

October 2019

CUTTING RED TAPE

IN THE RESOURCES SECTOR



Kurt Wallace, Research Fellow

 **Institute of
Public Affairs**

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Introduction

Declining rates of private sector business investment is one of the most substantial economic challenge in Australia. Investment is critical for generating strong and sustainable economic growth as it sustains and grows the capital base necessary for expanding economic production. Private business investment is currently lower than the period of stagflation under the Whitlam government in the 1970s, at just 11.2 percent of GDP. In the last 60 years investment has only dropped below this level once, during Australia's last technical recession in the early 1990s.

The resources sector is a key component of Australia's overall business investment with mining investment accounting for 27 percent of private new capital expenditure.¹ Since the Global Financial Crisis, levels of investment have been closely tied to the mining boom, with mining investment driving the increase in business investment to its most recent peak in 2012. Since then, mining investment has dropped off substantially and non-mining investment has failed to compensate for the decline. While mining investment is driven in large part by changing commodity prices, not all of the investment decline in the sector is due to uncontrollable economic conditions.

Australia's economic competitiveness plays a central role in attracting investment. The World Economic Forum's *Global Competitiveness Report 2019*, which provides an indexed measure of key components driving international competitiveness, ranks Australia 80th in the world out of 140 countries for the 'burden of government regulation'.² Onerous government regulation is making Australia less favourable for investment and is restricting businesses from expanding economic opportunity. IPA research estimates that red tape costs the Australian economy \$176 billion a year.³

Achieving structural reductions to the red tape burden on the economy requires an examination of Australia's regulatory framework. The Council of Australian Governments views the goal of best-practice regulation as "maximising net benefits accruing to the Australian community".⁴ In practice, this approach means costs are imposed on individuals and businesses in a way that undermines property rights, a central institutional requirement for strong investment.

1 Reserve Bank of Australia, 'Composition of the Australian Economy Snapshot', Reserve Bank of Australia, accessed 23 October, 2019, <https://www.rba.gov.au/education/resources/snapshots/economy-composition-snapshot/>. Australian Bureau of Statistics, 'Private New Capital Expenditure and Expected Expenditure, Australia, Jun 2019', accessed 17 October, 2019, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/5625.0Main+Features1Jun%202019?OpenDocument>.

2 World Economic Forum, 'Global Competitiveness Report 2019', http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf.

3 Mikayla Novak, 'The \$176 billion tax on our prosperity', Institute of Public Affairs, Melbourne, Australia (May 2016)

4 Council of Australian Governments, 'Best Practice Regulation: a Guide for Ministerial Councils and National Standard Setting Bodies', accessed 17 October, 2019, https://www.pmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf.

The red tape burden has also been exacerbated by increased centralisation. By regulating activity already covered by state regulation, the Commonwealth Government has duplicated regulation and increased compliance costs. Commonwealth regulation has also further removed regulatory decisions from the local level where community concerns can best be accounted for.

In addition to the general growth of regulation, the resources sector currently faces a number of specific regulatory issues diminishing investment in that sector. Laws allowing third party environmental groups to legally challenge ministerial approvals have resulted in major project delays that have put billions of dollars of investment at risk. Similarly, heavy restrictions on natural gas and uranium exploration, fracking, and nuclear power, have also prevented innovation and investment in the resources sector.

The Productivity Commission was recently asked by the Australian Government to undertake an inquiry into the regulatory impact on investment in the resources sector. The issues paper, released in September, frames the inquiry around identifying ways to reduce regulatory costs without compromising environmental standards, and examining regulatory impediments to business investment.⁵ The Commission's inquiry informs the focus of this report.

