



Australian Government
Productivity Commission

Major Project Development Assessment Processes

Productivity Commission Draft Report

August 2013

This draft report has been prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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Publications enquiries:

Media and Publications
Productivity Commission
Locked Bag 2 Collins Street East
Melbourne VIC 8003

Tel: (03) 9653 2244
Fax: (03) 9653 2303
Email: maps@pc.gov.au

General enquiries:

Tel: (03) 9653 2100 or (02) 6240 3200

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

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Opportunity for further comment

You are invited to examine this draft report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by **Friday 13 September 2013**. Further information on how to provide written comments is included on the study website listed below.

The Commission is planning on holding several roundtables with stakeholders to get feedback on the draft report. This feedback, along with further discussions with interested parties and any written comments received will be drawn on by the Commission in preparing its final report. The final report will be forwarded to the Australian Government in December 2013.

Roundtables

Monday 2 September – Brisbane

Tuesday 3 September – Melbourne

Friday 6 September – Sydney

Commissioners

For the purposes of this study and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Jonathan Coppel

Presiding Commissioner

Dr Warren Mundy

Commissioner

Study contacts

Website: www.pc.gov.au/study/major-projects

Email: major.projects@pc.gov.au

Terms of reference

STUDY TO BENCHMARK AUSTRALIA'S MAJOR PROJECT DEVELOPMENT ASSESSMENT PROCESSES

Productivity Commission Act 1998

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

Background

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

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

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

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

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

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

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

Scope of the research study

In undertaking the study, the Commission should:

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

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

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

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

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

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

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

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

DAVID BRADBURY
Assistant Treasurer

[Received 7 December 2012]

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Abbreviations and explanations

Abbreviations

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

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

Explanations

Approval authority	The Minister or regulatory authority that is making a decision to approve a project or a particular action within the scope of the project (see ‘decision maker’).
Assessment authority	The Minister or regulatory authority (for example, the government department, agency or statutory body) that is undertaking an analytical and systematic examination of the merits and consequences of a project proposal or part thereof.
Assessment track	The level of assessment within a pathway, usually the EIA process.
Decision maker	The Minister or regulatory authority that is making a decision to approve a project or a particular action within the scope of the project.
Environmental impact assessment (EIA)	An analytical and systematic examination of the possible environmental consequences of the implementation of projects, programs and policies.
Fast-track	Methods by which different rules of assessment and approval apply to a selected development, or if the rules are not changed, the decision maker is changed (for example, to a political person or appointed body).
Major project	The Commission does not define a ‘major’ or ‘significant’ project by its total capital expenditure but rather through a number of characteristics that include its physical size, complexity, long-lead times and life cycle and potential for significant economic, environmental and social impact on the local and broader community. Major projects can include both public infrastructure and private projects.
Major project development assessment and approval regulations and processes	The regulatory steps that proponents must adhere to in seeking the various permits, authorisations and approvals needed by law for their project.
Major projects pathway	Some jurisdictions in Australia have designated regulatory pathways for projects deemed to be ‘major’ or ‘significant’. The pathways differ across jurisdictions and the types of permits, authorisations and approvals that apply.
Major project proponent	The individual or entity seeking regulatory approval for a project. For example, a publicly listed corporation may be a proponent of a major mining project.
Ministerial call-in	When the assessment and approval of a development is taken out of the hands of the usual regulatory bodies and instead decided by a Minister.
Primary approvals	Decisions by regulatory authorities about whether a proponent’s project proposal is able to be developed. A primary approval may be subject to conditions under which the development is allowed to proceed.
Secondary approvals	The various authorisations, licences and permits required

	by the proponent concurrently with (or subsequently to) primary approvals for their proposed project to proceed.
Stages of a DAA process	DAA processes (whether for environmental or other matters) generally consist of four stages: application; assessment; approval; and, for projects that are approved, monitoring of compliance and enforcement of conditions of approval.
Stop the clock	The act of stopping the regulatory process by which a development is assessed or approved.
Strategic assessment	An analytical process that systematically assesses the potential impacts of plans, policies and programs across an entire region, catchment, activity or industry.
Strategic planning	A continuous and systematic process during which people and organisations make decisions about intended future outcomes, how they are to be accomplished, and how success is to be measured and evaluated.

OVERVIEW

Key points

- Many of the building blocks of a sound development assessment and approval regulatory system are already in place for Australia. However, there is substantial scope for improvement.
- None of the countries benchmarked for this study stood out as performing better than Australia overall, but a number of leading practices that could be replicated in Australia were identified.
- Major projects are characterised by their scale, complexity and long lead times. They are primarily resources and infrastructure developments. Investment in major projects has surged over the past decade and the size of the largest developments is unprecedented in Australia's history.
- Governments regulate major projects to facilitate their development and to manage the impacts that they may have on the environment, heritage and local amenity.
- Common concerns raised in this study have been unnecessary regulatory burdens on project proponents, lengthy approval timeframes, lack of regulatory certainty and transparency, conflicting policy objectives and inadequate consultation. These factors could result in higher project costs and increase the likelihood of avoidable adverse impacts.
- The costs of delay to a project proponent can be large. An indicative estimate for a large oil or gas project delayed by one year could be in the order of \$700 million.
- There is no 'silver bullet' solution to reduce the unnecessary regulatory burden on project proponents while maintaining environmental outcomes, broadly defined. A suite of changes are needed.
- The Commission's recommendations for improving regulatory arrangements build on previous efforts and include:
 - establishing a 'one project, one assessment, one decision' framework for environmental approvals, by strengthening and adopting bilateral assessment and approval agreements between the Commonwealth and States and Territories
 - adopting a coordination office model to advise proponents on statutory requirements, to coordinate and facilitate assessment and approval processes and to track and report on progress against timelines
 - institutionally separating environmental policy from regulatory and enforcement functions in all jurisdictions
 - setting statutory timelines together with safeguards for key decision points in the development assessment and approval process
 - using Strategic Assessments where they can be an effective tool to reduce project assessment costs and account for cumulative impacts
 - requiring that approval authorities publish reasons for their approval decisions and conditions for all major projects, and that regulatory agencies develop risk-based strategies for monitoring and enforcing compliance with approval conditions.
- Implementation of these reforms is essential if Australia is to secure the full benefits of major projects and remain an attractive destination for investment while protecting its environmental, heritage and cultural assets.

Overview

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

Major projects also have wider impacts on community wellbeing that are not reflected in economic performance measures such as gross domestic product. These impacts can include damage to the environment and heritage, and local communities incurring a loss of amenity. Governments regulate major projects through development assessment and approval (DAA) processes to manage these risks and to promote an appropriate balance of economic and other impacts on community wellbeing.

The costs of developing major infrastructure, resource, commercial and public purpose buildings in Australia are high and rising. This is driving concerns about Australia's competitiveness, productivity and future prosperity. The sources of higher costs include the cost of capital, labour costs and rigid work practices, the increased complexity of projects, higher community valuation placed on protecting amenity, heritage and environmental assets and the regulatory burden of DAA regulations.

It is the last of these factors that the Commission has been asked to review. In particular, there are concerns that Australia's DAA regulations and processes are failing to meet their objectives. The problems that have been highlighted include poorly articulated or inconsistent regulatory objectives, lengthy approval timeframes, duplication of assessment processes, lack of regulatory certainty, unnecessary and poorly constructed conditions and offsets, low transparency and inadequate consultation and compliance (box 1).

Box 1 **Participants' contrasting experiences with approval processes**

To date the Commission has received 60 submissions from governments, project proponents, industry bodies and environmental and community groups. These have contained experiences and perspectives about different aspects of Australia's development assessment and approval (DAA) regulations and processes.

Proponents of major projects have suggested that environmental impact statement processes are onerous in relation to cost of delays, uncertainty, duplication, lack of coordination and poorly crafted offsets and conditions. For example:

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

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

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

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

In contrast, environmental and community groups focused on the inadequacy of baseline environmental data, perceived consultant bias, governance and procedural gaps and lack of appeal rights and consultation in DAA processes. Environmental groups were also concerned about the potential for changes to current processes leading to worse environmental outcomes. For example:

Key problems with domestic environmental impact statements (EIS) processes are: Lack of independent assessment, or comprehensive baseline data; poor cumulative impact assessment; no links to catchment limits; inadequate consideration of climate change; limited government oversight and quality assurance (Australian Network of Environmental Defenders Offices, sub. 14).

Economic assessment of net benefits 'currently plays an inadequate, late and minor role in DAA processes ...' (Economists at Large, sub. 13).

About the study and the Commission's approach

Against this background, the Commission has been asked to benchmark Australia's major project DAA processes against international and domestic best practice. In

particular, the Commission was asked to examine specific regulatory practices, including the role of facilitation, lead agencies and one-stop shops, strategic planning and assessment, statutory timeframes, risk- and outcome-based approaches to regulatory design, and in doing so to make recommendations on how to improve Australia's DAA processes. This is not the first report to examine DAA processes (box 2) and some of the proposals in this report build on worthwhile recommendations made in earlier reports that have not been implemented.

Box 2 Earlier reports on development approval regulation

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

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

There are practical challenges in benchmarking complex and diverse DAA regulations and processes for major projects. It is especially difficult to control for differences in policy objectives and preferences between jurisdictions and to obtain comparable data that permit meaningful insights into best regulatory practices. As such, a purely quantitative benchmarking exercise is neither possible nor desirable.

The Commission has adopted a largely qualitative approach to comparing DAA processes. In this study, 12 criteria have been drawn from the large and widely accepted body of literature on good regulatory principles. These criteria relate to:

- regulator conduct (for example, regulatory outcomes consistent with objectives, open and transparent processes, proportionate and flexible regulatory requirements)
- regulator governance (for example, clarity in roles and responsibilities, accountable decision makers, well-defined regulatory objectives).

Regulatory practices in line with these criteria are considered more likely to achieve their objectives and impose lower cost on proponents, regulatory agencies and the community.

For international comparisons, the Commission has focused on processes in Canada, the United Kingdom and the United States and will compare practices in New Zealand in the final report. These countries have similar political systems, are at roughly equivalent stages of development, and face broadly equivalent challenges in making tradeoffs between commercial, environmental and heritage concerns. The study has not focused on low-income countries, where the policy objectives, institutional arrangements and community preferences differ greatly and hence are less comparable.

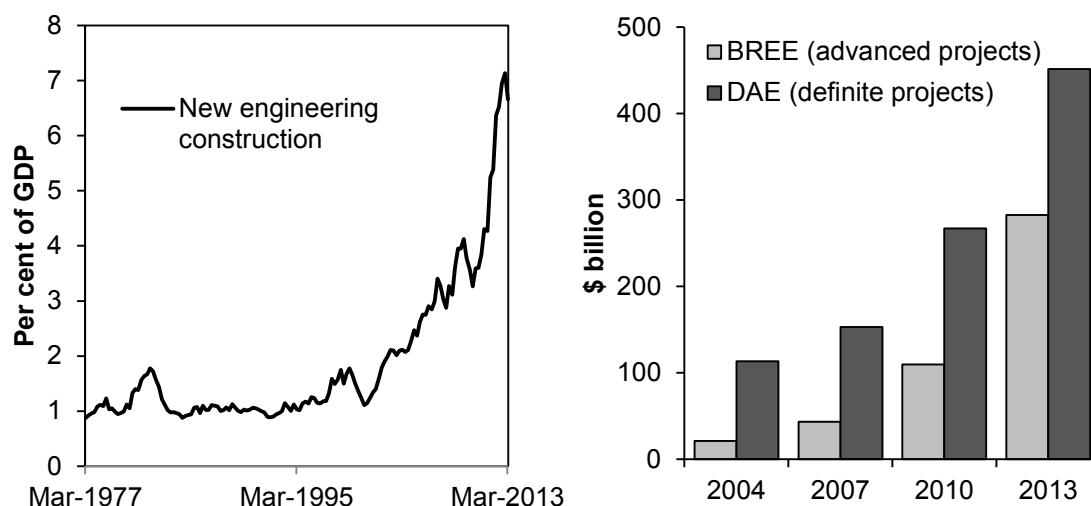
The importance of major projects to Australia

Major projects are characterised by their cost, size, complexity and long lead times. How these characteristics are used to distinguish a *major* project from a *regular* project varies, and often relatively small value developments qualify as major projects. In Australia, major projects are typically resource developments, infrastructure projects and large commercial or public purpose buildings, such as hospitals or stadiums.

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

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

Figure 1 **Investment in major projects has surged^a**



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

Cost of a major project approval delay

The efficiency and effectiveness of DAA processes bears heavily on the viability, location and timing of major project investment decisions. Even small changes in the process can make significant differences to the viability of a project. As an illustration, the Commission has estimated the indicative cost to a project proponent of a one-year delay to a major oil or gas project with a capital cost of \$17 billion to be between \$300 million to \$1.3 billion, depending on the assumptions made. The central estimate of \$700 million would reduce the net present value of the investment by about 9 per cent (box 3).

Navigating the myriad regulatory processes

DAA regulations and processes provide a way for risks (which may have irreversible outcomes) to be considered before significant capital investment takes place, typically by requiring the proponent to obtain various permits, authorisations and approvals. These approvals relate (but are not limited) to land acquisition, use and access (including zoning), planning, environmental regulations (covering pollution, waste management, habitat and biodiversity, fauna and flora and threatened species), Indigenous and non-Indigenous heritage, native title and public health and safety.

Box 3 The indicative cost of a major project approval delay

The Commission has applied discounted cash flow analysis to estimate the cost to a project proponent of delaying an average-sized Australian oil and gas extraction project by one year. The cost was calculated as the difference between the net present value of the project with and without the delay. This approach does not capture any changes in the wider economic, social or environmental benefits or costs that may result from a delay to the project.

The investment for the project was set at \$17 billion dollars, based on projects under construction in the sector in early 2013. Indicative cash flows were generated by scaling up those used for a similar exercise undertaken for the Commission's 2009 study into the oil and gas sector and assuming an internal rate of return of 17.5 per cent. A discount rate of 10 per cent was used to reflect the opportunity cost of capital in the sector.

On this basis, the cost of a one-year delay is estimated to be \$700 million, equivalent to a reduction in net present value of around 9 per cent. These partial estimates relate to the costs borne by the project proponent, including delayed profits and additional regulatory compliance costs. Delay may also result in higher financing costs and commercial risks.

These cost estimates are indicative only, and are highly sensitive to the assumed profile of the project's income stream and discount rate. Varying these assumptions within plausible ranges results in cost estimates between \$300 million and \$1.3 billion.

The costs of delaying a project due to protracted development assessment and approval processes could be influenced by a range of other factors not considered in the analysis. For example, an increased difficulty in financing the project or reduced flexibility to respond to market conditions could push costs higher. In contrast, any ability to accommodate the delay within the planned project schedule could lower costs. Similarly, variations in oil and gas prices over time could influence the cost of delay in either direction.

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

Box 4 Matters of national environmental significance

There are currently nine matters of national environmental significance that can trigger the need for development assessment and approval under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth). These are:

- world heritage properties
- national heritage places
- wetlands of international significance (listed under the Ramsar Convention)
- listed threatened species and ecological communities
- migratory species protected under international agreements
- Commonwealth marine areas
- the Great Barrier Reef Marine Park
- nuclear actions (including uranium mines)
- water resources impacted by a coal seam gas development or a large coal mining development.

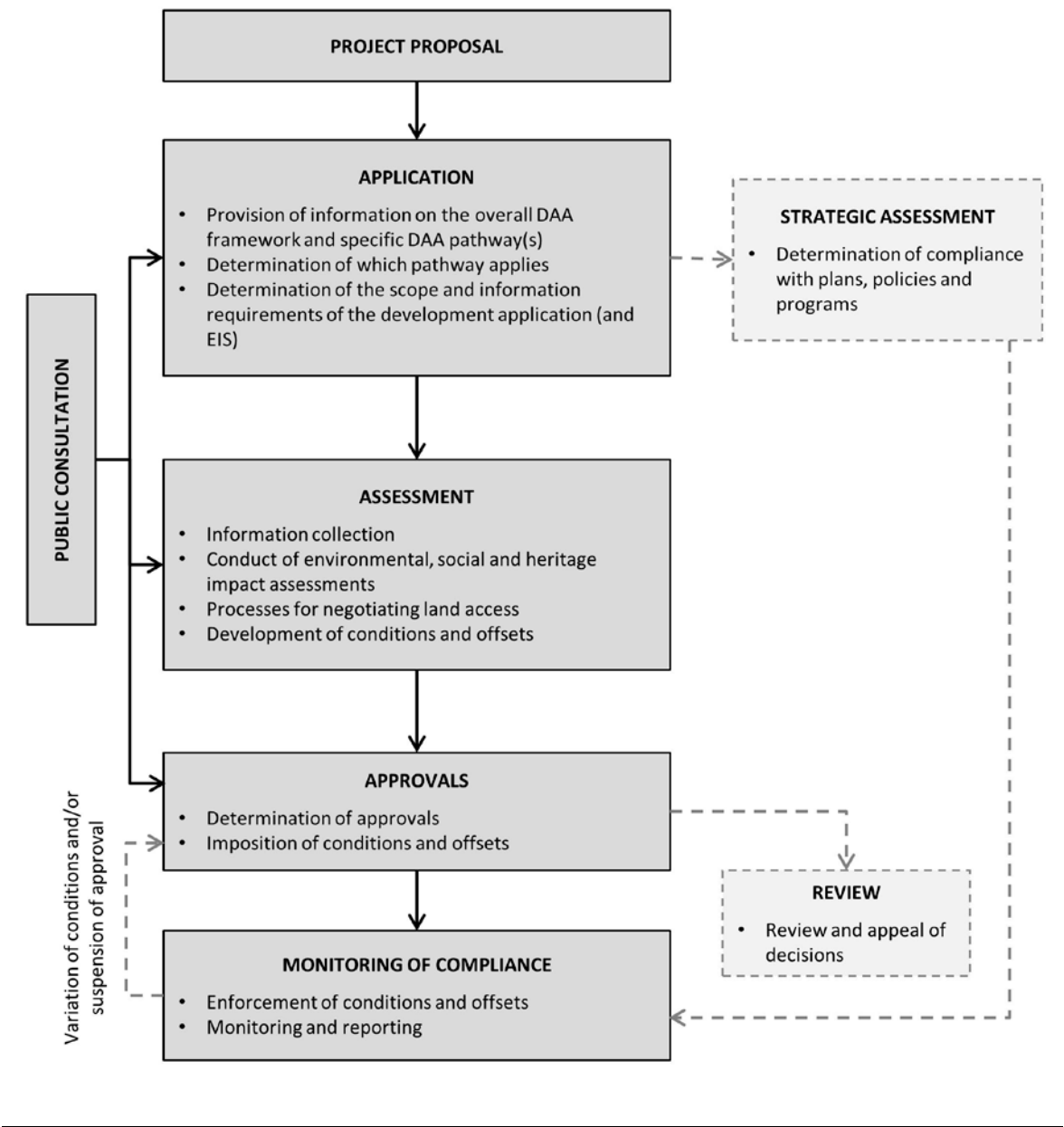
Part 3 of the Act also protects the environment on Commonwealth land (primarily defence land and most major airports) and the environment generally in relation to actions by Commonwealth agencies.

Complexity arises because of the vast quantity of legislation and regulatory instruments that may apply to major projects, depending on specific circumstances (for example, the size, sector, and location of a major project), which vary considerably across jurisdictions. Moreover, processes vary within jurisdictions, depending on what aspect of a major project proposal is being evaluated and on the stage of the assessment and approval process (figure 2). Such complexity reflects the intrinsic nature of major projects and is a challenge that all parties to a major project have to manage.

Nevertheless, navigating the regulatory system is daunting. Examples of the complexity include:

- the 79 policies or pieces of legislation that were pertinent for the Port Phillip Bay channel deepening project
- major projects sometimes needing more than 70 different primary and secondary approvals, licenses, permits and authorisations
- major projects being subject to different regulatory pathways depending on a variety of ‘triggers’ (box 5). While these pathways can, in theory, make processes more transparent for proponents, in practice this is not necessarily the case.

Figure 2 **The regulatory stages of a major project approval process**



Box 5 Triggers for major project assessment pathways

- In some jurisdictions, special assessment pathways are triggered by the capital cost of the project. For example, in New South Wales, a project will be declared a state significant development if it falls into one of 24 development classes and has a capital value greater than \$30 million. Similarly, Western Australia considers a project to be a major development if it has a capital value greater than \$15 million (within Perth) or \$7 million (outside Perth).
- Other jurisdictions adopt the subjective criterion of whether the project is sufficiently 'significant', 'important' or 'complex'. In South Australia, a project may be declared a 'major development' if it is of major environmental, social or economic importance. In Queensland, a 'coordinated project' will be declared if it has complex approval requirements; strategic significance to a locality, region, or the state; or significant environmental effects or significant infrastructure requirements.
- Some pathways are triggered by projects of a particular type. For example, in Victoria, a project will be declared a major transport project if it comprises road, rail or other infrastructure that can be used for the movement of persons or goods, a port or a facility at which goods can be transferred or temporarily stored.
- Ministerial discretion plays a role in many of these triggers, both in determining whether certain criteria are met, and also in the decision of whether to declare a project when it meets (or even if it does not meet) the criteria. In the Northern Territory, the major project assessment pathway is triggered solely at ministerial discretion.

There is substantial scope to improve regulation

The building blocks of a sound regulatory system are already in place for Australia. Indeed, when Australia's DAA processes were compared with practices in Canada, the United States and the United Kingdom, none of these countries stood out as performing better overall than Australian jurisdictions. In fact, on some aspects of DAA regulation, other nations look to Australia as a model.

However, there is substantial scope to improve Australia's major project approval processes. This draft report proposes a reform agenda that, if implemented, will ensure Australia secures the full benefits of major projects and remains an attractive destination for international investment, while protecting its environmental, heritage and cultural assets. The Commission's proposals build on previous efforts and would strengthen the development assessment and approval regulatory framework by:

- better achieving regulatory objectives

-
- reducing regulatory overlap and duplication
 - improving regulatory certainty, transparency and accountability
 - improving timeframes and coordination
 - reducing compliance costs.

Achieving regulatory objectives

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

The Commission recommends that Australian, State and Territory Governments take stock of their DAA processes, identify where objectives are vague, inconsistent or ambiguous and where deficiencies are found set about to make them clearer. Where policy objectives compete with each other, governments and parliaments should provide public guidance on how decision makers should weigh conflicting objectives.

Limiting the scope and setting precise criteria for ministerial discretion to call-in and intervene in DAA processes and being transparent in the exercise of that discretion would also bolster the legitimacy of approval decisions.

Making greater use of Strategic Assessments

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

Strategic planning and assessment are tools that can be used to take into account broader regulatory objectives, such as cumulative impacts on landscape-scale ecosystems from multiple projects. They can result in subsequent project assessment and approval processes being less resource intensive and time consuming, since some of the issues have already been dealt with.

Despite these advantages, and even though Strategic Assessments have been available under the EPBC Act since 1999 (and some state laws), their use has only recently started to become more frequent. Most have been used for urban areas where the pattern of future development is reasonably predictable, the environmental risks are well understood and existing planning and assessment frameworks are well established. These few examples have been successful in reducing the need for subsequent Commonwealth approvals.

There are several Strategic Assessments in progress, including one for the Great Barrier Reef that involves a marine component and a coastal component. Strategic Assessments are also in progress to assess the environmental and other impacts of BHP Billiton's and Rio Tinto's plans for expansion in the Pilbara region of Western Australia.

The Commission considers that efficiency gains and improved environmental outcomes could be achieved through greater use of Strategic Assessments, both under the EPBC Act and more broadly by the States and Territories. However, before a wider deployment of the approach, governments should first draw on the lessons learnt from the successful examples to date, and ensure agencies are equipped and ready to embrace a different approach to development assessment and approval. Without the proper groundwork, the benefits of considering cumulative impacts could easily be outweighed by the costs of cumulative layers of regulation.

Reducing regulatory overlap and duplication

Overlap and duplication of regulatory processes is one obvious source of unnecessary burden (that is, where the objectives of the regulation could be achieved with lower compliance costs). Australia's federal system of government, where responsibilities for matters such as environmental protection span all levels of government, gives rise to overlap and duplication, which the Commission considers can be greatly reduced without risking the quality of environmental outcomes (box 6).

Box 6 Participants' views on regulatory overlap and duplication

Participants in this study offered what they considered as examples of overlap and duplication in the regulations for assessing and approving the development of major projects.

Urban Taskforce Australia — among many participants — highlighted overlap between Commonwealth and State and Territory environmental approvals processes:

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

The Australian Petroleum Production and Exploration Association provided an example of inconsistencies between Commonwealth and State and Territory agencies relating to seismic surveying:

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

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

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

The majority of major project proponents, for example, need to undertake some sort of environmental assessment (broadly interpreted) for the State or Territory Government in which the planned project is located and for the Australian Government.

Renewing efforts on bilateral assessment and approval agreements

The Commission regards bilateral agreements for assessment and approval on matters of national environmental significance under the EPBC Act as the best way to address directly overlaps and duplicative processes. Such agreements would promote a 'one project, one assessment, one decision' framework for environmental matters. In 2012, COAG agreed to embark on this route, but the negotiations subsequently broke down for a range of reasons, including community concerns about how environmental standards would be maintained and the accreditation

standards themselves. An overly ambitious timetable arguably did not make it any easier.

Box 7 outlines the concerns of some participants regarding State and Territory DAA processes, including environmental standards and the possibility that higher environmental standards under the EPBC Act could be jeopardised by bilateral approval agreements. The Commission acknowledges these legitimate concerns, but considers that the first best solution is to ensure that the State and Territory processes accredited by the Commonwealth are at least of the same standard as Commonwealth processes, and provide for the same level of public consultation and review.

The Commission sees merit in renewing efforts to reach agreement between the Australian Government and the States and Territories on bilateral approval agreements. Acknowledging the difficulties encountered in the 2012 negotiation process, the Commission has developed a five point plan for incremental reform towards this goal (box 8).

A first step in this direction would be the Commonwealth Environment Minister using existing powers in relation to strategic approaches to enter into an agreement with the States and Territories. These agreements would effectively delegate to States and Territories the responsibility for assessing and granting most environmental approvals under the EPBC Act in urban areas, where relatively mature assessment and decision-making processes are in place and strategic planning tools have already been used successfully. Subsequently, where matters of national environmental significance were involved, the Commonwealth could transfer responsibility for approving controlled activities in non-metropolitan areas to the States and Territories.

The Commonwealth Environment Minister would retain the right to withdraw accreditation if national standards were not being met. The Commonwealth would also continue to have control over matters where it is unlikely that the community would accept the Commonwealth exiting the field – such as for world heritage, nuclear and maritime matters. In such cases, the States and Territories should accredit Commonwealth processes where the processes address the same matter. This proposal should be properly scoped to identify the necessary steps and appropriate safeguards, reviewed by jurisdictions and a timetable set.

Box 7 **Participants' concerns about State and Territory processes**

A number of participants to this study expressed concerns about State and Territory development assessment and approval processes. For example:

- Wentworth Group of Concerned Scientists opposes the use of bilateral approval agreements:
... agreement to hand over Commonwealth environmental approval powers to state governments puts at risk decades of environmental reform, and risks the health of environmental assets which the Commonwealth has an obligation to protect. (sub. 1)
- Australian Network of Environmental Defender's Offices emphasised that the Commonwealth and states have different standards and obligations:
States are not legally mandated to act in the national interest; states may have inherent conflicts of interest as proponents of major projects; The Commonwealth is responsible for implementing Australia's international environmental obligations ... The federal Environment Minister was publicly scathing of State-based approval processes in relation to Queensland's Alpha Coal mine. ... If state DAA processes seek to meet federal EPBC Act requirements, they would need to *increase* environmental and assurance standards. (sub. 14)
- East End Mine Action Group expressed concerns about state processes, including:
... various recent news items regarding Queensland's approvals processes for massive CSG projects and of alleged company leverage to facilitate approvals within a certain timeframe despite proper environmental impact assessments not being complete. (sub. 38)
- Nature Conservation Society of SA pointed to conflicting objectives:
We would recommend strongly, if such [bilateral approval] agreements are to continue that they are not accredited under the current South Australian *Development Act 1993*, as the objects of this Act are fundamentally different from the objects of the EPBC Act. (sub. 37)
- Mackay Conservation Group claimed that States had a conflict of interest:
State governments have a strong conflict of interest in owning mineral resources yet being responsible for stewardship of state biodiversity. There is a strong incentive to allow mineral development at the expense of environmental and community values. (sub. 7)
- North Queensland Conservation Council commented:
For whatever reason, states often have other agendas and other criteria for success ... and fail to take responsibility for matters of national environmental significance. (sub. 10)

The Senate Committee's inquiry into the Retaining Federal Approval Powers Bill 2013 also considered concerns expressed by stakeholders about state approval processes, including conflicts of interests, resource constraints, differential standards between the Commonwealth and the States, lack of Commonwealth oversight of state processes, and the view that the Commonwealth is best placed to protect the national interest. Given the concerns about the inadequacy of state processes, the Committee concluded approval powers should remain with the Commonwealth.

Currently only about a fifth of projects are assessed under bilateral assessment arrangements. The Commission also sees substantial scope to strengthen existing bilateral assessment arrangements. This would be an interim step towards the

reforms described above and would build on existing (or expired) agreements. Areas where improvements could be made include agreement on standards and procedures for assessment, better utilisation of existing legislative procedures and extending, where relevant (for example, South Australia), the number of regulatory processes accredited under current bilateral agreements.

Box 8 A five point plan towards bilateral approval agreements

1. Increase the number of State and Territory assessment procedures with Commonwealth accreditation. Consider accreditation of Commonwealth processes for State and Territory decisions where certain matters of national environmental significance are involved (for example, world heritage, nuclear and maritime matters).
2. Strengthen State and Territory approval processes, through other reforms proposed in this report.
3. Initially progress bilateral approval agreements on less environmentally sensitive issues and where there is better information about impacts, such as urban environments.
4. The COAG Reform Council should closely monitor progress of bilateral approval agreements. To facilitate this, State and Territory Governments should prepare annual reports on their implementation of the agreements.
5. COAG should publish a timetable of agreed reforms and have the COAG Reform Council report annually on key milestones, barriers to reform and how to address them.

The Australian Parliament's decision to exclude the option for bilateral approval agreements when it introduced a 'water trigger' into the EPBC Act is not conducive to the cooperation between the Australian Government and States and Territories that the Commission regards as necessary to progress reforms.

Reducing duplication within jurisdictions

Within a jurisdiction, the number of regulatory agencies involved in assessing and approving a major project can also be a source of overlap and duplication. For example, regulatory responsibility for oil spill contingency plans in Commonwealth waters near Western Australia is shared by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), the Australian Maritime Safety Authority, the Australian Government Department of Sustainability, Environment, Water, Population and Communities (DSEWPAC), the WA Department of Environment and Conservation and, potentially, the WA Department of Transport and the WA Department of Mines and Petroleum. Despite their differing areas of responsibility, there are opportunities for agencies to coordinate

compliance activities to minimise the regulatory burden on proponents. Further, there is capacity for governments to accredit one agency to provide approvals on behalf of other agencies.

The Australian Government recently announced that NOPSEMA will be accredited to assess and approve certain petroleum activities as meeting the environmental requirements of the EPBC Act. The Commission supports these changes, and expects that removing unnecessary duplication will materially reduce compliance costs for affected businesses.

The Commission recommends that State and Territory Governments take a similar approach by encouraging their agencies to work together to share assessments and over time look to ways of streamlining decisionmaking. For instance, memorandums of understanding agreements could be used to accredit the process of one agency as meeting the requirements of another agency. This would help to avoid overlap and duplication of regulatory activities, improve administrative efficiency and lower the compliance cost borne by the project proponent.

Regulatory certainty, transparency and accountability

Having predictable regulatory processes builds confidence in regulatory agencies and reduces compliance costs for project proponents. They also help to establish trust in and the legitimacy of the regulatory framework. This is especially important for major projects since they usually involve stakeholders with strongly held and disparate views on their impacts.

A common concern raised in this study by both proponents and other stakeholders was a lack of regulatory certainty and transparency. The nature of the concerns differs:

- For proponents, the cost of undertaking required assessments is lower when all the requirements are known in advance. Information requested once an application is lodged is typically more expensive to deliver and in doing so the approval process may be delayed.
- For community stakeholders, doubts about the rigour and legitimacy of the approval process arise when the criteria for determining an assessment pathway are loosely defined and when ministerial powers to call-in a project are exercised arbitrarily.

The importance of early consultation and guidance

Throughout the conduct of this study, participants repeatedly stressed the importance of early public consultation with all stakeholders and of guidance for project proponents on regulatory requirements. Consultation before a project is put forward for formal approval allows regulators to explain the objectives of the regulatory framework and the broad requirements placed on proponents. It gives the community the opportunity to raise issues on how a development might impact on them. And for project proponents, regulator and community feedback allows them to give early consideration to design modifications that limit undesirable impacts.

Given these mutual benefits, consultation, not surprisingly, is often self-initiated by major project proponents. As well, it is a prescribed feature at some stages of the DAA process. For instance, some states organise pre-application consultation meetings. Sometimes, however, consultation is only undertaken well into the approval phase. In such cases, substantive changes to project design will be very expensive and community views may have hardened and eroded the social license to proceed even if formal approvals are ultimately granted.

The Commission considers that the practice of early consultation between regulators, proponents and community stakeholders could be undertaken more systematically. Holding pre-application meetings between major project proponents and a ‘Major Projects Coordination Office’ (MPCO, discussed below) is one way to improve upfront clarity around regulatory requirements. A practical way to enshrine a culture of early public consultation is for jurisdictions to publish draft terms of reference (TOR) for the environmental impact assessment related to a major project proposal and to provide an opportunity for meaningful public consultation to inform the final TOR.

At the same time, to bolster transparency and accountability, governments should ensure that regulatory agencies provide guidance on what information is needed from the proponent and reasons for the assessment pathway declaration by Ministers or their delegates, and the rationale for the TOR.

Separating policy and regulatory functions

Good regulatory practices can only go so far in promoting certainty and transparency. Changes to regulatory governance and institutional arrangements also have a role to play. In particular, public confidence, competitive neutrality and impartiality are more likely to be established through independent regulatory agencies. This is one of the findings from jurisdictions that have already established independent regulatory agencies.

Accordingly, the Commission proposes that jurisdictions consider the institutional separation of regulatory assessment from policy functions, both at the federal level and for States and Territories. Some State and Territory Governments have already separated their environmental protection agencies from core departments responsible for environmental policy. Where jurisdictions have not done this, further work should be undertaken to assess the benefits and costs of separating policy from regulatory functions.

For the Commonwealth, the Commission's recommendation involves examining the net benefits of transferring assessment, monitoring of compliance and enforcement functions under the EPBC Act from DSEWPAC to a new independent agency. Primary approval decisions would remain with the Commonwealth Environment Minister.

Judicial review of ministerial decisions

Review mechanisms help ensure that approval decisions are made in a transparent and accountable manner. There are two main types of review:

- Merits review, which allows a 'second look' at the decision. Although a merits review body generally exercises all the power and discretion of the original decision maker, there are ways in which the remit of the merits review body can be limited. For example, the merits review body may not be able to consider any new evidence.
- Judicial review, which focuses on the legality of the decisionmaking process.

The challenge is to ensure the right to robust and accessible review procedures and at the same time avoid vexatious review applications. The latter can have a significant impact on the timeframe and cost of approvals. While abuse of review processes, by both proponents and opponents of major developments arises on occasion, overall the system broadly works well. That said, the Commission believes that there is merit in refining the design and scope of reviews.

The decision to approve a major project involves balancing competing interests and making tradeoffs. The relevant Minister, as an elected representative accountable to the Parliament (and through it the wider community) is the most appropriate decision maker to grant primary approvals for major projects. It is not appropriate for a tribunal to second-guess these decisions through merits review, but it is important that the legality of these decisions be safeguarded through judicial review.

However, there is a tension between elected representatives making delicate balancing decisions and the efficient use of ministerial time. While the Commission considers it preferable for Ministers not to delegate decisions for primary approvals, if delegation does occur, provision should be made for the decision of the delegate to be personally reconsidered by the Minister. Where reconsideration is possible, it would be equivalent to the decision being made by the Minister himself or herself. In these circumstances, judicial review would be the appropriate type of review.

Further, in some jurisdictions the Parliament has decided that certain DAA decisions will be made by a separate or independent body. These might be ‘preliminary’ decisions made throughout the DAA process by an assessment manager, or primary approval decisions for major projects made by someone other than the Minister (for example, the Planning Assessment Commission in New South Wales). These decisions are not made by a Minister and hence in these circumstances allowing more expansive review, such as a limited form of merits review, would be appropriate.

Standing to bring review applications should be given to: the project proponent; to persons and organisations whose interests have been, are or could potentially be directly affected by the project; and to those who have taken a substantive interest in the assessment process. The review body should also be able to grant leave to persons other than those mentioned above in exceptional circumstances, for instance if a denial of natural justice would occur if they were not granted leave.

Improving timeframes and coordination

No comprehensive information on timelines for the assessment and approval of major projects is available. However, there is some evidence that the average time taken for approval has increased (box 9). It is likely that the extraordinary and sudden rise in the number of major developments over the past five years has put pressure on regulatory agencies’ capacity to process approvals and contributed to the extended delays.

To improve timelines for approvals, the Commission is proposing greater use of statutory timeframes and institutional arrangements that coordinate the multitude of approvals required and make transparent the time taken.

Box 9 **Approval timeframes can be long and variable**

Since statistics on development approval timeframes are not collected in a systematic way, it is not possible to report the average approval timeframe and how it has evolved. However, administrative data and proponents' experience indicate it is long and variable.

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

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

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

It takes an average of 28 months to gain approval for a mine in Western Australia. This timeline includes the time taken by government, the proponent and required public consultation processes. It excludes the time for the tenement grant and exploration ... DMP considers the time it takes to get a mine approved is measured from the date of EPA referral to the date the 'Mining Proposal' is approved, which allows construction of the mine to begin.

The 28-month timeline in the example above does not take into account further requirements for safety and other regulations and licences. It is also an average and actual approval times would vary significantly between projects.

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

In most cases, for major projects, most of the assessment time can be attributed to the proponent undertaking studies and preparing assessment documentation. For example, proponents spent an average of 20 months (from an average of 37 months from referral to approval) preparing environmental impact statements and collecting public comments. (sub. 55, p. 7)

The Minerals Council of Australia stated that the average period for approval-related activities for a thermal coal project was just over three years:

In thermal coal, for example, the average project experiences an additional 1.3 years of delay relative to those elsewhere (a total delay from studies to completion of 3.1 years in Australia compared with 1.8 years for the rest of the world). (sub. 33, p. 15)

These comparisons are based on a sample of the 50 or so major global coal mines that are part of research firm Wood Mackenzie's international database covering nations such as Canada, China, Colombia, Indonesia, Russia, Southern Africa, the United States and Venezuela (MCA, pers. comm., 30 July 2013).

The design and setting of statutory timelines

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

The Commission favours the wider use of statutory timelines in DAA processes and believes that any perverse incentives they create can be limited through good design. Specifically, jurisdictions should develop timelines that set, once a proponent's assessment documentation is lodged, the maximum time for the assessment agency to provide its report and decision recommendation to the relevant Minister, and for the Minister to make the decision. If the relevant Minister makes no decision within the time period specified, the recommendation by the assessment body (along with the reasons and any conditions), should be deemed to be the decision.

To provide some flexibility while avoiding unnecessary delay and cost, the design of statutory timelines should include triggers that specify the grounds under which regulators can stop the clock and for how long. Such arrangements should only be available when matters emerge that were not contained in the terms of reference and could not have been reasonably anticipated. To encourage agencies to seek time extensions only when absolutely necessary, regulators should be required to disclose when they have activated a stop the clock provision and the reason(s) for doing so. They should also specify when the clock restarts and when the assessment is deemed to be complete. This information should be provided and published in formats that allow for meaningful comparisons across jurisdictions.

These principles apply to both the assessment and approval stages. However, given that there will have been an extended assessment process before the matter reaches the decision maker, only one further opportunity to stop the clock is sufficient during the approval stage.

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

For the largest major projects, the complexity and number of approvals required from multiple agencies invariably involves considerable time. It also requires close coordination among regulatory agencies — small delays by one agency may prevent another agency from advancing. To guide and facilitate a proponent through the

regulatory system, some jurisdictions have established dedicated institutional structures for specific developments.

There are a variety of models. One approach is a ‘one-stop shop’ where all regulatory requirements are assessed and approved by a single agency. Canada’s National Energy Board is an example that approaches a one-stop shop for assessing and approving national and international oil, gas and electricity network projects. Another approach is a lead agency, which takes responsibility for coordinating regulatory requirements and giving guidance. Western Australia and South Australia have lead agencies for resource and some other types of major projects. In other cases, the lead agency coordinates the environmental impact assessment, which is the model of the Queensland Coordinator General.

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

The Commission sees merit in each State and Territory Government establishing a MPCO, similar to Canada’s Major Projects Management Office. The roles of the MPCO would be to advise proponents on their statutory requirements; coordinate and facilitate assessment and approval processes; and electronically track and report on progress against agreed timelines. The MPCO would not have a direct role in conducting assessment and approvals.

The Commission considers that access to major projects coordination offices should be limited to large-scale developments in terms of their physical or geographic footprint, their technical complexity and the degree to which they make a significant contribution to the economic development of the State or Territory. In practice, a MPCO is likely to manage fewer than a handful of projects at a time. The existing capital expenditure triggers for major project assessment pathways (box 5) are too low and should be re-examined.

Reducing compliance costs

The main compliance costs of DAA regulations relate to fulfilling approval conditions and offsets, and the administrative costs of monitoring and enforcement.

In these areas, the Commission sees opportunities for risk-based and outcome-focused regulation to reduce unnecessary costs.

Approval conditions and offsets

The approval of a major project is granted subject to complying with conditions. Regulators impose conditions to avoid and mitigate adverse impacts of a project not properly addressed by the project proposal. In principle, if development is still expected to have significant residual impacts, offsets may be an appropriate response. Offsets are a special form of condition that involves replacing an environmental asset or feature with another that is similar, or by making compensation (including monetary payment) for that loss.

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

Some projects have conditions numbering in the thousands. While it is not possible to draw conclusions just from the number of conditions attached to an approval, many study participants reported that the number of conditions is increasing, becoming more prescriptive and less directly related to project risks.

Complying with prescriptive conditions is more onerous on a proponent than conditions formulated as outcomes (for example, meeting a noise standard). An outcome-based approach is also more efficient for major projects, since the proponent has flexibility to determine how the constraint is met and has an incentive to find new ways to achieve the constraint at lower cost.

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

Other measures that would help reduce unnecessary compliance costs or limit their escalation include:

- publishing on the internet all conditions attached to approved major projects, with an explanation of how they mitigate the risk and evidence that the intended outcome is being achieved at least cost
- conditions that do not direct compliance, or the manner of compliance, with other legislation
- undertaking detailed public consultation about the conditions before recommending them to the decision making authority
- providing scope to remove, alter or add conditions when a strong case to do so exists (for example, if evidence from a compliance report shows that conditions are no longer meeting objectives, or if a proponent considers that compliance with a condition would have unintended adverse consequences)
- periodically reviewing conditions for long-lived projects (with appropriate public consultation) to remove redundant conditions and to ensure outcomes are being achieved at least cost.

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

Efficacy of monitoring of compliance and enforcement

Confidence in the integrity of major project assessment and approval processes is shaped by how well regulatory requirements are applied and approval conditions enforced. Some participants in this study expressed concerns about inadequate enforcement, while others argued that the approach to enforcement imposes unnecessary compliance costs.

Several reports from Auditors General have found considerable room for improvement in compliance processes. For example, regulators could better articulate how compliance with conditions will be assessed and produce annual

reports that detail how proponents have complied with conditions. The Commission supports the use of such measures.

The Commission also proposes that all jurisdictions legislate (where this has not already been done) to enable third parties to bring enforcement cases to courts or tribunals.

Making it happen

Some of the proposed reforms in this report are new while others repeat recommendations made in earlier reviews. Others are currently being introduced, and when fully implemented will secure improvements in the regulatory framework. However, other worthwhile measures have not been implemented.

There is no ‘silver bullet’ solution. The Commission’s proposals, summarised in table 1, instead put forward a suite of changes that build on previous reform efforts. Each of the Commission’s recommendations alone is likely to have only a marginal benefit. Given the interconnectedness of the regulatory framework, the system is only as good as its weakest link. Partial reform efforts, therefore, are unlikely to achieve the meaningful and sustained change that Australia needs to secure the full benefits of major projects and remain an attractive destination for investment while protecting its environmental, heritage and cultural assets.

The Commission considers there is merit in, and a role for, the COAG Reform Council to monitor jurisdictions progress in implementing major project DAA reforms. Moreover, since community preferences evolve over time, periodic (for example, decennial) reviews that examine the rationale for policy interventions and whether they continue to produce net benefits is worth consideration. Reviews should consult extensively with the community and all levels of government, and could occur as a part of a broader review of planning or regulatory systems.

Table 1 Summary of key reforms ^a

<i>Issue</i>	<i>Proposed response</i>	<i>Expected benefits</i>
Meeting regulatory objectives	Review of legislative and regulatory objectives. In-principle support for further integration of strategic planning with DAA processes for individual projects.	Improved transparency and confidence in processes and decisionmaking consistent with regulatory objectives.
	Increased use of Strategic Assessments.	Less costly and time consuming assessment. Better environmental and social outcomes.
	Enhanced engagement of stakeholders and public participation in DAA processes.	Confidence that regulatory objectives are being addressed.
Reducing duplication	Strengthen bilateral agreements on assessment and pursue bilateral agreements on approval processes for matters of national environmental significance under the EPBC Act.	Reduced duplication, an integrated 'one project, one assessment, one decision' system for environmental matters.
	Cooperative arrangements between regulators within a jurisdiction for joint or substitute assessment processes.	Reduced duplication, reduction in compliance costs.
Regulatory certainty, transparency and accountability	Separate environmental policy from regulatory assessment and enforcement functions.	Clarity of responsibilities, transparency of processes.
	Greater transparency in process for setting terms of reference for environmental impact statements and in-principle support for pre-application meetings.	Greater certainty for proponents on processes and requirements.
	Binding criteria for regulatory pathway determination. Limited ministerial discretion on pathway determination.	Greater certainty, transparency, and accountability.
	Publication of guidance for proponents and factors taken into account in approval decisions. Judicial review for decisions of the Minister to approve a project, and limited merits review for decisions not personally made by the Minister.	Certainty and accountability.
Improving timeframes and coordination	Support for MPCOs at the State or Territory level. Enhanced roles for these offices in jurisdictions where they already exist.	Certainty of process for proponents, reduced bureaucratic delays.
	Time limits at the assessment and approval decision stages.	Improved timeliness of decisions.
	Clear triggers and limits for stop the clock provisions for regulatory decisions.	Improves timeframes and certainty.
Lower compliance costs	Better targeted and administered conditions and offsets. COAG to commission a national review of offsets to report by the end of 2014.	Proportionate and well-targeted conditions and offsets, reducing compliance costs.
	Establishing separate levels of assessment that match the level of regulatory scrutiny to project risks and impacts, accompanied by strong transparency requirements.	Reduction of unnecessary compliance costs.
	Enhanced reporting of compliance and enforcement procedures.	Better targeted compliance activities.

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

Draft recommendations and findings

DRAFT FINDING 1.1

Many of the building blocks of a sound development assessment and approval regulatory system are already in place for Australia. However, there is substantial scope to improve the current system.

DRAFT FINDING 1.2

None of the countries benchmarked for this study stood out as overall performing better than Australia, but a number of leading practices that could be replicated in Australia were identified.

Achieving regulatory objectives

DRAFT RECOMMENDATION 5.1

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

DRAFT RECOMMENDATION 5.2

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

DRAFT RECOMMENDATION 10.1

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

DRAFT RECOMMENDATION 11.1

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

DRAFT RECOMMENDATION 11.2

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

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

DRAFT RECOMMENDATION 7.6

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

Reducing regulatory overlap and duplication

DRAFT RECOMMENDATION 7.1

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

DRAFT RECOMMENDATION 8.1

Governments should aim to establish a ‘one project, one assessment, one decision’ framework by restarting negotiations on bilateral approval agreements between the Australian Government and the States and Territories. Such agreements must ensure that rights of appeal are no less than those in the Environment Protection and Biodiversity Conservation Act 1999.

DRAFT RECOMMENDATION 8.2

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

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

DRAFT RECOMMENDATION 7.2

The Australian Government should undertake and publish a regulatory impact assessment of the ‘water trigger’ amendment to the Environment Protection and Biodiversity Conservation Act 1999, including the exclusion of water trigger-related actions from bilateral approval arrangements.

DRAFT RECOMMENDATION 7.3

Regulatory agencies at the state and territory level should establish cooperative arrangements (for example, memorandums of understanding) for joint or substitutable assessments to minimise unnecessary duplication between major project assessment processes within a jurisdiction.

Improving timeframes and coordination

DRAFT RECOMMENDATION 7.4

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

- *advise proponents on statutory requirements*
- *develop project agreements that document agreed working arrangements among regulators and timeframes for the completion of processes*
- *electronically track and report on progress against statutory and regulator-determined timeframes*
- *facilitate interactions with relevant Australian Government regulators and local governments.*

These offices should be close to the centre of government and access should be limited to complex, large-scale projects of state or territory significance.

