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Resources Sector Regulation
Productivity Commission
Locked Bag 2,
530 Collins Street East
MELBOURNE VIC 8003

Via online portal:
www.pc.gov.au/inquiries/current/resources/make-submission#lodge

To Whom it May Concern,

The Tasmanian Minerals, Manufacturing and Energy Council (TM^2EC) represents an important wealth creating sector within the Tasmanian economy. Minerals exports alone account for 55% of Tasmania's commercial exports and is the foundation stone of many regional communities with 5,600 direct jobs.

Tasmania has had a commercial mining history extending back over 100 years and with extensive mineralisation identified could do so for another 100 years.

TM^2EC is a vocal critic of how the current approvals processes are being subjected to counterproductive manoeuvres with the objective of tying up developers for extended periods in the hope investment funds will be depleted before a ruling is made on the application. It is important to register TM^2EC supports strong standards to underpin a sustainable industry, hence our submission is focussed on efficiency with genuine priority matters, not on lowering any approval standards.

We welcomed the opportunity to have a frank discussion with the Productivity Commission on 11th November 2019 and as discussed, please find attached two historical submissions which we believe add value to the process of improving the Resources Sector Regulation requirements.

Attachment A provides our experience with the EPBCA and provides recommendations and case studies from Tasmanian resource development applications.

Attachment B provides an alternate view on how Project Approvals could be structured. This primarily calls for the Project Threshold items to be listed up front, to be subjected to community and government consultation and ultimately provide the proponents to know whether their application is fundamentally approved, and then allowing subsequent resolution of the non-threshold, but important issues.

Please feel free to contact the undersigned should you have further questions. We welcome the opportunity to review the subsequent papers and continue our contribution to making the Resources Sector Regulation more productive.

Yours sincerely

Ray Mostogl
Chief Executive Officer

Attachment "A"

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Submission:

Draft Bilateral Approvals Agreement

Environment Protection and Biodiversity Conservation Act 1999

Tasmanian Minerals and Energy Council

Submission on Draft Bilateral Approvals Agreement

EXECUTIVE SUMMARY

The Tasmanian Minerals and Energy Council (TMEC) supports the One-Stop Shop for environmental approvals but requests changes to the draft Tasmanian Bilateral Approvals Agreement being made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA).

The draft as written is suitable for routine, non-controversial projects but it fails to address the problems that major projects, such as mines, face in Tasmania. Ironically, it has been problems with mine project approvals that have been at the forefront of Tasmania's calls for approvals streamlining and a one-stop shop but the draft Agreement addresses everything but those problems. If the one-stop approvals shop is to be true to its intent, the Bilateral Agreement must do more than smooth the administration of simple approvals – it must tackle the hard approvals too, like mines, the very ones for which an improved approval process is really needed.

The mining industry does not question the importance of protecting Matters of National Environmental Significance (MNES). Indeed, the mining industry is demonstrably proactive in protecting MNES. EPBCA approval conditions typically reflect commitments already made by the mine proponent. The enemy of mining projects is not approval conditions. The enemy is approval dead time.

Tasmania has become a "can't do kind of" state. We have earned an unfortunate but regrettably well-deserved reputation as being a place where things cannot get done. Investors are looking elsewhere and the Tasmanian economy is languishing as a result.

Tasmania's approval systems are being gamed by environmental NGOs, whose clear intentions are to politically and economically sabotage development that they don't like, by causing delays and frustrations to projects that otherwise pass every reasonable and lawful environmental test. Undefined and protracted delays mean that critical market windows that come and go with fluctuating ore prices are lost, and companies cannot proceed with their development. This is not an accidental and innocent consequence of the approval process – maximising delays is clearly a weapon that environmental NGOs use very deliberately.

The Bilateral Approvals Agreement provides an opportunity to right these wrongs for the EPBCA component of environmental decision making.

EPBCA matters typically comprise only a small proportion (around 10%) of the matters that an impact assessment needs to consider. There is no need for the EPBCA matters component of the decision to be held back until the State matters have been dealt with. This would not only fail to remove approvals dead time, it would entrench it as obligatory.

The changes needed to the draft Bilateral Approvals Agreement are simple: the Agreement must require the decision on approval conditions relating to EPBCA matters to be made as soon as there is sufficient requisite information to do so, not waiting until all the assessment and approval conditions for the much more comprehensive State matters have been finalised.

The concept of making a decision as soon as there is sufficient information to do so is so simple and so obvious that it is surprising that the point even needs to be made. However, the evidence of the recent experience in the Tasmanian mining industry demonstrates unequivocally that timely decision making is a real and pressing issue.

This submission has been prepared for the Tasmanian Minerals Council by Dr Ian Woodward, Principal Environmental Scientist, pitt&sherry, Hobart office.

The following amendments to the draft Bilateral Approvals Agreement would be required to achieve this pragmatic outcome:

1. The assessment report should be defined to be a report on MNES prepared by (or for) the decision maker that provides all necessary and sufficient information on MNES for the decision maker to make an informed decision on whether or not to approve the proposed action and, if so, under what conditions.
2. For the avoidance of doubt, the assessment report definition should note that the assessment report could either be a standalone report dealing only with MNES or a separate section within a combined State and EPBCA matters report.
3. The assessment report should further be defined to constitute a Statement of Reasons under section 13 the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.
4. The agreement should state that the act of publication of the Statement of Reasons constitutes the furnishing of it to any person who subsequently seeks a judicial review of the decision. If legislative amendment of the EPBCA is required to confirm that status, it should be so amended.
5. The agreement should require the decision maker to make its EPBCA matters decision as soon as it has all necessary and sufficient information to do so and to not unreasonably delay that decision until the completion of its State matters decision. The test of reasonableness should be whether the prospect of an imminent State decision was sufficiently real and likely that a delay for a combined decision would not disadvantage the proponent.
6. The Agreement should recognise that although the determination of EPBCA matters approval conditions may be made earlier than the determination of State matter approval conditions, the EPBCA conditions will not take effect until they have been incorporated into the State's permitting instrument at the end of the State matter approval condition determination process.

None of these changes diminish the protection of MNES in any way. What they diminish is the damage to projects caused by indefinite and avoidable delays. The changes could remove 4 to 24 months or more of dead time from project approvals, depending on the complexity of State matters.

INTRODUCTION

The Tasmanian Minerals and Energy Council (TMEC) supports the One-Stop Shop for environmental approvals but requests changes to the draft Tasmanian Bilateral Approvals Agreement being made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA).

The draft as written is suitable for routine, non-controversial projects but it fails to address the problems that major projects, such as mines, face in Tasmania. Ironically, it has been problems with mine project approvals that have been at the forefront of Tasmania's calls for approvals streamlining and a one-stop shop but the draft Agreement addresses everything but those problems.

The draft takes a lowest common denominator approach and proposes a system and process derived from a theoretical administrative perspective that will work for a statistical majority of projects but it ignores the very significant case by case problems that occur in the real world of mining and other natural resource approvals in Tasmania. The success of an approvals system should not be judged on the basis of how it deals with simple approvals but how it deals with difficult ones.

In statistical terms, the EPBCA approval system shows[1] national average approval decision delays of only 32 business days (2 days for referral decisions, 15 days for assessment approach and 15 days for approval decisions) but these statistics swamp and hide the very significant, and massively damaging, delays that occur to individual projects when they are targeted by environmental NGOs.

In the real world, our approval systems are being gamed by environmental NGOs whose clear intent is to politically and economically sabotage development that they don't like, by causing delays and frustrations to projects that otherwise pass every reasonable environmental test.

