



13th September 2013

Jonathan Coppel
Presiding Commissioner
Productivity Commission
Locked Bag 2 Collins Street East
Melbourne VIC 8003

Dear Jonathan

Major project development assessment processes, Draft Report August 2013

Thank you for the opportunity to provide input to the Productivity Commission's *'Major Project Development Assessment Processes – Draft Report August 2013'*.

The Association of Mining and Exploration Companies (AMEC) is the peak national industry body for mineral exploration and mining companies within Australia. The membership of AMEC comprises hundreds of exploration, mining and service industry companies.

AMEC's strategic objective is to secure an environment that provides clarity and certainty for mineral exploration and mining in Australia in a commercially, politically, socially and environmentally responsible manner.

It is in this context that the **attached** submission is made.

I would be pleased to attend before the Commission, if considered necessary.

In the meantime, if you have any queries on the content of the submission please do not hesitate to contact me or Graham Short.

Yours sincerely

Simon Bennison
Chief Executive Officer

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Submission to:

Productivity Commission

***'Major Project Development Assessment Processes'
– Draft Report August 2013***

ASSOCIATION OF MINING AND EXPLORATION COMPANIES (AMEC)

September 2013

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1. Introduction

Thank you for the opportunity to provide input to the Productivity Commission's *'Major Project Development Assessment Processes – Draft Report August 2013'*.

The Association of Mining and Exploration Companies (AMEC) is the peak national industry body for mineral exploration and mining companies within Australia. The membership of AMEC comprises hundreds of exploration, mining and service industry companies.

AMEC's strategic objective is to secure an environment that provides clarity and certainty for mineral exploration and mining in Australia in a commercially, politically, socially and environmentally responsible manner. It is in this context that this submission is made.

2. Executive summary

Australia's mining industry is no longer internationally competitive with production costs continuing to rise dramatically due to a range of additional operating expenses; taxes and levies.

Approvals are also becoming far more expensive, equity investment is being lost to competitive offshore projects, discoveries are reducing, getting deeper and harder to find.

Australia is a nation with significant minerals endowment. It is imperative that Australia regains and enhances its competitive edge and market share over other emerging and multiplying jurisdictions in order to take immediate advantage of the significant social and economic dividends.

In recognising the difficulties facing the industry and in order to secure the mines of tomorrow, AMEC has identified a number of policy priorities in its Federal Policy Platform¹ that need to be implemented or completed in the short term by the incoming Federal Government.

These policy priorities are focused around increasing exploration activity, and reducing the cost of doing business.

AMEC considers that the Productivity Commission should recognize these priorities in its Final Report to Government, and ensure that appropriate recommendations are made in order to address them.

¹ <http://amec.org.au/publications/amec-federal-policy-platform>

3. AMEC responses to Commission draft recommendations

As detailed in AMEC's submission to the Commission in April 2013 increased efficiency and effectiveness of the approvals process is fundamental in addressing the increasing cost of doing business in Australia.

AMEC is therefore pleased to note that the Commission has made several recommendations in the Draft Report that address some of these issues, but not all (as detailed in Section 4 below). AMEC responses to the various Commission recommendations follow in accordance with the order in which they are made in the Draft Report.²

Achieving regulatory objectives

DRAFT RECOMMENDATION 5.1

Governments should review legislative and regulatory objectives across major development assessment and approval processes within their jurisdictions to ensure that they are clear and concise, with unnecessary objectives removed.

DRAFT RECOMMENDATION 5.2

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

DRAFT RECOMMENDATION 10.1

Governments should ensure that agency responsibility and strategies for monitoring of compliance and enforcement with project conditions are clearly specified and communicated to stakeholders.

AMEC response:

AMEC agrees with the recommendations.

² Commission Draft Report August 2013 pages 29-36

DRAFT RECOMMENDATION 11.1

Drawing on the lessons learnt from the use of Strategic Assessments to date, governments should use the tool in circumstances where it is likely to produce a reduction in the costs of project approval, while delivering regulatory outcomes equal or superior to those delivered under existing processes.

AMEC response:

Implementation of this recommendation will require extreme care in defining the potential 'cumulative impact' of plans, policies and programs across an entire region, catchment area, activity or industry. The conservation values of such areas would also need to be clearly understood.

Care would also need to be taken with a strategic assessment / bio-regional planning approach to ensure that a one-size-fits assumption is not made. Strategic assessments may be relevant to large scale projects in broad environmental areas, but not necessarily where multiple projects of varying sizes may be developed in an identified strategic area.