DRAFT RECOMMENDATION 8.3

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

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

DRAFT RECOMMENDATION 8.4

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

Regulatory certainty, transparency and accountability

DRAFT RECOMMENDATION 6.1

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

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

DRAFT RECOMMENDATION 6.3

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

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

DRAFT RECOMMENDATION 7.5

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

DRAFT RECOMMENDATION 8.5

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

DRAFT RECOMMENDATION 8.6

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

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

DRAFT RECOMMENDATION 8.7

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

DRAFT RECOMMENDATION 6.2

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

DRAFT RECOMMENDATION 9.1

Judicial review is appropriate for major project primary approval decisions where a Minister is the decision maker. For decisions not made by a Minister, including those that are deemed because a Minister has not made a decision, limited merits review is appropriate. Where necessary, jurisdictions should amend their legislation to allow judicial review of ministerial decisions.

DRAFT RECOMMENDATION 9.2

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

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

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

INFORMATION REQUEST 9.1

The Commission seeks feedback on the advantages and disadvantages of the current legal costs arrangements in each jurisdiction. To what extent do the current provisions allowing the award of legal costs against unsuccessful third parties impact access to justice, or the extent to which vexatious litigation occurs?

Compliance costs

DRAFT RECOMMENDATION 10.2

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

DRAFT RECOMMENDATION 7.7

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

DRAFT RECOMMENDATION 10.3

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

INFORMATION REQUEST 10.1

The Commission seeks feedback on the most appropriate arrangements for standing in third party enforcement cases. In addition to allowing people directly affected by noncompliance to take enforcement action, possible approaches would also include applying standing to:

- *people or organisations that had participated in the initial approval process for a project*
- *‘interested persons’ such as any person or organisation directly affected by a project, or any person or group involved with ‘protection or conservation of, or research into, the environment’ in recent times (for example, within the past two years)*
- *any person.*

DRAFT RECOMMENDATION 7.8

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

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

DRAFT RECOMMENDATION 7.9

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

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

1 About the study

1.1 The importance of the study

The costs of developing major infrastructure, resource, commercial and public purpose buildings in Australia are high and rising. This is driving concerns about Australia's competitiveness, productivity and future prosperity. The sources of higher costs include the cost of capital; labour costs and rigid work practices; the increased complexity of projects; higher community valuation placed on protecting amenity, heritage and environmental assets; and the regulatory burden of development assessment and approval (DAA) regulations.

It is the last of these factors that the Commission has been asked to review. This is not the first study to examine aspects of the system that underpin major project DAA regulation. Previous reviews include:

- the report by Infrastructure Australia, *Building Australia's Future: A Review of Approval Processes for Major Infrastructure*
- the Commission's *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*
- the Council of Australian Governments Reform Council's review of capital city strategic planning systems
- work on development assessment processes by individual jurisdictions, such as the New South Wales Planning System Review
- work led by the Commonwealth Department of the Prime Minister and Cabinet to agree bilateral arrangements for accreditation of State and Territory Government environment assessments and approvals processes
- the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (the Hawke Review).

Some of the reforms from these reviews are currently being introduced and, when fully implemented, will secure improvements in the regulatory framework. Others, which would have also lead to improvements, have been rejected by governments but where appropriate, the Commission has again recommended them, albeit in slightly different forms. The Commission's proposals build on previous initiatives and aim to enable Australia to accrue the full benefits of major projects, remain an

attractive destination for investment while maintaining its environmental, heritage and cultural assets.

1.2 What the Commission has been asked to do

The Commission has been asked to benchmark Australia's major project DAA regulations and processes against international and domestic best practice. From this analysis, the Commission has also been asked to make recommendations on how to improve Australia's major project DAA processes based on an examination and assessment of:

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

Issues in and out of scope

The study focuses on the regulatory approvals related to managing the impacts of a major development and the enforcement of conditions placed on those approvals. Depending on their location and impacts, major projects trigger specific assessment and other regulatory requirements under local, State/Territory and/or Commonwealth legislation. The DAA regulations and processes that are in scope for the purposes of this study relate to:

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

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

There are other business regulations that relate to the development and operational phases of a project, such as industrial relations, foreign investment, immigration (for example, 457 visas) and local procurement requirements (for example, *A Plan for Australian Jobs: The Australian Government's Industry and Innovation Statement* (2013)). These may impact on the feasibility of a major project, but they are not linked to an approval, and are not within the scope of this study.

1.3 The Commission's approach

For this study, the Commission has not sought to define a 'major' or 'significant' project by its total capital expenditure, but rather through a number of characteristics that include its physical size; complexity; long lead times and life cycle; and potential for significant economic, environmental and social impact on the local and broader community. Major projects can include both public infrastructure and private projects.

There are practical challenges in benchmarking DAA regulations and processes for complex and diverse major projects within Australia and internationally. It is especially difficult to control for differences in policy objectives and preferences between jurisdictions and to obtain comparable data that permit meaningful insights into best regulatory practices for DAA.

As such, a purely quantitative benchmarking exercise is not possible. Rather the Commission has adopted a largely qualitative approach to comparing DAA regulations and processes. To make international comparisons, the Commission has chosen countries with similar levels of economic development, preferences for ecologically sustainable development and closely alike institutional, legal and governance structures. On this basis the Commission selected Canada, the United States, the United Kingdom and New Zealand. The Commission has also used case studies to illustrate examples of leading practice.

Box 1.1 explains some of the concepts that are commonly used throughout the report.

Box 1.1 **Key concepts**

- *Major project*: the Commission does not define a ‘major’ or ‘significant’ project by its total capital expenditure but rather through a number of characteristics that include its physical size; complexity; long lead times and life cycle; and potential for significant economic, environmental and social impact on the local and broader community. Major projects can include both public infrastructure and private projects.
- *Major project proponent*: the individual or entity seeking regulatory approval for a project. For example, a publicly listed corporation may be a proponent of a major mining project.
- *Major project development assessment and approval (DAA) regulations and processes*: the regulations and processes that proponents must adhere to in seeking the various permits, authorisations and approvals needed by law for their project.
- *Major project DAA pathways*: some jurisdictions in Australia have designated regulatory pathways for projects deemed to be ‘major’ or ‘significant’. The pathways differ across jurisdictions and the types of permits, authorisations and approvals that apply.
- *Stages of a DAA process*: DAA processes (whether for environmental or other matters) generally consist of four stages: application; assessment; approval; and, for projects that are approved, monitoring of compliance and enforcement of conditions of approval.
- *Primary approvals*: decisions by regulatory authorities about whether a proponent’s project proposal is able to be developed. A primary approval may be subject to conditions under which the development is allowed to proceed.
- *Secondary approvals*: the various authorisations, licences and permits required by the proponent, concurrently with (or subsequently to) primary approvals, for their proposed project to proceed.

1.4 **Conduct of the study**

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

The Commission has drawn on a range of information and data sources to evaluate development assessment and approval regulation. This includes:

-
- evidence submitted by study participants in response to a Commission issues paper published in February 2013. A total of 60 submissions have been received since the issues paper was published
 - information gathered through stakeholder visits and roundtables including with government agencies, businesses, industry associations, non-government organisations and academics. The Commission has conducted over 50 meetings with governments, proponents (and their advisors and industry groups) and a wide range of environment groups – including international, national and local. Appendix A provides details of participants in this study through submissions, visits and roundtable discussions
 - meetings with stakeholders involved in DAA processes for several jurisdictions targeted for benchmarking, including Canada (national and provincial), the United States and the United Kingdom
 - existing reviews, studies and literature. The Commission has been particularly mindful of previous reviews (described earlier) into aspects of major project DAA processes
 - case studies.

Given the material available to the Commission at this stage of the study, it is of the view that Australia's regulatory system for development assessment and approvals is not fundamentally broken; however, there is substantial scope for improvement.

DRAFT FINDING 1.1

Many of the building blocks of a sound development assessment and approval regulatory system are already in place for Australia. However, there is substantial scope to improve the current system.

In reviewing international practices, the Commission has formed the view that none of the countries benchmarked have an unequivocally better system than Australia, although a number of leading practices that could be replicated in Australia were identified.

DRAFT FINDING 1.2

None of the countries benchmarked for this study stood out as overall performing better than Australia, but a number of leading practices that could be replicated in Australia were identified.

1.5 Structure of the report

The structure of this report is as follows:

- chapters two and three provide overviews of major project development in Australia and of how DAA regulations and processes are organised
- chapter four outlines the methodology and framework the Commission has used to evaluate and benchmark DAA processes across Australia and internationally
- chapter five examines the consistency and alignment of regulatory objectives in key legislative and regulatory instruments governing DAA processes
- chapters six, seven, eight and ten analyse how the issues outlined earlier could manifest at each phase of the DAA process and provide recommendations based on leading practices to tackle these issues
- chapter nine analyses review and appeal rights associated with DAA processes
- chapter 11 considers how the tools of strategic planning and strategic assessment can potentially address some of the problems caused by relying solely on individual project based assessment and approval processes.
- Appendixes provide:
 - a list of participants in this study through submissions, visits and roundtable discussions (appendix A)
 - summaries of DAA processes in each Australian jurisdiction (appendix B)
 - an overview of DAA processes in selected international jurisdictions (appendix C)
 - a review of reports that rank either aspects of Australia's DAA processes or, more generally, the overall regulatory system (appendix D)
 - a summary of international use of strategic assessments (appendix E).

The Commission thanks those who have provided input into this study to date and welcomes further submissions in response to this draft report by 13 September 2013, to enable their full consideration. The Commission will also be holding roundtables in September 2013 in Melbourne, Sydney and Brisbane. Following this, the Commission will produce a final report, which will be forwarded to the Australian Government in December 2013.

2 Major project development in Australia

Key points

- Major projects are characterised by their scale, complexity, long lead times and potential to have significant economic, social and environmental impacts.
- Major projects are typically comprised of mining developments, terminal and network infrastructure projects and large commercial or public purpose buildings, such as hospitals or stadiums.
- Major projects are critical to economic performance and the material wellbeing of Australians. They contribute directly to gross domestic product (GDP) during the construction phase. Once completed, the new productive capacity boosts domestic and often export demand, creates new employment opportunities and raises productivity.
- These benefits, however, do not all accrue at the same time. In the short run, major project development may suppress aggregate productivity given the long lead times between the investment of significant capital and the project producing output.
- Major developments also have impacts that are not reflected in measures of market output, such as loss of biodiversity, damage to waterways and pollution of the atmosphere. Local communities may also incur a loss of amenity value and experience noise, congestion and other impacts.
- The total value of major project investment has surged over the past decade and this activity has been one of the reasons why Australia withstood the global financial crisis without entering into recession.
- Major project investments are concentrated in a few industries, with resource and economic infrastructure projects accounting for almost 90 per cent of the total value of investment.
- The average value of major projects has also increased and the size of the largest projects is unprecedented in Australia's history.
- Western Australia and Queensland account for the bulk of major project investment, which is often located in regional and remote areas.

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

2.1 What is a major project?

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

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

Box 2.1 Definitions of major projects

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

- BREE currently considers a resource project to be a major project if it involves \$50 million or more in capital expenditure.
 - Before October 2012, a resource project was deemed a major project if capital expenditure was \$15 million or more in the case of gold projects or \$40 million or more in the case of all other resource projects.
 - BREE defines mega projects as resource projects that ‘cost more than \$5 billion’.
- BREE considers an electricity project to be a major project if its expected capacity exceeds 30 megawatts.
- DAE maintains the Investment Monitor database, which includes large investment projects in Australia. The threshold for inclusion in this database is a gross fixed capital expenditure of \$20 million or more.
- The Australian Department of Infrastructure and Transport publishes the National Infrastructure Construction Schedule for government infrastructure projects. It includes all public infrastructure projects valued at \$50 million or more.

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Box 2.1 (continued)

- Under the *Airports Act 1996* (Cwlth), a ‘major development’ includes a new or lengthened runway, a significant new terminal or terminal extension or a building, taxiway, road or railway exceeding \$20 million in cost or any other development having a significant environmental impact.

The statutory definition of a major project also varies across jurisdictions and between pieces of legislation.

- In South Australia, a project is eligible to be declared a ‘major development’ under the *Development Act 1993*, s. 46, if it is of major environmental, social or economic importance.
- In Tasmania, the *State Policies and Projects Act 1993*, s. 16, stipulates that a ‘project of state significance’ must possess at least two of the following characteristics: significant capital investment; significant contribution to the state’s economic development; significant consequential economic impacts; significant potential contribution to Australia’s balance of payments; significant impact on the environment; complex technical processes and engineering designs; or significant infrastructure requirements. However, under the *Land Use Planning and Approvals Act 1993*, s. 60C, a project is eligible to be declared a ‘project of regional significance’ if it is of regional planning significance, requires high-level assessment or would have a significant environmental impact.
- In New South Wales, a project is considered to be a ‘state significant development’ under the *Environmental Planning and Assessment Act 1979*, s. 89C, if it falls into one of 24 development classes and has a capital value greater than \$30 million.

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

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

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

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

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

Box 2.2 Examples of major projects

Some recent examples of major projects include:

- The Perth (Kwinana) Seawater Desalination Plant, completed in 2008, now supplies approximately 17 per cent of Perth's water. As the first major reverse-osmosis desalination plant in Australia, the project involved potential environmental risks. These risks were managed through extensive environmental approval procedures and ongoing monitoring of the plant's operation. The Emu Downs Wind Farm was built as an energy offset to alleviate the pressure that the desalination plant would place on the electricity grid.
- The Victorian Government is constructing the Regional Rail Link between West Werribee and Melbourne city centre. The transport link will directly benefit the community using the infrastructure, and facilitate increased business activity in the western region of Melbourne. The project is also expected to have some favourable environmental impacts through reduced greenhouse gas emissions, as well as some adverse impacts as the project potentially disturbs protected species along the rail link corridor. Moreover, in the short term, construction of the project will have noise, vibration, air and water quality impacts on the surrounding areas.
- The Tarkine is a large wilderness area in the north west of Tasmania, parts of which have been placed on the National Heritage register (and many more recommended for inclusion by the Australian Heritage Council) for their environmental and Indigenous heritage values. A number of endangered species, most notably the Tasmanian devil, are endemic to the region. Currently, two mines are operating in the Tarkine, with a further ten mines proposed over the next five years. Mining groups argue that these projects will provide economic and social benefits for local communities. However, this must be balanced against any negative environmental and cultural impacts that may arise from mining in the area.

(Continued next page)

Box 2.2 (continued)

- The Brisbane Airport Corporation is building a \$1.3 billion parallel runway to ease congestion and to meet the future growth of passenger numbers and air services travelling through Brisbane Airport. Construction has had to accommodate the Lewin's Rail, a rare bird species that inhabits the project site. To mitigate and offset the ecological effects of the project, the Brisbane Airport Corporation has undertaken to convert an adjacent casuarina forest into suitable habitat for the Lewin's Rail and to put in place a research and monitoring program.
- The Western Australian Government is building the Fiona Stanley Hospital, as part of a wider health reform program. At an estimated \$2 billion, the hospital will be Western Australia's flagship health facility, providing health care services as well as dedicated research and education resources. As part of the project, more than \$7 million will be invested in conservation programs (especially in relation to Carnaby's black cockatoo) and environmental initiatives to ensure that the project achieves 'the best possible environmental outcomes' (Department of Health (WA) 2013).

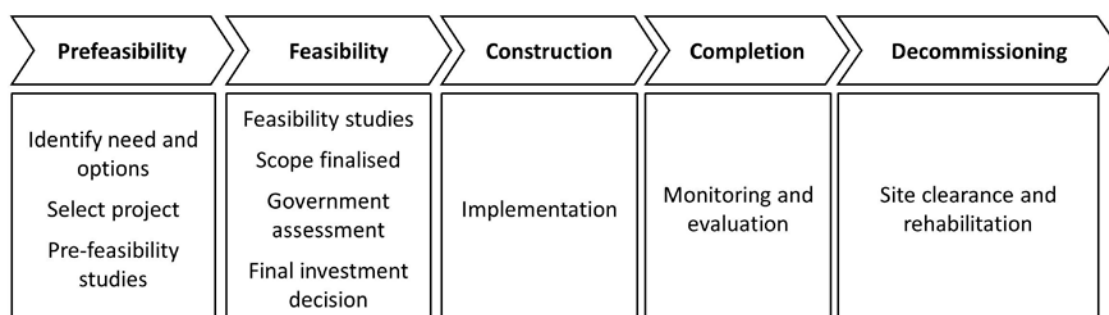
Sources: Brisbane Airport Corporation (2006); Department of Health (WA) (2013); Regional Rail Link Authority (2013); Water Corporation (WA) (2012).

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

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

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

Box 2.3 Life cycle of a major project



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

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

2.2 The economic importance of major projects

Investment in major projects is critical to economic performance and the material wellbeing of Australians. Major project developments give rise to a number of direct economic benefits by adding to the capital base and contributing to gross domestic product (GDP), employment and often export income. Indeed, Australia's economic performance over the past decade has been strongly and positively influenced by the surge in large resource and infrastructure projects. The contribution of these projects to GDP through construction and export activity is one of the reasons why Australia withstood the global financial crisis without entering into recession.

Major projects may also contribute to economic performance indirectly. Once completed, some projects improve productivity by increasing the stock of

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

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

Box 2.4 The effect of investment on measures of productivity

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

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

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

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

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

Major developments also have impacts that are not reflected in measures of market output, such as loss of biodiversity, damage to waterways and pollution of the atmosphere. Local communities may also incur a loss of amenity value and experience noise, congestion and other external impacts. Development assessment

and approvals regulations aim to consider these wider impacts on community wellbeing.

2.3 The landscape of major projects in Australia

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

How big are major projects?

The total value and individual scale of major project investments in Australia has risen sharply over the last decade and is unprecedented in Australia's history. As at March 2013, there were over 900 definite and prospective investment projects, with a total value of \$929 billion (DAE 2013).

Woodside's Pluto Stage 1 gas development is the most expensive project ever completed in Australia at an estimated cost of \$14 billion. This compares with \$8 billion for the Snowy Mountains scheme at today's prices. There are currently seven projects under construction which exceed \$14 billion. These include the National Broadband Network (\$44 billion) and several liquefied natural gas plants, including the Gorgon development (\$52 billion), which is Australia's largest project under construction (box 2.6).

Box 2.5 Data sources on major project developments

ABS Australian National Accounts

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

DAE Investment Monitor

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

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

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

BREE Resources and Energy Major Projects

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

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

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

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

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

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

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

Source: Chevron Australia (2013).

Most major projects are resource or infrastructure projects

The landscape of major project investments in Australia is dominated by a few industries. Developments in the resource industry and economic infrastructure — including projects in the transport and storage, energy generation, gas, water and telecommunication industries — account for almost 90 per cent of all prospective and definite major projects investment (table 2.1).

Resource industry projects

The value of resource capital expenditure has steadily increased over the last decade, growing at an average annual rate of about 23 per cent between 2001-02 and 2011-12 (BREE 2012c). As at March 2013, the total value of resource projects was about \$451 billion, accounting for almost half of all major project investment in Australia (DAE 2013). Around 80 per cent of this amount is in 'mega projects', which are projects where capital expenditure exceeds \$5 billion (BREE 2013). The prevalence of major resource projects is to be expected given that Australia is a resource-rich country and many commodity prices are at or close to their historical peaks.

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

<i>Industry^a</i>	<i>Number of projects</i>	<i>Value of projects^b \$ million</i>	<i>Value as a per cent of total</i>
Mining	164	450 648	48.5
Transport and storage	204	276 117	29.7
Electricity, gas and water	130	45 143	4.9
Communication	6	44 891	4.8
Community and other services	212	39 641	4.3
Manufacturing	31	23 732	2.6
Mixed use	43	16 428	1.8
Finance, property and business services	54	14 846	1.6
Trade	47	10 112	1.1
Accommodation	25	4 374	0.5
Government	9	1 769	0.2
Agriculture and Forestry	2	1 220	0.1

^a Classifications used by DAE are based on the Australian and New Zealand Standard Industrial Classification (ANZSIC). Includes projects that are possible, under consideration, committed and under construction. ^b The 'value' of a project refers to the estimated gross capital expenditure for the project.

Source: DAE (2013).

Economic infrastructure projects

Infrastructure projects in the transport and storage; electricity, gas and water; and communication industries also represent a significant share of major project investment in Australia. In early 2013, they accounted for two-fifths of the total value of capital spending on major projects (DAE 2013). The majority of these by number were in the transport and storage and the electricity, gas and water industries. But in terms of size, the National Broadband Network project is Australia's largest economic infrastructure project in history, valued at \$44 billion (DAE 2013).

Engineering projects dominate the landscape

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

Table 2.2 Investment by sector

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

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

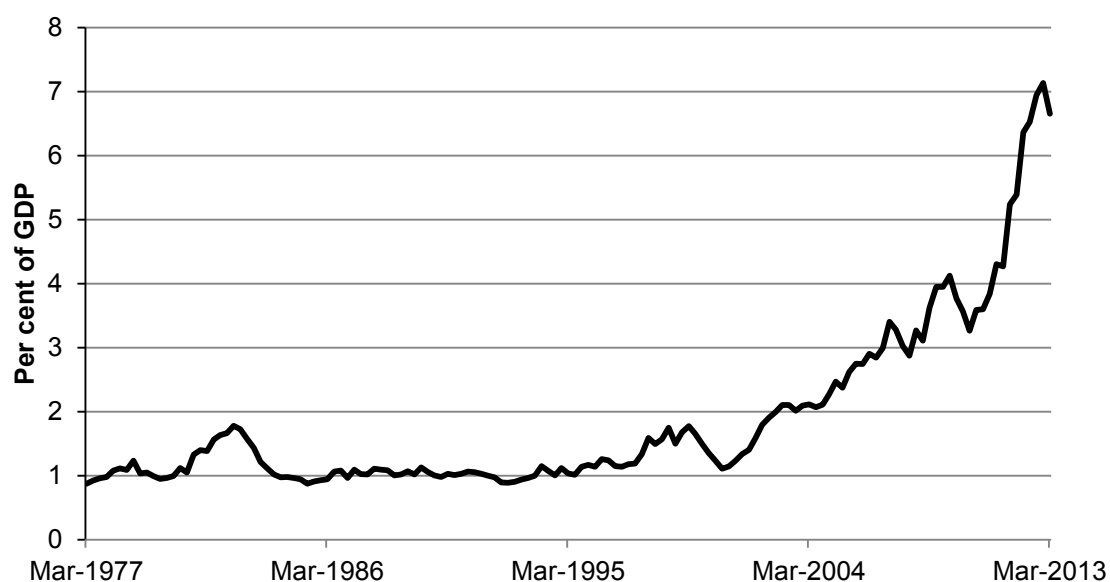
^a Classification based on the investment classification used by the ABS in classifying engineering construction and non-residential building projects. ^b The 'value' of a project refers to the estimated gross capital expenditure for the project.

Source: DAE (2013).

The ABS measure of new engineering construction expenditure includes all expenditure on civil engineering works regardless of size, and is therefore only a proxy for the value of major project construction. Figure 2.1 indicates that new engineering construction has steadily increased over the last decade and now comprises about 7 per cent of GDP, a seven-fold increase from the average level of the previous three decades of 1 per cent.

Figure 2.1 New engineering construction has risen sharply^a

March 1977 to March 2013 (seasonally adjusted)



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

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

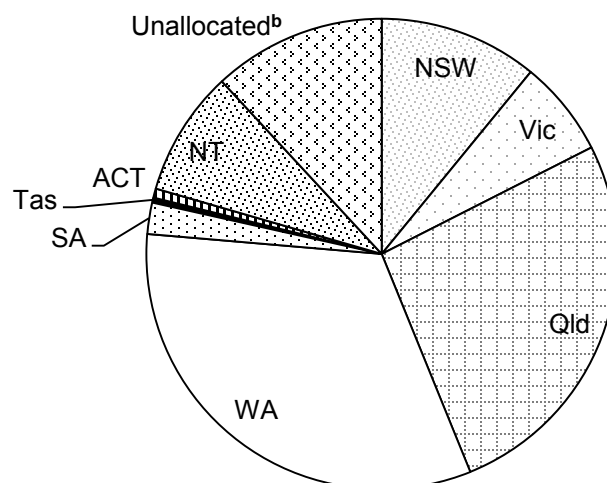
The split between public and private projects

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

Where is investment taking place?

Nearly two-thirds of investment in major projects is located in Western Australia and Queensland, reflecting the fact that resource projects, which account for almost half of total major project investment and tend to be high-value, are concentrated in these two states (figure 2.2). Indeed, investment in resource projects is largely responsible for the dramatic increase in the value of projects in Western Australia and Queensland over the last five years (figure 2.3). In a similar vein, the surge in the value of projects in the Northern Territory in March 2012 is attributable to the decision to proceed with the \$31 billion Ichthys gas field project Aboriginal Affairs and Northern Development Canada 2012, Beaufort Regional Environmental Assessment: Annual Progress Report 2011-2013, September, Ottawa (DAE 2012).

Figure 2.2 Major project investment by jurisdiction
Definite projects valued at \$20 million or more^a

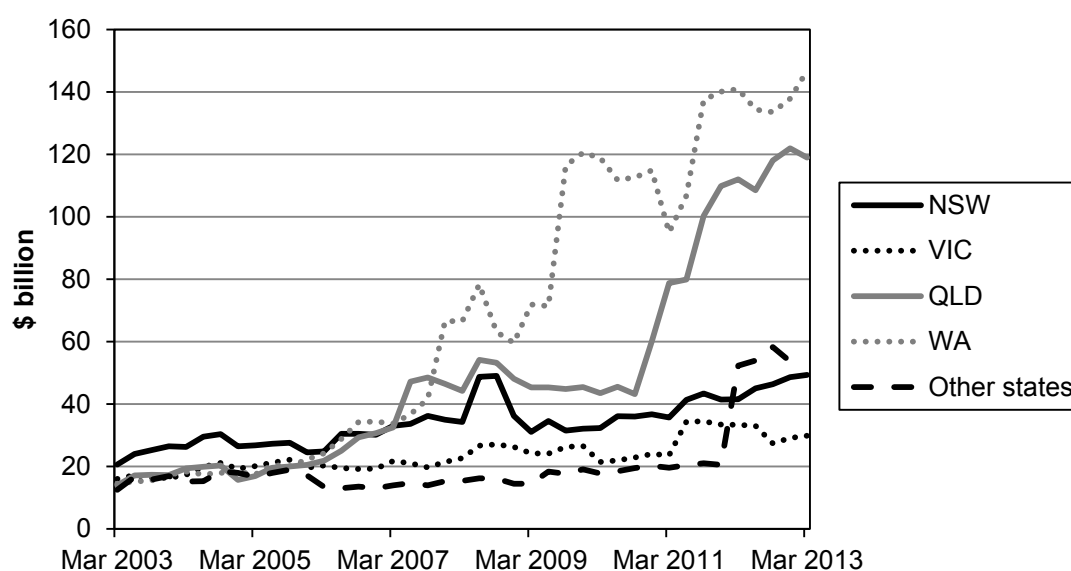


^a Includes projects listed as 'committed' or 'under construction' in the database. ^b Includes projects not based in a single state or territory and projects for which the location is undecided.

Source: DAE (2013).

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

Figure 2.3 Major projects by jurisdiction
Definite projects valued at \$20 million or more, 2003 to 2013^a



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

Source: DAE (2013).

3 Major project assessment and approval processes

Key points

- Governments regulate major project developments for two broad reasons:
 - to facilitate their development (either as private or as publicly funded projects)
 - to manage and balance the risks that major projects may have on environmental and heritage values, local amenity and other impacts that bear on community wellbeing.
- The powers for granting a major development approval are distributed between:
 - the Australian Government, which is responsible for assessing and approving actions that are likely to have a significant impact on matters of national environmental significance, projects on Commonwealth land and waters, and actions by certain Commonwealth agencies
 - State and Territory Governments, which have the primary role in development assessment and approval processes for major projects. (Local governments have a role in planning and ‘secondary approvals’.)
- The legislation governing major developments is extensive and complex. To deal with this complexity, governments have adopted two broad approaches (sometimes known as ‘fast track’ approaches) for declared major projects:
 - development assessment legislation or ministerial call-in powers that define a dedicated assessment pathway
 - specific administrative arrangements (for example, lead agency arrangements) and special units to coordinate and accelerate the approval process.
- A major project proponent may need to undertake an impact assessment and obtain approvals before the development can proceed, including environmental protection, planning and zoning, land use, and heritage, social, cultural and Indigenous issues.
- The seamlessness of jurisdictions’ assessment processes differ. In some cases (for example, New South Wales), assessment is mostly centralised through a single assessment authority that makes referrals to other agencies. Others (such as Victoria) rely more on assessments being conducted by separate agencies.
- Across levels of government, bilateral agreements on the assessment or approval of *Environmental Protection and Biodiversity Conservation Act 1999* controlled actions by the State or Territory Government on behalf of the Commonwealth can create a more seamless development assessment and approval process. All jurisdictions have entered into assessment bilaterals with the Commonwealth. There are currently no approval bilaterals. Strategic assessments of State Government policies can also reduce the need for multi-jurisdictional approvals.

Well-designed and administered legislation and regulation governing the assessment and approval of major developments is critical to the achievement of ecologically sustainable development. In Australia's federal system of government, powers for granting and determining the conditions attached to an approval for a major development are divided across the federal, state and territory, and local levels of government. The institutional arrangements, legislative instruments and regulatory agencies involved in this framework are both extensive and complex.

This chapter begins with an overview of the roles and responsibilities of the Australian, and the State and Territory Governments in major project development regulation. It then provides a selective summary of the key legislation that frames development assessment and approval (DAA) and the main features of how these processes work. Appendix B gives a more comprehensive listing of the legislation governing major developments in Australian jurisdictions.

3.1 Major projects and the regulatory framework

Why do governments regulate development activity?

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

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

However, issues arise when markets are incomplete or do not function efficiently, thus price discovery is absent or unreliable. In these cases, market signals (prices) alone may fail to identify how a community values assets without markets that may be adversely impacted by a major development. These assets include noise, air and water pollution, loss of urban amenity, and destruction of heritage assets. Similarly, a project may deliver benefits that cannot easily be captured by the proponent, even though they are valued by the community. Examples include urban transport infrastructure projects that reduce congestion, but improve access to employment

and services and benefit the urban environment. In other words, there is a market failure.

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

DAA processes also provide a mechanism for the public to participate in development decisions. Public participation may be sought to gather information, identify and possibly resolve differing opinions or competing objectives among stakeholders, or enhance public understanding, trust or support for decisions. Some have argued that ‘the basic legitimacy of an [environmental impact assessment] process is questionable if the process does not provide for meaningful participation’ (Sinclair, Schneider and Mitchell 2012, p. 85).

Mechanisms to facilitate a major development through the regulatory process

Given the potentially significant impacts of a major development, the regulatory requirements that a proponent must meet are extensive. They typically include approvals for environmental protection, zoning and land use, planning and development assessment, land acquisition, and heritage, social, cultural and Indigenous issues. The complexity of the system is compounded by the need to obtain approvals from multiple regulators within a jurisdiction, and across jurisdictions (when a project spans local government or state borders or impacts on matters within the Australian Government’s jurisdiction).

Understanding how the system functions as a whole and what specific requirements are needed can be daunting. This can still be the case for major project proponents who are usually well-resourced companies or government agencies, with significant technical expertise in managing approvals processes. Nevertheless, to deal with this complexity, all Australian jurisdictions have put in place specific mechanisms designed to guide and facilitate a major project proponent through the regulatory approvals process. This helps to promote the achievement of the broad regulatory goal of ecologically sustainable development. It can also reduce the cost of compliance.

In practice, governments have adopted one of two approaches. One is to establish specific development legislation that provides a streamlined assessment pathway that is dedicated to major project developments of particular significance (economic or other) for the state. The other approach is to apply regular DAA processes, but to establish specific administrative arrangements and special units within government to coordinate and accelerate the various licensing agencies involved in the approval process. These approaches are not mutually exclusive, and some jurisdictions use both. Bates (2010) called these approaches ‘fast-track’ mechanisms.

How are responsibilities for major projects divided between governments?

Australia’s federal system shares the powers for granting and determining the conditions attached to a major development approval between the Australian, and the State and Territory Governments.

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

- the Australian Government regulates matters of national environmental significance, certain heritage matters, developments on designated Commonwealth land (such as certain airports and defence facilities) and waters beyond the three nautical mile limit
- State and Territory Governments have the ability to legislate on a broad range of matters, including the environment and cultural and natural heritage
- local governments normally implement and enforce much of the state legislation, but in the case of major projects, local government DAA processes may be deemed to be redundant, as the project is usually assessed and approved at the state level. However, they might have a range of other responsibilities, such as granting permits within their jurisdiction.

This division of responsibilities is dictated by Australia’s Constitution (and the self-government legislation for the Northern and Australian Capital Territories) and broadly reflects the subsidiarity principle. This principle states that ‘policy development, program delivery and decisionmaking should be the responsibility of the level of government best placed to deliver agreed outcomes’ (box 3.1).

Box 3.1 The subsidiarity principle and the governance of planning systems

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

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

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

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

Source: PC (2011c).

The Australian Constitution leaves State Governments with the primary role in DAA processes (at least within state borders). The Constitution does not contain powers for the Australian Government to legislate on environmental or planning matters; the Australian Government has had to use other constitutional heads of power to legislate on the environment, most notably the external affairs power and the corporations power (box 3.2).

Box 3.2 **The Australian Government's power to make environmental laws**

The State and Territory Governments have a broad power to legislate on most matters, including the environment. By contrast, the Australian Government has no direct power to make laws with respect to the environment (except on Commonwealth land, territories and waters). As such, it relies on other Constitutional powers, particularly the trade and commerce power, the trading, financial and foreign corporations power, and the external affairs power to implement its environment policy.

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

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

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

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

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

The matters of national environmental significance are now triggers for the operation of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act) (box 3.3). The Australian Government also has sole responsibility for assessing and approving matters on Commonwealth land or waters.

Box 3.3 Matters of national environmental significance

There are currently nine matters of national environmental significance that can trigger the need for development assessment and approval under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth). These are:

- world heritage properties
- national heritage places
- wetlands of international significance (listed under the Ramsar Convention)
- listed threatened species and ecological communities
- migratory species protected under international agreements
- Commonwealth marine areas
- the Great Barrier Reef Marine Park
- nuclear actions (including uranium mines)
- water resources impacted by a coal seam gas development or a large coal mining development.

Part 3 also protects the environment on Commonwealth land and the environment generally in relation to actions by Commonwealth agencies.

3.2 Legislative framework for development assessment and approvals

As already noted, the Australian Government's power to legislate on matters that bear on how major developments are assessed and approved is limited by the Constitution. In addition to matters of national environmental significance, the Australian Government has jurisdiction over matters on Commonwealth land or waters, including certain airports (*Airports Act 1996*), offshore minerals (*Offshore Minerals Act 1994*), petroleum (*Offshore Petroleum and Greenhouse Gas Storage Act 2006*), historic shipwrecks (*Historic Shipwrecks Act 1976*), fisheries (*Fisheries Management Act 1991*), Indigenous heritage and native title regulation.

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

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

Key points from the legislation relating to major project DAA processes include that:

- every state has legislation that defines a major project and sets out the DAA process. Most states have multiple pathways depending on the type of project
- most jurisdictions have separate legislation for the assessment and approval of mining projects
- a major project will ordinarily be required to conduct an environmental impact assessment. Other impact assessments (such as a social impact assessment) might also be required
- regimes for the protection of Indigenous heritage vary significantly between jurisdictions. They differ in terms of what heritage is protected, how it is protected and who decides whether an activity can go ahead, for example, when harm to an Indigenous heritage site cannot be avoided
- when a major project proposal impacts on habitat, biodiversity or native vegetation, a range of legislation is in place to regulate these impacts. Proponents of major projects might be required to obtain a permit, enter into an environmental management plan or comply with specific requirements.

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

<i>Category of legislation</i>	<i>Comments</i>
Planning, zoning and development assessment	Most states have multiple pathways for assessing and approving projects. All development applications are assessed against state, regional and local strategic plans, but these can sometimes be overridden for major projects.
Mineral resources	Specific legislation applies to mineral resources. However, large mining projects are often subject to development assessment under a dedicated major project pathway.
Petroleum	Specific legislation applies to petroleum developments. The Australian Government regulates areas more than three nautical miles from the coastline.
Environment and natural resource management	This legislation might require an environmental impact assessment, an environmental management plan, and/or a works permit.
Heritage	The Australian Government also has a role in heritage matters under the EPBC Act.
Indigenous heritage	Consultation with Indigenous groups might be required. The Australian Government has powers to intervene where state processes are deemed to have failed.
Land access and acquisition	There are specific tenure requirements for development on Crown land.
Native title	The Federal Court has a key role in determining native title claims.
Marine and coastal	The Australian Government regulates development in areas more than three nautical miles from the coastline, and specific areas, such as the Great Barrier Reef and the Australian Antarctic Territory.
Pollution and waste management	The Australian Government regulates areas more than three nautical miles from the coastline and on Commonwealth lands.

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

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

3.3 How are major developments assessed and approved?

The assessment and approval process for major developments vary significantly within and between jurisdictions. Notwithstanding this, there are four broad stages of a major project DAA process that are common to all jurisdictions (box 3.4).

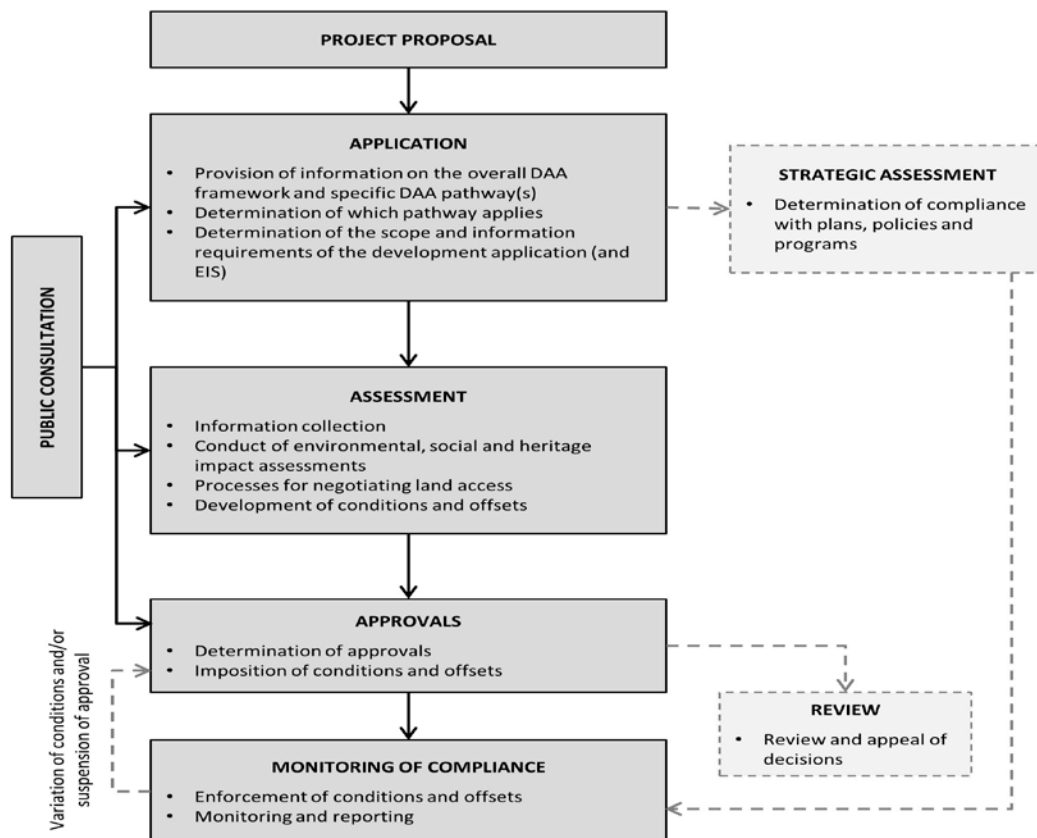
These stages are described briefly in this section and examined in more detail in subsequent chapters.

Box 3.4 The four stages of the major project DAA process

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

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

Not all of these activities necessarily apply to all assessment and approval processes.



Application stage

Declaration of a major project

For a development to be declared a major project, it must meet the criteria for a ‘major project’ as set out in the legislation. These criteria or triggers differ between jurisdictions (box 3.5). If the project does not meet the criteria, then the Minister may still have discretion to declare that the project be assessed under a particular pathway. Application stage processes are discussed further in chapter 6.

Box 3.5 Triggers for declaring a major project

- In some jurisdictions, special assessment pathways are triggered by the capital value of the project. For example, in New South Wales, a project will be declared a ‘state significant development’ if it falls into one of 24 development classes and has a capital value greater than \$30 million. Similarly, Western Australia considers a project to be a major development if it has a capital value greater than \$15 million (within the City of Perth) or \$7 million (outside the City of Perth).
- Other jurisdictions adopt the subjective criteria of whether the project is sufficiently ‘significant’, ‘important’ or ‘complex’. In South Australia, a project may be declared a ‘major development’ if it is of major environmental, social or economic importance. In Queensland, a ‘coordinated project’ will be declared if it has complex approval requirements; strategic significance to a locality, region, or the State; significant environmental effects; or significant infrastructure requirements.
- Some pathways are triggered by projects of a particular type. For example, in Victoria, a project will be declared a ‘major transport project’ if it comprises road, rail or other infrastructure that can be used for the movement of persons or goods, a port, or a facility at which goods can be transferred or temporarily stored.
- Ministerial discretion plays a role in many of these triggers, both in determining whether certain criteria are met, and also in the decision whether to declare a project when it meets (or even if it does not meet) the criteria. In the Northern Territory, the major project assessment pathway is triggered by ministerial discretion alone. Victoria and the ACT rely on the Minister ‘calling in’ a project to assess and approve it.
- The Australian Government does not have any dedicated major project assessment pathway. However, the Australian Government has a Major Project Facilitation Program. To access this program, a project must either: significantly boost Australian industry innovation; have significant net economic benefit for regional Australia or have an estimated investment in excess of \$50 million and make a significant contribution to economic growth, employment and/or infrastructure. Under the *Airports Act 1996*, development carried out at an airport site is generally defined as ‘major airport development’ if the cost of construction exceeds \$20 million or is likely to have a significant environmental impact.

Sources: Commonwealth, State and Territory websites.

Major projects can have significant positive or negative impacts on a state or territory. In these situations, the Minister may have a reserve power to call-in a development application and decide the application in place of the nominated assessment manager, or declare that the project will be assessed under a particular pathway. For example:

- in Queensland, the Minister has broad call-in powers. When the power is exercised, the Minister is required to table a report with parliament
- in Victoria, exercise of the Ministerial call-in power is governed by guidelines
- in South Australia, the Minister has discretion to declare that a project will be assessed under one of the major project pathways.

Special legislation and state agreements

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

The use of special legislation has been criticised for allowing decisions to be made that are inconsistent with the wider DAA framework.

In South Australia, retrospective enabling legislation was used in an attempt to facilitate the Ophix tourist development at Wilpena Pound in the Flinders Ranges. In a long-running dispute over the project, the Australian Conservation Foundation and the Conservation Council of SA had unsuccessfully challenged the legality of certain planning approvals and were awaiting the outcome of an application for special leave to appeal to the High Court. The State Government, fearing an adverse finding (or simply seeking to expedite the project) passed legislation to retrospectively cure any defects in due legal process that may have taken place in the development approval process. (Parnell 2000)

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

... are used to foster major developments, including mineral, petroleum and related downstream processing proposals, together with associated infrastructure investments. Such proposals require long term certainty, extensive or complex land tenure and are often located in relatively remote areas of the State requiring significant infrastructure development. (DPC (WA) 2011a, p. 10)

State agreements and special legislation are used for many different types of projects.

-
- Western Australia has 62 state agreements for a wide range of industries, including alumina, oil, salt, mineral sands, gas, uranium, iron ore, diamonds, railways, silicon, and industrial lands.
 - Victoria relied on special legislation for an urban road development: *Eastlink Project Act 2004*.
 - Tasmania relied on special legislation for a power station: *Bell Bay Power Station Act 2004*.
 - Queensland has at least 13 coal, aluminium and nickel mines under state agreements, as well as the *Gladstone Power Station Agreement Act 1993*.

Assessment stage

After the DAA pathway has been determined, it is necessary to decide what assessments are required and the scope of those assessments.

For example, the project might require an environmental impact assessment (EIA). An EIA is a systematic process for the examination and evaluation of the environmental effects of proposed activities that can be used to inform decision makers about the environmental impacts of a proposal and how they will be managed (Bates 2010) (box 3.6). If an EIA is required, the assessment manager will have to determine the scope of the EIA by developing terms of reference (which may involve public consultation).

Other assessment processes might also apply, for example, assessments related to heritage matters, Aboriginal land rights and native title, and social impacts on local communities.

The way the assessment stage is managed varies between jurisdictions; some jurisdictions are more seamless than others. For example, the New South Wales Department of Planning is responsible for conducting an integrated assessment for state significant development and state significant infrastructure in that state.

Where relatively integrated assessment arrangements apply, other agencies might participate in the process through referral arrangements. For example, the assessment authority may be required to seek input from agencies that have responsibility for particular project impacts, such as heritage issues or the management of a forest reserve. Referral agencies might provide advice, suggest conditions, or in some cases, mandate conditions.

Box 3.6 **The environmental impact assessment process**

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

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

Source: Bates (2010)

In other jurisdictions, assessment arrangements are more disparate and a number of standalone assessment processes apply. Governments have established various administrative arrangements to help coordinate these processes (chapter 7).

Public projects

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

- In New South Wales, specific provisions apply to state significant infrastructure, critical state significant infrastructure, and Crown development. Proposed reforms will allow deemed approvals for public priority infrastructure identified in strategic plans (NSW Government 2013).
- South Australia has different assessment tracks for public (Crown infrastructure) and private projects (major developments).
- In Queensland, the *Transport Infrastructure Act 1994* governs certain kinds of public projects, such as ports.

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- In Victoria, Major Projects Victoria has a facilitative role for public projects, and the *Major Transport Projects Facilitation Act 2009* covers most government-funded transport infrastructure projects.
 - In Tasmania, the major infrastructure project pathway was established for assessing and approving linear infrastructure, such as roads, railways and transmission lines.

Approval stage

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

This is discussed further in chapter 8.

Secondary approvals

In addition to the primary approvals for development to go ahead, there may also be a number of licenses required for environmental matters, or approvals of works or management plans. These can also contain conditions.

- It is not uncommon for major projects to need 70 different primary and secondary approvals, licenses, permits and authorisations (Business Council of Australia, sub. 43).
- A Productivity Commission review (2009b) of the upstream petroleum sector found a single liquefied natural gas project could require up to 390 regulatory approvals.
- Dredging Moreton Bay to build a new runway at Brisbane Airport, required a number of secondary approvals, in addition to the primary approvals to allow the development to proceed (under the *Airports Act 1996* (Cwlth), EPBC Act, and the *Environmental Protection Act 1994* (Qld)) (table 3.2).

Table 3.2 Secondary approvals relevant to dredging Moreton Bay
Brisbane Airport Corporation, 2007

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

^a Agencies current at time and may have changed since then.

Source: Based on Brisbane Airport Corporation (2007)

Review and appeal

Review and appeal processes can allow proponents, participants in the public consultation process and/or members of the community to seek reconsideration of a DAA decision. The persons that can bring a review application differ between jurisdictions, but review rights for major projects are typically more limited than review rights for ordinary developments.

There are two types of review available. The first type is a merits review which allows the decision made by the original decision maker to be challenged. In this case, a review body looks at whether the decision was the ‘correct or preferable’ one. However, merits review can be limited, such as by restricting the matters or materials the review body can consider (limited merits review). The second type of review is a judicial review. It seeks to determine if a decision was lawful and reasonable, but not whether a preferable decision was available. This is more restrictive in scope and looks at the legality of the decisionmaking process, rather than the outcome of the decision itself.

Review processes are discussed further in chapter 9.

Monitoring compliance and enforcement

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

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

Consultation

The stakeholders involved in the DAA process are regulators, project proponents and communities. Different forms of consultation can occur between these stakeholders. For example, consultation between the proponent and the regulator can occur in the form of pre-application meetings.

The most widely acknowledged form of consultation is public consultation with communities. Public consultation increases transparency of decisionmaking, builds public confidence in the decisionmaking process, increases the information available to decision makers, and helps regulators to balance competing interests. Participation in the public consultation process can also give rise to appeal rights.

Most commonly, public consultation occurs when a proponent has submitted the EIA to the regulator and communities have the opportunity to comment on it. However, some jurisdictions also allow communities to participate in the development of the terms of reference for the EIA. Examples of this include:

- major transport projects and the environmental effects statement process in Victoria
- coordinated projects in Queensland
- projects of state significance and major infrastructure developments in Tasmania
- certain controlled actions under the EPBC Act.

This is discussed in chapter 6.

It is also possible for public consultation to occur outside the project-specific DAA process, for example, in the development of strategic plans or strategic assessments (box 3.7).

Box 3.7 Examples of consultation methods in the development of strategic plans and strategic assessments

Western Australia conducted public consultation in the strategic assessment of the Perth and Peel region, and South Australia conducted public consultation in the development of their strategic plan, as follows.

In Western Australia's strategic assessment of the Perth and Peel regions, consultation on the draft terms of reference and draft report on the impacts of actions under the matters of national environmental significance plan was conducted as required. The Western Australian Government also undertook additional community engagement and stakeholder consultation by establishing a Strategic Assessment Stakeholder Reference Group comprised of key stakeholder groups, organisations and peak bodies to facilitate information sharing and detailed consideration of views and issues.

