

Submission to PC white paper on Major Project Development Assessment Processes

submitted by email
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I am not a developer, but I am a stakeholder.

I am a member of the public distressed at the destructiveness of the development culture in my country, in my state and in my community.

I note that this process is product of a paper by the Business Council of Australia filled with unquantified and unsubstantiated assertions and anecdotal evidence but little more. As this submission will make clear, there is substantial evidence that shows that the real problem is that we are failing to protect our environment, our biodiversity and the quality of life upon which we all depend.

“The focus of this study is on addressing the unnecessary burdens — that is, where the objectives of the regulation could be achieved with lower compliance costs — that are placed on the proponents of major project developments.”

The approach being taken by the PC – focusing on the stories and evidence of developers and working on the assumption that the economic activity associated with development is by definition good (see, e.g., p3) is misguided and likely to produce a completely distorted picture of the issues surrounding development.

The PC, for example, cites a BCA example of a lengthy and expensive EIA process. BCA provides no detail regarding the reasons for delays and reasons for costs; no analysis of whether the many conditions imposed were legitimate and nowhere in their paper do they assess whether the environmental objectives of the Act are being met.

The beginning point for any assessment of major projects development processes must be the question whether current laws are succeeding in meeting the objectives of the Acts that oversee development. The primary federal legislation that provides for development assessment is the Environment Protection and Biodiversity Conservation Act 1999. I won't address State environmental legislation, although generally it will have similar objects. Assessing the effectiveness of current laws is not primarily a matter of black letter law but of how the laws are implemented and whether the outcomes of development processes results in meeting the objectives of the Act.

The PC paper puts this issue towards the end of the discussion paper.

- How can the PC determine whether there are regulatory burdens and inefficiencies etc that can be eliminated or changed , if it doesn't know whether the DAA processes are failing in their fundamental duty to meet the objects of the Act?
- And if the DAA processes are failing to protect the environment, how can the PC make recommendations relating to burdens on business without understanding why those processes are failing?

The relevant objects of the EPBC Act are:

(a) to provide for the protection of the [environment](#), especially those aspects of the [environment](#) that

are matters of national environmental significance; and
(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
(c) to promote the conservation of biodiversity; and
(ca) to provide for the protection and conservation of heritage;

Unfortunately and strangely, the Hawke Review into the EPBC Act was not charged with looking at the Act's effectiveness. How one can propose recommended changes to environmental legislation without determining the effectiveness of the legislation is beyond perplexing – although politically normal.

In the absence of that assessment, I'd recommend that the PC examine the State of the Environment Report 2011.

This is the major work that tracks and describes environmental trends, conditions and drivers nationally and within states and territories. This is not even mentioned in the discussion paper and yet is critical to understanding development realities in Australia.

Among the failings of the current DAA processes is the fact that this document is not used and not referred to in making analyses and decisions that impact on our environment. It sits outside the DAA process and unfortunately has become almost entirely irrelevant.

The rationale for State of the Environment reporting requirement and environmental legislation is the premise that a healthy economy fundamentally depends on a health environment; that sustainability refers to the capacity of systems to continue to act as life support systems. The PC discussion paper simply ignores this absolutely fundamental relationship between development and the environment. IT IS NOT A MATTER OF BALANCING COMPETING INTERESTS (as you suggest below), but of recognising the interdependent nature of human interests (social and economic) and the environment. This is basic. This is as rudimentary a reality as there is – and it is the basis for ESD – a basis that is consistently ignored or distorted by government and industry.

*Do major project DAA processes deliver good regulatory outcomes for the community? Do the current arrangements **strike the right balance between economic, social and environmental objectives?***

The SOE report should form a significant part of the PC analysis. If conditions and trends are worsening despite the plethora of laws etc., what is the problem? Why are we seeing a continuing decline in our environmental life support systems despite the interventions that occur? If most indicators of environmental health are in decline, this requires a different analysis of regulatory burden and inefficiency. One must first determine why we are failing and the extent to which current regulatory regimes are promoting failure, the extent to which implementation and other discretionary decisions are creating failure. It is only in this context that questions of duplication, regulatory burden, inefficiencies etc can be understood and improved.