In Tasmania, gaming of the EPBCA process has been used by activist groups most recently to attack the Shree Minerals and Venture Minerals mine proposals in northwest Tasmania through legal challenges against EPBCA decisions.

It is an environmental and economic travesty that environmental merit can become subsumed by political and legal tactics to damage a project, particularly for Tasmania which has a moribund economy that is failing future generations through its dependence on Commonwealth financial assistance and its vulnerability to national environmental activism.

Statistically, mining approvals are only a very small proportion of EPBCA approvals but those few projects have enormous consequences for our economy. Political and economic sabotage of mining projects is sabotage of Tasmania's future self reliance.

A Bilateral Approvals Agreement that simply deals with the statistical majority of projects, which are uncontroversial, but ignores the small number of major, but often controversial,

[1] Deloitte Access Economics (20 April 2011) *Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the Environment Protection and Biodiversity Conservation Act 1999*. Report prepared for the Department of Sustainability, Environment, Water, Population and Communities.

projects is missing the point. Uncontroversial projects need little help from a one-stop shop. Controversial projects need a lot of help.

If the one-stop approvals shop is to be true to its intent, the Bilateral Agreement must do more than smooth the administration of simple approvals – it must tackle the hard approvals too, the very ones for which an improved approval process is really needed.

THE CHANGES REQUIRED

The mining industry does not question the importance of protecting Matters of National Environmental Significance (MNES). We may not always agree with the wording of approval conditions but we have no disagreement with the intent of the conditions.

Indeed, the mining industry is demonstrably proactive in protecting MNES. EPBCA approval conditions typically reflect commitments already made by the mine proponent. Evidence for this is presented in the Venture Minerals Riley mine case study, attached to this submission.

The enemy of mining projects is not approval conditions. The enemy is approval dead time.

Dead time comprises wasted time during the assessment and approval process due to administrative delays and obstructionist time following approvals due to legal challenges by activist groups. Dead time is not only a waste in its own right but it is exploited by project opponents to maximise the adverse impacts of delays to project approvals.

Avoidable and unwarranted administrative delays to decision making, and subsequent post-approval delays by legal challenges to the decisions, damage projects at a time when many millions of dollars of exploration money have been spent, cash reserves have been depleted, cash flow is yet to commence and the project is at the mercy of international ore prices completely outside the control of the proponent.

Undefined and protracted delays mean that critical market windows that come and go with fluctuating ore prices are lost, and companies cannot proceed with their development. This is not an accidental and innocent consequence of the approval process – maximising delays is a weapon that environmental NGOs use very deliberately.

It is also clearly a successful tactic, as evidenced by Venture Minerals' recent decision to suspend its three prospective Tasmanian projects – Riley, Livingstone and Mt Lindsay – after spending $50M on exploration and project development and having obtained all environmental approvals for the first of them, Riley. Venture Minerals cited the more than 12 months of delays and ongoing time uncertainties caused by NGO legal challenges against the EPBCA approval of the Riley mine as the reason for the suspension.

The changes needed to the draft Bilateral Approvals Agreement are simple: the Agreement must require the decision on approval conditions relating to EPBCA matters to be made as soon as there is sufficient information to do so, not waiting until all the assessment and approval conditions for the much more comprehensive State matters have been finalised.

The concept of making a decision as soon as there is sufficient information to do so is so simple and so obvious that it is surprising that the point even needs to be made. However, the evidence of the recent experience in the Tasmanian mining industry demonstrates unequivocally that timely decision making is a real and pressing issue.

The draft Agreement already contemplates, indeed requires, an explicit separation of the EPBCA matters assessment and approval conditions from State matters. EPBCA matters typically comprise only a small proportion (around 10%) of the matters that an impact assessment needs to consider. There is no need for the EPBCA matters component of the decision to be held back until the State matters decision is ready. This would not only fail to remove approvals dead time, it would entrench it as obligatory.

An early as possible decision on EPBCA approval conditions will mean that any legal challenges against that decision will have to be commenced and heard early, rather than at the very end of the approval process, when delays will be most damaging.

THE NEED FOR CHANGE

Disproportionate influence

While EPBCA matters comprise only a small proportion of environmental approval considerations they have a disproportionately large influence on major project approval timelines. This is not because EPBCA matters are more scientifically complex but because the EPBCA process culminates in a political (Ministerial) decision rather than one by an independent board. EPBCA decision making is therefore vulnerable to political pressure by environmental activist groups. These attacks delay decision making far beyond their scientific information needs.

Devolving the approval decisions on EPBCA matters to the accredited Tasmanian approval processes, in which the environmental approval decision is made by the independent Board of Environmental Management and Pollution Control (or similar), will remove the decision making from that direct political exposure.

However, the decision making will still be vulnerable to process gaming by opponents, usually environmental activist groups, who seek to use the assessment and approval process to achieve political ends.

Changes are required to the draft Bilateral Approvals Agreement to minimise gaming opportunities.

Tasmania – an environmental gamer's paradise

Tasmania has become a "can't do kind of" state. We have earned an unfortunate but regrettably well-deserved reputation as being a place where things cannot get done. Investors are looking elsewhere and the Tasmanian economy is languishing as a result.

The EPBCA and its approval processes have not only been caught up in this gaming but they have unwittingly become a gamer's tool. Environmental merit, upon which the EPBCA is founded, has become a secondary issue for major projects like mines, and it has been over-ridden by political and legal obstructionism.

Unable to win their arguments on merit, environmental NGO's simply side-step science and use political agitation to force protracted delays to decision making and then legal action to force last minute delays to approved projects.

Timeliness of decision making is of paramount importance to the mining industry and mining opponents know this, and abuse this. Fluctuating ore prices and the enormous time and costs of exploration and resource drilling make new mine proposals very vulnerable to approval timelines falling out of step with ore price windows.

Our approval systems and processes and have not yet caught up with the tactics of environmental gamers but the Bilateral Approvals Agreement provides an opportunity to right these wrongs for the EPBCA component of environmental decision making.

The Bilateral Approvals Agreement cannot affect the State component of decisions, and environmental gamers may subsequently turn their attention to State approvals, but that will be a matter for the State to respond to and it is no reason to refuse to take this opportunity to fix the failings of the EPBCA component.

The Tarkine - a perfect storm of conflicting values

In Tasmania, the nexus between mines, the Tarkine and the Tasmanian devil have encouraged environmental gaming to new heights (or lows, depending on perspective).

The Tarkine is a region of northwest Tasmania that was unsuccessfully nominated for protection as a wilderness region by an environmental NGO, the Tarkine National Coalition (TNC). The TNC's reason for being is to agitate for the Tarkine to become a national park and for any new mines to be prohibited.

The Tarkine as nominated by the TNC is a huge area – some 450,000 ha – and covers a great variety of landscape and vegetation types. It also happens to cover much of the Mount Read Volcanic Belt, one of the richest mineral zones in the world. This zone is recognised by Tasmanian legislation through the *Mining (Strategic Prospectivity Zones) Act 1993*, an act to protect and foster the exploration and development of mineral wealth.

Existing mines in western Tasmania are either mature or approaching the end of their economically recoverable resources. The Shree Minerals mine was the first new mine in about a decade. Recent announcements by Copper Mines of Tasmania (Mt Lyell) and Unity Mining (Henty Gold) of mine closures, while not unexpected, are devastating to local communities. Venture Minerals' three mine projects gave some hope but their suspension by the company due to protracted approval and legal delays and falling ore prices has dashed those hopes.

New mines are portrayed by the TNC as destroyers of the Tarkine. This absolutism beggars belief. The disturbance footprints of the Shree Minerals Nelson Bay River and Venture Minerals Riley mines are approximately 150 ha and 120 ha respectively, each only about 0.03% of the Tarkine region.