South Australia has made use of innovative technologies, such as social media, to facilitate public participation in the development of its strategic plan. The consultation program allowed over 9200 people to participate through Facebook, Twitter and an online discussion forum.

Sources: DPC (WA) (2011b); Government of South Australia (2013).

Strategic assessment and planning

Strategic assessment is a tool that focuses on the potential impacts of plans, policies and programs, rather than individual projects. As such, it can reduce or even remove the need for subsequent project-level assessments. Under the EPBC Act, the Australian Government has the power to conduct strategic assessments with State and Territory Governments, or with other partners, such as mining companies. To date, four such strategic assessments have been completed and a further 12 are in progress, including one for the Great Barrier Reef.

Strategic assessments conducted under the EPBC Act can also remove the need for further Commonwealth approval of some subsequent projects. To a significant extent, the effect is the same as a limited approval bilateral. State and Territory Governments can also conduct strategic assessments of various types.

Strategic planning is another tool that can help to improve the way DAA processes operate. Strategic planning is ‘a way of achieving a balance between conflicting objectives or priorities and resolving the conflicts between economic, social, environmental and cultural imperatives’ (DAF 2001, p. 8). Strategic planning documents set out what the ground rules are for the use, development, and/or conservation of land (DAF 2001). Where such plans are underpinned by community consultation and consideration of environmental, heritage and other values, they can help proponents of major projects design proposals that are likely to be less contentious and have fewer assessment issues.

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

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

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

4 Benchmarking and good regulatory practice

Key points

- Benchmarking involves collecting data to construct indicators that enable comparisons of economic performance and of approaches to policy across jurisdictions. Indicators can either be quantitative (statistical or empirical) or qualitative (descriptive).
- Policy benchmarking is helpful to identify those practices that work well and those that do not.
- There are practical challenges in benchmarking complex and diverse development assessment and approval (DAA) processes for major projects. These challenges include:
 - controlling for differences in policy objectives and preferences between jurisdictions
 - gleaning insightful lessons regarding the efficiency and effectiveness of DAA processes from quantitative indicators alone.
- In light of these issues, the Commission has adopted a two-pronged analytical framework to identify leading practices and where there is scope for improvement.
 - Processes in individual jurisdictions are examined against a set of criteria that relate to the design, governance, implementation and performance of the regulatory arrangements.
 - Case studies of DAA processes are used to illustrate the impacts of various approaches.

The terms of reference tasked the Commission with benchmarking major development assessment and approval (DAA) processes across jurisdictions. In particular, the Commission has been asked to examine how different approaches affect the costs incurred by business, deliver good regulatory outcomes and provide transparency and certainty to facilitate business investment.

This chapter explains the analytical framework that the Commission has used to benchmark DAA processes, to define leading practices and to identify where there is scope to improve current regulatory practices.

4.1 What is benchmarking and why is it useful?

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

Benchmarking helps to identify practices that work well and those that do not. It can lead to improved efficiency and effectiveness of regulation by:

- exposing areas where improvement is needed
- identifying good practice processes
- setting targets for improvement
- encouraging innovation.

Comparisons between organisations and especially between many organisations may also help to identify links between processes and performance (Helgason 1997).

In addition to identifying better approaches, benchmarking can strengthen incentives to put these approaches into practice.

Benchmarking can promote ‘yardstick’ competition across jurisdictions (or levels of government) and, through this competition, foster ongoing improvement in the regulatory environments of those jurisdictions. This increased transparency and accountability also places incentives on policy makers to improve their regulatory regimes and, in turn, to reduce unnecessary burdens on business. To the extent that gaps between current and better practices can be identified and made transparent, benchmarking can promote the accountability of regulators for moving to the better regulatory practices. (PC 2009a, p. 57)

Limitations and challenges of benchmarking

Benchmarking complex and diverse DAA processes across Australian and international jurisdictions is challenging.

A first challenge is data availability. Benchmarking typically requires quantitative measures of the efficiency and effectiveness of regulatory arrangements. Quantitative indicators reduce the need for subjective assessments, enable ranking across jurisdictions, and can provide information about costs and benefits. However, there are few available quantitative input-based performance measures — such as the cost per environmental impact statement — or output-based indicators, such as

the time taken per approval. In addition, these indicators do not capture significant aspects of DAA processes, especially their quality.

A second challenge with benchmarking is that governments rarely have common regulatory objectives, and often use regulatory instruments to fulfil more than one objective. Benchmarking cannot easily account for this sort of variation across regulatory regimes. Similarly, factors that are unique to a given major project can affect the efficiency and effectiveness of DAA processes. For example, it would not be meaningful to compare directly the number of approvals required for an uncontentious project, with a complex project that spans multiple jurisdictions and triggers regulations relating to native title and matters of national environmental significance.

A third challenge is controlling for differences in regulatory objectives and major project characteristics, which is needed to put benchmarking results in proper context. Standard metrics, such as the time taken for approval decisions, have been criticised as too simplistic, given the many influential factors that vary between projects and jurisdictions. Moreover, these indicators are not a *direct* measure of the *unnecessary* burden from inefficient approval processes (PC 2007).

Another challenge with benchmarking concerns how the results are presented. Often a ‘league table’ or ‘score card’ approach is used to indicate the relative performance of jurisdictions. Performance rankings can act as a catalyst for change. However, rankings alone cannot reveal the reasons for differences in performance — especially when based on perceptions — or identify leading policy practices.

The Commission has synthesised and analysed Australian and international studies that rank the performance of Australia’s DAA processes or regulatory framework more generally. These are summarised in table 4.1 and presented in more detail in appendix D. In most international studies, Australia performs reasonably well in relation to the overall efficiency of DAA regulatory systems.

Despite Australia’s favourable rankings, many participants in the study suggested that Australia’s major project DAA processes are inefficient and ineffective and require significant reforms. The reasons for a dichotomy of views may be linked to the shortcomings of benchmarking discussed above. But they may also reflect a disconnect between regulator practices as prescribed and regulator practices as implemented. The gap between *de jure* and *de facto* regulatory practices may be large.

Table 4.1 Comparisons of planning and approval processes and regulatory environment

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
Survey of Mining Companies 2012-13 <i>Fraser Institute</i>	This survey ranks the mining investment climate of 96 different jurisdictions around the world. Jurisdictions are assigned scores for each of 17 policy factors.	The best ranked Australian jurisdiction for mining investment in 2012-13 was Western Australia (15th of 96) and the lowest ranked Australian jurisdiction was Tasmania (49th overall).
Global Petroleum Survey 2012 <i>Fraser Institute</i>	This survey ranks 147 jurisdictions around the world in relation to the barriers to investment in upstream oil and gas exploration and production.	South Australia was ranked highest for petroleum investment (29th overall). Western Australia and the Northern Territory ranked relatively high on encouraging investment by reducing regulatory uncertainty, but not as well on avoiding regulatory duplication and inconsistencies.
Doing Business 2013 <i>World Bank</i>	The report covers 185 economies and 11 areas of the regulatory environment.	Australia was 10th overall on the ease of doing business and 11th on dealing with construction permits.
The Global Competitiveness Report 2012-13 <i>World Economic Forum</i>	Global Competitiveness Index is a weighted average of components measuring aspects of competitiveness.	Australia was ranked 20th overall in a sample of 144 countries. (This included ranking 96th on the burden of complying with government regulation, and 18th on the efficiency of the legal framework in settling disputes.)
2013 Ranking of Countries for Political Risk: Where Not to Invest <i>Behre Dolbear</i>	Covers 25 countries in relation to potential destinations for global mining investment and ranks them based on seven criteria.	Australia was ranked the best destination for mining investment of all 25 countries.
Development Assessment Report Card 2012 <i>Property Council of Australia</i>	Ranks the planning system of each Australian jurisdiction against the Development Assessment Forum leading practice principles.	The Northern Territory was ranked first. Western Australia made significant improvement between 2010 and 2012.
DAF Reform Implementation Report Card 2012 <i>Property Council of Australia</i>	Ranks the progress of each Australian jurisdiction's planning system in implementing planning reforms.	The Northern Territory was ranked the best jurisdiction overall. South Australia made the most advances. New South Wales scored lowest.

Sources: Behre Dolbear (2013); Fraser Institute (2012; 2013); PCA (2012a, 2012b); WEF (2013); World Bank and the International Finance Corporation (2013).

To a certain extent, these challenges to undertaking benchmarking can be managed by placing caveats and qualifications on benchmarking results and how they should be interpreted. However, this can complicate the interpretation of the benchmarking results, and their value diminishes as the incidence of caveats increases. Contextual information on the policy objectives and the social and environmental preferences

of those jurisdictions is also helpful. However, the availability of relevant contextual information may be limited.

Making international comparisons

Benchmarking Australia's performance against international best practice is particularly demanding, since projects have different impacts and are located in vastly different contexts. Moreover, other countries may have different regulatory objectives, institutional frameworks and political systems. Countries at different stages of development or with different preferences place different weight on policy objectives, or may attach more or less significance to public involvement in decisionmaking.

Such differences mean that there is not a perfect international comparator and it is not feasible to label a jurisdiction's DAA regulations as international or Australian 'best practice'. On the other hand, overseas experience can be a rich source of insights. The issue is how to harvest these insights while excluding practices that would not be feasible in Australia.

The Commission's approach has been to focus on countries that have similar political systems, are at roughly equivalent stages of development, and face broadly equivalent challenges in making tradeoffs between commercial, environmental and heritage concerns. It has focused on experience in Canada, the United Kingdom and the United States, and will review practice in New Zealand in the final report. Canada and the United States, like Australia, are significant resource producers, and all four countries have large infrastructure projects. The study has not focused on lower income countries, in which the policy objectives differ greatly and the institutional arrangements are less comparable.

4.2 A practical approach

A largely qualitative approach, based around criteria and case studies

In light of these methodological issues, the Commission has adopted a largely *qualitative* approach, comparing DAA processes against a set of criteria (or principles) that relate to the design, implementation and performance of regulatory arrangements. Looking at DAA processes through the lens of best practice regulatory criteria illuminates approaches that are likely to lead to good regulatory outcomes and are consistent with the focus in the terms of reference on costs, timeliness, transparency and certainty.

This qualitative approach is supplemented, where feasible, by quantitative indicators, used with a limited number of caveats and qualifications. The Commission has also developed case studies of projects that have been through DAA processes in order to illustrate examples of leading regulatory practice, the impacts of poor regulatory practices and the policy lessons learnt.

By comparing as far as possible ‘like with like’, judicious use of benchmarking and case studies can identify relevant ‘leading practice’ approaches to major project assessment and approval, as well as practices that do not work well. Where this analysis identifies insights or a leading practice from an Australian or international jurisdiction that the Commission considers could improve DAA processes in Australia, it has explained why it believes this to be the case.

The criteria for benchmarking regulatory practice

Since its establishment, the Commission has done extensive work on regulatory policy (2009a, 2011a, 2011c). For this study, the Commission has drawn on this work and on a range of other sources (for example, Australian Government (2010b); COAG (2007); Development Assessment Forum (2005, 2009); Department of Treasury and Finance (Vic) (2011); Infrastructure Australia (2009); OECD (2010); Regulation Taskforce (2006); and the Victorian Competition and Efficiency Commission (2009)) to develop 12 regulatory principles that constitute a benchmark of good regulatory governance and conduct (box 4.1). Regulations that are designed, administered and enforced in line with these criteria are more likely to achieve the desired regulatory outcomes at a lower cost to the proponent and to the regulatory agency.

The Commission has used these criteria to identify where there is scope for improvement, to assess the performance of jurisdictions, and to provide insights into leading practices. For example, if all jurisdictions are performing well in relation to relevant criteria in a particular stage or aspect of the DAA process, there is unlikely to be much to be gained from analysing that matter. On the other hand, where all or some jurisdictions are falling short of a good practice criterion, there is a stronger case for analysing that issue in more detail.

The rest of this section describes the criteria.

Box 4.1 Commission criteria for benchmarking regulatory practices**Regulator governance**

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

Regulator conduct

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

Regulator governance

Governance frameworks provide a structure through which the objectives of regulators are set and the means of attaining these objectives and monitoring performance are determined. Governance principles, such as those outlined below, should provide incentives for regulators to pursue objectives that will lead to broader community benefits and build confidence in the operation of the regulatory system.

Clear, well-defined regulatory objectives

DAA processes address situations where the private and social costs and benefits of development diverge, by imposing conditions on projects that are intended to remove this divergence. However, regulation in this (or any) area can be over used or poorly directed. This is less likely to happen when regulatory objectives have been clearly defined through a process that has established a robust rationale for intervention. Such a process should specify precisely the problem that regulation is intended to address and identify why there is a role for government to address that problem.

Having clear objectives has other benefits, as it:

- diminishes regulators' discretion to extend their activities beyond what Parliament intended
- reduces uncertainty about how regulation will be interpreted and what is needed for compliance
- establishes the basis for assessing the performance of regulators and holding them accountable
- provides a focus for regulators and so guides their resource allocation and development of expertise (VCEC 2010).

Clarity in roles and responsibilities

With objectives clearly defined, there needs to be clarity about who is responsible for delivering them. All levels of government, and different agencies within each level of government, can be involved in DAA processes. This creates scope for problems such as:

- overlap and shared responsibilities between different agencies
- conflicts between the roles performed by different agencies
- conflicts of interest in the roles performed by an agency.

These problems are less likely to be present when the roles and responsibilities of all entities involved in DAA processes are set out clearly. For example, it may be useful if statutory referrals are set out in one document and specify the role of the referral agency (DAF 2009). When decisionmaking authority can be delegated, the circumstances under which that authority is delegated, and how it is to be exercised, should be set out clearly.

Accountable decision makers

When decision makers are clear about their objectives and their roles and responsibilities have been specified, there is a basis for accountability. It is the prospect of being held to account that creates incentives to carry out roles and responsibilities in line with specified requirements.

The accountability of participants in DAA processes is strengthened when there is clear specification of authority for:

- assessors to make recommendations
- approval authorities to make decisions based on those recommendations.

If decisionmaking is delegated, accountability can be diminished, unless the conditions under which delegation is made and the scope of the authority that is devolved, are both carefully specified.

The approval decision that is typically made by a Minister or delegate is the last major step in the DAA process, which involves regulatory agencies, government departments, project proponents and other stakeholders. While a Minister is often ultimately accountable for the approval decision, other entities may have roles and responsibilities in the process for which they are accountable. If the process leads to a decision that is seen to be deficient, it is simplistic to hold only the Minister to account for this. Applying the accountability criterion requires defining the responsibilities for which participants in the process can be held accountable.

Appropriately skilled and resourced institutions

It is unreasonable to hold institutions accountable for their contribution to the DAA process if they have insufficient resources to develop and maintain the skills to perform their responsibilities. The adequacy of resourcing bears on whether the DAA process will lead to desired outcomes.

Chapter 2 described the growth in the number of major projects, some of which are of a scale unprecedented in Australia's history. Proposals outlined later in this report would improve the efficiency of DAA processes and so help to offset the pressure on regulator resources. Effective regulators would have staff development and retention policies to build up necessary skills and reduce turnover.

Appropriate opportunities for public participation and review of decisions

One of the main purposes of DAA processes is to allow evidence to be sought from interested parties that informs the assessment of the project. Consultation can generate evidence and identify options for addressing problems. It also promotes transparency by exposing the merits of decisions, assumptions and the analysis used to make those decisions.

Consultation is important in all stages of the DAA process. Amelia Thorpe suggested:

... Public participation can offer many benefits, including improving the content of decisionmaking by providing decision makers with information about potential benefits and impacts of projects, possible alternatives, and the different perspectives of the many groups that form the public. Participation can increase the legitimacy of decisionmaking, thus reducing opposition to projects and making implementation easier. Participation is also valuable for its educative potential, as a means to raise

awareness among the public about the tradeoffs involved in planning for the future. (sub. 16, p. 4)

In the application stage, consultation helps to identify the issues that need to be addressed, while in the assessment stage it provides evidence about these issues. Further consultation may be needed in the approval stage if there are gaps in the information that the decision maker needs. How much consultation may be needed at this stage depends on the effectiveness of consultation earlier in the process.

Consultation is more likely to be effective if:

- information is given in a wide range of formats
- a variety of forums are used
- it occurs when there is still scope to affect the outcomes
- there is clarity about the consultation process
- the process is accessible to those it is intended to reach
- feedback is provided to those who have made an input (Cabinet Office (UK) 2012); sub. 16).

The choice of consultation methods is evolving, reflecting the fact that the internet has reduced the cost of new forms of engagement, such as electronic polling, deliberative polls, and online tools that can illustrate the consequences of choices, and engage a wider cross-section of the community and draw out tacit community opinion.

Consistency with other regulations and higher level planning strategies

Major developments require approvals under different acts and regulations. When they have different objectives or impose dissimilar approval processes, this can increase both the cost of securing approval and the probability of inconsistent decisions that do not achieve regulatory outcomes. Differences in policy objectives underpin many of the concerns with DAA processes, and bolster the support for project coordination offices, lead agencies and one-stop shops, to address these underlying inconsistencies.

Consistency is enhanced by integrating objectives in different acts and regulations or by governments providing guidance on how different priorities should be weighted, where conflicting objectives are unavoidable.

Regular review and evaluation

DAA processes operate within a plethora of competing pressures that are continually adjusting. This happens as the nature and number of projects change, as technology develops, and as community expectations evolve. Approaches to regulation also develop as there is more experience with, for example, outcome-based regulation or self-accreditation. In such a fluid environment, there can be much to be gained from testing current practices and looking for ways to improve them. Evaluation, for example, can:

- indicate whether regulations are working as intended and, if they are not, suggest ways to address problems
- keep regulation up to date when technological or social forces change
- improve legislation, because the knowledge that legislation will be formally reviewed may increase the quality of initial drafting
- improve the allocation of responsibilities for regulation, if it demonstrates weaknesses and suggests improvements
- build stakeholder support for regulation, if regulators demonstrate a willingness to learn from experience (VCEC 2008).

Good practice regulatory frameworks will therefore normally build in evaluation procedures and mechanisms for building on the lessons from these reviews.

Regulator conduct

Governance frameworks leave considerable discretion as to how regulators administer regulation. Participants in this study had a wide range of views about how this discretion is exercised, but agreed that the impacts could be considerable. The Minerals Council of Australia (sub. 33), for example, cited a survey that found that monitoring or enforcement regimes were either impractical or unduly focused on dictating process rather than outcomes. On the other hand, the Nature Conservation Society of South Australia (sub. 37) considers that the interpretation of criteria under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) has not been sufficiently rigorous and cautious. The Commission has found that regulator conduct has a significant impact in other areas as well (box 4.2).

Box 4.2 The impact of regulator conduct: examples from other areas

In its submission to the Commission's study into regulator engagement with small business, the Council of Small Business of Australia noted that the majority of small business respondents to its survey reported that regulator behaviour is just as important as the design of regulation in contributing to compliance costs:

... respondents [business] indicated that they overwhelmingly considered BOTH regulatory design and regulator behaviour contributed equally to regulatory compliance cost. (2013, p. 3)

Similarly, Business SA submitted:

... it is often the approach and behaviour of regulators that can have a direct impact on how onerous or not the regulation and reporting requirements are for small business. (2013, p. 1)

And in an urban planning context, the Australian Hotels Association has argued:

... it is most often the interpretation of planning laws, rather than the laws themselves, that are the source of obstruction to the desirable improvement of licensed premises which serve the local community. (2011, p. 4)

This section outlines five criteria that identify conduct by regulators that will lead to more efficient and effective outcomes.

Clear and predictable processes

Clear and predictable processes build confidence in the legitimacy of the regulatory framework and reduce the costs of engaging with it. Given that tradeoffs between competing objectives are the focus of DAA processes, there need to be clear and predictable processes for managing these tradeoffs. Regional Development Australia Far North Queensland and Torres Strait (sub. 26, p. 5) submits that 'providing certainty of processes and relevant industry policy is critical to securing investment and economic development'. Business SA (sub. 4) considers that DAA regulation and processes need to be predictable, transparent and easy to understand; and there should be certainty about information requirements.

Clarity and predictability are more likely to be achieved when regulators use a stable set of decision criteria that are well understood and lead to decisions that could have been predicted on the basis of the evidence that is available. When more than one regulator is involved, clarity is assisted if they use the same set of decision criteria. Predictability does not mean that criteria never change. However, changes to criteria should be limited to those that are a logical development of existing methodologies or could have been predicted on the basis of new evidence.

Regulatory outcomes consistent with objectives

This criterion is significant because applying it seeks to reveal the extent to which the DAA process delivers intended outcomes. For example, it would be expected that Commonwealth environmental decisions will be made in accordance with the principle of ecologically sustainable development as set out in section 3 of the EPBC Act.

In addition, by focusing on the link between objectives and outcomes, this criterion directs attention to compliance. For example, there is little to be gained in regulating projects through conditions that are not capable of being enforced. Regulatory outcomes are more likely to be consistent with objectives when approval conditions are in line with the objectives of regulation, are enforceable and are enforced.

Open and transparent processes

Open and transparent processes increase accountability and lead to decisions that more closely reflect the interests of stakeholders. Transparency is enhanced by opportunities for public participation and review and by publishing the reasons for approval decisions. Publication strengthens incentives for decisions to be evidence-based and rigorous, is consistent with procedural fairness, and demonstrates how decision makers have balanced competing priorities.

Proportionate and flexible regulatory requirements

Regulation involves the use of government authority to change behaviour. It typically imposes costs on entities that are regulated, as well as delivering benefits through the consequent change in behaviour. There are typically many different ways to bring about that change in behaviour.

Proportionality is present when:

- alternatives to a particular regulatory approach have been considered and the option that yields the largest community benefits has been chosen
- there are no unnecessary obligations
- regulatory decisions, including conditions that are imposed before approval is given, impose costs that are proportionate to the impacts they are intended to address.

Outcome-based regulation, which focuses on what needs to be achieved, rather than prescribing how it should be achieved, is a proportionate approach in many circumstances.

No unnecessary costs

Administering and participating in approval processes imposes costs on government departments, regulators, the project proponent, and other participants (as well as creating benefits). There are various types of costs:

- the costs of administering the process, such as determining the scope of the assessment, preparing impact assessments and running and participating in consultation processes
- the costs of complying with conditions and offsets that are imposed through approval decisions, and which are borne in the first instance by project proponents
- delay costs that arise if the process delays project planning and implementation, which may take the form of additional holding costs, lost profits and lost interest on foregone profits. Delay costs may not be confined to the project in question.
 - The Hunter Valley Coal Chain Coordinator (sub. 56) pointed out that because projects in the coal chain are interdependent, the capacity benefits of other infrastructure projects cannot be fully realised until a delayed project is commenced.

Comparing jurisdictions draws attention to unnecessary regulatory burdens, given policy objectives, by identifying:

- differences in regulatory requirements for regulations with similar objectives across jurisdictions
- regulatory burdens imposed by regulations with similar objectives and comparing these across jurisdictions
- the extent of regulatory duplication and inconsistency
- inconsistencies and poor practice in the design, administration or enforcement of regulation.

Costs that exceed those that are needed for an effective approval process are wasteful. Such costs are less likely to occur in a regulatory framework that exhibits the other criteria outlined in this chapter, where there are clearly specified objectives linked to outcomes, and the process is run by skilled and accountable regulators, who operate transparently and adopt a proportionate approach to administering regulatory requirements.

5 Evaluating regulatory objectives

Key points

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

This chapter examines and evaluates the regulatory objectives of key planning and policy frameworks relevant to major project development assessment and approval (DAA) processes.

Regulations with clearly specified objectives that are consistent with other policies are likely to better target the policy issues at hand. They would also be easier to understand. Clearer objectives, by constraining discretion and providing a more transparent base for evaluation, will also improve the accountability of regulators and reduce the scope for regulatory creep.

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

The Commission has then made a high-level assessment of selected jurisdictional objectives, drawing out leading practices where possible. It identified and evaluated two key issues around objectives: the level of clarity and consistency of core

objectives; and the scope for better guidance on balancing differing objectives. Before turning to these issues, the next section provides an overview of the broad architecture of objectives across jurisdictions.

5.1 Overview of jurisdictions' DAA regulation objectives

The range of legislation and policies impacting major project DAA processes is vast. Each of these has its own objectives. Agencies, sometimes even the same agency, have multiple objectives to navigate as they implement DAA processes. From the perspective of the proponent, the purpose of the underlying compliance burden is understandably sometimes hard to comprehend. The complexity of the laws and plans that can apply to major projects is illustrated by the example of the Port Phillip channel deepening project (box 5.2). (Appendix B also contains further information on the arrangements applying in Australian jurisdictions.)

Given the scope of policies applying to DAA processes, the Commission has focused on the core legislation governing major project development, namely the primary planning Act (applying to major projects) and the main environmental protection Act. Objectives are determined by analysing legislative objects clauses (box 5.1).

Box 5.1 The role and importance of objects or purpose clauses

It has become common practice to provide an objects clause that indicates to practitioners and the community the general scope and purpose of legislation. It may be included as an early section in the law, with sub-objectives sometimes also specified for later 'Parts'. Interpretation Acts across jurisdictions commonly state that an interpretation that promotes the objects is to be favoured over one that does not.

Commonly, regulators are required to 'have regard to' the Act's objects in framing decisions. Some objects clauses also require decision makers to 'further' the objects.

By guiding interpretation, an objects clause can constrain and guide, to some degree, the exercise of statutory power. The interpretation of objects clauses has sometimes been a material element in past legal cases against development approvals (box 5.5).

Notwithstanding their role in formal legal interpretation, objects clauses can have a wider role through signalling to administrators and the public the law's aims. This can be particularly important, as it can shape how the law is implemented and administered by regulators.

Source: Bates (2010).

Box 5.2 **Legislation and policies relevant to the Port Phillip channel deepening project**

The Victorian Government has reported that the following 'statutory and policy compliance' frameworks applied to this project.

Primary environment assessment and protection legislation and policy

- *Environment Protection and Biodiversity Conservation Act 1999 (Cwlth)*
- *Environment Effects Act 1978 (Vic)*
- *Environment Protection Act 1970 (Vic)*
- *Planning and Environment Act 1987 (Vic)*

Relevant generic policy

- National Strategy for Ecologically Sustainable Development 1992
- Intergovernmental Agreement on the Environment 1992
- Growing Victoria Together (Vic)
- Melbourne 2030 (Vic)
- Linking Victoria (Vic)

Ports and freight legislation and policy

- *Port Services Act 1995 (Vic)*
- Channel Deepening Facilitation Bill (Vic)
- Victorian Ports Strategic Framework 2004 (Vic)
- Melbourne Port@L 2002 (Vic)
- Victoria: Leading the Way 2004 (Vic)
- Shaping a Prosperous Future: Prospects, Issues and Choices 2003 (Vic)
- Next Wave of Port Reform in Victoria 2001 (Vic)
- Linking Melbourne: Metropolitan Transport Plan 2004 (Vic)
- Future Directions 2001 (Vic)

Marine and water environment legislation and policy

- *Quarantine Act 1908 (Cwlth)*

- National Ocean Disposal Guidelines for Dredged Material 2002 (Cwlth)
- Australia's Ocean Policy 1998 (Cwlth)
- Australian and New Zealand Water Quality Guidelines for Fresh and Marine Waters 2000 (Intergovernmental)
- *Coastal Management Act 1995 (Vic)*
- *Marine Act 1998 (Vic)*
- *Pollution of Waters by Oil and Noxious Substances Act 1986 (Vic)*
- *State Environment Protection Policy (Waters of Victoria) Act 1988 (Vic)*
- Schedule F6 Waters of Port Phillip Bay 1997 (Vic)
- Schedule F7 Waters of the Yarra Catchment 1999 (Vic)
- *State Environment Protection Policy (Groundwaters of Victoria) Act 1998 (Vic)*
- Victorian Coastal Strategy (Vic)
- Victorian Biodiversity Strategy (Vic)
- Waste Management Policy (Ships' Ballast Water) 2003 (Vic)
- Industrial Waste Management Policy (Waste Acid Sulphate Soils) 1999 (Vic)
- Best Practice Environmental Management Guidelines for Dredging 2001 (Vic)

Resource conservation and management legislation and policy

- *Fisheries Act 1995 (Vic)*
- *National Parks Act 1975 (Vic)*
- *National Parks (Marine National Parks and Marine Sanctuaries) Act 2002 (Vic)*
- *Crown Land (Reserves) Act 1978 (Vic)*

(Continued next page)

Box 5.2 (continued)

- *Flora and Fauna Guarantee Act 1988 (Vic)*
- *Wildlife Act 1975 (Vic)*
- *Water Act 1989 (Vic)*
- *Water Industry Act 1994 (Vic)*
- *Catchment and Land Protection Act 1994 (Vic)*
- *Land Act 1958 (Vic)*
- Victoria's Biodiversity Strategy 1997 (Vic)
- Victoria's Native Vegetation Management: A Framework for Action 2002 (Vic)

Cultural resource legislation and policy

- *Native Title Act 1993 (Cwlth)*
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cwlth)*
- *Historic Shipwrecks Act 1976 (Cwlth)*
- *Archaeological and Aboriginal Relics Preservation Act 1972 (Vic)*
- *Heritage Act 1995 (Vic)*

Noise policy

- State Environment Protection Policy (Control of Noise from Commerce Industry and Trade) 1992 (Vic)
- Interim Guidelines for Control of Noise from industry in Country Victoria 1989 (Vic)
- EPA Noise Control Guidelines (Construction) (Vic)

Air policy

- State Environment Protection Policy (Ambient Air Quality) 1999 (Vic)
- State Environment Protection Policy (Air Quality Management) 2001 (Vic)
- Industrial Waste Management Policy National Pollutant Inventory (Vic)
- Victoria's Greenhouse Strategy 2002 (Vic)

Tourism and recreation policy

- Green Paper: A Medium to Long Term Strategy for Tourism 2003 (Cwlth)

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

- Victoria's Tourism Industry Strategic Plan 2002–2006 (Vic)
- Melbourne Surrounds Regional Tourism Development Plan 2004–2007 (Vic)
- Victoria's Food and Wine Tourism Plan 2004–2007 (Vic)
- Victoria's Adventure Tourism Action Plan 2002–2004 (Vic)
- Victoria's Nature Based Tourism Directions and Opportunities for Victoria 2000–2003 (Vic)

State Planning Policy Framework (Vic)

Local Planning Policy Framework (Vic)

Other legislation and policy

- *Occupational Health and Safety Act 2004 (Vic)*
- *Essential Services Act 1958 (Vic)*
- *Electrical Industry Act 2000 (Vic)*
- *Mineral Resources (Sustainable Development) Act 1990 (Vic)*
- *Gas Safety Act 1997 (Vic)*
- *Pipelines Act 2005 (Vic)*
- *Health Act 1958 (Vic)*
- *Seafood Safety Act 2003 (Vic)*
- Victorian Shellfish Quality Assurance Program (Vic)
- Dredging Strategy for the Port Waters of Geelong and Melbourne Environmental Management Plan 2000 (Vic)
- Victoria Emergency Management Manual (Vic)
- Melbourne Port Emergency Management Plan 2004 (Vic)
- Port Phillip Region Marine Pollution Contingency Plan 1999 (Vic).

The core objectives across DAA processes primarily revolve around protecting the environment and heritage, and promoting safe and orderly development. Often, sustainable or ecologically sustainable development (ESD) is specifically listed as a central objective.

To illustrate the broad frameworks, table 5.1 summarises the core element of objects clauses across key jurisdictional legislation relevant to major projects.

This table, however, does not provide a full account of how legislation describes the exercise of objectives. Jurisdictions also commonly list a host of other objectives relevant to DAA processes, including the following indicative selection:

- community participation
- proper management of land
- affordable housing or housing choice
- supplying infrastructure
- protecting endangered species and critical habitat
- avoiding or attenuating climate change and urban congestion
- effective waste management and waste minimisation.

Regulators must consider and balance these objectives as they implement DAA regulations.

5.2 Clarity and consistency of objectives

Inconsistencies may arise where policy objectives are not well integrated. This can occur where objectives conflict with one another or overlap. Protecting the environment against ‘no net loss’, for example, may be inconsistent with the principles of sustainable development, which call for decisionmaking that integrates economic, social and environmental considerations.

Moreover, objectives that appear distinct may in practice create overlapping compliance obligations. For example, multiple regulators might require similar surveys or management plans to meet similar objectives. Administrative overlap and compliance burdens may be reduced where legislative objects are refined or objects and related administrative requirements are moved into the legislation applying to the other area.

Table 5.1 Core objects across primary legislation affecting major projects

	Legislation	Key objective^a
Cwlth	<i>Environment Protection and Biodiversity Conservation Act 1999</i>	'the protection of the environment, especially ... matters of national environmental significance ... to promote ecologically sustainable development ... the conservation of biodiversity ... and conservation of heritage ...'
	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>	'to provide an effective regulatory framework for: ... petroleum exploration and recovery ... in offshore areas.'
	<i>Airports Act 1996</i>	'... to promote the efficient and economic development and operation of airports ...'
NSW	<i>Environmental Planning and Assessment Act 1979</i>	'the proper management, development and conservation of natural and artificial resources'
VIC	<i>Planning and Environment Act 1987</i>	'to provide for the fair, orderly, economic and sustainable use, and development of land'
	<i>Major Transport Projects Facilitation Act 2009</i>	'facilitate the development of major transport projects'
	<i>Environment Effects Act 1978</i>	<i>Nil (no objects or purpose clause)</i>
QLD	<i>Sustainable Planning Act 2009</i>	'to achieve ecological sustainability'
	<i>State Development and Public Works Organisation Act 1971</i>	<i>Nil (no objects or purpose clause)</i>
	<i>Environmental Protection Act 1994</i>	'to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends'
SA	<i>Development Act 1993</i>	'to provide for proper, orderly and efficient planning and development in the State'
	<i>Environment Protection Act 1993</i>	'ensure that all reasonable and practicable measures are taken to protect, restore and enhance the quality of the environment having regard to the principles of ecologically sustainable development'
WA	<i>Planning and Development Act 2005</i>	'promote the sustainable use and development of land in the State'
	<i>Environmental Protection Act 1986</i>	'to protect the environment of the State' (sustainable development principles then follow)
Tas	<i>State Policies and Projects Act 1993, Land Use Planning and Approvals Act 1993, Major Infrastructure Development Approvals Act 1999, Environmental Management and Pollution Control Act 1994</i>	'to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity' (the same objects are listed in a common schedule)
NT	<i>Planning Act</i>	'the orderly use and development of land'
	<i>Environmental Assessment Act</i>	'a matter which could ... [have] a significant effect on the environment, is fully examined and taken into account'
ACT	<i>Planning and Development Act 2007</i>	'to provide a planning and land system that contributes to the orderly and sustainable development of the ACT'
	<i>Environment Protection Act 1997</i>	'protect and enhance the quality of the environment'

^a As assessed by the Commission, often the core objective is one among many.

The clarity and comprehensibility of objectives can also be an issue. Clear objectives help regulators in the interpretation, implementation and administration of policy, and guide understanding of the policy in the community. Clear objectives also have other benefits. They:

- narrow discretion in interpretation and thus lower the risk of ‘regulatory creep’ (which is when the administration of law diverges from the intent of the parliament over time)
- make it easier to benchmark the performance of regulators
- help to prioritise aims and thus assist regulators in resource allocation.

To secure these benefits, jurisdictions generally seek to ensure clarity and consistency among policy objectives. For instance, the Tasmanian Government observed that ‘all decisions about the use of land and natural resources in the State are made in pursuit of common objectives’ (sub. 53, attachment 1 p. 1). Similarly, the South Australian State Government Departments asserted that:

Regulatory objectives are clearly defined in South Australia; there are no known examples of contradictory regulatory objectives. (sub. 51, p. 24)

The Australian Government Department of Infrastructure and Transport highlighted that its legislative framework for airports helps give ‘regulatory certainty to support continued investment’ through a number of features, including ‘a planning hierarchy that has clear objectives and processes’ (sub. 59, p. 6).

Nevertheless, a number of participants in this study expressed concerns that regulatory goals were not sufficiently clear, lacked consistency and tried to achieve too many objectives, making it difficult for regulators to deliver satisfactory outcomes.

The Australian Network of Environmental Defender’s Offices (ANEDO) noted a lack of clear and consistent objectives:

A fundamental problem with Australia’s planning systems is the lack of clear and consistent regulatory objectives. This reduces the likelihood of balanced, ‘triple bottom line’ decision making. Major project DAA processes tend to further prioritise economic outcomes and benefits — without sufficiently valuing environmental and social benefits and costs. (sub. 14, p. 13)

Xstrata Coal pointed to duplicative objectives across DAA systems:

The regulatory objectives of major project DAA processes often overlap with the objectives and controls imposed by other State legislation relating to protection of the environment and the built environment e.g. in NSW the objectives of the Environmental Planning and Assessment Act 1979 overlaps with the Heritage Act 1998 and the Water Management Act 2000. These overlapping objectives mean that various

State Government agencies have the power to impose assessment requirements and compliance requirements in relation to the same issue but with different outcomes. (sub. 50, p. 42)

The Australian Petroleum Production and Exploration Association argued that inconsistent regulatory objectives were resulting in duplicative approvals and unnecessary project delay:

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

Several participants favoured legislative objects that specify policy priorities. For instance, ANEDO recommended:

Environment protection and planning legislation must set out clear objectives, which prioritise ecologically sustainable development (ESD) as the overarching aim. These objectives must then be consistently and rigorously applied to all decisions and actions to implement the legislation. (sub. 14, p. 39)

Similarly, the Business Council of Australia (BCA) suggested reforms redefining DAA policy objectives, including instituting 'sustainable development' objectives that 'prioritise the investment and business activity needed to grow national wealth and achieve well-managed population growth' (sub. 43, p. 13; BCA pers. comm., 11 July 2013).

Evaluating the clarity and consistency of objects

It is not surprising that the views cited above, which are drawn from stakeholder experiences with the DAA system, raise a wide range of issues. There will always be cases of problematic regulator conduct and outcomes, no matter how good the regulatory system. What is important, however, is that the regulatory framework is able to avoid systemically inferior outcomes. Adopting and maintaining best regulatory practices is a tested way to do this.

There are several principles and relevant leading practices. Clarity, brevity, consistency, accountability and transparency are principles the Commission has identified as associated with leading practice objects clauses (box 5.3). Ideally objectives should be specific enough to allow for better targeting and evaluation, but not be too prescriptive as to unduly constrain administrative flexibility to respond to unforeseen circumstances.

Box 5.3 **Leading practice objects clause elements**

A number of features of clauses are judged to be likely to improve outcomes:

- **Clarity** — objects are specified, including for major project pathways. The language used allows a reasonable person to understand the objective. Key terms are defined and consistently applied across key legislation (for example, within the main planning and environmental protection legislation).
- **Brevity** — an overarching objective is specified (with a limited number of secondary objectives); alternatively specific objectives are concise (not unwieldy). Redundant or related and overlapping objectives are removed.
- **Consistency** — objectives are broadly aligned (that is, not in obvious conflict) across significant legislation.
 - Within a jurisdiction this may involve cross-referencing of objectives or terms (for example, across state planning and environmental protection legislation). An overarching objective, or hierarchy of objectives, may be used to provide guidance on priority.
 - Where possible, object terms and concepts are aligned with relevant legislation in related jurisdictions (for example, across federal-state environmental protection legislation).
- **Accountability and transparency** — key administrative output criteria for relevant agencies are aligned with objectives, with associated reporting requirements in place.

Clarity

Not all Acts include objects or purpose clauses, although this generally is a reflection of their age (for example, the *Environment Effects Act 1978* (Vic) and the *State Development and Public Works Organisation Act 1971* (Qld)). Moreover, most do not include sub-objects for the sections identifying specific major project pathways. For example, no sub-objects are specified for section 46 of the *Development Act 1993* (SA) that deals with major developments. Furthermore, some objects clauses contain terms that could be better defined. The *Environment Protection Act 1993* (SA) suggests that ‘proper weight should be given to both long and short term economic, environmental, social and equity considerations’. However, ‘proper weight’ is not defined and it is not clear how it would apply. Similarly, a ‘precautionary approach’ is suggested, but not defined.

Brevity

Some objects clauses are lengthy which risks impacting on clarity and arguably contributes to a sense of ‘objective overload’. For example, the objects clause of the

Environment Protection Act 1997 (ACT) contains 16 objects of equal weight. Other clauses are relatively short, potentially providing insufficient guidance on applicable principles and priorities. For example, the operative objects of the *Planning and Development Act 2005* (WA) are simply ‘to provide for an efficient and effective land use planning system in the State; and promote the sustainable use and development of land in the State’.

Consistency

Some objects currently in relevant planning legislation may be more appropriately dealt with through other policy instruments. For example, section 5 of the Queensland *Sustainable Planning Act 2009* requires that entities are to advance the Acts purposes by, in part, attempting to avoid or ameliorate the effects of development on climate change. While objects to address adaptation to climate change are appropriately dealt with in planning law, objects to address mitigation are arguably unnecessary in the presence of a national carbon price.

Further, the Commission considers that some objects may overlap with or be implied in others. For example, the *Environmental Planning and Assessment Act 1979* (NSW) contains ten objects, one of which is to promote ‘ecologically sustainable development’ (partially defined as ‘the effective integration of economic and environmental considerations’). However, two other objects are to promote ‘the orderly and economic use and development of land’ and ‘the protection of the environment’, which are arguably implied in ESD. Bates (2010) broadly concurs, noting that sometimes such legal definitions effectively create unhelpful ‘double weighting’. Reforms that narrow objects, including by using key shared objects across laws (like perhaps ‘sustainable development’), could play a role in simplifying objects.

Objects that include a primary goal or objective, with other sub-objectives that explain how this might be achieved or carried out, may also assist in clarifying priorities across objects. One overarching objective, with related sub-objectives, may be easier to interpret and apply, as against 16 objectives with apparent equal weights.

Accountability and transparency

Currently, none of the primary planning authorities’ mission statements appear to be tightly aligned with key legislative objectives. For example, the Queensland Department of State Development, Infrastructure and Planning says its vision is to

‘drive the economic development of Queensland’, with the following specific objectives:

- champion the interests of business and industry in Queensland
- fast track delivery of major resource and industrial development projects
- diversify and build resilience in regional and state economies
- assist property and construction industries to grow and flourish through streamlined planning processes
- re-empower local governments and their communities to plan for their futures
- improve service delivery (2012, p. 7).

It is not clear these are well aligned with its legislative object ‘to achieve ecological sustainability’. Better aligning the mission statement of the assessment authority, and instituting performance reporting requirements is likely to encourage greater conformance with objectives. Where an agency administers many different programs or laws, one overarching mission may not be practical. In this case, the addition of key output reporting aligned to specific legislative objects may be an alternative. While a small number of agencies report broadly on progress toward objects in their annual reports, it is not clear that any agency has detailed annual reporting against legislative objects. This may reflect, to some degree, the ambiguity and difficulty of measuring some objects. This is a further argument for examining whether all current objects are necessary.

As far as the Commission can ascertain no jurisdiction requires major project DAA decision documents to include a section on a project’s conformance with relevant legislative objectives. A requirement to state how a decision, assessment or condition is consistent with relevant objectives would oblige the relevant decision maker to justify the specific balance struck, and could ensure decisions better reflect any overarching objectives for economic, social and environmental outcomes.

General observations

There is a vast constellation of objectives impacting DAA processes and any assessment must take into account the complexity of the legislation and how the legislation is administered. As a rule, well specified objectives are likely to increase the effectiveness of major project DAA processes. In the Commission’s judgment, based on a selective sample of relevant DAA legislation, no one jurisdiction stands out as best practice and all are found to have scope to improve the clarity and consistency of objectives (table 5.2).

Table 5.2 Evaluation of key jurisdictional objects clauses against leading practices^a

	<i>Legislation</i>	<i>Specific objects for major project pathway</i>	<i>Primary objective or clear order of objects</i>	<i>Key objects or terms shared across key laws</i>	<i>Agency mission broadly reflects key objects^b</i>	<i>Agency reports against objects in annual report</i>
Cwlth	<i>Environment Protection and Biodiversity Conservation Act 1999</i>	✓ ^c	x	x ^d	x	✓ ^e
	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>	x	✓ ^f	x	✓	✓ ^g
	<i>Airports Act 1996</i>	✓ ^h	x	x	x	x ⁱ
NSW	<i>Environmental Planning and Assessment Act 1979</i>	x	x	✓ ^j	x	x
Vic	<i>Planning and Environment Act 1987</i>	x	x	x	x	x ⁱ
	<i>Major Transport Projects Facilitation Act 2009</i>	✓	✓ ^f	x	x ^k	x ^k
	<i>Environment Effects Act 1978</i>	l	-	-	-	-
Qld	<i>Sustainable Planning Act 2009</i>	✓ ^m	✓	x	x	x ⁱ
	<i>State Development and Public Works Organisation Act 1971</i>	✓ ⁿ	l	-	-	-
	<i>Environmental Protection Act 1994</i>	x ^o	✓ ^f	x	✓	x
SA	<i>Development Act 1993</i>	x	✓	x	x	x ^p
	<i>Environment Protection Act 1993</i>	x ^o	x	x	x	x ^p
WA	<i>Planning and Development Act 2005</i>	x	x	x	x	x
	<i>Environmental Protection Act 1986</i>	x ^o	✓	x	x	x
Tas	<i>State Policies and Projects Act 1993</i>	x	x	✓	x	x
	<i>Land Use Planning and Approvals Act 1993</i>	x	x	✓	x	x
	<i>Major Infrastructure Development Approvals Act 1999</i>	x	x	✓	x	x
	<i>Environmental Management and Pollution Control Act 1994</i>	x ^o	x	✓	x	x ⁱ
NT	<i>Planning Act</i>	x	✓	x	x	x ⁱ
	<i>Environmental Assessment Act</i>	x ^o	x	x	✓	x
ACT	<i>Planning and Development Act 2007</i>	x	✓	x	x	x ⁱ
	<i>Environment Protection Act 1997</i>	x ^o	x	x	x	x ⁱ

^a As assessed by the Commission, based on relevant legislation, agency annual reports and websites.

^b Non-conformance more often reflects on the objects clause, rather than the agency mission. Conformance often reflects the simplicity of the objects clause. ^c Section 44 allows for bilateral assessment agreements, which may be utilised by major projects. ^d Not linked to other Commonwealth assessment Acts or state Acts.

^e DSEWPAC reports against key 'outcomes' that are broadly aligned with objects, though alignment could be tighter. ^f Only one effective object in clause. ^g While the Act's objects are very short, NOPSEMA broadly reports against legislative functions. ^h Section 88, which lists an 'outline' for major development plans, is arguably a statement of aims. ⁱ The agency reports against agency objectives but not the Act's objects.

^j State planning and environmental assessment processes are in one Act. ^k The Department of Transport is the relevant agency but does not appear to report on facilitating major transport projects in its annual report. ^l No primary objects or purpose clause. ^m In part, there are purposes for the Environmental Impact Statement process (s. 689). ⁿ Only for 'prescribed projects' under s. 76A. ^o Environmental assessments generally depend on the scale of impacts not the scale of the project, thus major projects are not allocated a separate pathway. ^p The agency reports against the South Australian Strategic Plan not the objects of the Act.

The Commission notes that there are a range of approaches that could be used to improve clarity and consistency, including:

- Refining objects to include one succinct *primary goal* (or overarching legislative objective) for the primary planning legislation applying to major projects.
- Secondary objectives could flow from this primary goal, with unnecessary or duplicative objectives removed or merged (so as to simplify the system and lower instances of administrative overlap).
- The same objectives or terms could be utilised across key legislation within a jurisdiction, including via consistent objectives specified in a legislative schedule.
- Objectives for specific major project pathways could be specified.
- Assessment agency mission statements and key performance outcome measures could be better aligned with core legislative objectives.
 - For example, the assessment authority could include a reporting section in its annual report on how it is meeting overarching objectives of the legislation it administers. Where there are sufficient projects to warrant the reporting obligation, annual reports could outline the conformance of major project assessments with objectives.
 - Major project assessment and approval decision documents could be better linked with objectives. Chapters 7 and 8 provide more detail on options in this area, including suggestions to publish reasons for decisions.
- Reforms to objectives could occur according to a schedule over time, to reduce administrative costs.

DRAFT RECOMMENDATION 5.1

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

5.3 Guidance on weighting differing objectives

In 2011, the Commission found that State and Territory planning systems ‘suffer from “objectives overload” which has been increasing’ (2011c, p. XVIII). This chapter has reiterated that finding, noting the constellation of policy objectives in this sphere.

Given the wide array of objectives being pursued, some of which may be overlapping, greater public guidance on how differing objectives should be weighed by decision makers has the potential to improve public understanding and potentially the quality of approval decisions themselves. The New South Wales Independent Commission Against Corruption (2012) has argued for clearer objectives and guidance on the priority between competing objectives, as this can have integrity benefits by lowering the risk of corruption.

The importance of policy guidance

Several participants highlighted concerns about a lack of guidance on how objectives should be weighed and interpreted. From a proponents perspective, the BCA and Xstrata Coal respectively, maintained that:

Reconciling and/or balancing different policy objectives is a very important aspect of the study and should be dealt with as a priority in the Commission's deliberations.

Regulatory approvals processes should be supporting the achievement of the broader economic, social and environmental policy objectives of government and allowing for an appropriate weighing up of the costs and benefits of projects to the community ...