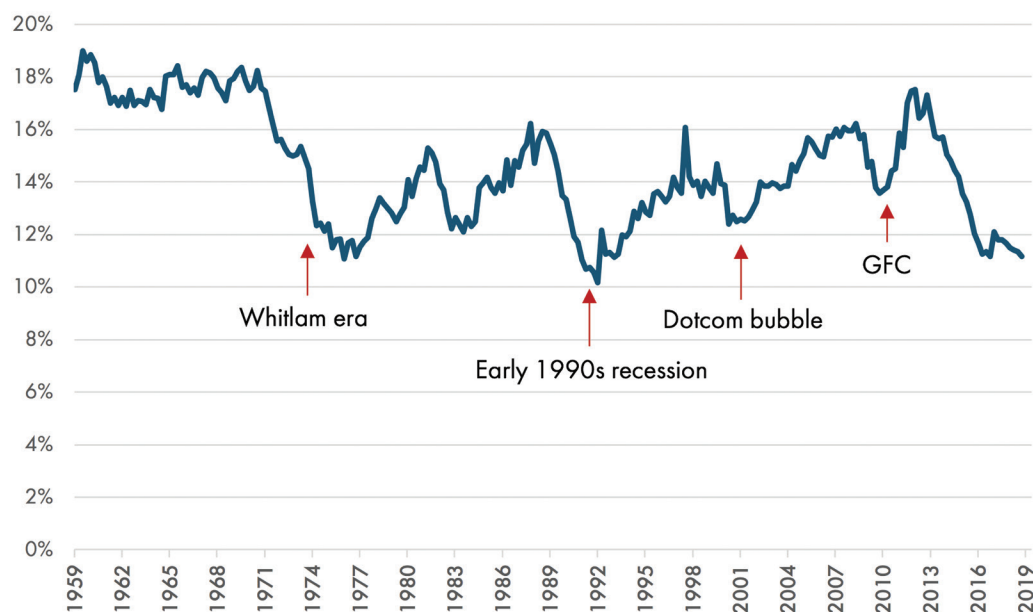
Key recommendations

- Re-frame regulation to be based on the assumption of clearly defined property rights.
- Eliminate duplication by adopting a policy of regulatory decentralisation to the state level.
- Abolish provisions such as section 487 of the *EPBC Act* that allows third party activist groups to delay and disrupt projects.
- Remove the water trigger from the *EPBC Act* that unnecessarily expands the regulatory burden.
- Lift state level bans on gas exploration and fracking.
- Remove the uranium trigger from the *EPBC Act* and lift bans on uranium exploration and nuclear energy.

⁵ Productivity Commission, 'Resources Sector Regulation: Issues paper', accessed 14 October, 2019, <https://www.pc.gov.au/inquiries/current/resources/issues>.

A. Historically low investment

Graph 1: Private business investment (% of GDP)



Source: IPA, ABS

Australia's private business investment is at a historic low of just 11.2 percent of GDP.⁶ In the last 60 years, investment has only been this low during the 1970's recessions and Australia's last technical recession in the early 1990s. The most recent troughs occurred following the Global Financial Crisis (GFC) and during the dotcom recession in 2001.

Examining the industry contributions to private new capital expenditure reveals the central role of mining in total business investment. Following the post GFC lows, private business investment rose to 18 percent of GDP in 2012 due to the rapid expansion of mining investment.⁷ After the height of the mining boom, mining investment has dropped off and non-mining investment has not risen sufficiently to fill this gap. Research from the Reserve Bank of Australia estimates that in the absence of the mining boom, mining investment would have peaked at around 3 percent of GDP, well below the 8 percent mark it reached in 2012.⁸ Without the growth in mining investment induced by the mining boom, business investment would not have recovered strongly following the GFC and it is likely that total business investment would be lower today.

6 Australian Bureau of Statistics, '5206.0 Australian National Accounts: National Income, Expenditure and Product, Jun 2019', accessed 14, October, 2019, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/5206.0Main+Features1Jun%202019?OpenDocument>.

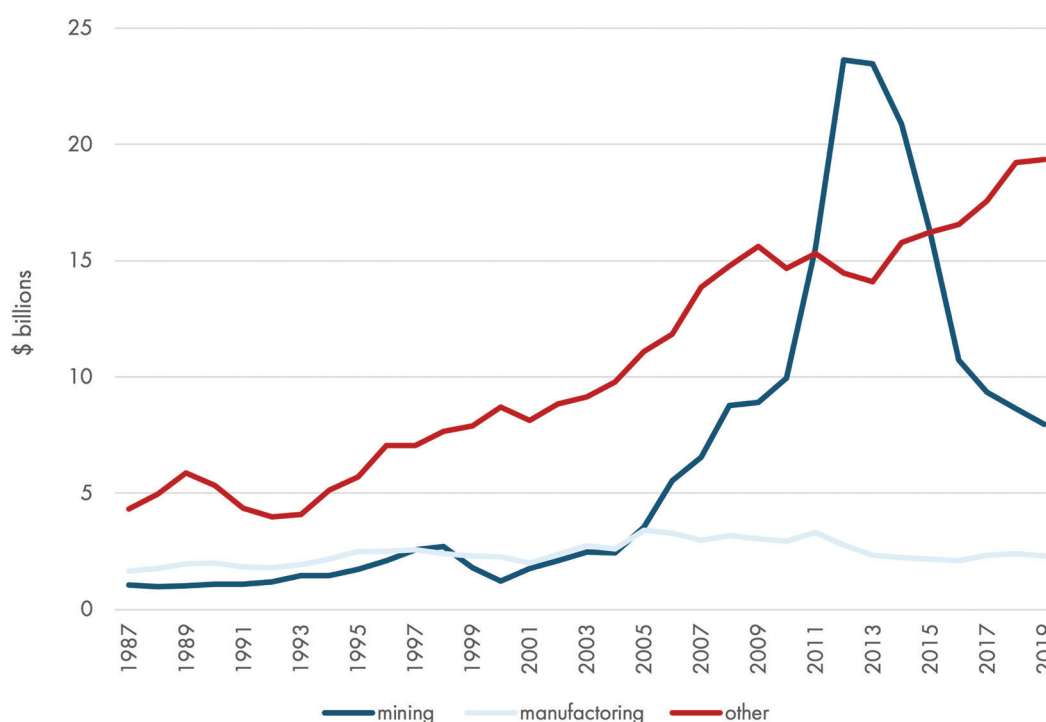
7 Australian Bureau of Statistics, 'Private New Capital Expenditure and Expected Expenditure'.