Even if 10 new mines were built in the Tarkine, each with, say, a 200 ha disturbance footprint, the total 2,000 ha disturbance would still be only 0.5% of the Tarkine. A total

disturbance of 0.5% is apparently too much for the TNC – only zero will satisfy them and they oppose any and all new mines.

Having failed in their attempts to have the Tarkine placed on the National Heritage List as a wilderness region, the TNC have sought to achieve their ends by what a leading Tasmanian wildlife biologist has rightly described as the "politicisation of species".

The politicisation of species - the Tasmanian devil

The Tasmanian devil is listed as endangered under the EPBCA. The identified key threats to the devil are devil facial tumour disease and roadkill. Habitat loss is not a key threat to the devil and the mine disturbance footprints are therefore not a key threat.

Disturbance is a key threat to the TNC's absolutist view of the Tarkine, however, and the TNC has transferred its protectionist objectives onto the Tasmanian devil because the devil provides them with a hook into the EPBCA process that in the absence of a wilderness listing of the Tarkine is otherwise not there.

The devil has become a convenient vehicle for the TNC to prosecute its real objectives, which is to damage mining companies so severely that they cannot proceed with new mine projects. The evidence for this is patently obvious on the TNC's own web site, which explicitly states an objective to "*Deter investment in Venture Minerals*" and boasts of the 36% reduction in the company's share price following the TNC's lodging of its Federal Court challenge against the EPBCA approval.

As demonstrated by the attached case studies, summarised below, the politicisation of the devil has led to decision inertia and inordinate and unwarranted delays in approvals for mines in Tasmania.

The EPBCA process must stop allowing itself to be manipulated in this way and, in the specific case of the Bilateral Approvals Agreement, it must not foster, or by neglect allow to continue, an approval system that is conducive and indeed encouraging to gaming.

Case studies

The attached Shree Minerals, Venture Minerals and Grange Resources case studies show how unnecessary delays in EPBCA decision making, and then legal challenges against those decisions when they are eventually made, can have very substantial impacts on project planning:

- For Shree Minerals, there were 7 months of unnecessary delays in the Commonwealth decision making and the subsequent legal action delayed the project by a further 4 months – a total of 11 months of approval dead time.
- For Venture Minerals, there were 12 months of unnecessary delays in the Commonwealth decision making and the subsequent legal action has delayed the project by a further 12 months to date, causing Venture to suspend its projects – a total of at least 24 months of approval dead time.
- For Grange Resources, there were 5 months of unnecessary delays in the Commonwealth referral decision making and then 5 months of unnecessary delays in the final approval decision – a total of 10 months of approval dead time.

Tackling approval dead time

Although a function of the Bilateral Approvals Agreement is to declare that EPBCA approvals are not required for specified actions because the State agrees to protect MNES on the Commonwealth's behalf, the State's decision on the approval conditions protecting MNES would legally still constitute a decision under the EPBCA.

This is because it is only through the Bilateral Agreement made under that Act that the State will have the authority to set MNES approval conditions. The State's decision on MNES approval conditions will therefore be subject to legal challenge and judicial review in the Federal Court just as the Commonwealth Minister's decision currently is.

Under the draft Agreement, as currently written, the decision on EPBCA approval conditions by the State would not occur until it made its simultaneous decision on State matters, which would be at the very end of the approval process. We would therefore still have the situation as now, where legal challenges in the Federal Court are used by environmental activist groups right at the very end of the approval process to sabotage projects, at the time when projects are most vulnerable to delays.

Although the EPBCA approval conditions will only be able to be given effect through the State's permit, which necessarily comes at the end of the State approval process, there is no reason why the decision on those EPBCA conditions could not be made much earlier. They could then sit as determined EPBCA conditions until the State permit is ready to incorporate them.

The statutory time limit on legal challenge against the EPBCA approval conditions would commence from when those conditions were determined, and the Statement of Reasons for them issued, not from when they are later given effect through the State permit.

If legal challenges are made in the Federal Court against the EPBCA decision, they would be commenced (and possibly completed) while the State is still working through its assessment and approval conditions on State matters. Instead of Federal Court legal challenges being sequential to the issue of the State permit, they would be dealt with in parallel to the preparation of the permit.

Potentially this could remove many months of approval dead time.

Section 27H of the *Environmental Management and Pollution Control Act 1994* (EMPCA) specifies a maximum 3 month period for the Board to complete its assessment following the end of the public consultation period (for a Level 2C assessment). For straightforward Level 2C assessments and approvals, the potential dead time savings by an early EPBCA matters decision are therefore relatively minor and the need for the TMEC's requested amendments to the draft Approvals Agreement might be questioned.

However, the TMEC's request is not focussed on simple approvals - it is focussed on complex approvals, such as new mine proposals. For complex assessments, the EMPCA Board will often 'stop the clock' seeking supplementary information about State matters, such as details relating to the design of pits, tailings dams and waste rock storages, ore processing, water management, geochemistry and acid drainage prevention. This

supplementary information may take the proponent several months to investigate and report.

For complex assessments, the Board's decision on State matters may therefore not be ready until 6 months or more after the end of the public consultation period. A decision on the much fewer and simpler EPBCA matters (which typically are more concerned with vegetation disturbance and habitat loss, not engineering details) will usually be able to be made towards the start of this extended decision period. An early decision on EPBCA matters could therefore remove perhaps 4 months or more of approvals dead time from an EMPCA assessment, via commencement (or even completion) of any legal challenges to the EPBCA matters in parallel with the State matters.

For the other assessment types that the Bilateral Approvals Agreement covers, the savings could be even more substantial. For Projects of Regional Significance (PoRS), the nominal maximum assessment period for the Panel is 4 months but this can be extended by the Minister and if the EMPCA Board is also involved in the assessment the Board's time is added in also, again with 'stop the clock' provisions. The decision time for a PoRS assessment could therefore be 9 months or more (this process has never been used, so there are no case studies to reference). For Projects of State Significance (POSS), there are no statutory decision periods but a decision period can be specified in the Minister's declaration. Experience with POSS projects shows that decisions can take up to 2 years or more.

The TMEC's requested amendments could therefore remove 4 to 24 months or more of dead time from major project approvals, depending on the assessment type and the complexity of the assessment. If there are legal challenges against the EPBCA matter conditions, they could be substantially underway, if not completed, during this period while the State matters are still being assessed and determined.

AMENDMENTS REQUIRED TO DRAFT AGREEMENT

Definition of "Assessment Report"

As a preliminary comment, we point out that the draft Approvals Agreement has editing errors. The Assessment Report definition in clause 1.1 of the Approvals Agreement is a verbatim duplication of the Assessment Report definition in the Assessment Bilateral Agreement and it fails to recognise that Schedule 1, which it refers to, has changed in the Approvals Agreement from the original in the Assessment Agreement.

The definition refers to classes of actions purportedly described in clause 2(a)(i), 2(a)(ii) and 2(a)(iii) of Schedule 1. In the Assessment Agreement, clause 2 did indeed describe classes of actions this way but in the Approvals Agreement clause 2 refers to classes of actions differently and the clause referencing is therefore wrong.

[Incidentally, the subclause referencing in the Assessment Agreement is itself also technically wrong – the references should be to 2.**1**(a)(i), 2.**1**(a)(ii) and 2.**1**(a)(iii).]

In the Approvals Agreement there is also now no Item 4.6 in Schedule 1, which part (b) of the definition attempts to refer to.

The definition of Assessment Report therefore needs to be rewritten specifically to match its own Schedule 1.