Legislative objectives should reflect that DAA processes are designed to meet broader policy objectives of government, as well as any specific economic, environmental or social objectives. (sub. 43, p. 13)

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

Brisbane City Council noted competing priorities can be an issue:

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

ANEDO argued that a primary goal is a necessary, but not a sufficient condition to guide DAA processes in line with policy objectives:

... [T]he laws that regulate planning and major projects are inconsistent in their recognition of ESD, and sometimes it is not recognised at all ... [E]ven where ESD is acknowledged as an object, legal decision making and assessment processes do not require that ESD be achieved, or that decision makers act in accordance with its principles (with few exceptions). (sub. 14, pp. 14–5)

Several previous reports have also underlined the importance of policy guidance. The Regulation Taskforce recommended:

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

Similarly, the Productivity Commission's inquiry into the Urban Water Sector proposed reforms to strengthen guidance:

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

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

Different objectives being pursued across agencies can lead to overlap. If in these cases objectives cannot be made consistent, it was noted by the South Australian State Government Departments that administrative agreements, such as memorandums of understanding (MOUs), could be an effective alternative remedy:

Administrative agreements between regulatory agencies have been a feature of the South Australian application and assessment frameworks for over a decade. This approach defines documents that will be acknowledged for various processes; where processes will occur concurrently; where priority and timeliness will be assured; and exemptions that will be honoured between agencies. (sub. 51, p. 18)

Victorian Government departments have also used a number of inter-agency MOUs to coordinate roles and responsibilities for assessment, approval and delivery of major projects (Department of Transport, Planning and Local Infrastructure (Vic), pers. comm., 17 June 2013).

A similar approach is used in the United States to help deal with interjurisdictional overlaps in agency objectives (appendix C). For example, the State of California and the United States Department of the Interior have MOUs in place to assist cooperation on project permitting for renewable energy projects in areas of joint jurisdiction. Cooperation includes monthly and weekly coordination meetings between officials, which help keep processes on track and resolve conflicts.

Chapter 7 has further discussion on the potential for intrajurisdictional agency agreements to reduce assessment process duplication.

Ecologically sustainable development in DAA processes

Sustainable development or 'ecologically sustainable development' is a guiding principle and widely specified objective applying to decisionmaking on environmental impacts in planning (box 5.4). Since the 1990s, much of Australia's

environment, planning and natural resources management legislation has been amended to make ESD a key legislative object (Bates 2010; Godden and Peel 2010). These changes generally occurred following COAG's adoption of the National Strategy for Ecologically Sustainable Development in December 1992. Decision makers are generally required to 'encourage', 'promote' or 'have regard to' ESD.

Box 5.4 Ecologically sustainable development (ESD) and related principles

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

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

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

Subsequent legislative definitions applied across the States and Territories have varied. A common general theme is that decisionmaking processes under ESD should:

- effectively integrate both long- and short-term economic, environmental, social and equity considerations.

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

- precautionary principle — where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation)
- intergenerational equity — the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations
- conservation of biological diversity and ecological integrity
- improved valuation, pricing and incentive mechanisms.

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

Sources: Bates (2010) and Australian Government (1992; 1992).

While ESD is only one of many objectives within DAA systems, it has significant potential to help deepen consideration of sustainability in decisionmaking and to help guide the appropriate balancing of environmental, social and economic impacts in development assessment.

Despite this potential, and its prevalence across environmental protection legislation, there is no detailed guidance on how to balance impacts. Justice Paul Stein (1999) usefully summarised many of the issues:

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

A Commission Staff Research Note on the concept of sustainability across ecological, social and economic pillars drew similar conclusions. It observed that such a three pillared approach is ‘difficult to operationalise, mainly because it lacks an analytical basis to make decisions about any tradeoffs between’ pillars (Markulev and Long 2013, p. 2).

Limited guidance and interpretation difficulties are points also made by Bates, who reports that legal ESD definitions tend to ‘treat sustainability as part of a procedure’ rather than as an outcome, with accountability for monitoring and achieving sustainability often inadequately specified (2010, p. 211). Bates reasoned:

If ESD is to be pursued seriously ... then surely this should be the paramount object of legislation. It should be the outcomes that decision makers strive to achieve, not part of a process that simply requires ESD to be considered on the way through to making a decision; and decision makers should therefore be instructed to do more than simply ‘have regard to’ it. (2010, p. 214)

The precautionary principle encounters similar issues, having been described as ‘vague’ and ‘fuzzy’, given the lack of definition of ‘precaution’ or how much precaution should be taken. The scale of proof needed before the principle is triggered is also unclear. Likewise, operationalising the concept of intergenerational equity is complicated by ambiguities around how resources may be shared across generations and how far ahead in time future generations’ interests should be considered (Bates 2010).

Given these difficulties, it is notable that legislative objectives, particularly ESD, have been material to the evolution of recent case law on development approvals. Box 5.5 details the April 2013 Warkworth case, which included consideration of the appropriate balance across economic, social and environmental objectives.

Box 5.5 **Weighing objectives — the Warkworth case**

An April 2013 decision of the New South Wales Land and Environment Court, in relation to the extension of an existing coal mine in the Hunter Valley, illustrates how underlying legislative objectives are influencing the evolution of case law on major project approvals.

The case considered an appeal against the New South Wales Minister for Planning and Infrastructure's decision (delegated to the Planning Assessment Commission (PAC)) to approve an extension to an existing open cut coal mine. Chief Judge Preston's judgment upheld the appeal, among other things rejecting the PAC's conclusion that the balance between the economic, social and environmental impacts of the proposed project was acceptable. This was based on the finding that the project would have significant and unacceptable environmental, noise and social impacts. Mitigation strategies and proposed conditions were also seen as inadequate.

The legislative objective within the *Environmental Planning and Assessment Act 1979* (NSW) of encouraging ecologically sustainable development (ESD) was central to the decision. The parties to the case disagreed on whether the project was consistent with the principles of ESD, with the Minister adding that those principles were only one of the objects of the Act. Chief Judge Preston assessed that the principles of ESD were a relevant consideration, noting that the public interest — another consideration — also implicitly includes the principles of ESD.

As an aside, the judgment explored the 'polycentric' difficulty in weighing environmental, social and economic impacts, citing that 'often criteria cannot be reduced to one authoritative standard or objectively weighted except by seriously impoverishing the situation'. The decision further observed that the New South Wales assessment criteria that are to be considered 'are numerous, cannot be objectively weighted, and are interdependent'.

Indeed, the PAC's own February 2012 approval report on the proposal noted the difficulty of balancing social impacts against large economic benefits, noting that the New South Wales Government could clarify its policy position to provide:

... further guidance to decision makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines. (2012, pp. 8–9)

The New South Wales Government has joined the proponent in appealing the decision in the New South Wales Court of Appeal (*Australian*, 13 May 2013, p. 1).

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

The Victorian Competition and Efficiency Commission (VCEC) has examined frameworks for integrating ESD into regulation. It heard similar evidence of concerns from businesses and environmental groups about:

... how decision makers 'strike the balance' between the economic, environmental and social factors — the integration of which lies at the core of the ESD principles. The concerns suggest a need for mechanisms to assist agencies in achieving the ESD

objectives to promote transparency and community understanding about the development, implementation and administration of environmental regulation. (2009, pp. 336–7)

VCEC recommended:

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

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

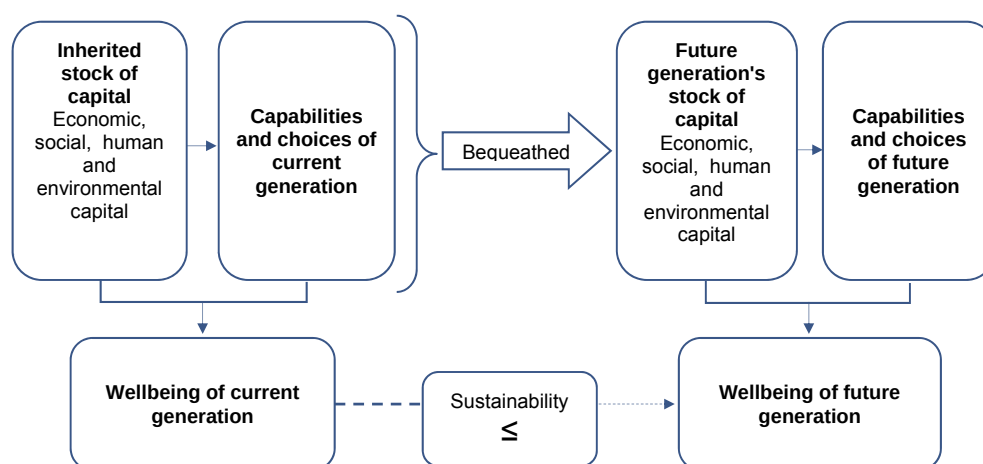
There would be merit in jurisdictions describing an overarching framework to guide the balancing of objectives. The 2010 Intergenerational Report outlined elements that could be included in such an overarching framework (box 5.6). Such a framework would help to guide how tradeoffs are made between environmental, social and economic impacts. This would likely increase transparency and help guide assessors and the courts. Illustrative case studies describing how the framework could work in practice could also be provided to give more detailed guidance.

Box 5.6 2010 Intergenerational Report framework

This box provides a synthesis of the Intergenerational Report's commentary on sustainability and community wellbeing.

Wellbeing is a multi-dimensional concept that goes beyond material living standards to take account of other things that people value, including leisure, social relationships and environmental goods. It is affected by the benefits that flow from the total stock of capital across the economic, social, human and environmental domains. These stocks influence the capabilities and choices of the current generation. The way these stocks are used by the current generation will determine the level of stocks left for future generations. Investment *flows* influence the level of each stock, either increasing or decreasing it. For example, investments in education might increase the stock of human capital, while environmental destruction would reduce the natural capital stock. The figure below shows the interrelation between these stocks and intergenerational equity.

Stylised depiction of sustainability and wellbeing



Source: Australian Government (2010a, p. 85).

For wellbeing to be maintained or increased, the current generation must bequeath future generations an equal or greater level of *total* capital stock. Future generations can then make their own choices in the use of those stocks to enhance their wellbeing.

Optimising the total capital stock requires tradeoffs across domains. While it need not, this could result in a fall in capital in one domain, offset by increases across others. Technological advancements that increase efficiency or utilise alternative resources, may also allow a fall in capital to be offset. Assessing tradeoffs between domains is very difficult, as reductions or increases in one may have opportunity costs in others. Given notable uncertainties around measurement and impacts, representative government has an appropriate role in assessing whether the level of capital across domains is consistent with increased wellbeing for current and future generations.

Sources: Australian Government (2010a); Markulev and Long (2013).

Decisions balancing differing objectives and outcomes should have regard to their relative costs and benefits. However, uncertainty and a lack of precision in measuring tradeoffs significantly hamper such judgments and it is appropriate that governments make such normative decisions. That said, there is a need for transparency on how decision makers should strike an appropriate balance across the range of objectives pursued through DAA processes.

Better and practical guidance on how to balance different objectives would increase transparency, and improve understanding among proponents and the community. It may also increase the consistency and quality of DAA decisions, by assisting delegated decision makers, regulators and the courts. There is a range of approaches that could be used to provide better guidance on whether and how to prioritise regulatory objectives. For instance, State and Territory Governments could:

- consider implementing one succinct *primary policy goal* (or overarching legislative objective) for primary planning legislation applying to major projects.
- include a disallowable instrument in their planning systems, which describes the framework for how decision makers are to balance development impacts across the human, social, environmental and economic domains.
 - Each parliament could update this instrument as required, providing guidance on priorities and on how to weight impacts and promote development and environmental protection.
 - Guidance material could be complemented by practical case studies. Such guidance information and resources should be periodically reviewed.

DRAFT RECOMMENDATION 5.2

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

6 The application stage

Key points

- The application stage for a major project involves decisions on the regulatory pathway(s) that the project will be subject to, and on the scope and information requirements (the terms of reference (TOR)) of any environmental impact assessment (EIA).
- The Commission has identified at least 30 key pathways used across Australia to assess and approve major projects (25 are dedicated major project pathways, the remainder include ministerial call-ins and regular development approval processes).
- Study participants have raised three broad issues regarding the application stage of the development assessment and approval (DAA) process for major projects. These relate to:
 - ministerial discretion to declare a project into a pathway
 - upfront clarity and guidance on DAA processes and requirements
 - transparency in setting the TOR for the EIA.
- To improve certainty and transparency in determining which pathway(s) apply, statutory criteria should be used.
- Ministerial discretion to declare a project into a pathway should be used sparingly, and when used, the Minister should:
 - follow guidelines on when and how the power can be used
 - be required to publicly report the reasons for a declaration against the guidelines.
- Governments should provide clear, upfront information and guidance on the pathways that apply to different types of major projects, including on the processes, generic information requirements, assessment criteria, standard and model conditions, and statutory timelines.
- To improve transparency in the process for setting the TOR for the EIA, regulators should require public consultation on draft TOR, and public reporting of:
 - any advice used in setting the TOR
 - the referral agencies' rationale for their advice
 - the assessment authority's rationale for setting the TOR.

The application stage of the development assessment and approval (DAA) process for a major project typically includes decisions about which regulatory pathway(s) a project will be assessed and approved under and the scope and information requirements (the terms of reference (TOR)) of the environmental impact assessment (EIA).

This chapter examines the processes used in Australian jurisdictions to make these decisions and proposes recommendations that could improve the efficiency and effectiveness of the current arrangements. It starts with an overview of how Australian jurisdictions determine the regulatory pathway(s) that apply to a major project and the scope of the TOR for an EIA, and then identifies the issues that participants in the study raised regarding these processes. Appendix B provides a more detailed description of Australian DAA regulatory processes.

6.1 Assessment pathways applied to major projects

The Commission has identified many key pathways used to assess major projects in Australia (table 6.1). These pathways typically encompass the main regulatory processes a major project is subject to (such as the planning and environmental approvals) but do not necessarily incorporate all approvals, authorisations, licenses and permits that may be needed (such as those relating to land access, water use, and heritage impacts).

Most jurisdictions have at least one of four types of designated major project pathway (table 6.1). These include:

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

Table 6.1 Key regulatory pathways applied to major projects^a

<i>Jurisdiction</i>	<i>Pathway</i>	<i>Types of projects typically subject to the pathway</i>
New South Wales	State significant developments ^b	Projects greater than \$30 million (i.e. urban commercial and residential, resource and infrastructure projects)
	State significant infrastructure ^b	Large public infrastructure projects (i.e. road and rail)
	Critical state significant infrastructure ^b	State significant infrastructure declared as 'critical'
Victoria	Ministerial 'call-in' ^b	State significant projects requiring a planning permit or planning scheme amendment that are called-in by the Planning Minister (i.e. wind farms and urban projects such as roads, subdivisions and sports venues)
	Ministerial permits ^b	Large commercial and residential developments in the City of Melbourne, its surrounds, and Alpine areas
	Major transport project ^b	Large public road, rail and port infrastructure
	Mining and resource projects ^b	Any project subject to the <i>Mineral Resources (Sustainable Development) Act 1990</i> (Vic)
	Special legislation ^b	Large public infrastructure projects (i.e. East Link)
	Planning permits/ planning scheme amendments ^c	Major projects not called-in by the Minister or subject to a designated major project pathway (i.e. wind farms and urban developments)
	Environmental effects statements ^d	Any project that is likely to have a significant environmental impact
Queensland	Coordinated projects ^b	Projects with complex approval requirements; of strategic significance; with significant environmental effects; or significant infrastructure requirements (i.e. LNG and mining projects, industrial installations and resorts)
	Prescribed developments ^b	Resource projects of major economic significance; that require provision of infrastructure which would place an excessive financial burden on the state; or significantly affect provision of services and facilities by government
	Prescribed projects ^b	Ministerial call-in of coordinated projects; projects in a state development area; or projects of economic or social significance to the state or a region
	State development areas ^b	Projects within one of the declared state development areas (i.e. Gladstone)
	Private infrastructure facilities ^b	Projects with economic or social significance; economic or social benefits to a region; or that satisfy an identified need or demand for services
	Urban developments ^b	Projects in a declared 'priority development area'
	Ministerial call-in ^b	Any project with a 'state interest'
Western Australia	Development assessment panels ^b	Projects of \$15 million or more in the City of Perth, or \$7 million or more in the rest of the state
	State agreements or special legislation ^b	Large mining projects and related processing and infrastructure (i.e. Natural Gas (Canning Basin Joint Venture) Agreement)
	Public environmental reviews ^d	Any project considered likely to have a significant effect on the environment

(Continued next page)

Table 6.1 (continued)

<i>Jurisdiction</i>	<i>Pathway</i>	<i>Types of projects typically subject to the pathway</i>
South Australia	Major developments or projects ^b	Projects of major economic, social or environmental importance, and where declaration is appropriate or necessary for proper assessment (i.e. port facilities, commercial and residential buildings and mines)
	Crown developments and public infrastructure ^b	Government infrastructure projects
	Special legislation ^b	Adelaide Oval redevelopment
Tasmania	Projects of state significance ^b	Two projects have been approved to date, Lauderdale Quay and Basslink
	Projects of regional significance ^b	Projects of regional planning significance; requiring high level assessment; or having a significant environmental impact (no projects have used this pathway to date)
	Major infrastructure projects ^b	Linear infrastructure such as road, railway, power and telecommunications lines
	Special legislation ^b	Bell Bay Pulp Mill
Northern Territory	Exceptional development permits	Ministers can grant exceptional development permits for projects (major and non-major) otherwise in breach of planning schemes (i.e. Conoco Phillips gas plant, Ichthys accommodation facility)
	Development consent ^c	Projects (major and non-major) not subject to an exceptional development permit
	Environmental impact statements or public environmental reviews ^d	Any project considered likely to have a significant effect on the environment
ACT	Development applications ^c	Projects (major and non-major)
	Environment impact statements ^d	Any project considered likely to have a significant effect on the environment
Cwlth	'Controlled' actions under the EPBC Act ^d	Any project that includes an action likely to have a significant impact on a matter of national environmental significance
	Major airport infrastructure ^b	Major infrastructure at airports covered by <i>the Airports Act 1996</i> (Cwlth) (typically more than \$20 million)

^a Key pathways generally include designated major project pathways (which are regulatory processes that are specifically designed to assess and approve particular types of major projects), some regular development pathways and EIA processes where they are conducted separately to a designated major project or regular development pathway. Not all pathways that apply to major projects are included. ^b Designated major project pathway. ^c Regular development pathway. ^d EIA process.

Source: Based on appendix B.

Designated major project pathways usually include an EIA process. For example, all projects declared as state significant developments (New South Wales) must undergo an environmental assessment. However, under some designated pathways, an EIA is only undertaken if it is deemed to be required in a separate, parallel process. For example, an EIA is required under the development assessment panel pathway (Western Australia) if a project is determined to have a 'significant'

environmental impact by the state Environmental Protection Authority. Similarly, major developments under the *Airports Act 1996* (Commonwealth) only require an EIA if they trigger one under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Some jurisdictions do not have designated major project pathways and instead typically rely on regular planning approval processes. This can be the case for major projects in the Northern Territory and the ACT, with the need for an EIA depending on the project's likely environmental impact. In another example, the Commonwealth DAA pathway for 'controlled' actions under the EPBC Act, applies to any project that includes an action likely to have a significant impact on a matter of national environmental significance (table 6.1).

Determining which pathway(s) apply

The processes and requirements used to determine which regulatory pathway is applied to a major project differ across jurisdictions. Key differences relate to:

- *the degree of ministerial discretion:* The most common approach among jurisdictions is to rely on ministerial discretion (guided by non-binding criteria) to declare or 'call-in' a project to a designated pathway. Some pathways (such as state significant developments (SSDs) (New South Wales)) rely primarily on binding statutory criteria, while others (such as for 'controlled' actions under the EPBC Act (Commonwealth)) use a referral and impact assessment approach where any project (not just a major project) that meets an impact test is subject to the pathway.
- *the public reporting requirements of ministerial declarations:* Some pathways (such as major developments or projects (South Australia)) do not require the Minister to publicly explain the reasons for a declaration. Other pathways (such as environmental effects statements (EESs) (Victoria)) require the relevant Minister to publicly report on their reasons against established criteria.
- *the information requirements:* Most processes (such as SSDs (New South Wales)) require a preliminary application describing the project proposal. Some approaches (such as coordinated projects (Queensland)) require sufficient information to be provided upfront to allow a pathway determination and initial assessment (appendix B).

Determining the terms of reference of the environmental impact assessment

The key regulatory pathways have different processes and requirements for setting the TOR of a major project EIA. Key differences include:

- *the degree of consultation undertaken:* In all jurisdictions, the assessment authority responsible for setting the TOR consults with referral agencies on the issues and requirements to include. Public consultation (between a proponent and the public) sometimes occurs during the preparation of the EIA but is typically undertaken (between the assessment authority and the public) once the EIA has been exhibited (chapter 7). Under some pathways (such as EESs (Victoria) and coordinated projects (Queensland)), the assessment authority engages in earlier and wider consultation with local governments and the general public on the TOR. In a few cases (such as with the Coordinator-General (Queensland) and state referral agencies (South Australia)) there is an opportunity for pre-application consultation between project proponents and regulators that includes discussion on the TOR.
- *the public reporting requirements around the TOR setting process:* Typically, pathways that include public consultation on the TOR require submissions received during the comment period to be made public. Under some pathways (such as major developments or projects (South Australia)), advice given by referral agencies to the assessment authority and used in determining the TOR is also made public. Further, in some cases (such as EESs (Victoria)), the assessment authority setting the TOR publicly reports on the rationale used (appendix B).

6.2 Issues with the application stage

Study participants have argued that processes at the application stage of major project DAA pathways may be a source of regulatory uncertainty and potentially lead to unnecessary costs. These concerns have been raised through submissions and stakeholder consultations with the Commission and relate to:

- ministerial discretion to declare a project into a pathway
- a lack of upfront clarity and guidance on DAA processes and requirements
- a lack of transparency in the process for setting the TOR for the EIA.

Each of these concerns is examined below.

Ministerial discretion to declare major projects

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

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

Whilst the Minister must form an opinion that the development or project is of ‘major environmental, social or economic importance’, there are no specific criteria prescribed in either the Act or Regulations to guide the Minister in forming this opinion. (sub. 25, p. 2)

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

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

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

The result [of an increasing use of Part 3A] was that many residential, commercial and coastal projects were declared [by the Minister] as ‘state significant’ and ‘called in’ for ministerial determination when in reality they were of only a regional or even local scale. The original intent may have been to speed up assessments and/or remove blockages to ‘major’ developments, but the practice became widespread and subject to ministerial discretion, and only served to alienate local communities and diminish trust. (sub. 36, p. 4)

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

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

Improving certainty and transparency

Recent reforms in New South Wales aim to redress these shortcomings. In line with some of the recommendations in an Independent Commission Against Corruption (ICAC) report into the use of ministerial discretion (ICAC (NSW) 2010) and the Development Assessment Forum best practice principles (DAF 2009), New South Wales has limited ministerial discretion to declare a project as state significant by developing clear and statutory criteria on the use of ‘ministerial orders’.

The Business Council of Australia supports these measures (sub. 43) and the LGASA favoured further transparency measures, recommending that:

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

ICAC also proposed greater oversight and public reporting requirements around the use of ministerial orders to declare projects and recommended limits on the Minister’s powers to list sites of state significance (ICAC (NSW) 2010). This proposed requirement is similar to the practice of the Victorian Department of Planning, which lists the types of large-scale projects and areas that require a project to be assessed under the ministerial permit pathway (appendix B).

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

The NSW system addresses this potential rigidity by allowing limited ministerial discretion to declare projects that do not otherwise meet the statutory criteria. The ministerial power can only be used after an independent body (the Planning Assessment Commission) has assessed and publicly reported on the ‘state or regional significance of the development’. The Minister is also required to report on his or her reasons for using the call-in power (appendix B).

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

DRAFT RECOMMENDATION 6.1

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

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

Guidance on regulatory processes and requirements

All jurisdictions provide guidelines and explanatory documents on the processes and requirements of their major project DAA pathways. This can provide a degree of certainty about what is expected by regulators, reduce compliance costs and avoid delays. Generally, guidance material includes:

- high-level information on the DAA framework (including state and regional development policies, strategic plans, and general planning, development, environment and heritage legislation)
- information on legislation and regulation establishing the key DAA pathways
- guidance on how a particular DAA pathway works (including criteria and guidelines for eligibility for a pathway, ministerial interventions, assessments and approvals; environmental and technical standards; public notification, consultation and reporting requirements; and statutory timelines).

Some jurisdictions also provide (or are developing) additional guidance through standardised or indicative examples of aspects of DAA pathways:

- The NSW Department of Planning and Infrastructure (2013b) is preparing draft sets of standard and model conditions (by industry sector) to assist proponents, regulators and the community understand the types of conditions that are likely to be applied to state significant developments, should they be approved.

-
- The WA Department of Environmental Regulation (2013) is implementing a reform program (Re-Engineering for Industry and Environment) that aims to create common template licences (including standardised conditions).
 - The Commonwealth EPBC Act environmental offsets calculator provides guidance on acceptable offsets for a given impact (DSEWPAC 2012d).
 - The Queensland Coordinator-General (2013) recently developed generic draft TOR for coordinated project EISs that include standardised aspects of the TOR.

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

For example, the Minerals Council of New South Wales noted that:

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

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

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

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

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

There is an extensive literature on leading practice in this domain of regulatory policy. The Productivity Commission's 2011 study of planning and zoning focused on improving development assessment processes by ensuring clear objectives, rules and decision criteria were established (PC 2011c). Predictable processes, well-defined roles and responsibilities, accountable decision makers, and open and transparent processes are all among the Commission's criteria for benchmarking regulatory practices in this study (chapter 4).

The Development Assessment Forum principles are similar to the Productivity Commission criteria of leading regulatory practice. They state that development

assessment requirements and criteria should be written as objective rules and tests that are linked to stated policy intentions. And in relation to the development of EIS processes, they favour:

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

Infrastructure Australia, in a review of approval processes for major infrastructure projects also favoured better documentation of assessment requirements (IA 2009).

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

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

DRAFT RECOMMENDATION 6.2

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

Some jurisdictions have gone further and offer proponents the opportunity to formally meet with regulators to discuss a project proposal before a formal application or EIA is lodged (box 6.1). These opportunities can be mutually beneficial. Regulators can gain an earlier understanding of a proposal which may assist in staff resourcing and agency coordination. And proponents have an opportunity for early clarification of which regulatory processes are likely to apply and how, and explore issues that may be potentially sensitive with an agency.

Box 6.1 Examples of pre-application consultation in Australia

Commonwealth

The Minister for Infrastructure and Transport may grant Major Project Facilitation status to major infrastructure projects meeting eligibility criteria. For these projects the Department may:

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

Queensland

Major project proponents seeking to be declared a coordinated project are encouraged to schedule a pre-lodgement meeting with the Coordinator-General (CG) before applying. The proponent and the CG can discuss the project proposal, including the:

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

The CG may also arrange meetings between proponents and referral agencies during the consultation period on the draft terms of reference to:

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

South Australia

The South Australian Government provides informal and formal pre-application guidance to major project proponents.

- A proponent may contact the Planning Department to discuss options for declaring a development a major project. Typically, the Department seeks legal advice and briefs the Minister. A suggestion is then made to the proponent on the likely assessment pathway.
- A proponent can enter into formal discussions with a referral body (such as the Environmental Protection Authority (EPA)) prior to lodging an application. A pre-lodgement agreement may result, which can remove the need for the application to be referred to the EPA when it is formally lodged.

Sources: Department of State Development, Infrastructure and Planning (QLD) (2013b); DIT (Cwlt) (2012a); SA Government pers. comm. 22 March 2013.

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

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

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

There are also potential disadvantages with pre-application meetings. They could be resource intensive and pose risks to regulator transparency and independence, which could instil a perception of undue influence and compromise public confidence in the DAA system. However, there are safeguards that could limit these risks, such as public documentation and reporting of meetings and clear guidelines for regulator conduct (ICAC (NSW) 2012). Such practices have been institutionalised by the National Energy Board of Canada, which the Commission considers to be a good model for regulator-proponent consultation at the pre-application stage (box 6.2).

The Commission believes that more systematic use of pre-application consultation meetings with major project proponents would improve the efficiency and effectiveness of DAA processes. However, appropriate safeguards must be in place to ensure transparency and accountability and that public trust is maintained. Moreover, pre-application meetings should not become an alternative to existing regulatory processes (such as those for determining the DAA pathway or the TOR of the EIA) or a substitute for governments providing clear upfront information on how their regulations work. To avoid unnecessary costs, pre-application meetings should target very large, complex and state significant developments.

Setting the assessment terms of reference

Early public consultation

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

Box 6.2 Pre-application meetings with the National Energy Board of Canada

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

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

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

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

NEB staff can learn about aspects of the proposal, what pre-application public consultation has been undertaken by the proponent and what contact has been made with other regulatory agencies.

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

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

Source: NEB (2013a).

The OECD emphasises that public consultation can:

- bring into the discussion the expertise, perspectives, and ideas for alternative actions of those directly affected
- help regulators to balance opposing interests
- identify unintended effects and practical problems. Pre-notification makes it easier to foresee the consequences of planned policies and is a productive way to identify administrative burdens

-
- provide a quality check on the administration's assessment of costs and benefits
 - identify interactions between regulations from various parts of government. (OECD 2013, p. 2)

There is no unique model on how to undertake public consultation and methods will depend on the nature of the project. However, research into the types of public consultation strategies used in development and planning areas in Australia has identified a range of leading practices that can make consultation more meaningful and effective (box 6.3).

Box 6.3 Some leading practices on public consultation

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

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

Source: ACT Planning and Land Authority (2005).

One of the early opportunities for public consultation is when the TOR for the EIA undertaken by the major project proponent is being prepared. The Commission's analysis found limited public consultation on the TOR for the EIA in Australian jurisdictions (appendix B). Under most major project pathways, the first opportunity for public input into the assessment process occurs while the EIA is being prepared, or more typically, at the stage when the EIA report is publicly exhibited, which is already well into the process (chapter 7).

A notable exception is Victoria. The EES for projects with a 'significant' impact on the environment includes processes to solicit early community feedback (box 6.4).

The Commission believes that the Victorian EES process is a leading practice and other jurisdictions should adopt it or a similar practice.

Box 6.4 Victorian environmental effects statements

Under the *Planning and Environment Act 1978* (Vic), projects determined to have a 'significant' impact on the environment by the Minister for Planning must undergo an environmental effects statement (EES) assessment. The process to set the EES scoping requirements typically includes:

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

A second round of public consultation occurs while the proponent is preparing the EES. Generally, a proponent must develop and implement a Consultation Plan that is consistent with the scoping requirements to inform individuals and groups who could be affected by the project and provide opportunities for input. This consultation helps the proponent to identify issues of concern and potential effects, as well as get feedback from stakeholders on project options or potential mitigation measures. The proponent includes this feedback and their response in the EES.

A third opportunity for public input occurs once the EES is completed and exhibited for public comment. The public have between 20 and 30 business days to make written submissions. The Minister may appoint an inquiry panel to evaluate the effects of the project, having regard to the EES studies and public submissions. The inquiry may take one of three forms, depending on how complex the issues are:

- a desktop review of written submissions
- a conference of submitters and review of submissions
- a hearing, where proponents and submitters can speak and present witnesses.

Source: Department of Planning and Community Development (Vic) (2013).

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

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

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

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

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

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

However, there are also costs from expanding opportunities for public consultation on major projects. It could lead to delays as additional time is set aside for the process to be undertaken and it could add to the compliance and administrative costs borne by project proponents and regulators.

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

In contrast, reforms overseas have favoured early public input on the TOR of major project assessments. One example is the Canadian Government's environmental assessment process conducted by the Canadian Environmental Assessment Agency (box 6.5).

It is not straightforward to give an assessment of the adequacy of existing early public consultation practices and recent reforms in this area. The rationale for, and impacts of, even small changes depend critically on other aspects of the DAA regulatory system, such as the right to appeal decisions (chapter 9), the use of statutory timelines (chapter 8) and the standards of assessment used (chapter 7). However, the Commission believes that the gains from fostering earlier consultation are greater than the downside risks, provided regulatory practices in the latter phases of the DAA process are also strengthened.

Box 6.5 Public consultation for Canadian environmental assessments

Early public consultation is a feature of federal environmental assessments (EAs) conducted by the Canadian Environmental Assessment Agency (CEAA).

The CEAA process includes three opportunities for public consultation:

- In determining whether a project will require an EA, the CEAA considers comments received from the public within 20 days of publicly exhibiting the project description.
- In determining the final environmental impact statement guidelines (EIS) for the EA, the CEAA publicly exhibits draft EIS guidelines for public comment on proposed studies, methods and information requirements.
- In assessing the EIS, the CEAA publicly exhibits the EIS and its EIS report and solicits comments from the public on the potential environmental effects of the project and the proposed measures to prevent or mitigate those effects.

Source: Canadian Environmental Assessment Act 2012.

Whilst the Commission acknowledges the need to reduce approval times, it considers this should be achieved through increased process efficiency and removing duplication and redundancy in processes, not through removing safeguards. Further, the provision of proper consultation on the TOR strengthens the case for limiting the use of ‘stop the clock’ provisions that many participants have indicated are the primary source of delay in DAA processes (chapter 8).

Proponent consultation with regulators

Early consultation between the proponent of a major project and regulatory agencies on the TOR for an EIA can also improve regulatory outcomes and avoid potentially unnecessary regulatory burdens. It may, for instance, help clarify the scope and deliverables in the EIA, and avoid situations where specific work is undertaken for an EIA even though it is not required by any of the agencies.

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

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

Xstrata Coal also supported earlier opportunities for public consultation for major projects.

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

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

... prior to the start of the assessment process, agreement to be reached between the proponent and the authorities collectively on the assessment process with authorities having the authority to commit to the agreement. This agreement would cover:

- the assessment and approval pathway to be followed
 - data requirements
 - timing and scheduling
 - how departures from the pathway are to be dealt with
 - mechanisms for resolving problems and issues that arise during the process.
- (sub. 34, p. 3)

Using transparent processes to set the terms of reference

Transparency in a regulatory process also depends on the public and other stakeholders being able to see how regulatory decisions are made. ICAC (2012), in a review of the NSW planning system, highlighted the importance of publicly available information as follows:

The provision of information is fundamental to ensuring transparency and generating public interest in proposals. A transparent planning system requires the provision of publicly available information so that members of the public understand what is being proposed, why decisions have been made, what has influenced those decisions, and the processes involved in making a decision. (p. 15)

In this regard, the scope and detail of public reporting on the processes used to set the TOR of major project assessment in Australia varies depending on the DAA pathway.

- All jurisdictions with public consultation on draft TOR typically make the submissions received during the comment period public.
- Some jurisdictions also allow referral agencies to publicly report on the advice they give to the authority responsible for setting the TOR (for example, the NSW Director General Requirements (the TOR) for state significant projects can be released with the referral agency advice attached) (Director General of Planning (NSW) 2013).
- A few jurisdictions require the authority responsible for setting the TOR to publicly report on the rationale used (for example, the scoping requirements document for a Victorian EES explains how the requirements are relevant to the various assessment criteria and related State and Commonwealth legislation and policies (Department of Planning and Community Development (Vic) 2012).

A public reporting requirement for referral agencies and the assessment authority responsible for setting the TOR of a major project assessment has multiple benefits. It can help to:

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

The Commission believes that public reporting of all advice used in setting the TOR of an EIA, and of the rationale used by referral agencies and the assessment manager in compiling the final TOR are leading practices for major project assessment.

DRAFT RECOMMENDATION 6.3

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

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

7 The assessment stage

Key points

- Major projects are subject to assessment processes across all levels of government depending on the nature, location and complexity of the project. Assessor institutions include government departments and statutory agencies.
- State and Territory Governments have primary responsibility for assessing major project proposals and regulatory approaches vary. In some jurisdictions, a single institution is responsible for managing a relatively integrated assessment process. In other cases, a potentially large number of standalone processes apply.
- Australian Government assessment processes apply if proposed major projects are undertaken on Commonwealth land (or waters) or by the Commonwealth or its agencies, or if projects are likely to have a significant impact on matters of national environmental significance.
- Local governments have a limited role in major project assessment.
- Unnecessary regulatory burdens that add to timelines and compliance costs arise at the assessment stage due to:
 - unnecessary duplication between assessment processes
 - uncoordinated administration of processes
 - problems with regulator conduct, capability and independence
 - unnecessary or burdensome assessment requirements
 - disproportionate and poorly targeted approval conditions (including offsets).
- The Commission's recommendations for improving the assessment stage relate to:
 - establishing a 'one project, one assessment' framework through more extensive and comprehensive bilateral assessment agreements under the *Environment Protection and Biodiversity Conservation Act 1999*
 - reducing duplication at the state and territory level through greater cooperation between regulators to conduct joint assessments, or to accredit each other's processes
 - better coordination and tracking of processes through establishment of major projects coordination offices (where such arrangements do not already exist)
 - institutional reform that separates environmental policy from regulatory functions, provided the expected benefits exceed the costs
 - COAG commissioning a review of environmental offset policies, including consistency of offset policy objectives with principles of ecologically sustainable development, the methodologies used for identifying offsets, the merit of a single national offsets framework and the role of market-based approaches.

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

7.1 Overview of major project assessment processes

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

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

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

The processes in place to facilitate major project assessment in Australia cover a diverse and complex set of issues, comprise various steps (including public consultation) and require substantial information and data. Box 7.1 provides a generic description of a sample of these processes. Appendix B provides a comprehensive account of assessment arrangements in Australian jurisdictions.

In most cases, primary responsibility for assessing major projects rests with the States and Territories and regulatory approaches vary depending on the nature of the project and the assessment 'pathway' that is adopted (chapter 6).

Box 7.1 **Key major project assessment processes**

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

In broad terms, assessment arrangements in New South Wales, Queensland, South Australia and Tasmania can be characterised as relatively integrated due to the ‘dedicated’ major project assessment processes in place — table 7.1. Under these

arrangements a comprehensive range of impacts are considered jointly. In Victoria, a dedicated assessment pathway is available for major transport projects only.

Table 7.1 ‘Integrated’ approaches to major project assessment

<i>Jurisdiction</i>	<i>Dedicated major project assessment pathway</i>	<i>Key requirements</i>
New South Wales	State significant development and state significant infrastructure	• Environmental impact statement and development application • 30 day public exhibition period
Victoria	Major transport projects	• Comprehensive impact statement or impact management plan • 20-30 day public exhibition period
Queensland	Coordinated projects	• Environmental impact statement (not mandatory) • Social impact assessment and a social impact management plan • Public exhibition period
South Australia	Section 46 (major projects) process	• Environmental impact statement or public environment report or development report • Public comment period of 3 to 6 weeks
	Section 49 (Crown development and public infrastructure) process	• Development application • Environmental impact statement (not mandatory) • Public comment period of at least 3 weeks
Tasmania	Projects of state significance	• Impact statement
	Projects of regional significance	• Impact statement • Environmental impact assessment
	Major infrastructure projects	• Determined on a project-by-project basis

Source: Based on appendix B.

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

Dedicated major project assessment processes are not in place in Victoria (except for transport projects), Western Australia, the Northern Territory and the ACT. Instead, a range of ‘ordinary’ development assessment and approval (DAA) processes apply (table 7.2). In some cases administrative arrangements are in place to coordinate these processes, as discussed in section 7.3.

Table 7.2 Key assessment processes in ‘non-integrated’ systems

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

Source: Based on appendix B.

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

- health, safety and environmental assessments required under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. Specifically, proponents of

offshore petroleum projects may be required to prepare an Environment Plan, Safety Case, Oil Spill Contingency Plan or Well Operations Management Plan

- Indigenous heritage assessment processes under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
- processes for negotiating access to Aboriginal land or land held under native title as set out in the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Native Title Act 1993*
- development assessment processes set out in the *Airports Act 1996*, including preparation of a Major Development Plan consistent with a pre-existing Master Plan.

What are the key issues?

Study participants have suggested that major project assessment processes are creating unnecessary regulatory burdens and may not be delivering on their objectives. Specific concerns relate to five broad areas:

- unnecessary duplication between assessment processes
- uncoordinated administration of processes
- regulator conduct, capability and independence
- unnecessary or burdensome assessment requirements
- disproportionate and poorly targeted approval conditions (including offsets).

7.2 Duplication between assessment processes

Participants' contrasting views about duplicative assessment processes

Concerns about duplication between assessment processes (across and within levels of government) have been a strong theme of study submissions, particularly in regard to environmental assessment processes:

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

and

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

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

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

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

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

Notwithstanding concerns about duplication, the importance of the Australian Government's role in major project assessment was strongly emphasised by a number of participants. The Australian Network of Environmental Defender's Offices (ANEDO) observed:

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

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

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

The impacts of duplicative assessment processes

Duplicative environmental assessment processes lengthen assessment timeframes and contribute to significant costs (box 7.2). Other factors that contribute to high environmental assessment costs include:

- expansive information and public consultation requirements
- the complex and highly technical nature of the issues involved
- the need for regulators to make judgements amid substantial uncertainty, and often in the face of significant pressure from interested parties.

Box 7.2 Cost of environmental assessment processes

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

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

The Business Council of Australia noted:

Complex environmental approvals associated with exploration have been estimated to cost up to 60 cents in every \$1 raised for exploration purposes. (sub. 43, p. 9)

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

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

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

As set out in chapter 3, under Australia's federal system of government the States and Territories are primarily responsible for environmental management and administer a range of regulatory processes in this context. The Australian Government's environmental responsibilities are more limited and include matters of national environmental significance, the environment on Commonwealth land (or waters) or impacts on the environment (anywhere) caused by the actions of a Commonwealth agency. For particular major projects, this circumstance can manifest in environmental assessment processes at each level of government that cover similar (if not the same) issues and impacts.

Bilateral assessment agreements between the Commonwealth and the States and Territories are one way of reducing unnecessary duplication between processes. These agreements ‘accredit’ particular state and territory processes for the purposes of controlled action¹ assessments under the EPBC Act (appendix B). (Bilateral *approval* agreements are discussed in chapter 8.)

Assessment by bilateral agreement is one of seven available assessment methods under the EPBC Act. The assessment approach decision is made by the Australian Government Environment Minister in accordance with section 87 of the EPBC Act. For controlled action assessments over the period November 2000 to March 2013, bilateral assessment arrangements were used in about one fifth of cases (column 1, table 7.3).

Table 7.3 Assessment approach for controlled actions^a
November 2000 to March 2013

	<i>Bilateral</i>	<i>Accredit</i>	<i>RI</i>	<i>PD</i>	<i>PER</i>	<i>EIS</i>	<i>Total</i>
New South Wales	20	55	9	78	15	11	188
Victoria	8	21	-	104	5	3	141
Queensland	99	25	9	141	15	41	330
South Australia	1	4	-	27	7	6	45
Western Australia	59	14	13	133	9	8	236
Tasmania	19	2	1	24	1	4	51
Northern Territory	29	2	-	9	2	1	43
ACT	5	-	5	21	2	-	33
Total	240	123	37	537	56	74	1067

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

Source: Unpublished data provided by DSEWPAC.

One reason for this is the relatively narrow scope of bilateral assessment agreements. For example, in the case of South Australia, while the ‘section 46’ (major projects) assessment process (under the *Development Act 1993*) is accredited, the ‘section 49’ (Crown development and public infrastructure) process and key mining assessment processes (under the *Mining Act 1971*) are not. This — in part — explains why only one of 45 controlled actions has been assessed under a bilateral agreement in South Australia since 2000.

¹ Not all controlled actions under the EPBC Act constitute ‘major projects’ — the controlled action decision is based on the expected impact of the action on protected matters.

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

However, table 7.3 (column 2) shows that various state and territory assessment processes are often accredited on an ad hoc basis despite being excluded from bilateral assessment agreements. This suggests there is more flexibility to agree a single assessment process than bilateral agreements currently provide for. A number of State and Territory Governments have indicated support for more comprehensive bilateral assessment agreements:

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

and

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

Moreover, the Australian Government Department of Infrastructure and Transport considered that stronger bilateral assessment agreements are important to reduce delays:

Many delays experienced for major infrastructure projects are ...[because] current bilateral processes do not cater for all environmental issues ... A recent example of where delays can be extensive is the road works between Traralgon East and Kilmany in Victoria ... the Australian and Victorian governments have a bilateral agreement ... however, [the agreement] is unable to accommodate all environmental requirements ... As a result ... this project is now expected to be completed by mid-2016, some 30 months later than initially scheduled. ... These sorts of delays are not unusual in the Department's experience, but despite early involvement there is often little the Department can do to expedite the process (sub. 59, pp. 13–14)

The Commission recognises that it might never be practical to remove *all* incidences of duplication between Australian Government and state and territory environmental assessment processes. However, more comprehensive bilateral agreements that accredit a broader range of state and territory processes — and in particular, those most commonly used for major project assessment — offer significant potential to reduce the incidence of regulatory duplication (and the costs and delays this gives rise to).

All bilateral agreements should be reviewed and renewed with the aim of instituting a ‘one project, one assessment’ framework for the significant majority of major projects requiring approval under the EPBC Act. Furthermore, where accreditation of a process to all applicable matters is not possible, consideration should be given to whether processes can be accredited for use in particular circumstances, locations or for particular types of projects (‘partial accreditation’) — this approach has been adopted in Canada (box 7.3). The outcome of this work should be public, including (where relevant) the reasons why processes are not deemed to meet Commonwealth standards.

Box 7.3 Bilateral assessment arrangements in Canada

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

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

Source: BCEAO (2013).

DRAFT RECOMMENDATION 7.1

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

The recent ‘water trigger’ amendment to the EPBC Act was highlighted by some study participants as a particularly pertinent example of regulatory duplication. This amendment — passed by the Australian Senate in June 2013 — means that coal seam gas and large coal mining developments must be assessed and approved by the Australian Government if they are expected to significantly impact on a water resource.

Several study respondents considered that existing state and territory water protection laws are adequate, and that the new EPBC trigger adds to the regulatory burden unnecessarily:

The introduction of the water trigger will mean that water will be assessed by up to three different bodies on some mining projects in NSW: the independent gateway panel; the Planning Assessment Commission; and the Australian Government. This process is not efficient, will result in increased delays and costs for projects, and is unlikely to achieve commensurate gains for the environment. (NSW Minerals Council, sub. 23, p. 3)

and

The plan to introduce the [water] trigger ... is a textbook example of how regulation can increase costs to industry while delivering no environmental benefit. (APPEA, sub. 17, p. 1)

Participants also questioned the logic of introducing an ‘activity-specific’ EPBC trigger, noting the new arrangements imply water resources impacted by coal seam gas and coal mining activities are a matter of national environmental significance but other water resources are not.

Concerns have also been raised about the integrity and transparency of the process proceeding this legislative amendment:

New approvals regimes continue to be added to a long list, the latest proposals being the federal assessment of coal seam gas projects under the EPBC Act due to the ‘water trigger’ The addition of new approvals requirements rarely considers the addition to the cumulative regulatory burden placed on the project and whether there are better alternatives. (BCA, sub. 43, p. 12)

The Australian Government’s decision to exempt the Bill that provided for this amendment from regulatory impact statement (RIS) requirements has been identified as a particular concern. The NSW Minerals Council noted:

Exemptions from regulatory impact statement (RISs) should only be granted in exceptional circumstances, including where truly urgent and unforeseen events arise or there is a matter of budget or other sensitivity ... it is critical that this [a RIS] is undertaken to allow properly informed debate about the justification for the Bill and its costs and benefits. (2013b, p. 2)

Similarly, Queensland Gas Company observed:

The process by which the Bill came to be considered by the Parliament is void of satisfactory industry consultation ordinarily and reasonably afforded to regulatory amendments of such a significant nature and runs counter to the Government’s recent commitment to effective, proportionate and beneficial regulations through the mandatory regulatory impact statement process. (2013, p. 2)

Moreover, the amendment rules-out the potential for water trigger-related actions to be approved by State and Territory Governments under any future bilateral approval agreement (chapter 8). This is at odds with the objects of the EPBC Act (namely, to

‘strengthen intergovernmental cooperation, and minimise duplication, through bilateral agreements’ and ‘provide for the intergovernmental accreditation of environmental assessment and approval processes’ (s. 3)), and recent commitments made by the Australian Government to reduce doubling-handling and streamline regulatory processes.

‘Best practice’ regulatory process requires that expected benefits and costs are assessed ahead of undertaking significant legislative or regulatory reform. Exceptions from this practice should be limited to genuinely exceptional circumstances, such as emergency situations, where a clear public interest can be demonstrated (PC 2012).

The water trigger amendment (in combination with the prohibition on use of bilateral approval agreements) will impose an extra layer of regulation on affected proponents. Further, it is not obvious that existing laws are deficient or that the particular legislative amendment adopted by the Australian Government is the best approach to dealing with any identified gap in the regulatory framework. There is a strong case for undertaking a public and independent review of the water trigger amendment to determine whether the benefits exceed the costs.

DRAFT RECOMMENDATION 7.2

The Australian Government should undertake and publish a regulatory impact assessment of the ‘water trigger’ amendment to the Environment Protection and Biodiversity Conservation Act 1999, including the exclusion of water trigger-related actions from bilateral approval arrangements.

Duplication between regulatory assessment processes *within* States and Territories has also been raised as an issue. The Chamber of Commerce and Industry of Western Australia considered:

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

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

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

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

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

Strict adherence to ‘best practice’ regulatory principles by State and Territory Governments is critical to improve the efficiency and effectiveness of the regulatory framework governing major project development. This means:

- regular review and judicious streamlining of major project regulatory processes
- clarity about objectives, and the roles and responsibilities of individual agencies
- establishing a case (based on expected benefits and costs) for introducing new regulatory requirements.

