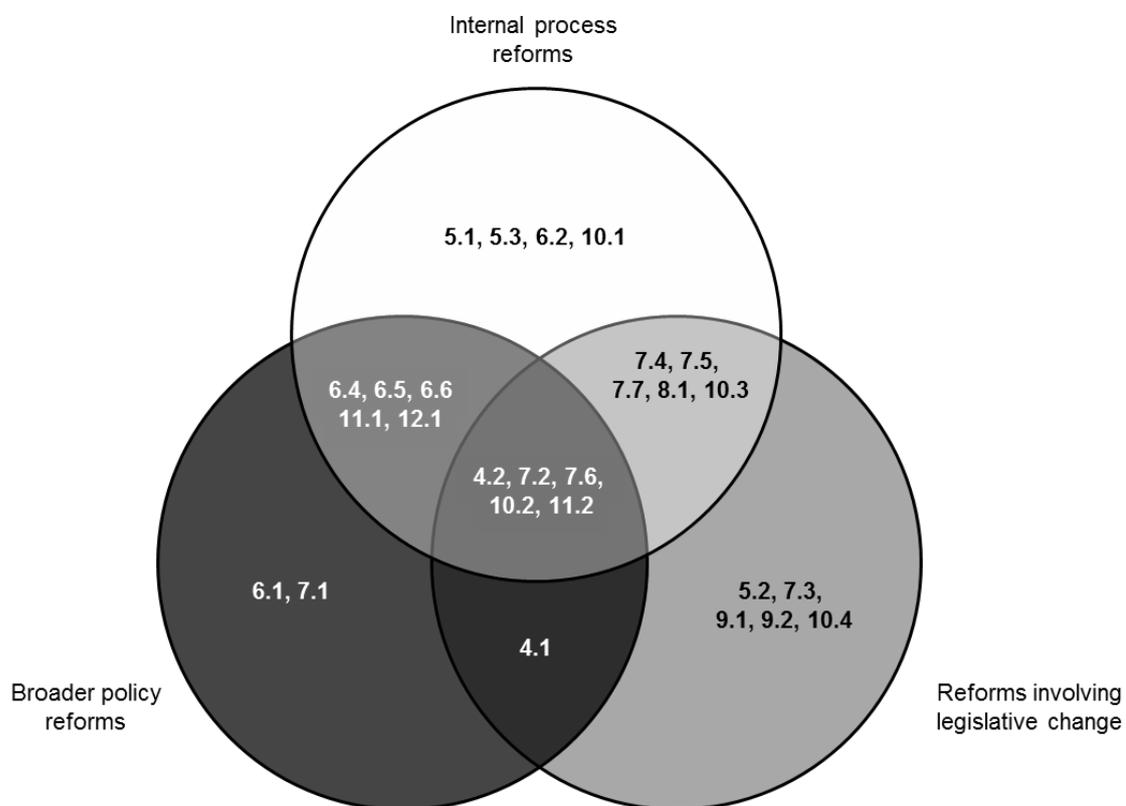
The Commission's recommendations are extensive and, as previous chapters have demonstrated, no jurisdiction is precisely in line with the recommendations. As such, jurisdictions will need to consider prioritising and sequencing the reforms.

Priorities will vary by jurisdiction, depending on jurisdictions' existing DAA regulatory settings. They will also depend on the specific nature of the Commission's recommendations, including their ease of implementation, complementarity and/or overlap with existing reform programs.

To assist jurisdictions in prioritising and sequencing the implementation of the reforms, the Commission has grouped its key recommendations according to three broad categories (figure 12.1):

- *Internal process reforms* — primarily administrative (non-legislative) changes that are able to be implemented unilaterally. These could be delivered relatively quickly and build the momentum for further reforms by achieving 'early wins'.

Figure 12.1 Key recommendations by broad descriptive category^a



^a Numbers in this figure represent the Commission's recommendations (see pages accompanying Overview for descriptions).

- Examples of these reforms include the Commission's recommendations for the publication of guidance for proponents; enhancing public participation in DAA processes; and establishing cooperative arrangements between regulators within a jurisdiction for joint or substitute assessment processes.
- Such reforms are largely uncontroversial and can be enacted administratively by State and Territory Governments. Some could potentially be first introduced administratively with legislative changes to entrench them proceeding later.
- *Reforms involving legislative change* — reforms that either require legislative change or that could be best implemented (or further entrenched) by legislation.
 - Examples of legislative reforms include the Commission's recommendations to clarify legislative objectives; changes to review and appeal rights; and establishing binding criteria for regulatory pathway determination, while limiting ministerial discretion on project call-in.
- *Broader policy reforms* — those likely to require consultation, coordination and cooperation across jurisdictions. They require time to involve stakeholders and

to study the costs and benefits of specific options and thus take longer to put in place.

- Examples of these reforms include the Commission’s recommendations for increased use of strategic planning and assessments and pursuing bilateral approval agreements for matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth).

Reforms complementary to each other should ideally be pursued together. Examples of these reforms include the Commission’s recommendations to establish time limits at the assessment and approval decision stages and putting in place clear triggers and limits for ‘stop the clock’ provisions for regulatory decisions.

Overcoming barriers to implementation

Consideration of barriers to reform and a commitment to overcome them is likely to strengthen the possibility of successful implementation. Past experience provides lessons that will assist in successfully implementing reform.

Broad community and political support required

Broad community and political support is essential to successful implementation of the Commission’s reforms because DAA processes are about balancing often competing and contested interests.

Lack of broad community and political support may occur for a number of reasons, including where the case for reform has not been clearly made and accepted, or where affected communities have not been sufficiently consulted. In the context of reforms to DAA objectives, the Australian Local Government Association argued:

The planning legislation at the jurisdictional level has been under constant review over the past decade and ... amending or introducing new legislation and policies regularly can lead to reform fatigue and confusion. Any reviews must be done after consulting widely with local government. (sub. DR71, p. 7)

Implementation efforts will be more successful and enduring where they gain the support of the broad community. Genuine engagement with the community by governments will build this support and bring stakeholders along. As noted by Amelia Thorpe, DAA processes are about community preferences:

The design of DAA processes needs to recognise that communities, and their preferences, are multiple, overlapping and dynamic. Meaningful public participation processes are a vital mechanism to respond to this complexity, and in turn to ensure that major projects do indeed serve the public interest. (sub. DR98, pp. 2–3)

Garnering political support and achieving successful implementation of reform will be more likely where governments develop a compelling narrative for reform (’t Hart and Uhr 2008). Such a narrative is particularly important given project assessments and approvals are embedded within broader environmental and planning regulatory frameworks that are sometimes contested by stakeholders with entrenched positions.

State and Territory Governments could lower risks to legislative reforms through genuine and thorough early stakeholder consultation, including green and white paper processes and draft Bills for comment. Public participation in shaping reforms is likely to yield more lasting and stable outcomes.

The success of even the best-designed policies depends ultimately on the motivation and capabilities of those assigned to deliver the reforms, which potentially includes other governments (for example, for bilateral reforms) and non-governmental stakeholders. Successful implementation of reforms requires strong leadership by governments and implementation agencies. Leadership by governments and heads of agencies responsible for implementation has been identified as a critical factor in determining the ultimate success of reforms. The Australian Petroleum Production and Exploration Association reiterated the importance of leadership, specifically in relation to bilateral agreements:

It is important that there is a strong commitment from all levels of Government to ensure that cooperative arrangements are ... not bogged down in overly bureaucratic processes. (sub. DR105, p. 2)

Accountabilities must be clearly allocated

Clarity regarding roles and responsibility of individuals and agencies for reform improves accountability, and makes successful implementation more likely. Governments should therefore specify responsibilities for reform implementation, and ensure those people and agencies tasked with these responsibilities are accountable for its success or failure.

To promote clear accountabilities and allocation of responsibilities, States and Territories should consider establishing cross-ministerial or agency taskforces for implementation. The Western Australian Government has initiated a ministerial taskforce on approvals, development and sustainability that is considering various reforms, including a consistent risk-based approach in approvals processes and removing duplication and overlap in DAA processes (Government of Western Australia, sub. DR103).

Collaboration, coordination, monitoring

Cross-jurisdictional coordination can present difficulties where different jurisdictions with overlapping responsibilities disagree, or where interests diverge. This has been most evident with the breakdown of negotiations through COAG in 2012 between the former Australian Government and the States and Territories to achieve bilateral approval agreements for environmental matters, as well as the lapsing of bilateral assessment agreements:

Some proponents of major projects have essentially been left in regulatory limbo upon the expiry / non-renewal of existing bilateral agreements in NSW and other states. (King & Wood Mallesons, sub. DR99, p. 2).

Cross-jurisdictional coordination difficulties can also occur where there is a disparity in the distribution of the costs and benefits of reform. In regard to major project DAA reforms, this issue is sometimes framed in terms of whether States and Territories should be funded for administering federal environmental protection laws under bilateral agreements. Similarly, there may be questions about who should fund any expansion of strategic assessments.

As collaboration between Commonwealth and State and Territory Governments will be required to advance a number of key reforms, the Commission sees merit in reinstating major projects DAA reform on the COAG agenda. The recent experience with negotiations on bilateral agreements has, however, made some stakeholders cautious. For example, the Chamber of Minerals and Energy (CME) Western Australia said:

CME questions the effectiveness of COAG as an implementation and compliance/monitoring body for approval bilateral agreements given the loss of momentum in 2012. (sub. DR85, p. 3 attachment)

Despite this recent history, the Commission sees COAG as the most appropriate forum to discuss issues relating to duplication and overlap across levels of government. The involvement of COAG would not prevent the Australian Government from negotiating bilateral agreements with individual States or Territories.

In addition, the Commission considers that there is merit in the COAG Reform Council being tasked with monitoring and reporting on jurisdictions' progress in implementing the Commission's recommendations over the next five years. At the end of this period, the Commission envisages the COAG Reform Council would produce a State of Play report on overall progress across jurisdictions.

Financial incentives to secure implementation

In the past, the Australian Government has provided financial incentives to State and Territory Governments to initiate productivity-enhancing reforms. This was the case, for example, with the National Competition Policy reforms beginning in the mid-1990s. The concept of ‘productivity payments’ to jurisdictions that make reforms has been raised by participants in this study (Business Council of Australia sub. DR102).

With regard to DAA reform the Commission does not see a strong case for the Australian Government providing incentive payments to States and Territories. However, there is a role for Commonwealth funding in assisting with the reform process. The Commission sees a potentially beneficial role for Commonwealth funding to improve the availability and quality of consolidated baseline environmental data (particularly with regard to water resources and species biodiversity). A ministerial council (or similar body) could oversee improvements in this area. There is also a case for the Commonwealth to provide funding for monitoring the progress of reforms across jurisdictions, and the Commission suggests the COAG Reform Council play this role.

Transitional challenges and unexpected roadblocks

Reform will often be confronted with unexpected obstacles or complexities. Transitional challenges are always likely when implementing new approaches. For example, when the National Offshore Petroleum Safety and Environmental Management Authority’s role was extended to environmental regulation, the shift towards a more risk-based regime led to uncertainty for many proponents about what was expected of them, with calls for greater guidance from the regulator. Similarly, the WA Government is moving to increased tracking of project approval processes within and across departments, and this is creating significant IT challenges for agencies.

A number of the Commission’s recommendations would be likely to meet similar transitional challenges. However, the Commission considers it is unlikely that these challenges undermine the case for their implementation. Governments should consider, in advance, what the likely transitional issues associated with particular reforms will be, and develop strategies for overcoming them (such as providing information to stakeholders, or training to regulators) and maintaining support for reforms.

Reforms may be adopted slowly, or not at all, where they challenge existing norms and operational cultures within agencies. For example, in 2011 the WA

Auditor-General noted that although the WA Department of Mines and Petroleum had adopted a risk-based approach to inspections, in practice how recently a site had been inspected still played a role in decisions about risk ratings despite this not changing a site's intrinsic risk (chapter 10).

12.3 Ensuring long-term reform success

Beyond the implementation phase, the success of reforms to DAA regulatory frameworks depends on the performance of regulatory agencies.

Resourcing and expertise

Throughout the study, participants have detailed concerns about the resourcing, expertise and performance of regulatory agencies (box 12.2). There are two aspects of resourcing that are particularly important for major project DAA processes: the expertise, skills and judgment of regulatory staff, and the number and availability of those staff.

Is funding adequate?

An adequate level of funding is required to enable regulators to administer DAA regulations efficiently and effectively. Clarity about regulators' funding levels and sources is also necessary to ensure their ongoing independence and objectivity.

The consequences of inadequate resourcing can be significant. Pressures are particularly acute during investment booms, when the scale and complexity of major resource project applications increase rapidly and competition for skilled staff intensifies. Government agencies are typically less able than private enterprise to adjust to these pressures by, for instance, hiring more staff and offering more attractive remuneration. Given Australia's economic history, these pressures are likely to recur.

Box 12.2 Participants' concerns regarding regulatory agencies resourcing and capabilities

The Chamber of Minerals and Energy of Western Australia was concerned about lack of regulatory staff:

The extent to which sufficient resources are available to approval agencies is critical to the timely arrival of approval decisions. The resource sector's general experience with the Department of Sustainability, Environment, Population and Communities (DSEWPAC) is a lack of staff resources to effectively manage the DAA process. (sub. 18, p. 4)

The Queensland Resources Council noted the mining boom had diminished staff retention for regulatory agencies:

QRC agrees wholeheartedly that regulatory agencies need to have the resources, capacity and skills to effectively implement, operate and enforce their legislation. QRC does recognise that industry has played a role in the diminished retention rates of skilled staff within regulatory agencies. The extent to which sufficient resources are available to approval agencies is critical to the timely arrival at approval decisions. The complexity of the regulatory environment certainly adds to the issue as it takes many years for staff to become familiar with the legislation and have the experience to apply it effectively. (sub. DR91, p. 3)

The Australian Network of Environmental Defender's Offices noted resources had to keep pace with regulatory activity:

Regulatory resources must keep pace with industry expansion, to avoid increased risks to communities and the environment. In 2009, a Senate committee called for urgent review of under-resourcing of federal environmental regulation. (sub. DR92, p. 24)

Business SA was also concerned about staff turnover:

One of the issues raised by business is that while they might find an effective liaison within Government, whenever that person is absent on leave, issues of business continuity arise. Further, high staff turnover within Government can create delays and uncertainty for business. (sub. DR74, p. 2)

Peabody Energy suggested the number of requests for additional information related to resourcing problems:

... regulators need to be adequately resourced and equipped to properly digest and assess [Environmental Impact Statement documents] in a timely manner. ... the number of requests from departments for information already clearly outlined in EIS documents suggests a possible deficit in this area. (sub. DR81, p. 2)

Lock the Gate expressed concern that under-resourcing of Queensland regulatory agencies could lead to regulatory error:

Poorly resourced bureaucracies operating under tight timelines are at risk of poorly considered decision-making. (sub. DR97, p. 6)

Under-resourcing of regulatory agencies can lead to unnecessary delays, increased compliance costs for proponents, and potentially poor decisions. One possible effect of a lack of staff or expertise within regulators might be the placing of excessive conditions on a project because staff lack the expertise to accurately assess risks

associated with a project, or knowledge of specific solutions (effectively putting quantity of conditions in place of quality). As noted by the Commission in its recent report *Regulator Engagement with Small Business*, where regulators are inadequately resourced, either some risks to communities will go unmitigated or the costs of mitigation will be pushed onto those regulated (PC 2013b).

A risk-based approach can alleviate some resource constraints

Adoption of risk-based approaches should help alleviate resourcing pressures by ensuring resources are used more efficiently and effectively. Under a risk-based approach, resources are proportionately allocated to those activities perceived to represent the greatest risk. For example, in its compliance program, the WA Office of the Environmental Protection Agency scans all reports it receives from project operators and uses the information provided to drive the selection of sites for desktop audits based on an assessment of risk. However, a shift to a risk-based approach to regulation is not without transitional challenges, and could involve missteps and upfront costs. Xstrata Coal noted:

The want and desire of the current regulatory agencies to pursue risk-based approaches is far less apparent, with many Government agency staff seeing themselves or being instructed to act as project facilitators and mediators, rather than drivers of the project approvals process, and staff are not being required to understand the overall scope of the projects they are “regulating” nor where they fit in the approval processes to which they are meant to follow. Risk-based assessment has been substituted by ‘risk averse’. (sub. 50, pp. 30–31).

When the WA Environmental Protection Authority first experimented with a risk-based approach, many stakeholders thought it had been too precise in trying to allocate risk. Improvements have since been made and its modified ‘significance framework’ approach (EPA (WA) 2013a), while still in its early stages, is an example of ‘leading practice’.

A role for cost recovery?

Cost recovery mechanisms can in some circumstances be a source of funding for regulators. However, such an approach needs to be considered in the light of agency roles that are not amenable to cost recovery (such as monitoring, enforcement and educative activities) and to ensure that agency finances are robust across the economic cycle.

The Australian Government has announced it will apply cost recovery to aspects of federal environmental assessment from 1 July 2014, on the basis that:

Cost recovery will improve the department's ability to meet statutory timeframes and respond to changes in demand for its services. It will also provide incentives to industry to undertake early engagement and incorporate the most environmentally acceptable outcomes into their business planning, as this may reduce the level of assessment required and therefore the costs payable. (DSEWPAC (Cwlth) 2012e, p. 7)

Targeted cost recovery can be consistent with the user-pays principle, and should make funding arrangements more equitable in cases where benefits to an applicant clearly outweigh community-wide benefits, although such assessments, as a practical matter, are often difficult to make.

Should governments pursue cost recovery, they should ensure that charges are genuinely reflective of costs incurred and be subject to regular review through a Cost Recovery Impact Statement, in line with current Australian Government practice. This should ensure that cost recovery charges remain appropriate for the activity; that the design of cost recovery charges is efficient and equitable; and that charging does not lead to over or under recovery.

Cost recovery should also be restricted to areas where it is suitable. For example, the Commission considers that some use of cost recovery for environmental impact assessments and strategic assessments would be consistent with the principles of cost recovery proposed by the Commission in its *Cost Recovery by Government Agencies* report (PC 2002), and contained in the Australian Government's Cost Recovery Guidelines. However, there need to be mechanisms to discourage 'gold plating' of regulatory activities that add unnecessarily to the quantum of costs recovered.

Improving regulatory agency performance and culture

The implementation of regulations and ongoing performance of regulatory agencies is crucial to the long-term success of DAA systems. As the Commission has recently noted in its report on small business regulation:

The way regulations are implemented is often as important to small business and to compliance outcomes as the content of the regulations themselves. Regulators, by their conduct in interpreting, administering and enforcing regulatory requirements, can take considered, well designed regulation and produce regimes which discourage compliance, squander government resources or add to business costs and delays. Alternatively, a regulator might take an unwieldy accumulation of regulation and, by choosing judiciously what, when and how to enforce, deliver the desired regulatory outcomes in an efficient manner. (PC 2013b, p. 3)

The culture of regulatory agencies and the attitude of staff to their functions and responsibilities have a significant impact on the performance of regulatory agencies,

particularly given the interface between proponents and regulators throughout the DAA process:

An organisation's culture is regarded as a critical determinant of performance and as one of the most promising mechanisms management can use to achieve control and coordination. (Sinclair 1991, p. 321)

While there is no single regulatory culture that best delivers regulatory outcomes and avoids unnecessary burdens for those regulated (PC 2013b), concerns about culture raised by stakeholders to this study included excessive risk aversion, a lack of service focus, perceptions of a lack of objectivity and a lack of peer learning.

The Commission was also made aware of instances where some agencies develop an 'us and them' culture based around formal rules, including conditions, with adversarial and punitive enforcement and an underlying distrust of the regulated proponents. Other participants typically raised the opposite concerns, suggesting environmental, heritage and cultural concerns were often swept aside as agencies sought to approve projects.

There are tangible actions that Governments, working with their regulators can take to improve the performance and culture of regulatory agencies responsible for DAA processes.

Clear objectives of regulation

Having clearly defined objectives of regulation is the starting point for improving implementation by regulatory agencies by:

- ensuring that the reach of regulation does not extend beyond what Parliament intended
- reducing uncertainty about how regulation will be interpreted and what is needed for compliance
- making clear to regulatory agency officers that the ultimate responsibility for assessing the tradeoffs between economic, environmental and social values rests with Ministers
- establishing the basis for assessing the performance of regulators and holding them accountable
- guiding the resource allocation of regulators and their development of expertise (VCEC 2010).

Setting a statement of expectations

One opportunity for government to influence regulatory agency culture is through Ministerial Statements of Expectations (and corresponding agency Statements of Intent) that are consistent with setting clear objectives of regulation. Statements of Expectations typically outline the Government's objectives that are relevant to the agency, establish the level of information that should be provided to Ministers regarding issues facing the agency, and the Government's expectations of how the agency should conduct its operations.

As noted by the Regulation Taskforce in 2006, such statements can 'be helpful and transparent vehicles for guiding a regulator's approach — and simultaneously educating the community — without infringing on a regulator's essential independence' (2006, p. 161). The Victorian Competition and Efficiency Commission (VCEC) has suggested that performance reporting could be combined with the issuing of statements of expectations by Ministers. This would provide clarity for the regulator about what it is expected to achieve, and yield information about the extent to which the regulator has met these expectations.

The [VCEC] considers it would be good practice for every regulator to receive a Statement of Expectations from the relevant minister. ... a regulator must respond to a minister's Statement of Expectations, and explain how it will meet the minister's expectations. The [VCEC] also considers Victorian regulators should reduce applicants' uncertainty about timeliness, either by publishing or directly advising applicants of the target or expected timeframes (the timeframes that would apply if the regulator has received all required information). Moreover, to promote accountability and improved performance, regulators should be encouraged to collect and report timeliness data. (VCEC 2011, pp. 102–103)

Statements of Expectations also give governments an opportunity to guide agencies with regard to the level of risk they might tolerate, as the VCEC has noted:

The ministers' Statements of Expectations could provide an appropriate avenue to give regulators high level guidance on the expected treatment of risk and use of risk-based approaches — including accepting that some risk is unavoidable (2011, p. 114).

Statements of Expectations are commonly used in the Commonwealth and in some States for regulatory agencies. For example, the current Ministerial Statement of Expectation for the Tasmanian Planning Commission includes clear expectations regarding policy development and community stakeholder engagement (Government of Tasmania 2012). Statements of Expectations could be more comprehensively used for all regulatory agencies involved in DAA processes, especially the State and Territory based regulators.

Moving from prescriptive to outcomes focused regulation

The Commission favours outcomes focused regulation, including outcomes-based conditions that require the proponent to achieve particular performance standards or measurable outcomes, but do not prescribe how to do so.

Moving away from prescriptive regulation does, however, impose an additional responsibility on regulatory staff to provide advice about whether proposed actions comply with regulatory requirements. Agencies can help their staff to do this by, for example:

- ensuring their staff have the necessary technical and other knowledge
- clarifying the roles of staff
- supporting staff by providing clear guidance
- developing internal quality controls on advice provided to business, such as requiring advice to be written down, and peer review of advice (VCEC 2012, p. 12).

Commonwealth agencies with responsibility for business regulation are required to publish annual regulatory plans on their websites each year. The regulatory plan details any changes within the agency's area of responsibility and contains information about:

- changes to business regulation which have occurred since the beginning of the previous financial year
- activities planned for the current financial year which could lead to changes in business regulation.

The Commission considers such plans could be expanded to include information about the activities the agency has undertaken to improve the implementation of regulation.

Investment in staff competencies

Enhancing regulatory agency performance involves investment in staff, including having in place programs to identify staff skill gaps and processes to address them through formal and informal training. Peer learning is an important element of this initiative and forums such as the Australasian Environmental Law Enforcement and Regulators Network and the previous work of the Development Assessment Forum (Property Council of Australia sub. DR106) represent useful opportunities for peer learning.

Stakeholder engagement and feedback

Stakeholder confidence in a regulator's performance is enhanced when the regulator communicates effectively with the public using targeted communication mechanisms (ANAO 2007a).

There are a number of mechanisms for such effective communication. For example, the EPA in Victoria has recently formalised its *EPA Victoria Engagement Policy* which aims to improve regulations, programs and services and bring stakeholders together in resolving issues. Progress against the engagement policy will be reported publicly. The Australian Fisheries Management Authority (AFMA), responsible for some approvals, engages with stakeholder groups through a variety of avenues, including management advisory committees. It also has a client service charter that it monitors and publicly reports on, setting out the standards that all clients or stakeholders can expect from AFMA. These mechanisms help to maintain an open dialogue between AFMA and stakeholders.

Ongoing monitoring and broader review

The pressures on regulators engaged in DAA processes, and the context within which they are operating are likely to change over time; for example, as community expectations change, new types of major projects emerge, and related legislation evolves. To ensure that DAA processes remain fit for purpose, governments should undertake periodic reviews to ensure that regulatory agencies have the necessary governance frameworks, resources, capacity and skills to efficiently administer major development assessment and approval processes.

RECOMMENDATION 12.1

Governments should undertake periodic reviews to ensure that regulatory agencies have the necessary governance frameworks, resources, capacity and skills to efficiently administer the development assessment and approval processes of major projects.

A Public consultation

This appendix lists the organisations and individuals that have participated in the study.

- Following receipt of the terms of reference on 7 December 2012, an advertisement was placed in newspapers and a circular was sent to identified interested parties.
- The Commission released an issues paper on 11 February 2013 to assist interested parties in preparing their submissions. Some 60 written submissions were subsequently received.
- A draft report for the study was released on 5 August 2013 and a further 46 submissions were received. All submissions are listed in table A.1 and available online at: www.pc.gov.au/projects/study/major-projects.
- The Commission met with a wide range of stakeholders across Australia, including government departments¹², companies, industry associations, non-government organisations and academics (table A.2).
- In addition, teleconferences and meetings were undertaken with various government departments, industry associations, non-government organisations and academics in the United States, the United Kingdom, France (OECD) and Canada. Meetings were also held with relevant parties in New Zealand following the release of the draft report (table A.3).
- A pre draft report roundtable was held in Melbourne on Friday 24 May. Post draft report roundtables were also held in Brisbane (2 September), Melbourne (3 September) and Sydney (6 September). A list of roundtable participants is provided in table A.4.