In doing so, we submit that the rewriting should be done on the following basis.

We understand that the assessment report definition is attempting to pick up three types of Tasmanian approval processes:

- Projects of State Significance under the *State Policies and Approvals Act 1993*;
- Projects determined by the EMPCA Board under the *Environmental Management and Pollution Control Act 1994*; and
- Projects of Regional Significance under the *Land Use Planning and Approvals Act 1993*.

We agree that these are appropriate approvals for the Approvals Agreement to cover.

We note that the *Major Infrastructure Development Approvals Act 1999* is not covered by the Agreement. The Act provides for integrated cross-municipal approvals of major linear infrastructure projects. To our knowledge, this process has only been used twice in its history (for the Tasmanian natural gas project in 2002 and for a high voltage transmission line duplication in 2004), and at most it will receive only occasional use. However, by its nature and intent (major linear infrastructure), any projects approved under this Act would be likely to also require approval under the EPBCA. It would therefore be prudent for the Approvals Agreement to also pick up this Act.

When correcting the Assessment Report definition, a simplistic (and in our view wrong) approach would be to make a direct reference to the assessment reports used to make decisions under each of the approval Acts.

That is, the simplistic (and wrong) approach would be for the definition of the Assessment Report would comprise:

- The Commission's Project of State Significance report to the Minister under section 26(1) of the *State Policies and Approvals Act 1993*;
- The Level 2 assessment reports prepared by the EMPCA Board under section 25(5) and 27(3) of the *Environmental Management and Pollution Control Act 1994;*
- The Project of Regional Significance statement of reasons report prepared under section 60T(6) of the *Land Use Planning and Approvals Act 1993*; and
- (If this Act comes to be included in the Agreement) the decision of the Combined Planning Authority under section 17(2), or of the Commission under section 22(2), of the *Major Infrastructure Development Approvals Act 1999*.

This would mean in each case that the Assessment Report would necessarily then be <u>the</u> report prepared under each of those Acts. That is, the Assessment Report for the EPBCA decision would necessarily be one and the same document used for the State component of the decision.

Requiring the EPBCA decision report to be one and the same document as the State decision report is both unnecessary and counterproductive to improved decision making on major projects.

It is unnecessary because clauses 5.3(b)(i) and 6.6 of the Approvals Agreement require the report's consideration of EPBCA matters to be an explicit, stand-alone section of the overall report. In doing so, the overall report simply becomes a container for the EPBCA report. That stand-alone section could be excised into its own document without loss of information – if it could not be so excised it would fail the test of 5.3(b)(i) and 6.6.

It is counterproductive because requiring the EPBCA component decision to be delayed until the State component decision will entrench approvals dead time.

Separable reports and decisions

As evidenced by the attached case studies, there may often be circumstances where the decision on EPBCA matters could be made well before the decision on State matters. Tying the EPBCA matters report to the overall State report would unnecessarily delay the EPBCA decision, to no environmental benefit: either the stand-alone report adequately covers EPBCA matters or it does not – if it does, there is no valid reason to delay the EPBCA matters decision until the State matters decision is ready to be made.

For circumstances like this, the Approvals Agreement needs to allow for the EPBCA component of the decision to be separated from the State component. This would not be possible if the EPBCA report necessarily had to be one and the same document as the State assessment report.

The feasibility of separating the State and Commonwealth matters into separate reports is supported by the Bilateral Assessment Agreement. Clauses 6.5 and 6.6 of that agreement contemplate the Commonwealth Minister only seeing that part of the report that deals with Commonwealth matters (which, as noted earlier, must be explicitly dealt with in their own section), for both the draft and the final report.

If the Commonwealth Minister is able to make the EPBCA decision based only on the EPBCA section of the assessment report, so must the State be able to under the Approvals Agreement, and it follows that the State and EPBCA components must be separable into standalone reports and decisions.

The only proviso to this separation and for the EPBCA component of the decision to be made earlier than the State component of the decision is, of course, that the separate EPBCA matters report contains sufficient information for the EPBCA decision to be made. This will be a matter for the State decision maker to determine at the time, based on the evidence.

The draft Approvals Agreement should be amended to allow for the State and EPBCA matters to be separated into standalone assessment reports if and when appropriate and for the State and EPBCA decisions on approval conditions to similarly be separated from each other, again if and when appropriate.

In some cases it may be appropriate for the EPBCA and State components to be combined into a single decision but usually the much more limited scope of EPBCA matters will allow that component to be determined well before the more complex and comprehensive State component is ready for determination.

The contrary argument – that everything about everything needs to be known before the EPBCA decision could be made – is fallacious. As demonstrated by the attached case studies of recent mine approvals, there is no credible reason why the EPBCA approval conditions for those projects could not have been designed, assessed and approved early in the overall approval process, rather than being left to the very end of the process as the current administrative practice has been.

An early decision is not a one and only chance decision. In the unlikely event of an early decision on EPBCA matters being later found to be incomplete, the EPBCA matter approval conditions could simply be varied using the State's regulatory instruments, just as the Commonwealth Minister can vary approval conditions using section 143 of the EPBCA.

Statement of Reasons needed

The State EMPCA Board's routine practice when making an approval determination under the Tasmanian *Environmental Management and Pollution Control Act 1994* is to prepare an Assessment Report, which is published at the same time as its decision on approval conditions.

The EPBCA equivalent of this Assessment Report would be a Statement of Reasons under section 13 of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*. Commonwealth practice, however, is to not prepare a Statement of Reasons unless and until it is requested. This practice can cause unnecessary delays in any legal challenges against the approval.

Persons (who usually are environmental NGOs like the TNC) seeking a judicial review of an EPBCA decision have 28 days within which to commence proceedings. This time period does not commence from the date of the EPBCA decision but rather from the date that the judicial review applicant '*has been furnished with*' a Statement of Reasons.

The Commonwealth's usual practice is for the Minister to simply issue an approval, with conditions, but with no accompanying Statement of Reasons and only prepare a Statement of Reasons if it is requested. Under section 11 of the Act, the applicant has 28 days from the approval decision to request a Statement of Reasons and then the Minister has 28 days under section 13 to provide that Statement to the applicant.

This means that a person seeking a review has in effect 56 days from the approval decision to commence proceedings.

As part of their process gaming, NGOs use all that time available to them, thereby adding 2 months of project delays before the proceedings are even commenced.

To reduce this gaming delay by at least half, the Bilateral Approvals Agreement should require the publication of the State decision on EPBCA matters to always be accompanied by an assessment report, and for that report to formally constitute a Statement of Reasons. Because the publication of an assessment report is the normal State practice, this will not be an exceptional requirement – the draft Agreement already requires a separate identification and description of EPBCA matters in the assessment report anyway.

The Agreement should explicitly state that the Statement of Reasons so published is the Statement of Reasons described by section 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

The Agreement should further state that the act of publication of the Statement of Reasons constitutes the furnishing of it to any person who subsequently seeks a judicial review of the decision. If legislative amendment of the EPBCA is required to confirm that status, it should be so amended.

The time period for commencing judicial review proceedings will therefore end 28 days after the EPBCA matters approval decision is published.