A number of State and Territory Governments have recognised that regulatory burdens are increasing and various reform efforts are underway. For example, the Queensland Government recently passed legislation (*Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012*) to consolidate environmental impact statement legislation, simplify applications for environmental authorities, and ‘reduce the cycle of repeated requests for information from proponents’ (sub. 47, p. 5). Notwithstanding this, further judicious streamlining is required across all jurisdictions to improve regulatory performance.

A further way to minimise duplication between assessment processes covering similar impacts is for responsible agencies to cooperate to undertake joint assessments, or alternatively, to use memorandum of understanding (MOU) agreements to accredit the process of one agency as meeting the requirements of another agency. For example, mining projects are often required to participate in (at least) two environmental assessment processes at the state and territory level — one under general environmental law and another under mining-specific law. A cooperative arrangement that removes the need for proponents to comply with two separate but similar and overlapping assessment processes presents significant potential for efficiency gains.

This concept was supported by the South Australian State Government Departments (sub. 51), and is consistent with foreshadowed changes to environmental regulations applying to offshore petroleum projects at the federal level (box 7.4).

Box 7.4 Federal environment regulation of offshore petroleum projects

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

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

The Australian Government recently announced that NOPSEMA will be accredited to assess and approve certain petroleum activities as meeting the environmental requirements of the *Environment Protection and Biodiversity Conservation Act 1999* (Gray 2013). The Commission supports these changes and expects that removing unnecessary duplication will materially reduce compliance costs for affected businesses. That said, implementing this reform will involve transitional issues and it may take some time for the full benefits to be realised. Good communication with stakeholders and provision of appropriate information and guidance on the new arrangements is important to foster support and patience throughout the implementation period.

DRAFT RECOMMENDATION 7.3

Regulatory agencies at the state and territory level should establish cooperative arrangements (for example, memorandums of understanding) for joint or substitutable assessments to minimise unnecessary duplication between major project assessment processes within a jurisdiction.

7.3 Uncoordinated administration of assessment processes

Concerns about high coordination costs

Study respondents have indicated that unnecessary costs and delays are being incurred, and regulatory uncertainty increased, due to poor coordination between regulatory institutions. Xstrata Coal noted:

State and Territory Government agency coordination [and] cooperation ... must be improved through the adoption of a 'whole of Government' approach to major project assessment. (sub. 50, p. 45)

The Chamber of Commerce and Industry of Western Australia pointed to a lack of ‘parallel processing’ under the current arrangements, leading to sequencing problems and unnecessary delays (sub. 44). Inadequate communication and information sharing between regulators was also raised as an issue, with many proponents noting they often have to provide the same information twice.

A particularly frustrating issue for proponents is a lack of timely information on the progress of project approvals once assessment has commenced. Moreover, respondents often found it difficult to identify the relevant person within government to contact about the progress of a project application.

Improving assessment coordination arrangements

The scale and ‘footprint’ of major projects mean the number and scope of regulatory requirements is significant. Moreover, these requirements are spread across several legislative and regulatory instruments, and can vary across projects, locations and circumstances. This underscores the importance of well-designed and administered regulatory arrangements to avoid overlap, inconsistencies and uncertainty.

In practice, the major projects regulatory system is complex, cumbersome and subject to regular change. In this circumstance, effective coordination and communication between regulatory agencies is imperative to minimise transaction costs. Governments have implemented various administrative arrangements to better coordinate major project assessment processes without changing statutory assessment and approval responsibilities. This includes ‘lead agency’ arrangements in Western Australia, ‘case management’ arrangements in South Australia and the ‘coordinated projects’ pathway in Queensland (box 7.5).

Box 7.5 Coordination of major project regulatory processes

- Under a *lead agency* model, a particular agency (with some direct involvement in the assessment and approval process) is made responsible for providing proponents with information on statutory requirements and coordinating relevant assessment and approval processes across government. This approach has been adopted for major projects in Western Australia and the Northern Territory.
- *Case management* arrangements involve the appointment of a case manager to work with proponents throughout the approvals process. Case management services are available in South Australia.
- The *Coordinator-General* arrangements in Queensland provide a coordinated environmental assessment process for declared ‘coordinated projects’. This process does not exempt major project proponents from obtaining necessary approvals from relevant regulators.
- The Australian Government’s *Major Projects Facilitation Program* (administered by the Department of Infrastructure and Transport) provides eligible proponents with advice on relevant Australian Government approvals and facilitates relationships with key State and Territory Government agencies. Very limited resources are dedicated to this program.

Sources: Submissions 46, 47, 51, and 59.

An alternative way to manage coordination issues is via a dedicated major projects coordination agency independent of the assessment and approval process. For example, Major Projects Victoria — a division of the Victorian Government’s Department of Business and Innovation — provides advice and assistance with regulatory approval processes for public major projects. A more substantial version of this concept is provided by the Major Projects Management Office (MPMO) in Canada (box 7.6). MPMO services are provided to proponents of major resource projects².

An extension of this model is a ‘one-stop shop’ whereby a single agency or Minister has statutory responsibility for a wide range of major project assessment and approval functions (functions that would normally reside with other regulators). A number of study participants supported this approach:

Governments should work together to remove all overlap and duplication in approving major projects and introduce wherever possible a single point of contact for business (or ‘one-stop shop’) that covers all project approvals requirements for major project proponents. (BCA, sub. 43, p. 3)

² Defined as ‘Large resource projects which are subject to either a comprehensive study or panel review under the *Canadian Environmental Assessment Act*’.

Box 7.6 **Canada's Major Project Management Office**

The Major Projects Management Office (MPMO) was established in 2007 to facilitate coordination between federal regulators of major resource projects. Functions of the MPMO include:

- providing information regarding relevant regulatory requirements
- developing 'Project Agreements' that outline the roles and responsibilities of agencies and a timeline for each component of the process
- tracking and publicly reporting on the progress of regulatory processes against agreed timeframes
- monitoring compliance with, and reporting on performance against, the Canadian Government's Aboriginal Consultation requirements
- leading research on initiatives to improve the performance of the regulatory system.

The 2007 budget provided \$30 million over five years for the MPMO.

Source: Government of Canada (2012).

In Australia, the regulatory arrangements governing major transport projects in Victoria provide one example of this approach. The *Major Transport Projects Facilitation Act 2009* establishes the Minister for Planning as the responsible authority for granting various 'applicable approvals' such as permits and approvals related to heritage, environment protection, flora and fauna, road management and water.

Internationally, a variation of the one-stop shop model is used for regulation of major international and interprovincial oil, gas and electricity projects in Canada. Specifically, the National Energy Board has the authority to grant approvals for relevant pipeline and power line projects to proceed, as well as some approvals required under other legislation, including environmental approvals required under national environmental law.

A one-stop shop approach offers significant potential to reduce coordination costs and provide greater certainty and clarity about the regulatory framework. However, these benefits must be weighed against the costs and risks inherent in this model, namely:

- the risk of 'regulatory capture'
- the feasibility of one agency having the combined expertise to assess and grant approvals across a range of areas
- community concerns about the independence and rigour of the process
- costs associated with implementing legislative changes

-
- the need for efficient and effective referral arrangements (to the extent that input and advice from other departments is sought)
 - the risk of the one-stop shop making decisions that have precedentiary and other impacts on the activities and decisions of the agencies that administer the laws in question on a routine basis.

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

That said, the Commission anticipates that many of the same benefits associated with this model could be achieved through alternative (and less costly and risky) institutional arrangements in the form of a dedicated major projects coordination ‘office’ (MPCO) (or similar) in each State and Territory. A similar body is unlikely to be justified at the federal level given the limited number of relevant Australian Government DAA processes. That said, the case for expanding the resources and operational relevance of the Major Projects Facilitation Program (box 7.5) should be considered.

These offices would have the primary purpose of coordinating and facilitating the various approvals, licences, permits and authorisations required by the proponent by identifying bottlenecks and publicly reporting on progress against statutory and regulator-determined timeframes (chapter 8). These bodies would *not* have the authority to override the decisionmaking capacity of regulators. To maximise net benefits:

- Coordination offices should report directly to senior economic Ministers, for example, the Premier, Treasurer or Minister for State Development.
- Access should be limited to projects that are large scale (in terms of the scale of the activities involved and the physical or geographic footprint of the project), technically complex and ‘state significant’ (that is, make a significant contribution to the broader economic development or infrastructure requirements of the State or Territory). In practice, a MPCO is likely to manage fewer than a handful of projects at a time.
- The Australian Government should commit to its regulators actively participating and supporting these coordination activities.

This reform does not necessarily entail establishing new institutions. For those jurisdictions that already have some type of coordination mechanism in place, refinements to these arrangements (in terms of functions and resources) may be all that is required.

DRAFT RECOMMENDATION 7.4

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

- ***advise proponents on statutory requirements***
- ***develop project agreements that document agreed working arrangements among regulators and timeframes for the completion of processes***
- ***electronically track and report on progress against statutory and regulator-determined timeframes***
- ***facilitate interactions with relevant Australian Government regulators and local governments.***

These offices should be close to the centre of government and access should be limited to complex, large-scale projects of state or territory significance.

7.4 Regulator conduct, capability and independence

Reports of poor performance and conduct by regulators

Capable regulators and good regulator conduct are fundamental to the efficiency and effectiveness of the major projects regulatory framework. However, participants have suggested that regulators sometimes lack technical expertise — particularly in terms of interpreting and assessing scientific information — and an appropriate understanding of the ‘commercial realities’ of major project development:

Regulatory administration functions are not always adequately staffed to manage the increasing number and complexities of approvals processes demanded by government legislation. Personnel are frequently inexperienced in undertaking the assessment and/or lacking in project experience or commercial acumen. (BCA, sub. 43, p. 10)

The Chamber of Minerals and Energy of Western Australia considered:

The resourcing of approval agencies is a key consideration in the conduct of efficient and effective DAA processes. The extent to which sufficient resources are available to approval agencies is critical to the timely arrival at approval decisions. The resource sector’s general experience with the Department of Sustainability, Environment, Water,

Population and Communities is a lack of adequate staff resources to effectively manage the DAA process. (sub. 18, p. 4)

Xstrata Coal considered that regulatory performance should be better given the high fees paid by proponents:

[In Queensland] application fees alone to progress a major project can easily exceed \$500 000 with no guarantee ... that specific Government staff will be dedicated to work on the project, that Government staff will be suitably relevantly qualified and experienced in mining to understand and comprehend the complexity of a mining project, and also that any statutorily defined timeframes for Government agencies will be met. (sub. 50, p. 40)

King & Wood Mallesons (sub. 39) proposed that regulatory agencies would be more effective if aspects of assessment were outsourced to certified experts. It was also suggested that governments should adjust agency resources in anticipation of changes in workload, based on the investment pipeline (BCA, sub. 43).

Stakeholders have also expressed anecdotal concerns about the impartiality of regulators, however evidence to this effect has not been provided. That said, the independence and rigour of major project assessments was regarded as a critical issue by several participants:

It is the responsibility of the assessing officers to critically evaluate the assessments contained in the environmental impact statement and to then provide full, frank and independent advice to the consent authority. (Xstrata Coal, sub. 50, p. 52)

and

Best practice environmental impact assessment should remove the nexus between developers and environmental consultants by introducing a framework for the independent appointment of environmental consultants. (Nature Conservation Council of NSW, sub. 22, p. 3)

Establishing independent assessment agencies

Governments have implemented various measures to encourage rigorous, expert and impartial assessment of major projects. For example, external expert groups have been established in a number of jurisdictions to advise regulators on technical matters — the statutory advisory committees and panels provided for under the EPBC Act are one example. In other cases, peer review arrangements are used to manage quality concerns.

A further way of encouraging objective and robust regulatory assessment is by assigning this responsibility to an independent expert body separate from the policy making functions of government. Among the States and Territories, this approach

has been adopted most fully in Tasmania, where the Tasmanian Planning Commission has responsibility for all aspects of assessment for projects of state significance. A number of other jurisdictions have instituted this model for environmental matters via the establishment of separate ‘environment protection authorities’ from core departments responsible for environmental policy (table 7.4).

Table 7.4 Regulatory assessment agencies

<i>Jurisdiction</i>	<i>Assessment pathway or process</i>	<i>Regulator</i>
New South Wales	State significant development and state significant infrastructure	Department of Planning
Victoria	Environmental effects statement Works approval	Minister for Planning Environment Protection Authority Victoria
	Major transport projects	Minister for Planning
Queensland	Environmental impact statement for coordinated projects	Coordinator-General
South Australia	Section 46 (major projects) process Section 49 (Crown development and public infrastructure) process Works approval	Minster for Planning Development Assessment Commission Environment Protection Authority South Australia
Western Australia	Public environmental review or assessment on proponent information Development Assessment Panel application	Environmental Protection Authority Western Australian Local government or the Western Australian Planning Commission
Tasmania	Projects of state significance Projects of regional significance Development approval for major infrastructure project Environmental impact assessment	Tasmanian Planning Commission Panel appointed by the Tasmanian Planning Commission Combined Planning Authority established by Minister Environment Protection Authority Tasmania
Northern Territory	Environmental impact statement or public environmental review Authority certificate	Northern Territory Environment Protection Authority Aboriginal Areas Protection Authority
ACT	Environment impact statement	ACT Planning and Land Authority Inquiry panel may also be established by the Minister
Commonwealth	Development application Controlled action assessment under the EPBC Act Heritage listing assessments under the EPBC Act Offshore petroleum environmental and safety assessments	ACT Planning and Land Authority Department of Environment Australian Heritage Council National Offshore Petroleum Safety and Environmental Management Authority

Source: Based on appendix B.

There is a strong ‘in-principle’ argument as to why an agency independent of government (and ministerial direction) should be responsible for major project assessment. The OECD Regulatory Policy Committee notes:

Independent regulatory agencies should be considered in situations where:

- There is a need for the regulatory agency to be independent in order to maintain public confidence
- Both the government and private entities are regulated under the same framework and competitive neutrality is therefore required
- The decisions of regulatory agencies can have significant economic impacts on regulated parties and there is a need to protect the agency’s impartiality. (2012, p. 14)

Each of these circumstances applies to the regulation of major project developments. Moreover, institutional separation of regulation and policy functions can encourage more transparent and effective regulatory performance (box 7.7).

For environmental matters protected under the EPBC Act, adoption of this approach would mean transferring responsibility for regulatory assessment and enforcement functions from the Australian Government Department of Environment to a new federal agency governed by an independent Commission (a ‘National Environment Commission’ (NEC)). Specifically, this body would:

- determine whether assessment under the EPBC Act is required, and if so, the appropriate assessment method (including whether the assessment can be undertaken under a bilateral agreement)
- conduct the assessment process (if a bilateral is not used) and provide advice and recommendations to the Australian Government Environment Minister (who would remain the ultimate approval authority — chapter 8) as to whether the action should be approved, and any conditions or offset requirements to be attached to that approval
- undertake monitoring, audit, compliance and enforcement activities under the EPBC Act.

The Department of Environment would continue to have exclusive responsibility for *policy* functions under the EPBC Act, including the identification and management of World, National and Commonwealth heritage places, properties and values, and listing threatened species and ecological communities and managing conservation programs associated with these matters.

Box 7.7 **The case for independent regulators**

Establishing independent regulators at arm's length from government is characteristic of 'good practice' regulation and encourages more transparency, consistency and a longer-term focus:

Independent regulators ... protect market interventions from direct short-term political interference in regulatory matters and also from the influence of specific private or public interests, such as those of the regulated firms. Independence is expected to go hand in hand with transparency, stability and expertise. (OECD 2004, p. 92)

The Victorian Competition and Efficiency Commission also indicated support for this approach and noted that combining policy and regulatory functions can:

- increase the risk of regulatory 'creep', because it can be in the regulator's institutional interest to maintain and expand its role
- reduce accountability, by making it harder to assess regulators' performance
- increase the risk that the regulator may come to identify its own interests with those of the groups it is regulating ('industry capture')
- encourage excessive reduction of risk
- draw regulators into the political process, possibly compromising their perceived and actual independence, and their capacity to make impartial decisions
- confuse the roles of administering regulations and investing resources in changing regulation
- lead to more complex regulatory environments. Regulators may have an interest in creating complex environments, in which it becomes difficult to discern whether poor regulatory outcomes can be attributed to regulators' performance or to the complexity of regulation
- confuse advocacy and regulatory roles.

Notwithstanding this, the benefits of independent regulators are contingent on strong accountability mechanisms and clear objectives set by government.

Source: VCEC (2005).

Institutional separation of regulatory assessment and enforcement functions from environmental policy at the national level is common to many federal systems (box 7.8), and is consistent with (but not identical to) the recommendation made by Dr Allan Hawke as part of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*.

Box 7.8 **Independent federal environment agencies**

- The *Canadian Environment Assessment Agency* (CEAA) is an independent federal body accountable to the Minister of the Environment. The CEAA is responsible for determining whether an environmental assessment is required, issuing the terms of reference, reviewing the documentation and preparing an assessment report for the Minister.
- The *New Zealand Environmental Protection Authority* (EPA) was established in 2009 to centralise and streamline the decisionmaking process of nationally significant proposals. The EPA is responsible for assessing whether a proposal should be identified as a project of national significance, and if so, it will recommend to the Minister that he or she refer the matter to a board of inquiry (chaired by a current, former or retired Environment Judge or a retired High Court Judge) or the Environment Court for decision.
- The *Netherlands Commission for Environmental Assessment* (NCEA) was established in 1987 as an independent expert body to advise governments (national, provincial and local) on the scope and quality of environmental assessment reports (including environmental impact assessments and strategic assessments). Advisory reports prepared by NCEA are intended to provide an impartial judgment on controversial projects, increase the value of environmental assessment reports as a basis for decisionmaking and reduce the likelihood of legal challenges to decisions.

Sources: CEAA (2012); EPA (NZ) (2013); NCEA (2011).

The Australian Government did not support Hawke's recommendation:

The Australian Government does not agree to this recommendation.... Broader issues of sustainability can be referred by the government to the Productivity Commission. The Productivity Commission currently has four research themes, one of which focuses on environmental and natural resource management. ... The government can also convene an inquiry where such statutory independence is required in assessing a major project. (2011b, p. 114)

The Productivity Commission is *not* the appropriate body to administer the regulatory assessment and enforcement functions of the EPBC Act. The Commission is an independent public policy agency — not an environmental regulator — and to undertake such administrative activities would compromise the independence of the Commission's advice in other areas.

Establishing a NEC would involve upfront and ongoing costs. The Commission expects that some of these costs could be met through a transfer of staff from the Department of Environment, reducing the need for 'new' expenditure. Notwithstanding this, the Australian Government should undertake a detailed assessment of the benefits and costs of establishing a NEC. This work should be

public and undertaken in the context of the full set of recommendations made in this draft report.

The Senate Environment and Communications Legislation Committee has also recently called for the Australian Government to reconsider the merits of a NEC:

The committee is persuaded by the evidence it received to indicate that Australia's interests would be well served by establishing an independent National Environment Commission and appointing a National Environment Commissioner. ... The committee is of the view that the Commonwealth should reconsider its position on this [Hawke] recommendation as the evidence in support of the recommendation is strong. (2013, p. 29)

At the state and territory level, similar cost–benefit analysis is required taking into account jurisdiction-specific factors such as the extent to which major project assessment functions are already undertaken by an independent agency (or agencies), and the scope for expanding or refining the roles of these agencies to include a broader range of regulatory assessment functions.

DRAFT RECOMMENDATION 7.5

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

High performing regulators

Establishing independent regulators is not sufficient to achieve leading practice major project assessment arrangements. Indeed, *how* regulation is implemented can be as important as the regulation itself. Good regulatory outcomes are invariably associated with regulatory agencies that are financially well resourced, have cultures that develop and retain skilled staff, and are led by people who encourage their organisations to remain focused on achieving their regulatory objectives at minimum cost to the entities they regulate.

As noted above, not all major project regulators are regarded as high performers and many participants have identified inadequate agency resourcing (both in terms of the quantity and ‘quality’ of regulatory staff) as a key factor. Furthermore, stakeholders have suggested that resource constraints have worsened since the onset of the resources boom due to the increased number of major project proposals and difficulties attracting and retaining suitably qualified staff. Recent job cuts in some States and Territories may also be impacting on the ability of regulators to

administer their functions in a timely way (Senate Environment and Communications Legislation Committee 2013).

While judicious streamlining of regulatory arrangements and increased use of risk-based approaches is expected to alleviate these problems to some degree, there is also a role for greater use of cost recovery mechanisms to ensure adequate resourcing of regulators. Should governments pursue this, in line with current Australian Government practice, cost recovery arrangements should be subject to regular review through a cost recovery impact statement at least every five years to ensure that charges remain appropriate.

The culture of regulatory agencies and the attitude of staff to their functions also has a significant impact on the functioning of the regulatory system, particularly given the interface between proponents and regulators throughout the DAA process. These characteristics can be difficult to measure and monitor, however this is not a valid reason to ignore poor performance. Change management programs and appropriate training and development regimes should be implemented where necessary to achieve a culture conducive to being a high performing regulator.

DRAFT RECOMMENDATION 7.6

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

7.5 Unnecessary assessment requirements

Claims of high and increasing assessment costs

Rigorous assessment processes are critical for ensuring that regulatory objectives are achieved. However, participants have suggested that current processes may be unreasonably onerous, adding to compliance costs and assessment timeframes unnecessarily.

Comments about the disproportionate and burdensome nature of major project assessment processes — and the cost of meeting information and data requirements in particular — were almost exclusively focused on EIA processes. Respondents expressed concern that these processes follow a ‘one size fits all’ approach:

Government agencies prefer an applicant to ‘cover the field’ of issues in the development assessment process, regardless of the substantive merits of each particular issue and its relevance to the specific project. ... A one size fits all approach ... results

in devoting time, effort and expense in areas that have little or no relevance to the project. (Xstrata Coal, sub. 50, pp. 34, 39)

To illustrate this point, Xstrata Coal referred to a case study example where a proponent was required to assess the impact of a coal mine in Western Queensland on marine species despite a river length of over 400 kilometres from the project site to the marine environment:

A marine study ... can cost a proponent tens of thousands in reporting and Government negotiation. Add this type of terms of reference (ToR) scope across multiple EIA topics (noise, air, water, ecology, visual amenity), and the cost of addressing ToR scope that has little or no relevance to the project and provides no positive environmental or social outcome, can easily exceed hundreds of thousands of dollars within months of a project EIA commencing. (sub. 50, p. 39)

The Queensland Resources Council considered that major project assessment processes are susceptible to ‘scope creep’:

One of the reasons terms of references (ToRs) and environmental impact statements (EISs) are so large is that some of the points needing to be responded to are beyond the scope of the legislation ... The ToR needs to request information that is within the management responsibility of the agency requesting the information, and be relevant to support an application. (sub. 19, p. 5)

A number of respondents referred to the significant costs associated with preparing assessment documentation and, in this context, emphasised the importance of ensuring that information requirements are relevant and justified. The costs associated with conducting heritage surveys and managing native title claims in Western Australia was of particular concern:

The average cost of a heritage survey has increased from \$11 000 per day in 2010 to the current approximate cost of \$15 000 per day ... [these] costs are in addition to those paid to anthropologists, archaeologists, consultants, lawyers and a lesser percentage to native title representative bodies and Traditional Owners themselves. (AMEC, sub. 42, pp. 9–10):

Achieving proportionate major project assessment arrangements

Economic efficiency suggests that major project assessment processes should only be as rigorous (and as onerous) as necessary to ensure that regulatory objectives are met. The UK Institute of Environmental Management and Assessment notes:

Environmental impact assessment should ... impose the minimum cost burdens in terms of time and finance on proponents and participants consistent with meeting accepted requirements and objectives of EIA ... be adjusted to the realities, issues and circumstances of the proposals under review without compromising the integrity of the

process ... be applied so that the scope of review is consistent with the size of the proposal and commensurate with the likely issues and impacts. (IEMA 2002, p. 128)

In practice, there are various circumstances that make it very difficult to design and administer perfectly efficient assessment processes. In particular, the highly complex and variable characteristics of major projects mean that the ‘optimal’ level, scope and type of assessment can vary across projects, locations and time. Moreover, it is not always possible to identify the appropriate level of assessment, or the necessary information inputs, at the commencement of the process.

This circumstance presents a difficult balancing act for regulators at the assessment stage. Applying a level of assessment that is ‘too low’ (that is, not sufficiently rigorous), risks delivering an incomplete or substandard assessment of major project impacts, with potentially significant repercussions for policy outcomes or changing the scope or level of assessment mid-process, generating costs and delays and causing frustration for proponents.

On the other hand, major project assessment is a time-consuming and expensive exercise. Setting the level of assessment ‘too high’ (that is, over and above what is required to ensure that regulatory objectives are achieved) risks imposing significant unnecessary costs on proponents and the community. Moreover, assessment processes that encourage overly complex and technical assessment documentation can adversely impact on the effectiveness of public consultation processes.

There is no ‘silver bullet’ that can completely safeguard against either of these scenarios. However, well-designed and administered ‘risk-based’ assessment arrangements can — in principle — encourage a level of regulatory scrutiny that is proportional to the risks and significance of major project impacts (box 7.9).

In practice, ‘scaling’ regulatory requirements in this way is challenging. Notwithstanding this, chapter 6 considered how risk assessment tools can be effectively used at the time of setting the terms of reference to achieve more efficient EIA processes. A further way to reduce unnecessary compliance costs is to establish multi-layered assessment arrangements (that is, assessment *tracks* within individual processes — including but not limited to EIA processes) supported by strong transparency and accountability requirements. A number of jurisdictions have adopted this approach:

- assessment of controlled actions under the EPBC Act
- EIA processes administered by the EPA in Western Australia
- major project assessment processes under the *Development Act 1993* in South Australia.

Box 7.9 What is risk-based regulation?

Risk can be defined as the probability of an unfavourable event multiplied by the severity of harm if the event occurs. When a regulator employs a risk-based approach, they are recognising that different major project characteristics present different levels of risk to meeting intended regulatory objectives. Likewise, regulators can also accommodate the different *nature* of risk — some regulations seek to prevent catastrophic outcomes, such as the loss of lives, while others aim to reduce less significant adverse events such as damage to a local road.

Armed with knowledge about such differences in risk, a regulator can then tailor the delivery of regulation so that compliance costs are proportionate to the benefits of addressing those risks. Accordingly, risk-based approaches can ensure that regulatory resources are allocated efficiently and that objectives are achieved at 'least cost' to the community. Notwithstanding this, use of a risk-based approach requires regulators to develop the information and capacity to systematically target their effort to regulatory areas presenting the greatest risks.

Source: PC (2013b).

Multi-layered assessment arrangements are a common feature of 'ordinary' development systems. The Commission's *Planning, Zoning and Development Assessments* report found that 'leading practice' characteristics of development assessment processes include:

Streaming development and rezoning applications into assessment 'tracks' that correspond with the level of assessment required to make an appropriately informed decision. This both speeds up most development assessments and rezonings, and releases assessment resources to focus on those proposals which are particularly technically complex or have significant impacts on others. (2011c, p. XLVIII)

A number of jurisdictions are making greater use of tiered assessment approaches, as well as arrangements that exempt 'low risk' projects and activities from certain regulatory requirements (box 7.10). Strategic Assessment tools can also support a risk-based approach to major project regulation by reducing the need for project-specific assessment requirements. The role and impact of strategic approaches is considered in chapter 11.

Many study participants advocated a risk-based approach to major project regulation:

Jurisdictions should adopt a risk-based approach to regulation to ensure that regulatory effort is directed to the areas of development approvals where it will have most impact and that the costs of regulation are commensurate with the risks to be managed. (BCA, sub. 43, p. 2)

Box 7.10 Risk-based approaches to major project assessment

The Queensland Government is implementing reforms that lower regulatory assessment requirements for low risk mining developments:

Low environmental risk resource activities that meet eligibility criteria can now automatically receive a standard approval containing standard environmental conditions. ... The principles of risk based assessment are being applied in developing new thresholds for assessment of resource project expansions and in determining thresholds for application of environment authorities. It is expected that this will simplify the application process for certain activities and significantly reduce the compliance burden. (sub. 47, pp. 5, 37)

Risk-based reforms to native vegetation regulations have also been undertaken in Victoria and Queensland.

- Risk-based pathways for native vegetation permit applications have been established in Victoria to better match the obligations and costs faced by landholders with the biodiversity impact of clearing proposals. For example, low-risk permit applications do not need to include a 'habitat hectares' assessment of the native vegetation to be removed. (DEPI (Vic) 2013)
- The *Vegetation Management Framework Amendment Act 2013* (Qld) establishes self-assessable clearing codes that enable landowners to undertake vegetation clearing without the need to obtain a development permit in certain circumstances. (Queensland Government 2013)

That said, various challenges with risk-based regulation were identified, highlighting the need for caution in designing and implementing these arrangements:

A single bad development outcome can discredit the entire risk-based approach if the risk framework hadn't anticipated that situation or was not flexible enough to deal with it. This is especially the case if public, media or political attention is focused on the bad decision — there tends to be an over-reaction and movement back to a very risk averse approach. (Queensland Government, sub. 47, p. 40)

and

Using risk-based approaches to regulation may have drawbacks, particularly if there are significant unknowns either with the technology proposed to be used in the project, or a lack of knowledge on the existing environmental conditions of a site. (Xstrata Coal, sub. 50, p. 57)

The Commission considers that there is scope to reduce the incidence and materiality of unnecessary regulatory burdens through greater uptake of risk-based approaches. However, a number of pre-conditions must be met.

- Staff must have the requisite skills and experience to administer risk-based assessment approaches (draft recommendation 7.6).

-
- Sound institutional design and governance is critical to protect against the (real or perceived) risk associated with providing regulators with greater discretion. For example, clear guidance or criteria should be identified to guide decisions about the appropriate level of assessment, and the decisions and reasons should be public.
 - A strong monitoring and enforcement regime (including material penalties for breaking environmental law and a real and credible threat of detection) must accompany risk-based approaches that lower assessment requirements for proponents (chapter 10).

DRAFT RECOMMENDATION 7.7

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

7.6 Poorly targeted and disproportionate conditions and offsets

Approval conditions are a necessary and desirable feature of the major projects regulatory framework. Regulators impose conditions to avoid and mitigate adverse impacts of a project not addressed by the project proposal. However, current processes may be giving rise to impractical, poorly targeted and unnecessarily costly conditions (including offset measures — box 7.11).

Concerns about how conditions and offsets are used in practice

Participants suggested that approval conditions have become more prescriptive and onerous over time without improving environmental outcomes:

Too many ad hoc conditions are being attached to project approvals, which not only add significant costs to proponents — which can be prohibitive — but also can be simply unmanageable and unable to be properly monitored by regulators, resulting in high cost from red tape for no real benefit. This is multiplied across jurisdictions. (BCA, sub. 43, p. 10)

The Queensland Resources Council questioned the integrity of condition-setting processes and suggested that some governments use these processes to encourage proponents to fund public infrastructure requirements:

When major projects are routinely having twelve hundred or more specific conditions imposed on them — which collectively require hundreds of subsidiary assessment

processes, such as the preparation of a social impact management plan — the case could be made that regulations are being made by stealth. In many cases, these quasi-regulations are blurring the boundaries of the Government’s responsibility to provide basic services for growing communities by seeking to shift these costs onto major projects. (sub. 19, p. 4)

Box 7.11 The economic role of offsets

Major project proponents are often required to deliver (directly or via third parties) environmental offsets. In broad terms, offsets refer to measures that compensate for the adverse impacts of a development on the environment (such as air pollution, loss of native vegetation and impacts on biodiversity).

In an environmental management context, offsets can allow development activity to proceed (that is, comply with relevant environmental regulations) at ‘least cost’ to the community. For example, suppose a proponent proposes to build a coal mine that would, in expectation, cause environmental damage but is also expected to deliver significant economic and social benefits. If prevailing regulations prohibit such a reduction in environmental quality, the mine would not be allowed to go ahead and the foregone economic and social benefits would represent the ‘opportunity cost’ of maintaining environmental quality.

In contrast, if environmental offsets are available the mine would proceed provided the proponent also undertakes (or purchases from another) a separate action (‘offset’) that increases the quality of the environment by the same amount. In some cases, the requirement may be to produce a net increase in environmental quality (Murtough, Aretino and Matysek 2002). In this way, offsets can allow economic benefits to be realised without compromising the achievement of environmental objectives.

In practice, there a number of challenges associated with designing and applying offset policies — particularly in the case of biodiversity — such as determining the amount of environmental degradation and identifying offsetting activities that are ‘equivalent’ to the adverse impact of the development (Godden and Vernon 2003).

The cost-effectiveness and rigour of offset measures was highlighted as a particularly important issue by a number of participants:

Biodiversity offsetting requirements are unnecessarily excessive. In our experience agencies often rigidly apply a set ratio rather than assessing the need for offsets on a case by case basis ... [and] there is a lack of scientific rigour in determining ratio offsets and this results in uncertainty and unpredictability. (Xstrata Coal, sub. 50, pp. 39–40)

Cash offsets [in Western Australia] are calculated as \$1500 per hectare of good to excellent condition native vegetation and \$3000 per hectare of more sensitive vegetation communities. ... The cash offset framework and monetary multipliers have had no industry consultation, have not been substantiated by the Environmental

Protection Authority, nor has there been any methodology released on how ‘good to excellent’ is determined. (AMEC, sub. 42, p. 13)

A lack of consistency in offset policies and ‘ratio requirements’ across jurisdictions was also highlighted as an issue:

The Commonwealth approval required Ulan [a coal mining complex in New South Wales] to create biodiversity offset areas that are different to the biodiversity offset areas required by the NSW approval, which has made ongoing management of those biodiversity offset areas more difficult ... [and] the Commonwealth EPBC Act approval requires the Wandoan Coal Project [in Queensland] to create biodiversity offset areas that are different to the biodiversity offset areas required by the Queensland Coordinator-General. (Xstrata Coal, sub. 50, pp. 13, 16)

Within a project a single environmental impact can require two separate, sometimes conflicting, actions as an offset. For example, Federal procedures could require a direct offset of offsite habitat protection, while the state might mandate scientific research in response to the same impact, effectively double counting the impact and its costs to the business. (Chamber of Commerce and Industry of Western Australia, sub. 44, p. 4)

The Association of Mining and Exploration Companies and the Chamber of Minerals and Energy of Western Australia raised a number of concerns about current offset-setting practices, including:

- an increasing trend of environmental offsets being applied for project approvals in the absence of clear significant residual environmental impacts
- a decisionmaking process surrounding offsets that lacks transparency, accountability and consistency
- limited opportunities for proponents to acquire land in Western Australia to meet offset requirements given ‘55 per cent of Western Australia’s land is either publically owned or under the control of native title. Of the 45 per cent privately owned, only 18 per cent is freehold land’ (2013, p. 8).

While many stakeholders commented on the important role that conditions and offsets have in protecting environmental outcomes, there was some doubt as to whether these outcomes are actually achieved:

I would recommend that the Commission look at the case of the Lungfish and conditions imposed as part of the approval of the Paradise Dam [project]. One of the conditions was to monitor the effectiveness of mechanisms to transport lungfish upstream and downstream of the dam. Over five years, Sunwater monitored and found abject failure. Not a single step has been taken thus far to rectify a problem that may well see extinction of the lungfish in the Burnett River system. (Jeremy Tager, sub. 8, p. 4)

Although participants have expressed concerns about current offset-setting arrangements, it is important to recognise that — based on meetings between the

Commission and regulatory officials in Canada, the United Kingdom and the United States — Australian's offset policies are regarded favourably by the international community. That said, there is scope to improve on these arrangements, as discussed below.

How are conditions and offsets for major projects determined?

The legal basis for determining approval conditions and offset requirements varies across jurisdictions and DAA processes.

Generally speaking, conditions are expressly provided for in the legislative and regulatory instruments governing major project development. For example, for proponents seeking approval under the EPBC Act, requirements that are deemed to be 'necessary or convenient' to protect, repair or mitigate damage to a matter protected by the Act may be imposed as conditions of approval (s. 134).

Similar legislative provisions apply at the state and territory level. For example, projects granted approval under the *Development Act 1993* (SA) may be subject to 'such conditions as the relevant authority thinks fit to impose in relation to the development' (s. 42). For environmental approvals required under the *Environment Protection Act 1994* in Queensland, the approval authority can impose conditions that are considered 'necessary or desirable' (s. 203).

Offset requirements (in the context of major projects) generally come about in one of two ways. First, offsets may be required if applicable laws and regulations stipulate that adverse environmental impacts must be counterbalanced. For example, to obtain approval to clear native vegetation in Victoria, proponents must secure an offset that makes an equivalent contribution to Victoria's biodiversity (DSE (Vic) 2012).

Second, offset measures may be included in the set of conditions attached to other approvals ('offset conditions'). For example, for actions seeking approval under the EPBC Act, policy guidance has been developed which states that offset conditions may be imposed if the action is expected to have a significant residual impact on the environment. Offset conditions may also be attached to approvals obtained at the state and territory level — for example, s. 207 of the *Environment Protection Act 1994* (Qld) allows the approval authority to impose offset conditions 'if all cost-effective on-site mitigation measures have been undertaken'.

Offset conditions — are objectives being achieved?

The practice of requiring proponents to deliver environmental offsets as a condition of approval has become increasingly commonplace. However there is some risk that this practice may be compromising the achievement of broader regulatory objectives.

For example, offset conditions imposed under the EPBC Act are determined with reference to the EPBC Offsets Policy (box 7.12). The first policy principal (to ‘improve or maintain’ the environment) is generally referred to as a ‘no net loss’ requirement and is common to many offset policies. The aim of no net loss has intuitive appeal. However the consistency of this requirement with the objects of the Act — namely, to promote ecologically sustainable development (ESD), defined as ‘long-term and short-term economic, environmental, social and equitable considerations’ (s. 3) — warrants further consideration.

Consider the case of a proponent seeking approval under the Act for an action that is expected to have a significant adverse residual impact on the environment. In the absence of an offsets policy, the approval decision would be based on an assessment of whether the various impacts are, on balance, consistent with the promotion of ESD. In contrast, where an offsets requirement *does* apply, the proponent must — in advance of the approval decision being taken — commit to a series of actions or activities that are deemed to neutralise the adverse impact of the development on the environment. That is, the approval decision is subject to a binding constraint that the development has a ‘net zero’ environmental impact. This effectively prioritises (or gives more weight to) the impacts of the project on particular environmental matters *over all other impacts* (including economic and social impacts).

In the Commission’s view, embedding such a requirement in the decisionmaking process is *not* consistent with ESD (and by consequence, the objectives of the EPBC Act). Moreover, pursuing this net zero outcome may come at a significant cost — costs include compliance costs for the proponent, monitoring and enforcement costs for regulators and, from a community-wide perspective, the cost of foregone consumption on other goods and services.

Box 7.12 The Australian Government's Offsets Policy

Under the Australian Government's Offsets Policy, suitable offsets must:

1. deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action
2. be built around direct offsets but may include other compensatory measures (or 'indirect offsets'). Direct offsets are actions that provide a measurable conservation gain for an impacted protected matter. Other compensatory measures are actions that do not directly offset the impacts on the protected matter, but are anticipated to lead to benefits for the impacted protected matter
3. be in proportion to the level of statutory protection that applies to the protected matter
4. be of a size and scale proportionate to the residual impacts on the protected matter
5. effectively account for and manage the risks of the offset not succeeding
6. be additional to what is already required, determined by law or planning regulations or agreed to under other schemes or programs (this does not preclude the recognition of state or territory offsets that may be suitable as offsets under the EPBC Act for the same action)
7. be efficient, effective, timely, transparent, scientifically robust and reasonable
8. have transparent governance arrangements including being able to be readily measured, monitored, audited and enforced.

In assessing the suitability of an offset, government decision-making will be:

9. informed by scientifically robust information and incorporate the precautionary principle in the absence of scientific certainty
10. conducted in a consistent and transparent manner.

Source: DSEWPAC (2012d).

In this context, the Commission is recommending that the Australian and State and Territory Governments review how offset policies are currently applied to major projects to ensure that offset policies are consistent with relevant statutory objectives (including ESD) and where they are, whether the benefits achieved are in excess of the costs. As part of this work the economic impacts of adopting a 'no net loss for the environment' policy objective should be assessed and compared relative to alternative objectives (such as no net loss to the community).

Are current offset-setting processes ‘best practice’?

A further issue raised in this study concerns the robustness and transparency of offset policies and processes more generally, particularly in regard to the determination of ‘indirect offsets’.

In most cases, offset policies seek to counterbalance adverse environmental impacts through measures that *directly* benefit the environmental matter impacted by development (that is, ‘direct offsets’ or ‘like for like’). For example, an appropriate offset for the removal of some degraded native vegetation would be the restoration and permanent preservation of similar vegetation within the landscape concerned. This approach is attractive from an environmental perspective and, in theory, can make it more straightforward to identify ‘legitimate’ offset activities consistent with objectives.

It is also common for offset policies to allow for *indirect* offsets or ‘like for unlike’ measures. Indirect measures might be desirable for practical reasons (for example, if direct offset measures are not available), or to allow for some form of ‘trading up’ of environmental outcomes (for example, if the offsets policy had the objective of ‘like for like for better’).

Indirect offsets are intuitively appealing and can deliver environmental benefits that would not otherwise be achieved. However, implicit in the use of indirect measures is the need to make judgments about how different environmental outcomes should be traded-off, and the ‘equivalence’ of various offsetting actions — decisions that are inherently complex and often highly subjective.

Several participants have raised concerns about the transparency, integrity and consistency of the processes that lead to offset decisions — on multiple occasions, offset-setting processes were described by respondents as a ‘black box’ and a ‘take it or leave it’ proposition. Some jurisdictions have taken steps to clarify offset policies and develop more transparent and rigorous frameworks for determining offset requirements (box 7.13), however many stakeholders considered that further reform is required.

Box 7.13 Recent reviews and reform of offset policies**Australian Government**

The Australian Government's framework on the use of environmental offsets under the EPBC Act was published in October 2012 following a public consultation exercise. This policy guidance has helped to clarify how offsets are determined and the accompanying 'Offsets Assessment Guide' (or calculator) encourages greater consistency and predictability by using a balance sheet approach to the quantification of impacts and offsets (where the impacted protected matter is a threatened species or ecological community). This tool is available to proponents to assist with planning and estimating future offset requirements.

While broadly supportive of the intent and direction of these reforms, several stakeholders have queried the methodology underpinning the offsets calculator and suggested that greater transparency is required to verify the robustness of this tool. Concerns have also been raised about how the determination of a 'significant residual impact' is made (which in turn triggers application of the offsets policy), and how suitable direct and indirect offsets are identified when the calculator does not apply.

Victorian Government

In Victoria, if the removal of native vegetation is permitted, an offset is required as a condition of permit approval. Recent reforms provide greater clarity and rigour around the determination of offset requirements, including:

- a quantitative framework for estimating the contribution to biodiversity that is lost from removing native vegetation or gained from securing and managing an offset ('biodiversity equivalence scores')
- identification of appropriate offset risk factors
- clarity as to the offset attributes that must be met, for example, that the offset must be located within the same Catchment Management Authority boundary as the native vegetation to be removed.

Sources: DSEWPAC (2012d); DEPI (2013).

In the Commission's view, there remains considerable scope for all Australian governments to clarify the objective of environmental offset policies and identify a scientifically rigorous, transparent and predictable framework (or methodology) for identifying suitable direct and indirect offset measures consistent with objectives. To do otherwise creates regulatory uncertainty and risks delivering inconsistent, unnecessarily costly and poorly targeted offset requirements. Some examples of indirect offset measures included as conditions of approval under the EPBC Act are provided in box 7.14.

Box 7.14 Examples of offset conditions under the EPBC Act**South of Embley Bauxite Mine and Port Development — Queensland**

The South of Embley mine project was approved in May 2013. As a condition of approval (EPBC 2010/5642), the proponent must implement a Feral Pig Management Offset Strategy and the strategy must 'provide information detailing Traditional Owner employment opportunities and mechanisms for reporting the number of local Indigenous person/s actually employed in the implementation of this strategy'. Similar employment requirements apply to the Inshore Dolphin Offset Strategy (DSEWPAC 2013a).

Australian Pacific LNG Project — Queensland

Construction of a multi-train LNG plant at Curtis Island was granted approval in 2011 (EPBC 2009/4977). Indirect offset measures include that the proponent provide funding of \$200 000 per annum for the life of the project and \$100 000 per annum, for each operating LNG train, to support implementation of a strategy for field management and visitor awareness of the Great Barrier Reef World Heritage Area (DSEWPAC 2011).

Southern Sydney Freight Line — New South Wales

A proposal by the Australian Rail Track Corporation to construct a 30 kilometre rail track in Sydney was granted approval under the EPBC Act in 2008 (EPBC 2005/2393). Offset conditions include provision of street furniture, public art, landscaping and tree planting, lighting and other measures to the value of \$2 million or more (DSEWPAC 2008a).

Fiona Stanley Hospital — Western Australia

Approval to construct the Fiona Stanley Hospital in Murdoch was obtained in 2008 (EPBC 2008/3970). Conditions include:

- provide a minimum of \$275 000 toward the Research Project on Carnaby's Black Cockatoo, and \$575 000 towards funding community and stakeholder environmental initiatives in the provision of care and rehabilitation for Carnaby's Black Cockatoo
- establish areas of open space within Fiona Stanley Hospital including urban plaza, internal gardens and roof gardens planted with at least 70 per cent native species (DSEWPAC 2008b).

Do market-based offset approaches have a role?

Historically, offsets have either been delivered by the proponent directly or procured from third parties on an 'as needs' basis. However, as the demand for offsets has increased, more formalised markets have developed to link purchasers and providers of offsets (box 7.15).

Box 7.15 **Market-based offset approaches**

New South Wales — BioBanking

The *BioBanking and Offsets Scheme* creates a market for biodiversity credits. These credits are created by landowners by establishing a biobank site and committing to enhancing and protecting biodiversity values. In turn, the credits represent an improvement in the condition of biodiversity values. Developers can buy the credits to offset impacts from their development to meet the ‘improve or maintain’ test. The credits can also be sold to those seeking to invest in conservation outcomes, including philanthropic organisations and government.

Victoria — BushBroker

The *BushBroker Scheme* provides a mechanism for sourcing, generating and allocating ‘Native Vegetation Credits’ (NVC). A NVC is a gain in the quality and/or quantity of native vegetation that is subject to a secure and ongoing agreement. If a developer seeking to clear native vegetation is required to obtain an offset, NVCs purchased via the BushBroker program can be used to meet this requirement. The Victorian Government trialled an online Native Vegetation Exchange (NVX) in 2012 to facilitate the trading of NVCs by automating the offset matching process. The NVX is under evaluation to determine whether it should be used on an ongoing basis.

A national biobanking scheme?

Dr Allan Hawke examined the role of market-based mechanisms in delivering biodiversity outcomes as part of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*. Hawke found that biodiversity banking schemes have merit and that a systematic approach to biobanking could bring considerable benefits to biodiversity conservation in Australia. Hawke recommended:

- COAG develop a national biodiversity banking system and standards
- the Australian Government, in the interim, accredit state and territory biobanking schemes, subject to their meeting acceptable standards
- the EPBC Act be amended to facilitate and promote the use of biobanking as part of project approvals and facilitate the operation of a national biobanking scheme.

Sources: Department of Environment and Climate Change (NSW) (2008); Victorian Government (2012); Hawke (2009).

A number of study participants favoured market-based approaches over having to directly undertake offsetting activities

One approach currently used allows proponents to contribute funding into a Government trust for offset projects rather than individually purchasing land (and potentially competing for the same parcel) and carrying out offset projects themselves. This model would simplify the process greatly and reduce compliance costs for proponents whilst still meeting regulatory objectives. (Xstrata Coal, sub. 50 p. 40)

Offset markets present genuine opportunities for efficiency gains and there is a strong ‘in-principle’ argument for using these approaches to deliver cost-effective offset opportunities. A previous Commission study found:

Markets promote achievement of native vegetation and biodiversity conservation at least cost and promote innovative solutions over time as individuals have an incentive to identify cost-effective solutions. In this way, markets also deal with site-specific environmental problems and with variations in the benefits and costs of supplying conservation services across the country. In addition, as new information about supply and demand is continually revealed through prices, individuals can respond quickly to changing circumstances and to new understanding of native vegetation benefits or of the costs of supplying it. (2004, p. 196)

That said, designing and administering efficient offset markets can be challenging. The Victorian Government noted:

Issues identified with the offset market include high and volatile prices, and the inability to meet demand for certain offsets. ... offset prices are considerably higher than the cost of similar permanent environmental outcomes purchased through tender programs. Volatility in offset prices has also been observed in the market. For example, since 2006, BushBroker offset average prices for bioregions ranged from \$34 000 to \$370 000 per Habitat Hectare. (2012, p. 19)

Similar problems have been experienced with the New South Wales BioBanking Scheme, and a review of those arrangements is underway. The insights gleaned from the operation of these schemes provides a valuable basis from which to improve upon — and extend the use of — market-based offset arrangements. There is merit in all jurisdictions considering the role for, and potential of, market-based offset approaches as part of a broader review of offset arrangements.

DRAFT RECOMMENDATION 7.8

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

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

Are condition-setting processes efficient?

While offset policies and practices have been identified as a particular issue in this study, concerns have also been raised about the cost-effectiveness and relevance of conditions more generally.

If implemented in full, the Commission's recommendations set out in this draft report will have the effect of encouraging more efficient, practical and targeted approval conditions. That said, further efficiency gains could be achieved by embedding a more 'outcome-based' approach to setting conditions.