The Commission would like to thank all who have contributed to the study.

¹² A number of Commonwealth department and agency names have changed since the draft report, following the 2013 federal election.

Table A.1 Submissions

<i>Participant</i>	<i>Submission no.</i>
ACIL Tasman	29
AGL Energy	27, DR96
Association of Mining and Exploration Companies	42, DR70
Australian Airports Association	41
Australian Local Government Association	DR71
Australian Network of Environmental Defender's Offices	14, DR92
Australian Petroleum Production and Exploration Association	17, DR105
Australian Uranium Association	34, 52, DR62
Blue Mountains Conservation Society	DR86
Brisbane Airport Corporation	DR69
Brisbane City Council	60
Business Council of Australia	43, DR102
Business SA	4, DR74
Canberra Airport	31, DR75
Capricorn Conservation Council	12
Cardno HRP	20
Cement Concrete and Aggregates Australia	49
Chamber of Commerce and Industry of Western Australia	44
Chamber of Minerals and Energy of Western Australia	18, DR85
Clowes, Richard	DR65
Conservation Council SA	DR76
Department of Infrastructure and Transport	59
Department of Sustainability, Environment, Water, Population and Communities	55, DR88
Derrington, Theresa	35
Doctors for the Environment Australia	48
East End Mine Action Group	38, DR68
Economists at Large	13
Economists at Large and The Australia Institute	DR83
ElectraNet	DR63
Enthalpy	21
Faldt, Kathy	DR82
General Electric	9, DR89
Government of Western Australia	DR103
Hunter, Dr Tina	58
Hunter Valley Coal Chain Coordinator	56
King & Wood Mallesons	39, DR99
Leggate, Jim	DR61
Local Government Association of Queensland	DR78

(Continued next page)

Table A.1 (continued)

<i>Participant</i>	<i>Submission no.</i>
Local Government Association of South Australia	25
Local Government NSW	36
Lock the Gate Alliance	DR97
Mackay Conservation Group	7
Master Builders Australia	24, DR80
Medical Association for the Prevention of War	45
Metropolitan Redevelopment Authority of Western Australia	DR66
Minerals Council of Australia	33
Mueller, Otto	5, 54
NTSCORP	DR104
Nature Conservation Council of NSW	22, DR94
Nature Conservation Society of South Australia	37, DR95
North Queensland Conservation Council	10, DR64
Northern Territory Government	46
NSW Minerals Council	23, DR93
Origin Energy	DR100
Peabody Energy Australia	DR81
Planning Institute of Australia	DR73
Project Management Institute	32, DR84
Property Council of Australia	DR106
QGC	DR79
Queensland Conservation	DR77
Queensland Government	47
Queensland Resources Council	19, DR91
Regional Development Australia Far North Queensland and Torres Strait	26
Roads Australia	DR90
Scott-Kemmis, Don, Pacific Innovation	6
Schinkel, Maurice	28
South Australian State Government Departments	51
Spiers, John	DR67
SRA Information Technology	57
Tager, Jeremy	8, DR72
Tasmanian Department of Premier and Cabinet	DR101
Tasmanian Government	53
The Warren Centre for Advanced Engineering	11

(Continued next page)

Table A.1 (continued)

<i>Participant</i>	<i>Submission no.</i>
Thorpe, Amelia	16, DR98
Urban Taskforce Australia	15, DR87
UrbanGrowth NSW	40
Wentworth Group of Concerned Scientists	1
Whan, Ian	3
Woodward, Dr Ian	2
WWF Australia	30
Xstrata Coal	50

Table A.2 Meetings

Participant

New South Wales

Infrastructure Australia
Infrastructure NSW
Roads and Maritime Services
Sydney Water
Transport for NSW
Endeavour Energy
Department of Premier and Cabinet (NSW)
Department of Planning and Infrastructure (NSW)
Department of Trade and Investment, Regional Infrastructure and Services (NSW)
Environmental Defender's Office (NSW)
Environment Protection Authority (NSW)
NSW Minerals Council
Property Council of Australia
Sydney Ports
Wentworth Group
Xstrata Coal

Victoria

Australian Conservation Foundation
Port of Melbourne
Business Council of Australia
Department of Planning and Community Development (Vic)
Department of Treasury and Finance (Vic)
Major Projects Victoria
Department of Premier and Cabinet (Vic)
Infrastructure Partnerships Australia
AGL
WWF Australia
Great Barrier Reef Marine Park Authority (teleconference)
BHP Billiton
World Bank
Dr Matthew Currell (RMIT)

Queensland

Brisbane

Brisbane City Council
Local Government Association of Queensland
Queensland Government
Queensland Resources Council
Brisbane Airport Corporation
Port of Brisbane Corporation
Queensland Conservation Council

(Continued next page)

Table A.2 (continued)

Participant

Brisbane

Environmental Defender's Office (Qld)
World Wildlife Fund
Department of Transport and Main Roads (Qld)
BG Group (owner of Queensland Gas Company)

Gladstone

Capricorn Conservation Council and Gladstone Conservation Council
Gladstone Airport
Gladstone Ports Corporation
Gladstone Regional Council
QER Shale Oil
Santos

South Australia

Australian Rail Track Corporation
Department of Manufacturing, Innovation, Trade, Resources and Energy (SA)
South Australian Chamber of Mines and Energy
Rex Minerals Ltd Hillside Mine

Western Australia

Perth

Office of the Environmental Protection Authority (WA)
Chamber of Minerals and Energy (WA)
Conservation Council of Western Australia
Department of State Development (WA)
Department of Mines and Petroleum (WA)
Yamatji Marpla Aboriginal Corporation
Chevron Australia
Cameco
Herbert Smith Freehills
Sinosteel Midwest
Crosslands Resources
Rosslyn Hill Mining
DLA Piper
National Offshore Petroleum Safety and Environmental Management Authority
National Native Title Tribunal
AngloGold Ashanti Australia
BHP Billiton — Iron ore
SRA Information Technology

Karratha

Dampier Port Authority
Rio Tinto – Cape Lambert Port Operations
Woodside Energy – North West Shelf Project

(Continued next page)

Table A.2 (continued)

Participant

Tasmania

Pitt and Sherry
Mineral Resources Tasmania
Department of Premier and Cabinet (Tas)
Department of Infrastructure, Energy and Resources (Tas)
Department of Primary Industries, Parks, Water and Environment (Tas)
Department of Treasury and Finance (Tas)
Tasmanian Planning Commission
Tasmanian Irrigation

Northern Territory

NT Government

Australian Government and national bodies

Australian Petroleum Production and Exploration Association
Department of Infrastructure and Transport
Minerals Council of Australia
Department of Prime Minister and Cabinet
The Treasury
Department of Finance and Deregulation
Department of Resources, Energy and Tourism
Department of Sustainability, Environment, Water, Population and Communities

Table A.3 **International meetings and teleconferences**

Participant

Canada

Edmonton

Alberta Energy
Ministry of International and Intergovernmental Relations
Ecojustice
Pembina Institute
Athabascas Chipeweyan First Nation NGO

Calgary

National Energy Board
Explorers and Producers Association of Canada
Canadian Association of Petroleum Producers
Fraser Institute

(Continued next page)

Table A.3 (continued)

Participant

Ottawa

Major Projects Management Office
Canadian Environmental Network
Commissioner of the Environment and Sustainable Development, Office of the Auditor General of Canada
The Mining Association of Canada
Canadian Electricity Association
Sierra Club
Natural Resources Canada
Fisheries and Oceans Canada
Aboriginal Affairs and Northern Development Canada
Environment Canada
Canadian Nuclear Safety Commission

Teleconferences

Alberta Government Policy Management Office
Major Projects Management Office

France

Paris

Organisation for Economic Co-operation and Development
International Transport Forum
Conseil d'analyse économique

Mexico

Teleconference

Centro Mario Molina

United Kingdom

London

DLA Piper
Department for Environment, Food and Rural Affairs — Major Infrastructure and Environment Unit
Major Projects Authority
Planning Inspectorate

(Continued next page)

Table A.3 (continued)

Participant

United States

Washington

World Bank
 US Department of Transportation (and related agencies)
 US Department of the Interior (and related agencies, including the Bureau of Land Management)
 White House Council on Environmental Quality
 National Mining Association
 Edison Electric Institute

Teleconferences

California State Lands Commission
 California Energy Commission
 Office of California Governor
 Federal Bureau of Land Management – California State Office

New Zealand

Environment Court of New Zealand
 NZ Environmental Protection Authority
 Royal Forest and Bird Protection Society of New Zealand
 NZ Ministry for the Environment
 Wind Energy Association
 New Zealand Transport Agency
 Transpower

Table A.4 **Roundtable participants**

<i>Participant and location</i>	<i>Organisation</i>
Melbourne — 24 May 2013	
John Short	Aurizon Holdings
Ben Stewart	ANZ
Phil Montgomery	BHP Billiton
Emma Covacevich	Clayton Utz
Mike Rollo	Leighton Holdings
David Stuart-Watt	Parsons Brinckerhoff
Sam Maresh	Rio Tinto Australia
Hilary Mercer	Shell Australia
Cassandra McCarthy	Glencore Xstrata
Steve Bridger	Glencore Xstrata
Jennifer Westacott	Business Council of Australia
Simon Pryor	Business Council of Australia
Matt Garbutt	Business Council of Australia

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Table A.4 (continued)

<i>Participant and location</i>	<i>Organisation</i>
Brisbane — 2 September 2013	
Clare Andersen	Qld Dept. of Premier and Cabinet
Roger Black	Projects Queensland/Queensland Treasury & Trade
Michael Allen	Coordinator-General
Sally Noonan	Qld Dept. of State Development, Infrastructure & Planning
Andrew Broadbent	Qld Dept. of State Development, Infrastructure & Planning
Alex Ackfun	Qld Dept. of State Development, Infrastructure & Planning
Lindsay Delzoppo	Qld Dept. of Environment & Heritage Protection
John Lane	Qld Dept. of Environment & Heritage Protection
Vishal Jaitley	Qld Dept. of Natural Resources & Mines
Tom Orr	Qld Dept. of Transport & Main Roads
Jim Hefferan	Brisbane City Council
Coenraad Groenewald	Brisbane City Council
Andrew Barger	Queensland Resources Council
Katie Mulder	Queensland Resources Council
Melanie Stutsel	Minerals Council of Australia
Pat Fiore	Rio Tinto
Nicole Buchanski	Santos
David Shankey	Santos
Terry Rossitto	Brisbane Airport Corporation
Emma Covacevich	Clayton Utz
Jo-Anne Bragg	Environmental Defender's Office (Qld)
Richard Leck	WWF (Qld)
Dr Tina Hunter	Centre for International Minerals & Energy Law
Melbourne — 3 September 2013	
Corey Hannett	Victorian Regional Rail Link Authority
Simon Pryor	Business Council of Australia
Jennifer Westacott	Business Council of Australia
Matt Garbutt	Business Council of Australia
Sean Myers	Parsons Brinckerhoff
Philippa Forge	Parsons Brinckerhoff
John Whittington	Tas Dept. of Primary Industries, Parks, Water and Environment
Murray Arthur-Worsop	SA Dept. of Premier and Cabinet
Tristan Knowles	Economists at Large
David Byers	APPEA
Keld Knudsen	APPEA

(Continued next page)

Table A.4 (continued)

<i>Participant and location</i>	<i>Organisation</i>
Chuck Berger	Australian Conservation Foundation
Nicola Rivers	Vic Environmental Defender's Office
Corinne Cadilhac	Vic Dept. of Premier and Cabinet
Trevor Blake	Vic Dept. of Transport, Planning and Local Infrastructure
Rod Hook	SA Dept. of Planning, Transport and Infrastructure
Brad Ostermeyer	Regional Development Victoria
Sydney — 6 September 2013	
Steve Alchin	Infrastructure Australia
Oliver Steele	Infrastructure NSW
Adrian Dwyer	Infrastructure Partnerships Australia
David Frith	NSW Minerals Council
Andrew Rode	NSW Minerals Council
Steve Reid	Origin Energy
Debra Townsend	King & Wood Mallesons
Guy Templeton	Parsons Brinckerhoff
Rachel Walmsley	NSW Environmental Defender's Office
Chris Johnson	Urban Taskforce
Andrew MacIntosh	ANU
Amelia Thorpe	UNSW
Steve Hulton	Wood MacKenzie
Caryn Kakas	Property Council of Australia
Charlie Thomas	Property Council of Australia
Martin Hoffman	Commonwealth Dept. of Resources, Energy & Tourism
Richard Niven	Commonwealth Dept. of Resources, Energy & Tourism
Benjamin Arnold	Commonwealth Dept. of Infrastructure & Transport
Chris Wilson	NSW Dept. of Planning and Infrastructure
Matthew Dunn	NSW Treasury
Tim Hampton	NSW Dept. of Premier & Cabinet
Rod Stolorz	Tas Dept. of Economic Development, Tourism and the Arts

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B Benchmarking and good regulatory practice

Box 1.2 (chapter 1) set out 13 regulatory principles that constitute a benchmark of good regulatory governance and conduct. This appendix describes these principles.

B.1 Regulator governance

Governance frameworks provide a structure through which the objectives of regulators are set and the means of attaining these objectives and monitoring performance are determined. Governance principles, such as those outlined below, should provide incentives for regulators to pursue objectives that will lead to broader community benefits and build confidence in the operation of the regulatory system.

Clear, well-defined regulatory objectives

Development assessment and approval (DAA) processes address situations where the private and social costs and benefits of development diverge, by imposing conditions on projects that are intended to remove, or at least reduce, this divergence. However, regulation in this (or any) area can be over used or poorly directed. This is less likely to happen when regulatory objectives have been clearly defined through a process that has established a robust rationale for intervention. Such a process should specify precisely the problem that regulation is intended to address and identify why there is a role for government to address that problem.

Having clear objectives has other benefits, as it:

- diminishes regulators' discretion to extend their activities beyond what Parliament intended (known as regulatory creep)
- reduces uncertainty about how regulation will be interpreted and what is needed for compliance

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- establishes the basis for assessing the performance of regulators and holding them accountable
 - provides a focus for regulators and so guides their resource allocation and development of expertise (Victorian Competition and Efficiency Commission 2010).

Clarity in roles and responsibilities

With objectives clearly defined, there needs to be clarity about who is responsible for delivering them. All levels of government, and different agencies within each level of government, can be involved in DAA processes. This creates scope for problems such as:

- overlap and shared responsibilities between different agencies
- conflicts between the roles performed by different agencies
- conflicts of interest in the roles performed by an agency.

These problems are less likely to be present when the roles and responsibilities of all entities involved in DAA processes are set out clearly. For example, it may be useful if statutory referrals are set out in one document and specify the role of the referral agency (Development Assessment Forum 2009).

Accountable decision makers

When decision makers have clear objectives and their roles and responsibilities have been well specified, there is a basis for accountability. The prospect of being held to account creates incentives to carry out roles and responsibilities in line with specified requirements.

The accountability of participants in DAA processes is strengthened when there is clear specification of authority for:

- assessors to make recommendations
- approval authorities to make decisions based on those recommendations.

If decision making is delegated, accountability can be diminished, unless the conditions under which delegation is made and the scope of the authority that is devolved, are both carefully specified.

The last major step in the DAA process is the approval decision, which is typically made by a Minister or delegate and involves regulatory agencies, government

departments, project proponents and other stakeholders. While a Minister is often ultimately accountable for the approval decision, other entities may have roles and responsibilities in the process for which they are accountable. If the process leads to a decision that is seen to be deficient, it is simplistic to hold only the Minister to account for this. Applying the accountability criterion requires defining the responsibilities for which participants in the process can be held to account.

Appropriately independent regulators

While Ministers often make approval decisions, regulators may manage the assessment process and enforce approval conditions. The OECD (2013) points out that regulators' decisions need to be 'objective, impartial, consistent and expert' and that having decisions made by an independent regulator rather than a Minister or officer of the Ministry should be considered where:

- there is a need for the regulator to be seen to be independent, to maintain public confidence in the objectivity and impartiality of decisions;
- both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required; or
- the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality (OECD 2013, p. 33).

Independence is never absolute but is rather a matter of degree. Even separately constituted regulators with statutory independence normally depend on government funding. On the other hand, regulators located within departments can have arrangements that provide some independence from ministerial direction. The amount of independence that a regulator has will depend on factors such as the extent to which a Minister can direct it; its staffing flexibility; and the processes for appointment, termination of appointments of board members and the personal character of the individual concerned. The regulator's independence from those it is regulating is also important, and may be managed by, for example, mandatory time gaps or cooling-off periods between leaving a regulator and working in the regulated industry (OECD 2013).

Suitably skilled and resourced institutions

It is unreasonable to hold institutions accountable for their contribution to DAA processes if they have insufficient resources to develop and maintain the skills to perform their responsibilities. The adequacy of resourcing influences whether the DAA process will lead to desired outcomes. Funding levels need to be:

adequate to enable the regulator, operating efficiently, to effectively fulfil the objectives set by government, including obligations imposed by other legislation. (OECD 2013, p. 58)

Opportunities for public participation and review of decisions

DAA processes allow evidence to be sought from interested parties that informs the assessment of the project. Public participation, involving some form of dialogue between the public and the state, can generate evidence and identify options for addressing problems. It also promotes transparency by exposing the merits of decisions, assumptions and the analysis used to make those decisions.

Participation is important in all stages of the DAA process. Amelia Thorpe suggested:

... Public participation can offer many benefits, including improving the content of decision-making by providing decision makers with information about potential benefits and impacts of projects, possible alternatives, and the different perspectives of the many groups that form the public. Participation can increase the legitimacy of decision-making, thus reducing opposition to projects and making implementation easier. Participation is also valuable for its educative potential, as a means to raise awareness among the public about the tradeoffs involved in planning for the future. (sub. 16, p. 4)

In the application stage, consultation helps to identify the issues that need to be addressed, while in the assessment stage it provides evidence about these issues. Further consultation may be needed in the approval stage if there are gaps in the information that the decision maker needs. How much consultation may be needed at this stage depends on the effectiveness of consultation earlier in the process.

Participation is more likely to be effective if:

- public input has a real impact on decision-making
- information is given in a wide range of formats
- a variety of forums are used
- it occurs when there is still scope to affect the outcomes
- there is clarity about the consultation process
- the process is accessible to those it is intended to reach
- feedback is provided to those who have made an input (Cabinet Office (UK) 2012); sub. 16, p. 5).

The choice of participation methods is evolving, reflecting the fact that the internet has reduced the cost of new forms of engagement, such as electronic polling, deliberative polls, and online tools that can illustrate the consequences of choices, and engage a wider cross-section of the community and draw out tacit community opinion.

Consistency with other regulations and higher level planning strategies

Major developments require approvals under different Acts and regulations. When they have different objectives or impose dissimilar approval processes, this can increase both the cost of securing approval and the probability of inconsistent decisions that do not achieve regulatory outcomes. Consistency is enhanced by integrating objectives in different Acts and regulations or by governments providing guidance on how different priorities should be weighted, where conflicting objectives are unavoidable.

Regular review and evaluation

DAA processes operate within competing pressures that continually adjust as the nature and number of projects change, as technology develops, and as community expectations evolve. Approaches to regulation also develop as there is more experience with, for example, outcome-based regulation or self-accreditation. Evaluating current practices and looking for ways to improve them can:

- indicate whether regulations are working as intended and, if they are not, suggest ways to address problems
- keep regulation up to date when technological or social forces change
- improve legislation, because the knowledge that legislation will be formally reviewed may increase the quality of initial drafting
- improve the allocation of responsibilities for regulation, if it demonstrates weaknesses and suggests improvements
- build stakeholder support for regulation, if regulators demonstrate a willingness to learn from experience (Victorian Competition and Efficiency Commission 2008).

Good practice regulatory frameworks normally build in evaluation procedures and mechanisms for building on the lessons from these reviews.

B.2 Regulator conduct

Governance frameworks leave considerable discretion as to how regulators administer regulation. Participants in this study had diverse views about how this discretion is exercised, but agreed that the impacts could be considerable. The Minerals Council of Australia (sub. 33), for example, cited a survey that found monitoring or enforcement regimes were either impractical or unduly focused on dictating process rather than outcomes. On the other hand, the Nature Conservation Society of South Australia (sub. 37) considers that the interpretation of criteria under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) has not been sufficiently rigorous and cautious. The Commission has found that regulator conduct has a significant impact in other areas as well (box B.1).

Box B.1 The impact of regulator conduct: examples from other areas

In its study into regulator engagement with small business, the Commission concluded:

... The way regulations are implemented is often as important to small business and to compliance outcomes as the content of the regulations themselves. (2013, p. 3)

The Council of Small Business of Australia noted in its submission to that study that the majority of small business respondents to its survey reported that regulator behaviour is just as important as the design of regulation in contributing to compliance costs:

... respondents [business] indicated that they overwhelmingly considered BOTH regulatory design and regulator behaviour contributed equally to regulatory compliance cost. (2013, p. 3)

Similarly, Business SA submitted:

... it is often the approach and behaviour of regulators that can have a direct impact on how onerous or not the regulation and reporting requirements are for small business. (2013, p. 1)

And in an urban planning context, the Australian Hotels Association has argued:

... it is most often the interpretation of planning laws, rather than the laws themselves, that are the source of obstruction to the desirable improvement of licensed premises which serve the local community. (2010, p. 4)

This section outlines five criteria, which identify conduct by regulators that lead to more efficient and effective outcomes.

Clear and predictable processes

Clear and predictable processes build confidence in the legitimacy of the regulatory framework and reduce the costs of engaging with it. Given that tradeoffs between competing objectives are the focus of DAA processes, there needs to be clear and predictable processes for managing these tradeoffs. Regional Development

Australia Far North Queensland and Torres Strait (sub. 26, p. 5) submitted that ‘providing certainty of processes and relevant industry policy is critical to securing investment and economic development’. Business SA (sub. 4) considered that DAA regulation and processes need to be predictable, transparent and easy to understand; and there should be certainty about information requirements.

Clarity and predictability are more likely to be achieved when regulators use decision criteria that are stable, well understood and lead to decisions that could have been predicted on the basis of the evidence that is available. When more than one regulator is involved, clarity is assisted if they use the same set of decision criteria. Predictability does not mean that criteria never change. However, changes to criteria should be limited to those that are a logical development of existing methodologies or could have been predicted on the basis of new evidence.

Regulatory outcomes consistent with objectives

This criterion is significant because applying it seeks to reveal the extent to which the DAA process delivers intended outcomes. For example, it would be expected that Commonwealth environmental decisions will be made in accordance with the principles of ecologically sustainable development as set out in section 3 of the EPBC Act.

In addition, by focusing on the link between objectives and outcomes, this criterion directs attention to compliance. For example, there is little to be gained in regulating projects through conditions that are not capable of being enforced. Regulatory outcomes are more likely to be consistent with objectives when approval conditions are in line with the objectives of regulation, are enforceable and are enforced.

Open and transparent processes

Open and transparent processes increase accountability and lead to decisions that more closely reflect community preferences. Such processes also mitigate concerns that regulators may be captured by regulated entities. Transparency is enhanced by opportunities for public participation and review and by publishing the reasons for approval decisions. Publication:

- strengthens incentives for decisions to be evidence-based and rigorous
- is consistent with procedural fairness
- demonstrates how decision makers have balanced competing priorities.

Proportionate and flexible regulatory requirements

Regulation uses government authority to change behaviour. It typically imposes costs on entities that are regulated, as well as delivering benefits through the consequent change in behaviour. There are usually many different ways to bring about that change in behaviour.

Proportionality is present when:

- alternatives to a particular regulatory approach have been considered and the option that yields the largest community benefits has been chosen
- there are no unnecessary obligations
- regulatory decisions, including conditions that are imposed before approval is given, impose costs that are proportionate to the impacts they are intended to address.

A risk-based approach to regulation can be a proportionate approach when it is well designed.

The case for a risk-based approach to regulation can be easily made on efficiency and effectiveness grounds. Regulation should be proportionate to the problem that it seeks to address; therefore a risk-based approach would be underpinned by scientific evidence and a robust decision methodology. This is necessary if governments are to balance the tension towards reactive regulation to public responses to risk. (Bounds 2010, p. 23)

No unnecessary costs

Administering and participating in approval processes imposes costs on government departments, regulators, the project proponent, and other participants (as well as creating benefits). Types of costs include:

- the costs of administering the process, such as determining the scope of the assessment, preparing impact assessments and running participation processes
- the costs of complying with conditions and offsets that are imposed through approval decisions, and which are borne in the first instance by project proponents
- delay costs that arise if the process delays project planning and implementation, which may take the form of additional holding costs, lost profits and lost interest on foregone profits. Delay costs may not be confined to the project in question. (The Hunter Valley Coal Chain Coordinator (sub. 56) pointed out that because projects in the coal chain are interdependent, the capacity benefits of other

infrastructure projects cannot be fully realised until a delayed project is commenced.)

Comparing jurisdictions draws attention to potentially unnecessary regulatory burdens, given policy objectives, by identifying:

- differences between jurisdictions in regulatory requirements for achieving similar objectives
- the extent of regulatory duplication and inconsistency
- poor practice in the design, administration or enforcement of regulation.

Costs that exceed those that are needed for an effective approval process are wasteful. Such costs are less likely to occur in a regulatory framework that exhibits the other criteria outlined in this appendix, where there are clearly specified objectives linked to outcomes, and the process is run by skilled and accountable regulators, who operate transparently and adopt a proportionate approach to administering regulatory requirements.