8 Peter Tulip, 'The Effect of the Mining Boom on the Australian Economy', Reserve Bank of Australia, accessed 17 October, 2019, <https://www.rba.gov.au/publications/bulletin/2014/dec/pdf/bu-1214-3.pdf>.

Low levels of business investment are inconsistent with long-term growth. While GDP has been growing since 2012, the declining share of private investment is putting future growth at risk by undermining the maintenance and expansion of the economy's capital base. Growing consumption at the expense of investment can occur while GDP continues to grow, but if the capital base is undermined future economic output will be limited.

While the decline in mining investment is related to changing economic circumstances and a fall in commodity prices, there are a number of regulatory constraints holding back mining investment that will be outlined in section C.

Graph 2: Private new capital expenditure



Source: IPA, ABS

B. Australia's red tape crisis

IPA research estimates that red tape costs the Australian economy \$176 billion every year, which is equivalent to 11 percent of GDP.⁹ The volume of red tape is in turn weighing down Australia's international competitiveness and ability to attract investment. The World Economic Forum's *Global Competitiveness Report 2019*, which provides an international comparison of various components relating to economic competitiveness, ranks Australia 16th in the world out of 140 countries for global competitiveness.¹⁰ Australia is ranked 80th for the 'burden of government regulation' and for the majority of the components of the index weighing Australia down are related to regulation.¹¹

Figure 1: Australia's ranking for Global Competitiveness Index components

Index component	Ranking
Burden of government regulation	80
Hiring and firing practices	111
Flexibility of wage determination	95
Internal Labour mobility	94
Ease of hiring Foreign Labour	138
Labour tax rate	97
Credit gap	110
Banks' regulatory capital ratio	118

A key area of regulation that affects the resources sector is environmental law. IPA research has revealed the extent of the problem with the expansion of environmental law since 1971. In 1971 the Department of Environment, Aborigines and the Arts administered 57 pages of federal legislation. In 2019, the Department of Environment and Energy administers 4,640 pages of legislation. This represents a more than 80-fold increase in environmental regulation in terms of the number of pages of legislation.¹²

This measure is only a count of environmental law administered at the federal level. All Australians are also required to comply with laws passed by the state and territorial parliaments, meaning the number of pages of environmental legislation applying to any Australian can be much more than 4,460. Victoria's Minister for Energy, Environment and Climate Change administers more than 5,000 pages of legislation, meaning Victorians must comply with 9,968 pages of environmental legislation alone.