DRAFT RECOMMENDATION 11.2

State and Territory Governments should continue to improve the quality of their strategic planning by:

- *making broad decisions about development at the strategic level so as to reduce the number of issues that need to be considered at the project level*
- *using more effective public consultation techniques*
- *ensuring thorough analysis of plan impacts through the collection of baseline environmental and heritage data and the use of Strategic Assessments.*

AMEC response:

AMEC agrees with the recommendation.

DRAFT RECOMMENDATION 7.6

Governments need to ensure that regulatory agencies have the resources, capacity and skills to efficiently administer major development assessment and approval processes.

AMEC response:

AMEC agrees with the recommendation.

Reducing regulatory overlap and duplication

DRAFT RECOMMENDATION 7.1

The Australian and State and Territory Governments should strengthen and expand the scope of existing bilateral assessment agreements under the Environment Protection and Biodiversity Conservation Act 1999. Areas for improvement include agreements on standards and procedures for assessment and extending the number of regulatory processes accredited under current bilateral agreements.

DRAFT RECOMMENDATION 8.1

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 rights of appeal are no less than those in the Environment Protection and Biodiversity Conservation Act 1999.

DRAFT RECOMMENDATION 8.2

To ensure the successful negotiation of bilateral assessment and approval agreements:

- the task of negotiating the agreements should be properly scoped, approved by COAG and published with a timetable of key milestones*
- priority should be given to approval responsibilities for activities in urban areas (other than on Commonwealth land)*
- the COAG Reform Council should monitor progress with developing the agreements, examine how well they are working and draw out implications for improving current and future agreements. To facilitate this, State and Territory Governments should prepare annual reports on their implementation of the agreements.*

AMEC response:

AMEC agrees with the recommendations.

AMEC strongly supports and has constantly advocated delegation of the Federal Government's assessment and approval powers under the EPBC Act to accredited State and Territory Governments.

Adoption of such an approach will remove the current significant duplications and additional layers of approval required by the EPBC Act, whilst maintaining high environmental standards.

COAG has previously recognised that considerable Federal Government resources could be saved by delegating its powers to accredited States and Territories. A consultation process had commenced, but for a variety of reasons those consultations were put on hold.

AMEC supports the incoming Coalition Government's Policy for Resources and Energy commits to 'deliver a one-stop-shop environmental approvals process that sets high standards, makes swift decisions and delivers certain outcomes.'

DRAFT RECOMMENDATION 7.2

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, including the exclusion of water trigger-related actions from bilateral approval arrangements.

AMEC response:

AMEC agrees with the recommendation.

AMEC notes the observation by the Commission that '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'.³

AMEC considers that the 'water trigger' amendment creates an extra layer of regulation as the water trigger related actions are already being duplicated at State and Territory levels.

AMEC recommends that the 'water trigger' amendment should be repealed.

DRAFT RECOMMENDATION 7.3

Regulatory agencies at the state and territory level 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.

AMEC response:

AMEC agrees with the recommendation.

³ Ibid - page 145

Consideration should also be made, in accordance with the lead agency / coordination office concept, for the delegation of 'secondary' low risk approvals by way of MOU's or similar delegation instruments.

Improving timeframes and coordination

DRAFT RECOMMENDATION 7.4

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

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

AMEC response:

AMEC agrees with the general thrust of the recommendation to establish a major projects coordination office, noting that such a concept already exists specifically in WA through the lead agency framework.

However, AMEC is concerned that case management assistance would only be provided to those applicants above the 'major projects' threshold. It is in fact, the companies that are under the threshold that are more likely to require case management and guidance through the diverse and complex approvals processes as they do not have access to large staffing numbers or significant financial reserves in order to outsource such assistance.

DRAFT RECOMMENDATION 8.3

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 and any conditions) by the assessment agency should be deemed to be the decision by the decision maker.

DRAFT RECOMMENDATION 8.4

Governments should provide guidance, preferably in statute, for the use of the 'stop the clock' mechanism. Such arrangements should only be available to assessment agencies when matters emerge that were not contained in the terms of reference and 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) why.

AMEC response:

AMEC supports the recommendations and specifically adoption of statutory timelines for major projects. AMEC also considers that such timelines should be reviewed every two years, and where possible reduced.

AMEC also considers that there should be no stop the clock mechanism when the application is referred to other approvals agencies and that the timeline should be 'whole of government'.