SUMMARY OF REQUIRED CHANGES

The following amendments to the draft Bilateral Approvals Agreement would be required to minimise approvals dead time:

1. The assessment report should be defined to be a report on MNES prepared by (or for) the decision maker that provides all necessary and sufficient information on MNES for the decision maker to make an informed decision on whether or not to approve the proposed action and, if so, under what conditions.
2. For the avoidance of doubt, the assessment report definition should note that the assessment report could either be a standalone report dealing only with MNES or a separate section within a combined State and EPBCA matters report.
3. The assessment report should further be defined to constitute a Statement of Reasons under section 13 the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.
4. The agreement should state that the act of publication of the Statement of Reasons constitutes the furnishing of it to any person who subsequently seeks a judicial review of the decision. If legislative amendment of the EPBCA is required to confirm that status, it should be so amended.
5. The agreement should require the decision maker to make its EPBCA matters decision as soon as it has all necessary and sufficient information to do so and to not unreasonably delay that decision until the completion of its State matters decision. The test of reasonableness should be whether the prospect of an imminent State decision was sufficiently real and likely that a delay for a combined decision would not disadvantage the proponent.
6. The Agreement should recognise that although the determination of EPBCA matter approval conditions may be made earlier than the determination of State matter approval conditions, the EPBCA conditions will not take effect until they have been incorporated into the State's permitting instrument at the end of the State matter approval condition determination process.

None of these changes diminish the protection of MNES in any way. What they diminish is the damage to projects caused by indefinite and avoidable delays. The changes could remove 4 to 24 months or more of dead time from project approvals, depending on the complexity of State matters.

Case Studies

Case Study 1: Shree Minerals Nelson Bay River mine

The Shree Minerals Nelson Bay River mine is located adjacent to the Nelson Bay River in northwest Tasmania. It had the misfortune to be located on the wrong side of the river and therefore happened to lie just inside the northern boundary of the Tarkine area nominated by the Tarkine National Coalition (TNC) for wilderness listing.

The nomination bid was unsuccessful, so the TNC used other matters, primarily supposed impacts on the Tasmanian devil, to make its claim that the mine should be refused.

Devil experts estimated that only one or two devils would be displaced by the mine. Based on this expert advice (which has never been overturned), and similar reasons for other Commonwealth species, in its EPBCA referral Shree Minerals presented a suite of impact mitigation measures and argued that the action was not a controlled action.

Despite this, the Commonwealth Minister determined that it was controlled and that it must be assessed through a separate and stand alone Environmental Impact Statement process, not the Bilateral process.

The decision meant that the mine had to go through two parallel approval processes: the Commonwealth EPBCA process and the State EMPCA process. Two sets of documentation had to be prepared and revisions to either needed to be reflected in revisions to the other to ensure consistency. The document preparation cost to the developer effectively doubled as a consequence.

The mine proposal attracted high media and political attention generated by the TNC but the public consultation process led to only one public submission being received, and it was from the TNC.

The proponent provided the Commonwealth with a response to submissions (ie. the TNC submission) on 9 March 2012. After a 2 month delay the Commonwealth formally 'stopped the clock' on 8 May 2012 and requested further information from the proponent. This information was provided to the Commonwealth on 22 May 2012.

No further information requests were made but the Commonwealth took until 19 September 2012 to 'restart the clock' and until 18 December 2012 to actually make its decision.

The Commonwealth therefore took 7 months (from 22 May to 18 December and not including the initial 2 month period from when the Commonwealth received the response to submissions) from the date that its last information request was satisfied to make its decision, a decision for which the statutory time period is 40 days. Shree Minerals' consultants recorded 23 separate contacts with the Department during this period chasing up the decision.

Following detailed mine design and the preparation of preconstruction reports, clearing and preliminary construction works at the Nelson Bay River site began on 29 April 2013. Federal Court legal action against the mine development was initiated by the TNC in that month and a court injunction prevented further work until a fresh Ministerial decision was issued on 29 July 2013. Site clearing works recommenced on 12 August 2013. The legal challenges therefore delayed the commencement of the mine by a further 4 months.

In the meantime, the State government made its much more complex and comprehensive decision and approved the project on 26 July 2012, 5 months before the Commonwealth managed to make its decision.

The approval and legal challenge delays have been very damaging to the project. The project has two ore bodies: surface hematite and deep magnetite ore. The hematite ore can be mined and shipped directly with relatively little infrastructure required but the magnetite ore requires the construction of a costly processing plant and associated infrastructure. The commercial value of hematite ore is much more vulnerable than magnetite to competition from other iron ore suppliers to the steel market and therefore more subject to fluctuations in iron ore price. The magnetite would supply the dense media industrial market, where there is less competition and prices are much less volatile.

The project economics were structured to use the cash flow from the hematite ore to fund the construction of the magnetite processing plant. The approval delays pushed the project past the favourable hematite price window (prices are currently at a 5 year low) and forced the project into suspension because the expected cash flow to fund the magnetite infrastructure was not available. If the project had been able to commence as planned when hematite prices were favourable, the magnetite mining would have been secure and the suspension of mining would not have been necessary.

Despite the failure of its environment merit and legal challenges, the TNC has continued political gaming to try to damage the project. This has included claims that a State approved amendment to allow waste rock to be temporarily stored adjacent to the mine pits will somehow harm the EPBCA listed Australian grayling fish and orchids. The Australian grayling is not even found in Nelson Bay River – a small waterfall near its mouth would prevent it swimming upstream from the sea, where it spends all but the breeding period of its life cycle – and two separate surveys by flora experts confirmed that orchids are not found in the vicinity of the pit. The TNC claims are nothing but the ongoing politicisation of species.

In total, the delays in the Commonwealth decision making (7 months) and the subsequent delays due to legal action (4 months) amount to 11 months of approval dead time.

Case Study 2: Venture Minerals Riley mine

The Venture Minerals Riley mine is located adjacent to the Lake Pieman hydroelectricity impoundment in northwest Tasmania. Like the Shree Minerals Nelson Bay River mine, the Riley mine was just inside the nominated Tarkine area, this time its southern boundary.

As noted above for the Shree Minerals Nelson Bay River mine, the TNC failed in its bid for the Tarkine to be added to the National Heritage List as a wilderness area, so the TNC used other matters, primarily supposed impacts on the Tasmanian devil, to make its claim that the Riley mine should be refused.

Again like with Shree, devil experts estimated that only one or two devils would be displaced by the Riley mine.

Again like Shree, the proponent fully recognised the importance of mitigating potential impacts on devils from the outset and made comprehensive impact mitigation commitments in their 4 April 2012 referral documentation, indeed arguing that with those commitments the project should not be a controlled action.

Notwithstanding these commitments, the Commonwealth determined that the action was controlled and it went through a Bilateral Assessment process.

Being a Bilateral process, both State and Commonwealth matters were dealt with in a single document, the Development Proposal and Environmental Management Plan (DPEMP). The EPBCA matters formed a stand-alone section of that document.

Because the EPBCA matters were locked into the DPEMP, the approval decision on them could not be made until the DPEMP was completed. With the much greater number and variety of matters that the State process assesses, the DPEMP was not completed until November 2012.

The State's assessment and approval process then took until 15 May 2013 for a determination decision to be made. The EPBCA component of the decision was not made for about another 2 months, on 3 August 2013.

There are very few substantive differences between Venture Minerals' original 4 April 2012 devil impact mitigation commitments and the 3 August 2013 EPBCA approval conditions.

A side-by-side comparison of the proponent's original commitments relating to devils and the Commonwealth's EPBCA approval conditions is provided in the following table (similar comparisons could be made for other EPBCA species).

As is evident from the first row of the table, the likely number of devils occurring within the mine footprint disturbance area was just one. This density was based on expert advice reported in the referral and despite appeals and legal challenges to the mine's approval this density expectation has never been overturned. Notwithstanding a devil density of just one, it took 16 months for the EPBCA approval to be made.