C Australian DAA arrangements

This appendix summarises development assessment and approval (DAA) arrangements for major projects in each jurisdiction. Section C.1 describes the arrangements in each jurisdiction. Section C.2 contains a series of tables on assessment and approval authorities, compliance and enforcement responsibilities, and legislation relevant to DAA processes.

Unless otherwise indicated, the material in this appendix is based on Commission analysis of legislation in each jurisdiction, or the Commission's correspondence with individual agencies.

C.1 Overview of major project DAA arrangements by jurisdiction

Commonwealth

Major projects that are likely to have a significant impact on a matter of national environmental significance (MNES), or that are undertaken on Commonwealth land, or by a Commonwealth agency, may be subject to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Under the EPBC Act, there are no assessment and approval pathways of the type existing under State and Territory arrangements, although actions that are likely to have a significant impact on an MNES must be referred to the relevant Commonwealth Minister to determine whether the action is 'controlled' by the Act. If an action is controlled, the Minister determines what assessment process should be used.

The Minister can decide that the action is: unacceptable (and cannot proceed as planned); a controlled action (subject to the full assessment and approval process under the EPBC Act); not a controlled action (provided the action proceeds in the manner specified by the Minister); or not a controlled action (no further action required under the EPBC Act). For actions deemed 'unacceptable', the proponent is notified and may withdraw the action, modify and resubmit, or request the Minister reconsider the decision.

For controlled actions, the next step is to determine the assessment approach. There are seven possible options open to the Minister:

- an assessment under a State or Territory bilateral assessment agreement accredited under the EPBC Act
- an assessment under a State or Territory assessment process accredited under the EPBC Act on a case-by-case basis
- assessment on referral information (that is, assessment is undertaken solely on the information provided on the referral form)
- assessment on preliminary documentation (this includes information on the referral form and any other relevant material identified by the Minister as being necessary to adequately assess a proposed action)
- assessment by environmental impact statement (EIS)
- assessment by public environment report (PER)
- assessment by public inquiry.

Table C.1 shows State and Territory processes accredited for EPBC Act purposes.

Table C.1 Accredited State and Territory assessment processes

<i>Jurisdiction</i>	<i>Accredited processes</i>	<i>Legislation</i>
New South Wales ^a	This agreement has expired	-
Victoria	Environmental effects statement Assessment by an Advisory Committee or a joint Advisory Committee/Panel Assessment by permit application Works approval application Bulk water entitlement assessment	<i>Environment Effects Act 1978</i> <i>Planning and Environment Act 1987</i> <i>Planning and Environment Act 1987</i> <i>Environment Protection Act 1970</i> <i>Water Act 1989</i>
Queensland	Environmental impact statement for coordinated projects	<i>Sustainable Planning Act 2009</i> <i>State Development and Public Works Organisation Act 1971</i> <i>Environment Protection Act 1994</i>
South Australia	Environmental impact statement, public environment report or development report for 'major projects'	<i>Development Act 1993</i>
Western Australia	Assessment by public environmental review	<i>Environment Protection Act 1986</i>
Tasmania	Integrated assessment process for projects of state significance Assessment of development proposal and environmental management plan Assessment process for projects of regional significance	<i>State Policies and Projects Act 1993</i> <i>Environmental Management and Pollution Control Act 1994</i> <i>Land Use Planning and Approvals Act 1993</i>
Northern Territory	Assessment by environmental impact statement public environmental review Assessment by inquiry	<i>Environmental Assessment Act</i> <i>Northern Territory Inquiries Act</i>
ACT	Environmental impact statement	<i>Planning and Development Act 2007</i>

^a The New South Wales agreement expired in 2012. The Australian and New South Wales Governments have indicated that this agreement will be renewed by 2014.

A major project can also be subject to a range of other Commonwealth regulations requiring assessment and approval relating to environment, heritage, native title and land rights protections, as well as some regulations specific to offshore petroleum extraction and pipeline construction (table C.2).

Table C.2 Commonwealth legislation affecting major projects

	<i>Act</i>	<i>Agency</i>	<i>Process/approvals</i>
Environment	<i>Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)</i>	Dept of the Environment	<p>Under the EPBC Act, there are two ways of achieving approval for actions that are likely to have a significant impact on a matter of national environmental significance (MNES):</p> <p>Assessment of individual actions</p> <p>An individual action that will have, or is likely to have, a significant impact on a MNES (or any action that will have a significant impact on the environment on Commonwealth land or which is taken on Commonwealth land or by a Commonwealth agency that is likely to have a significant impact on the environment) must be referred to the Minister to determine if it requires assessment and approval under the EPBC Act.</p> <p>Strategic assessments</p> <p>These examine the potential impacts of actions under a policy, plan or program (for example, local government plans, regional plans and infrastructure plans). The Minister may endorse the plan and/or approve actions under the plan. The EPBC Act provides several other ways to strategically protect MNES including:</p> <ul style="list-style-type: none"> • conservation agreements • bilateral agreements • providing the Ministers advice in relation to particular activities (s. 160) • bioregional planning • World and National Heritage plans.
	<i>Great Barrier Reef Marine Park Act 1975</i>	Dept of the Environment	Permits are required for particular activities undertaken in the Great Barrier Reef Marine Park.
	<i>Environment Protection (Sea Dumping) Act 1981</i>	Dept of the Environment	Permits are required for sea dumping activities undertaken in Commonwealth waters.
	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	DIRD/AMSA	This Act sets standards for sea pollution/discharge and imposes fines and penalties for breaches of those standards.
	<i>Sea Installations Act 1987</i>	Dept of the Environment	Permits are required to construct sea installations in Commonwealth waters.
	<i>Environment Protection (Alligator Rivers Region) Act 1978</i>	Dept of the Environment	This Act imposes requirements on proponents of uranium mining projects in the Alligator Rivers region.

(Continued next page)

Table C.2 Commonwealth legislation affecting major projects (continued)

	<i>Act</i>	<i>Agency</i>	<i>Process/approvals</i>
Heritage	<i>Australian Heritage Council Act 2003</i>	Dept of the Environment	This Act establishes the Australian Heritage Council, which advises the Minister responsible for heritage matters (including the significance of heritage places being considered for listing by the Minister under the EPBC Act).
	<i>Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)</i>	Dept of the Environment	World Heritage properties and National Heritage places are identified as MNES under the EPBC Act. Accordingly, any action that will have, or is likely to have, a significant impact on the heritage values of these places must be referred to the Minister to determine if it requires assessment and approval under the EPBC Act.
	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	Dept of the Environment	The Minister can make a declaration to protect an area or object of Indigenous heritage from a threat of injury or desecration if a request is made by an Aboriginal or Torres Strait Islander person.
	<i>Protection of Movable Cultural Heritage Act 1986</i>	AGD	Permits are required to export items of cultural heritage from Australia.
	<i>Historic Shipwrecks Act 1976</i>	Dept of the Environment	Permits are required to damage or disturb historic shipwrecks or relics, to enter a protected zone around an historic shipwreck site, to transfer possession of an historic shipwreck relic and to remove an historic shipwreck relic from Australia.
Petroleum and pipelines	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>	Dept of Industry/ NOPSEMA	Authorisation is required to conduct petroleum exploration and recovery operations, and to construct and operate petroleum and greenhouse gas pipelines, in Commonwealth waters. Authorisations (titles) are granted by the Joint Authority. Petroleum projects undertaken in Commonwealth waters are regulated by NOPSEMA. Approvals and requirements under this regime include an environment plan (including an oil spill contingency plan), a well operations management plan, well activity approvals and a safety case.
	<i>Offshore Minerals Act 1994</i>	Dept of Industry	This Act applies to (non-petroleum) mining projects undertaken in Commonwealth waters. There are five different mining authorisations that can be granted by the Joint Authority.

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Table C.2 Commonwealth legislation affecting major projects (continued)

	<i>Act</i>	<i>Agency</i>	<i>Process/approvals</i>
	<i>Petroleum (Timor Sea Treaty) Act 2003</i>	Dept of Industry	Petroleum production activities in the Joint Petroleum Development Area (JPDA) (an area in the Timor Sea in which Australia and Timor-Leste jointly manage exploration and development of petroleum resources) are subject to approvals by the Autoridade Nacional do Petroleo (the ANP) (the Timor-Leste National Petroleum Authority) which regulates operations in the JPDA on behalf of both Australia and Timor-Leste.
	<i>Submarine Cables and Pipelines Protection Act 1963</i>	DIRD	Permits are required for activities that may impact on cables and pipelines in Commonwealth waters.
Native title and land rights	<i>Native Title Act 1993</i>	DPM&C	This law allows for recognition of the native title rights of Indigenous people through a claims and mediation process. Determinations are made by the Federal Court of Australia. Other processes are administered by the Native Title Tribunal.
	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	DPM&C	This Act provides for the transfer of land in the Northern Territory to Aboriginal people, who are represented by Aboriginal Land Councils. Permits are required to access land held under inalienable freehold title.
Others	<i>Airports Act 1996</i>	DIRD	Masters Plans, Environment Strategies and Major Development Plans are subject to approval by the Commonwealth Transport Minister.
	<i>Fisheries Management Act 1991</i>	Dept of Agriculture/ AFMA	Permits are required for taking fish and using boats and equipment in Commonwealth fisheries.

DIRD = Department of Infrastructure and Regional Development. NOPSEMA = National Offshore Petroleum Safety and Environmental Management Authority. DPM&C = Department of Prime Minister and Cabinet. AGD = Attorney-General's Department. AFMA = Australian Fisheries Management Authority. AMSA = Australian Maritime Safety Authority.

New South Wales

The NSW *Environmental Planning and Assessment Act 1979* (EPA Act) currently establishes two pathways for major project assessment in NSW:

- the state significant development pathway (SSD) (under Part 4.1 of the EPA Act) is primarily for large-scale private sector projects usually greater than \$30 million
- the state significant infrastructure pathway (SSI) (under Part 5.1 of the EPA Act) is primarily for large public infrastructure projects where a government agency is the proponent.

The NSW State Environmental Planning Policy (State and Regional Development) 2011 sets out a range of criteria defining the types of projects that must be subject to

the SSD or SSI pathway. A proponent who believes that their project meets the SSD or SSI criteria typically lodges a preliminary online development application with the NSW Department of Planning and Infrastructure (the Department). The Department makes a preliminary assessment of the project against the criteria and confirms whether the proposal qualifies.

In certain circumstances, the Minister for Planning (the Minister) can ‘declare’ or ‘call-in’ projects that do not meet the criteria as a SSD or SSI. For example, the Minister can ‘call-in’ a project as a SSD, but only after the Minister has obtained, and made public, advice from the Planning Assessment Commission about the state or regional planning significance of the development.

Development applications are processed and assessed within the Department. Once the pathway is confirmed, the Department begins the process for determining the Director-General’s Environmental Assessment Requirements (DGRs) for the project. These specify the scope of issues and other information requirements that must be addressed in the project’s environmental impacts statement (EIS). In setting the DGRs, the Department seeks input from the referral agencies and public authorities (including local councils) that would normally have statutory regulatory and approval responsibilities for the proposed project.

While the Minister is technically the consent authority for SSD and SSI applications, in practice the Department has delegation to make decisions where:

- there are less than 25 objections
- there is local council support
- a reportable political donation has not been made.

The Planning Assessment Commission has delegation to make decisions on applications made by proponents as follows (excluding applications made by, or on behalf of, a public authority):

- there are more than 25 objections
- the local council has objected, or
- a reportable political donation has been made.

A declaration of SSI means certain permits or approvals are not required by proponents, such as:

- an approval under Part 4, or an excavation permit under section 139, of the *Heritage Act 1977*

-
- an Aboriginal heritage impact permit under section 90 of the *National Parks and Wildlife Act 1974*
 - an authorisation referred to in section 12 of the *Native Vegetation Act 2003* (or under any Act repealed by that Act) to clear native vegetation or State protected land.

A declaration of SSI also means there are some permits or approvals which, while proponents still need to obtain them, cannot be refused by agencies because their refusal would be inconsistent with the development consent. These include:

- an aquaculture permit under section 144 of the *Fisheries Management Act 1994*
- an approval under section 15 of the *Mine Subsidence Compensation Act 1961*
- a mining lease under the *Mining Act 1992*
- a production lease under the *Petroleum (Onshore) Act 1991*
- an environment protection licence under Chapter 3 of the *Protection of the Environment Operations Act 1997*
- a licence under the *Pipelines Act 1967*.

The Minister can also declare any SSI project as critical state significant infrastructure (CSSI) if he or she considers it is essential for economic, environmental or social reasons. A CSSI declaration means a development application can be lodged without the consent of landowners, exempts the development application from additional environmental laws, and restricts the availability of merits review. The EPA Act prohibits ministerial delegation of CSSI projects.

The NSW Government is seeking to implement a number of reforms to the NSW planning system. The Planning Bill 2013 is before the NSW Parliament at the time of completion of this report (and has passed the Legislative Assembly). The proposed reforms seek to place greater reliance on strategic planning, reduce assessment times for straightforward applications, simplify the planning process and reduce the costs associated with planning decisions. Proposed reforms continue the existing major project pathways (SSD and SSI), while introducing a new pathway for infrastructure projects identified by the State Government as ‘essential’ (Public Priority Infrastructure).

Under the proposed reforms, projects can be declared Public Priority Infrastructure by a published ministerial order containing reasons for the declaration. Once declared, such projects will not require further planning approval, and will not be subject to a number of other provisions of the proposed Act (including the environmental impact assessment requirements). However, a project definition

report is required to be made public. The report must set out a description of the development, the measures that the proponent will take to avoid, minimise or mitigate any adverse impacts of the development, and the monitoring, auditing and reporting that the proponent will undertake in relation to the environmental impacts of the development.

The Planning Bill 2013 will repeal the EPA Act if passed by both houses of parliament in its current form.

Victoria

A major project in Victoria can be assessed and approved under a range of regular and designated major project pathways depending on the characteristics of the project and the requirements under the *Planning and Environment Act 1987* (Planning and Environment Act) and other legislation. In particular, the DAA processes for a given project will depend on:

- whether it requires a planning permit, an amendment to a local planning scheme, or a Ministerial Permit under the Planning and Environment Act
- whether the ‘responsible authority’ under the Planning and Environment Act — the authority in charge of administering a planning scheme and granting permits — is a local government, the Minister for Planning (through use of ‘call-in’ powers or Ministerial Permits), or some other authority
- what other DAA processes are required under other state legislation (such as for mining projects under the *Mineral Resources (Sustainable Development) Act 1990*)
- whether an environmental assessment is required under the *Environment Effects Act 1978* (Environment Effects Act).

For major projects that require a planning permit, a project proponent lodges a planning permit application with the local council which assesses and approves the application in accordance with a local planning scheme following processes set out in the Planning and Environment Act.

A major project may also require an amendment to a local planning scheme to allow a planning permit to be approved by a local government. The amendment can be requested by a project proponent, the local government or another planning authority, but must be decided by the Minister for Planning following processes set out in the Planning and Environment Act.

The Minister for Planning can call-in a planning permit application that would otherwise be assessed and approved by a local government (under Section 97 of the Planning and Environment Act) or an application to amend a planning scheme (under processes laid out in the Planning and Environment Act, *Heritage Act 1995* and *Victorian Civil and Administrative Tribunal Act 1998*). The criteria for exercising this call-in power include where a project is of State or regional significance.

Certain large-scale developments or developments in specified areas require a Ministerial Permit from the Minister for Planning. This pathway has been used frequently in recent years, predominantly for large commercial and residential buildings in the City of Melbourne and its surrounds and developments in the State's alpine areas.

Environmental impacts are assessed under a separate environmental assessment process established under the Environment Effects Act. Any responsible authority (local government, Minister or other) that believes a project they are assessing may have significant effects on the environment must refer the planning permit application to the Minister for Planning for a decision on whether an environment effects statement (EES) is required. Where the Minister determines an EES is required, the proponent must prepare and submit the EES to the Minister for assessment under processes set out in the Environment Effects Act. The Minister's assessment report is sent to the relevant decision making authority to inform them in making a final decision on whether or not to approve the project.

Major transport projects in Victoria are assessed under a dedicated DAA pathway. They must be declared by the Governor under a process set out in the *Major Transport Projects Facilitation Act 2009*.

A project is eligible to be declared if it is: road infrastructure; rail infrastructure; infrastructure that can be used for the movement of persons or goods; a port; a facility at which goods can be loaded or unloaded or temporarily stored; or any project that incorporates one of these types of infrastructure.

The Premier must prepare, and publish in the Government Gazette, project declaration guidelines which are used to determine whether the project is of economic, social or environmental significance to the State or a region.

The Premier, in consultation with the Minister for Planning, assesses the project against the guidelines and if they find it to be of significance, the Premier can recommend declaration to the Governor, who then formally declares the project a major transport project.

Once the project has been declared, the process depends on the level of assessment. For impact management plans, the Minister for Planning assesses and approves the development. For comprehensive impact statements, a committee assesses the development, and the Minister for Planning approves it.

The Victorian Parliament recently passed an Act amending these processes, the *Major Transport Projects Facilitation (East West Link and Other Projects) Act 2013*. This Act, among other things, provides increased flexibility to proponents (for example, with regard to allowing variations to project designs); allows some early works to commence sooner; shortens statutory timelines; provides for more risk-based assessment processes and streamlines administrative arrangements (Naphthine 2013).

Queensland

Major projects in Queensland can be assessed and approved under various designated pathways under the *State Development and Public Works Organisation Act 1971* (SDPWOA). These pathways include the following:

- *Coordinated projects*: developments with complex approval requirements, that are of strategic significance, or that have significant environmental effects, or significant infrastructure requirements (for example, large LNG and mining projects, industrial installations, resorts, ports and transport infrastructure).
- *Prescribed developments*: mineral or energy projects of major economic significance, or that require provision of infrastructure which would place an excessive financial burden on the State, or that significantly affect provision of services and facilities by the Government.
- *prescribed projects*: coordinated projects, projects in a state development area, or projects considered to be economically or socially significant to Queensland or the region in which the project is to be undertaken, or that affect an environmental interest of Queensland or a region, can be declared prescribed projects by the Minister for Planning.
- *Projects in declared state development areas*: clearly defined areas of land established by the Coordinator-General to promote economic development in Queensland (for example, industrial hubs for large-scale, heavy industry, multi-user infrastructure corridors and major public infrastructure sites).
- *Private infrastructure facilities*: projects that are of economic or social significance and have economic or social benefits to a region, or that satisfy an identified need or demand for services (for example, road, railway, bridge or

other transport infrastructure, electricity generation, transmission or distribution facilities, oil or gas storage, transmission or distribution facilities).

Major projects with a 'state interest' can be called-in and assessed by the Minister for Planning under the *Sustainable Planning Act 2009*. Major urban developments in priority development areas can be assessed under processes set out in the *Economic Development Act 2012*.

Under the SDPWOA, a project might be declared a coordinated project if it has:

- complex approval requirements, involving local, State and Australian Governments
- significant environmental effects
- strategic significance to the locality, region or State, including for the infrastructure, economic and social benefits, capital investment or employment opportunities it may provide
- significant infrastructure requirements.

The Coordinator-General can make a declaration in response to an application from a proponent or can declare any project he or she considers justified.

When an environmental impact statement (EIS) is required under the SDPWOA, terms of reference must be developed. The Queensland Government has recently reformed this process by developing shortened, standardised terms of reference for the EIS and by reducing state agency input into the draft terms of reference.

Once the EIS has been conducted, the EIS report is publicly exhibited and public submissions can be made. The Coordinator-General is responsible for evaluating the EIS, taking into account public submissions and other material, before preparing an assessment report, which is also made public. The proponent may propose changes, which if substantial may prompt the Coordinator-General to require a further EIS assessment with public notice period. The Coordinator-General will then prepare a 'Change Report' which is also made public.

The Coordinator-General provides an assessment report to the decision maker (ordinarily the Department of Environment and Heritage Protection (DEHP)) that recommends whether or not the project should proceed, sets out conditions and offsets for the development approval, and can also recommend conditions that should be imposed on subsequent environmental authorities/permits. DEHP is also responsible for granting some environmental authorities and permits, and imposing conditions on these permits. DEHP can only decide whether or not the project should proceed. If the development is approved, DEHP must accept all the

conditions recommended by the Coordinator-General. Any additional conditions it imposes must be consistent with these conditions.

Coordinated projects are also required to conduct a social impact assessment. Recent reforms mean proponents are no longer required to prepare a social impact management plan, instead the focus is on outcomes-based commitments and mitigation strategies.

Coordinated project proponents are still required to obtain all other secondary development approvals and licences from local authorities and State Government agencies.

On 1 July 2013, Queensland established the State Assessment and Referral Agency (SARA) to create a central point for development applications, resulting in one application and one response from Government. The reform means the Department of State Development, Infrastructure and Planning (as the SARA) will coordinate assessment and referrals across government (but this will not apply to the Coordinator-General's processes).

The Queensland Government is also developing a 'Common Resources Act' to replace the State's current resources legislation (*Mineral Resources Act 1989*; *Petroleum and Gas (Production and Safety) Act 2004*; *Petroleum Act 1923*; *Greenhouse Gas Storage Act 2009*; *Geothermal Energy Act 2010*), which will be implemented in stages and finalised by 2016. This is to simplify resources industry regulation to bring it into line with comparable jurisdictions. (For example, the Queensland Government suggests that Alberta, Canada has 27 per cent of Queensland's regulatory volume (DNRM 2013).

South Australia

The two pathways for assessing major projects in South Australia are set out in the *Development Act 1993*:

- the major development or project pathway (under section 46). Major development proposals include a range of private and some publicly funded projects including the desalination plant, port facilities, commercial and residential buildings, and mining operations
- the Crown development and public infrastructure pathway (under section 49). These provide for the streamlined assessment of public infrastructure projects (advanced by either public or private proponents). The Crown development and public infrastructure pathway is used primarily for government infrastructure

projects but is also available for private projects that are sponsored by a Government agency.

The major developments process is accredited under the Commonwealth EPBC Act bilateral assessment agreement (although the Crown development and public infrastructure pathway process is not). Once a proposal has been declared a 'major development' by the Minister under section 46, the development application is referred to the Development Assessment Commission (DAC) — a statutory body established under the *Development Act 1993*.

The DAC then determines which of three levels of further detailed assessment is required:

- an environmental impact statement (EIS) for the most complex proposals, where there are a wide range of issues to be investigated in depth
- a public environmental report (PER) where the issues surrounding the proposal need investigation in depth but are narrower in scope and relatively well known
- a development report (DR), the least complex level of assessment, which relies principally on existing information.

Typically where an EIS is required, the proponent would prepare the EIS and the Department would prepare an assessment report for the Minister, ahead of a decision on the development application by the Government (although some decisions could be delegated to a Minister or the DAC). For Crown development and public infrastructure, the DAC assesses all applications and provides a report to the Minister for Planning, who makes the final decision. If the Minister approves a development that the DAC considers to vary significantly from the local development plan, or if the local council objects, the Minister must submit a report on the matter to Parliament. There are no merit appeal rights for the major developments or Crown development and public infrastructure pathways.

Where a project includes one or more activities of environmental significance (*Environmental Protection Act 1993* Schedule 1), assessment documents must be referred to the Environment Protection Authority (EPA) for deliberation and comment. Where such an activity is not proposed, assessment documents may still be referred to the EPA should the assessment authority decide such a referral is necessary to fully understand the potential impacts of a proposal. The EPA also issues environmental permits (although after a development approval has been obtained under section 46, the EPA cannot refuse a required permit).

In South Australia, case management facilitates access to regulatory agency personnel on behalf of the proponent, enabling regulatory agencies to be aware of

the potential project and to assign resources from the beginning of the assessment process. Case managers typically have established networks within the relevant regulatory agencies.

In February 2013, South Australia announced the formation of an Expert Panel on Planning Reform to review the State's planning system. While focused on South Australia's planning legislation, it will also look carefully at all legislation that intersects with planning, and other factors that impact on the planning system. Final recommendations are scheduled for December 2014.

Western Australia

Major projects¹ in Western Australia can be assessed and approved as a:

- development that must be approved by Development Assessment Panels (DAPs)
- development for which the proponent may elect to have the DAPs or another body determine it
- development that is not eligible to be determined by the DAPs, in which case it will be assessed and approved by the local council and/or the Western Australian Planning Commission (WAPC).

With some exceptions (such as single dwellings), applications for which the estimated cost of development is \$7 million or more (\$15 million or more in the City of Perth) are mandatory DAP applications. There are 15 DAPs, each dealing with a specific region. DAPs comprise a mix of local government representatives and technical experts. Local government representatives are nominated by the relevant local government, and appointed by the Minister. Specialist members are appointed by the Minister.

A project subject to an ultimate approval decision by a DAP may be assessed by the local council, the WAPC, or both, depending on the provisions of the regional planning scheme.

The local government and/or the WAPC assesses the application in accordance with the relevant local or regional planning scheme, including public advertising of the application (if required) and referral to internal and external departments and agencies. The local government and/or the WAPC prepares a 'responsible authority

¹ The thresholds used to determine who assesses and approves projects are not considered by the Western Australian Government to be thresholds for attaining major project status. Projects are categorised as major based on their size, complexity or environmental, economic or social impact (rather than solely by capital values) (sub. DR103).

report' containing its recommendations on how the DAP application should be determined and provides it to the DAP. This is intended to be a technical report by their planner, and not an expression of a council's view as to whether they think the application should be approved.

The DAP is required to determine applications in accordance with the provisions of the relevant planning instrument. The DAP is required to determine the application within 60 days (if the application does not require public advertising) or within 90 days (if the application does require public advertising) from the date the DAP development application was received and acknowledged by the local government. The DAP must have regard to, but is not bound to give effect to, the recommendations included in the report. However, the planning scheme applies to the DAP as to other bodies. The meeting at which the DAP makes its decision is public.