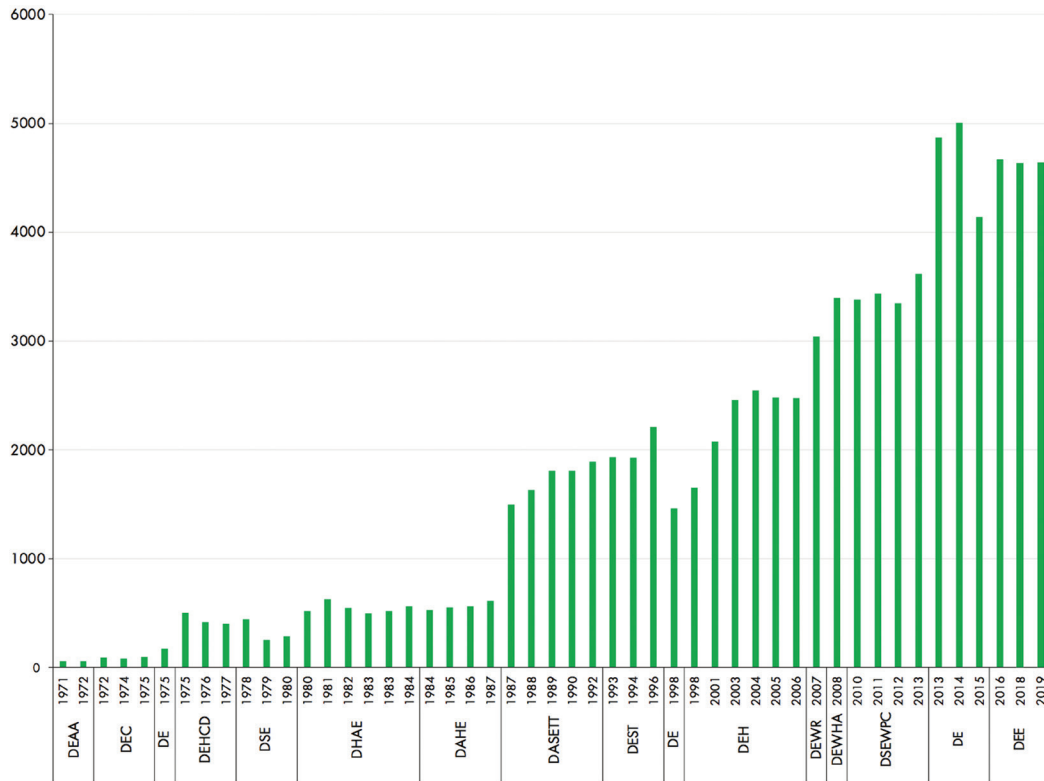
9 Mikayla Novak, 'The \$176 billion tax on our prosperity'.

10 World Economic Forum, 'Global Competitiveness Report 2019'.

11 Other poorly ranked components are generally related to Australia's unique economic and geographic situation. Terrorism incidence, railroad density, mobile-cellular telephone subscriptions, imports %GDP

12 Morgan Begg, 'The Growth of Federal Environmental Law: 2019 Update', Institute of Public Affairs, accessed 24 October, 2019, <https://ipa.org.au/wp-content/uploads/2019/10/1PA-Report-The-Growth-Of-Environmental-Law.pdf>.

Graph 3: Pages of legislation administered by a federal environmental department



Source: IPA, Federal Register of Legislation

C. Regulatory issues effecting the resources sector

There are a number of regulatory issues facing the resources sector. This section addresses broader problems with the current approach to regulation, as well as specific regulatory restrictions that negatively impact the resources sector.

1. Framework issues

a. Property rights not “community benefits”

The *Resources Sector Productivity Commission Issues Paper* follows the Council of Australian Governments (COAG) principles of best-practice regulation by framing the issue of red tape as regulation that “imposes burdens on industry beyond those necessary to maximise the net benefits accruing to the Australian community”.¹³

By making the maximisation of net benefits the goal of regulation, costs are imposed in a way that undermines property rights. Property owners can be expected to bear the cost of regulation that seeks to provide a positive good for the community. An example of this is provided by state vegetation laws that require landowners to spend resources providing for an abstractly conceived community benefit. Property owners see their property devalued by being forced to set aside land for non-economic purposes, and have the cost of maintaining land in accordance with regulation imposed on them. The benefits of the use of the property accrue to those who do not own the property while the costs are borne by the property owner.

There are further issues in measuring ‘community benefits’ and weighing them against the costs of complying with regulation. The cost-benefit calculation is built upon the economic fallacy of cardinal utility as identified by introductory microeconomic textbooks.¹⁴ Individual subjective preferences can only legitimately be ranked in an ordinal fashion that doesn’t seek to measure and compare the strength of preferences. Measuring preferences with units of utility and adding preferences together is illegitimate as it incorrectly assumes that the ratios of subjective preferences can be quantified.¹⁵ The cost-benefit approach contains a further difficulty as it relies on making interpersonal utility comparisons. It is impossible to weigh up various community preferences that have not been demonstrated in market transactions.

13 Council of Australian Governments, ‘Best Practice Regulation: a Guide for Ministerial Councils and National Standard Setting Bodies’, accessed 17 October, 2019, https://www.pmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf.

14 Walter E. Block and Robert Wutscher, ‘Ordinal or Cardinal Utility: a Note’, *Studia Humana* 3:1 (2014) 27-37.

15 Murray Rothbard, *Man, Economy, and State with Power and Market* (Ludwig von Mises Institute), 27-28.

Even if calculating a redistribution that maximised net benefits were possible, the redistribution would not necessarily be just. Taking from someone who invested capital under risk to create value in the market, and giving to someone who played no role in the enterprise is a violation of basic property rights.