Proponent's commitments in EPBCA referral 4 April 2012	EPBCA approval conditions 3 August 2013
Devil occurrence likelihood: The indices of abundance of devils, their food and competitors within the study area suggests devils are at low densities, perhaps in the order of 0.2 devils per square kilometre. The area of vegetation to be cleared is approximately 118 ha, which is likely to support a 1 devil or, more realistically, helping to support several more.	N/A
Preclearance surveys for devil dens will be undertaken immediately before each stage of clearing to identify any occupied dens. The surveys will be conducted by a suitably qualified person.	Venture Minerals must ensure that targeted preclearance surveys for EPBCA species [ie. including devils] must be undertaken by a suitably qualified person prior to any vegetation clearance
During vegetation clearing operations, a temporary 50 m buffer will be established around any occupied natal devil dens found in the pre-clearance surveys. The buffer will encompass all structural elements of the surrounding forest and will remain until the den has been confirmed to have been vacated. Only after the den has been confirmed to be vacated will the vegetation clearing be completed.	The mandatory management responses during vegetation clearing must include: Tasmanian devil dens - cease all works within 50 m of the den until it is vacated and the individuals have naturally dispersed from the area as determined by a suitably qualified person.
Additional devil denning opportunities will be created as part of the vegetation clearing activities.	Venture Minerals must engage a suitably qualified person to design and plan the creation of new denning opportunities to compensate for the loss of any Tasmanian devil dens.
Monitoring of the effectiveness of the establishment of suitable devil denning habitat as a mitigation measure will be implemented by using sentinel camera monitoring stations.	Venture Minerals must install 4 camera traps to monitor the use and effectiveness of built denning opportunities
Devil photos will also be examined for any signs of devil facial tumour disease (DFTD). Any evidence of potential symptoms will be forwarded immediately to the Save the Tasmanian Devil Program (STDP).	Venture Minerals must install 4 camera traps dedicated to identifying incidences of DFTD. Within 14 days of a request any raw data relating to the devil must be provided to requesting agency or the STDP.
A roadkill minimisation strategy will be implemented for the Tasmanian devil, including:	Venture Minerals must:
the provision of workers transport (bus) to and from the site	provide for each work shift a bus to transport staff, contractors and visitors between the mine site and (at least) the town of Tullah
reducing traffic speed	limit speeds on mine site roads to no more than 40 kph
improving visibility by use of driving lights	use light coloured aggregate on mine site roads
acoustically alerting animals	For vehicles with animal deterrence technology such as ultrasonic alert whistles
discouraging animals from scavenging	remove carcasses from Pieman road
and educating staff and contractors.	develop an environmental induction training and awareness program

Proponent's commitments in EPBCA referral 4 April 2012	EPBCA approval conditions 3 August 2013
Staff and contractor inductions will include education about Devil Facial Tumour Disease, its significance and measures to avoid contributing to its spread	Venture Minerals must develop an environmental induction training and awareness program
	Venture Minerals must contribute no less than $144,000 to the STDP.
	For each roadkill devil death beyond 3 in any 12 month period Venture Minerals must contribute an additional $48,000 to the STDP

As is evident from the table, apart from the financial offsets there are no substantive differences between the approval conditions and the original referral commitments yet it took 16 months for those conditions to be formulated. The financial offsets did not rely on any more information from the proponent but were simply an administrative decision by the Commonwealth.

The 16 month delay was because the EPBCA decision was locked into the Bilateral Assessment process. Had it not been locked in, there would have been no reason that the same EPBCA decision, with the same outcome and the same approval conditions, could not have been made at least 12 months earlier than it was.

The TNC challenged the State approval through the Resource Management and Planning Appeals Tribunal (RMPAT), which dismissed the challenge on 24 September 2013.

Having failed to make its case on merit, the TNC subsequently mounted a legal challenge in the Federal Court against the Commonwealth decision on 2 October 2013. This challenge was dismissed by the Court on 15 May 2014.

The TNC subsequently appealed to the full bench.

On 19 August 2014, Venture Minerals suspended its Riley mine and also its Livingstone and Mt Lindsay mine projects, citing the protracted legal delays and associated loss of a favourable ore price window as the reasons.

The legal challenges delayed the project for 12 months up until the suspension decision and remain as an unresolved impediment to the project being reactivated.

In total, the delays in the Commonwealth decision making (c.12 months) and the subsequent delays (12 months so far) due to legal action amount to more than 24 months of approval dead time.

Case Study 3: Grange Resources Savage River tailings dam

Of the three case studies, this is the most recent and the least controversial. It was not opposed by the TNC and was not subjected to political or legal challenge. Its value as a case study is that it demonstrates that, even without that overt pressure, the EPBCA decision making processes have become caught up in the politicisation of the Tasmanian devil.

The Savage River mine has been operating since 1966. A proposed closure in 1994 by the original owners, Pickands Mather International, was averted by it being taken over by Australian Bulk Minerals. State legislation (the *Goldamere Act 1996*) separated legacy pollution from new arisings, with the State assuming responsibility for the legacy pollution under a trust fund negotiated between the State and PMI.

Following the merger of Goldamere and Grange Resources in 2009, this arrangement has continued. For more than 10 years following the promulgation of the EPBCA in 1999, works on the site did not impact upon any Matters of National Environmental Significance. However, a proposal by Grange in 2012 to construct a new tailings dam identified potential impacts on the Tasmanian devil as warranting an EPBCA referral.

The referral was lodged on 25 April 2012. The referral described impact mitigation measures, which comprised minimisation of vegetation clearance, minimising vehicle noise at identified devil habitat, marking the works area, raising staff awareness of roadkill risks, imposing low (40 kph) speed limits on site, monitoring roadkill on Savage River Road and reporting any signs of DFTD.

The referral assumed that the action would be controlled. Under the EPBCA the referral determination should have been made within 20 business days; that is by 23 May 2012. However, it was not until 7 June 2012 that the Department responded and then it was not with a decision but with a request for further information. Grange provided this information on 18 June 2012 and followed this up with a visit to Canberra to discuss the project with the Department.

Nothing more of significance was heard from the Department until 10 September 2012 when the Minister finally made the determination that it was a controlled action.

It had therefore taken approximately 5 months for the Department to determine that the action was controlled, let alone actually assess it, despite the fact that Grange had assumed in its referral that it would be controlled and despite the expected statutory time period for the decision being only 1 month.

The assessment of the proposal then went through the Bilateral Assessment process. Only one public representation was received during the public consultation process and it related to water quality issues, not to Tasmanian devils or any other MNES.

The EPA requested supplementary information from Grange on 26 July 2013. The request included supplementary information requests from the Commonwealth. The supplementary response was provided on 20 November 2013.

The EPA made its determination on 7 January 2014 but it was not until 24 April 2014 the Commonwealth issued its approval. This was 5 months after it received the requested supplementary information.

The Commonwealth's approval conditions relating to devils were virtually identical to those of the previous Shree Minerals and Venture Minerals decisions, and other approval conditions related to matters already covered by the EPA's approval conditions.

In total, the initial controlled action decision delays (5 months) and the final approval delays (5 months) amount to 10 months of approval dead time.

ADDENDUM

The TMEC met with representatives of the Department of the Environment on 11 September 2014 to discuss the above submission.

TMEC offers the following comments on the two key points discussed.

The potential for legal challenge

The question arose as to whether or not a decision made under the Bilateral Approvals Agreement would be immune from legal challenge under the EPBC Act.

We cannot see how a State decision on approval conditions made pursuant to the Bilateral Approvals agreement could be immune to legal challenge in the Federal Court. The only reason that the State would be making such a decision would be because of its agreement to do so under the Bilateral Agreement, which is created under the EPBC Act. The only reason that the Commonwealth could determine that it itself needs to make no decision under the EPBC Act is because the State has, through the Agreement, undertaken to protect those EPBC matters. Were it not for the Agreement, the Commonwealth could not make such a determination. The EPBC Act also specifies what the matters to protect are.