Regulatory certainty, transparency and accountability

DRAFT RECOMMENDATION 6.1

Governments should establish statutory criteria as to 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 (making it subject to a major project pathway). However, 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.*

DRAFT RECOMMENDATION 6.3

Regulators should ensure transparency in the processes used to set the terms of reference (TOR) of the environmental impact assessment for a major project by allowing for public consultation on draft TOR and by reporting the:

- *advice provided to the assessment authority and used in setting the TOR*
- *referral agencies' rationale for their advice, including how risks were assessed*

- *assessment authority's rationale for setting the TOR, including how and why the TOR differ from the advice received and how risks were assessed.*

AMEC response:

AMEC agrees with the general thrust of these recommendations.

DRAFT RECOMMENDATION 7.5

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 the expected benefits exceed the costs.

AMEC response:

AMEC agrees with the general concept of separating regulatory assessment and enforcement functions, however it should be noted that the assessment and enforcement activities currently being undertaken by the WA Department of Mines and Petroleum appear to be working well for Mining Act projects. The final recommendation should recognise current effective processes.

DRAFT RECOMMENDATION 8.5

Ministers should be the decision makers for major project primary approvals. Governments should consider whether this is better achieved through administrative or legislative means. Guidelines should be established as to what types of decisions Ministers can delegate.

DRAFT RECOMMENDATION 8.6

Governments should publish the process that decision makers need to follow when making approval decisions, including:

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

DRAFT RECOMMENDATION 8.7

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

AMEC response:

AMEC agrees with the recommendations.

DRAFT RECOMMENDATION 6.2

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

AMEC response:

AMEC agrees with the recommendation.

DRAFT 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. Where necessary, jurisdictions should amend their legislation to allow judicial review of ministerial decisions.

DRAFT 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, or*
- *those who have taken a substantive 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.

AMEC response:

AMEC does not agree with these recommendations.

As noted by the Commission, ‘Ministers are accountable to Parliament and to the public for their decisions in the same way that an independent body is not. Allowing merits review of ministerial decisions would allow the decisions of an elected official to be challenged by an unelected body.’⁴

⁴ Commission Draft Report August 2013 - page 218

AMEC notes that legal action can still be initiated as evidenced by the recent decision by WA Chief Justice Martin who brought down a judgement in *The Wilderness Society of WA (Inc) v Minister for Environment* and found that the assessment and approvals process for the proposed LNG Precinct at James Price Point to be invalid.⁵

Compliance costs

DRAFT RECOMMENDATION 10.2

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

AMEC response:

AMEC agrees with the recommendation.

DRAFT RECOMMENDATION 7.7

Where it is not already the case, regulators should establish a hierarchy of assessment methods for major projects that correspond to different levels of regulatory scrutiny. Criteria for determining the level of assessment should be identified and in the public domain.

AMEC response:

AMEC strongly supports a risk based outcomes focussed assessment and compliance approach.

DRAFT RECOMMENDATION 10.3

Governments should ensure that third parties can initiate legal action to enforce conditions on primary approvals. Consideration should be given to ensuring legal costs do not present a barrier to legitimate actions of this type by individuals or bona fide community groups.

AMEC response:

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<http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=9FCC155C5840105948257BCC0009A340&action=openDocument>

AMEC does not agree with this recommendation as it could invariably result in further delays and a disincentive to invest in Australia. Major projects are already subject to robust assessment, review and public appeals processes. There is no justification to provide an additional appeal process to those that currently exist.

DRAFT RECOMMENDATION 7.8

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

- *consider the merit of a single national offsets framework*
 - *survey the consistency of offset policy objectives against the principles of ecologically sustainable development*
 - *critically assess the methodologies used for identifying offsets*
- examine the role of market-based offset approaches.*

DRAFT RECOMMENDATION 7.9

Governments should ensure that regulatory agencies only set conditions and offsets that:

- *are consistent with objectives and directed at the impacts of the development to be consented*
- *are outcome-based wherever possible*
- *can be amended by agreement, provided there is a strong case and the proponent is first consulted*
- *do not direct compliance, or the manner of compliance, with other legislation*
- *are public, and explain what impact the condition is seeking to address*
- *are enforceable, precise and reasonable in all other respects.*

AMEC response:

AMEC supports the recommendations and the analysis in the Draft Report.

As AMEC argued in its submission to the Issues Paper the implementation and application of environmental offsets is off significant concern. What is clear is that offsets policies are poorly developed. Governments and their agencies have been blinded by what offsets may deliver without appropriate evidence or delivery mechanisms, or even what it is they are trying to achieve.

AMEC supports the Commission`s view that offsets may be in contradiction to the principles of Ecological Sustainable Development and a more thorough examination of this is welcomed.

Furthermore, AMEC supports a thorough national inquiry into environmental offsets with the view to developing a single national offsets framework.

The Draft Report contains commentary around the use of conservation trusts to receive funds as an offsetting mechanism. AMEC notes that NSW has recently adopted such an approach following the failure of the well intentioned, but ultimately overly complex, BioBanking system⁶.