The SOE 2011 identifies three primary drivers of environmental harm – all are critical to this inquiry:

1. Climate change
2. Population growth
3. Economic growth

(SOE 2011, Summary - <http://www.environment.gov.au/soe/2011/report/key-findings.html>)

The key findings in SOE 2011 highlight continuing declines in the health of water systems and land particularly in intensive land use areas; our marine areas are generally good although the majority of fisheries are overfished. The South East Marine Region remains under high stress. The Great Barrier Reef

Marine Park Authority has said that the Great Barrier Reef Marine Park, is 'at the crossroads' (Outlook 2009) and threatened by pollution, climate change, acidification, and intensive coastal development, particularly of ports in order to export the very product that is most likely to kill off the Reef entirely. Since that Outlook Report, every major coastal development proposal and related mine that has come up for approval has been approved. Resilience is being removed, not added, to the system. The SOE notes continuing declines in biodiversity. Australia has the highest mammalian extinction rate in the world and we have poor information on invertebrates and are woefully ignorant in relation to plants and insects. We literally do not know what we are doing. We continue to fail to deal with invasive species, which are driving serious declines in habitat health and species numbers. These declines are highlighted as well by the current Senate Inquiry into Threatened Species Protection, which provides an overwhelming picture of the failure of current laws to protect our unique species. The SOE found that "This decline is seen in all components of biodiversity—genes, species, communities and ecosystems—and the evidence from pressures suggests that many components of biodiversity continue to decline" (SOE 2011, Key Findings).

The other context that the PC needs to consider is whether all development activity is good – from an economic, social and environmental perspective. If the PC operates on the assumption that all development is good, you will come to conclusions profoundly unrelated to reality.

The PC asks '*Do major project DAA processes deliver good regulatory outcomes*'.

What is a 'good regulatory outcome?' The reality is that almost no major development proposal is rejected. The rare exception are developments where there is substantial public opposition and potential political costs. (the EPBC has rejected around a dozen developments in a dozen years – most of those rejections have been based on high profile public campaigns). DAA processes are profoundly biased against the public interest, based on an unsubstantiated assumption that major developments are, as a matter of course, in the public interest and for the greater good.

I have been involved in a number of Queensland coastal developments and virtually every one of them was approved and built and lost money. In fact, Ralph Buckley did an analysis that showed only after going into bankruptcy and being resold twice did these 'cargo cult' development bring any profits to owners. The social impacts of these developments was and remains largely ignored. The environmental impacts forgotten or simply accepted as the price of 'progress'. It is these thousand cuts that have helped put the Great Barrier Reef in such trouble. At an individual development level, no single development will have a major impact on a reef wide scale. These kinds of scale arguments, regularly made by government and developers, are entirely misleading – and there is little capacity in the current regime – legal and political – to have cumulative impacts assessed and acted on.

The PC asks, '*how well are the cumulative impacts of major projects accounted for under the current arrangements?*'

There is no adequate assessment of cumulative impacts under any current legislation in Australia. Strategic assessment could overcome this – but strategic assessments completed thus far utterly fail to do this. In fact, environment NGOs have begun to conclude that completed Strategic Assessments are mechanisms for facilitating more development. A good example is the current GBR SA. Despite the legal authority to do so, the Environment Minister refused to place a moratorium on major developments while the SA is being undertaken. By the time the SA is completed virtually all the major project proposals affecting the coast and GBRMP will be in the assessment system or already approved. This Strategic Assessment is fundamentally a sham.

Cumulative impacts must operate on both temporal and spatial scales. They must incorporate not only current development proposals, but past ones – using proper historical benchmarks. Cumulative impacts must track trends, drivers and changes and note the manner in which different actions and effects may interact. Developments are currently assessed in isolation – frequently they are so fragmented that they don't even consider themselves! (see below re filters). Developments rarely refer to development and

impacts that have preceded them. For instance, the recent dredging PER put out by North Queensland Bulk Ports, relies on 2 seagrass surveys conducted in 2008 and 2009. It doesn't mention how historical port operations may have changed quality and quantity of seagrasses or the dynamics of seagrass beds or the use of those beds by species such as dugong and sea turtles. This should be basic to all EIAs but it isn't – and it is getting worse. Both the quality of the EIAs and the capacity to break projects into various stages or components means that cumulative impacts are even more ignored.

More generally, the lack of cumulative impact assessment is part of broader defects in the entire EIA process.