The applicant can seek a review of the DAP's decision by the State Administrative Tribunal. If there is an application before the State Administrative Tribunal, the Minister may call-in this application and determine it him or herself. The Minister is not bound by planning considerations but may make the determination having regard to any other matter, including the public interest, and this decision is not appellable.

The assessment manager (WAPC or the local council) does not conduct the environmental impact assessment associated with major projects. These are the responsibility of the Environmental Protection Authority (EPA) in Western Australia. The EPA processes are separate from the development approval process.

Once a significant or strategic proposal has been referred, the EPA has 28 days to decide whether or not to assess it. When it completes an assessment, it will provide a report to the Minister and the decision making authority. The report is also made public. The Minister for the Environment will then consult with relevant Ministers (for example, Planning and Mining) and if possible, agree with them on whether, and how, the proposal should be implemented. If the Ministers cannot agree, the matter is referred to Cabinet, and its decision cannot be appealed.

Western Australia has adopted a Lead Agency Framework to assist in facilitating the approval of major projects. This means one government agency, such as the Department of Mines and Petroleum for a mining project, assists with or coordinates approvals for a project proposal.

The lead agency is responsible for:

-
- providing proponents with information on statutory requirements through agency guidelines and referrals
 - case-managing and coordinating approvals applications across government for proposals, where appropriate
 - assisting proponents to identify the potential impacts of the proposal on matters such as infrastructure, the environment and regional communities, as well as the social considerations that arise from the proposal.

Tasmania

Tasmanian legislation establishes three main pathways for major projects:

- projects of state significance (under the *State Policies and Projects Act 1993*)
- projects of regional significance (under the *Land Use Planning and Approvals Act 1993*)
- major infrastructure development projects (under the *Major Infrastructure Development Approvals Act 1999*), used primarily for large public infrastructure projects such as roads, railways or power lines.

If a project is declared a project of state significance, the Environment Protection Authority (EPA) will not conduct an environmental impact assessment. Instead, the Tasmanian Planning Commission (TPC) conducts an integrated assessment of all the environmental, social, economic and community issues relevant to that project, as well as any other issues as may be prescribed by the Minister. The TPC reports to the Minister ‘as soon as practicable’ on whether the project should proceed and under what conditions. This report is publicly available.

The Minister must make a decision, which can differ from the TPC’s recommendation, within 28 days of receiving the report. There are no criteria in legislation to guide decisions. However, they need to be approved by both Houses of Parliament to take effect. The TPC can subsequently specify additional conditions in a report (which also must be publicly available). The Minister must respond to this report within 28 days. If the new decision diverges from the previous one, it must be provided to both Houses of Parliament.

If a project is declared as a project of regional significance, the TPC appoints a Development Assessment Panel (DAP) to undertake the assessment, including the setting of the scope of the environmental assessment (the Assessment Guidelines), and also refers the project to the EPA. A DAP comprises a representative from the TPC, a person nominated by relevant councils and a person considered to be an expert by the TPC. The DAP (and the Minister) receive advice from the EPA on

whether the project will be assessed under the *Environmental Management and Pollution Control Act 1994*, the class of assessment required, and the scope of the Assessment Guidelines. The DAP must make a decision about whether to grant a development permit for the project (and under what conditions) as soon as practicable.

If the Minister decides to declare a project to be a major infrastructure project (a decision which is disallowable by Parliament), a combined planning authority is then set up with representatives from relevant planning authorities. It assesses the project and decides whether to grant permits to the project and under what conditions. The role of the EPA is the same as for projects of regional significance.

Northern Territory

Approval procedures for major projects in the Northern Territory are consistent with the approval process operating more generally in the Territory. There are major project teams in the Department of Business and the Department of the Chief Minister, that perform a ‘lead agency’ role facilitating approvals through government (but not doing assessments or providing approvals directly).

The NT *Planning Act* defines activities requiring a ‘development consent’. Divisions of the Development Consent Authority assess and approve development applications within their division area. Outside of these areas, the consent authority is the Minister. The Minister may also ‘call-in’ applications.

The Planning Minister can also grant Exceptional Development Permits to allow projects that would otherwise be a prohibited development under the Planning Scheme, and this instrument has been used for some major projects.

Zoning maps show the zoning of land in the Northern Territory, and there is a defined range of uses permitted for each zone under the Planning Scheme. Uses in a particular zone may be permitted without the consent of the consent authority, permitted with the consent of the consent authority, or prohibited. There are large areas of the Northern Territory that are unzoned. In the unzoned areas, development provisions of the Planning Scheme do not apply, although land use controls sometimes do.

Environmental assessments are overseen by the NT Environment Protection Authority. Where a project is likely to have a significant impact on the environment, some form of environmental assessment is required. This will take the form of either an environmental impact statement (EIS) or public environmental report (PER), depending on the scale, complexity and impact of the project. The PER

process is more limited than for an EIS except where the proposal is being assessed under the bilateral assessment agreement between the Northern Territory and Australian Governments.

The NT EPA assesses the PER or EIS and makes recommendations to the Environment Minister, who passes on the NT EPA's assessment and recommendations to the responsible portfolio Minister, who makes the final decision. In providing it to the responsible Minister, the Environment Minister may make comment on the NT EPA's assessment report. If the comment is contrary to the assessment report, the Environment Minister must provide notice to the NT EPA of the comment and the reason for it, and table this notice in the Legislative Assembly.

If the responsible Minister makes an approval decision that is contrary to the NT EPA's assessment report, he or she must provide notice to the NT EPA of the decision with reasons and table this notice in the Legislative Assembly.

Mining projects are regulated under the *Mining Management Act*. For mining projects, following an environmental impact assessment that takes place in the same way as for non-mining projects, all proposed disturbance to the environment must be assessed and approved through a Mining Management Plan overseen by the Department of Mines and Energy. The plan includes responses to recommendations of the environmental impact assessment.

Australian Capital Territory

Under the *Planning and Development Act 2007*, the requirements for assessing development depend on which assessment track the development falls under. When an application for development is made, it can fall under one of three assessment tracks: code track, merit track or impact track.

The code track is the least onerous. Development proposals are approved if they comply with the rules that apply to the proposal.

Development applications in the merit track are considered by the Planning and Land Authority which must consider:

- the objectives for the zone in which the development is proposed to take place
- the suitability of the land for the proposed development
- each representation received in relation to the development
- the advice of any entity to which the application was referred

-
- any management plan for public land
 - the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts.

Merit track applications must also be referred to a number of other agencies as prescribed by the Territory Plan (the key statutory planning document in the ACT), unless their endorsement has been lodged with the development application.

In addition to decision requirements that apply to merit track assessments, development applications in the impact track must include a completed environmental impact statement (EIS). However, the Minister may exempt an application from having to complete an EIS where he or she is satisfied that the expected environmental impact of the development proposal has already been sufficiently addressed by another study. An EIS is also not required if the ACT Conservator of Flora and Fauna or the ACT Heritage Council provides advice that the proposal is not likely to have a significant adverse environmental impact. Where an EIS is required from a proponent, the Planning and Land Authority must prepare an assessment report responding to the EIS.

If a development application is in the impact track, The Planning and Land Authority must refer the application to a number of other agencies, and must take into account any advice received from entities to which the application was referred. Development approval must not be given if this would be inconsistent with any advice given by a referral entity, unless the person approving the application is satisfied that the approval is consistent with the objects of the Territory Plan and that other options, design solutions and alternatives have been considered.

The Territory Plan usually dictates which track the application will fall into, but the application can be allocated to the impact track regardless of what the Territory Plan dictates, if:

- the Minister with planning responsibilities makes a declaration under section 124
- the Health Minister makes a declaration under section 125
- the development is not prohibited or exempt and the Territory Plan does not specify which track is applicable
- the development is a controlled action under the EPBC Act and a bilateral agreement allows the proposal to be assessed by the Territory.

The Minister may call-in any decision if, in the Minister's opinion:

- the application raises a major policy issue

-
- the application seeks approval for a development that may have a substantial effect on the achievement or development of the object of the Territory Plan
 - the approval or refusal of the application would provide a substantial public benefit.

C.2 Jurisdictional tables

The following tables highlight key aspects of the assessment and approval process.

Table C.3 provides information about the assessment and approval authorities in each jurisdiction.

Table C.4 details the Commission's analysis of responsibility for compliance and enforcement of approval conditions in each jurisdiction.

Table C.5 lists the legislation most likely to impact on major projects. This list is not intended to be fully comprehensive. Importantly, the table highlights legislation potentially affecting any major project, and should not be read as being representative of the regulatory burden affecting any one project.

Table C.3 Assessment and approval authorities

Selected pathways, by jurisdiction

<i>Jurisdiction</i>	<i>Assessment manager</i>	<i>Approval authority</i>	<i>Is the assessor also the approval authority?</i>
New South Wales			
State significant developments	Department of Planning	Minister delegates to the Planning Assessment Commission or Department of Planning ^a	Sometimes
State significant infrastructure	Department of Planning	Minister delegates to the Planning Assessment Commission or Department of Planning ^a	Sometimes
Critical state significant infrastructure	Department of Planning	Minister for Planning	No
Victoria			
Ministerial call-in	Minister for Planning	Minister for Planning	Yes
Major transport projects	Assessment committee or Minister for Planning	Minister for Planning (on advice from the EPA)	Sometimes, depending on the pathway
Queensland			
Coordinated projects	Department of Environment and Heritage Protection is the assessment manager. However, in practice, the Coordinator-General, as a concurrence agency, conducts the environmental impact assessment and imposes conditions which, if the project is approved, bind the approval authority. ^b	Department of Environment and Heritage Protection	In practice, no
Urban development	Minister for Economic Development	Minister for Economic Development	Yes
South Australia			
Major development	Minister	Government, but may delegate ^c	Sometimes
Crown development and public infrastructure	Development Assessment Commission	Minister	No

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Table C.3 Assessment and approval authorities (continued)

<i>Jurisdiction</i>	<i>Assessment manager</i>	<i>Approval authority</i>	<i>Is the assessor also the approval authority?</i>
Western Australia			
Development Assessment panel (DAP) projects ^d	Local government/ Western Australian Planning Commission	Development Assessment Panel	No
Tasmania			
Projects of state significance	Tasmanian Planning Commission	Minister and both Houses of Parliament	No
Projects of regional significance	Development Assessment Panel	Development Assessment Panel	Yes
Major infrastructure projects	Combined Planning Authority	Combined Planning Authority	Yes
Northern Territory			
Development permits	Development Consent Authority	Development Consent Authority	Yes
Exceptional Development Permits (EDPs) ^e	Minister for Planning	Minister for Planning	Yes
Ministerial call-in ^f	Minister for Planning	Minister for Planning	Yes
ACT			
Ordinary development	ACT Planning and Land Authority	ACT Planning and Land Authority	Yes
Ministerial call-in	Minister for Planning	Minister for Planning	Yes
Commonwealth			
Matters of national environmental significance (Dept of the Environment)	Secretary of the Department of the Environment	Minister for the Environment	No

^a While section 23 of the *Environmental Planning and Assessment Act 1979* (NSW) allows the Minister to delegate to the Planning Assessment Commission, the Director-General of the Planning Department, or any other public authority, in practice the Minister for Planning has issued two instruments of delegation clarifying when this delegation will occur. The Department of Planning has delegation to make decisions on state significant development or state significant infrastructure applications where there are less than 25 objections, the local council has not objected, and a reportable political donation has not been made. <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=5ILFYmn9OAY%3d&tabid=514&language=en-US>. The Planning Assessment Commission makes decisions on applications for state significant infrastructure or state significant development made by private proponents where there are more than 25 objections, a local council has objected, or a reportable political donation has been made, http://www.pac.nsw.gov.au/Portals/0/Documents/instrument_of_delegation_pac.pdf. Delegation of critical state significant infrastructure projects is prohibited. ^b The approval authority cannot impose any conditions that are inconsistent with the conditions imposed by the Coordinator General. ^c May delegate to Minister or Development Assessment Commission below size limits specified in the *Development Act 1993* (SA). ^d A development application with an estimated cost of \$7 million or more (and \$15 million or more in the City of Perth), unless an exclusion, must be determined by a DAP. ^e EDPs can be granted when a development application is inconsistent with a planning scheme. ^f Ministerial call-in operates when the Minister gives a direction to the consent authority, after which the Minister becomes the consent authority.

Table C.4 Monitoring of compliance and enforcement responsibilities by jurisdiction

<i>Area of responsibility</i>	<i>Agencies involved</i>
New South Wales	
Approvals from Planning Department or Minister	Department of Planning and Infrastructure
Mining and petroleum approvals	Division of Resources and Energy
Heritage	Office of Environment and Heritage Department of the Environment (Cwlth)
Indigenous heritage	Office of Environment and Heritage
Crown Land access	Division of Crown Lands
Transport infrastructure	Roads and Maritime Services
Environmental works approvals	Environment Protection Authority
Threatened species	Office of Environment and Heritage
Environment approval conditions and offsets	Office of Environment and Heritage
Explosives and dangerous goods	Environment Protection Authority
Water licences	Office of Water
Noise pollution	Environment Protection Authority
Victoria	
Mining and petroleum approvals	Department of Environment and Primary Industries
Heritage	Heritage Victoria Department of Transport, Planning and Local Infrastructure Department of the Environment (Cwlth)
Indigenous heritage	Department of Transport, Planning and Local Infrastructure Department of the Environment (Cwlth)
Environmental works approvals	Environment Protection Authority
Threatened species	Department of Environment and Primary Industries
Environment approval conditions and offsets	Environment Protection Authority Department of the Environment (Cwlth)
Explosives and dangerous goods	Worksafe Victoria
Water licences	Department of Environment and Primary Industries
Noise pollution	Environment Protection Authority
Queensland	
Coordinator-General Approvals	Department of State Development, Infrastructure and Planning
Mining and petroleum approvals	Department of Natural Resources and Mines
Heritage	Department of Environment and Heritage Protection Department of Environment and Heritage Protection Department of the Environment (Cwlth)
Indigenous heritage	Department of Environment and Heritage Protection Department of the Environment (Cwlth)
Environmental works approvals	Department of Environment and Heritage Protection

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Table C.4 Monitoring of compliance and enforcement responsibilities by jurisdiction (continued)

<i>Area of responsibility</i>	<i>Agencies involved</i>
Threatened species	Department of Environment and Heritage Protection
Environment approval conditions and offsets	Department of Environment and Heritage Protection Department of the Environment (Cwlth)
Explosives and dangerous goods	Department of Transport and Main Roads Department of Natural Resources and Mines
Water licences	Department of Natural Resources and Mines
South Australia	
Mining and petroleum approvals	Department for Manufacturing, Innovation, Trade, Resources and Energy
Heritage	Department of Environment, Water and Natural Resources Department of the Environment (Cwlth)
Indigenous heritage	Aboriginal Affairs and Reconciliation Division, Department of the Premier and Cabinet Department of the Environment (Cwlth)
Crown Land access	Department of Environment, Water and Natural Resources
Environmental works approvals	Environment Protection Authority
Threatened species	Department of Environment, Water and Natural Resources
Environment approval conditions and offsets	Environment Protection Authority Department for Manufacturing, Innovation, Trade, Resources and Energy Department of Environment, Water and Natural Resources Department of Planning, Transport and Infrastructure Department of the Environment (Cwlth)
Explosives and dangerous goods	SafeWork SA
Water licences	Department of Environment, Water and Natural Resources
Western Australia	
Mining and petroleum approvals	Department of Mines and Petroleum
Heritage	State Heritage Office Department of the Environment (Cwlth)
Indigenous heritage	Department of Aboriginal Affairs Department of the Environment (Cwlth)
Crown Land access	State Land Services
Environmental works approvals	Department of Environment and Conservation
Threatened species	Department of Environment and Conservation
Environment approval conditions and offsets	Environmental Protection Agency Department of the Environment (Cwlth)
Explosives and dangerous goods	Department of Mines and Petroleum
Water licences	Department of Water
Local content	Department of State Development

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Table C.4 Monitoring of compliance and enforcement responsibilities by jurisdiction (continued)

<i>Area of responsibility</i>	<i>Agencies involved</i>
Tasmania	
Mining and petroleum approvals	Mineral Resources Tasmania
Heritage	Tasmanian Heritage Council Department of the Environment (Cwlth)
Indigenous heritage	Aboriginal Heritage Tasmania Department of the Environment (Cwlth)
Crown Land access	Department of Primary Industries, Parks, Water & Environment
Environmental works approvals	Environment Protection Authority
Threatened species	Department of Primary Industries, Parks, Water & Environment
Environment approval conditions and offsets	Environment Protection Authority Department of Primary Industries, Parks, Water & Environment Department of the Environment (Cwlth)
Explosives and dangerous goods	Workplace Standards
Water licences	Department of Primary Industries, Parks, Water & Environment
Northern Territory	
Mining and petroleum approvals	Department of Mines and Energy
Heritage	The Northern Territory Heritage Council Department of Lands, Planning and the Environment Department of the Environment (Cwlth)
Indigenous heritage	The Aboriginal Areas Protection Authority Department of the Environment (Cwlth)
Crown Land access	Land and Planning Services
Environmental works approvals	Northern Territory Environment Protection Agency
Threatened species	Department of Land Resource Management
Environment approval conditions and offsets	Northern Territory Environment Protection Agency Department of the Environment (Cwlth)
Explosives and dangerous goods	NT WorkSafe
Water licences	Department of Land Resource Management
Australian Capital Territory	
Heritage	ACT Heritage Department of the Environment (Cwlth)
Indigenous heritage	ACT Heritage Department of the Environment (Cwlth)
Environmental works approvals	Environment Protection Authority
Threatened species	Environment and Sustainable Development Directorate
Environment approval conditions and offsets	Environment and Sustainable Development Directorate Environment Protection Authority Department of the Environment (Cwlth)
Explosives and dangerous goods	WorkSafe ACT
Water licences	Environment and Sustainable Development Directorate

Source: Commission analysis.

Table C.5 Legislation relevant to major project DAA processes^a

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Energy and minerals		
Minerals		
NSW	<i>Mining Act 1992</i>	NSW Trade and Investment
	<i>Coal Industry Act 2001</i>	NSW Trade and Investment
	<i>Mine Subsidence Compensation Act 1961</i>	NSW Trade and Investment
Vic	<i>Gas Industry Act 2001</i>	Department of Environment and Primary Industries
	<i>Mineral Resources (Sustainable Development) Act 1990</i>	Department of Environment and Primary Industries
Qld	<i>Mineral Resources Act 1989</i>	Department of Natural Resources and Mines
	<i>Greenhouse Gas Storage Act 2009</i>	Department of Natural Resources and Mines
	<i>Offshore Minerals Act 1998</i>	Department of Natural Resources and Mines
SA	<i>Mining Act 1971</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
	<i>Offshore Minerals Act 2000</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
	<i>Opal Mining Act 1995</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
WA	<i>Mining Act 1978</i>	Department of Mines and Petroleum
	<i>Offshore Minerals Act 2003</i>	Department of Mines and Petroleum
	<i>Mining on Private Property Act 1898</i>	Department of Mines and Petroleum
Tas	<i>Gas Act 2000</i>	Department of Infrastructure, Energy and Resources
	<i>Mineral Resources Development Act 1995</i>	Department of Infrastructure, Energy and Resources
	<i>Mining (Strategic Prospectivity Zones) Act 1993</i>	Department of Infrastructure, Energy and Resources
NT	<i>Mineral Royalty Act 1982</i>	Department of Treasury and Finance
	<i>Mineral Titles Act 2010</i>	Department of Mines and Energy
	<i>Mining Management Act 2001</i>	Department of Mines and Energy
	<i>Mineral Titles Act 2010</i>	Department of Mines and Energy
Petroleum and pipelines		
NSW	<i>Petroleum (Offshore) Act 1982</i>	NSW Trade and Investment
	<i>Petroleum (Onshore) Act 1991</i>	NSW Trade and Investment
	<i>Pipelines Act 1967</i>	NSW Trade and Investment
Vic	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2010</i>	Department of Environment and Primary Industries
	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Environment and Primary Industries
	<i>Petroleum Act 1998</i>	Department of Environment and Primary Industries
	<i>Pipelines Act 2005</i>	Department of Environment and Primary Industries
Qld	<i>Petroleum Act 1923</i>	Department of Natural Resources and Mines

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Petroleum and pipelines		
Qld	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Natural Resources and Mines
	<i>Petroleum and Gas (Production and Safety) Act 2004</i>	Department of Natural Resources and Mines
SA	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
	<i>Petroleum and Geothermal Energy Act 2000</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
WA	<i>Barrow Island Act 2003</i>	Department of Mines and Petroleum
	<i>Petroleum and Geothermal Energy Resources Act 1967</i>	Department of Mines and Petroleum
	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Mines and Petroleum
	<i>Petroleum Pipelines Act 1969</i>	Department of Mines and Petroleum
Tas	<i>Gas Pipelines Act 2000</i>	Department of Infrastructure, Energy and Resources
	<i>Mineral Resources Development Act 1995</i>	Department of Infrastructure, Energy and Resources
	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Infrastructure, Energy and Resources
	<i>Petroleum Products Emergency Act 1994</i>	Department of Infrastructure, Energy and Resources
NT	<i>Energy Pipelines Act 1983</i>	Department of Mines and Energy
	<i>Petroleum Act 1984</i>	Department of Mines and Energy
	<i>Petroleum (Submerged Lands) Act 1981</i>	Department of Mines and Energy
	<i>Geothermal Energy Act 2009</i>	Department of Mines and Energy
Cwith	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>	Department of Industry
	<i>Petroleum (Timor Sea Treaty) Act 2003</i>	Department of Industry
Energy		
Vic	<i>Geothermal Energy Resources Act 2005</i>	Department of Environment and Primary Industries
	<i>Victorian Renewable Energy Act 2006</i>	Essential Services Commission
Qld	<i>Clean Energy Act 2008</i>	Department of Energy and Water Supply
	<i>Geothermal Energy Act 2010</i>	Department of Natural Resources and Mines
WA	<i>Energy Coordination Act 1994</i>	Office of Energy
Nuclear		
NSW	<i>Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986</i>	NSW Trade and Investment
	<i>Mining Legislation Amendment (Uranium Exploration) Act 2012</i>	NSW Trade and Investment
Vic	<i>Nuclear Activities (Prohibitions) Act 1983</i>	Department of Environment and Primary Industries

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Nuclear		
Qld	<i>Nuclear Facilities Prohibition Act 2007</i>	Department of Energy and Water Supply
SA	<i>Radiation Protection and Control Act 1982</i>	Environment Protection Authority
	<i>Nuclear Waste Storage Facility (Prohibition) Act 2000</i>	Environment Protection Authority
WA	<i>Radiation Safety Act 1975</i>	Department of Health
	<i>Nuclear Activities Regulation Act 1978</i>	Department of State Development
	<i>Nuclear Waste Storage and Transportation (Prohibition) Act 1999</i>	Department of Health
Cwth	<i>Atomic Energy Act 1953</i>	Department of Industry
	<i>Uranium Royalty (Northern Territory) Act 2009</i>	Department of Industry
	<i>Nuclear Non-Proliferation (Safeguards) Act 1987</i>	Australian Safeguards and Non-Proliferation Office
	<i>Australian Radiation Protection and Nuclear Safety Act 1998</i>	Australian Radiation Protection and Nuclear Safety Agency
	<i>Environment Protection (Alligator Rivers Region) Act 1978</i>	Department of the Environment
Transport projects		
NSW	<i>Transport Administration Act 1988</i>	Roads and Maritime Services
	<i>Roads Act 1993</i>	Roads and Maritime Services
Vic	<i>Major Transport Projects Facilitation Act 2009</i>	Department of Transport, Planning and Local Infrastructure
	<i>Major Transport Projects Facilitation (East West Link and Other Projects) Act 2013</i>	Department of Transport, Planning and Local Infrastructure
	<i>Road Management Act 2004</i>	VicRoads
Qld	<i>Transport Infrastructure Act 1994</i>	Department of Transport and Main Roads
	<i>Airport Assets (Restructuring and Disposal) Act 2008</i>	Queensland Treasury
WA	<i>Main Roads Act 1930</i>	Commissioner of Main Roads
	<i>Transport Coordination Act 1966</i>	Department of Transport
Tas	<i>Highways Act 1951</i>	Department of Infrastructure, Energy and Resources
	<i>Rail Infrastructure Act 2007</i>	Department of Infrastructure, Energy and Resources
ACT	<i>Public Roads Act 1902</i>	ACT Planning and Land Authority
Cwth	<i>Airports Act 1996</i>	Department of Infrastructure and Regional Development
Local government		
NSW	<i>Local Government Act 1993</i>	Department of Premier and Cabinet
Vic	<i>Local Government Act 1989</i>	Department of Transport, Planning and Local Infrastructure