Intuitively, trusts have a number of benefits, including:

- **enabling a more strategic approach to offsets and the subsequent conservation outcomes ;**
- **create economies of scale by aggregating offsets which could deliver better outcomes;**
- **place the management of offsets with stakeholders with the proper expertise, noting that offsets management is not the core business of the proponent in almost all cases.**

However, there are a number of issues with the use of trusts, including:

- **loss of transparency of what a proponents funds are contributing to. Notwithstanding offsets management not being core business, many companies want to demonstrate their environmental responsibility and therefore want to have control or some say over offset programs and be able to report on them to stakeholders.**
- **at what point does the contributions to the trust become an `environmental tax` and every project pays.**

AMEC would support the use of market-based offsets. However, in Western Australia and in some parts of Queensland market-based offsets will be extremely difficult to implement. This is borne from the land tenure regime in these states where Pastoral leases are the predominate form of tenure. It is extremely difficult to subdivide a pastoral station to accommodate environmental offsets and purchasing one outright is out of the financial capacity of most development proponents, mostly small to mid-cap miners.

⁶ <http://www.environment.nsw.gov.au/resources/MinMedia/MinMedia13072001.pdf>

AMEC also draws to the attention of the Commission the use of agricultural offsets in Queensland under the strategic agricultural land (SCL) framework⁷. Under this framework, if the resources project has an impact on the productivity of the SCL, they are compelled under the SCL Act to make a financial contribution to improve the productivity of the remaining SCL. There are two main ways in which this occurs, through a contribution to the SCL Trust or through funding of research and development projects that deliver improvements in the productivity of SCL. AMEC contends the use of agricultural offsets duplicates land use decisions that have already been made at a holistic policy perspective, that is, a trade off has already been made when an approval (or not) is given for a project.

Governance is also a significant issue with offsets. 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. This can occur where SEWPaC, with no detailed knowledge of the local situation, turns to the State / Territory agency to find out what programs there is a need funding. Furthermore, AMEC is very concerned that there is a perceived 'extortion-type' tactic off saying to proponents that if they do not agree with the proposed offsets then they will not get their project approval – effectively an 'approvals tax'. Some of these activities include the control of fire, weeds and feral animals in conservation parks or adjoining properties in addition to the statutory responsibilities they have on their own land.

4. Other issues requiring Commission consideration

AMEC considers that there are several other areas requiring consideration by the Commission in its Final Report to Government, as follows:

Benchmarking assessment and approvals processes

Despite devoting Chapter 4 in the Draft Report to benchmarking and good regulatory practice, the Commission has failed to make any related recommendations as *'is it particularly demanding'*⁸.

AMEC recommends that the Bureau of Resources and Energy Economics (BREE) should be commissioned by the Commonwealth Government to undertake an annual review similar in nature to that conducted by Canada's Fraser Institute.

⁷ <http://www.nrm.qld.gov.au/factsheets/pdf/land/l283.pdf>

⁸ Commission Draft Report August 2013 -page 81

Such a Report should also include an in depth survey of Australian jurisdictions by Australian proponents.

Pre-application conference

The Commission has noted in Chapter 6⁹ that some jurisdictions offer proponents the opportunity to formally meet with regulators to discuss a project proposal before a formal application or Environmental Impact Assessment is lodged.

AMEC considers that such an approach is extremely important in scoping the project and having a clear understanding of approval agency expectations and likely assessment timeframes.

AMEC considers that the Commission should include such a recommendation in the Final Report.

Condition setting

AMEC considers that licence condition setting should be risk based, essential and specific to the subject project.

Although a standard set of conditions may exist within the approvals agency there is no need for each and every condition to be used on all applications.

AMEC considers that the Commission should include a recommendation to address this issue.

Parallel processes

AMEC considers that 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.

Reporting and design of performance targets

In order to provide increased transparency and accountability it is critically important that approvals agencies produce and publish key performance indicators and performance reports for public scrutiny.

⁹ Ibid -page 123

AMEC considers that the Commission should make such a recommendation.

Wider adoption of information communication technology (online approvals systems)

Wide implementation of integrated electronic lodgement and tracking systems for applications is an essential component of a more efficient approvals system.

AMEC considers that the Commission should make such a recommendation.

Integration of geographic and geophysical information databases

Integration of environment, Aboriginal heritage, water and mineralisation databases would be extremely valuable tools for government and industry for the pre-application and post-application processes. Such integration would also result in a more efficient and effective process.

AMEC considers that such a recommendation should be made by the Commission.