The defects in the EIA process are so deeply embedded that only wholesale changes will alter the current system. EIAs are promotional documents not based on science but on an approval outcome. They are paid for by developers and I have never seen an EIA that recommends against a development proceeding. All impacts can be managed – frequently with management approaches that have no basis in science or practice. They are not independent, they are not rigorous and they are rarely based on field work. They are not peer reviewed. It would be valuable to have a review of EIAs in relation to several issues:

- Do they accurately identify projects and activities?
- Do they accurately identify impacts, including cumulative, long term, synergistic and distal impacts?
- Do they accurately predict impacts?
- Do conditions imposed avoid or mitigate projected and actual impacts? (I would recommend that the PC look at the case of the Lungfish and conditions imposed as part of the approval of the Paradise Dam. One of the conditions was to monitor the effectiveness of mechanisms to transport lungfish upstream and downstream of the dam. Over five years, Sunwater monitored and found abject failure. Not a single step has been taken thus far to rectify a problem that may well see extinction of the lungfish in the Burnett River system)
- Do offsets work?

In one sense, the BCA may be correct – the current system may be so rigged that virtually any expense associated with a development assessment process is a waste of time and money – it amounts to a fee for approval not a process designed to protect the environment; since approval is virtually a certainty and since the mechanisms designed to protect the environment are failing to do so, why bother. It may well be correct that ripping up all the development approval processes in relation to environmental issues may not result in substantially worse results than we are getting now.

Do the current arrangements provide appropriate opportunities for public participation in major project DAA processes? What are the benefits and costs of public involvement in these processes? How can the benefits be enlarged and the costs reduced?

The current arrangements for development approval are rigged in favour of developers. The negotiation process between developers and government is inherently an approval process that excludes public participation and influence. Public engagement is virtually worthless. One writes a submission. It is noted. Very rarely does it change a development proposal. It never results in a development not proceeding. I have been involved in numerous (over 50) EIA processes, as representative for NGOs, as individual and as legal and policy advisor and only once have I experienced a process that is anything but token. Around ten years ago I was involved in perhaps the only consultation process I would characterise as complete and thorough. It provides a compelling story of the kinds of failures we are currently dealing with. When Environment Minister Robert Hill approved the Port Hinchinbrook development in North Queensland, one of the conditions he imposed was that a regional coastal plan must be developed under Queensland Legislation (Coastal Protection and Management Act). For over three years, I was involved in meetings, discussions, development of databases, production of studies, expert advice and shared information. Ultimately, the community, the scientists, the NGOs all asked for much higher levels of protection for significant areas of the region.

The Government response was to remove the powers from the Act that would have allowed protections to be put in place and over the next decade to gut the Act itself.

The assumption is that any 'development' is good – and that public opposition is stupid, ill informed, indifferent to the Australian economy or simply irrelevant. This entire study seems to be predicated on much the same view.

The development processes in states such as NSW and Qld are getting worse. The DAA processes are being redefined to speed the process of approval and to reduce public input. For instance in Queensland, the water permit rules are being amended to remove the need to renew licences. 99 year licences will be issued. In a time of climate change that will change (and probably reduce) the amount of available water, this is not reducing red tape, but ignoring the evidence.

It would be useful in this process for the PC to ask some basic questions about developments

- How many major projects have been rejected?
- How many major developments that have been approved have imposed externalities on the community or country?
- What is the value of those externalities? (or has the value of those externalities been determined?)
- Who bears or should bear the costs of these externalities?

Business complains bitterly about any regulation and yet from any objective perspective, it is clear that business – big business – has had its way in relation to developments. It is clear that communities and the environment have not driven decisions. The complaint of the BCA is essentially that we want faster and cheaper approvals. There may well be savings to be had and inefficiencies to be changed – but this broader context must be the framework in which we think about and understand the reality of regulatory burden.

Perhaps in order to give the PC some perspective on the grim realities of DAA for the environment and Australia's unique wildlife, I'd like to look at the processes for securing a listing of a threatened species. Comparison to current development laws provides a stark summary of who is really losing out in the development process.

There is no mandatory listing process. Even a newly discovered species is not automatically protected under federal law (eg Snub Fin dolphin, discovered in 2005). There are no mandatory time frames for any process related to listing. Once listed, there are no mechanisms for ensuring protection – instead one becomes subject to the trigger mechanisms of the EPBC Act – no guarantee of anything; there is no mechanism for listing key threats, no mandatory threat abatement plans once a threat (such as feral animals or trawling) is listed and no mandatory funding and implementation of threat abatement plans if they are ever prepared. Recovery plans for listed species may be prepared, but often they're not. Some recovery plans have taken up to ten years to prepare. There is no requirement to amend recovery plans even if circumstances change dramatically (eg 2007 Victorian bushfires and the Leadbeaters Possum). There is no funding required for recovery plans. There is no enforcement or compliance monitoring of recovery plans. There is no accountability for allowing a species to go extinct (see, e.g., the Christmas Island Pipistrelle) despite intervention requests for years preceding the extinction. There is no negotiated process for any part of these processes. One can nominate a species but cannot participate in the process of determining whether to list or not. It is easier and faster to get a coal mine approved than an endangered species protected.