Outcome-based conditioning can be achieved by defining approval conditions in terms of the specific outcome or performance standard that is to be achieved. Where feasible, this allows proponents to use flexible and innovative approaches to meet relevant objectives at 'least cost', and reduces the role of the regulator in prescribing the means by which an outcome will be achieved. In contrast, prescriptive conditions do not permit flexibility in how the outcome will be achieved, and can have the effect of discouraging a proponent to go beyond compliance (Keating 2002).

Notwithstanding the Commission's broad preference for outcome-based conditions, caution is required. This is particularly the case where the desired environmental outcome is not well defined or easily measured, or where there is significant uncertainty. In these circumstances prescriptive conditions may be more appropriate, but subject to regular review to make use of information about the impacts of the activity that will emerge over time.

A further point concerning conditions relates to evidence that some regulators impose conditions on project approvals that amount to 'do not break the law' or 'comply with the law in the way we tell you'. These practices increase administrative costs, stifle innovation and create confusion without a substantial benefit. The Environment Assessment Guidelines published by the EPA in Western Australia explicitly safeguard against this practice:

Conditions should not be imposed where legislation exists to ensure an outcome, such as requiring approval for the removal of any flora or fauna protected under the *Wildlife Conservation Act 1955*. (2009, p. 4)

Similar provisions should be adopted by all regulators with responsibility for conditioning major project developments.

Even if leading practice condition-setting practices are adopted, situations will emerge where approval conditions need to be varied, removed or bolstered (for example, if compliance with a condition turns out to have unintended and adverse

consequences or if unexpected circumstances arise that justify stricter conditions). The NSW Minerals Council noted:

Mining is unlike other development. It is a temporary land use and a dynamic form of development subject to changes as knowledge and technology improves. As a dynamic form of development it is important that mining has access to an efficient process for modifying development consents. (sub. 23, p. 4)

In some jurisdictions, proponents can apply directly to the responsible regulator for conditions to be varied (for example, under the *Planning and Environment Act 1987* (Vic) planning permits can be amended by the approval authority). In other cases, variations may be sought via merits review (chapter 9), however there are also instances where neither internal variation nor merits review are available. This is the case for conditions imposed under the EPBC Act.

Given the time and cost involved with merits review processes, internal variation mechanisms are considered to be a more efficient way to vary conditions. Where this is not already the case, governments should amend relevant legislation to allow for internal variation of approval conditions.

A further way to ensure that conditions remain relevant and efficient over time is for regulators to undertake periodic evaluations of approval conditions. However, this would generate significant regulatory uncertainty for proponents and is only likely to be efficient in a limited set of circumstances (for example, for very long-lived assets where the risk of out of date conditions emerging is high). A better way forward is to use the information obtained through compliance reporting processes (chapter 10) to identify cases where there is a strong case for a review of conditions.

DRAFT RECOMMENDATION 7.9

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

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

7.7 Summing up

Taken together, the reforms proposed in this chapter are aimed at minimising the costs associated with major project assessment while ensuring that environmental and social objectives are achieved. Key features of the proposed arrangements include:

- Implementing a ‘one project, one assessment’ framework for environmental matters through more extensive and comprehensive bilateral assessment agreements under the EPBC Act. The recent ‘water trigger’ amendment to the Act represents a backward step in terms of enhancing coordination and streamlining regulatory processes across levels of government and should be publicly assessed to determine whether the expected benefits exceed the costs.
- Reducing regulatory duplication at the state and territory level through greater cooperation between regulators to conduct joint assessments or to accredit each other’s assessment processes. MOU agreements between regulatory agencies are one way to facilitate this.
- Establishing a major projects coordination office in each jurisdiction to provide proponents with a single ‘point of entry’ into the regulatory system, and to coordinate and track the progress of relevant assessment and approval processes against agreed timeframes. Where similar arrangements already exist, refinements (in terms of functions and resources) may be all that is required.
- Achieving rigorous, independent and cost-effective assessment processes by:
 - institutionally separating environmental policy functions from regulatory assessment functions, where the benefits exceed the costs
 - ensuring that regulators are adequately resourced in terms of the quantity and quality of staff
 - establishing separate tiers of assessment that better match the level of regulatory scrutiny to the risks and impacts of the project.
- COAG commissioning a review of environmental offset policies and practices, including the methodologies used for identifying offsets, the role of market-based approaches, the merit of a single national offsets framework and consistency of offset policy objectives with the principles of ecologically sustainable development.
- Encouraging cost-effective, outcome-based and enforceable approval conditions that are consistent with objectives and directed at the impacts of the development to be consented. Conditions and offsets should be public and regulators should explain what impact the condition or offset is seeking to address.

The following chapter examines the scope for efficiency gains at the next stage of the regulatory cycle — major project approval.

8 The approval stage

Key points

- At the approval stage of development assessment and approval processes, decisions are made about whether, and under what conditions, proposed major project developments are allowed to proceed.
- The Commission has identified four issues in relation to this stage:
 - duplication of processes between levels of government
 - slow approval decisions
 - appropriate allocation of responsibility for making approval decisions
 - whether the process that decision makers are required to follow encourages evidence-based and balanced approval decisions.
- To reduce duplication, there needs to be renewed effort to establish a ‘one project, one assessment, one approval’ framework through establishing bilateral approval agreements between the Australian and State and Territory Governments.
- To improve timeliness, jurisdictions should set a maximum time that may elapse between a proponent’s assessment documentation being lodged and when the assessment agency provides its report, and a maximum time for the approval decision to be made. There should be:
 - clarity about when the clock starts, combined with clear triggers for when and for how long it can be stopped
 - public disclosure of when and why stop the clock provisions are activated
 - measures to encourage compliance with statutory timelines.
- If no decision is made by the relevant Minister within the set time period, the recommendation made by the assessment agency (along with the reasons and any conditions) should be deemed to be the Minister’s decision.
- Ministers should make the primary approval decisions for major projects. Guidelines should indicate the types of decisions that Ministers can delegate.
- To strengthen the decisionmaking process, jurisdictions should publish the process to be followed when making approval decisions. Decision makers should publish statements of reasons for their approval decisions and conditions.

8.1 Overview of major project approval processes

At the approval stage of development assessment and approval (DAA) processes, decisions are made about whether, and under what conditions, proposed major developments are allowed to proceed, based on assessments that have previously been undertaken.

Proponents of major projects seek approval under a large number of Commonwealth and State and Territory Acts. While there is not a standard approval process, key features include:

- an identified decision maker
- specification of the discretion that the decision maker has to depart from the assessment recommendations
- the process to be followed in reaching decisions
- time periods within which decisions must be made (and the consequences when these time periods are breached).

While legislation identifies the decision maker and sometimes a time limit for decisions, the process and discretion are rarely specified. For example, the *Environmental Planning and Assessment Act 1979* (NSW), the *Planning and Environment Act 1987* (Vic), the *Planning Act* (NT), and the *Planning and Development Act 2007* (ACT) do not set out the process to be followed when making decisions. In contrast, the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) sets out the four features of the approval stage with clarity (box 8.1).

The identity of the decision maker

While Ministers are often designated as the decision maker, this is not always the case. For example, in New South Wales approval decisions in relation to projects that have been deemed to be state significant developments or state significant infrastructure may, depending on the features of these projects, be made by: the Minister, the independent Planning Assessment Commission (PAC), or the relevant government department. This illustrates that sometimes the entity that undertakes the assessment (in this case the PAC) also makes approval decisions. This is common practice, as table 8.1 illustrates.

Box 8.1 The approval process in the *Environment Protection and Biodiversity Conservation (EPBC) Act 1999* is clearly articulated

The Act:

- establishes the Australian Government Minister for the Environment (or delegate) as the decision maker under the Act, who decides whether to approve, approve with conditions, or not approve a proposed action
- specifies how much discretion the Minister has when responding to the recommendations of the assessment report that has been provided by the relevant Australian Government Department or State Government agency (when there is a bilateral assessment agreement). The Minister does not have to accept these recommendations. However, the Minister's decisions must be cost effective 'as far as practicable'. Conditions that are not reasonably related to the action, and various other conditions, can only be applied with the consent of the applicant.
- sets out the process that the Minister must follow when making an approval decision
- stipulates time limits for decisions made under the EPBC Act that vary between 20 and 40 business days of the Minister receiving the relevant report, depending on the assessment pathway. The Minister must make the decision within these time periods or within 'such longer time period as the Minister specifies in writing'. If the Minister specifies a longer period, the specification of the variation must be published.

Source: EPBC Act, ss. 130; 134.

In some cases, legislation may establish a decision maker other than the Minister. For example, under the Planning and Development (Development Assessment Panels) Regulations 2011 (WA), a development application in Western Australia above a specified capital value (ss. 5 and 6), must be approved by a Development Assessment Panel (s. 8). In other cases, legislation may permit the Minister to delegate approval authority. For instance, the *Planning and Environment Act 1987* (Vic) (s. 186) enables the Minister to delegate any of his or her powers to the Secretary or employees of the Department or to the Growth Areas Authority. Under the EPBC Act (s. 515), the Minister may delegate his or her powers or functions to an officer or employee in the Department of Environment or to the Director of National Parks, although the delegate is subject to the directions of the Minister.

Table 8.1 **Approval authorities^a (selected pathways, by jurisdiction)**

<i>Major project assessment pathways</i>	<i>Approval authority</i>	<i>Assessor is the approval authority</i>
Commonwealth		
Matters of national environmental significance	Minister for Environment	No
New South Wales		
State significant developments	Minister may delegate to the Planning Assessment Commission or Department	Sometimes
State significant infrastructure	Minister ^b or the Planning Assessment Commission or Department	Sometimes
Victoria		
Ministerial call-in	Minister for Planning	Yes
Major transport projects	Minister for Planning	Sometimes ^c
Queensland		
Coordinated projects	Department of Environment and Heritage Protection	No ^d
Urban Development	Minister for Economic Development	Yes
South Australia		
Major development	Governor (effectively the Executive). Delegation to the Minister or Development Assessment Commission is possible	Sometimes
Crown development and public infrastructure	Minister	No
Western Australia		
Development assessment panel projects	Development Assessment Panel	No
Tasmania		
Projects of state significance	Minister and both Houses of Parliament	No
Projects of regional significance	Development Assessment Panel	Yes
Major infrastructure projects	Combined Planning Authorities	Yes
Northern Territory		
Development permits	Development Consent Authority	Yes
Exceptional development permits	Minister for Planning	Yes
Ministerial call-in	Minister for Planning	Yes
ACT		
Ordinary development	Environment and Sustainable Development Directorate	Yes
Ministerial call-in	Minister for Planning	Yes

^a More details can be found in table B.3 in appendix B. ^b Minister cannot delegate decisionmaking for critical state significant infrastructure. ^c Assessment manager is either the Minister for Planning, or an assessment committee established by the Minister. ^d Even though the Department of Environment and Heritage Protection is the assessment manager under the *Sustainable Planning Act*, the Coordinator-General conducts the environment impact assessment process.

The approval authority's decisionmaking discretion

Approval authorities' discretion to depart from the recommendations in assessment reports is expressed in different ways. For example, in Tasmania the Minister is not bound by the recommendations of the Tasmanian Planning Commission in recommending to the Governor that a project of state significance be approved. In New South Wales, the Minister must consider the findings of the PAC, but can approve the project with modifications or conditions that the Minister may determine. In Western Australia, Development Assessment Panels must have regard to, but are not bound to give effect to, the recommendations included in the assessment report.

By contrast, in Queensland, the approval authority (ordinarily the Department of Environment and Heritage Protection) can decide whether or not to approve or refuse a major project. However, if it approves the project, it must impose the conditions recommended by the Coordinator-General, and any other conditions that it imposes must be consistent with the conditions proposed by the Coordinator-General.

The decisionmaking process

The process that decision makers are required to follow when considering assessment reports — such as the principles they should follow, the evidence they should examine and whom they should consult — affects the quality of their approval decisions. The EPBC Act sets out in detail the process that the Australian Government Environment Minister should follow (box 8.2). State and Territory legislation also sets out various matters that the decision maker is required to consider. For example:

- in South Australia, the *Development Act 1993* (s. 48) requires that before the Governor approves a major development, he or she must have regard to the objects of the general environmental duty, and any relevant environmental protection policies under the *Environmental Protection Act 1993*, among other things
- in Tasmania, a set of objectives is included in a schedule to each of the Acts within the Resource Management and Planning System, to ensure that all decisions about the use of land and natural resources within the State are made in pursuit of common objectives (*Land Use and Planning Approvals Act 1993*, schedule 1).

Box 8.2 Decisionmaking under the *Environment Protection and Biodiversity Conservation Act 1999*

Factors that the Australian Government Environment Minister must take into account include:

- the principles of ecologically sustainable development
- the assessment report relating to the action
- the relevant recommendation report from the Secretary of the Australian Government Department of Environment
- community and stakeholder comments
- any other relevant information available on the impacts of the proposed action, and
- relevant comments from other Australian Government and State and Territory Government Ministers (such as information on social and economic factors).

The Environment Minister may also take into account the environmental history of the individual or company proposing to take the action.

Before reaching an approval decision, the Environment Minister:

- must inform relevant Ministers and the proponent about the proposed decision and seek comments
- must take into account any relevant comments made by the proponent
- must seek advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, when the action involves coal seam gas or coal mining
- may invite public comment by publishing the proposed decision on the internet
- may in some cases request the appropriate State or Territory Minister to provide a notice stating the method that has been used to assess the impacts of the action on other matters.

If the Minister refuses to approve the action, the proponent may request reasons for the refusal and the Minister must give them. Conditions requiring specified activities to be undertaken cannot be attached to the approval of an action if these activities are not reasonably related to the action.

Source: EPBC Act.

The Commission found few instances where decision makers are bound by good regulatory practice when reaching decisions. One example of legislation that goes in this direction is South Australia's *Petroleum and Geothermal Energy Act 2000*. The Act's objectives include an effective, efficient and flexible regulatory system, and appropriate consultation.

Time limits

Approaches to setting time limits on approval decisions vary within and between jurisdictions. Some have none, while others have statutory time limits with no scope for extension. Most jurisdictions are positioned between these extremes, with specified timelines that can be extended (box 8.3).

Box 8.3 Approaches to legislated timelines for approval decisions

States and Territories have adopted different approaches to limiting the time between when decision makers receive an assessment report and when they make decisions.

- Some jurisdictions have not legislated approval timelines. (An example is major infrastructure projects in Tasmania.)
- Some jurisdictions have legislated approval timelines with stop the clock provisions, although there are differences between jurisdictions as to how the clock can be stopped.
 - For coordinated projects in Queensland, the approval authority must make a decision within 20 business days of receiving the Coordinator-General's report. However, this time can be extended by written agreement of the proponent, and the proponent can choose to stop the clock in particular circumstances.
 - Other jurisdictions stop the clock when requests for further information are made, such as for developments of regional significance in Tasmania (which require a decision to be made within one month of receiving the report on the environmental impact assessment).
- Some jurisdictions have approval timelines with no stop the clock provisions. For example, in Western Australia, Development Assessment Panels must make a decision within 60 or 90 days of receiving a development application. Information requests do not stop the clock.

Source: appendix B.

What are the key issues?

Study participants have suggested that major project approval processes create unnecessary regulatory burdens and uncertainty. The Commission considers there are four areas of significant policy concern with the approval stage:

- unnecessary duplication of approval processes between levels of government
- slow approval decisions
- appropriate allocation of responsibility for making approval decisions
- whether the process that decision makers are required to follow encourages evidence-based and balanced approval decisions.

8.2 Duplication of approval processes between levels of government

Bilateral approval agreements

Chapter 7 recommended that Australia's Governments strengthen and expand the scope of bilateral *assessment* agreements under the EPBC Act, including through accrediting key State and Territory major project assessment processes. The EPBC Act also enables the Australian Government Minister for the Environment to enter into bilateral *approval* agreements, subject to conditions set out in the Act.

Where an approval agreement exists, actions that are subject to a bilaterally accredited management arrangement in a State or Territory do not require further assessment or approval under the EPBC Act (ss 29 and 46). The Sydney Opera House approval agreement is the only one that has been negotiated, and it has since expired (box 8.4).

The Council of Australian Governments (COAG) agreed in 2012 to expedite the accreditation of State and Territory environmental approval processes for matters of national environmental significance (MNES) under the EPBC Act. The Australian Government subsequently developed a *Statement of Environmental Assurance Outcomes* and *Framework of Standards for Accreditation*. These set out, among other things, the outcomes expected from approval systems and standards for accreditation.

The Australian Government worked with State and Territory Governments on developing bilateral approval agreements during 2012. In its 7 December 2012 communiqué, COAG confirmed its commitment to removing unnecessary duplication in Australian Government and State processes (BAF 2012, p. 4). However, the 6 December 2012 communiqué of the Business Advisory Forum to COAG noted the 'significant challenges that have emerged in developing accreditation arrangements that provide consistency for business and assurance to the community that high standards will be met and maintained' (BAF 2012, p. 1).

Box 8.4 The Sydney Opera House bilateral approval agreement

The Australian and New South Wales Governments entered into a bilateral approval agreement in December 2005. Its aims were to:

- protect the World Heritage and National Heritage values of the Sydney Opera House from unacceptable and unsustainable impacts
- ensure an efficient, timely, and effective process for environmental assessment and approval of actions
- minimise duplication of environmental assessment and approval processes relating to the protection of the World Heritage and National Heritage values of the Opera House.

The effect of the agreement was that certain specified actions did not require approval under the EPBC Act if they had been approved by an agency of New South Wales where this was in accordance with the management plan for the Opera House and if the Australian Government Environment Minister had accredited the management plan. The New South Wales Minister was required to notify the Australian Government of all proposed actions that will have or are likely to have a significant impact on the World or National Heritage values of the Opera House.

The Commonwealth Auditor-General was able to audit the operation of the Australian Government in relation to the agreement and the agreement had to be reviewed after 5 years. However, the agreement was replaced by a conservation agreement for the Opera House as a World Heritage site, because that was less administratively burdensome and achieved the same outcome.

Sources: Australian Government and New South Wales Government (2005); Senate Environment and Communications Legislation Committee (2013).

The Department of Sustainability, Environment, Water, Population and Communities (DSEWPAC) enlarged on this point, noting that negotiations over bilateral approval agreements:

... proved to be complex and would have resulted in systems that would not have simplified the regulatory regime. As a result, the Commonwealth is not progressing negotiation of approval bilateral agreements. (sub. 55, p. 18)

While progress on negotiations has stalled, the communiqué of the Business Advisory Forum to COAG reported that:

States and Territories confirmed their commitments made at the last Forum in April 2012, to work towards approaches, such as the creation of taskforces for major projects, so that approvals are administered by a single State agency and unnecessary duplication in Commonwealth and State processes is removed. (BAF 2012, p. 2)

Reducing duplication

The arguments for and against bilateral approval agreements are similar to those made by proponents and opponents of bilateral assessment agreements. Proponents point to reduced compliance and delay costs, while opponents question whether States and Territories have the legal framework, capacity or incentive to take on the Commonwealth's approval role. A Senate Committee inquiry in 2013 concluded that approval powers should remain with the Commonwealth (Senate Environment and Communications Legislation Committee 2013).

Deloitte Access Economics estimated that bilateral assessment and approval agreements could create a net benefit approaching \$400 million, largely from reduced delays (DAE 2011, pp. 33–36). While this study did not divide these savings between assessment and approval agreements, it noted that delays have been experienced in both stages. Most of the benefits of bilateral agreements would accrue to project proponents. The Australian Government would have fewer approvals to process, while processing costs would rise a little for State and Territory Governments.

Chapter 7 made the case for a 'one project one assessment' framework. The Commission considers that this should be extended to include project approval and that governments should aim for a 'one project, one assessment, one decision' framework. Notwithstanding recent setbacks, there is merit in attempting to renew negotiations to secure bilateral approval agreements. A strategy with five components could decrease duplication while addressing concerns that bilateral agreements may reduce environmental standards.

First, increasing the number of State and Territory assessment procedures with Commonwealth accreditation, as recommended in chapter 7, would provide a firmer foundation on which to build accreditation of approval processes.

Second, strengthening State and Territory approval processes, through other reforms proposed in this report, would facilitate Commonwealth accreditation.

Third, because achieving comprehensive nationwide approval agreements is neither feasible nor desirable, there should be a targeted approach focusing initially on less environmentally sensitive issues and where there is better information about impacts.

A first step in this direction would be the Commonwealth Environment Minister using existing powers in relation to strategic approaches to enter into an agreement with the States and Territories. These agreements would effectively delegate to States and Territories the responsibility for assessing and granting most

environmental approvals under the EPBC Act in urban areas, where relatively mature assessment and decision-making processes are in place and strategic planning tools have already been used successfully. Subsequently, where matters of national environmental significance were involved, the Commonwealth could transfer responsibility for approving controlled activities in non-metropolitan areas to the States and Territories.

The Commonwealth Environment Minister would retain the right to withdraw accreditation if national standards were not being met. The Commonwealth would also continue to have control over matters where it is unlikely that the community would accept the Commonwealth exiting the field — such as for world heritage, nuclear and maritime matters. In such cases, the States and Territories should accredit Commonwealth processes where the processes address the same matter.

Substantial regulatory burdens could be lifted from proponents (especially in the offshore oil and gas sector) if the Commonwealth were to be the sole assessment and decisionmaking body where projects require decisions in relation to both Commonwealth and State waters.

Fourth, close monitoring of the progress made under bilateral approval agreements would provide early warning of any problems with particular agreements. In the longer term, monitoring would provide evidence to confirm whether the agreements as a whole are reducing duplication without risking environmental harm. The Sydney Opera House bilateral approval agreement demonstrated that the Australian Government could monitor progress even when it had delegated approval authority.

Beyond this, the Wentworth Group of Concerned Scientists — while opposed to handing approval authority to the States and Territories — suggested that State Governments should report annually on their implementation of assessment agreements, and the reports should be subject to audit by an independent National Environment Commission. The Australian Government Environment Minister should retain the right to withdraw accreditation if national standards are not being observed (sub. 1, p. 4).

The Commission agrees that monitoring is needed. It considers that the COAG Reform Council should monitor the performance of bilateral assessment and approval agreements, examine how well the agreements are working, and draw out implications for improving them. To facilitate this, State and Territory Governments should prepare annual reports on their implementation of the agreements.

Finally, the task of negotiating bilateral approval agreements needs to be carefully designed. COAG should publish a timetable of agreed reforms and have the COAG Reform Council report annually on key milestones, barriers to reform and how to

address them. The time allowed for completing the negotiations needs to match the complexity of the task.

DRAFT RECOMMENDATION 8.1

Governments should aim to establish a ‘one project, one assessment, one decision’ framework by restarting negotiations on bilateral approval agreements between the Australian Government and the States and Territories. Such agreements must ensure that rights of appeal are no less than those in the Environment Protection and Biodiversity Conservation Act 1999.

DRAFT RECOMMENDATION 8.2

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

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

8.3 Slow approval decisions

The timeliness of DAA processes as a whole

The timeliness of DAA processes has been a central issue in this study. Business participants contended that the time required for the process as a whole is too long and has been increasing, without any improvement in regulatory outcomes:

Processes take too long or are highly uncertain: a BCA member told us it took 10 years to get some basic service centres approved in Western Australia. Another said it took over five years to have a relatively straightforward mine deepening application approved ... not knowing how long the approval process will take is a deterrent to business investment. (Business Council of Australia sub. 43, pp. 9-11)

and

Perhaps one of the more material concerns is the delays and length of time the assessment process is taking for major projects. We estimate that approval timeframes

for projects has increased from ~ 7 months on average (2002) up to ~18-36 months (2012). (Xstrata Coal sub. 50, p. 3)

The Minerals Council of Australia (MCA) stated that the average period for approval-related activities for a thermal coal project was just over three years:

In thermal coal, for example, the average project experiences an additional 1.3 years of delay relative to those elsewhere (a total delay from studies to completion of 3.1 years in Australia compared with 1.8 years for the rest of the world). (sub. 33, p. 15)

These comparisons are based on a sample of the 50 or so major global coal mines that are part of research firm Wood Mackenzie's international database covering nations such as Canada, China, Colombia, Indonesia, Russia, Southern Africa, the United States and Venezuela (MCA, pers. comm., 30 July 2013).

The examples set out in box 8.5 illustrate that lengthy DAA processes are not unusual.

Box 8.5 Concerns about lengthy DAA processes

- Xstrata Coal noted the approval process for its Ulan West Expansion project took three and a half years, which it suggested was consistent with timeframes for other similar projects (some of which had been longer). For example, the Wandoan Coal Project has – to date – taken more than six years to obtain approval (sub. 50).
- The Association of Mining and Exploration Companies referred to a Gantt chart prepared by the Department of Mines and Petroleum (DMP) in Western Australia that shows the minimum time to get an approval to explore for uranium is 358 days, and the total time that it takes to get approval (from exploration to production) is 1 135 days (sub. 42).
- The DMP has prepared a similar stylised Gantt chart for shale and tight gas projects in Western Australia. State environmental approvals are estimated to take 643 days, and the minimum timeframe for negotiating native title agreements is nominated as 185 days (sub. 42).
- The Australian Petroleum Production and Exploration Association highlighted that the Commonwealth approval process for the Pluto Gas Field project took 437 days to complete (sub. 24).

Industry participants tended to regard long timeframes as evidence that major project DAA processes (and the institutions that administer them) are inefficient. They also tended not to distinguish between the different stages of the process. Some government participants, on the other hand, drew attention to delays in the early stages of the process. For example, the South Australian State Government Departments pointed out that DAA processes are necessarily time consuming, and

that the conduct of the proponent — for example, during its preparation of assessment documentation — can have a significant impact on timeliness:

Delays to the DAA processes are mostly proponent driven (e.g. through more investigative work to provide sufficient information to undertake an assessment of the proposal), which may cause additional holding costs for land etc. that the proponent generally bears. (sub. 51, p. 18)

Similarly, DSEWPAC considered a sample of 17 projects of varying type and complexity and found:

In most cases, for major projects, most of the assessment time can be attributed to the proponent undertaking studies and preparing assessment documentation. For example, proponents spent an average of 20 months (from an average of 37 months from referral to approval) preparing environmental impact statements and collecting public comments. (sub. 55, p. 7)

Reforms proposed in earlier chapters — including: providing more guidance on DAA pathways; improving the process for setting terms of reference; and establishing major project coordination offices — would help to shorten the early stages of DAA processes. They do not, however, address the time required by regulators to assess the documentation provided by the proponent and by the decision maker to reach a determination. This is considered in the rest of this section.

The time required for preparing assessment reports and determining approval decisions

Notwithstanding the pervasiveness of business concerns about timeliness, corroborating evidence presented to the Commission has been largely anecdotal. The Commission reviewed publicly available data about the time taken by regulators to prepare assessment reports and by decision makers to determine approvals. It also approached regulators with responsibility for major project assessment functions in several jurisdictions. Despite these efforts — and, in most cases, the best endeavours of staff in the relevant agencies — information on the time required in these two parts of the DAA process is extremely limited. The primary reason for this is that agencies generally do not publicly report on (and are not statutorily required to report on) assessment and approval timeframes in a meaningful and comprehensive way.

In particular, there is little data on the total number of days between the proponent's assessment documentation being 'accepted' by regulatory authorities, and their recommendation report being finalised, *including* stop the clock periods. To the best of the Commission's knowledge, this information is not publicly documented in any

jurisdiction, and a number of agencies (including DSEWPAC) have indicated that this information cannot be collated without investing considerable resources to ‘sift through’ hard copy files and extract the data. Aggregate measures of regulator performance against target timeframes are available in some jurisdictions (box 8.6). However, in other jurisdictions regulators do not have statutory time limits to report against.

Box 8.6 Timeframes on assessment processes

Controlled action assessments under the EPBC Act

For controlled action assessments on preliminary documentation (PD), by public environment report or by environmental impact statement (EIS), the Secretary of the Australian Government Department Environment is to provide the relevant recommendation report to the Minister within 40 business days of receiving the finalised documents from the proponent.

In 2011-12, 13 per cent of PD recommendation reports did not meet this timeframe. A single EIS recommendation report was completed over this period and did not meet the 40 day timeframe. The Secretary of the Australian Government Department is required to publish all recommendation reports on the internet every week. In 2011-12, 91 per cent of PD and EIS recommendation reports were *not* published within this timeframe.

Major project assessments in New South Wales

State significant development and infrastructure projects are assessed by the Department of Infrastructure and Planning in New South Wales. Under this process, the Director-General is required to complete the assessment report within 90 days of the end of the public exhibition period. For projects assessed in 2009-10, 71 per cent of recommendation reports were finalised within 90 days, and 90 per cent within 5 months.

Sources: DSEWPAC (2012c); Department of Planning (NSW) (2011).

Statutory time limits, and performance reporting against them, are more common at the approval stage (that is, after the assessment report has been presented to the decision maker). Even here, however, published data generally do not reveal the extent to which approval decisions are made within statutory timelines and so cannot demonstrate how different approaches to time limits affect the extent and costs of unnecessary delays. DSEWPAC’s annual report is an exception, and shows that in 2011-12, 42 out of 73 decisions were delayed because of administrative delays and requirements for further consultation. However, the amount of time that this added to the approval process is not reported (DSEWPAC 2012c, p. 290).

Both New South Wales and South Australia publish data about the time taken for each stage of the DAA process. However, for many projects, determinations are signed within a few days of assessment reports being signed (or even on the same day). The small or non-existent gap between assessment and decision suggests either that the decisionmaking stage is extremely short or that the data do not fully separate the assessment and decisionmaking stages in these jurisdictions' DAA processes.

The Department of Mines and Petroleum in Western Australia publishes more information than most regulators, through a quarterly approvals performance report, but it does not separate the assessment and approval stages (box 8.7).

Box 8.7 Approvals performance in Western Australia

The Department of Mines and Petroleum (DMP) in Western Australia has established an online Environmental Assessment and Regulatory System to track the progress of mining-related approvals, including exploration licences, mining leases, native vegetation clearing permits, pipeline licences, environment plans and radiation management plans.

Target timelines (excluding stop the clock periods) apply to each approval process (ranging from 20 to 120 business days) and performance against timeframes is published quarterly. These timeframes are not specific to approvals (as assessment and approval processes are integrated). For the first quarter of 2013, the proportion of environmental applications and approvals for the minerals and petroleum and geothermal sectors that were finalised within timeline targets ranged from 51 to 98 per cent.

As part of Western Australia's lead agency framework, DMP coordinates resource project approvals with other approval agencies. It is automating notification of certain applications with other agencies in order to improve interagency communication and to track more effectively interagency timelines for project approvals.

Source: DMP(WA) (2013a).

In summary, the value of published information about the timeliness of DAA processes is limited. It does not reveal:

- timeframes for preparing assessment reports and reaching approval decisions for individual projects (in numbers of days or weeks)
- average or median timeframes for all assessments and approvals
- the materiality of delays when target timeframes are not met
- the reasons for delays (in some cases reasons are provided, but only in a high-level way; for example, 'administrative delays').

This makes it difficult for the Commission to form an accurate understanding of the key drivers of timeframes; the incidence, materiality and reasons for ‘unnecessary’ delays; and how assessment and approval timeframes have changed over time.

Improving timeliness

While data limitations constrain the Commission’s evaluation of major project DAA processes, regulatory systems should support and encourage timely processes — without compromising achievement of relevant objectives — as a matter of good regulatory practice.

As an illustration of the consequences of a slow process, the Commission has estimated that the indicative cost of a one-year delay to an average major oil and gas extraction project is in the order of \$300 million to \$1.3 billion, depending on assumptions made. The central estimate of \$700 million would reduce the net present value of the investment by about 9 per cent (box 8.8).

Box 8.8 The indicative cost of a major project approval delay

The cost of delay to a major project is hard to estimate, given the difficulty of disentangling the multitude of interacting factors that affect real world projects. The Commission has thus developed a simplified oil and gas extraction project case study to derive an illustrative range of estimates of the cost of delay to a project proponent.

Adapting previous Commission discounted cash flow methodology (PC 2009b), the Commission estimates that a one-year delay to an average-sized current oil and gas extraction project could reduce its net present value by between \$0.3–1.3 billion, with a central estimate loss of around \$700 million (or around 9 per cent). These partial estimates relate to costs borne by the project proponent, including delayed profits and additional regulatory compliance costs. Delay may also result in higher financing costs and commercial risks.

These estimates were developed by assuming construction costs of \$17 billion, the average for projects under construction in the sector in early 2013. An indicative cash flow profile for development costs, revenues and operating expenses was generated by scaling up cash flows used in the Commission’s 2009 study into the oil and gas sector (which were based on historical data from Mackenzie and Cai (1993)). Project approvals were assumed to take two years, with construction commencing after this.

(Continued next page)

Box 8.8 (continued)

These baseline cash flows were then discounted to the present day using an assumed cost of capital. Delay was modelled by assuming project approvals take three years, thus all other cash flows are delayed one year. The delay scenario cash flows were also then discounted. The difference between the two net present values then represents the estimated cost of delay from the perspective of the proponent.

The cost estimates are indicative only, and are highly sensitive to the assumed profile of the project's income stream and discount rate. To test the sensitivity of the estimates, both the discount rate and the project's internal rate of return (IRR) were varied. (Lower IRR's were derived by scaling down the profile of gross revenues.) The table below presents the range of estimated costs that result from this analysis.

Table **Sensitivity analysis**

Change in net present value (\$ million) for various IRRs and discount rates

<i>Project IRR</i>	<i>Discount rate: 12%</i>	<i>Discount rate: 10%</i>	<i>Discount rate: 8%</i>
15.0%	-300	-500	-700
17.5%	-400	-700	-1000
20.0%	-800	-1000	-1300

These estimates do not reflect any changes in the wider economic benefits or social and environmental benefits and costs that may result from a delay to the project. The analysis also implicitly assumes there is no behavioural response to the regulatory uncertainty generated by delay. Moreover, a range of other factors not considered in the analysis could influence the actual cost of delay. For example, an increased difficulty in financing the project or reduced flexibility to respond to market conditions could push costs higher. In contrast, any ability to accommodate the delay within the planned project schedule could lower cost. Similarly, variations in oil and gas prices over time could influence the cost of delay in either direction.

Sources: DAE (2013); PC (2009b).

As noted earlier, part of the delay involved in securing project approval may occur while the proponent is preparing assessment documentation. Measures such as providing more guidance on DAA pathways and improving the process for setting terms of reference may expedite the application stage. After this stage is completed, the proposed increased use of bilateral assessment and approval agreements should reduce the time required for regulators and decision makers to respond to the proponent's documentation. In addition, however, several participants have suggested that more use should be made of time constraints in the later stages of the DAA process:

Statutory timelines create discipline within regulatory agencies, deliver certainty and promote openness and transparency of the decisionmaking process. They also provide a

mechanism for government and industry to monitor the regulatory agencies' performance. (Association of Mining and Exploration Companies, sub. 42, p. 17)

Some jurisdictions have established statutory timelines for certain decisions in the approval process (for example, government response to the proponents' environmental impact assessment). Statutory timelines have proven a useful device that focuses regulatory agencies on critical decision points and provides certainty to proponents. However, such mechanisms typically have, for legitimate reasons, procedures that allow the process to be suspended ('stopping the clock') if further information is sought.

Participants highlighted that inappropriate use of stop the clock provisions can limit the benefits of binding timeframes:

As just one example, the statutory timeframe for the approval of one mine in WA in 2013 was extended on three occasions by the Minister with no specific actions required of the project proponent, amounting to an additional 90 days over the original statutory timeframes. (Chamber of Commerce and Industry of Western Australia, sub. 44, p. 5)

On the other hand, institutions need to have the flexibility to stop the clock in a range of circumstances, to avoid decisions that are rushed or based on incomplete information:

Requests for further information during the assessment process may be viewed by proponents as a cause of unnecessary delay, yet to the authority assessing the project, and often the community, the information may be viewed as critical to ensuring an adequate assessment can be made. (Northern Territory Government, sub. 46, p. 4)

The Commission favours the wider use of statutory timelines in DAA processes and believes that any perverse incentives they create can be limited through better design arrangements. Specifically, jurisdictions should develop timelines that specify, once a proponent's assessment documentation is lodged, the maximum time for:

- the assessment agency to provide its report and decision recommendation to the relevant Minister
- the Minister to make the decision.

If the relevant Minister makes no decision within the time period specified, the recommendation made by the assessment body (along with its reasons and any conditions) should be deemed to be the decision of the Minister.

To provide flexibility while avoiding unnecessary delay and cost, statutory timelines should include triggers that specify the grounds under which regulators can stop the clock and for how long. Such arrangements should only be available

when matters emerge that were not contained in the terms of reference and could not have been reasonably anticipated. To encourage agencies to seek time extensions only when absolutely necessary, regulators should be required to disclose when they have activated a stop the clock provision and the reason(s) for doing so. They should also specify when the clock starts and when the assessment is deemed to be complete. This information should be provided and published in formats that allow for meaningful comparisons across jurisdictions.

These principles apply to both the assessment and approval stages. However, given that there will have been an extended assessment process before the matter reaches the decision maker, one further opportunity to stop the clock is sufficient during the approval stage.

DRAFT RECOMMENDATION 8.3

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

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

DRAFT RECOMMENDATION 8.4

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

8.4 Responsibility for making approval decisions

As noted earlier, proponents of major projects need to secure many approvals. Some of these approvals will involve major decisions that determine whether the project

can proceed. At the other extreme, will be permits that are required from road authorities or local government — for example, for road use by over-size vehicles.

As table 8.1 illustrated, there are examples in Australia of Parliaments, Ministers, departments and independent agencies having approval authority. Among these alternatives, the issue is who should be the decisionmaking authority in order to lead to balanced approval decisions for major projects.

When approval decisions can be made through applying objective, quantitative rules, experts in those rules are well placed to make decisions. (Code assessable development decisions are an example.) In a similar manner, it is sometimes suggested that technical experts, such as the Threatened Species Scientific Committee and the Australian Heritage Council, should have decisionmaking powers.

However, the issues associated with major projects often involve judgments about tradeoffs between competing environmental, social and economic values. In these situations, it is inappropriate that a purely technical body is charged with making these judgments. On this issue, the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (the Hawke Review) concluded that:

... It is appropriate that these decisions continue to be made by an elected representative of the people. In the vast majority of cases, it is expected that the Minister will follow expert advice. Retaining the Minister as the primary decision maker under the Act also means that the Minister can be held publicly accountable for those decisions and it creates a context that motivates experts to ensure their reasoning is careful, well supported and convincing. (Hawke 2009, p. 231)

The Commission agrees with this conclusion. While the Hawke Review reached this conclusion in the context of the EPBC Act, the Commission considers that the case for Ministers being responsible for primary approval decisions applies equally in the States' and Territories' legislation, given that a requirement to make comparable balancing judgments is involved and there are similar implications for public accountability.

Ministers' time, however, needs to be used efficiently. It is common for approval legislation to permit Ministers to delegate some or all of their powers. However, some legislation is imprecise about the circumstances under which authority can be delegated and how that delegated authority should be exercised. In other cases, for example, in New South Wales, the *Environmental Planning and Assessment Act 1979* (s. 23) requires the publication of instruments of delegation in the Government Gazette that report the planning Minister's delegation of approval decisions.

There is a tension between reserving primary approval decisions to Ministers — on the basis that elected representatives should make the complex balancing decisions required to approve major projects — and the efficient use of ministerial time. The Commission considers that Ministers should not delegate decisions on primary approvals for major projects.

If it was considered necessary to make this a legislative prohibition, as opposed to relying on Ministers choosing not to delegate, this would be relatively easy to implement in the case of legislation that is restricted to major projects. However, when the approval legislation potentially applies to a wider spread of projects, implementing this approach would require including in the legislation a definition of major projects for which delegation of authority would not be permitted.

Should Governments decide to retain the capacity for Ministers to delegate decisions with respect to some major projects, the Commission considers that guidelines should be established as to what types of decisions Ministers can delegate. For example, this could be limited to decisions that do not require balancing of different values or where the Minister has a potential conflict of interest. Moreover, as is the practice in New South Wales, delegations should be published.

DRAFT RECOMMENDATION 8.5

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

8.5 Improving the decisionmaking process

Chapter 7 set out proposals to encourage assessment authorities to make cost-effective recommendations for conditions and offsets. The benefits of improved assessment recommendations could be unwound if the process for making approval decisions based on these recommendations is deficient. A poor process could, for example, lead to conditions being applied that do not pass a cost–benefit test, or for purposes that are not related to the project, such as through contributions to social amenities and unrelated infrastructure. Such conditions amount to an indirect means of taxing anticipated economic rents. The Queensland Government recognised this possibility and that such conditions would not be an efficient form of taxation:

The Queensland Government has sought to address the reasonable expectations of communities in resource regions for flow-on benefits of major projects through the establishment of the Royalties for the Regions program that enables communities to apply directly for infrastructure funding from resource sector royalties. (sub. 47, p. 30)

Clarifying the factors that must be considered

Publishing the process that decision makers must follow can provide a degree of confidence that decisions are being made within a consistent framework, on the basis of expert advice and with suitable consultation. A properly constructed and transparent process can also increase public accountability and encourage evidence-based decisions.

Box 8.2 demonstrated that the EPBC Act sets out in detail the factors that the Minister must consider when making decisions and the extent of consultation required. The specific features of the decisionmaking process in the EPBC Act may not be suitable for all approval frameworks in States and Territories. Indeed, the Hawke Review suggested potential improvements to the process set out in the EPBC Act. Nevertheless, this Act indicates the types of factors that are likely to populate a well-designed decisionmaking processes.

The EPBC Act does not, however, require that approval decisions are consistent with principles of good practice regulation, such as the ones outlined in chapter 4. Imposing such a requirement in approval legislation could improve the quality of conditions. For example, requiring approval decisions to aim at achieving regulatory outcomes that are consistent with objectives would require the Minister to consider how this can be given effect. This would focus attention on whether the conditions attached to the approval are likely to achieve the regulatory objectives. This in turn would depend on whether the conditions are capable of being enforced (chapter 10).

Adopting new frameworks, within which decision makers must operate, could increase the cost of reaching approval decisions. For this reason, there is unlikely to be a single best practice process that all jurisdictions should implement. However, there is merit in each jurisdiction developing and publishing its process for arriving at approval decisions, where this has not already been done. This would provide certainty and predictability for stakeholders in major projects and create opportunities for jurisdictions to learn from each other.

DRAFT RECOMMENDATION 8. 6

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

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

Improving transparency

The benefits of the reforms outlined in draft recommendation 8.6 could be bolstered by increasing the transparency of the approval process in order to strengthen the incentives for effective decisionmaking by approval authorities.

It is common for jurisdictions to require approval authorities to publish decisions, including the conditions under which approval is granted. For example, the EPBC Act requires that if the Minister proposes not to approve an action, he or she must give the proponent:

- a copy of the assessment and recommendation reports
- any information relating to economic and social matters that the Minister has considered
- any information about the history of the proponent in relation to environmental matters that the Minister has considered.

This requirement is subject to exemptions, including that the Minister believes it is not in the national interest to provide the notice. Information prepared for the Minister by the Secretary of the Department is excluded from this requirement.

The EPBC Act does not, however, require the Minister to explain why conditions are being imposed. Similarly, some State and Territory legislation also does not require decision makers to provide such explanations. The Hawke Review favoured the publication of statements of reasons for all decisions made by the Minister, or a delegate under the Act, at the time the decision is made (Hawke 2009, pp. 240–241). The Australian Government agreed in principle with this recommendation, but noted that:

... Statements of reasons can be complex legal documents and are resource intensive to prepare. Requiring a statement of reasons for every decision under the amended Act, including those that are not controversial or are of an administrative nature, would unduly divert resources for little public benefit.

The government supports providing the public with clear and accessible explanations for all significant decisions taken under the amended Act in a resource-efficient manner. (2011a, p. 82)

The Australian Government indicated that it would give effect to its decision by publishing reports from expert committees and from the Department of Environment that contributed to the approval decision. It noted that this advice would not constitute a statement of reasons for the purposes of litigation, but that:

... People considering a legal challenge to a decision under the amended Act will still be able to make an application for a more comprehensive statement of reasons for any decision taken under the amended Act in accordance with the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Similarly, those who are entitled to seek merits review of a decision may apply for a statement of reasons under the *Administrative Appeals Tribunal Act 1975* (Cth). (2011a, p. 82)

The Hawke Review covered a much wider range of decisions under the EPBC Act than are the subject of this study. As such, the costs of publishing reasons for all significant major project decisions would be less than those of concern to the Australian Government, and in the Commission's judgment, less than the benefits that would accrue to the community from increased transparency.

Further, the Commission considers that the case for publishing the justification for major project primary approval decisions is no less persuasive in other jurisdictions and that this would provide a significant improvement in State and Territory DAA processes.

DRAFT RECOMMENDATION 8.7

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

9 Review and appeal of regulatory decisions

Key points

- Review mechanisms help ensure that development assessment and approval (DAA) decisions are made in a transparent and accountable manner and provide a way for the community to participate in DAA processes.
- Reviews can determine whether a decision was lawful and based on a proper process (judicial review), or whether it was reasonable or preferable to other possible decisions (merits review). There are ways in which merits review can be limited.
- In evaluating the degree to which review mechanisms in Australia contribute to transparency and accountability of decision making without incurring unnecessary costs, several issues have been identified by participants:
 - What review rights should apply to decisions that are made by the Minister?
 - What review rights should apply to decisions that are made by a person other than the Minister?
 - Procedural matters, including who has ‘standing’ for the purposes of bringing a judicial or merits review application; how vexatious review applications should be treated; and how costs associated with reviews are allocated.
- Each of these issues is a potential source of uncertainty or costs for proponents. Each is also a source of contention for other stakeholders, such as NGOs, that regard the degree to which they can participate in, and have rights of review, as a measure of whether DAA processes are serving the public interest.
- The Commission considers review for DAA decisions should be determined in the context of the DAA process, particularly by looking at who the decision maker is:
 - if the decision maker is a Minister, judicial review is appropriate
 - in most other cases, limited merits review will be appropriate.
- Review rights should be determined by evaluating the costs and benefits, which might include ensuring public participation in the process, and the potential for multiple review rights to overlap with each other.
- Standing for judicial and limited merits review should be granted to proponents, those who are directly affected or could potentially be directly affected by the decision, and those who have taken a substantive interest in the assessment process. In exceptional circumstances, leave should be able to be granted to persons seeking review if a denial of natural justice would occur if they were not granted standing.

This chapter considers the provisions that exist for review of decisions throughout the DAA process.

Review mechanisms help to ensure that DAA decisions are made in a transparent and accountable manner. The degree to which review mechanisms in practice contribute to transparency and accountability of decision making without incurring unnecessary costs depends on:

- what review rights apply to decisions made by a Minister, such as major project primary approval decisions
- what review rights apply to decisions that are not made by a Minister, such as decisions made by government departments or independent bodies at the assessment stage of the DAA process
- procedural matters, including who has ‘standing’ for the purposes of bringing a judicial or merits review application; how vexatious review applications should be treated; and how costs associated with reviews are allocated.

9.1 Overview of review processes

Types of review

Review refers to challenging a DAA decision or the conditions imposed on that decision. A number of parties could be affected by a DAA decision and may seek to challenge it. When a DAA decision is made, it is important to identify:

- what is the scope of the review
- who can seek review?

Each jurisdiction varies as to what type of review, if any, is allowed for decisions about major projects, and whether ministerial decisions are reviewable.

What is the scope of the review?

There are two types of review: merits review and judicial review.

Merits review allows a ‘second look’ at the decision (box 9.1). The merits review body generally exercises all the power and discretion of the original decision maker (‘stands in their shoes’) to determine what is the correct or preferable decision (Bates 2010).

Box 9.1 **Challenging decisions through merits review**

Two recent cases in the New South Wales Land and Environment Court provide an example of a decision maker's judgments about the precautionary principle and ecologically sustainable development being overturned on review.

In the first case, the approval for an extension of a mine was overturned because the judge found the social and environmental costs outweighed the economic and social benefits of the project. The judge criticised the modelling used in the development assessment and approval process, finding that:

- the offsets were not scientifically proven to be adequate to fix the environmental damage
- some of the social impacts on the community had been overlooked
- the input–output analysis overstated the employment gains of the project
- the non-market valuation study was flawed in its design
- the benefit–cost analysis failed to take into account issues of equity, distributive justice, intergenerational equity and ecologically sustainable development (an objective of the relevant planning legislation).

In the second case, the judge overturned the approval for the extension of a mine because of the lack of data on the impacts on a nearby river:

- could not be overcome with an environmental management plan
- meant the adaptive management regime did not meet the required standard of imposing precise limits on the cumulative operations of the mine
- meant the precautionary principle had not been satisfied, because the proponent had not demonstrated the risk of environmental harm would be adequately mitigated.

Both decisions are currently being appealed to the New South Wales Court of Appeal.

Sources: Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48 (15 April 2013); SCHCAG Pty Ltd v Minister for Planning and Infrastructure and Boral Cement Limited [2013] NSWLEC 1032 (27 February 2013).

The right to a merits review does not exist at common law and must be specifically granted by statute. This means the statute determines the powers of the merits review body. For example, the merits review body might only be able to consider certain things or be required to remit the decision back to the original decision maker (box 9.2).

Box 9.2 Limited merits review of decisionmaking in the electricity and gas regulatory frameworks

The Standing Council on Energy and Resources recommended that a form of limited merits review be introduced into the electricity and gas regulatory frameworks, where the review body must:

- only consider information that was available to the original decision maker
- acquire expert advice as needed and consult with relevant stakeholders
- remit more complex decisions back to the original decision maker.

To obtain review, an applicant must demonstrate that the decision maker made an error of fact, an incorrect exercise of discretion or was unreasonable in its original decision, and make a *prima facie* case that addressing this would lead to a materially preferable outcome in the long-term interests of consumers.