The EPBC Act therefore would remain fundamental to the protection of EPBC matters by the State. The Bilateral Approval process is created under the EPBC Act and any decision under that process must necessarily therefore be subject to judicial review in the Federal Court.

Even if this argument is wrong, it can only be tested by the court. We have absolutely no doubt that if a mine in the Tarkine is approved under the Bilateral it would be challenged in the Federal Court. It doesn't matter whether or not that challenge was winnable or not – the effect on the proponent by the delay would be the same. The legal challenges by the TNC against Venture's Riley mine were clearly unwinnable but that hasn't stopped the challenges holding up the project for 12 months, with devastating consequences. If the challenge against a first mine approval is lost, the next mine approval would still be challenged also - the legal arguments would simply be morphed to get around the first decision. The TNC doesn't have to win a legal challenge to damage a project – it simply has to launch a challenge at a damaging time.

Split decisions

We don't agree with the view that the split decisions on EPBC matters and State matters couldn't be done under the existing EMPCA process (ie. without legislative change).

We don't believe that there is anything in EMPCA as it stands that would preclude the EMPCA Board from making and publishing its EPBC matter approval conditions before they complete their State matters assessment.

It's true that they could not send their approval condition instructions to Council under section 25(5) of EMPCA until all conditions (ie. EPBC plus State) were ready, because their assessment has to be complete before that happens (section 25(5) says "On completion of an assessment...").

However, sending their instructions to Council is not the Board's decision – it is an administrative Act of conveying to Council what its decision is. The actual decision by the Board necessarily precedes that sending, and is made when the Board makes and minutes its resolution at its Board meeting. Similarly, the issue by Council of an approval permit is not the Board's decision, it is Council's. After its resolution on approval conditions the Board plays no further part in the process – its resolution is its final decision making act, so it is that resolution that must be the decision that protects EPBC matters (not the sending of its resolution to Council and not Council's issue of a permit).

There is nothing in EMPCA to prevent the Board determining its approval conditions over a series of meetings. The Board resolution about approval conditions for EPBC matters could be made in one meeting and their resolution about conditions for State matters could be made separately in a later meeting. It follows that the Board could publish its early EPBC matters decision as soon as that is made.

The advertising could use words to the following effect: "The Board advises that in accordance with its responsibilities under the Bilateral Approvals Agreement, it has determined that the following conditions to protect MNES must apply to any approval for Project ABC that is issued by XYZ Council and that these conditions will be included in the Board's notice to Council under section 25(5) of EMPCA, which will be issued to Council following the Board's completion of its assessment of remaining (State) matters."

TMEC
Tasmanian Minerals, Manufacturing & Energy Council

Attachment "B"

Project approvals – there's a better way

Advancing through the environmental approvals process is often one of the greatest hurdles that companies face when developing projects in Australia. The already high environmental rigour of regulatory approval processes can be made even tougher by the pressure exerted by environmental activist groups.

Whether it's a pulp mill in Tasmania, a port near the Great Barrier Reef in Queensland, coal seam gas in New South Wales or a mine in the Kimberley region of Western Australia, securing environmental approvals for developments can be a long and arduous task.

Projects in areas such as these naturally provide developers and environmental specialists with tough challenges due to the special qualities of the regions but when these same qualities attract the ire of environmental groups the approval difficulties can become immense.

Despite efforts by governments around Australia to streamline the approval process, current processes fail to deliver good decision making when projects become controversial.

Our existing approval processes deal with controversy very poorly, and changes are needed. However, it's not that we need to find a way to force approvals through the system. Regrettably, when there's talk about the need to improve our approvals systems it's all too often about shortening timelines or limiting the rights of opponents, which just leads to claims of fast tracking and approval short-cuts, pouring fuel on the fire rather than fixing the problem. This is not the way to do it.

What we need is an approval system that deals with controversy up front, literally. What we need is an approval system that can defuse that controversy quickly or, failing that, actually use it to achieve a better outcome for all parties – the proponent, the opponents, regulators and the community.

Shouting doesn't help

The approval battles that we all too frequently see between environmental groups and developers on controversial projects pit the simple black and white philosophies of opponents up against the complex nuances of environmental management.

Regulatory decision makers try to deal with controversy by requiring proponents to gather more and more information, hoping that the sheer weight of evidence will address the concerns of opponents.

However, that's a false hope. It's like watching two people arguing in different languages and expecting that it will all make sense if only one of them would just shout more loudly. It doesn't matter how much environmental information proponents gather or how thick their environmental documentation becomes, it can't deal with a fundamental opposition from environmental groups to the very existence of a proposed development. Someone who is philosophically opposed to a project will never be satisfied with

it being approved, no matter how stringent the approval conditions are.

Ironically, forcing proponents to shout more loudly by ever thicker assessment documentation just means that the community will cover their ears more. The likelihood of a member of the community reading an environmental impact assessment document is inversely proportional to its thickness.

Ever thicker documentation just drives a thicker wedge between a development and the community, allowing fear and gossip to take over and making the project ripe for derailing by environmental groups.

The fundamental problem with our current approval systems is that proponents, opponents and the community alike cannot know whether a development will be able to proceed until the very end of what may be several years of expensive data collection and socially debilitating argument and controversy.

Proponents spend years and often huge amounts of money gathering detailed environmental information, virtually none of which is relevant to the opponents' case. Philosophical opponents don't really want to know the intricacies of how the proponent will manage their project – they simply want to make their case that the project should not even be approved in the first instance.

We could end this madness by changing the way we do approvals. We need to bring the fundamental threshold issues to the very front of the process instead of leaving them buried under the mass of operational detail that our current system requires proponents to prepare and the community to digest.

We can make these changes and fix these problems by introducing staged approvals.

Staged approvals

Rather than do as now and leave the go-no-go decision until the very end of the assessment process, when it is made amongst the morass of detailed condition setting, we should introduce a staged approval process.

Under a staged approval, the go-no-go decision would be made first, leaving the intricacies of environmental management and condition setting to be dealt with later, after that threshold decision has been made. This would allow everyone to focus their early efforts and energy on the fundamental decision about whether a development should be allowed to exist in the first place.

Under a staged approval process, big picture issues would be dealt with up-front, to examine the potential fatal flaws of a project first. This would allow developers and regulators to deal with the go-no-go issues that are the real interest of opponents and the community through focussed studies and investigations, unencumbered by the more detailed examination of non-fundamental matters that would follow only if and when a project got through its development acceptability gate.

Any appeal or legal challenge against an approval or refusal would be dealt with and settled before a successful proponent needed to spend money on the secondary studies and investigations required to

allow conditions to be set.

Making controversy do good work

With a staged approval process, in most cases controversy could be nipped in the bud by dealing with controversial issues front and centre. However, even if the nipping doesn't work, the positive aspect of controversy is that it will quickly flush out threshold issues that need to be examined. Opponents may well remain unsatisfied if the project is approved despite their opposition but there could be no sustainable argument from them that the system had not heard and dealt with their concerns, and that it had done so as a first priority.

The failed proposal by Gunns Limited to build a pulp mill at Bell Bay in Tasmania provides an excellent example of how a project that was killed and buried by years of controversy could have been better dealt with through a staged approval.