Furthermore, this approach to regulation puts investment at risk by burdening investors with additional costs. Only a market based system based on property rights provides reward for investment and allows resources to best be allocated to meet consumer preferences.

b. Federalism

The current approach to regulation violates important principles of federalism. States governments should be free to design and implement regulation without the Commonwealth Government stepping in and undermining state sovereignty.

The expansion of federal regulation has in large part been enabled by the High Court through a series of decisions which have interpreted the heads of power under the Australian Constitution so as to expand the power of the Commonwealth parliament. In particular, current environmental laws, such as the *Environment Protection and Biodiversity Conservation Act 1999*, can trace their origins to the Tasmania Dams case of 1983, where the High Court accepted the Commonwealth's argument that the external affairs power allowed it to pass a law prohibiting the Tasmanian state government's authorisation of a dam construction.¹⁶ This was despite the absence of a specific environmental law power being included in the Australian Constitution.¹⁷

The intrusion of the Commonwealth into areas traditionally controlled by the states has created the problem of regulatory duplication. Not only do businesses have to deal with state government imposed regulation, they have to make sure their actions are in line with Commonwealth Government regulation. This adds to the red tape burden by increasing compliance costs that are exacerbated when the laws are inconsistent.

While increasing the role of Commonwealth regulation may provide for consistency between states, there are number of reasons why further erosion of federalism should be avoided. Firstly, it undermines the sound principle that decisions should be made at the most local level as possible. Local communities are in a better position to evaluate the effectiveness of regulatory approaches than are centralised structures that create blanket regulation across a vast array of circumstances.¹⁸

Secondly, decentralised regulatory regimes are more likely to lead to best-practice regulation. Competition among the states for investment creates natural barriers against onerous regulation that discourages investment. Community concerns are also better accounted for by increased competition where people can move across jurisdictions.

16 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties,' Senate Standing Committee on Legal and Constitutional Affairs', https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/treaty/report/c05#TheHighCourts.

17 Morgan Begg, 'The Growth of Federal Environmental Law: 2019 Update'.

18 Daniel Wild and Darcy Allen, 'Five Principles of Red Tape Reduction', Institute of Public Affairs (April, 2018) <https://ipa.org.au/wp-content/uploads/2018/06/IPA-Report-Principles-of-Red-Tape-Reduction.pdf>.

For these reasons, issues arising from inconsistency between state regulations should be addressed by individual states forming agreements without removing sovereignty from the states. The Commonwealth Government should return responsibility to the states to end the unnecessarily intrusion on state affairs that creates a duplication of regulation. In its most ideal form this would involve removing regulation in areas that can be covered by the states.

2. Specific issues

A. Disruptive activism enabled by section 487 of the *Environment Protection and Biodiversity Conservation Act*

The *Environment Protection and Biodiversity Conservation Act* allows environmental activist groups to delay and disrupt projects by challenging approvals in court. Section 487 of the act extends the legal privilege of challenging project approvals to organisations or associations that have been “engaged in a series of activities... for the protection or conservation of, or research into, the environment”.¹⁹

This has resulted in major delays and disruption of major projects. Between 2000 and 2016, projects have spent approximately 7,500 cumulative days (20 years) in court. Despite the major delays these cases have generally not resulted in significant changes to approvals, with only four of the 32 cases resulting in changes to the Minister’s original approval, and only one resulting in major changes.²⁰

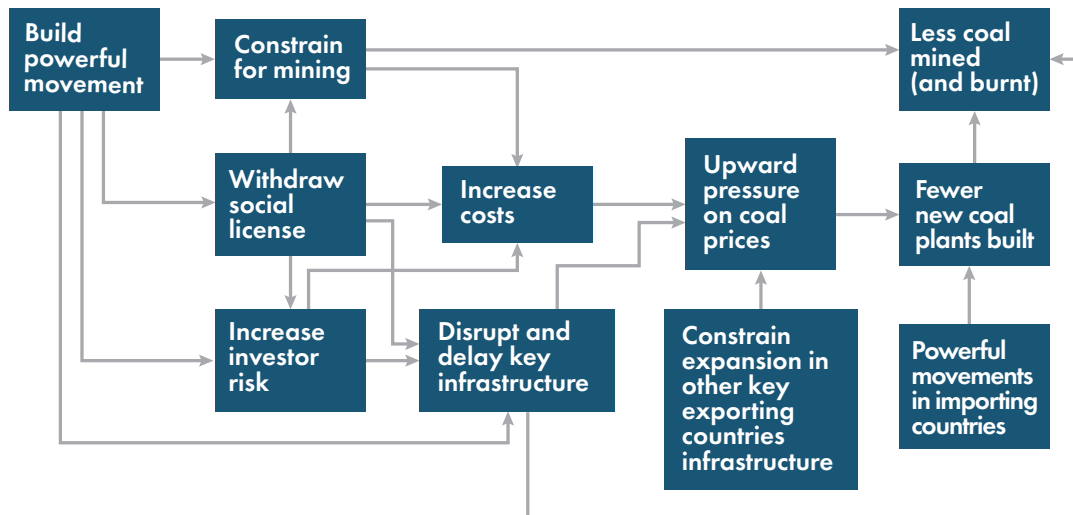
The ‘lawfare’ approach by environmental groups was outlined in a 2011 Greenpeace document, *Stopping Australia’s Coal Export Boom*. The intent of this strategy is to abuse the legal system in order to delay and disrupt projects. As the Greenpeace document outlines, this approach will “increase investor risk by creating a heightened perception of risk over coal investments”.