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Local government		
Qld	<i>Local Government Act 1993</i>	Department of Local Government, Community Recovery and Resilience
SA	<i>Local Government Act 1999</i>	Office for State/Local Government Relations
WA	<i>Local Government Act 1995</i>	Department of Local Government and Communities
Tas	<i>Local Government Act 1993</i>	Department of Premier and Cabinet
NT	<i>Local Government Act</i>	Department of Local Government
Development assessment, planning and zoning		
Vic	<i>Planning and Environment Act 1987</i>	Department of Transport, Planning and Local Infrastructure
	<i>Regional Development Victoria Act 2002</i>	Department of Transport, Planning and Local Infrastructure
	<i>Urban Renewal Authority Victoria Act 2003</i>	Places Victoria
	<i>Project Development and Construction Management Act 1994</i>	Department of Treasury and Finance
Qld	<i>State Development and Public Works Organisation Act 1971</i>	Department of State Development Infrastructure and Planning
	<i>Sustainable Planning Act 2009</i>	Department of State Development, Infrastructure and Planning
	<i>Integrated Planning Act 1997</i>	Department of State Development, Infrastructure and Planning
	<i>Economic Development Act 2012</i>	Minister for Economic Development
SA	<i>Development Act 1993</i>	Department of Planning, Transport and Infrastructure
WA	<i>Planning and Development Act 2005</i>	Department of Planning
Tas	<i>Land Use Planning and Approvals Act 1993</i>	Department of Justice
	<i>Tasmanian Planning Commission Act 1997</i>	Department of Justice
	<i>State Policies and Projects Act 1993</i>	Department of Premier and Cabinet; Department of Justice
	<i>Approvals (Deadlines) Act 1993</i>	Department of Justice
NT	<i>Lands, Planning and Mining Tribunal Act 1998</i>	Department of Justice
	<i>Planning Act 1993</i>	Department of Lands, Planning and the Environment
	<i>Northern Territory Environment Protection Authority Act 2012</i>	Department of Lands, Planning and the Environment
	<i>National Environmental Protection Council (Northern Territory) Act 1994</i>	Department of Lands, Planning and the Environment
ACT	<i>Planning and Development Act 2007</i>	ACT Planning and Land Authority
	<i>Australian Capital Territory (Planning and Land Management) Act 1998</i>	ACT Planning and Land Authority

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Crown Land access		
NSW	<i>Crown Lands Act 1989</i>	Department of Primary Industries
	<i>Crown Lands (Continued Tenures) Act 1989</i>	Department of Primary Industries
	<i>Western Lands Act 1901</i>	Department of Primary Industries
Vic	<i>Land Act 1958</i>	Department of Environment and Primary Industries
SA	<i>Crown Land Management Act 2009</i>	Department for Environment, Water and Natural Resources
	<i>Pastoral Land Management and Conservation Act 1989</i>	Department for Environment, Water and Natural Resources
WA	<i>Land Administration Act 1997</i>	Department of Lands
Tas	<i>Crown Lands Act 1976</i>	Department of Primary Industries, Parks, Water and Environment
NT	<i>Crown Lands Act 1992</i>	Department of Lands, Planning and the Environment
	<i>Pastoral Land Act 1992</i>	Department of Land Resource Management
Native title, land rights and land acquisition		
Native title		
NSW	<i>Native Title (NSW) Act 1994</i>	Department of Attorney General and Justice
Vic	<i>Land Title Validation Act 1994</i>	Land Titles Office
Qld	<i>Native Title (Queensland) Act 1993</i>	Department of Natural Resources and Mines
SA	<i>Native Title (SA) Act 1994</i>	Attorney-General's Department
WA	<i>Titles (Validation) and Native Title (Effect of Past Acts) Act 1995</i>	Department of the Attorney General
Tas	<i>Native Title (Tas) Act 1994</i>	Department of Premier and Cabinet
NT	<i>Validation (Native Title) Act 1994</i>	Department of the Attorney-General and Justice
Cwth	<i>Native Title Act 1993</i>	Department of the Prime Minister and Cabinet
Land rights/access		
NSW	<i>Aboriginal Land Rights Act 1983</i>	Office of Communities, Aboriginal Affairs
Vic	<i>Aboriginal Lands Act 1970</i>	Department of Transport, Planning and Local Infrastructure
	<i>Aboriginal Lands Act 1991</i>	Department of Transport, Planning and Local Infrastructure
	<i>Aboriginal Land (Manatunga Land) Act 1992</i>	Department of Transport, Planning and Local Infrastructure
Qld	<i>Aboriginal Land Act 1991</i>	Department of Natural Resources and Mines
	<i>Land Act 1994</i>	Department of Natural Resources and Mines
	<i>Torres Strait Islander Land Act 1991</i>	Department of Natural Resources and Mines
	<i>Sugar Industry Act 1999</i>	Department of Agriculture, Forestry and Fisheries
SA	<i>Aboriginal Lands Trust Act 1966</i>	Department of the Premier and Cabinet
	<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i>	Department of the Premier and Cabinet

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Land rights/access		
SA	<i>Maralinga Tjarutja Land Rights Act 1984</i>	Department of the Premier and Cabinet
WA	<i>Regional Development Commissions Act 1993</i>	Department of Regional Development
	<i>Land Administration Act 1997</i>	Department of Lands
	<i>Aboriginal Affairs Planning Authority Act 1972</i>	Department of Aboriginal Affairs
	<i>Aboriginal Communities Act 1979</i>	Department of Aboriginal Affairs
Tas	<i>Aboriginal Lands Act 1995</i>	Department of Premier and Cabinet
NT	<i>Aboriginal Land Act 1978</i>	Department of Lands, Planning and the Environment
	<i>Coburg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981</i>	Parks and Wildlife Commission of the Northern Territory
	<i>Nitmiluk (Katherine Gorge) National Park Act 1989</i>	Parks and Wildlife Commission of the Northern Territory
	<i>Parks and Reserves (Framework for the Future) Act 2004</i>	Parks and Wildlife Commission of the Northern Territory
	<i>Minerals (Acquisition) Act 1953</i>	Department of Mines and Energy
	<i>Crown Lands Act 1992</i>	Department of Lands, Planning and the Environment
	<i>Northern Territory Land Corporation Act 1995</i>	Department of Lands, Planning and the Environment
ACT	<i>Community Title Act 2001</i>	ACT Planning and Land Authority
Cwlth	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	Department of the Prime Minister and Cabinet
	<i>Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987</i>	Department of the Prime Minister and Cabinet
	<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>	Department of the Prime Minister and Cabinet
	<i>Ashmore and Cartier Islands Acceptance Act 1933</i>	Department of Infrastructure and Regional Development
Land acquisition		
NT	<i>Lands Acquisition Act 1979</i>	Department of Lands, Planning and the Environment
ACT	<i>Lands Acquisition Act 1994</i>	ACT Planning and Land Authority
Indigenous heritage		
Vic	<i>Aboriginal Heritage Act 2006</i>	Department of Transport, Planning and Local Infrastructure
Qld	<i>Aboriginal Cultural Heritage Act 2003</i>	Department of Aboriginal and Torres Strait Islander and Multicultural Affairs
	<i>Torres Strait Islander Cultural Heritage Act 2003</i>	Department of Natural Resources and Mines
WA	<i>Aboriginal Heritage (Marandoo) Act 1992</i>	Department of Aboriginal Affairs
	<i>Aboriginal Heritage Act 1972</i>	Department of Aboriginal Affairs

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Table C.5 **Legislation relevant to major project DAA processes^a** (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Indigenous heritage		
SA	<i>Aboriginal Heritage Act 1988</i>	Department of the Premier and Cabinet
Tas	<i>Aboriginal Relics Act 1975</i>	Department of Primary Industries, Parks, Water and Environment
NT	<i>Northern Territory Aboriginal Sacred Sites Act</i>	Minister for Regional Development
Cwth	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	Department of the Prime Minister and Cabinet
Heritage		
NSW	<i>Heritage Act 1977</i>	Office of Environment and Heritage
Vic	<i>Heritage Rivers Act 1992</i> <i>Heritage Act 1995</i>	Department of Environment and Primary Industries Heritage Victoria
Qld	<i>Queensland Heritage Act 1992</i> <i>Cape York Peninsula Heritage Act 2007</i>	Department of Environment and Heritage Protection Department of Environment and Heritage Protection
SA	<i>Heritage Places Act 1993</i> <i>Historic Shipwrecks Act 1981</i>	Department for Environment, Water and Natural Resources Department for Environment, Water and Natural Resources
WA	<i>Heritage of WA Act 1990</i> <i>Maritime Archaeology Act 1973</i>	Heritage Council of Western Australia Western Australian Museum
Tas	<i>Historic Cultural Heritage Act 1995</i>	Department of Primary Industries, Parks, Water and Environment
NT	<i>Heritage Act 2011</i>	Department of Lands, Planning and the Environment
ACT	<i>Heritage Act 2004</i>	ACT Planning and Land Authority
Cwth	<i>Historic Shipwrecks Act 1976</i>	Department of the Environment
Environmental protection and impact assessment		
NSW	<i>Environmental Planning and Assessment Act 1982</i> <i>Protection of the Environment Operations Act 1997</i>	Department of Planning and Infrastructure Environment Protection Authority
Vic	<i>Environment Protection Act 1970</i> <i>Victorian Environmental Protection Council Act 2001</i> <i>Environment Effects Act 1978</i> <i>Environment Protection Act 1978</i> <i>Planning and Environment Act 1987</i>	Environment Protection Authority Department of Environment and Primary Industries Department of Transport, Planning and Local Infrastructure Environment Protection Authority Department of Transport, Planning and Local Infrastructure
Qld	<i>Environment Protection Act 1994</i> <i>Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012</i>	Department of Environment and Heritage Protection Department of Environment and Heritage Protection

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
SA	<i>Environment Protection Act 1993</i>	Environment Protection Authority
WA	<i>Environmental Protection Act 1986</i>	Department of Environment Regulation
Environmental protection and impact assessment		
Tas	<i>Environmental Management and Pollution Control Act 1994</i>	Department of Primary Industries, Parks, Water and Environment
NT	<i>Environmental Assessment Act 1982</i>	Department of Lands, Planning and the Environment
	<i>Environmental Offences and Penalties Act 1996</i>	Department of Lands, Planning and the Environment
Cwlth	<i>Environment Protection and Biodiversity Conservation Act 1999</i>	Department of the Environment
Natural resource management		
NSW	<i>National Parks and Wildlife Act 1974</i>	Office of Environment and Heritage
	<i>Threatened Species Conservation Act 1995</i>	Office of Environment and Heritage
	<i>Water Act 1912</i>	NSW Trade and Investment
	<i>Water Management Act 2000</i>	NSW Trade and Investment
Vic	<i>Conservation, Forests and Lands Act 1987</i>	Department of Environment and Primary Industries
	<i>Wildlife Act 1975</i>	Department of Environment and Primary Industries
	<i>Flora and Fauna Guarantee Act 1988</i>	Department of Environment and Primary Industries
	<i>Parks Victoria Act 1998</i>	Department of Environment and Primary Industries
Qld	<i>Nature Conservation Act 1992</i>	Department of Environment and Heritage Protection; Department of National Parks, Recreation, Sport and Racing
	<i>Fisheries Act 1994</i>	Department of Agriculture, Forestry and Fisheries
	<i>Wild Rivers Act 2005</i>	Department of Environment and Heritage Protection
	<i>Strategic Cropping Land Act 2011</i>	Department of Natural Resources and Mines
	<i>Recreation Areas Management Act 2006</i>	Department of National Parks, Recreation, Sport and Racing
	<i>Biodiscovery Act 2004</i>	Department of Environment and Heritage Protection
	<i>Plant Protection Act 1989</i>	Department of Agriculture, Forestry and Fisheries
	<i>Vegetation Management Act 1989</i>	Department of Natural Resources and Mines
	<i>Fisheries Act 1994</i>	Department of Agriculture, Forestry and Fisheries
	<i>Forestry Act 1959</i>	Department of Agriculture, Forestry and Fisheries
	<i>Land Protection (Pest and Stock Route Management Act) 2002</i>	Department of Agriculture, Forestry and Fisheries
	<i>Animal Care and Protection Act 2001</i>	Department of Agriculture, Forestry and Fisheries
	<i>Soil Conservation Act 1986</i>	Department of Natural Resources and Mines
SA	<i>Adelaide Dolphin Sanctuary Act 2005</i>	Department for Environment, Water and Natural Resources
	<i>River Murray Act 2003</i>	Department for Environment, Water and Natural Resources

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Natural resource management		
SA	<i>Wilderness Protection Act 1992</i>	Department for Environment, Water and Natural Resources
SA	<i>Public and Environmental Health Act 1987</i>	Department of Health
	<i>National Parks and Wildlife Act 1972</i>	Department for Environment, Water and Natural Resources
	<i>Natural Resources Management Act 2004</i>	Department for Environment, Water and Natural Resources
WA	<i>Soil and Land Conservation Act 1945</i>	Department of Agriculture and Food
	<i>Parks and Reserves Act 1895</i>	Department of Lands
	<i>Reserves (National Parks and Conservation Parks) Act 2004</i>	Department of Parks and Wildlife
	<i>Reserves (National Parks, Conservation Parks, and Other Reserves) Act 2004</i>	Department of Parks and Wildlife
	<i>Reserves (National Parks, Conservation Parks, Nature Reserves and Other Reserves) Act 2004</i>	Department of Parks and Wildlife
	<i>Reserves and Road Closure Act 1977</i>	Department of Lands
	<i>Conservation and Land Management Act 1984</i>	Department of Parks and Wildlife
	<i>Wildlife Conservation Act 1950</i>	Department of Parks and Wildlife
	<i>Land Drainage Act 1925</i>	Department of Water
	<i>Rights in Water and Irrigation Act 1914</i>	Department of Water
Tas	<i>Natural Resource Management Act 2002</i>	Department of Primary Industries, Parks, Water and Environment
	<i>National Parks and Reserve Management Act 2002</i>	Department of Primary Industries, Parks, Water and Environment
	<i>Forest Practices Act 1985</i>	Department of Infrastructure, Energy and Resources
	<i>Forestry Act 1920</i>	Department of Infrastructure, Energy and Resources
	<i>Living Marine Resources Management Act 1995</i>	Department of Primary Industries, Parks, Water and Environment
	<i>Water Management Act 1999</i>	Department of Primary Industries, Parks, Water and Environment
NT	<i>Fisheries Act 1988</i>	Department of Primary Industry and Fisheries
	<i>Weeds Management Act 2001</i>	Department of Land Resource Management
	<i>Waste Management and Pollution Control Act 1998</i>	Department of Lands, Planning and the Environment
	<i>Soil Conservation and Land Utilisation Act 1969</i>	Department of Land Resource Management
Marine and coastal environment		
NSW	<i>Marine Parks Act 1997</i>	Office of Environment and Heritage

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Marine and coastal environment		
NSW	<i>Coastal Protection Act 1979</i>	Office of Environment and Heritage
	<i>Marine Pollution Act 1987</i>	Roads and Maritime Services
	<i>Land and Environment Court Act 1979</i>	Department of Attorney General and Justice
Vic	<i>Catchment and Land Protection Act 1994</i>	Department of Environment and Primary Industries
	<i>Coastal Management Act 1995</i>	Department of Environment and Primary Industries
	<i>Pollution of Waters by Oil and Noxious Substances Act 1986</i>	Environment Protection Authority
	<i>Marine (Drug, Alcohol and Pollution Control) Act 1988</i>	Transport Safety Victoria
Qld	<i>Marine Parks Act 2004</i>	Department of National Parks, Recreation, Sport and Racing
	<i>Coastal Protection and Management Act 1995</i>	Department of Environment and Heritage Protection
	<i>Transport Operations (Marine Pollution) Act 1995</i>	Maritime Safety Queensland
	<i>Wet Tropics World Heritage Protection and Management Act 1993</i>	Wet Tropics Management Authority
	<i>Marine Parks Act 2004</i>	Department of Environment and Heritage Protection
	<i>River Improvement Trust Act 1940</i> <i>Water Act 2000</i>	Department of Natural Resources and Mines Department of Environment and Heritage Protection
SA	<i>Coast Protection Act 1972</i>	Department of Natural Resources and Mines Department for Environment, Water and Natural Resources
	<i>Marine Parks Act 2007</i>	Department for Environment, Water and Natural Resources
	<i>Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987</i>	Department of Planning, Transport and Infrastructure
WA	<i>Pollution of Waters by Oil and Noxious Substances Act 1987</i>	Department of Transport
	<i>Western Australian Marine (Sea Dumping) Act 1981</i>	Department of Transport
	<i>Western Australian Marine Act 1982</i> <i>Marine and Harbours Act 1981</i>	Department of Transport Department of Transport
Tas	<i>Pollution of Waters by Oil and Noxious Substances Act 1987</i>	Department of Primary Industries, Parks, Water and Environment
NT	<i>Marine Pollution Act 1999</i>	Department of Lands, Planning and the Environment

(Continued next page)

Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Marine and coastal environment		
Cwth	<i>Great Barrier Reef Marine Park Act 1975</i>	Great Barrier Reef Marine Park Authority
	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	Australian Maritime Safety Authority
	<i>Seas and Submerged Lands Act 1973</i>	Attorney-General's Department
	<i>Environment Protection (Sea Dumping) Act 1981</i>	Department of the Environment
Occupational health and safety		
NSW	<i>Work Health and Safety Act 2011</i>	Department of Finance and Services
	<i>Coal Mine Health and Safety Act 2002</i>	NSW Trade and Investment
	<i>Mine Health and Safety Act 2004</i>	NSW Trade and Investment
	<i>Explosives Act 2003</i>	Department of Finance and Services
	<i>Dams Safety Act 1978</i>	Department of Primary Industries
	<i>Dangerous Goods (Road and Rail Transport) Act 2008</i>	Department of Finance and Services
Vic	<i>Rail Safety Act 2006</i>	Transport Safety Victoria
	<i>Dangerous Goods Act 1985</i>	WorkSafe Victoria
	<i>Marine Safety Act 2010</i>	Transport Safety Victoria
	<i>Occupational Health and Safety Act 2004</i>	WorkSafe Victoria
	<i>Equipment (Public Safety) Act 1994</i>	WorkSafe Victoria
Qld	<i>Work Health and Safety Act 2011</i>	Workplace Health and Safety Queensland
	<i>Coal Mining Safety and Health Act 1999</i>	Department of Natural Resources and Mines
	<i>Mining and Quarrying Safety and Health Act 1999</i>	Department of Natural Resources and Mines
	<i>Transport (Rail Safety) Act 2010</i>	Department of Transport and Main Roads
	<i>Explosives Act 1999</i>	Department of Natural Resources and Mines
	<i>Gene Technology Act 2001</i>	Department of Science, Information Technology, Innovation and the Arts
	<i>Biological Control Act 1987</i>	Department of Agriculture, Forestry and Fisheries
	<i>Waste Reduction and Recycling Act 2011</i>	Department of Environment and Heritage Protection
	<i>Public Health Act 2005</i>	Department of Health
SA	<i>Dangerous Substances Act 1979</i>	SafeWork SA
	<i>Work Health and Safety Act 2012</i>	SafeWork SA
	<i>Mines and Works Inspection Act 1920</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
	<i>Explosives Act 1936</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
WA	<i>Jetties Act 1926</i>	Department of Transport
	<i>Port Authorities Act 1999</i>	Department of Transport
	<i>Rail Safety Act 2010</i>	Department of Transport

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Occupational health and safety		
WA	<i>Contaminated Sites Act 2003</i>	Department of Environment Regulation
	<i>Mines Safety and Inspection Act 1994</i>	Department of Mines and Petroleum
	<i>Gas Standards Act 1972</i>	Department of Commerce
	<i>Energy Safety Act 2006</i>	Department of Commerce
	<i>Dangerous Goods Safety Act 2004</i>	Department of Mines and Petroleum
	<i>Carbon Rights Act 2003</i>	Department of Environment Regulation
	<i>Occupational Health and Safety Act 1984</i>	Department of Commerce
Tas	<i>Port Companies Act 1997</i>	Department of Infrastructure, Energy and Resources
	<i>Irrigation Clauses Act 1973</i>	Department of Primary Industries, Parks, Water and Environment
	<i>Drains Act 1954</i>	Department of Primary Industries, Parks, Water and Environment
	<i>Dangerous Goods (Road and Rail Transport) Act 2010</i>	Department of Justice
	<i>Work Health and Safety Act 2012</i>	Workplace Standards Tasmania
NT	<i>Dangerous Goods Act 1998</i>	Department of Business
	<i>Work Health and Safety (National Uniform Legislation) Act 2011</i>	Department of Business
	<i>Radioactive Ores and Concentrates (Packaging and Transport) Act 1980</i>	Department of Business
	<i>Waste Management and Pollution Control Act 1998</i>	Department of Lands, Planning and the Environment
	<i>Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act 2010</i>	Department of Business
	<i>Marine Act 1981</i>	Department of Transport
ACT	<i>Work Health and Safety Act 2011</i>	Chief Minister and Treasury Directorate
	<i>Dangerous Substances Act 2004</i>	Chief Minister and Treasury Directorate
	<i>Machinery Act 1949</i>	Chief Minister and Treasury Directorate
Cwth	<i>Occupational Health and Safety Act 1991</i>	ComCare
	<i>Work Health and Safety Act 2011</i>	ComCare
Other		
Qld	<i>Queensland Competition Authority Act 1987</i>	Queensland Competition Authority
	<i>Electricity Act 2004</i>	Department of Energy and Water Supply
	<i>Gas Supply Act 2003</i>	Department of Energy and Water Supply
	<i>Queensland Reconstruction Act 2011</i>	Queensland Reconstruction Authority
SA	<i>AustralAsia Railway (Third Party Access) Act 1999</i>	Essential Services Commission of South Australia
WA	<i>Railways (Access) Act 1998</i>	Economic Regulation Authority

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Table C.5 Legislation relevant to major project DAA processes^a (continued)

<i>Scope</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Cwth	<i>Australian Maritime Safety Authority Act 1990</i>	Australian Maritime Safety Authority
	<i>Coastal Waters (Northern Territory Powers) Act 1980</i>	Attorney-General's Department
	<i>Coastal Waters (Northern Territory Title) Act 1980</i>	Attorney-General's Department
	<i>Coastal Waters (State Powers) Act 1980</i>	Attorney-General's Department
Other		
Cwth	<i>Coastal Waters (State Title) Act 1980</i>	Attorney-General's Department
	<i>Competition and Consumer Act 2010</i>	Australian Competition and Consumer Commission
	<i>Clean Energy Act 2011</i>	Clean Energy Regulator
	<i>Customs Act 1901</i>	Department of Immigration and Border Protection
	<i>Defence Act 1903</i>	Department of Defence
	<i>Energy Efficiency Opportunities Act 2006</i>	Department of Industry
	<i>Fair Work (Building Industry) Act 2012</i>	Department of Employment
	<i>Fair Work Act 2009</i>	Department of Employment
	<i>Foreign Takeovers and Acquisitions Act 1975</i>	Foreign Investment Review Board
	<i>Maritime Transport and Offshore Facilities Security Act 2003</i>	Department of Infrastructure and Regional Development
	<i>National Greenhouse and Energy Reporting Act 2007</i>	Department of the Environment
	<i>Navigation Act 1912</i>	Department of Infrastructure and Regional Development
	<i>Quarantine Act 1908</i>	Department of Agriculture
	<i>Submarine Cables and Pipelines Protection Act 1963</i>	Australian Maritime Safety Authority

^a This list is not intended to be fully comprehensive.

Sources: ComLaw; State and Territory legislation databases; various departmental websites.

D International DAA processes

This appendix provides an overview of development assessment and approval (DAA) processes for major projects in Canada, the United Kingdom, the United States and New Zealand. These countries were chosen because they have similar political systems to Australia, are at roughly equivalent stages of development, and face broadly equivalent challenges in making tradeoffs between commercial, environmental and heritage concerns.

D.1 Canada

Jurisdictional overview

Under the *Constitution Act, 1867*, there are three levels of government in Canada with different areas of regulatory responsibility for activities related to major projects (box D.1). Responsibility for areas, such as the environment, is not specifically identified and assigned to a level of government under the Act. It may be addressed under various federal and provincial legislative powers depending on the nature or scope of the issue.

The jurisdictional division of regulatory powers means that major projects wholly within a Canadian province are typically assessed and determined using provincial government processes. Projects beyond the boundaries of a province, or that are deemed likely to have significant adverse environmental effects, may also be subject to a federal environmental assessment and approval process.

Major projects in Canada can require a wide range of permits, licences, agreements and approvals from federal, provincial and municipal regulatory bodies and other stakeholders (including Indigenous peoples and landholders and users). This section gives an overview of key federal and provincial DAA processes applying to major projects with a focus on environmental assessments.

Box D.1 **Division of regulatory powers in Canada**

Canada has three levels of government — federal, provincial and municipal — with different areas of legislative responsibility under the *Constitution Act, 1867*.

Federal Government regulatory powers relevant to the assessment and approval of major projects include those relating to:

- navigation/shipping
- sea coast and inland fisheries
- ferries (interprovincial and international)
- Indians/Indian reserves
- works connecting provinces; beyond boundaries of one province; within a province but to the advantage of Canada or more than one province.

Provincial Governments' regulatory powers relevant to the assessment and approval of major projects include those relating to:

- natural resource uses
- management of public lands belonging to a province
- property and civil rights
- municipalities.

In addition to 10 provinces, there are three territories with limited regulatory responsibilities granted to them by the Federal Government.

Municipal Governments receive authority from Provincial Governments to enable the provision of a range of local services such as libraries, parks, community water systems, local police, and roads.

Across Canada there are also 'band councils', which govern First Nations communities. These elected councils are similar to municipal councils and make decisions that affect their local communities.

Features of federal processes for major projects

Federal environmental assessments

Any project in Canada classified as a 'designated project' can require a federal environmental assessment (EA) and approval before it can proceed. Designated projects include:

- projects of a type listed in the Regulations Designating Physical Activities
- projects declared by the Federal Minister of the Environment (CEAA 2013).

Regulations Designating Physical Activities made under the *Canadian Environmental Assessment Act 2012* list project types that are likely to have

significant adverse environmental effects and therefore may be subject to a federal EA. These project types include: electrical generating stations or transmission lines; dams, oil or gas facilities or pipelines; mines or mills; marine terminals, railway lines, public highways, aerodromes or runways; and waste management facilities. The Federal Minister of the Environment may also ‘designate’ a project not identified in the regulations if he or she believes the project may cause adverse environmental effects or if there are public concerns about such effects (CEAA 2013).