I am unaware of any development proposal being stopped because of a threatened species. The most recent absurdity in this system that is designed to fail is the extensive use of offsets. These are a bit like papal dispensations that can be bought by developers. Rather than protect what needs protecting, we will protect something else, somewhere else. Recently, for instance, in approving a new port terminal, the Federal Environment Minister imposed a seagrass offsets requirement on the proponents as a condition of approval. This was a curious step because seagrasses are already protected in the Great Barrier Reef Marine Park and World Heritage Area. When asked to explain how this offset could be justified, the Minister said

they would be afforded 'greater protection'. This is a bizarre answer made more bizarre by the difficulties in actually talking about seagrass as a thing in a particular place. Seagrass beds are dynamic – they move frequently and are subject to a number of influences that even the Port Authority cannot control.

There has never been an audit of offsets – how many, where and whether any of them work.

Trying to paint a picture of the profound failings of the current system is difficult in a short submission (and I must say I am not convinced that any of this information will matter, either to the PC or those making decisions), but I hope this kind of snapshot at least prompts some questions and some thoughts about what this inquiry is really about.

I am happy to provide additional details on these issues.

Are major project DAA processes open and transparent? Are appropriate monitoring and enforcement mechanisms in place to ensure compliance with the regulations? Is regulation subject to regular review?

In general, publication of much information under DAA processes is adequate, although publication generally occurs after approval. Consultative processes are awful and tokenistic. Details of negotiations and meetings held as part of the approval process should be public. Any materials that would be subject to FOI should be released as the process proceeds.

In regards to Benchmarking, the starting point here must be that over 99% of all developments that pass through the EPBC Act are approved. Secondly, most environmental indicators have been in decline since SOE reporting began.

BCA report.

The BCA report is virtually worthless. It is extraordinary that a document with so little evidence became the basis for a government decision and this report. I can only hope that in seeking information from the development community, the PC undertakes to demand real evidence – not anecdotes – supported by data not simply assertion.

There may well be cost savings and improvements to be had in development processes, but we are a very long way from knowing if that is the case.

Reliance on Canada as a comparison. Canada is not best practice for environmental law. I would suggest looking at some of the Scandinavian countries and understanding how real environmental protection and development can both occur.

Risk based approaches. This has become the latest euphemism for speeding up approvals of developments. In the context of development approval processes it seems meaningless. There are already a number of filtering processes based on preliminary risk assessments. Under the EPBC Act, referral is only required if an action is likely to have significant impact on a matter of national environmental significance. This is effectively a three part threshold test: is it an action? Will it have a significant impact? On MNES? If not, no Commonwealth intervention is required. This is true of too many development proposals. If the matter is declared a 'controlled action' then there are a number of different assessments that may occur – from assessment based on preliminary documentation to a full inquiry. This too is based on a risk assessment approach.

Already there are problems with such filtering systems. It is a system that ignores cumulative impacts. In light of the tendency of proponents to break major developments into a number of separate component parts, it may not even allow proper consideration of a single proposal much less cumulative impacts of a

number of actions. For instance, recent proposals for mines have included separate EIAs for the mine itself; another for the rail component, another for dams and water pipelines, another for the port terminal, another for the dredging and dumping being undertaken by the Port Authority. No assessment is done of the impacts of burning CO2 we export on Australia or the Great Barrier Reef. There is no cumulative impact assessment of all of the mines, all of the port expansions and all of the increases in shipping.

There is little evidence that assessment bilaterals are working in terms of meeting the objectives of the EPBC Act. In the eNGO community there is a strong view that assessment bilaterals are weakening an already failing system and that most state governments have lower environmental standards, poorer implementation, less enforcement and more vested interests in developments than the Commonwealth.

SOE 2011 makes it clear that national leadership is needed on environmental issues. Approval bilaterals represent a regressive step of over forty years. We have seen them already – the Regional Forest Agreements are effectively approval bilaterals under the EPBC Act – and they are not working. I would suggest again that the PC review submissions to the Threatened Species Inquiry (http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/threatened_species/index.htm). The most common issue raised in submissions – including from world experts such as Professor Lindenmayer – is the failure of RFAs; the lack of compliance and enforcement and the rapidly disappearing biodiversity in those areas where State Governments are supposed to be responsible for adhering to the objects of the EPBC Act.

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21/3/13