19 Environment Protection and Biodiversity Conservation Act 1999 s487

20 Daniel Wild, ‘Section 487 of the Environment Protection and Biodiversity Conservation Act: How activists use red tape to stop development and jobs’, Institute of Public Affairs, https://ipa.org.au/wp-content/uploads/archive/26Oct16-DW-Section487-How_activists_use_red_tape.pdf.

The abuse of Australia’s legal system in this way to prevent investment is making Australia uncompetitive and is destroying important economic development and growth. Section 487 should be abolished from the *EPBC Act* to end this economically harmful abuse.

Figure 2: Greenpeace’s anti-investment strategy



Source: Greenpeace

B. Water trigger

Under the *EPBC Act* projects are referred to the minister for approval “if the action has, will have, or is likely to have, a significant impact on a matter of national environmental significance”.²¹ Included in the definition of “national environmental significance” is a ‘water trigger’ that requires coal seam gas and large coal mining developments to be referred for approval.

Despite the mining sector accounting for less than three percent of national water consumption, the *EPBC Act* requires coal seam gas and large coal mining projects to go through a duplicated process of approval at the Commonwealth level. Projects must now go through two processes of government assessment. First the relevant state government conducts its assessment and determines the conditions of approval, and then the Australian Government repeats the process adding further conditions.²²

The 2013 amendment that inserted the trigger represents a further Commonwealth intrusion into state affairs. By imposing further conditions on the approval, the Commonwealth is effectively challenging the regulatory determinations of the states.

21 Department of the Environment, ‘Matters of National Environmental Significance’, accessed 17 October, 2019, https://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guidelines_1.pdf.

22 Stephen Hunter, ‘Independent Review of the Water Trigger Legislation’, accessed 14 October, 2019, <http://www.environment.gov.au/system/files/resources/905b3199-4586-4f65-9c03-8182492f0641/files/water-trigger-review-final.pdf>.

An independent review of the water trigger estimated the regulatory burden to industry to be \$46.8 million a year.²³ The water trigger should be removed to reduce the regulatory burden and return regulation to the states.

C. Bans on gas exploration and fracking

Many forms of red tape go beyond increasing compliance costs and making investments less favourable to investors. State governments have severely limited development in the resources sector through restrictions on gas exploration and by implementing blanket bans on fracking.

Victoria's *Resources Legislation Amendment (Fracking Ban) Act 2017* prevents the exploration and mining of coal seam gas, bans hydraulic fracturing, and imposes a moratorium on petroleum exploration and production. The artificial restriction of supply has driven up energy costs for households and businesses, with Victoria now importing large amounts of gas from Queensland.²⁴

Similar restrictions and proposals at the state level are clearly detrimental to the industry and have destroyed employment and investment opportunity. These restrictions are an extreme response that fail to weigh environmental and economic concerns. Furthermore, they undermine investment in cleaner and more efficient forms of energy production.

D. Uranium trigger and ban on nuclear power

The *EPBC Act* also contains a nuclear trigger that treats a wide range of "nuclear actions" as actions having "a significant impact on a matter of national environmental significance".²⁵ Uranium ore mine projects, and actions around storing waste are referred to the federal minister for additional conditions of approval. Like the water trigger, this subjects projects to an additional assessment process that can result in additional requirements and conditions. It is unclear why uranium actions should constitute "a matter of national environmental significance" that cannot be regulated adequately by state governments.

On top of this trigger are heavy restrictions on uranium exploration and an outright ban on the development of nuclear energy projects in Australia. Despite Australia supplying around a third of the world's total uranium supply, the Australian government has prevented the use of nuclear energy in Australia through the *EPBC Act* and the *Australian Radiation Protection and Nuclear Safety Act*.

Energy policy in Australia should be technologically neutral to ensure the delivery of reliable and affordable electricity. Allowing investment in nuclear energy could meet the market demand for reliable and affordable electricity while having the additional value of being one of the lowest emitting forms of energy production.