There are three statutory bodies that can undertake a federal EA for a designated project.

- The Canadian Environmental Assessment Agency (CEAA) administers the EA process for designated projects subject to the *Canadian Environmental Assessment Act 2012* (the CEA Act). The CEAA prepares an EA report for the Minister for the Environment who makes the final determination.²
- The National Energy Board (NEB) undertakes EAs for designated projects involving activities regulated under the *National Energy Board Act 1959* (the NEB Act) or the *Canada Oil and Gas Operations Act 1985* (box D.2).
- The Canadian Nuclear Safety Commission (CNSC) undertakes EAs for designated projects involving activities regulated under the *Nuclear Safety and Control Act 2000* (CEAA 2013).

Direction of reforms to federal environmental assessments

The Canadian Parliament legislated a range of reforms to federal EA processes in June 2012 through the *Jobs and Growth Act, 2012*, which narrowed the scope of the types of projects that could face a federal EA. Key changes include:

- narrowing the definition of lakes and waterways upon which a federal EA can be required
- expanding the types of works that can be pre-approved, allowing more ‘low risk’ works (such as docks and boathouses) to proceed without further assessment and approval (Parliament of Canada 2013).

² The Minister of the Environment can refer an EA to a review panel if the Minister is of the opinion that it is in the public interest to do so. The review panel is a group of ‘independent experts’ appointed by the Minister who are responsible for managing the EA process. The panel prepares a report that includes its rationale, conclusions and recommendations and submits it to the Minister of the Environment for a final determination (CEAA 2013).

Box D.2 National Energy Board of Canada

The National Energy Board (NEB) — an independent federal statutory agency established under the *National Energy Board Act, 1959* — regulates international and interprovincial aspects of the oil, gas and electric utility industries in Canada, including assessments and approvals for interprovincial and international pipelines and power lines. Projects wholly within a province are not regulated by the NEB.

Key features of the National Energy Board process

Proponents wishing to develop a project must apply to the NEB for an assessment and determination. This process includes a number of steps.

- A 'planning and pre-application' phase, which aims to improve proponents' and other stakeholders' understanding of the regulatory processes and requirements before an application is lodged. Pre-application meetings give stakeholders and the regulator the opportunity to: share and process information and establish contacts; discuss application requirements; and identify resources relevant to the process.
- A range of public consultation requirements across the regulatory stages including at the project design, construction, operation and maintenance, and abandonment stages. Some proposed projects also require the NEB to hold public hearings.
- An environmental impact assessment undertaken by the NEB (this replaces the environmental assessment process normally undertaken by the Canadian Environmental Assessment Agency).
- A determination of whether a project is denied or can proceed, and if any terms or conditions must be applied. In making a decision, the NEB considers the economic, technical and financial feasibility, and the environmental and socioeconomic impacts of the project.
- Monitoring and enforcement of conditions the NEB attaches to a project from approval to decommissioning stages (including auditing and inspecting construction activities, maintenance and monitoring procedures during operation, and procedures during cessation).

Sources: NEB (2013a, 2013b, 2013c, 2013d).

Further reforms legislated in December 2012 through the *Jobs, Growth and Long-term Prosperity Act, 2012* established a new truncated federal EA process. Key changes include:

- reducing the possible levels of review for an EA from three to two
- allowing the CEAA to screen designated projects to determine whether they require an EA at all³

³ Screening does not apply to projects regulated under the Nuclear Safety and Control Act, 2000, the National Energy Board Act, 1959 or the Canada Oil and Gas Operations Act, 1985. Such designated projects are automatically required to undergo a federal environmental assessment.

-
- reducing the number of government agencies involved in carrying out federal EAs from approximately 40 to three — the CEAA, the NEB and the CNSC
 - focusing federal EAs on federal aspects of designated projects by limiting the statutory definition of ‘environmental effects’
 - imposing statutory time limits for EAs. Most standard EAs must be completed in one year, while panel reviews — the alternative federal EA pathway — are limited to two years
 - authorising the Minister of the Environment to establish a committee to conduct regional environmental assessment for regions that are entirely composed of federal lands (discussed in appendix F)
 - allowing (in prescribed circumstances) all or part of the federal EA to be delegated to, or substituted for, a provincial EA, and allowing (in prescribed circumstances) federal approval authority to be delegated to a provincial decision maker (see section on delegation, substitution and equivalency below) (Parliament of Canada 2013).⁴

Reforms to National Energy Board processes

A range of reforms to the NEB processes was initiated in 2012 through the *Jobs, Growth and Long-term Prosperity Act, 2012* and through amendments to the NEB Act. Key reforms include:

- establishing time limits of 18 months for most NEB applications. This includes 15 months from the date the NEB determines an application is complete until it completes its assessment
- requiring both approvals and denials of projects to go to the Governor in Council (the federal cabinet) for a decision. The NEB’s report on a project must also include any conditions to be attached to an approval
- requiring that, for projects identified by the CEA Act, the NEB must conduct an EA pursuant to that Act. For projects not covered under the CEA Act, the NEB will continue to conduct EAs under the NEB Act
- making hearings for gas export licences no longer mandatory. In deciding whether to issue a gas export licence, the NEB can no longer consider environmental matters in export applications (Parliament of Canada 2013).

⁴ Substitution and replacement provisions do not apply if a project is being assessed by the Canadian Nuclear Safety Commission or the National Energy Board, or if the project has been referred to a review panel.

Delegation, substitution and equivalency for federal environmental assessments

The delegation, substitution and equivalency provisions in the CEA Act aim to reduce duplication in regulatory processes where a single project requires more than one EA under federal law and provincial law or under an environmental impact assessment regime established under an Aboriginal land claims agreement.

- *Delegation* allows the responsible federal authority to delegate to a province the carrying out of any part of the federal EA (apart from the final decision making).
- *Substitution* (similar to an Australian bilateral assessment agreement) allows the Federal Minister for the Environment to substitute a provincial EA process for a federal EA if:
 - requested to do so by a province, and
 - the Minister is of the opinion that the provincial process is an appropriate substitute for a federal EA under the CEA Act, and that conditions contained in the CEA Act regarding factors to be considered, public participation and the submission of an EA report will be fulfilled (CEAA 2013).
- *Equivalency* (similar to an Australian bilateral approval agreement) allows the Governor in Council (the Federal cabinet), on the recommendation of the Minister for the Environment, to exempt a designated project from the CEA Act, if the Governor in Council is satisfied that:
 - after completion of the assessment, the provincial government will determine whether the designated project is likely to cause significant adverse environmental effects, taking into account appropriate mitigation measures
 - the provincial government will ensure that mitigation measures and a follow-up program are implemented
 - any other conditions that the Minister of the Environment establishes will be met (Parliament of Canada 2013).

Under the equivalency provision, the province carries out the EA and makes the final determination, including any measures to protect components of the environment under federal authority.

In March 2013, the CEAA entered into a Memorandum of Understanding with the British Columbia Environmental Assessment Office outlining the process by which the Province of British Columbia can substitute its EA process for the federal EA process where a project requires both. As of October 2013, the Federal Minister of the Environment had approved the substitution of the British Columbia EA process for the federal EA process for three projects (a liquefied natural gas export terminal and two coal mines) (Osler Legal 2013).

The Major Project Management Office

The Major Project Management Office (MPMO) — established in 2007 — aims to provide overarching project coordination, management and accountability for ‘major resource projects’ operating within the federal regulatory review process (Government of Canada 2012).

Major resource projects eligible for MPMO assistance are defined (under a Federal Cabinet Directive) as large resource projects that are subject to a comprehensive study, a panel review, or a large or complex multi-jurisdictional screening, as defined under the CEA Act. Typically, these projects involve extracting, processing, refining, producing, distributing, or disposing of natural resources, as well as decommissioning and reclaiming sites used for any of these activities (Government of Canada 2012).

The MPMO’s main roles and responsibilities are to:

- provide a single point of entry into the federal regulatory system for proponents of major resource projects
- engage in early discussions, distribution of guidance materials and information exchanges with proponents on proposed projects
- develop in collaboration with relevant federal departments and agencies, consensus-based Project Agreements that articulate the roles and responsibilities of each department and timeline-based performance targets for delivery of process milestones
- track and monitor the government’s Aboriginal consultation requirements related to the review of major resource projects and maintain the official record of Aboriginal/Crown consultation for the Canadian Government
- implement and manage a transparent monitoring and tracking system for major resource projects as a mechanism by which to monitor and track the progress of any specific project through the regulatory process
- lead collaborative research and policy analysis on short, medium and longer term initiatives to improve the performance of the regulatory system, including legislative options, cost recovery, cumulative effects, energy infrastructure corridors, regional assessment and capacity building initiatives or processes (Government of Canada 2012).

The MPMO process includes the development of a Project Agreement — a coordinating tool between interested federal departments — committing to a timeline and schedule for the completion of the EA, with regular milestones to allow tracking of progress. All agreements contain coordinated work plans that

outline the particular roles and responsibilities of federal departments and agencies throughout the entire life cycle of a particular regulatory review process. Agreements can include the following coordinated work plans:

- an Environmental Assessment work plan
- an Aboriginal Consultation and Engagement work plan
- a Permitting, Authorizations and Approvals work plan
- a Follow-Up and Monitoring work plan.

Project Agreements are posted on the internet to promote transparency and the MPMO tracks and reports on the progress of the EA and other regulatory processes, and also assists in the resolution of issues to avoid delays (Government of Canada 2012).

Features of provincial processes for major projects

Major projects wholly within a Canadian province are typically assessed and determined using provincial level DAA processes, but may also be subject to a federal EA where they meet the ‘designated project’ criteria set out in the Regulations Designating Physical Activities or are declared by the Federal Minister of the Environment (CEAA 2013). This section gives an overview of recent reforms to DAA processes in the Province of Alberta for upstream oil and gas projects.

Until 2012, responsibilities for the assessment and approval of upstream gas and oil projects in Alberta were spread between various bodies.

- *The Energy Resources Conservation Board (ERCB)* — an independent provincial regulator — granted primary approvals for oil and gas projects.
- *The Alberta Ministry of Sustainable Resource Development (SRD)* managed the environmental impact assessment (EIA) process (in parallel with ERCB processes) and granted a range of secondary approvals.
- *The Alberta Ministry of the Environment (Alberta Environment)* developed policies regarding air and water resources and the reclamation and remediation of oil and gas facilities and regulated these areas.
- *The Alberta Ministry of Energy (Alberta Energy)* developed policies regarding energy resources and was responsible for managing Crown mineral rights and royalties (Alberta Energy 2013).

In December 2012, the Alberta Parliament passed the *Alberta Responsible Energy Development Act, 2012* reforming these arrangements (box D.3).

Box D.3 **Key Alberta reforms (as at October 2013)**

A new policy coordination office

The Policy Management Office was established to work with existing policy departments (Alberta Environment, Alberta Sustainable Resource Development (SRD), and Alberta Energy) to:

- integrate and align policy in the Province and between Canadian jurisdictions
- provide clear and consistent policy direction to proponents, regulators and the public
- develop a more effective public consultation process
- develop a performance measurement framework to assess the new regulations.

A new single independent regulator

The Alberta Energy Regulator was established with unified responsibility for development assessment and approval (DAA) processes (taking powers held by Alberta Environment, the SRD, and the Energy Resources Conservation Board (ERCB)). Its functions include:

- acting as a single point of contact for assessing and determining applications, including Environmental Impact Assessments
- making decisions regarding the disposition of public lands and licensing of water (consistent with public lands and water allocation policies)
- post-approval activities (including variances, compliance and monitoring, overseeing suspension, abandonment, and closure and remediation) (details to be finalised)
- establishing a single process for appeals (details to be finalised)
- establishing standards for regulatory processes (such as approval timelines) to provide more predictability to applicants (details to be finalised).

Streamlined public engagement processes

A report reviewing the previous system — Enhancing Assurance — found that the effectiveness of public consultation was limited as it was difficult for interested parties to determine when and how to provide input into policy development and policy assurance processes. The new approach aims to address this by having separate processes for stakeholders with a ‘common interest’ and those with a ‘private interest’.

- Common interest stakeholders wishing to influence general policy questions (such as province-wide land use, water use and environmental management) will be ‘channelled’ into policy development consultations.
- ‘Specified parties’ with private interests who stand to be impacted directly by a specific project will be able to provide input during the DAA processes for an individual project. This will help make project-specific consultations more focused and relevant to the merits of a particular project.

(Continued next page)

Box D.3 (continued)

Integrated risk management framework

The Enhancing Assurance report found that the previous system predominantly used prescriptive ‘command and control’ regulations that did not allow for advances in technology or improved industry practices, and that while Alberta Environment, the SRD, Alberta Energy and the ERCB used risk-management processes to varying degrees, they did so in an inconsistent way.

An Integrated Risk Management Framework based on the international ISO 31 000 Risk Management Standard has been developed.

- At the policy development stage, the Framework will be used to evaluate new and existing natural resource policies. It will help assess risks to Alberta’s social, economic and environmental outcomes and assist in determining the best policy approaches to manage those risks.
- At the policy assurance stage, the Framework will be used to identify and assess risks associated with specific oil and gas developments. It will guide regulators’ selection of appropriate policy tools to manage those risks, monitor industry compliance and achievement of desired outcomes.

Performance measurement framework

A performance measurement framework with public reporting requirements is being developed to provide feedback about how the reformed system is performing against objectives. The framework will measure and report the performance of the new regulations publicly and will include:

- defined performance measures that consider the economy, society and the environment
- system benchmarks established internally and through comparison with other jurisdictions
- a system for monitoring and reporting performance measures
- establishment of an arm’s length environmental monitoring agency.

Sources: Alberta Energy (2013); Alberta Government (2010); Responsible Energy Development Act, 2012 (Alberta).

D.2 United Kingdom

Major project assessment and approval processes

In the United Kingdom, a separate approval process is used for projects deemed to be nationally significant infrastructure. To qualify, projects must be of a particular type (for example, an airport, harbour, reservoir or various types of land transport and energy infrastructure) and be above a minimum size threshold (for example, gas

pipelines must be at least 40 kilometres in length) (Planning Inspectorate (UK) 2012c). In all, there are 16 types of projects that can be deemed nationally significant infrastructure.

The legislative basis for the planning application process for nationally significant infrastructure projects is the *Planning Act 2008* (as amended by the *Localism Act 2011*). The Planning Act was introduced to streamline decision making. The Act sets out fixed time frames for the examination and decision making stages of the process.

In April 2012, the Planning Inspectorate became the agency responsible for operating the process in England and, for some types of infrastructure, in Wales (Planning Inspectorate (UK) 2012c). Other arrangements apply in Scotland and Northern Ireland.

Following the Planning Inspectorate's examination, it makes a recommendation to the appropriate Secretary of State (a Secretary of State is a Cabinet Minister in charge of a government department), who makes the decision to grant or refuse development consent (Barclay 2012). The process is summarised in box D.4.

Pre-application

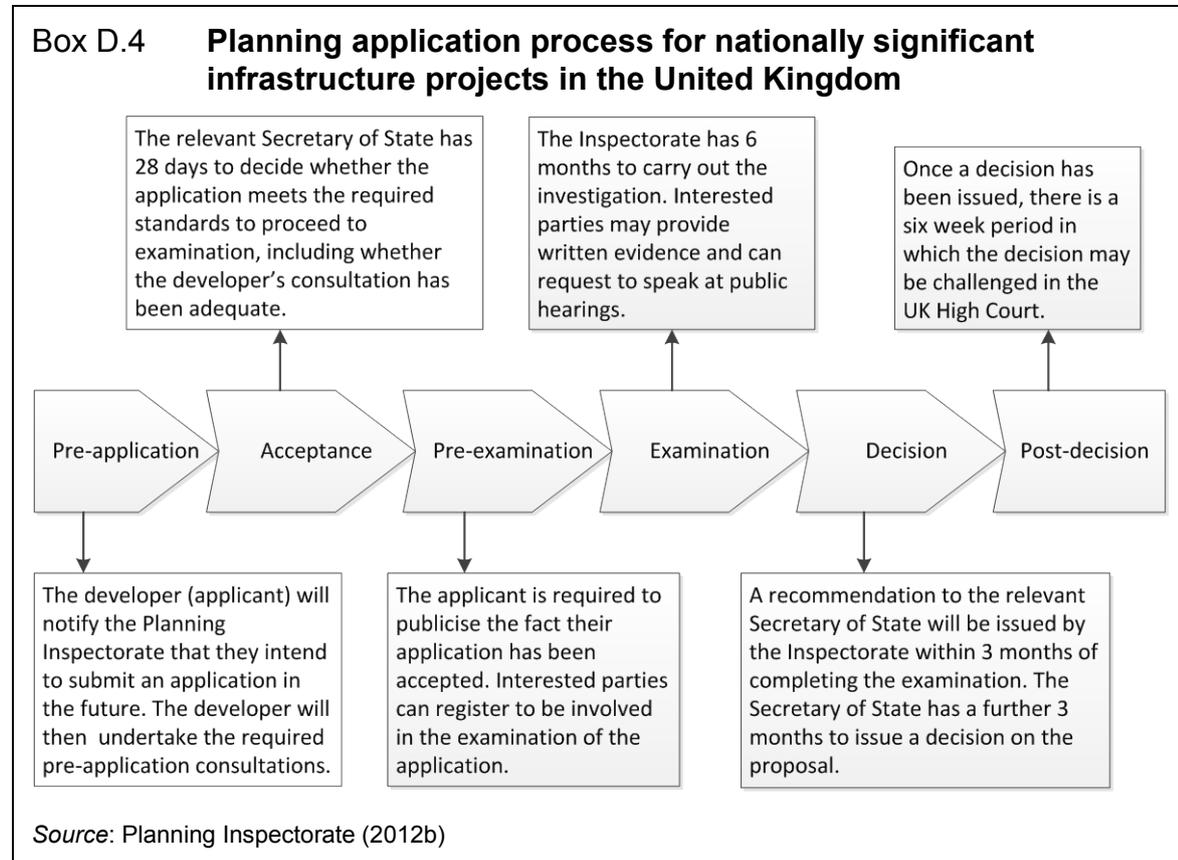
Before submitting an application to the Planning Inspectorate, the developer is required under the Planning Act to carry out consultation on their proposal. The pre-application process is considered a crucial part of the overall assessment process (DCLG (UK) 2013a).

Without adequate consultation, the subsequent application will not be accepted when it is submitted. If the Secretary of State determines that the consultation is inadequate, he or she can recommend that the applicant carries out more consultation activity before the application can be accepted. Once a scheme is in examination there is limited scope to make changes to what has been included in the draft Development Consent Order. This is why it is important that issues are made known and explored during the pre-application consultation ... (DCLG (UK) 2013a, p. 5)

National Infrastructure Planning Portal

Before carrying out this consultation, the developer notifies the Planning Inspectorate that they intend to submit an application in the future. The Inspectorate will then add the project to the Programme of Projects on the National Infrastructure Planning Portal, a publically accessible website (Planning Inspectorate (UK) 2012c). The Portal is used to record details of the project, application

documents, procedural advice given by the Inspectorate in relation to the project, and key project approval milestones.



Consultation

The Planning Act requires certain bodies and groups of people to be consulted at the pre-application stage. The Act allows for flexibility in the precise form that consultation may take, depending on local circumstances and the needs of the project itself (DCLG (UK) 2013a). The developer may be required to consult with:

- relevant local authorities
- persons who own, occupy or have an interest in the land in question where the development is proposed, or who could be affected by the project in such a way that they may be able to make a claim for compensation
- local communities that may be affected by the proposed project.

For offshore projects that do not feature any terrestrial development (such as offshore wind farms), there are no statutory requirements to consult specific local authorities. However, applicants for offshore projects should consider and consult

with communities in the vicinity of the proposed project about its potential visual, economic and social impacts (DCLG (UK) 2013a).

Before formally consulting people living in the vicinity of the project, the developer is required to prepare a Statement of Community Consultation (SOCC), having first consulted with the relevant local authorities about what it should contain. The SOCC details the consultation the developer intends to undertake with the local community about their project. The developer is required to publish a notice stating where and when the SOCC can be inspected (Planning Inspectorate (UK) 2012c).

The Planning Act provides a minimum 28 days for consultation. However, this period of consultation may be longer for larger or more complex projects. Where responses from those consulted are not received within the set deadline for consultation, the applicant is not obliged to take these responses into account in their application (DCLG (UK) 2013a).

Environmental Impact Assessment

Most nationally significant infrastructure projects will fall within the scope of the EIA Directive, and will require an Environmental Statement to be prepared and submitted as part of the application pack. Under the Planning Act, the EIA process is governed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. These regulations ensure that the pre-application publicity and consultation requirements for the EIA are consistent with those of the Planning Act (DCLG (UK) 2013a).

Acceptance

Acceptance means that an application can proceed to examination. The acceptance stage begins when a developer submits a formal application for development consent to the Planning Inspectorate. There follows a period of up to 28 days for the relevant Secretary of State to consider whether the application meets the standards required for formal examination (Planning Inspectorate (UK) 2012a). Applicants are required to produce a consultation report as part of their application, detailing how they have complied with the consultation requirements of the Planning Act. The Secretary of State will consider this report when deciding whether or not the applicant has complied with the pre-application consultation requirements, and ultimately, whether or not an application can be accepted (DCLG (UK) 2013a).

Pre-examination

If an application is formally accepted by the Secretary of State, then the pre-examination phase will commence. The applicant (developer) is required to publicise the fact that their application has been accepted and the arrangements for interested parties to make representations about the proposed development.

At this stage, interested parties must register with the Planning Inspectorate to have their views considered by the Examining Authority. At least 28 days must be provided for people to register. As part of the registration process, parties may provide a written summary of what they agree and/or disagree with in the application. This is known as a ‘representation’. The Examining Authority may disregard representations that are vexatious or frivolous, or deal with the merits of national policy rather than the project under application. The Examining Authority may also disregard representations that relate just to compensation for compulsory acquisition (rather than the justification or need for such acquisition). After the deadline for registration has passed, the Examining Authority has 21 days to review the application and all relevant representations and identify the principal issues for examination. The Planning Inspectorate will publish all relevant representations on the National Infrastructure Portal (Planning Inspectorate (UK) 2012c).

Examination

The examination of applications for development consent can be conducted either by a group of three or more appointed persons (‘Inspectors’), or by a single Inspector, depending on the complexity of the project and the level of public interest in the outcome. The Secretary of State makes this decision.

Where it seems likely that evidence to be given about an application will be of a level of complexity outside the normal experience of the persons appointed to examine the application, one or more assessors may be appointed to advise and assist the Inspectors (DCLG (UK) 2012).

The Examining Authority is required to invite the applicant, local authorities and other interested parties to a preliminary meeting to help determine how the application should be examined (DCLG (UK) 2012). The Examining Authority has a statutory duty to complete its examination within six months of the Preliminary Meeting. The examination is a form of legal process, during which consideration is given to relevant matters, including the representations of all interested parties, any evidence submitted and answers provided to questions set out in writing and explained at hearings (Planning Inspectorate (UK) 2012c).

During the examination stage, all interested parties are invited to provide further written evidence, if they wish, about the issues identified in their representations. The Examining Authority is likely to put written questions to the applicant and other interested parties to clarify points made or to seek additional information. All interested parties also have the opportunity to comment on the representations of others, and to respond to any comments made on their representations. While the examination is mainly a written process, in certain circumstances the Examination Authority may decide to hold hearings (Planning Inspectorate (UK) 2012c). It is also common practice for Inspectors to make site visits during this process (DCLG (UK) 2012).

Decision

The Examining Authority has three months from the end of the examination to make a recommendation to the Secretary of State. The Secretary of State then has a further three months to take a decision. The Secretary of State does not have to abide by the recommendation of the Examining Authority. The Secretary of State may disagree on any matter of fact mentioned in, or appearing to be material to, a conclusion reached by the Examining Authority, or may consider new evidence or any new matter of fact (DCLG (UK) 2012). For example, recently the Secretary of State for Energy and Climate Change refused approval for a proposed gas storage facility in Lancashire, despite a recommendation for approval from the Planning Inspectorate. Consent was refused on the grounds that the application ‘failed to demonstrate the suitability of the site’s geology’ (BBC 2013).

Post-decision

There is no right of appeal against the Secretary of State’s decision. However, once a decision has been issued, there is a six week period in which an application may be made to the courts for judicial review (Planning Inspectorate (UK) 2012b).

Views on the performance of the system

Time frames are largely being met

The Planning Inspectorate’s 2012-13 annual report stated:

In 2012-13, formal applications were submitted on 16 projects and we received notification of 19 pre-application projects. We issued Environmental Impact Assessment scoping opinions on 30 applications and screening opinions on 2 further cases. 13 applications were accepted for examination (acceptance decisions) and 15 completed the examination — recommendations were submitted to the Secretary of

State on 9. All these were within the statutory time limits set down. (Planning Inspectorate (UK) 2013, p. 16)

The report indicates that Secretary of State decisions were also being made within statutory time limits.

Walker (2013a) reported that ‘from the start of the examination until a decision is issued takes up to a year, which is how the regime was intended to work, and should provide comfort to future users of the regime’.

However, judicial review challenges are quite common and this is adding to time frames in some cases. Recent projects subject to judicial review include the Hinkley Point C nuclear power station in Somerset, the Heysham to M6 link road in Lancashire and the Rookery South ‘energy from waste’ project in Bedfordshire. The Hinkley Point decision is being appealed by An Taisce, an Irish heritage charity, on the grounds that the UK Government had not consulted with the Irish people before granting consent (Geoghegan 2013).