Source: Standing Council on Energy and Resources (2013).

By contrast, judicial review does not allow the conclusions of the original decision maker to be challenged — it only looks at the legality of the decisionmaking process (Cane 2010). Similarly:

... judicial review is limited in that it may only assess the lawfulness of a decision, not its merits. It is not for judges to question whether the decision was ‘good, bad or indifferent’, which is often what is sought in challenges to environmental decisionmaking, nor can a judge substitute his or her opinion for that of an administrative decision maker. If the decision was within the power of the decision maker, then judicial review will not provide a remedy. (Cabarrus 2009, p. 114)

Although the right to seek judicial review exists at common law, many jurisdictions have passed judicial review legislation which sets out the grounds for review (box 9.3) and which makes it easier for applicants to bring a claim than at common law. For example, a failure to properly consult might be grounds for judicial review for lack of procedural fairness. Further, judicial review by the High Court is guaranteed by the Commonwealth constitution for Commonwealth matters and cannot be removed by law, but the states can remove judicial review by law.

Box 9.3 **Legislated grounds for judicial review**

The grounds for judicial review listed in the judicial review legislation generally include:

- natural justice or procedural fairness (including proper consultation)
- procedural irregularities
- the decision maker was not given power to make the decision they made
- the decision maker going beyond the boundary of the statutory power conferred
- to what extent conditions of licences and other approvals might enable development to be carried out substantially differently to the concept for which approval was sought (uncertainty)
- failing to take into account a relevant consideration, or taking into account an irrelevant consideration
- where all statutorily mandated criteria have not been given due weight
- where power was exercised for an improper purpose
- where the decision was so unreasonable that no reasonable decision maker could ever have made that decision. As per *Tarkine*, courts have usually been reluctant to use the *Wednesbury* unreasonableness test to overturn a Minister's decision
- where the decision maker gave undue regard to government policy and failed to give due consideration to the merits of the application
- delegating a power that cannot be delegated.

Sources: Bates (2010); *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 at 84-85.

Who can challenge the DAA decision?

Not everyone is allowed to bring a merits or judicial review application before the tribunal or court. The people who can are specified by law (this is referred to as having 'standing'). Standing can be expanded or narrowed by legislation, and hence it varies depending on the jurisdiction and the type of review application being brought. Generally, to have standing, a person is required to have a 'special interest' greater than the concern of the general public (greater than a mere intellectual or emotional concern). Jurisdictions differ in how they define 'third party' (that is, a person other than a proponent who is able to bring a review application). A third party could be:

- an 'aggrieved person' or someone who has a 'special interest'
- an environmental group with conservation objectives, or
- an objector (that is, a person who made a properly-made submission).

Differences across jurisdictions

There are many decisions in the DAA process, each with varying review rights. The approval decision is the most important as it is the decision to approve, approve with conditions or refuse the project (table 9.1).

Where merits review is available, the Minister can play a role in the merits review process. This role varies between jurisdictions.

- There may be a requirement or a discretion for a Minister or a statutory agency to make submissions to the review process.
- A Minister may be able to call-in and decide a case currently before a tribunal, as occurs in Western Australia.
- A tribunal may only have the power to make recommendations to the Minister, who is the final decision maker. This occurs for some decisions in Queensland, where the Land Court has the power to make recommendations to the Minister.
- A Minister may conduct the review himself or herself, on advice from a body. This occurs in Western Australia, where the Minister for Environment decides environmental reviews on advice from the Office of the Appeals Convenor.
- A Minister may be able to give directions or make submissions to the review body.

Table 9.1 Key major project primary approval decisions and when they are reviewable

<i>Jurisdiction</i>	<i>Decision maker</i>	<i>Review rights^a</i>	<i>Standing</i>
Commonwealth			
EPBC Act	Minister for the Environment	Judicial review	Directly affected or conservation activities ^b
New South Wales			
State significant development	Planning Assessment Commission or Department ^c	Merits and judicial (common law)	Objectors (merits) ^d Any person (judicial)
State significant infrastructure	Minister, Planning Assessment Commission or Department ^c	Judicial review (common law)	Common law standing
Critical state significant infrastructure	Minister for Planning	Judicial review (common law)	Third parties require leave from Minister
Victoria			
Planning permits	Responsible authority	Merits and judicial	Objectors ^e
Ministerial call-in	Minister for Planning	Judicial review	Person affected, person aggrieved ^f
Major transport projects	Minister for Planning	Judicial review	Person affected ^g
Queensland			
Coordinated projects	Department for Environment and Heritage Protection ^h	Merits and judicial	Objectors ⁱ
Priority Development	Minister for Economic Development	Judicial review ^j	Person aggrieved
South Australia			
Major projects	Cabinet or delegate	None	n/a
Crown Development	Minister	None	n/a
Western Australia			
Development assessment panel decisions	Development Assessment Panel	Merits (proponents) ^k and judicial (common law)	Common law standing ^l

^a Not all jurisdictions have judicial review statutes. NSW, SA, WA, and NT rely on common law judicial review and this is indicated in the table. ^b Persons who could be directly affected or persons or organisations who have been engaged in conservation activities in the preceding two years. ^c Minister delegates to Planning Assessment Commission or Department of Planning under particular circumstances. ^d Only for state significant development that would have been designated development had it not been declared. ^e Affected persons may seek leave. ^f Depends on which judicial review legislation the application is brought under. ^g Only under the *Administrative Law Act*. ^h Determined by the Sustainable Planning Regulations 2009. ⁱ Limited to matters that assessment manager decides on. Review of Coordinator-General's process not available under the *Judicial Review Act 1991*. ^j Proponent may appeal Minister's decision to impose certain conditions in certain circumstances. ^k Minister can call-in the review. ^l Persons with a sufficient interest may make a submission to an existing review process.

(Continued next page)

Table 9.1 (continued)

<i>Jurisdiction</i>	<i>Decision maker</i>	<i>Review rights^a</i>	<i>Standing</i>
Tasmania			
Projects of state significance	Minister and both Houses of Parliament	No	n/a
Projects of regional significance	Minister	Judicial review	Person aggrieved
Major infrastructure projects	Combined planning authority	Merits (proponents only), judicial	Person aggrieved
Northern Territory			
Ordinary development	Development Consent Authority	Judicial review (common law) ^m	Common law standing
Ministerial determinations	Minister for Planning	Judicial review (common law)	Common law standing
ACT			
Ministerial call-in Ordinary projects	Minister for Planning ACT Planning and Land Authority	Judicial Merits ⁿ and judicial	Person aggrieved Objectors who could suffer material detriment

^m Merits review only permitted for development in residential zones. Minister may also exempt certain decisions from appeal. ⁿ Internal reconsideration also allowed for certain approvals.

Sources: Commonwealth, State and Territory Government websites.

Ensuring the full benefits of the review process

Review processes increase the transparency and accountability of decisionmaking, but also potentially impose costs (Willey 2005). The review rights in each jurisdiction determine how easy it is to bring a review application and how frequently they are brought (PC 2011c, p. 83)

Ensuring the full benefits of the review process requires examining the objectives of the DAA regulations and processes (chapter 5) and assessing whether or not the review process helps achieve the stated objectives. Whether or not the review process functions effectively is contingent on the rest of the DAA process. Thus, an effective review process needs to be designed in the context of the entire DAA system.

In assessing ways to maximise the net benefit of review processes, the Commission has referred to a number of principles.

- The Administrative Review Council's publication (ARC) *What decisions should be subject to merits review?* (1999)
- The Development Assessment Forum's (DAF) *Leading Practice Handbook* (2005)

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- The World Bank's *Handbook for Evaluating Infrastructure Regulatory Systems* (2006).

There are divergent views on how well existing review processes in Australian jurisdictions promote transparency and accountability of development decisionmaking in a cost-effective way.

Potential for costs and delay

Past reviews and submissions have noted that review processes might delay and add to the implementation cost of the project.

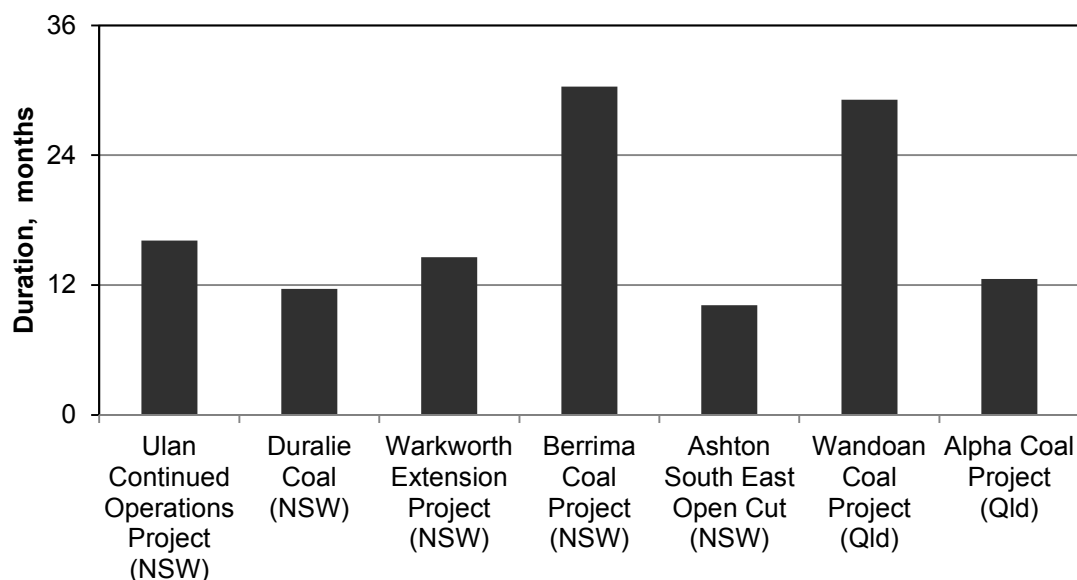
One problem with opening the controlled action decision to merits review is that the current system is predicated on proponents being able to get a quick answer as to whether their project falls under the Act. Merits review could slow down this part of the process (Hawke 2009, p. 258)

Third party merit appeals add delay, cost and risk to the development assessment process, and have rarely been successful against mining projects in NSW. The transparency provided by independent review should be an important part of the assessment process. However, as the introduction of new independent assessments/ reviews are designed to ensure better, more transparent decisions are made, this should lead to a reduction of appeal rights for third parties. (NSW Minerals Council, sub. 23, p. 4)

The New South Wales Minerals Council (2013a, p. 8) has also argued that 'appeals cause very long delays, frequently of more than 12 months' (figure 9.1).

Figure 9.1 Time between approval being granted and court challenge being determined^a for selected^b projects

New South Wales and Queensland



^a Timeframes are calculated as the time elapsed between the approval decision being granted and the appeal being determined (where that has occurred). ^b This is an indicative data set. Alpha Coal project is still to be heard in September 2013. Wandoan Coal project includes objections on mining lease (April 2011 to March 2012) and compensation claim (July 2012 to expected Q2/Q3 2013). Excludes time for judicial review (commenced November 2012 and is ongoing) because time overlaps with compensation claim. Ashton South East Open Cut is still to be heard in August 2013. The Warkworth decision is currently being appealed.

Source: Commission analysis of data provided by Xstrata Coal, sub. 50.

Examples of delays from submissions mainly focus on coal mine cases in New South Wales and Queensland; there is little or no evidence from other jurisdictions.

- The Wandoan Coal Project has been subject to three court processes. The first concerned objections to the mining lease, which took a total of 15 months including 7 months waiting for the Court's recommendations. The second concerned a compensation claim which began in July 2012 (finalisation of which is expected in the second quarter of 2013). The third, a judicial review application, was commenced in November 2012 and is ongoing (hearings expected in the second or third quarter of 2013) (Xstrata Coal, sub. 50).
- The decision to approve the Warkworth Extension project in New South Wales was reviewed by the Land and Environment Court. Determination of this review application took around 14 months, and the Court overturned the approval decision. The proponents have appealed this decision (NSW Minerals Council 2013a, p. 7).
- The decision to approve the Ulan Continued Operations project in New South Wales was appealed to the Land and Environment Court, which affirmed the

approval of the project and recommended some minor changes to the conditions. This review process delayed the project by 17 months (Xstrata Coal, sub 50).

King & Wood Mallesons noted that review processes can involve a delay cost and a financial cost to all parties to the review process.

The ability for objectors to commence a merit appeal with respect to some approvals means that astute proponents of such applications in most jurisdictions would factor in an additional 6-12 months into their development program to account for a potential appeal. The Productivity Commission should carefully consider how useful the merits review right actually is, because while it adds significant time and cost to the process whereby the whole economy suffers, in our experience, very few challenges have resulted in projects being refused. (sub. 39, p. 3)

There are concerns that appeals may be used to undermine the DAA process and reduce confidence in the system. For example, the NSW Minerals Council noted:

In NSW it will be possible for a mining project to be assessed by up to three separate independent bodies (the Gateway Panel, a Planning Assessment Commission review panel and a Planning Assessment Commission determination panel) and still be subject to merit appeal to the Land and Environment Court by third parties. (sub. 23, p. 4)

The Queensland Resources Council commented that judicial review, rather than merits review, is preferable, in order to discourage actions ‘which seem more motivated by the opportunity to delay and frustrate major fossil fuel projects than ... with debating the merits of a project’ (sub 19, p. 6).

Finally, review processes may allow ‘gaming’ of the system, ‘whereby incumbent businesses can avail themselves of objection or submission rights in order to prevent a development or at least to increase the time, cost and risk faced by a would-be competitor’ (PC 2011c, p. 345).

Accountability and participatory democracy

Other participants to this study and broader stakeholders have emphasised the benefits of Australia’s current review processes.

One benefit of review processes is improved decisionmaking and accountability. For example, the Nature Conservation Council of NSW noted:

It is important that development assessment and approval processes incorporate robust checks and balances to ensure that decisions are lawful, impartial and based on best practice planning principles; and that laws are properly enforced. There are well-documented benefits of having court-based review rights in planning systems — including, for example, participatory democracy, executive accountability, institutional

integrity, improved decision making and rational development of the law. (sub. 22, p. 5)

The Australian Network of Environmental Defender's Offices (sub. 14, p. 49) argued that review rights 'are a fundamental access to justice issue', and further:

Where third party rights do exist, they are very rarely exercised, but the additional scrutiny promotes better decision making and accountability. (sub. 14, p. 16)

Third party appeal rights can also foster participatory democracy, by allowing members of the public to influence the outcomes of issues that affect them. For example, Millner comments:

... an essential part of attaining social justice is enabling the members of the community who will be adversely affected by these [environmental] impacts to participate in, influence, and have rights of review in relation to the making of environmental laws, decisions about land use, and development and enforcement of environmental laws. (2011, p. 190)

The Department of Communities and Local Government in the United Kingdom argues that allowing proponent appeals results in better decisionmaking:

The main impact of the reinstatement of appeal rights where local authorities fail to validate planning applications is considered to be behavioural. The threat of challenge, via a potential appeal against non-determination, is considered likely to result in a positive influence on the behaviour of local authorities ... (DCLG (UK) 2013c, p. 27)

9.2 What reviews should be allowed?

Designing effective review processes requires a balance to be struck between competing interests. Review can increase the accountability and integrity of the decisionmaking process and contribute to participatory democracy, but can also increase costs, delays, uncertainty about the project, and could expose the project to the risk of vexatious applications by third parties.

Decisions made by a Minister

Major project primary approval decisions require the decision maker to balance environmental, social and economic values. Chapter 8 recommends that Ministers — who are accountable to constituents in a way that unelected officials are not — are the most appropriate officials to make these values-based decisions. Given this, the question becomes whether it is appropriate for merits review tribunals — who are not accountable to constituents — to reconsider the decisions of a Minister, or whether this risks creating a duplicate approvals process.

Although submissions commented on the costs and benefits of review processes generally (discussed earlier), none commented on what review rights should follow from ministerial decisionmaking.

The ARC (1999) considers that, as a general rule, policy decisions of a high political content made by a Minister should not be merits reviewable. However, while the ARC (1994) thought that decisions approving major projects might fall into this category, as a general rule the ARC thought that they should be subject to merits review unless the Minister issued a certificate declaring otherwise.

A range of literature has previously noted that courts and tribunals are better suited to adjudicating between competing individual rights rather than decisions dealing with many different public rights and interests (such as major project primary approval decisions).

The cases suggest that environmental decisions have ‘political’ characteristics which indicate that a restrained approach to judicial review is appropriate. The political characteristics are that decisions are made according to consultative processes similar to those used for making subordinate legislation and require balancing social, economic and environmental considerations — factors that make clear that they are public interest-based decisions. Moreover, the final decision is generally made by the Minister for the Environment, a politician, and this is likely to be recognised as meaning that the public interest assessments are primarily a matter of political responsibility ... a restrained form of review is appropriate. (Edgar 2011, pp. 460–1)

It is for this reason that DAA approval decisions under *the Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) are subject to judicial, not merits review.

A small number of the [EPBC Act] ... decisions require careful balancing of competing interests and judgments. The Government considers that where these decisions are sufficiently important to be taken by the Minister as an elected representative, those judgment calls should not be able to be overturned by an unelected tribunal such as the AAT. (Australian Government Department of the Environment and Heritage 2006)

The United Kingdom reached a similar conclusion in their recent reforms (box 9.4).

Box 9.4 Planning appeal processes in the United Kingdom

In the United Kingdom, a proponent can appeal a local authority planning decision to a planning inspector who will hear the appeal in the name of the Secretary of State. The Secretary of State can call-in significant appeals, including those related to major developments.

However, a third party can only challenge the decision through a judicial review application to the High Court. Parliament considered a more extensive community right of appeal covering situations where a decision to grant a planning permit was not consistent with the strategic plan or where a local authority had an interest in the development, but rejected it on the grounds that:

... if there are to be exceptional departures from the plan, who should decide whether that is in the community's interest? We have a choice between an unelected body — the Planning Inspectorate based in Bristol — or elected local councillors. It is consistent with the type of approach that we want that that power should be vested in local democratically elected and accountable people. ... They represent the community. They can make a more sensitive judgment than would be possible if the matter were contracted to a third party. (p. 5)

Two safeguards were identified to protect the interests of the community: the strategic plan, and the fact that any decision to depart from the plan must be in limited circumstances and can be taken only by representatives of the community in the planning committee.

It is necessary to reflect on the need to make the planning system more plan-based and less subject to the appeals mechanism, so that it is more fit for purpose, less costly and more accessible. (p. 5)

Source: Barclay (2011).

Judicial review of ministerial decisions

The Commission agrees with the approach taken in the EPBC Act. DAA primary approval decisions should be made by Ministers (chapter 8). Ministers are accountable to Parliament and to the public for their decisions in a way that an independent body is not. Allowing merits review of ministerial decisions would allow the decisions of an elected official to be challenged by an unelected body. (The same argument applies to decisions that have been ratified by Parliament.) However, ensuring the legality of the decisionmaking process is important and hence judicial review should be allowed for these decisions. (Judicial review also limits vexatious reviews and appeals — discussed later — because the focus is on procedural, rather than substantive matters.)

However, there are concerns that removing merits review prevents egregious decisions from being challenged (Willey 2005). On this argument, limited merits review would strike an appropriate balance as it allows the reconsideration of

egregious decisions, but requires the merits review body to remit the matter back to the original decision maker to prevent the creation of duplicative precedent (Brown, Stern and Tenenbaum 2006).

The Commission is proposing reforms that are intended to prevent impractical conditions that are not able to be complied with from being imposed, in order to negate the need for a more expansive form of review. In particular, the Commission has proposed that an internal mechanism for the variation of conditions be implemented (chapter 7). This effectively creates a restricted form of internal merits review. Other reforms to the process that would promote good regulatory outcomes include:

- separation of the assessment manager and the approval authority (chapter 7)
- public disclosure of the assessment report (chapter 7)
- effective consultation (chapter 6)
- more policy guidance (chapters 5 and 6)
- public disclosure of the justification for the DAA decision made and the conditions imposed (chapter 8)
- imposing conditions that can be complied with and enforced (chapter 7)
- review of conditions (chapter 7)
- national review of offset policies (chapter 7).

In sum, leading practice suggests that where major project decisions are personally made by a Minister (or ratified by Parliament), merits review should be removed for these decisions (where it exists). Judicial review of these decisions strikes an appropriate balance between accountability and timeliness. Jurisdictions that do not currently allow judicial review of these decisions should amend their legislation to allow for it.

Decisions made by persons other than a Minister

Decisions made by delegates

The Commission recommends that major project primary approval decisions be personally made by a Minister (chapter 8). However, there is a tension between elected representatives making delicate balancing decisions themselves, and the efficient use of Ministerial time. Accordingly, legislation often allows Ministers to delegate decision making.

Given the delicate balancing of competing interests involved in major project primary approval decisions, the Commission considers it is preferable that Ministers do not delegate these decisions. The argument for limiting review rights to judicial review does not apply when the decision is made by a delegate (such as, for example, an officer of a government department), since delegates are not elected officials and are not accountable to Parliament in a way that a Minister is.

However, there might be circumstances where the decision of the delegate can be considered to be a decision of a Minister — for example, where reconsideration of the delegate’s decision can be sought from a Minister personally. A similar provision exists under section 78A of the EPBC Act, where a person may request the Minister to reconsider a controlled action decision. The Commission considers, where a Minister delegates their decision, a limited amount of time (14 or 21 days) should be provided for the decision of the delegate to be reconsidered by the Minister. In these circumstances, judicial review would be appropriate.

Where provision for reconsideration is not made, the decision of a delegate cannot be taken as being a decision of a Minister. In these cases, limited merits review should be allowed for decisions of delegates (along with judicial review). This would be consistent with sections 206A and 263A of the EPBC Act, which states that an application for review of a delegate’s decision about a permit may be made to the Administrative Appeals Tribunal, but not for a decision of the Minister.

Decisions made by independent bodies

For some decisions in the DAA process, Parliaments have decided that they should be made by independent bodies. New South Wales for example, has moved towards this model for major project primary approval decisions.

Indigenous heritage decisions are another example of this approach, although these decisionmaking arrangements vary significantly between jurisdictions. The Commission has recently noted:

In Western Australia, South Australia and Tasmania, heritage decisions rest with the relevant Minister. In New South Wales, decisions rest with the head of the department which administers heritage. In the Northern Territory, the independent authority — the Aboriginal Areas Protection Authority (AAPA) — issues Authority Certificates for access and activity near sacred sites. However, a Minister’s Certificate can override non-certification by the authority.

In contrast to ministerial and departmental approval processes, in Victoria, heritage plans and permits for exploration must be approved by the relevant Registered Aboriginal Party (RAP). Traditional Owners must apply to the Victorian Aboriginal Heritage Council to be appointed as a RAP. When a proposed exploration area does not

have a RAP, the Secretary of the Department of Planning and Community Development, or in some instances the Aboriginal Heritage Council, may approve the permit or plan. (PC 2013a, p. 144)

Some stakeholders, such as the New South Wales Minerals Council, have argued that the existence of an independent decision maker negates the need for merits review.

The need for merit appeal is negated in the current system for SSD, where projects are subject to assessment and determination by the independent Planning Assessment Commission (PAC), as well as a separate merits review by the PAC in many cases. (2013a, p. 4)

However, independent bodies are not accountable to Parliament for their decisions, and thus, other accountability methods are needed. Given that independent bodies are not elected to office in the same way that Ministers are, there is no in-principle reason why another independent body (such as a tribunal) should not be able to ‘second-guess’ their decisions through merits review. In fact, merits review (along with judicial review) is a desirable way of holding these bodies to account.

Deemed decisions

Chapter 8 recommended that if the relevant Minister does not make a decision within a designated statutory time period, then the recommendations of the assessment body should be deemed to be decisions of the Minister. It is desirable that deemed decisions provide an incentive for Ministers to make decisions within the required time. Only allowing judicial review of deemed decisions would create an incentive for Ministers to choose not to exercise their decisionmaking responsibility and allow a deemed decision. Further, the assessment body effectively becomes the decision maker for deemed decisions, and hence allowing merits review of these decisions (along with judicial review) is a desirable way of holding these unelected bodies to account.

Disclosure of the assessment report (as recommended in chapter 7) would also provide interested parties with the equivalent of a statement of reasons for a deemed decision.

How should merits review be limited?

The Commission has concluded that merits review is appropriate for decisions of delegates that cannot be reconsidered by the Minister, decisions of independent bodies, and deemed decisions.

Concerns have been expressed that merits review creates an avenue for decisions of regulatory agencies to be bypassed rather than create a means for reviewing them (Brown, Stern and Tenenbaum 2006). However, there are ways in which merits review can be limited to prevent this. For example, the merits review tribunal might be required to remit more complex decisions back to the original decision maker, or be prohibited from considering new evidence on appeal.

While there is no single form of limited merits review, the Commission considers it should, at a minimum, prohibit evidence from being raised in the review process that was not raised at the public consultation stage. This would encourage participation in the public consultation process and give the decision maker the first opportunity to consider issues of importance. Jurisdictions should also consider whether or not it is appropriate for more complex decisions to be remitted back to the original decision maker.

Finally, consideration should be given to using less formal review bodies such as tribunals, as this can help reduce costs and delays for parties to review applications. While the Commonwealth Constitution requires judicial review to be conducted by courts, similar prohibitions do not apply at the state level. Thus, State and Territory Governments should consider less formal review mechanisms in place of judicial review by courts.

DRAFT RECOMMENDATION 9.1

Judicial review is appropriate for major project primary approval decisions where a Minister is the decision maker. For decisions not made by a Minister, including those that are deemed because a Minister has not made a decision, limited merits review is appropriate. Where necessary, jurisdictions should amend their legislation to allow judicial review of ministerial decisions.

Determining limited merits review rights

Which decisions should be subject to limited merits review should be determined by an assessment of the costs and benefits in each case. Two factors that might impact on the costs and benefits are public consultation processes and the risk of overlapping review rights.

The role of public consultation in review mechanisms

When assessing the costs and benefits of merits review processes, one factor to take into account is whether or not public consultation was undertaken in making the decision. As discussed earlier, one of the important benefits of third party merits

review is that it can facilitate participatory democracy by allowing people to influence the outcomes of issues that affect them. However, meaningful public consultation in the DAA process (chapter 6) can alleviate stakeholder concerns about the effect on public participation in the DAA process when third party merits review is restricted.

Different jurisdictions have different interactions between review rights and public consultation processes. For example, some jurisdictions curtail review rights where extensive public consultation has occurred (box 9.5).

Box 9.5 ‘Front-loading’ public consultation and review rights

South Australia, the United Kingdom and Canada focus on consulting extensively with the public in the development of a strategic plan or assessment, or early on in the project-specific assessment and approval process. As a result of this front-loaded or early consultation, review rights for these projects are subsequently limited.

- South Australia adopted the Statewide Wind Farm Development Plan Amendment which explicitly envisages wind farms in all rural type zones in the state. In these zones, wind farms will be classed as Category 2 developments and not be subject to third party appeal rights unless a turbine is located within two kilometers of a non-associated dwelling or township-type zone (in which case it will be subject to third party appeal rights).
- In the United Kingdom, significant consultation is conducted at the strategic planning and pre-application stage for nationally significant infrastructure projects. Only those directly impacted by the project can object. All others can only object at the stage when the Statutory Policy Plan is being developed and open for consultation, or else bring a judicial review application to the High Court.
- The Canadian model (British Columbia) uses community working groups from close to the outset of the assessment phase in an attempt to deal with issues early on in the coal mine approval process. Once a decision is made, judicial review is the only form of review available (there is no merits review).

Sources: Barclay (2011); Department for Communities and Local Government (2013b); RenewablesSA (2012); Xstrata Coal, sub. 50.

Public consultation is an important feature of environmental decision making. This view was supported by Hawke, which argued:

Environmental decisions generally affect the community in some way and therefore, including the public in the decisionmaking process makes good sense and good governance. The level at which the public is and should be involved will vary depending on the particular issues and the likely level of community interest. Public participation may be sought to gather information, resolve differing opinions or competing objectives among stakeholders, identify satisfactory tradeoffs, or enhance public understanding, trust or support for decisions. (2009, p. 240)

Some participants, such as Xstrata Coal, felt that expansive merits review unnecessarily duplicates the existing consultation process:

Providing third parties and external stakeholders with the opportunity to comment on proposals at the beginning of the process ensures that review can be limited to judicial review. Merits review at the conclusion of the process is not needed as these parties have already had an opportunity to provide their comments and a further opportunity simply undermines the decision maker's power and creates unnecessary delay and uncertainty. (sub. 50, p. 2)

Similarly, Hawke noted that:

One common feature of all of the types of decisions that are currently open to merits review under the [EPBC] Act is that the decisionmaking processes for these decisions do not include any opportunity for public comment. ... The assessment approach decision is also a decision which is not open to public comment under the Act. Allowing the assessment approach decision to be subject to merits review would increase the decision maker's accountability and could create a further incentive for the decision maker to get the level of assessment 'right'. (2009, p. 259)

Other participants, such as the East End Mine Action Group, noted that public participation is ineffective and does not affect the decisionmaking process, and the absence of merits review means third parties are unable to challenge conditions and the scientific evidence they are based on (sub. 38).

Both the DAF and the ARC raise public involvement early on in the DAA process as a relevant factor in determining third party merits review rights, but for different reasons.

- The DAF (2005) considered that for some, but not all, decisions, the right to be consulted does not necessarily imply a right to seek merits review.
- The ARC (1999) noted that it is time-consuming and costly to review decisions that were reached after an extensive public inquiry or consultation process that required the participation of many people.

The Commission considers it is not sufficient just to have public consultation in the DAA process. What is important is that it be meaningful. Chapter 6 makes some recommendations on how to improve public engagement. However, despite the improvements to community consultation that could be made, consultation processes will always have some inherent limitations.

- Reliance on submissions might not give a representative picture of the community's view on a particular project, as certain interest groups might be over or under-represented in the process (Amelia Thorpe, sub. 16, pp. 5–6).
- The period for consultation on the environmental impact assessment (EIA) may not give participants sufficient time to respond to a very lengthy document.

-
- There can be significant delays between granting the approval and the operationalisation of the project, which means interests can arise subsequent to the consultation process that are affected by the project but did not get a chance to participate at the public consultation stage.

The Commission supports improving the effectiveness of public consultation in the DAA process (chapter 6), but does not consider that these improvements will be sufficient to overcome every potential limitation of consultation processes and therefore does not eliminate the need for review.

Decisions with overlapping review rights: preliminary decisions

There are a number of different decisions that occur throughout the assessment process. For example, State and Territory Government DAA decisions are, generally:

- to declare the project a major project or to ‘call-in’ the project
- to decide whether or not an EIA should be conducted and if so, what level of assessment
- to set the scope of terms of reference of the EIA
- to make a recommendation to the decision maker after the EIA is completed
- to refuse the application or accept it (with or without conditions).

Jurisdictions vary on whether and which decisions preceding the approval decision (‘preliminary decisions’) are reviewable. For example:

- the Department of Planning in New South Wales determines whether a project will be assessed under a major project pathway (state significant development or state significant infrastructure). This determination can be appealed to the Land and Environment Court
- in Western Australia, both the proponent and third parties are allowed to seek review of the Environmental Protection Authority’s decision to assess and the recommendations it makes within 14 days
- the decisions of the Queensland Coordinator-General to declare the project a ‘coordinated project’ and to determine the terms of reference for the environmental impact assessment are not reviewable.

Hawke (2009) argued that certain preliminary decisions were more suitable for merits review than the final approval decision because they did not involve the same level of discretion and political judgment about social and economic tradeoffs as the final approval decision (which is only judicially reviewable under the EPBC Act).

However, there are many different preliminary decisions that are made in the DAA process, and not all of these decisions should have review rights. For example:

- recommendations to decision makers should not be merits reviewable because they are not final decisions and do not have to be adopted (ARC 1999)
- preliminary or procedural decisions should not be reviewable because they do not have substantive effect and thus the cost of the review process outweighs the benefits (ARC 1999)
- making multiple preliminary decisions reviewable can lead to overlapping review rights (Hawke 2009, p. 258).

Of the decisions that have substantive effect under the EPBC Act, Hawke recommended that either the controlled action (to trigger the EPBC Act) or assessment approach decision should be merits reviewable, but not both.

If controlled action and assessment approach decisions were both open to merits review, there may be concerns that a single project could be the subject of two separate merits review applications and processes. For example, the Minister could decide that a project is not a controlled action but this decision is successfully challenged on merits appeal. The Minister would then make an assessment approach decision, which could also be subject to merits review. While the number of these cases is likely to be very small, if this potential is regarded as a major concern, the Act could be amended to provide that where there has been a merits review of the controlled action decision, there cannot be merits review of the assessment approach decision. (Hawke 2009, p. 258).

The Commission broadly agrees with Hawke's approach, as the benefits of making the controlled action or assessment approach decisions reviewable would appear to outweigh the costs. Although some pathways, such as coordinated projects in Queensland, only allow review of decisions at the end of the process, the Commission considers it preferable to have review early on in the process to prevent delays to the implementation of the project once it has been approved.

Limited merits review of these decisions would allow the identification of matters that have been overlooked, or allow matters that have been wrongly identified as significant to be redacted. At the state and territory level, the equivalent decision would be the decision to declare a major project or exercise ministerial 'call-in', or the decision on the terms of reference of an environmental impact assessment. Making the terms of reference subject to limited merits review would also allow unnecessary requirements to be expeditiously struck out of the terms of reference.

However, jurisdictions should also carefully consider any overlaps that might arise from making multiple preliminary decisions reviewable, for the reasons outlined by Hawke (2009). Thus, it would seem appropriate that either the controlled action or

the assessment approach decision should be subject to limited merits review, but not both. Similar reasoning applies to preliminary decisions at the state level.

Decisions with overlapping review rights: secondary approvals

Proponents usually need to obtain a number of secondary approvals under legislation that are separate from the legislation under which the development is approved. Secondary approvals include environmental management plans and works permits. These processes may have different review rights. King & Wood Mallesons felt that review of permits adds a second layer of review.

A project that has completed a detailed and lengthy DAA process (including objections/submission processes) can still be delayed for a matter of months or years by a merits review in relation to a secondary approval processes, e.g. a water licence for mine de-watering. In general, there are appropriate opportunities for public participation in the major project processes and the processes are open and transparent. (sub. 39, p. 3)

The review rights for other approvals should be determined consistently with the principles outlined above, having regard to the costs and the benefits of making a particular decision reviewable. Jurisdictions should also consider the extent to which review of other approvals overlaps with the review of the DAA decision and ensure, so far as possible, that these review rights do not overlap.

9.3 Procedural matters

Who should be able to bring a review application?

Who can bring a judicial or merits review application is referred to as ‘standing’. Standing should be determined with regard to the purpose of the major project DAA process. Ordinarily a person cannot bring a judicial review application unless they have a ‘sufficient interest’ in the matter. This not only includes persons who are directly affected, such as adjoining landholders, but also conservation groups in certain circumstances (box 9.6).

Box 9.6 Who has standing at common law?

Australia's standing test of 'sufficient interest' will include persons directly affected by the project, such as adjoining landholders. It excludes conservation groups with a 'merely intellectual or emotional concern' in the matter: *ACF v Commonwealth*. However, 'peak' regional conservation groups that are government funded and invited by the government to participate in advisory committees have standing: *North Coast Environment Council Inc v Minister for Resources*.

Canada has taken an expansive view of the 'directly affected' test by extending it to persons who could potentially be affected by the project, for example, people who live in an area downwind of a hazardous release where outdoor pollutant concentrations may result in life-threatening or serious and possibly irreversible health effects: *Kelly v Alberta*.

Sources: *ACF v Commonwealth* (1980) 146 CLR 493; *Kelly v Alberta (Energy Resources Conservation Board)* 2009 ABCA 349; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492.

The uncertainty that standing rules can create for environmental groups has been criticised:

... environmental groups have difficulty with the private rights and interests model [of standing] since their concerns are largely outside of its parameters. The interests that they seek to advance are commonly referred to as public interests. Their objectives in bringing litigation — such as to prevent environmental impacts, raise issues for legislative attention and improve decisionmaking processes — reflect public rather than private concerns, such as protecting property and financial interests (Edgar 2011, p. 448)

It is important to note that many objectors do not have a direct financial or other interest in the subject matter of a merits appeal. Instead, unless directly affected by a proposal (such as by overshadowing or privacy or noise impacts), they are raising their concerns about environmental impacts on behalf of the wider general public (Millar 2005, p. 18)

The Australian Government has extended standing for judicial review (and enforcement — discussed in chapter 10) under the EPBC Act to include not just those who are directly affected by the projects, but also persons and organisations engaged in conservation activities in the preceding two years (Douglas 2009).

In some jurisdictions, participants in the public consultation process also have legal standing for merits review. If only participants in the public consultation process are given standing to bring a review application, then this prevents parties who did not participate bringing issues before a review body that the original decision maker did not have a chance to consider (Brown, Stern and Tenenbaum 2006).

Vexatious review and appeal applications

Review processes can ensure accountability but could also unnecessarily delay projects through vexatious review and appeal applications.

Third party (that is, non-applicant) appeals may improve the quality of decisions by reducing the scope for deals between developers and regulators and by catching poor decisions. Furthermore, the ability to appeal an unpopular development can protect neighbourhood amenity and enhance community trust in the system. However, this comes at the cost of increased delay for developers and possible frivolous or anticompetitive claims. (PC 2011c, p. 86)

What constitutes vexatious applications is not well-defined, although objections which have little basis in planning regulations would likely be considered to be vexatious (PC 2011c):

... [vexatious litigation is] legal proceedings started with malice and without good cause. Vexatious litigation is meant to bother, embarrass, or cause legal expenses to the defendant. A plaintiff who starts such litigation either knows or should reasonably know that no legal basis for the lawsuit exists. (Legal Information Institute 2010)

For example, vexatious reviews and appeals might be used as a deliberate strategy to delay a project, as the following excerpt from *Stopping the Australian Coal Export Boom* illustrates:

Legal challenges can stop projects outright, or can delay them in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigning. ... We will lodge legal challenges to the approval of all of the major new coal ports, as well as key rail links (where possible), the mega-mines and several other mines chosen for strategic campaign purposes (Hepburn, Burton and Hardy 2010, p. 6)

The courts have the ability to summarily dismiss an action due to it being frivolous, vexatious, or an abuse of process. However, under the EPBC Act, there are no examples of summary dismissal, perhaps because this is hard to prove and it is used cautiously by the courts (Edgar 2011, p. 442).

Other ways to limit vexatious reviews and appeals might include clear identification of appellants and their grounds for appeal, the capacity for courts to award costs against parties seen to be appealing for anti-competitive purposes, and prohibition of appeals if the party did not put in an objection to the development application (PC 2011c, p. 50).

Standing for third parties

Determining appropriate standing rights requires a balance to be struck between allowing those who have a legitimate interest in the decision to bring an application, while discouraging undesirable and vexatious reviews and appeals. The Commission is not aware of any evidence that indicates standing should be different for judicial review and (limited) merits review applications.

While proponents have an interest in the DAA decisions (as they are the ones most directly affected by them), persons other than the proponent should also be able to bring an application for review.

However, there can be costs if standing for third parties is not limited in some way.

We have rejected open standing merit appeal rights for third parties. We are aware that the broad third party merit appeal rights which are available under the Queensland planning system has led to commercially-based litigation between competitors. We are not prepared to open this avenue for costly litigation in NSW. However, we have recommended that a third party merit appeal right should exist for an objector who can demonstrate a direct adverse effect by the granting of a dispensation from an existing development standard. (Moore and Dyer 2012b, p. 66)

Brown, Stern and Tenenbaun (2006) recommended that the right to seek review should be limited to those who have participated in the decisionmaking process ('objectors') and/or been adversely affected by the decision. Xstrata Coal (sub. 50) opposed objector standing, arguing that objectors had already had their say in the consultation process, and hence supported limiting review rights to directly impacted landowners.

It is important to give standing to those who are directly affected by the project, such as neighbouring landowners. Further, given the limitations of public consultation processes, the Commission does not consider participation in public consultation earlier in the process should exclude a person from seeking review later. However, there might be situations where a nominal submission is made to the DAA process for the sole purpose of securing standing. To counter this, the Commission considers standing should only be granted to those people who have shown a substantive interest in the assessment process.

However, it is never possible to foresee all circumstances where review ought to be allowed. Thus, the Commission considers that, in exceptional circumstances, the review body should be able to grant leave to persons seeking review if a denial of natural justice would occur if they were not granted standing.

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

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

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

Commercially-motivated review and appeal applications

Reviews may also be brought for reasons of commercial competition. For example, in New Zealand, a 1997 study commissioned by the New Zealand Ministry of Commerce found that 32 per cent of business applications attracted submissions from parties they considered trade competitors. In a further 25 per cent of the cases it was suspected that trade competitors had been involved. Research carried out in New Zealand in 2008 suggests that 8 per cent of judicial review proceedings in the High Court relating to decisions made under the Resource Management Act may have been motivated by trade competition (MfE (NZ) 2009).

Some jurisdictions have provisions designed to limit commercially-motivated reviews and appeals (box 9.7).

Box 9.7 **Limiting commercially-motivated reviews and appeals**

Reforms in New Zealand designed to combat commercially-motivated reviews and appeals include:

- reinstating the power of the Environment Court to require security for costs
- making it explicit that decision makers are prohibited from having regard to trade competition or its effects in their decisions
- limiting standing so that competing parties are only able to participate if they are able to demonstrate that they are directly affected by a potential adverse effect of the activity on the environment
- preventing trade competitors from being represented at the proceedings of the Environment Court as third parties
- requiring third parties to disclose their interests and imposing sanctions for non-disclosure
- allowing the Court to award full costs and/or punitive damages in cases where the Courts find that participants have been substantially motivated by trade competition.

Similarly, in South Australia, competitors must disclose their interest when bringing proceedings, and if the competitor's case is unsuccessful, they will have to compensate the proponent for any economic loss caused by delays if the competitor's sole or predominant purpose was to delay or prevent the development in order to obtain commercial benefit.

Sources: Development Act 1993 (SA); Ministry for the Environment (NZ) (2009).

The Commission has not been provided with any evidence that suggests that commercially motivated reviews and appeals are a problem for major project DAA approvals. However, the Independent Review of the New South Wales Planning System found, for ordinary projects, that:

In both Victoria and Queensland [which do not limit standing for ordinary projects] ... planning appeal litigation is regularly commenced against larger scale commercial developments by commercial competitors of the proposed development. This ... occurs frequently in Queensland and we were informed of the considerable additional costs and delay that were caused by this style of litigation. We are of the view that such 'open go' third party litigation should not be permitted. (2012a, p. 105)

To the extent that commercially motivated reviews and appeals are a problem, the provisions in South Australia would appear to be a leading practice in this regard.

Costs and timelines

The general rule for the costs associated with reviews and appeals is they 'follow the event' — the unsuccessful party will be required to bear both their own costs,

and the costs of the successful party. Some jurisdictions also require security. In some jurisdictions, legislation also dictates how courts must award costs to parties, whereas other jurisdictions allow courts discretion to determine this on the merits of the case.

For example, in some jurisdictions there has been a move to abandon the rule that costs follow the event and prohibit courts from awarding costs against an unsuccessful public interest litigant (Bates 2010). The rationale for this is that allowing costs to be awarded against a losing side may create a disincentive for parties with limited financial resources to bring an application. McGrath (2008, p. 336) comments ‘these costs can be enormous — amounting to hundreds of thousands of dollars — and be crippling or even terminal for most community litigants.’ Similarly, requiring security to be provided for costs might mean that applicants with limited financial resources are not able to bring an action.

As a result of these concerns about access to justice, some jurisdictions might also exempt particular applicants, such as community groups, from costs requirements. For example, the United Kingdom has recently amended its costs limits for judicial review of environmental issues, placing a cap on costs exposure for claimants of £5000 for an individual and £10 000 for a business. The defendant’s exposure is limited to £35 000 (Berry 2013).

However, there can be both costs and benefits to making litigation cheaper for parties (Berry 2013). Xstrata Coal (sub. 50) argues that, given the cost to proponents, they should be able to claim costs against third parties for any unsuccessful merits appeals. The ability to award costs against a losing side can also be a valuable deterrent for vexatious applicants. For example, the *Planning and Environment Act 1987* in Victoria provides that if proceedings have been brought vexatiously or frivolously, then the tribunal may order that party to pay costs, as well as an amount of compensation for the loss another person has suffered from the proceedings. No evidence has been provided on how the current system is operating in Australia or whether any changes need to be made.

INFORMATION REQUEST 9.1

The Commission seeks feedback on the advantages and disadvantages of the current legal costs arrangements in each jurisdiction. To what extent do the current provisions allowing the award of legal costs against unsuccessful third parties impact access to justice, or the extent to which vexatious litigation occurs?

Timelines also play an important role in review processes. Timelines are commonly imposed on the review application — for example, a proponent or third party might

have 30 days to apply. However, statutory timelines can also be imposed on the duration of court or tribunal proceedings. For example, section 44ZZOA of the *Competition and Consumer Act 2010* (Cwlth) imposes a statutory timeline of 180 days for the Tribunal to make a decision. Given the lengthy timeframes for review applications, consideration could be given to imposing statutory timelines on the determination of review applications.

The Commission has not received any evidence on whether statutory timelines on court and tribunal processes would address the problem of lengthy delays to projects caused by review applications, or what the appropriate length of those timelines would be.

10 Monitoring of compliance and enforcement

Key points

- Compliance with, and enforcement of, project approval conditions are essential to effective development assessment and approval (DAA) processes that protect social, economic, heritage and environmental assets.
- If compliance is inadequate, the integrity of DAA processes is undermined. And if compliance arrangements are excessive they can add unnecessarily to project costs and weaken the viability of projects.
- The ability of regulators to monitor compliance and enforce approval conditions in a way that is not excessive and does not add unnecessary costs while protecting Australia's assets depends on the:
 - clarity of regulatory agency responsibilities for monitoring compliance
 - the use of proportionate (risk-based) approaches where possible
 - the effort put into compliance and enforcement by agencies.
- Agency responsibilities for compliance and monitoring activities are generally clear in legislation or regulations, but confusion can emerge, particularly for projects that are approved by various 'fast tracking' mechanisms or through special legislation. When governments use such processes for approving projects, they should ensure agency responsibility for monitoring and compliance with project conditions is transparent and communicated to stakeholders.
- In recent years there appears to be more effort devoted to monitoring compliance with approval conditions.
- At times, conditions placed on approvals have been impractical to comply with and difficult to monitor. Agencies should fully consider the practicality of monitoring compliance at the time of developing conditions.
- To ensure that compliance is feasible when conditions are initially set, agencies tasked with monitoring and enforcement of major project approval conditions should produce an annual public compliance statement.

This chapter examines the monitoring and enforcement of compliance with conditions placed on major project approvals. These arrangements are essential for the approvals process to be effective. If they are inadequate, the integrity of development assessment and approval (DAA) regulatory processes is undermined. And if they are excessive, compliance and monitoring arrangements can add

unnecessarily to costs and weaken the viability of projects. Striking the appropriate balance is always a challenge, but leading practice regulatory processes help to make it possible.

Ensuring compliance with conditions is not simply about maintaining the integrity of the approvals process. Non-compliance with project conditions can result in adverse outcomes for the environment, heritage and public health and safety. It can also lead to significant financial losses for other members of the community, and loss of amenity.

10.1 Approaches to monitoring and compliance

Requirements for monitoring compliance with and enforcement of approval conditions vary between projects, jurisdictions and with the type of conditions imposed on a project. Conditions are generally set out at the approval stage as part of the requirements under which a project is deemed to proceed. Regulatory agencies rely heavily on self-reporting by project proponents, backed up by audits and inspections, and reports from members of the public or the media.

Policies for monitoring of compliance and enforcement are fairly standard across jurisdictions and agencies. Agency responsibilities are generally set out in legislation or regulations and usually rest with the agencies that recommend or impose the original approval conditions or grant a licence. Appendix B summarises, by jurisdiction, the compliance responsibilities for the main development activities requiring an approval.

Compliance monitoring activities can be strategic, targeted or random and common methods for monitoring compliance include:

- site visits and inspections (both scheduled and unannounced)
- audits
- sample collections
- use of agency websites
- seeking information from the public
- investigations
- media monitoring
- observations by agency staff or from other agencies
- analysis of information, data and reports.

For environmental matters, the arrangements of the Commonwealth Environment Department are based on the department's *Compliance and Enforcement Policy*, and are typical of those used across the States and Territories. The Department:

... monitors compliance with, and detects potential contraventions ... by analysing information from sources such as the general public, the media, industry, non-government organisations and other government agencies. [It also undertakes] regular monitoring and auditing of projects that have been referred under the EPBC Act to ensure that any requirements placed on those projects are being adhered to. (DSEWPAC 2012b, p. 10)

Non-environmental agencies take a similar approach. For example, the Queensland Petroleum and Gas Inspectorate, a health and safety regulator located within the Department of Natural Resources and Mines, monitors compliance through a combination of routine inspections, audits and investigation of complaints and incidents. Noncompliance is assessed 'in accordance with the legislation, the analysis of facts and evidence, and the significance and severity of the level of total risk identified by the department's petroleum and gas inspectors' (DEEDI (Qld) 2011, p. 4).