23 Ibid

24 John Kehoe, 'Gas ban inflating Victoria power prices', *Australian Financial Review*, 6 August, 2019.

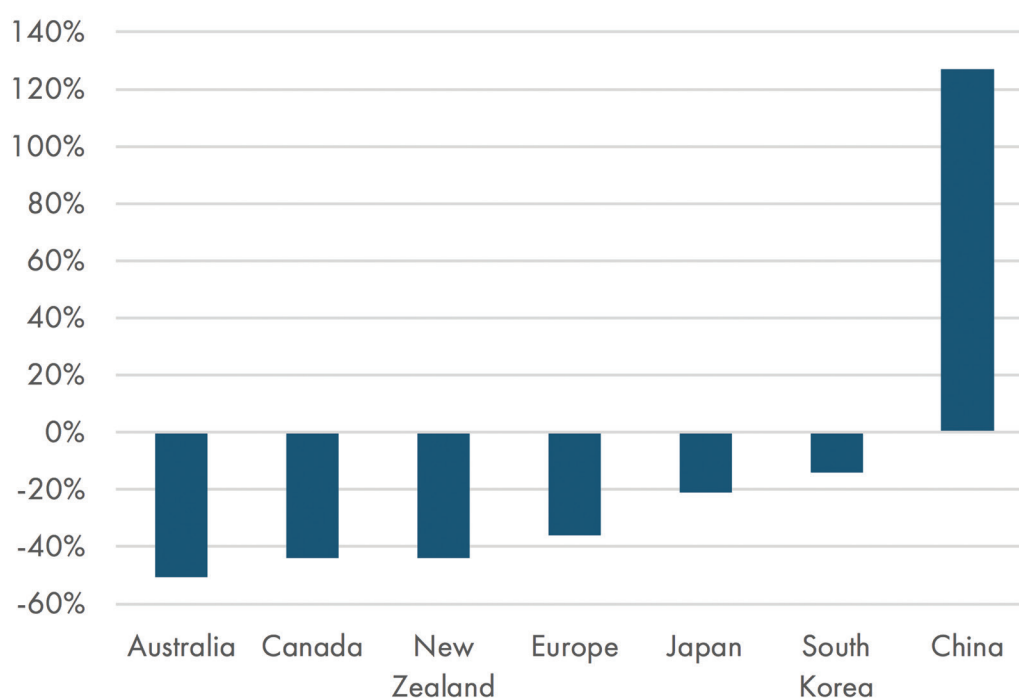
25 Department of the Environment, 'Matters of National Environmental Significance'.

Perception around the safety and environmental impact of nuclear energy among some members of the community are not borne out by facts of a proven track record for nuclear energy across the world.²⁶

E. Emission reduction policy

Driving many of the environmental restrictions on the resources sector, particularly with regards to coal and natural gas, is Australia's commitment to the Paris Climate Agreement. Under the agreement Australia committed to the highest per capita emissions reductions in the developed world. The agreement represents a move of economic self-harm with no benefits, considering that the major global emitters are either not meeting their targets or are unrestrained by the agreement. China is continuing to increase emissions, the United States have withdrawn from the agreement, European Union countries are failing to meet their targets, and India's target is consistent with 'business as usual'.²⁷

Graph 4: Per capita emission reduction obligations under the Paris Agreement, 2005-2030