All manner of accusations were thrown at the project and it was lumbered with a 550 page approval permit (now that's shouting!) but underneath everything there were really only a handful of fundamental acceptability issues of concern to the community: 1. Was the wood feedstock acceptably sourced? 2. Was Bell Bay an acceptable location? 3. Were the Emission Limit Guidelines acceptable? 4. Was the proposed bleaching technology acceptable? 5. Was the effluent discharge to Bass Strait acceptable? 6. Was the Tamar Valley air shed acceptable for stack emissions?

Instead of going through an all-encompassing approval process that was aborted, a consequential parliamentary approval that created more than 5000 permit conditions, the expenditure of tens of millions of dollars on environmental studies and the generation of years of collective angst and acrimony that is still reverberating around the community, those six issues could have been dealt with on their own, up-front if there had been a staged approval process in place. If the project had failed on any one of those issues, it would have ended there and then and Gunns would have needed to either abandon the idea or find a new location or a new technology or whatever was necessary to come up with a fresh acceptable proposal. On the other hand, if the project had survived an acceptability assessment on all issues, there could have been no doubt that the matters of fundamental concern had been fully assessed, even if some people still remained opposed to it on philosophical grounds.

Development Acceptability Assessment

Under our current system, all issues, large and small, need to be examined together before a decision is made about whether to open the approval gate.

With a staged assessment, a go-no-go assessment would occur first to examine a project for fatal flaws through a Development Acceptability Assessment (DAA). If and only if the project passed this assessment, it would be approved and could then move onto the more detailed assessment to determine construction, operating and closure conditions. If a project failed the DAA, that would be the end of it.

Attachment "B"

During the DAA stage, the regulatory decision maker would identify the fundamental threshold decisions that must be addressed by the proponent to allow the DAA decision to be made. This identification would be informed through a public consultative process that allows the proponent, opponents and the general community to raise their threshold concerns also.

The DAA should allow anyone to raise any concern that they wish to, subject only to the obligation that they must explain and justify why they consider it to be fundamental to the project's right to proceed. The decision-making body would then use its professional expertise to filter out any spurious or unreasonable claims, leaving a set of threshold issues that the proponent must address in its DAA documentation.

The proponent could then proceed to spend their preapproval funds on just those issues that are fundamental to the project approval, leaving expenditure on secondary issues until after the approval (if they obtain one) when it will be much easier to attract investment – and therefore fund a better outcome – because investors will know that the project can proceed, with only the conditions remaining to be determined.

This is a very important point – obtaining early certainty about whether a project will be able to proceed or not is critical for the investment life cycle. For investors, the absence of a definitive approval is equivalent to the absence of a definitive resource or market and spending big on a project prior to approval is very unattractive.

The proponent would submit its Development Acceptability Report, which would go on public display for comment, and then the decision maker would convene round table discussions between the developer, opponents and interested community members. These should be informal, informative and deliberative, definitely not adversarial. They should be focussed on the go-no-go issues, and not stray into construction or operational detail.

Following the round table discussions, the decision maker would prepare its assessment report and make a decision to approve or refuse the project.

After a DAA decision is made, a project will have a status of being either approved or refused. There would be appeal rights for all parties against this decision, but the appeal would be restricted to the fundamental go-no-go issues. If the proponent or an opponent wishes to follow the appeal decision with a legal challenge against the process, this could happen but after that decision is then made there should then be no further opportunity for any party to revisit the approval decision.

Basis for a social contract

The DAA process will flush out the issues of primary concern to opponents and the community and will therefore establish the fundamental points of engagement between the proponent and the community within which the development will operate.

Rather than being a negative for a project, opposition to it can then be turned into a positive because a

staged approval process would use that opposition to frame the acceptability decision matters that will determine whether the project can proceed through the approval gate to the condition setting stage.

With a staged assessment, the initial project documentation – the documentation that will be used to make the approval decision – will by design be focussed only on the very issues that the community is most concerned about. They will then read it with interest, rather than ignoring it, and they will be able to engage with the proponent through the round table discussions fully informed on those issues, uncluttered by secondary matters. If the project is approved, it will therefore be grounded on a common understanding between the proponent and the community, forming the basis of a social contract between them.

I consciously avoid the term social licence here. 'Social licence' smacks of an extra layer, a post- approval approval. 'Social contract' is a better term, truer to what approval processes should do that is, formalise the commitments that developers and regulators make to the community about how a project will proceed.

Condition setting

A project that survives the DAA and is approved will move onto the second, condition setting, stage. All parties will know that there is no prospect for the project approval to be overturned and the focus during this stage will be on determining the conditions and restrictions that will apply during the project's construction, operation and closure. Just as the preceding go-no-go decision will have been made free of the clutter of these second stage matters, so the second stage could be examined without the clutter of arguments about whether the development will be allowed to proceed or not
– the focus can now be on *how* it will proceed not *whether* it can proceed.

The decision maker will prepare assessment documentation guidelines and the proponent would prepare its Environmental Assessment Report (EAR) accordingly. As with the DAA, the EAR would go on public display for comment and the decision maker would convene round table discussions before making a decision on the construction, operating and closure conditions and restrictions.

These conditions and restrictions could be appealed by any of the parties but that appeal could not revisit the original approval.

The documentation will be different

The introduction of a staged approval process will necessarily change the scope and structure of approval documentation.

Regulators may respond to the idea of staged approvals by saying that their assessment processes often help proponents improve their projects by identifying deficiencies and that if regulators were asked to make approval decisions on the basis of early documentation they would often have to reject proposals because it was not up to scratch.

That argument assumes that the documentation will be the same as it is now and that only the assessment process will change. This is wrong. The documentation will change significantly to match the change in process.

The Development Assessment Report that will need to be prepared for a staged approval will be quite different to the environmental impact reports (names vary from jurisdiction to jurisdiction) that we are familiar with. Instead of covering all aspects and all phases of the entire project, the DAR will consider only the identified threshold issues, and proponents will have the time, money and incentive to get it right.

Staged approvals will also introduce an onus of responsibility to all parties above and beyond what currently exists. Under our present system, the onus of responsibility for assessment documentation rests entirely with the proponent. Sure, regulators provide guidelines to proponents, describing what their documentation must cover, but it is on an all-care no-responsibility basis. Regulators only exercise responsibility at the very end of the process, when they make their decision and set their conditions.

With a staged approval, regulators will need to exercise responsibility much earlier, when they decide on the threshold issues that the proponent's DAA must cover and when they subsequently make their approval or refusal decision. This may be a scary prospect for regulators but they have the professional expertise to cope.

Critics of the idea may also say that threshold issues may not be foreseeable at the start and may only become evident once the second stage studies are underway or perhaps even completed. This is disingenuous and an abdication of responsibility. We are talking here about issues so fundamental that a project's right to exist hinges on them. It should not be beyond the collective wisdom of proponents, regulators, environmental groups and the community to identify what is fundamental to that right, even without those second stage studies, and if something unforeseen did emerge it could be addressed through conditions and restrictions in the second stage.

A simple idea with potentially great benefits

The staged approval process is a simple idea but it could provide great benefits to everyone. Proponents and regulators could focus on the big picture and controversial issues first, free of the time and cost sapping detail of secondary issues. Opponents would have their views heard and assessed as a priority. The community could learn about, understand and contribute to those aspects of a proposed development that matter most to them. Investors would get an early decision about whether a project will be allowed to proceed, allowing them to then commit with confidence the further funds needed for the detailed studies and investigations that will inform the subsequent condition setting. And finally, we all would be relieved of much of the burden of community angst, division and acrimony that dogs controversial projects from beginning to end under our current approval system.

Attachment "B"

About the author

Dr Ian Woodward is Principal Environmental Scientist with pitt&sherry, whom he has been with for the last 16 years. Prior to that he was Director of Tasmania's (now) Environment Protection Authority.

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