Environmental and other regulations are imposing relatively high costs

A recent review of major infrastructure projects in the United Kingdom found that the United Kingdom ‘is an expensive place in which to build infrastructure’ (HM Treasury 2010, p. 7), with the United Kingdom consistently ranked among the most expensive countries in Western Europe to build infrastructure. These higher costs are largely due to factors other than higher labour, plant and material input costs:

Comparison of labour, plant and material input costs with Northern European countries indicate the UK is generally comparable and that input costs are not a significant driver of higher infrastructure costs. (HM Treasury 2010, p. 8)

While the report noted that in some instances the higher costs were a result of the United Kingdom’s greater density of population and high land costs, as compared to other European countries, the report also noted that some of the higher costs could be attributed to policy. Specifically, the report cited the United Kingdom’s approach to addressing environmental and ecological concerns, noting that:

[w]hile these systems [compliance and consent regimes] are individually designed to protect the environment, heritage, the rights of citizens and ensure high quality, safe infrastructure, the cumulative cost impact is considerable. (HM Treasury 2010, p. 12)

Compliance with environmental regulations and related third party constraints was estimated to add as much as 10 to 15 per cent to the cost of infrastructure (HM Treasury 2010).

Recent and prospective reforms

The UK *Planning Act 2008* was introduced to speed up approval processes for key infrastructure following a series of high profile proposals that took several years to be approved. For example, consent for Terminal 5 at Heathrow airport took eight years from the time a planning application was formally lodged (Falconer 2001). The reforms included:

- developing a series of National Policy Statements, that set out in advance government objectives for the development of nationally significant infrastructure in particular sectors
- requiring consultation be undertaken before an application was submitted
- reducing the use of public inquiries and hearings, and relying more on written submissions
- introducing fixed time frames for considering applications
- approval by the examining body, rather than a Minister (Walker 2013b).

The *Localism Act 2011*, reinstated Ministerial approval, but left many other aspects of these reforms unchanged.

Recently, the UK Government published draft regulations that would extend the nationally significant infrastructure regime to cover the most significant business and commercial projects (DCLG (UK) 2013b). Under the regulations, proponents would be able to choose to be subject to the regime, provided their project met certain criteria. Various types of construction projects potentially qualify, including offices, research and development, manufacturing, distribution, sport and tourism, and mining projects.

D.3 United States

Context

As a federation, most powers related to regulating aspects of major projects are reserved to the states. Planning powers, however, are predominantly applied by local government through the exercise of zoning (which is given effect under the policing head of power reserved for the states but delegated to the municipal level (Cullingworth and Caves 2009, pp. 78–79).

Further, two particular features of United States (US) land ownership are notable for their implications for major project assessment and approval. First, activities on Native American lands can be regulated differently, as tribes are considered

‘domestic dependent nations’ and operate as sovereign governments subject to Federal authority. Second, mineral rights are not always reserved to the State. Individual surface owners often own the subsurface mineral rights (though they may have on-sold or leased them separately from the surface rights). Mineral rights are also frequently owned by the Federal Government, especially in western states. (The Federal Bureau of Land Management manages around 13 per cent of the total US land surface, mostly in western regions.)

Key features of assessment and approval processes

The regulatory regimes that can apply to major projects in the US are extraordinarily complex, and can depend on which levels of government are involved (box D.5). The following section focuses primarily on the key environmental assessment processes that may apply.

Box D.5 US regulatory complexity — geothermal road mapping project

Against the backdrop of uncertainty around the US geothermal permit process, in April 2012 the US Government established a project team to develop working roadmaps of existing relevant permitting processes (for agency, industry and policymaker use).

As of mid-October 2013, the team had published over 460 different flow charts detailing potential processes or permits that a geothermal project may have to comply with, including:

- 20 general process flow charts (ranging from exploration to water access overviews)
- over 40 US Government flow charts (ranging from ‘Tribal Land Leasing’ to ‘Bald & Golden Eagle Permits’)
- over 390 state process flow charts (ranging from Alaskan ‘Right of Ways’ to Idaho’s ‘Well Abandonment Process’). In California alone, 31 flowcharts were listed.

These processes just cover the geothermal relevant processes of the US Government and ten largely western states (where most geothermal resources are). Additional or altered processes can apply for non-geothermal projects.

Source: US Department of Energy (2013b).

Key Federal processes

While the States have the most prominent role in regulating major projects, the Federal Government also plays a part in certain circumstances. Most prominently this occurs through the need for a Federal EIA. This can occur where Federal land or any Federal decision maker or agency is involved.

The National Environmental Policy Act 1970

A highly influential and much replicated statute, the *National Environmental Policy Act 1970* (NEPA) was legislated to protect and enhance the environment. It established a series of national environmental policies and related action-forcing provisions, and created the Council of Environmental Quality (CEQ) (an agency in the Executive Office of the President). CEQ is responsible for environmental policy coordination, monitoring and reporting, and the operation of the Act. It advises the President on environmental matters and sets the regulations for how NEPA operates, including the EIA process.

NEPA's action-forcing provisions are primarily procedural, and most obviously manifest in a requirement for Federal agencies to conduct an EIA for Federal actions that significantly affect the environment. NEPA requires that Federal decision makers consider the potential environmental consequences of their proposed action, and any reasonable alternatives, before deciding whether and in what form to take an action. While this EIA process provides more information on environmental impacts, it does not require decision makers to choose a project formulation with the least environmental impacts. The US Environmental Protection Agency, a sister agency of CEQ, has a role in reviewing EIAs. EIAs deemed inadequate are referred to CEQ. Federal agencies complying with NEPA often require the proponent to prepare and submit adequate application information to help in preparing the NEPA analyses and documentation.

Collaboration with tribal, state and local governments is encouraged to reduce duplication. Regulations 'explicitly provide for Federal agencies to conduct joint planning processes, joint environmental research ... and joint environmental assessments' (DOE (US) 2013c). State and Federal EIAs are thus sometimes combined into one document (since they can have similar elements for the most part).

Key State law

As the most populous State, and one with a prominent environmental regulatory regime, California has been chosen as an illustrative example for relevant state regulatory regimes.

The California Environmental Quality Act 1970

Similar to NEPA, the *California Environmental Quality Act 1970* (CEQA) has been a significant influence on environmental law in other jurisdictions. A number of

other US States have laws similar to CEQA (although their scope is usually narrower).

CEQA requires State Government agencies to consider (primarily through EIA) the environmental consequences of certain projects before approving their plans. It applies to any action when a project requires discretionary approval by a state or local governmental body.

CEQA is wider in scope than NEPA. NEPA applies only to projects receiving Federal funding or approval by federal agencies, while CEQA applies to projects receiving any form of state or local approval, permit, or oversight. (Thus, development projects in California funded only by private sources and not requiring approval by a Federal agency would be exempt from NEPA, but would likely be subject to CEQA.)

Moreover, unlike the NEPA process, CEQA has:

... substantive provisions beyond mere procedural requirements which means the State may halt a project that on balance is not advantageous for the environment and human health. (DOE (US) 2013a)

That said, a State agency may sometimes approve a project which causes significant environmental damage. In this case:

... the agency must make findings which clearly explain the circumstances surrounding the project analysis and the approval. Then, the agency must explain their decision to approve the project, despite expected environmental damage, by adopting a Statement of Overriding Considerations. This type of statement points out the reasons why a project's benefits outweigh its environmental costs. (San Luis Obispo County 2013)

Reform directions

The Commission understands reforms to CEQA were contained in a Bill the California legislature passed in September 2013 (*SB-743 Environmental quality: transit-oriented infill projects, judicial review streamlining for environmental leadership development projects, and entertainment and sports center in the City of Sacramento*). While it seems the primary motivation of the new law is to provide exemptions from permitting processes for a Sacramento basketball arena redevelopment, other changes include: removing certain urban parking and aesthetics matters as CEQA triggers; a new expedited 270 day period for judicial review; and other changes to facilitate urban infill. It is not clear how material the changes will be on implementation. Commentators have suggested the law is more incremental and narrow than earlier proposed statewide CEQA reforms, which failed to gain sufficient political support (Ewers 2013).

At a Federal level, the Commission is aware that legislative reforms have been mooted, but have yet to gain enough support for passage. For example, as of mid-October 2013, the US Senate had yet to consider *H.R. 761: The National Strategic and Critical Minerals Production Act of 2013*, which aims to streamline Federal permitting for resources projects (and was passed by the House on 18 September 2013). This Act supersedes an analogous Act (*H.R. 4402*) that similarly passed the House in 2012, but was never passed by the Senate.

In the absence of legislative reform, the US Administration has focused on both administrative changes and efforts to enhance access to information. For example, in February 2013, President Obama announced a goal of cutting timelines in half for major infrastructure projects (such as highways, bridges, railways, ports, waterways, pipelines and renewable energy):

[The] modernization effort will achieve time savings ... while ensuring projects create better outcomes for communities and the environment. The effort will ... [expand the] use of integrated planning, landscape and watershed-level mitigation, information technology, and publication of public timelines for permitting and review decisions to improve transparency and predictability. (White House 2013)

The changes have also occurred against the backdrop of the President signing a number of key orders to promote streamlined Federal permitting, including:

- the Presidential Memorandum — Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review (31 August 2011)
- the Executive Order — Improving Performance of Federal Permitting and Review of Infrastructure Projects (22 March 2012)
- the Presidential Memorandum — Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures (17 May 2013).

Administrative changes

Other reforms to Federal US DAA processes involving administrative changes have been implemented recently.

- Reforms to promote internal coordination within government, particularly amongst Federal agencies with a notable role in permits.
 - Specific examples, include a 2009 Memorandum of Understanding (MOU) between nine Federal Agencies to speed approval of new transmission lines. This was followed by the interagency ‘Rapid Response Team for Transmission’ initiative, which aims ‘to improve the overall quality and timeliness of electric transmission infrastructure permitting, review, and

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- consultation by the Federal government on both Federal and non-Federal lands' (CEQ nd).
- There have also been efforts to increase federal–state coordination, particularly through the use of MOUs. For example, CEQ has worked with the Western (States) Governors Association to reduce duplication on assessments and other permitting matters. Also, the Department of the Interior has signed a 2009 MOU with the State of California, which is assisting in the development of renewable energy projects.
 - Greater reporting and transparency requirements have been introduced.
 - A new annual report to the President on approaches to cut timelines and improve outcomes for Federal permitting of infrastructure projects has been initiated.
 - The Office of Budget Management now tracks the progress of large scale projects, like transmission lines and highways, which has helped put pressure on agencies to improve performance in providing approvals.
 - A new 'Federal infrastructure permitting dashboard' website has enhanced public transparency.
 - Evaluations of internal processes are being undertaken.
 - Collectively, the above initiatives have increased pressure on agencies to examine their own procedures. For example, the Department of Transportation initiated an internal improvement program called 'Every Day Counts' in 2010 to shorten 'the time needed to complete highway projects through the use of new technologies and innovative processes' (DOT (US) 2012). This initiative has led the department to systematically review the efficiency of their permitting processes.
 - CEQ is also working with the relevant Federal agencies to track five selected pilot projects which are utilising innovative environmental review methods, 'in an effort to evaluate their outcomes, and highlight and promote lessons learned on time and cost saving approaches to replicate across the government' (Council on Environmental Quality, White House 2013).

Information provision

Reforms to Federal US DAA processes involving information provision have also been implemented recently.

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- Better baseline data collection (including accessible electronic information systems) have been introduced.
 - US agencies have developed web tools to access geospatial databases in real time to help facilitate the environmental review process.
 - While certain databases and inventories are currently only available to government users, the US Environmental Protection Agency’s ‘NEPAssist’ tool is publicly accessible. This ‘provides immediate screening of environmental assessment indicators for a user-defined area of interest. These features contribute to a streamlined review process that potentially raises important environmental issues at the earliest stages of project development’ (EPA (US) 2012).
 - Better information on regulatory processes at the pre-application stage (to assist applicants to have everything in place before actually putting in an application) is being provided.
 - Regulatory roadmaps and handbooks are being developed to help proponents (and regulators) understand permitting requirements (for example, the Geothermal Regulatory Roadmap (box D.5)).
 - CEQ is working on a pre-application tool kit to make Federal processes easier to navigate.
 - CEQ is also apparently progressing efforts to encourage pre-application meetings and coordination amongst Federal agencies and applicants, to provide greater regulatory certainty and encourage early information provision.

D.4 New Zealand

Key features of the DAA framework

The *Resource Management Act 1991* (RMA) is the key legislation governing the assessment and approval of development in New Zealand, including major projects. It replaced in whole or part more than 20 major statutes and 50 other laws related to the environment: ‘a collection of uncoordinated approaches, with many conflicts, gaps and overlaps’ (MfE (NZ) 2013b, p. 12).

Introduced in 1991, the RMA was ‘in international terms ... the first real attempt to institute a planning system that was built on a concept of sustainability’ (Miller 2011, p. 1). Its purpose is ‘sustainable management’ — that is, the use, development and protection of natural and physical resources in a way, or at a rate,

which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety — while:

- sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations
- safeguarding the life-supporting capacity of air, water, soil, and ecosystems
- avoiding, remedying or mitigating any adverse effects of activities on the environment (s. 5).

In addition, the principles of the RMA include:

- matters of national importance that must be recognised and provided for, including:
 - the preservation of the natural character of the coastal environment, wetlands, lakes and rivers and protection of them from inappropriate subdivision, use and development
 - the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development
 - the protection of areas of significant Indigenous vegetation and significant habitats of Indigenous fauna
 - the relationship of Maori and their culture and traditions with their ancestral lands, water and sites
 - the protection of historic heritage from inappropriate subdivision, use and development
 - the protection of protected customary rights (s. 6).
- matters that all decisions shall have particular regard to, including:
 - kaitiakitanga⁵
 - efficient use and development of natural and physical resources
 - efficiency of the end use of energy
 - amenity values
 - finite characteristics of natural and physical resources
 - the habitat of trout and salmon (a proxy for water quality)
 - climate change
 - renewable energy (s. 7).

⁵ The traditional Maori system of environmental guardianship is kaitiakitanga, which is a way of managing the environment based on the traditional Maori world view.

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- taking into account the principles of the Treaty of Waitangi (s. 8).

Most decisions under the RMA are made by local government, but within a framework that flows from the national level (via statements determined by the Central Government, such as national environmental standards and national policy), through to regional policy statements and plans, and then to district plans and rules (determined by local government).

The RMA:

- imposes a statutory requirement on regional councils to prepare regional policy statements and regional coastal plans, which must give effect to national policy statements
- requires territorial councils to prepare district plans for resource management within their local areas, which must not only give effect to national policy statements of Central Government but also regional policy statements by regional councils.

The RMA allows all consent decisions about a project to be considered in one process. This aims to reduce costs otherwise associated with applications for multiple permits. It brings together in one Act broader coverage of the social, environmental, heritage and Indigenous issues than is the case in Australian legislation.

Nevertheless, the RMA has been criticised:

The Government continues to hear concerns that resource management processes are cumbersome, costly and time consuming, and that the system is uncertain, difficult to predict and highly litigious. The system seems to be difficult for many to understand and use, and is discouraging investment and innovation. The outcomes delivered under the RMA are failing to meet New Zealanders' expectations. (MfE (NZ) 2013b, p. 6)

Proposals of national significance

While local authorities are the principal decision makers under the RMA, the Act provides for the Minister for the Environment to make a direction that a proposal is of national significance and refer it to a board of inquiry (appointed by the Minister) or to the Environment Court for a decision. The Minister does not decide whether these proposals should be approved.

Factors the Minister may consider, when deciding whether the proposal has national significance, include whether the matter has:

- aroused widespread public concern

-
- involves significant use of natural and physical resources
 - is relevant to New Zealand's international obligations
 - will help the Crown fulfil public health, welfare, security or safety obligations or functions
 - is likely to contribute to significant changes to the environment
 - relates to network utilities extending to more than one district or region (s. 142(3)).

For nationally significant proposals that have been lodged with a local authority, the Minister can be formally requested to intervene in a decision-making process by either the applicant for the proposal or the local authority that would normally make the decision. Alternatively, the Minister can choose to intervene on his or her own volition. Applicants with proposals that they consider are of national significance can also lodge directly with New Zealand's recently established Environmental Protection Authority (EPA).

If the Minister calls in a proposal that has been lodged with a local authority, he or she can make a direction that the matter is referred for consideration and decision to an independent board of inquiry (the Minister appoints members to the Board), or to the Environment Court. In either case, the local authority will no longer have the role of deciding the matter. Examples of call-ins in the last five years include proposals for the Turitea, Waikato and Te Waka wind farms, the Upper North Island Grid Upgrades and the Te Mihi geothermal power station (MfE (NZ) 2011).

If the matter has been lodged with the EPA, the EPA must make a recommendation to the Minister on whether it considers the proposal to be of national significance, and whether it should be referred to a Board of Inquiry, the Environment Court or the local authority for consideration and decision.

If the Minister decides to call-in a proposal, he or she must give a direction in writing, stating the reasons for referring the matter to a Board of Inquiry or to the Environment Court. The EPA serves the Minister's direction on the local authority and applicant. The EPA also gives public notice of the Minister's direction and receives submissions on the proposal.

If the Minister makes a direction that the matter will be processed by the local authority, the Minister may still intervene in the process. For example, the Minister may make a submission on the matter for the Crown, appoint a project coordinator to advise the local authority on anything relating to the matter, or appoint an additional hearings commissioner.

If the matter is referred to a Board of Inquiry, as soon as practicable after the inquiry has been completed, the Board prepares a draft decision and produces a draft report which states the reasons for its decision. After inviting comments on ‘minor or technical’ aspects of the report, the Board produces a final report and decision. That is, the Board is the ultimate approval authority.

If the matter is referred to the Environment Court, the Court must have regard to the Minister’s reasons for making a direction in relation to the matter, and must apply relevant sections of the RMA as if it were a consent authority.

A Board of Inquiry must make its final decision within nine months of the public notification of the Minister’s decision to call-in the matter. However, the Minister can extend this timeframe to 18 months if special circumstances exist. The timeframe can be extended beyond 18 months only with the applicant’s agreement. The nine month decision making timeframe does not apply to the Environment Court.

Many of the costs that the EPA or a Board of Inquiry incur to review proposals of national significance are recovered from the proponent (MfE (NZ) 2013a).

A decision by a Board of Inquiry or the Environment Court may be challenged only by an appeal to the High Court on a question of law. If that decision is challenged, a further appeal may be taken to the Supreme Court or the Court of Appeal on a question of law, but only with the leave of the Supreme Court.

Reporting on implementing the RMA

Every two years the Ministry for the Environment surveys local authorities in New Zealand about key aspects of RMA implementation. The survey does not separate the processing of proposals of national significance, but has data about the approval process in general.

Five key facts from the 2010–11 survey were:

- 36 154 resource consent applications were processed through to a decision
- 0.56 per cent (203) of resource consent applications were declined
- 6 per cent (2263) of resource consent applications were notified in some way (publicly notified or limited notified)
- 95 per cent of resource consent applications were processed on time. Section 37 was used to extend the time limits for 15 per cent of all resource consent applications

-
- 68 per cent of consents that required monitoring were actually monitored.

The survey also monitors the use of good practice by local authorities to improve performance in resource management functions (MfE (NZ) 2011).

Reform directions

There have been 18 amendment Acts for the RMA since 1993. The New Zealand Government has a program for further streamlining the RMA and improving decision making:

... the Government is hearing that, in practice, every step of the current resource management system has become overly complex and unclear. There is a concern that focus under the RMA has shifted too far towards avoiding effects on the environment and that too little emphasis is being placed on using planning to deliver positive outcomes — this is a particular concern in urban areas. (MfE (NZ) 2013b, p. 12)

Phase One

The first phase was completed in 2009 and streamlined decision making for projects of national significance (MfE (NZ) 2013b). One main element of these reforms was the establishment of an EPA, as previously there was no dedicated authority to receive or process applications that were of national significance. Other elements included providing more guidance about what would likely be of national significance — in particular those projects involving key infrastructure — and making some procedural changes to one of the decision pathways.

Phase one involved a range of other changes.

- The Environment Court can award security for costs, in order to make appellants think carefully about the merits of their appeal.
- Parties that are trade competitors of an applicant cannot make a submission, except when they are affected by an environmental effect and this is not related to trade competition. Damages can be awarded against parties who participate for trade competition reasons.
- Councils' ability to stop the clock has been reduced except with the agreement of the applicant. The council must consider the interests of those affected by the extension and its duty to avoid unreasonable delay.
- Councils must discount charges for processing resource consents outside of statutory timeframes.
- Fines for noncompliance with the RMA have been increased.

-
- Applicants can choose whether their application is considered by elected representatives or by independent commissioner(s) (MfE (NZ) 2009).

Phase two

Phase two of the reforms aims to improve the operation of the RMA and resource management more broadly, including in freshwater management and use, planning for natural hazards and for urban land supply.

In 2011, the New Zealand Government established a Technical Advisory Group to provide independent advice to the Minister for the Environment on any changes needed to sections 6 and 7 of the RMA, to improve the functioning of the legislation in the light of: 20 years' experience of its operation; the Government's environmental and economic objectives; and the broader second phase of resource management reforms.

The Technical Advisory Group found:

- the RMA's principles give greater weight to the sustainable management of natural and physical resources, than to social, cultural and economic matters. As well, some ambiguity in the wording of sections 6 and 7 makes it unclear whether and how to weight the matters within or between the sections.
- sections 6 and 7 do not include nationally significant matters — such as natural hazards, urban design and related housing affordability issues — or investment in major infrastructure beyond renewable energy. Each of these is important to consider in present day planning, and a national view is needed because their impacts cross regional and local boundaries. One result is uncertainty for local decision makers who may then turn to the courts to make final decisions. (MfE (NZ) 2013b, p. 20)

In addition to these broad issues, the New Zealand Government sees a range of process-oriented problems that need to be resolved (box D.6).

Box D.6 **Areas targeted for further reform in New Zealand**

The Government has identified problems that need to be resolved:

- inefficient duplication of effort in developing plans, and unnecessary variation and complexity in planning documentation, creating problems for engagement, understanding and compliance
- a lack of clear, up-to-date national guidance on matters of national importance, leaving such issues to be resolved at local levels, coupled with a highly devolved decision making system, that has led to tension between national and local objectives and the development of inconsistent approaches to these matters across the country
- insufficient attention being paid to meeting future needs as opposed to mitigating impacts
- overreliance on consents and Environment Court appeals in attempting to resolve fundamental tensions over resource uses and values that would be better addressed at the plan stage
- high costs of securing and complying with decisions, particularly consent decisions that are not commensurate with actual impacts
- a lack of predictability in decision making — in both plans and consents — particularly affecting those needing decisions
- inflexibility in the application and enforcement of the Resource Management Act processes, leading to disproportionate costs and requirements, particularly for small projects.

Source: MfE (NZ) (2013b).

The New Zealand Government initiated a consultation process on a package of reforms in February 2013 (MfE (NZ) 2013b) and, in August 2013, published a summary of reform proposals, including:

- combining sections 6 and 7 of the RMA (matters of national importance and other matters, respectively) into a single list, to remove the current hierarchy between the two sections, in order to support more balanced decision making
- including three new matters of national importance in the new combined section:
 - effective functioning of the built environment
 - management of significant risks of national hazards
 - efficient provision of infrastructure
- creation of a new section 7, which will set clear expectations of best-practice approaches to resource management decisions for stakeholders, including:
 - endeavouring to use timely, efficient and cost-effective resource management processes

-
- promoting collaboration between or among local authorities on common resource management issues
 - ensuring that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of the Act
 - reduced regulatory requirements for minor and less complex projects
 - changes to reduce the cost and complexity of the EPA’s processing of applications for nationally significant proposals, including:
 - simplifying the requirements for public notification
 - requiring boards of inquiry to have regard for cost-effective processes when determining their procedures
 - improving the ability for electronic provision of information related to the proposal
 - enabling the EPA to stop processing a proposal where there are unpaid debts and clarifying the EPA’s ability to recover debts
 - measures to resolve appeals to the Environment Court more quickly, including judicial conferences and mediation
 - requirements that councils monitor how they are delivering their functions and duties under the RMA, against measures such as timeliness, cost and overall user satisfaction, and performance against environmental and economic indicators (MfE (NZ) 2013c).

E Overview of international rankings reports

There are a number of publicly available reports that rank Australia or its States and Territories against other jurisdictions in areas related to development assessment and approval (DAA) processes. Most of these reports adopt a perception survey approach and attempt to translate this information into some sort of comparative quantitative indicator(s) that can be used to rank jurisdictions.

Some of the reports survey broad regulatory performance, while others take an industry perspective (for example, attractiveness of jurisdictions for mining investment). Most of the reports do not directly measure the efficiency and effectiveness of DAA processes.

Australia compares favourably with other countries. Australia ranks 10th out of 185 countries in the World Bank's *Doing Business Report* (a proxy for the efficiency of regulatory processes) and 20th out of 144 countries in the World Economic Forum's *Global Competitiveness Report*. Resource-related surveys also indicate that Australia is a preferred location for mining investment and has a regulatory framework that is supportive of investment. For example, Behre Dolbear's *Ranking of Countries for Mining Investment* ranked Australia as the best destination (out of 25 countries) for mining investment for the last three years.

Within Australia, surveys that compare the regulatory performance of Australian jurisdictions generally rank Western Australia, South Australia or the Northern Territory highest.

Table E.1 summarises the focus and key findings of these surveys.