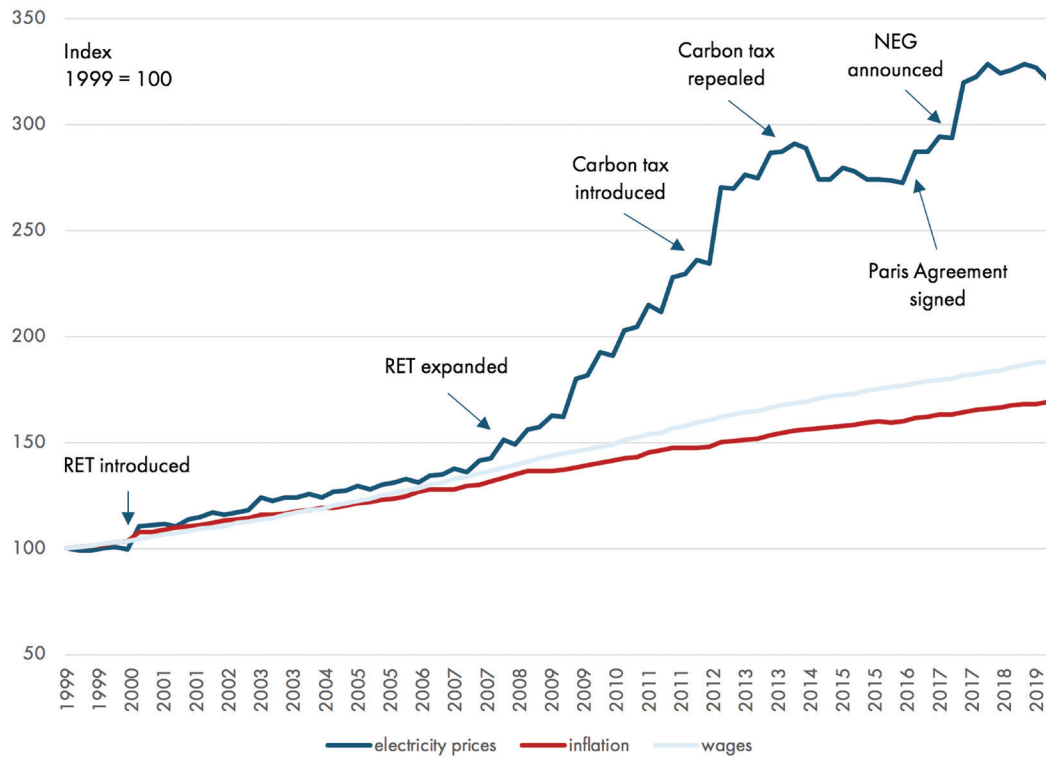
Source: Department of Environment

²⁶ Anil Makandya and Paul Wilkinson, 'Electricity generation and health', *The Lancet* 370, 9591 (September 2007).

²⁷ Daniel Wild and Morgan Begg, 'Ten Points about the Paris Climate Agreement', Institute of Public Affairs, accessed 14 October, 2019, <https://ipa.org.au/wp-content/uploads/2018/10/IPA-PRB-26102018-Ten-Points-About-the-Paris-ClimateAgreement.pdf>.

Government intervention into the energy market through renewable energy subsidies, onerous regulation on coal projects, restrictions on natural gas and uranium exploration, and bans on fracking and nuclear energy, have contributed to instability in the power grid and growing electricity prices. The effect of government policy on electricity prices is shown in Graph 5. Over the past two decades, electricity prices have tripled and far outpaced general consumer price inflation.

Graph 5: Australia's household electricity prices



Source: IPA, ABS

Conclusion

Australia's future economic growth is being undermined by historically low private business investment of just 11.2 percent of GDP. A key cause of low investment has been Australia's red tape burden that reduces international competitiveness and restricts business growth. The World Economic Forum's *Global Competitiveness Report 2019* ranks Australia 80th in the world, out of 140 countries, for the 'burden of government regulation', and IPA research estimates that red tape costs the Australian economy \$176 billion each year.²⁸

The resources sector is a significant component of overall investment, with mining investment making up 27 percent of new private capital expenditure. The recent decline in overall investment is largely a result of falling mining investment since the height of the mining boom in 2012, and the failure of non-mining investment to compensate for the decline. While the decline in mining investment has been driven by a fall in commodity prices, onerous regulation has also restricted mining investment.

To improve investment governments need to address structural issues contributing to Australia's red tape burden. COAG's view of best-practice regulation based on "maximising net community benefits" undermines property rights that provide a strong institutional foundation for investment. Increased centralisation is also contributing to the red tape burden by duplicating regulation and removing regulatory decision making from the local level.

The resources sector in particular is being weighed down by regulation that significantly reduces investment. Billions of dollars of investment have been put at risk by allowing environmental activists to engage in 'lawfare' to disrupt and delay major projects. Other forms of investment and innovation have been restricted by heavy restrictions on natural gas and uranium exploration, fracking, and nuclear power.

To address the growing investment crisis, governments need to take a broad approach to cutting red tape, as well as looking at reducing regulatory barriers to investment in specific sectors. The resources sector plays an important role in Australia's private investment and is subject to heavy regulation that is preventing investment opportunity.

²⁸ World Economic Forum, 'Global competitiveness Report 2019'.
Mikayla Novak, 'The \$176 billion tax on our prosperity'.

CUTTING RED TAPE IN THE RESOURCES SECTOR

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About the author

Kurt Wallace is a Research Fellow, working in the IPA's Dignity of Work program.

Kurt joined the Institute of Public Affairs as a Research Fellow in 2018.

He is interested in individual liberty, the expansion of free markets, the importance of ideas and culture, and studying the ill effects of government intervention in the economy. His work at the IPA focuses on industrial relations, the dignity of work, and red tape.

Kurt received a Bachelor of Commerce (Honours) from Monash University, majoring in Economics and Finance.