Table E.1 **An overview of international surveys that rank regulatory performance**

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
<p>Survey of Mining Companies 2012-13 <i>Fraser Institute</i></p>	<p>This survey ranks the mining investment climate of 96 jurisdictions around the world. Jurisdictions are assigned scores for each of 17 policy factors, covering:</p> <ul style="list-style-type: none"> • regulatory certainty • regulatory duplication and inconsistencies • uncertainty with respect to land use or claims • infrastructure (access to roads, power availability and so on) • political stability and level of corruption. <p>The factors are aggregated for each jurisdiction into a Policy Potential Index to provide an overall score.</p>	<p>The top ranked jurisdictions were Finland, Sweden and Alberta (Canada).</p> <p>The best ranked Australian jurisdiction was Western Australia (15th overall) and the lowest ranked Australian jurisdiction was Tasmania (49th overall).</p> <p>Western Australia and the Northern Territory scored relatively well as jurisdictions that encourage investment by reducing uncertainty concerning the administration, interpretation, and enforcement of existing regulations, but generally Australia does not rank as well on avoiding regulatory duplication and inconsistencies.</p>
<p>Global Petroleum Survey 2012 <i>Fraser Institute</i></p>	<p>This survey ranks 147 jurisdictions around the world in relation to the barriers to investment in upstream oil and gas exploration and production.</p> <p>Jurisdictions were assigned scores for each of 18 factors, covering:</p> <ul style="list-style-type: none"> • regulatory uncertainty • cost of regulatory compliance • trade barriers • infrastructure • political stability and corruption. <p>The All-Inclusive Composite Index for each jurisdiction is derived from the equally-weighted scores for each factor.</p>	<p>The top ranked jurisdictions were Oklahoma (USA), Mississippi (USA) and Texas (USA).</p> <p>The highest ranked Australian jurisdiction was South Australia (29th overall) and the lowest ranked Australian jurisdiction was New South Wales at 63rd. In general, Australian jurisdictions performed relatively poorly in terms of regulatory environment, with the highest performing jurisdiction (New South Wales) ranked 47th and the lowest performing jurisdiction (South Australia) ranked 116th.</p>

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Table E.1 (continued)

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
<p>2013 Ranking of Countries for Political Risk: Where Not to Invest <i>Behre Dolbear</i></p>	<p>This report ranks 25 countries on their attractiveness as global mining investment destinations. Seven criteria are used:</p> <ul style="list-style-type: none"> • economic system • political system • social issues affecting mining in the country • delays in receiving permits • the degree of corruption • stability of currency • competitiveness of the country's tax policy. 	<p>Australia ranks as the 'best destination' for mining investment of all 25 countries. Its position as the best destination is unchanged over the last three years.</p> <p>Within the specific criteria, Australia is also ranked as:</p> <ul style="list-style-type: none"> • being the most effective at managing social issues • having the fewest permitting delays.
<p>National audit of regulations influencing mining exploration and project approval processes (draft) <i>URS Australia Pty Ltd</i> (cited in MCA, sub 33)</p>	<p>This report covers the scope and application of laws that affect the minerals sector in Australia and New Zealand.</p> <p>Each jurisdiction was rated out of five for various criteria, covering the design of policies and regulations and the administration of the process for each approval/permitting/access requirement. The scores are aggregated to yield rankings, including an overall ranking of individual jurisdictions.</p>	<p>Unnecessary delays and duplication in processes were found to negatively impact mining projects in Australia. Overall, the ratings of all Australian jurisdictions fell between 2006 and 2012, which is attributed to the increase in the amount of legislation applicable to the minerals sector.</p> <p>South Australia ranks the highest, with an average score of 3.7 out of 5 across all criteria. This is closely followed by New South Wales, Victoria, Queensland and New Zealand.</p>
<p>Doing Business 2013 <i>World Bank and International Finance Corporation</i></p>	<p>This report ranks 185 economies in terms of ease of doing business generally as well as an assessment of 11 specific regulatory areas, including the ease of:</p> <ul style="list-style-type: none"> • starting a business • dealing with construction permits • getting credit • enforcing contracts • trading across borders. 	<p>The highest ranked economies were Singapore, Hong Kong and New Zealand. Overall, Australia ranked 10th.</p> <p>On dealing with construction permits, Australia is ranked 11th. It was estimated that the process of dealing with construction permits in Australia involved 11 procedures and took 112 days.</p>

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Table E.1 (continued)

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
<p>The Global Competitiveness Report 2012-13 <i>World Economic Forum</i></p>	<p>This report calculates a Global Competitiveness Index for 144 countries as a weighted average of different ‘pillars’, including:</p> <ul style="list-style-type: none"> • institutions • infrastructure • macroeconomic environment • health and primary education • higher education and training • goods market efficiency • labour market efficiency • financial market development • technological readiness • market size • business sophistication • innovation. 	<p>The best ranked jurisdictions were Switzerland and Singapore. Overall, Australia was ranked 20th.</p> <p>However, Australia performs relatively poorly on individual measures related to development assessment and approval processes. Australia is ranked:</p> <ul style="list-style-type: none"> • 96th on the burden of complying with government regulation • 29th on the transparency of government policymaking • 56th on government provision of services to help businesses boost their economic performance • 18th on the efficiency of the legal framework in settling disputes • 19th on the efficiency of the legal framework in allowing private businesses to challenge the legality of government actions and/or regulations.
<p>Development Assessment Report Card 2012 <i>Property Council of Australia</i></p>	<p>This report evaluates each Australian jurisdiction’s planning system against the Development Assessment Forum (DAF) leading practice principles, namely:</p> <ul style="list-style-type: none"> • effective policy development • objective rules and tests • built-in improvement mechanisms • track-based assessment • single point of assessment • notification • private sector involvement • professional determination for most applications • applicant appeals • third-party appeals. 	<p>The Northern Territory was ranked the best of the Australian jurisdictions in terms of a consistent improvement program and commitment to the DAF principles. Western Australia also made significant improvement between 2010 and 2012.</p>

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Table E.1 (continued)

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
DAF Reform Implementation Report Card (2012) <i>Property Council of Australia</i>	The progress of each Australian jurisdiction in implementing the planning reforms outlined by the DAF leading practice principles.	The Northern Territory was ranked the best jurisdiction overall, which is largely attributed to its single level of planning control. South Australia made the most advances by setting policies and strategies and providing planning direction to local government. New South Wales scored the lowest, notwithstanding the major reforms already put in place, but has the most potential for improvement if announced reforms are implemented.

Sources: Behre Dolbear (2013); Fraser Institute (2012, 2013); PCA (2012a, 2012b); URS Australia Pty Ltd (nd); WEF (2013); World Bank and the International Finance Corporation (2013).

F National and international use of strategic assessment

This appendix provides information on the use of strategic assessment by Australian States and Territories and selected overseas jurisdictions. This information supports the analysis contained in chapter 11.

F.1 Australian States and Territories

Strategic assessment in land-use and development planning

New South Wales

The implementation of formal strategic assessment mechanisms in New South Wales has been a difficult process. For example, prior to July 2009, the *Environmental Planning and Assessment Act 1979* (NSW) had allowed for the development of regional environmental plans (REPs). REPs were considered by some commentators (Ashe & Marsden 2011; Kelly, Jackson & Williams 2012) to constitute a framework for strategic assessment-type processes. However, REPs are no longer part of the hierarchy of environmental planning instruments in New South Wales. The NSW Government states that ‘the removal of the REP layer is intended to simplify the State’s planning system’ (Department of Planning and Infrastructure (NSW) 2009).

Although the State currently lacks a formal mechanism for strategic assessment, the NSW Government has instigated a number of metropolitan and regional plans that have elements of strategic planning and strategic assessment. For instance, the Metropolitan Plan for Sydney 2036 will be implemented through detailed sub-regional plans that will include ‘upfront consultation with communities about what culture and heritage they want to protect in their area’ (Department of Planning and Infrastructure (NSW) 2013, p. 18).

In addition, there are also ‘regional strategies’ in place for eight areas of regional New South Wales that have been prepared in partnership with local governments. These are intended to identify strategic priorities that will direct land use planning at the regional level and are to be updated every five years.

The NSW Government has also recently put in place a ‘Gateway process’ to provide independent assessment of how mining or coal seam gas proposals would impact the agricultural values of the land on which it is proposed to be located (NSW Government nd). However, this assessment is quite narrow in focus, considering only one dimension of impacts (agricultural land values), whereas a full strategic assessment would consider a broader range of environmental, economic and social values.

Victoria

Victoria lacks a formal framework for strategic assessment. Neither the *Environmental Effects Act 1978* (Vic) or the *Planning and Environment Act 1987* (Vic) explicitly provide for strategic assessment. However, section 12 of the *Planning and Environment Act* provides a mechanism for examining strategic proposals that require amendments to planning schemes, while section 151 of the Act allows the Minister for Planning to appoint an advisory committee to advise on the merits of a proposal or planning policy issue. Section 151 has been used several times to investigate the merit of strategic proposals (Parliament of Victoria 2011).

Queensland

In Queensland, the Coordinator-General undertakes strategic planning through the creation and planning of State Development Areas (SDAs). SDAs are specific areas created under the *State Development and Public Works Organisation Act 1971* (Qld) to facilitate industrial development, infrastructure corridors and major public infrastructure (Queensland Government, sub. 47). The planning process for the creation of SDAs contains elements of strategic assessment. Each SDA is subject to a development scheme, a regulatory document that controls land use and infrastructure planning and development in the SDA. The development scheme is prepared and administered by the Coordinator-General and covers the following broad areas.

- Compatibility of land uses with the objectives of the SDA.
- The processes and procedures for the assessment of development, or material change of use, applications.
- Avoiding or minimising environmental impacts.

Once complete, the scheme overrides local and Queensland Government planning instruments related to the use of land. The Coordinator-General may also prepare policies to assist in the implementation of an SDA's development scheme (Department of State Development, Infrastructure and Planning (Qld) 2012).

Western Australia

In Western Australia, the *Environment Protection Act 1986* (WA) was amended in 2003 to allow the WA Environmental Protection Authority to assess 'strategic proposals'. A strategic proposal is a proposal that identifies one or more future proposals that may, either individually or in combination, have a significant effect on the environment. According to the Environmental Protection Authority (2012b), strategic proposals can be used as an alternative to project-by-project assessment and are useful to ensure community involvement in the early stages of planning and for the consideration of cumulative impacts. The process may also give rise to more streamlined consideration of future 'derived' proposals that fall within the parameters of the strategic proposal.

However, the Environmental Protection Authority has noted the limited use of these provisions as an alternative to project-based assessment (Environmental Protection Authority (WA) 2012a). In light of this, it has published a bulletin to describe its approach and its expectations of proponents of strategic proposals.

South Australia

South Australia is currently in the process of developing a Regional Mining and Infrastructure Plan. The plan covers three regions: the Far North; Eyre and Western; and Yorke and Mid North/Braemar provinces. The regions have been selected as they cover the majority of mining projects in South Australia. The Plan will consider the infrastructure that is best able to facilitate the development of the mining sector in South Australia, and help articulate the means of delivering this infrastructure. As part of the process, stakeholder feedback will be sought on a number of issues that would be included in a strategic assessment, including the regional and community impacts of mining (both positive and negative), the contribution of mining to the economy and any environmental costs. This feedback will be used to develop a priority list of infrastructure projects (Department of Planning, Transport and Infrastructure (SA) 2013).

Tasmania

The Tasmanian Government has introduced a planning reform program, a key feature of which is the introduction of regional land use strategies (Tasmanian Government, sub. 53, attachment 1). The development of these strategies has employed elements of strategic assessment. However, the lack of consistent and accurate environmental data has, in some cases, hampered attempts to develop a pro-active planning approach to the protection of environmental values (Southern Tasmanian Councils Authority 2011)

ACT

Under the *Planning and Development Act 2007* (ACT), a strategic environmental assessment (SEA) may be undertaken when a major policy matter is proposed, such as a major variation to the Territory Plan (the key statutory planning document in the ACT). The ACT Minister for Planning can request a SEA, or the ACT Planning and Land Authority may decide that one is needed. Under the ACT approach, a SEA can be used to:

... assess the environmental benefits and impacts on an area [of the proposed policy or plan], which is an important part of any decision about an area's suitability for future development. It can also recommend how the finding of the assessment should be considered in future planning. (Environment and Sustainable Development Directorate (ACT) 2013)

Northern Territory

The Commission is not aware of strategic assessment being used in a land-use or development planning context in the Northern Territory.

Strategic assessment in environmental and resource management policy

Water planning

Under the COAG National Water Initiative (NWI), considerable effort has been put into increasing the number and quality of water plans across Australia. An NWI-consistent water plan: appropriately balances economic, social and environmental considerations; draws on the best available science, socioeconomic analysis and community input; and provides a clear basis for water access entitlements and allocations (National Water Commission 2011). As such, water

planning clearly requires a strategic approach to be taken to the assessment of water resources.

The latest biennial assessment of the NWI reported that progress has been made in increasing the proportion of areas covered by water plans and in improving their quality, but that further improvements could be made (National Water Commission 2011). Fermio and Hamstead reported:

There is a view amongst mining stakeholders that water allocation planning has been focused on agricultural and urban water use; and that remote areas where mines are the only significant water-using activity have not been prioritised for investment in water planning. (2012, p. 55)

There are regions where water planning can enable decisions about resource developments to be better informed about cumulative impacts on water resources. A possible example is the Fortescue Marsh area in Western Australia, where there is potential for the cumulative impacts of dewatering by iron ore mines to affect the groundwater-dependent ecosystem of the marsh (Fermio & Hamstead 2012).

Regulation of native vegetation clearing

A review of Victoria's native vegetation clearing regulations commenced in 2012. Part of the review involved developing an interactive model (called NaturePrint) that:

... brings together large amounts of information collected about species presence, habitat quality and connectivity, to determine relative environmental value across the landscape. This model ranks locations for their potential to contribute to the efficient conservation of the full range of Victoria's biodiversity. (Department of Sustainability and Environment (Vic) 2012, p. 23)

The development of this model entailed a strategic approach to the assessment of biodiversity values.

Reforms to Victoria's native vegetation clearing regulations that incorporate the use of NaturePrint have been announced (Department of Environment and Primary Industries (Vic) 2013). While the Commission has not independently evaluated the model, it would appear that it has enabled the regulations to be reformed in ways that are likely to improve the predictability and speed of decision making and ensure that offsets more cost-effectively target environmental benefits. For example, maps generated by the model will in some cases be able to be used in assessing a clearance application as low risk, thereby avoiding the need for on-site assessment. Proponents will also be able to more readily obtain information about the

biodiversity value of different parcels of land, which could assist them to reduce their costs by siting developments in less environmentally sensitive locations.

F.2 Selected overseas jurisdictions

European Union

Within the European Union, SEA has been mandatory for certain types of plans and programs since 2001 under Directive 2001/42/EC, known as the ‘SEA Directive’. A directive is a legislative Act of the European Union that requires member states to achieve a particular result, but typically does not dictate the means of achieving that result. Failure to comply with the Directive may result in the European Commission initiating legal action against the member state in the European Court of Justice.

The SEA Directive covers plans and programs that are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste, waste water management, telecommunications, tourism, town and country planning or land use. For plans and programs not covered by these categories, EU member states have to carry out a screening procedure to determine whether the plans and programs are likely to have significant environmental effects.

Governments within EU member states can choose to go further than the minimum requirements of the SEA Directive, as for example Scotland has (see below). Other EU member states, such as Sweden, have chosen to only comply with the minimum requirements of the Directive. Since July 2004, Swedish law has contained provisions requiring certain government plans and programs to be subject to SEA (Environmental Protection Agency (Sweden) 2010).

(Sadler & Jurkeviciute 2011) noted a number of leading practices that have contributed to successful SEA outcomes in the European Union, including:

- adequate procedural and methodological guidance is provided to practitioners
- proper public consultation is undertaken
- checks and balances for SEA quality, such as independent review, are used
- reasonable alternatives are identified and considered (for example, alternative locations for development should be genuinely considered, rather than undertaken during report preparation to meet requirements)
- cumulative and large-scale impacts are considered.

However, they suggested that there are some areas where EU nations need to improve, such as monitoring and compliance:

Not much seems to be known about practice in monitoring environmental effects of plans and programs ... or reviewing environmental reports to ensure they are of ‘sufficient quality to meet the requirements of the Directive’ – both of which are critical to gaining a firmer understanding of SEA effectiveness. (Sadler & Jurkeviciute 2011)

Overall, they found that the implementation of the SEA Directive in the European Union has been mixed, ‘proceeding at very different speeds in member states’ (Sadler & Jurkeviciute 2011). This accords with the observations of the Commission. The Commission has focused on the application of the SEA Directive in the United Kingdom, and more specifically, Scotland, which is considered by some researchers to have the most comprehensive application of SEA (Kelly, Jackson & Williams 2012).

United Kingdom

As an EU member state, the United Kingdom has legislation in place that addresses the requirements of the SEA Directive. The UK (Office of the Deputy Prime Minister (UK) 2005) reported that the UK SEA approach places an emphasis on the following areas in particular.

- Collecting and presenting information on the environmental baseline and current problems, and their likely future evolution.
- Predicting significant environmental effects of the plan or program, including those of strategic alternatives.
- Addressing adverse environmental effects through mitigation measures.
- Consulting the public and authorities with environmental responsibilities as part of the assessment process.
- Monitoring the environmental effects of the plan or program during its implementation.

However, SEA regulations and practice differ between England, Scotland, Wales and Northern Ireland and consequently the types of plans and programs that require a SEA varies across the UK (Office of the Deputy Prime Minister (UK) 2005). For example, in England the Department of Communities and Local Government is the lead department on SEA and has prepared regulations to implement the SEA Directive. In Wales, the National Assembly for Wales has prepared Regulations for SEA of Welsh plans and programs, while in Northern Ireland, the Department of the Environment for Northern Ireland has prepared regulations to implement the SEA Directive (Environment Agency (UK) 2013).

Of all the constituent parts of the United Kingdom, Scotland has the most comprehensive application of strategic assessment techniques. In Scotland, the *Environmental Assessment (Scotland) Act 2005* (EA Act), an Act of the Scottish Parliament, governs the implementation of the SEA Directive. This Act makes SEA a statutory requirement for virtually all aspects of Scottish policy formation. Kelly, Jackson and Williams (2012) argued:

[Scotland] currently represents the most comprehensive application of this technique to public sector policies, plans and programs, not just within the EU but across all the members of the Organisation for Economic Co-operation and Development. (p. 1)

The Scottish SEA experience

The Scottish Government has been an advocate of the value of the SEA approach. It argues that it has been an ‘important statutory step’ that can add value to development planning ‘by stimulating creative and lateral thinking, helping to challenge traditional views and facilitating fuller consideration of the environmental effects of policies and proposals’ (Scottish Government 2010). The Scottish Government (2006, p. 4) argued that SEA achieves this by:

- systematically assessing and monitoring the significant environmental effects of public sector strategies, plans and programs
- ensuring that expertise and views are sought at various points in the process from Scottish National Heritage, Scottish Environment Protection Agency, Historic Scotland and the public
- requiring a public statement as to how opinions have been taken into account.

From July 2004 to 1 January 2011, some 555 policies, plans and programs affecting Scotland were subject to at least one formal stage of SEA. Of these, 159 were screened out on the basis that they are unlikely to lead to significant environmental effects, while 396 went on to be subject to a full SEA (Environment Protection Agency (Scotland) 2011).

The Scottish SEA process involves a number of steps with formal requirements that must be undertaken according to statutory or agreed timelines. A SEA is instigated by a responsible authority, that is, the authority responsible for the policies, plans and programs as determined by the EA Act (such as the Scottish Government or a local council). The responsible authority must consult with the statutory consultation bodies under the Act and a report must be produced on how their responses have been taken into account (Environment Protection Agency (Scotland) 2011). The stages of the Scottish SEA process are described in box F.1. The progress of all Scottish SEA consultations can be tracked through a publically accessible online portal, the SEA Database. The SEA Database also holds all formal

submissions to the assessment, and the government responses to those submissions (Historic Scotland nd).

Box F.1 Main stages of the Scottish SEA process

The Scottish strategic environmental assessment (SEA) process has a number of steps.

- *Screening*: the responsible authority establishes whether the policy, plan or strategy is likely to have a significant environmental impact. Having formed an opinion, it must formally consult with the consultation authorities to seek their views prior to making a determination about undertaking a SEA. The consultation authorities are Scottish Natural Heritage, Scottish Environment Protection Agency and Historic Scotland. Certain categories of policies, plans and programs automatically require a SEA and therefore screening is not required.
- *Scoping*: formal consultation is undertaken with the consultation authorities to identify the scope and level of detail needed in the assessment, including the proposed period of consultation.
- *Assessment*: the assessment has to describe the effects on the environment of the policies, plans or programs and their reasonable alternatives. Environmental data collection will have been ongoing through these stages and an environmental report must be prepared.
- *Stakeholder engagement*: formal public consultation is required on the draft environmental report and on draft policies, plans and programs.
- *Post-adoption*: the responsible authority is required to make a statement on how the consultation responses and findings have been taken into account in the preparation of the policies, plans and programs.
- *Monitoring*: to ascertain the effectiveness of mitigation measures, as well as providing for the identification of any unforeseen adverse effects at an early stage.

Source: SEPA (2011).

A recent review of the SEA process found that, while it was not as efficient as it could be, SEA had considerable potential to improve the quality of Scottish policies, plans and programs (Environment Protection Agency (Scotland) 2011). The report identified a number of positive aspects of the Scottish approach, including:

- improved transparency of decision making in respect of environmental issues
- clearly defined requirements and procedures of the EA Act
- regular consultation (a requirement considered important by stakeholders).

However, the report also identified a number of negative aspects to the Scottish SEA process, including:

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- some stakeholders perceived that SEA had limited influence over policies, plans and programs
 - consideration and evaluation of the effect on the environment of different alternatives is not undertaken in a rigorous manner
 - SEA is sometimes treated as a ‘bolt-on’ process rather than being effectively integrated, and stakeholder engagement may be poor
 - benefits are not always clear and immediate and this can lead to a lack of ‘buy in’ to the process by some stakeholders, or it may potentially be viewed as an inconvenience rather than an opportunity
 - considerable resources are required to undertake a SEA appropriately, the process is time consuming, and the output is often complex.

A survey of Scottish SEA practitioners undertaken as part of the review found that around 40 per cent believed that SEA led to better environmental outcomes, around 35 per cent were unsure and 25 per cent disagreed that the process led to better outcomes (Environment Protection Agency (Scotland) 2011).

Canada

In Canada, regional environmental assessments incorporate aspects of strategic assessment, as they focus on the development potential of a geographic area, and include an examination of cumulative impacts under different development scenarios. The Canadian *Environmental Assessment Act 2012* provides the Minister of the Environment with authority to establish a committee to conduct a regional assessment for areas that are entirely composed of federal lands. The Minister may also establish a committee jointly with one or more provincial governments to conduct a regional study outside of federal lands (Natural Resources Canada, pers. comm., 8 June 2013).

At this stage, no regional environmental assessments have been started under the Environmental Assessment Act. However, a regional environmental assessment of the Beaufort Sea in Canada’s far north was instigated by the Canadian Government in August 2010 to facilitate socioeconomic and scientific research to inform regulatory decisions for potential offshore exploration and development activities in the region. It is a multi-stakeholder initiative, involving Inuvialuit communities, industry, federal and territorial governments, academia and regulators. The intention is to support effective and efficient regulatory decision making by providing the necessary scientific and socioeconomic information to all stakeholders (Aboriginal Affairs and Northern Development Canada 2012). The assessment is currently in progress and is expected to be completed within the next two years.

In addition, some Canadian provinces undertake SEAs for offshore developments. In these cases, SEAs must be undertaken prior to issuing exploration licences for oil and gas. These assessments are undertaken by the jurisdictions' petroleum board (the Canada–Newfoundland and Labrador Offshore Petroleum Board and the Canada–Nova Scotia Offshore Petroleum Board are two examples). These boards have used the SEA tool to analyse broad geographic areas and identify areas of particular environmental sensitivity that should be avoided or protected through mitigation measures. Assessments are also used to identify information gaps, and can assist efforts to assess project-specific environmental effects (Natural Resources Canada, pers. comm., 8 June 2013).

Alberta

The Government of Alberta intends to develop regional plans for seven different regions. These plans are intended to set environmental limits, conserve sensitive land from development and provide certainty to developers. The plans are also intended to assist in a shift to 'cumulative effects management' (Environment and Sustainable Resource Development Alberta 2013). The plans are legally binding. Only one regional plan (for the Lower Athabasca Region) has been approved, with the regional planning process not yet commenced for five of the seven regions.

The Lower Athabasca Regional Plan became effective 1 September 2012. The Albertan Government (Environment and Sustainable Resource Development Alberta 2012) has reported the successful outcomes of the plan as follows.

- More than 10 000 Albertans, including individuals and representatives from Aboriginal organisations, industry, municipalities and environmental organisations, were engaged in land-use planning over a three year period.
- The plan sets regional environmental limits for air and surface water quality and groundwater management. It also establishes six new conservation areas and protects important caribou habitat. The plan also establishes environmental monitoring frameworks, and commitments to engage with the Indigenous population in environmental planning decisions.
- The plan addresses infrastructure challenges and sets strategies to plan for both urban growth and the continued growth of the oil sands industry within the region.

United States

While the United States was the first country to require the use of environmental impact assessments for individual major projects through the *National*

Environmental Policy Act 1969, to date, strategic assessment in the United States has been relatively underused (Clark, Mahoney & Pierce 2011). Clark, Mahoney and Pierce (2011) outlined a number of challenges to the wider application of strategic assessments in the United States.

- US regulatory organisations are not sufficiently cohesive to work together at a strategic level.
- Current organisational frameworks do not support cohesive consideration of projects that have cross-jurisdiction impacts.
- There are limited environmental data available at the regional level to support strategic decision making.
- Decision makers are risk averse in situations where future developments are uncertain.
- There is a limited pool of professionals qualified to prepare strategic assessments.
- There is a risk of litigation if strategic assessment is flawed.

Overall, Clark, Mahoney and Pierce (2011) concluded that strategic assessment may result in improved decision making in the United States, but there would need to be more acceptance of the process by those involved in environmental impact assessments before it becomes more widely used.