A risk-based approach is now commonly used to prioritise cases and identify those that warrant further investigation. For instance, the NSW Department of Planning and Infrastructure, which has responsibility for monitoring compliance regarding projects approved by the NSW Planning Minister, prioritises the monitoring of projects in sensitive environments or with a high risk of noncompliance. Inspections and audits generally fall into one of four categories:

- Strategic - to inform the Department's assessment of proposed modifications to approved projects
- Campaign - groups of projects based on industry type, geographical location or impact type
- Ongoing - as part of the Department's regular inspection program
- Reactive - in response to reports or complaints alleging non-compliance. (Department of Planning (NSW) 2010, p. iii)

10.2 Monitoring of compliance and enforcement activities in practice

The Australian National Audit Office (ANAO) states that a good monitoring policy:

- is risk-based
- can be implemented with available resources and with an acceptable level of residual risk

-
- recognises the costs it imposes on regulated entities
 - is responsive to changing regulatory risks
 - is documented. (ANAO 2007a, p. 52)

While much basic information is available from agencies about their monitoring of compliance activities (for example, the Commonwealth Environment Department provides information on audits undertaken and their outcome, and on court decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)), there is limited public information provided by agencies that would enable the Commission to draw conclusions about the appropriateness of these activities.

There is little information, for instance, to state why some projects were chosen for audit, while others were not, or about whether the approach of particular agencies is encouraging compliance. Similarly, while successful prosecutions for breaches of conditions and civil penalties are a matter of public record (box 10.1), there is inadequate information to place these prosecutions in context to make overall judgments about performance.

However, there have been a number of reports from Auditors-General looking at agencies' monitoring of compliance and enforcement activities. Reports of relevance to this study include:

- the ANAO's 2007 report *The Conservation and Protection of National Threatened Species and Ecological Communities*
- the NSW Auditor-General's 2010 report *Protecting the Environment: Pollution Incidents*
- the NSW Auditor-General's 2006 report *Regulating the Clearing of Native Vegetation*
- the Victorian Auditor-General's 2012 report *Effectiveness of Compliance Activities: Departments of Primary Industries and Sustainability and Environment*
- the WA Auditor-General's 2011 report *Ensuring Compliance with Conditions on Mining*.

These (and other) audit reports have raised some doubts about the efficacy of compliance and enforcement processes of regulatory agencies. However, most of these reports have assessed these processes generally (or for particular activities), rather than those specifically related to development approval conditions. One report specifically assessing monitoring of compliance with approval conditions,

and focused on the mining industry, was the 2011 report of the WA Auditor-General (box 10.2).

Box 10.1 Examples of enforcement of approval conditions by government agencies

In 2008, Coalpac was fined \$200 000 in the New South Wales Land and Environment Court for exceeding a mining lease condition limiting production of coal to 350 000 tonnes per year. The mine produced 635 277 tonnes in one year. The case was brought by the Planning Minister (NSW LEC 2008).

In 2009, V/Line paid out \$188 010 after an enforceable undertaking was agreed between it and the Commonwealth Department of Environment, Water, Heritage and the Arts following destruction of 38 spiny rice-flower plants without approval by contractors widening an access track next to the railway line near Bendigo (DEWHA 2009).

In 2010, Moolarben Coal was fined \$70 000 for breaching planning laws by clearing vegetation, including endangered native species, without planning approval. The company's mine approval was subsequently modified, requiring the company to conserve 6.6 hectares of land (a larger area than the 4.1 hectares illegally cleared) (Kelly 2010b).

In 2013, the NSW Environment Protection Authority (NSW EPA) fined AGL \$1500 for breaching the licence conditions at its Rosalind Park Gas Treatment Plant after emissions of nitrogen oxides were recorded above the limits permitted by its Environment Protection Licence. The NSW EPA noted AGL self-reported the incidents and the emission monitoring data, including the exceedances, were published on the AGL website as required by the NSW EPA (NSW OEH 2013).

In 2012, LQ Management Pty Ltd, manager of Laguna Whitsundays Resort, and its director, David Marriner were fined a total of \$90 000 after pleading guilty to two counts of wilfully breaching a development approval condition and one count of wilfully causing environmental harm in the Mackay Magistrates Court after the resort's sewage treatment system discharged raw effluent into nearby waterways. LQ Management was fined \$70 000 and David Marriner was fined \$20 000 (DEHP (Qld) 2012).

In 2012, Barwon Region Water Authority was fined more than \$6000 by EPA Victoria for failing to get a works approval before building a water reclamation plant in Birregurra. The company admitted to EPA their failure to get the required approvals for the plant as required (EPA (Vic) 2012).

The ANAO also made specific findings on compliance and enforcement processes relating to project approval conditions in two broader audits of the EPBC Act. The ANAO stated in the second audit:

The department did not have sufficient information to know whether conditions on the decisions are generally met or not. There has been insufficient follow up on

compliance by the department for those individuals or organisations subject to the Act and little effective management of the information that has been provided. Consequently, the department has not been well positioned to know whether or not the conditions that are being placed on actions are efficient or effective. This is not consistent with good practice and does not encourage adherence to conditions set by the Minister. (ANAO 2007b, p. 25)

**Box 10.2 The Western Australian Auditor-General's 2011 report
*Ensuring Compliance with Conditions on Mining***

In 2011, the Western Australian Auditor-General undertook an assessment of compliance with conditions placed on project approvals in the mining industry. The Auditor-General concluded:

The legislation and powers are in place to enable agencies to monitor and enforce compliance with mining conditions. However, the way agencies have implemented this framework means they do not provide assurance on the overall levels of compliance with conditions, or whether the conditions deliver the desired outcomes. Responsibility for monitoring and ensuring compliance with conditions rests with several agencies, and performance varies significantly across these agencies, and across key conditions. (WA Auditor-General 2011, p. 7)

With regard to the WA Department of Mines and Petroleum (DMP), the Auditor-General stated:

DMP's inspection regime does not deliver adequate coverage or assurance that mines meet their conditions ... significant weaknesses in information management make it difficult for DMP to analyse and demonstrate the effectiveness of its inspections, or report accurately on how well operators comply with conditions. Information that is kept is inconsistent and the systems used to manage information are inefficient. (WA Auditor-General 2011, p. 8)

The review also found that the enforcement policies of DMP were theoretically sound, but let down by weaknesses in their implementation:

DMP's approach to environmental enforcement is appropriate and potentially successful. It establishes a hierarchy of actions based on the severity of the non-compliance and the response of the operators involved ... However, two weaknesses decrease DMP's ability to demonstrate that its environmental enforcement is consistent:

- there are no clear established criteria for determining the severity of non-compliance.
- DMP does not monitor the outcomes from inspections in a coordinated or comprehensive manner. (WA Auditor-General 2011, p. 29)

The findings of the various audit reports have had an impact on agencies. For example, in response to the ANAO findings, the Australian Government allocated substantially more resources to compliance and enforcement activities, and in 2007 established a dedicated Compliance and Enforcement Branch within the Commonwealth Environment Department to undertake a range of monitoring, audit, compliance and investigative functions. The Department has since achieved a number of successful investigative outcomes, including a successful criminal

prosecution and several civil prosecutions. Use of administrative remedies has also increased (Hawke 2009).

In the case of Western Australia, there have also been efforts made to improve monitoring and compliance in the mining sector, most particularly under the banner of *Reforming Environmental Regulation*. This includes the Department of Mines and Petroleum (DMP) moving to a risk- and outcome-based regulatory framework, improving interagency collaboration and information exchange, increasing transparency and improved agency resourcing to better perform regulatory functions (DMP (WA) 2013b).

While there are signs of improvement in these, and in a number of other agencies, there is still room for further improvement. The following discussion relates to the major factors affecting the ability of regulators to implement monitoring of compliance and carry out enforcement activities that are not excessive or do not add unnecessary costs while meeting DAA regulatory objectives. These are:

- clarity of regulatory agency responsibilities for monitoring compliance
- the use of proportionate (risk-based) approaches to these activities
- the importance agencies place on compliance and enforcement activities.

10.3 Clarity of regulators' responsibilities

For compliance and enforcement activities to be effective, it is important that agency responsibility for these activities is clearly assigned. It is also important that all approval conditions have an agency explicitly responsible for ensuring monitoring and compliance with them, and that overlap of these responsibilities is avoided to prevent confusion and duplication (or where some overlap is inevitable, that arrangements are in place to enable coordination).

It has been suggested to the Commission that some misunderstanding about compliance and monitoring responsibilities can emerge when projects are approved through special legislation or fast tracking methods. For example, the audit report looking at the mining industry in Western Australia found that the Department of State Development (DSD) and DMP seemed unclear about their respective roles in terms of monitoring conditions for projects taking place under State Agreements:

There is a risk that non-compliance with environmental requirements will not be identified or addressed on all 26 State Agreement mines because DSD and DMP have clear but differing views of their roles. DSD does not conduct active monitoring and enforcement, and expects that DMP will do so. DMP considers that it does not have the legislative powers to fulfil a monitoring and enforcement role on State Agreement

projects where the Mining Act is not specifically applied. (WA Auditor-General 2011, p. 9).

The Commission understands that DSD and DMP have since reviewed environmental compliance monitoring and enforcement policies and practices for State Agreement projects (Government of Western Australia 2012).

There is mixed evidence about how clearly defined are agency compliance and enforcement responsibilities. In areas where there is potential overlap within jurisdictions, such as, for example, between the various environment protection agencies and environment departments, legislation generally spells out the specific areas of responsibility. However, as highlighted in the example above from Western Australia, the allocation of responsibilities is not always clear, particularly for projects that have been approved through special legislation or fast tracking methods.

Monitoring compliance with approval conditions can easily ‘fall through the cracks’ in these situations. It is therefore important that governments ensure that monitoring and compliance responsibilities of agencies are clearly spelt out for projects approved through fast tracking or special legislation. This is particularly important given these projects are usually the most contentious and those perceived to have the most ‘downside risk’ to the community. To further ensure accountability, leading practice suggests there are benefits from making information about these responsibilities publicly available.

Potential leading practices to ensure monitoring of conditions could include the type of approach taken by the Office of the Coordinator-General in Queensland, or the NSW Department of Planning and Infrastructure (box 10.3). While these agencies liaise widely, and sometimes rely on other agencies to perform some monitoring tasks, they are still actively involved in ensuring compliance with approval conditions and ultimately responsible for compliance outcomes.

The Commission considers that the existence of such units in coordinating agencies or planning departments could reduce the risk of non-compliance over a sustained period. However, as noted by the NSW Department of Planning and Infrastructure in box 10.3, the creation of such units can also lead to a lack of clarity about the role of other agencies. It is important, therefore, for the lead agency to be proactive in coordinating with the other agencies with compliance responsibilities to avoid duplication of effort, or noncompliance continuing unchecked.

Box 10.3 Approaches to compliance with approval conditions in Queensland and New South Wales

The Queensland Office of the Coordinator-General — while able to nominate another agency such as the Department of Environment and Heritage Protection to take responsibility for monitoring conditions — maintains responsibility for the auditing and enforcement of the conditions it imposes. The Department of State Development, Infrastructure and Planning contains a unit specifically tasked to monitor and enforce compliance with conditions imposed by the Coordinator-General and ensure that any non-compliance is addressed. The unit works collaboratively with other administering authorities. (DSDIP (Qld) 2013a)

The NSW Department of Planning and Infrastructure also has an active compliance unit. The unit conducts inspections and audits of approved projects, responds to concerns of other State agencies, local councils and members of the public, investigates potential breaches and takes enforcement action where considered necessary. The Department's compliance and enforcement policy highlights the importance of working with other agencies:

In identifying matters for compliance attention, the Department works closely with its regulatory 'partners', in particular local councils and State agencies administering environment protection legislation to ensure information about non-compliances is shared and investigations are not duplicated. (Department of Planning (NSW) 2010, p. iii)

DRAFT RECOMMENDATION 10.1

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

10.4 Use of risk-based approaches

Some audit reports have questioned the efficacy of agencies' monitoring of compliance and enforcement activities due to the lack of a framework to adequately determine those projects most likely to be appropriate for audit. For example, the Victorian Auditor-General's Office (in a report looking at agency compliance processes generally, not just with regard to approval conditions) said of the Department of Sustainability and Environment in 2012:

DSE's regions rarely use a transparent, risk-based approach or any other clear rationale to inform the decisions they make about which compliance issues they will address, and how they will do it—even though its statewide compliance strategies have included a risk-based process for doing this since 2008. Instead, it conducts a series of largely reactive, one-off investigations and operations rather than adopting a targeted approach. (VAGO 2012, p. xi)

On the other hand, the WA Auditor-General was complimentary about the approach of Western Australia's Office of the Environmental Protection Agency towards compliance with Environmental Protection Agency imposed-conditions:

The OEPA is responsible for monitoring Ministerial conditions placed on projects as a result of environmental impact assessments by the EPA ... In planning its compliance program the OEPA scans all reports it receives from operators, and uses this information as part of its risk assessment. This in turn drives the selection of sites for desktop audits which include assessing reports against approved conditions ... With increasing numbers of projects, the OEPA believes it is unlikely to ever be able to audit or inspect all projects with Ministerial conditions. To mitigate this, the EPA has recently required managing directors of operating companies to formally approve reports submitted to the OEPA. The OEPA believes that this increases accountability and responsibility for compliance and non-compliance. We support this decision. (WA Auditor-General 2011, p. 25)

A number of participants in this study support moving towards risk-based approaches (box 10.4) to compliance and enforcement, and for DAA regulation and processes generally. For example, the Business Council of Australia said:

Jurisdictions should adopt a risk-based approach to regulation to ensure that regulatory effort is directed to the areas of development approvals where it will have most impact and that the costs of regulation are commensurate with the risks to be managed. (sub. 43, p. 2)

The Queensland Government highlighted benefits of a risk-based approach:

By better managing risk, additional resources can be shifted from low risk-low impact applications to more complex high risk-high impact applications such as those that typically are major development applications. (sub. 47, p. 15)

South Australian State Government Departments highlighted that they had moved to a risk-based approach to monitoring and compliance:

Another initiative is the adoption of high and low level surveillance classifications that divides regulated activities carried out under the Act into those requiring a high level of regulatory oversight and those for which the licensee has demonstrated its competence and capability in achieving compliance with the Act and the [Statement of Environmental Objectives] through the implementation of effective management systems. Consequently the focus of agency resources is on compliance monitoring and proponent strategies to maintain compliance. (sub. 51, p. 29)

Box 10.4 Risk-based approaches to enforcement

Agencies adopting a risk-based model will base their compliance requirements, incident responses and enforcement priorities on the likely risk of adverse outcomes, and the potential seriousness of adverse outcomes. Enforcement resources are targeted to those areas where the biggest difference can be made.

A 2011 review of compliance and enforcement for EPA Victoria, for example, defined risk as a combination of two elements: consequence (the risk of harm to health and the environment) and likelihood (the chance that non-compliance will occur). Therefore, when EPA Victoria starts the enforcement process following an incident of risk or non-compliance, it considers risk or harm and also the circumstances and culpability of the offender. Culpability considers the offender's history, how long the incident or non-compliance continued, whether or not the harm is still occurring or has been reduced, whether the risk was foreseeable and whether the act or omission was intentional (Krpan 2011).

Under a risk-based approach, proponents with poor compliance records would be likely to be seen as more high risk than other proponents undertaking similar projects, and therefore be potentially subject to greater regulatory focus and more severe sanctions in the event of a breach.

One area of concern with adopting a risk-based approach is that regulators, by changing behaviour, will do some things less than previously and this could have negative consequences. Cliff and Johnstone note, however, that this might be less of an issue depending on how risk-based regimes are implemented:

If risk-based approaches are properly implemented, the firms that are not being inspected as frequently as they were in the past can be justified by their status of having achieved 'earned autonomy' through their past commendable compliance efforts resulting in good OHS performance. (Cliff and Johnstone nd, p. 10)

Xstrata Coal highlighted that risk rating could be counterproductive if too many projects were rated as being of high risk:

A major potential drawback of adopting a risk based approach is that it will lead to even further delays due to a large number of projects being classified as high risk and being bogged down in further scrutiny and reporting requirements. In order for a risk-based approach to regulation to function properly, staff at the relevant government departments and agencies need to be properly qualified and trained in order to make accurate risk assessments. Furthermore, there should be clear guidelines as to how projects are classified on the risk scale. (sub. 50, p. 57)

The Commission notes that many regulatory agencies are moving in the direction of developing better risk-based approaches to monitoring of compliance and enforcement activities. It is therefore important that agencies, in line with leading

practice, should ensure that their audit processes are also based on their determinations of risk.

This is not always the case. For example, the WA Auditor-General suggested in 2011 that although the WA DMP had adopted risk ratings, time between inspections was still used to guide where inspections should take place:

Under DMP's approach, how recently a site was inspected influences the assessment of the site risk. Thus, if a site has been given a high rating but was inspected recently it may be downgraded to medium and inspected less frequently. This is not sound risk assessment practice. How recently a site has been inspected does not change its intrinsic risk. In a fully risk based system this should not change how often a site is inspected. (WA Auditor-General 2011, p. 27)

Leading practice considerations also suggest that agencies should ensure that their risk ratings are realistic to avoid the problem highlighted by Xstrata Coal of increasing the regulatory burden by inappropriately classifying projects as high risk. As noted by Xstrata Coal, this means agencies must ensure that their staff are appropriately qualified and trained to be able to accurately make these risk assessments.

Given that there will always be limited resources for monitoring of compliance (and therefore some element of 'rationing'), realistic risk ratings represent the most effective way for these resources to be allocated, and would help assure the community that the downside risks associated with projects are properly managed.

10.5 Prioritisation of compliance and enforcement activities

Many participants in this study emphasised the importance of compliance and the enforcement of conditions attached to approvals, and identified several factors limiting the capacity or willingness of agencies to prioritise their enforcement responsibilities. For example, the Australian Network of Environmental Defender's Offices noted potential conflicts of interest within agencies, and resource constraints:

Evidence and submissions to the NSW CSG Inquiry ... noted the limited resources available to monitor activities and enforce regulatory compliance. Questions of regulatory independence and 'conflicts of duties' have also been raised, particularly where agencies are responsible for 'promoting and facilitating' an industry, as well as licensing and enforcement action. (sub. 14, p. 22)

King & Wood Mallesons saw resourcing issues as the main problem with monitoring of compliance:

In our view, it is not the lack of enforcement mechanisms themselves that reduces the effectiveness of the current DAA processes, but rather the lack of resources with which to effectively monitor and enforce. At all levels, we suggest that greater direction of resources towards monitoring and enforcement of conditions and less focus on detailed assessment would increase the effectiveness of conditions imposed on major projects. (sub. 39, p. 3)

Other participants identified competing pressures for resources and the nature of approval conditions as factors that may act to compromise enforcement. For example, the WA Auditor-General made the following comment:

We found throughout our audit that individual staff and agencies had separate roles competing for their effort. Individual staff had to assess project proposals for approval, as well as monitor and enforce compliance in existing projects. The same challenge faces agencies in balancing the use of resources between approvals and compliance ... This can impact on the extent of agency activity in monitoring compliance with conditions. (WA Auditor-General 2011, p. 17)

The Association of Mining and Exploration Companies highlighted the importance of writing conditions in a manner that they could be complied with and enforced:

Licence conditions are a necessary part of an approval. However they must only be used to manage the highest level of risk that the project has to the objectives of the regulatory agency. That is, risk-based conditions. They also must be written in a way that not only allows the proponent to be able to comply but for enforcement to occur. (sub. 42, p. 17)

There is also a risk that agencies will place an excessive number of conditions if they do not believe they will have to monitor compliance with them. Stakeholders have suggested that, in some cases, there are too many conditions for effective monitoring to occur. The Business Council of Australia stated:

There are too many conditions: too many ad hoc conditions are being attached to project approval, which not only add significant costs to proponents – which can be prohibitive – but also can be simply unmanageable and unable to be properly monitored by regulators, resulting in high cost from red tape for no real benefit. This is multiplied across jurisdictions. The approval of one large project came with more than 1,500 conditions – 1,200 from the state and 300 from the Commonwealth. Those conditions have a further 8,000 sub-conditions attached to them. (sub. 43, p. 10)

Some agencies appear to be changing their approach with regard to condition setting. For example, the Western Australian Department of Environment Regulation has moved to a system called REFIRE (Re-engineering for industry regulation and environment), which seeks to employ similar conditions for similar facilities. The system involves use of common templates containing a series of draft

conditions to guide regulators in choosing the most appropriate conditions for any particular plant. It is expected that standardised conditions would also facilitate more efficient monitoring of compliance and enforcement activities.

Not every project would lend itself to common, template conditions but where this is feasible it should be encouraged. For projects where unique features make such an approach impractical, it is still important to ensure conditions can be both complied with by proponents and monitored and enforced by agencies.

Conflicts of duty and the risk of industry capture

Some participants raised the issue of conflicts of duty, where those agencies regulating an activity were also given the responsibility of promoting that activity.

In a 2008 report into the Queensland Mines Inspectorate (QMI), the Queensland Ombudsman, while not finding any evidence of the agency being inappropriately influenced, found a number of reasons for the perception of industry capture:

There is a reasonable perception that the QMI is subject to inappropriate influence from the mining industry and from officers in the DME responsible for promoting and supporting mining in Queensland. The main reasons for the perception are:

- lack of organisational autonomy having regard to its position within the administrative framework of the DME;
- its compliance practices, especially the preference for informal compliance options, which are not recorded in a way that can be publicly reported on;
- regional factors, leading to the development of social relationships and reliance on mine operators' hospitality; and
- staffing issues, including a high degree of mobility between the QMI and the mining industry. (Queensland Ombudsman 2008, p. 127)

These factors apply equally to the agencies involved in compliance and enforcement activities. Agencies should be cognisant of those areas where there is potential for capture, and put mechanisms in place to minimise these risks. These measures could include peer review and regularly rotating inspectors. The latter measure, however, could be counterproductive at the approval stage, where officer continuity is important to prevent regulatory delays.

Where conflict of duty within agencies is seen as a major problem, consideration should be given to separating the policy and regulatory functions of agencies. This has driven the decision to set up the National Offshore Petroleum Safety and Environmental Management Authority as a statutory authority, independent from the Department of Resources, Energy and Tourism. The Commission's proposals in

chapter 7 to separate regulatory assessment and enforcement functions from environmental policy functions would also assist in dealing with potential conflicts of duty.

Leading practices with respect to enforcement point to the benefits of employing a graduated approach to non-compliance. Advantages of this approach have been highlighted by the ANAO (box 10.5).

Box 10.5 Benefits of a graduated approach to compliance

The Australian National Audit Office has highlighted the benefits of taking a graduated approach to compliance:

A set of graduated responses enables a regulator to:

- impose a response that is proportionate to the risk
- escalate regulatory action
- de-escalate regulatory action
- minimise costs associated with a response. (ANAO 2007a, p. 64)

In determining the most appropriate measures to be employed in the event of breaches, agencies would typically take account of a number of factors. For example, the Commonwealth Department of Sustainability, Environment, Water, Population and Communities considers factors such as:

- the level of potential environmental damage or harm
- the requirements placed on referred projects
- changes to obligations (for example, the inclusion of new threatened species or the 'up listing' of existing ones)
- changes to enforcement measures or penalties
- new scientific knowledge
- emerging environmental issues
- new industries
- new developments or areas experiencing rapid growth
- expectations of different members of the regulated community
- international trends (DSEWPAC 2012b).

The Commission has also previously noted the benefits of maintaining a range of regulatory responses:

The greater the range of enforcement instruments available to a regulator, the greater the scope for a more proportionate approach to dealing with businesses in breach of their requirements. (PC 2010, p. xxii)

A range of enforcement options also allows for changes of strategy. A regulator, for instance, might be initially cooperative and adopt a 'soft' approach to compliance,

with the option to adopt more severe enforcement options if businesses fail to comply (Ayres and Braithwaite 1992). Such changes in strategy are likely to be appropriate from time to time, as a strong enforcement focus can meet resistance, while a cooperative approach can degenerate into laxity (Cliff and Johnstone nd).

The Commission sees merit in regulatory agencies publishing an annual compliance statement. The statement should report monitoring of compliance and enforcement activities by the agency relating to major projects and identify redundant or ineffective conditions that no longer need to be enforced by the agency.

The Commission considers that such a statement would help to achieve three outcomes:

- reduce the possibility of adverse impacts stemming from noncompliance
- oblige agencies to give more consideration to the conditions placed on projects
- demonstrate to the community that enforcement is a priority.

While there might be concerns that a requirement for such a compliance statement could increase the regulatory burden for proponents and put further resource pressures on agencies, the Commission does not consider that this would be a major issue. The statement should not unduly burden proponents as it only describes whether they are complying with conditions they are already obliged to meet. Moreover, the Commission considers proponents would be less likely to be faced with impractical, ill-considered and onerous conditions were such statements introduced.

DRAFT RECOMMENDATION 10.2

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

10.6 Third party enforcement

In addition to enforcement of conditions by agencies, there is also scope for third parties³ to exercise appeal or enforcement rights. One way in which this can be done is through litigation to enforce common law or statutory rights protecting the environment. The focus of such litigation is not on the appropriateness of approval

³ Who a third party is depends on the statutory definition of third party. It is not limited to individuals or organisations, but can also encompass local councils or assessment or referral agencies in some jurisdictions.

decisions, but whether or not there is a breach of a law that can be enforced. Public interest environmental litigation has been defined as:

... litigation with the particular object of obtaining a legal remedy from a court ... that has the effect of conserving or protecting or advancing the conservation or protection of the environment. (Barker 1996, p. 186)

The Australian Law Reform Commission (1996) in their report *Beyond the Door-keeper - Standing to Sue for Public Remedies* has previously concluded that third party enforcement has a role to play in enforcement of legal obligations:

Political, bureaucratic and financial constraints mean the Attorney-General and other government plaintiffs cannot adequately represent the public interest in all matters. There is an important role to be played by private plaintiffs in the maintenance of the rule of law through the review of government decisions and the enforcement of statutory rights and obligations. (ALRC 1996, para. 4.15)

While common law torts (such as public or private nuisance) may provide a limited cause of action for environmental matters, the major third party enforcement issue for this study relates to a second scenario: where third parties have been granted a statutory right to bring an enforcement action, including enforcement of approval conditions.

Such rights exist in most jurisdictions (table 10.1). For example, in New South Wales there is the potential for members of the community to seek rulings from the Land and Environment Court regarding whether approval conditions are being breached. The Victorian *Planning and Environment Act 1987* also enables 'any person' to apply to the Victorian Civil and Administrative Tribunal for an enforcement order in the event that a use of land contravenes a condition of a permit.

The recent NSW Planning White Paper re-iterated a continuing role for the community in ensuring compliance:

The community needs its own right to ask an independent umpire to review the activities of developers, neighbours and planning authorities where there has been a breach of the planning legislation or where a breach appears likely. (NSW Government 2013, p. 147)

Table 10.1 **Statutory third party enforcement of conditions, by jurisdiction**

	<i>Who can bring the action?</i>	<i>What can be enforced?</i>	<i>Remedy</i>
Commonwealth (EPBC Act)	An interested person or a person acting on behalf of an unincorporated organisation that is an interested person	Act or conduct consisting of an act or omission that constitutes an offence or other contravention of the Act or regulation	Injunction
New South Wales			
Planning and Assessment Act	Any person	A breach of the Act	An order to remedy or restrain the breach
Protection of the Environment Operations Act	Any person	A breach of the Act	An order to remedy or restrain the breach
Victoria			
Planning and Environment Act	Any person	A breach of the Act, a planning scheme, a condition of a permit or an agreement	Enforcement order
Queensland			
Nature Conservation Act	A person	A matter that has been, is to be or should have been done for this Act, the construction of a license or permit, or the lawfulness of an activity	Court may make orders and declarations
Sustainable Planning Act	Any person or assessment manager (in certain circumstances)	A matter done, to be done or that should have been done for this Act (other than about the lawfulness of land use or development)	Declaration
Western Australia			
South Australia			
Environment Protection Act 1993	The EPA, an administering agency, a person directly affected by the subject matter or another person with the permission of the court	Contravention of the Act or failure to do something required by the Act	An order
Tasmania			
Environmental Management and Pollution Control Act	A council or a person who has a sufficient interest	If a person is breaching the Act, failing to do anything required by the Act, or causing environmental harm	An order

(continued next page)

Table 10.1 **Statutory third party enforcement of conditions, by jurisdiction**
(continued)

	<i>Who can bring the action?</i>	<i>What can be enforced?</i>	<i>Remedy</i>
Australian Capital Territory			
Environment Protection Act 1997	The EPA or any other person with leave of the court	Contravention of the Act	An order
Planning and Development Act 2007	The planning and land authority or anyone else	Contravention of a controlled activity order or prohibition notice	Injunction
Heritage Act 2004	The council or any other person with leave of the court	Contravention of the Act	A heritage order
Northern Territory			
na			

na No statutory third party enforcement provisions.

Source: Commission analysis.

Others have noted that even when the law might allow for third party enforcement, individuals might still face major problems. For example, in 2011 the Victorian Environment Defenders Office noted the difficulties for individuals in bringing a court action:

This means that taking judicial review proceedings or enforcement proceedings is not usually possible for community groups unless they can get legal representation ... Furthermore, there is almost always a significant resource-imbalance between developers and government on the one hand, and members of the community trying to participate in decision-making processes on the other. (Millner 2011, pp. 200-201)

It was also suggested individuals might find gaining expert opinion difficult:

Finding experts willing to do work that may involve them giving evidence against large developers, mining companies, operators of industrial facilities and government bodies can be very difficult, because experts do not want to prejudice future opportunities for obtaining work from these companies and entities In one instance, it was so difficult that in the end the client retained an expert from the USA. Obviously, this is usually not a feasible option for community groups. (Millner 2011, p. 201)

Enforcement of compliance with approval conditions is essential to ensure the credibility of approval processes and to prevent adverse outcomes. In practice, not even the best resourced and most diligent and competent regulatory agencies could realistically be expected to deal with, or even be aware of, every significant act of noncompliance.

The Commission therefore sees an ongoing role for third parties with regard to enforcement of primary approval conditions, and considers that this role, where not

already the case, should be enshrined in legislation. Jurisdictions should also seek to ensure the ability of third parties to enforce primary approval conditions. This could include use of relatively informal tribunals where possible (which should also provide greater certainty for proponents if cases can be dealt with quickly).

The Commission considers that standing should be applied broadly in the case of third party enforcement. In many cases, projects with potential compliance issues will already be up and running so there is less incentive to bring frivolous cases to delay projects relative to the incentives provided for appeals against approval decisions. While use of measures such as injunctions can delay projects, these will only be provided where the court sees a strong reason to do so. Groups wishing to delay projects, including commercial rivals, would typically have little to gain, but much to lose, in bringing enforcement cases to court if the cases had little merit.

The Commission considers parties directly affected by noncompliance, such as property owners incurring property damage, should be given standing. The impacts of noncompliance will often be diffuse, meaning non-government organisations, such as environmental or heritage protection groups, would also potentially have a role. However, the Commission has not reached a conclusion for this draft report about precisely who should be given standing in third party enforcement cases, and is seeking feedback from participants on this question.

The Commission considers there are a number of potentially legitimate approaches to standing for third parties. One would be to restrict it to people or organisations that participated in the initial approval process for a project (in addition to any person or organisation directly affected by a project). However, given there is no obvious link between participation in approval processes and discovery of noncompliance, the Commission does not see it as necessarily appropriate to make this link to standing in third party enforcement cases (although it is appropriate in appeals against approval decisions).

The ‘interested person’ arrangements for taking enforcement action under the EPBC Act, or similar arrangements, could also represent an appropriate basis for determining who should be able to take enforcement action. These arrangements would allow any person or group involved with ‘protection or conservation of, or research into, the environment’ (EPBC Act, s. 475) at any time in the past two years to take enforcement action (in addition to any person or organisation directly affected by a project).

Alternatively, standing for third party enforcement cases could be given to ‘any person’, as is already the case in some jurisdictions (table 10.1). This would likely see more third party enforcement cases emerge but — and this applies which ever

approach is taken — current arrangements for dealing with vexatious litigants should prevent individuals or groups from bringing numerous cases devoid of merit. Moreover, in view of the difficulties for third parties in bringing court action highlighted above, the Commission does not expect ‘nuisance’ third party enforcement cases to become a major issue regardless of the arrangements with regard to standing.

DRAFT RECOMMENDATION 10.3

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

INFORMATION REQUEST 10.1

The Commission seeks feedback on the most appropriate arrangements for standing in third party enforcement cases. In addition to allowing people directly affected by noncompliance to take enforcement action, possible approaches would also include applying standing to:

- *people or organisations that had participated in the initial approval process for a project*
- *‘interested persons’ such as any person or organisation directly affected by a project, or any person or group involved with ‘protection or conservation of, or research into, the environment’ in recent times (for example, within the past two years)*
- *any person.*

11 Strategic approaches

Key points

- Development assessment and approval processes (DAA) in Australia predominantly involve project-level assessment. Strategic planning and assessment are not being used to their full potential at present.
- The Commission considers greater use of strategic (or higher level) approaches would be beneficial. Strategic assessment and strategic planning are tools for doing this.
- While the term 'strategic assessment' is most commonly used within the planning sphere, assessments of a strategic nature are also important to the development of sound environmental and resource management policies. Such policies can improve the operation of DAA systems and there are examples of this occurring.
- Both environmental and business groups participating in this study generally favour giving strategic assessment an enhanced role in the DAA system.
- Strategic assessment and strategic planning have the potential to reduce the scale and cost of subsequent project-level assessment of major projects. They can also improve environmental outcomes by considering cumulative impacts at the appropriate scale.
- However, strategic assessments can also be time consuming and costly. And benefits are only achieved where there is integration with planning and project-level processes. Without such integration, strategic assessments can increase, rather than reduce, regulatory burdens.
- Strategic assessments under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) have become more widespread. These can remove the need for Australian Government approval of subsequent projects where suitable State and Territory Government policies, plans and programs are in place.
- State and Territory Governments should continue to improve the quality of their strategic planning by placing greater emphasis on strategic decisionmaking, more effective community consultation and thorough analysis of the environmental and other impacts of plans.

Development assessment and approval (DAA) processes in Australia predominantly involve project-level assessment and previous chapters have highlighted a number of shortcomings with these processes. While many of these problems could be remedied through the reforms proposed elsewhere in this report, it is worthwhile

also considering whether greater reliance on strategic (or higher level) approaches would be beneficial.

The main way to do this is to undertake strategic assessment prior to the assessment of individual projects. Strategic assessments focus on the potential impacts of plans, policies and programs, rather than individual projects. Strategic assessment can reduce or remove the need for subsequent project-level development assessment and approval.

Strategic planning is another tool that can help to improve the way DAA regulations and processes operate. Strategic plans can indicate broad preferences for the location of particular types of developments. Where such plans are underpinned by community consultation and consideration of environmental, heritage and other values, they can reduce the number of issues that need to be considered at the project level. Strategic assessment can inform the development of strategic plans, and so the two approaches are related.

11.1 What is strategic assessment and how can it help?

Strategic assessment means different things to different people. In Australia, it is often used to refer specifically to a procedure that can be used under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (the EPBC Act) to facilitate the concurrent consideration of the environmental concerns of different levels of government. There is also an international literature that focuses on strategic environmental assessment (SEA) as a means of incorporating environmental factors into planning frameworks. But ‘strategic assessment’ can also refer more broadly to assessments that take place above the individual project level, including those done in the normal course of developing environmental and resource management policies.

In the Commission’s view, strategic assessment is best understood as a broad concept that covers assessments of the potential impacts of plans, policies and programs across an entire region, catchment area, activity or industry. The scope and complexity of a strategic assessment depends on the plans, policies and programs involved. Strategic assessment of a particular environmental policy would generally be a much simpler exercise than strategic assessment of the broad range of plans, policies and programs that influence development across a region.

Table 11.1 outlines some of the key differences between project-level assessment and strategic assessment. However, it should be noted that the differences are not always clear-cut. For example, some recent project-level impact assessments have

required the consideration of cumulative impacts, such as for the Arrow Energy LNG project (formerly known as the Shell Australia LNG project) in Gladstone (Coordinator-General (Qld) 2010b).

Table 11.1 Differences between project-level assessment and strategic assessment

<i>Project-level assessment</i>	<i>Strategic assessment</i>
Is reactive to development proposals and typically begins at a late stage of decisionmaking	May proactively inform development proposals and typically begins at an early stage of decisionmaking
Is narrowly focused with a high level of detail	Is broadly focused with a low level of detail
Assesses the impacts of a development	Assesses the impacts of one or more policy, plan or program
Focuses on a specific project at a specific location	Focuses on regions, catchments, activities or industry sectors
Assesses the direct impacts and benefits of a development	Assesses cumulative impacts and identifies implications and issues for sustainable development
Focuses on the mitigation of impacts	Focuses on achieving policy objectives or targets
Has a well-defined beginning and end	Can be a continuing process

Source: adapted from (Parliament of Victoria 2011).

As noted by the OECD (2006, p. 34), there is no ‘recipe approach’ to strategic assessment, with the diversity of applications reflecting the need to adapt the concept to the need being addressed and the circumstances in which the assessment is being applied. Common elements of the strategic assessment process include consulting stakeholders, identifying likely effects (be they environmental, economic and/or social), evaluating their significance, determining measures to mitigate adverse impacts, or enhance positive ones, and reporting the findings to decision makers (Sadler 2011).

Strategic assessment has been used in a range of countries, as outlined in appendix E. Much of this experience relates to the European Union, where SEAs have been mandatory for certain types of plans and programs since 2001. Some lessons that can be drawn from the international experience are given in box 11.1.

Both environmental and business groups favour strategic assessment

Environmental and business groups participating in this study generally favour giving strategic assessment an enhanced role in the DAA system. Most submissions that discussed this topic focused on the role of strategic assessment in dealing with overlapping Commonwealth and state environmental concerns under the EPBC Act, but there was also support for strategic assessment more generally.

Box 11.1 Lessons from the international use of strategic assessment

The Commission has examined the use of strategic assessment in the European Union (focusing mainly on the United Kingdom), Canada and the United States. Lessons relevant to Australia that can be drawn from the use of strategic assessment in these countries are as follows.

Consultation is important to achieve stakeholder ‘buy-in’

It is important that communities are engaged in the strategic assessment process from an early stage. By ensuring adequate consultation, both with the broader community and with planning experts, feedback may be incorporated into the assessment of policies, plans and programs. Without proper engagement with the community and incorporation of feedback, strategic assessments are unlikely to lead to more efficient DAA processes for major projects as stakeholders lack ‘buy-in’ to decisions.

Need to consider alternative options

Strategic assessment provides an opportunity to evaluate and compare the impact of alternative options in the development of a new policy, plan or program. This might involve, for example, examining the impacts of locating key infrastructure in a number of alternative locations. For the proper consideration of alternatives it is essential that strategic assessment be undertaken in the early stages of the planning process. The consideration of alternative options is assisted by the availability of high quality baseline data on environmental, heritage and other assets.

Benefits come from integration with the broader planning process

Rather than running strategic assessment as a parallel but separate process, which can lead to duplication of effort, it should be integrated with the planning process. This will help to ensure that environmental, cultural and economic impacts are properly considered, which should help to ensure better outcomes for the community. To avoid wasting time and resources, it is critical to ensure that strategic assessment focuses on the key issues early in the process. By integrating strategic assessment into the planning process, efficiencies may be generated through the pre-assessment of certain types of development. Where there is a lack of integration, stakeholders may view strategic assessment as a burden with little or no added value.

Source: Appendix E.

The Nature Conservation Society of South Australia (NCSSA) stated their support in the following terms:

The NCSSA supports the proposal to enhance the efficiency and effectiveness of the DAA processes through the use of strategic assessments. ... The NCSSA considers the current arrangements, in relation to assessments of the cumulative impact of major projects on protected species, grossly inadequate. (sub. 37, p. 3)

The Wentworth Group of Concerned Scientists argued that strategic assessments could be used to consider all environmental values together:

Strategic assessments can be used to identify matters of both national and state environmental significance therefore streamlining and simplifying development planning by enabling all environmental values to be considered together. (sub. 1, p. 7)

A number of business groups pointed to the potential for strategic assessments to reduce regulatory burdens. The Chamber of Minerals and Energy of WA stated that they:

... support the use of strategic assessments where these approaches reduce regulatory burden and provide for positive environmental outcomes. Ideally, these strategic environmental approaches should be integrated with strategic planning at the landscape scale. (sub. 18, p. 5)

The Business Council of Australia supported strategic assessments, but also argued that they can have a downside:

Strategic assessments, as are occurring in environmental regulation, are also a good alternative [to project based assessment], and should be prioritised. The strategic assessments can, however, take a long time to complete, sometimes many years, and would need to be regularly updated to incorporate new information or changed circumstances. (sub. 43, p. 15)

The Australian Network of Environmental Defender's Offices (ANEDO) argued that strategic assessment presented both opportunities and risks:

ANEDO is concerned that the Australian Government's intent to increase the use of strategic environmental assessment (or SEA) may place emphasis on 'streamlining' approvals, without the additional safeguards recommended in the Hawke Review. As an emerging field with a variety of implementation options, SEA presents new opportunities, but also a number of risks. (sub. 14, pp. 26–7)

Advantages and disadvantages

There can be significant advantages in undertaking strategic assessments. As discussed below, they can lead to improvements in policies, plans and programs that in turn produce better environmental outcomes. They can also enable project-level DAA processes to be made less costly, time-consuming and uncertain. But there are some potential disadvantages, mainly associated with the time and cost of conducting a strategic assessment and problems that arise where there is a lack of integration with planning and project-level processes. Ultimately, how a strategic assessment is designed and conducted, and how it is integrated with the overall DAA process, will determine whether the assessment is beneficial.

Advantages

Better understanding and management of cumulative impacts

The ability of strategic assessments to consider cumulative environmental (and other) impacts is widely recognised. For example, the Hawke Review found that:

... strategic assessments and other landscape-approaches offer feasible, equitable and cost-effective ways of addressing the cumulative impacts of actions in an area or region. (Hawke 2009, p. 78)

(Macintosh 2013) argued that project-based assessment was incapable of dealing adequately with cumulative impacts and that an important benefit of strategic assessment was that:

... it can capture the cumulative impacts of multiple actions and ensure that there is an alignment of objectives at all levels of government decision making (ie. policy, planning, program and project). (Macintosh 2013, p. 543)

Noble (2008, p. 68) also noted that it is difficult to properly assess cumulative impacts within the constraints of the individual project approval process, and that having a strategic assessment framework is useful to 'address the nature and underlying sources of cumulative change'.

There are two main elements to this advantage. First, strategic assessments can consider all sources of cumulative effects on the environment. For example, deterioration in water quality in a river may occur due to a combination of new developments that discharge contaminated water, the use of fertiliser on agricultural land and increasing recreational use causing erosion of river banks. A strategic assessment can consider the contribution of all these sources to the problem. This can lead to an integrated policy response focused on achieving better outcomes in a cost-effective manner. Project-level assessment, by focusing only on one new development at a time, can lead to higher cost mitigation actions that may be insufficient to properly address the problem.

Second, strategic assessments can focus attention on overall effects, sensitivities, and capacities of the receiving environment (Dales 2011). For example, a strategic assessment of a groundwater resource might determine that a certain quantity of water can be extracted sustainably, but that above this threshold the ecological health of wetlands will begin to deteriorate. Such an assessment can lead to the setting of an overall extraction limit that strikes a balance between the benefits from extraction and the benefits from conserving groundwater. By contrast, project-level assessments may be unnecessarily repetitive because the effect of extraction on wetlands needs to be revisited for each new project. Also, due to time and other

constraints, they may fail to identify important thresholds or properly assess costs and benefits.

However, it should be noted that the assessment of cumulative impacts is an area where methodology is still developing, and it can be challenging even within a strategic assessment framework (Stoeglehner 2010). For instance, it may be difficult to assess cumulative impacts where there are a range of individual projects (either planned or completed) with uncertain impacts, or where future development is uncertain. One potential solution to this problem, as suggested by the Queensland Coordinator-General is to use a scenario-based approach to cumulative impact assessment.

In this approach certain defined scenarios, based on the current portfolio of projects, and making reasonable estimations for known projects, are developed for alternative analysis to determine a range of credible impacts. This would be used as a more reliable guide to impact mitigation and conditioning. (2010a, p. 72)

In the view of the Commission, the consideration of cumulative impacts is a leading practice appropriate for major project assessment and approval processes. In most cases this is best done as part of a strategic assessment process. Where this is not feasible, project-level assessment should attempt to consider cumulative impacts to the extent possible. As more robust frameworks for cumulative impact assessment are developed, these should be incorporated into the assessment process.

More streamlined project-level DAA processes

Strategic assessments can lead to greater certainty, lower costs and shorter time frames for project-level DAA processes in three main ways. First, strategic assessments conducted under the EPBC Act can remove the need for Australian Government assessment and approval of some subsequent projects (section 11.2).

Second, strategic assessments used to guide planning (conducted either under the EPBC Act or by individual jurisdictions) can help to resolve tradeoffs between development and environmental and other values, and provide more certainty about which areas are suitable for development. By raising the discussion above the individual project level, the appropriate level of development can be considered from a strategic perspective.

In some cases, this could lead to pre-approval for some developments. In others, project-level DAA processes would still apply, but may be less onerous. This streamlining of DAA processes would create efficiencies for proponents, community stakeholders and governments.

The extent to which project-level assessment can be reduced will depend on the scope and nature of the strategic assessment, as well as the specific nature of the proposed development. Where the range of possible future developments in a region being strategically assessed is more predictable, it may be easier to generate efficiency savings through pre-approval. For example, within and around Australia's capital cities, planners can have reasonable confidence that there will be continued growth in housing stock, as well as of roads, airports, public transport, hospitals, schools and other infrastructure necessary to facilitate urban development. Accordingly, in these regions strategic assessment can be used to provide pre-approval for the more predictable and planned elements of urban development.

In regional and remote areas, the type and location of possible developments may be less certain. For instance, the location, size and nature of future resource projects may be difficult to predict, particularly as new extraction technologies such as coal seam gas develop. In addition, government plans for infrastructure in regional and remote areas may be less developed. As a result, strategic assessment may be less likely to provide opportunities to pre-approve activities in some cases. However, strategic assessment may be able to be usefully employed in the lead up to a series of identified resource-related projects in a region.

Third, strategic assessments conducted in the development of environmental and resource policy can establish clear requirements that projects need to meet and remove the need for detailed assessment of particular issues at the project level. For example, strategic assessment of biodiversity values can reduce the need for on-site assessment and lead to greater certainty about which areas of native vegetation can be cleared and the likely cost of any compensating actions (such as providing offsets). These issues are discussed further in section 11.2.

Better outcomes due to early consideration of issues

The potential environmental benefits from the early consideration of issues was recognised by the Wentworth Group of Concerned Scientists:

Rather than leaving the assessment until after a plan, policy or program has been finalised and actions set in place, strategic assessments completed either before, or even at the same time as, the development of a major plan or policy are more likely to deliver better environmental outcomes. (sub. 1, p. 7)

Macintosh (2013, p. 544) also refers to the potential for strategic assessments to provide benefits because 'environmental issues, and less environmentally damaging alternatives, are considered throughout the decision making chain'.

By incorporating the consideration of project alternatives at an earlier stage in the decision process, strategic assessment potentially allows for a broader consideration of development options than project-based assessment. Significantly, strategic assessment allows for assessment of alternatives to a project, rather than just of alternative options for a project. This may allow environmental problems to be avoided through planning and design, rather than relying on mitigation measures to reduce the impact of development on the environment.

Provision of better baseline data

To manage environmental and other assets well, it is necessary to understand the effect of development and other processes on their condition. This gives rise to a need for baseline data on the condition of assets in the absence of new development. Preferably, this data set would cover not just natural assets, but also economic, historical and cultural assets where present. In many cases, monitoring programs already exist at national, regional and local levels, but there are often important gaps in the information collected through these processes.

Donnelly, Prendergast and Hanusch (2008) found that it is not always clear what data are required to monitor and manage environmental assets, or who should be responsible for collecting data. In these cases, the strategic assessment process can be useful for identifying information gaps and establishing processes to collect the relevant data to establish an environmental baseline.

Without strategic assessment, data gaps may only be identified during the assessment of an individual project and surveys to collect data at this stage can be costly and time consuming. For example, some environmental data are best collected at a particular time of year and this can add to delays. A further issue is that data collected for a project may not be available to subsequent project proponents, leading to a duplication of effort. In outlining their support for strategic assessment, the Business Council of Australia stated:

... baseline environmental data that can be shared and which can avoid costly new research is useful if it is robust and independent and updated. (sub. 43, p. 15)

The Commission considers that the collection of baseline data is an important leading practice for both improving environmental outcomes and improving the efficiency of DAA processes. Strategic assessment can be a useful means for improving baseline data and making it available to both governments and proponents to assist them plan for the future. That said, the cost and benefits of data collection need to be considered and strategic assessments can still be worthwhile even where environmental baseline data are not comprehensive (Ministry of the Environment (Japan) and Mitsubishi Research Institute 2003).

Disadvantages

Costly and time consuming process

Undertaking a strategic assessment can be a costly and time consuming process. For example, more than five years after agreement was reached to conduct the Browse Basin LNG Precinct strategic assessment, the Australian Government has not verified whether the requirements of the strategic assessment have been met (DSEWPAC 2012f).

Strategic assessment may also be problematic for project development. As previously noted by the Commission (PC 2011c), the benefits of strategic assessment to all stakeholders are likely to be highest if it is undertaken in conjunction with the broader strategic land use planning for an area and completed before anyone seeks to commence development in that area. However, an assessment that takes five or ten years to complete may end up costing more than allowing the relevant area to be developed through an individual project approval process if development is delayed while the assessment takes place.

Governments can, therefore, face a formidable choice when considering how to manage development during a strategic assessment process. One option is to place a moratorium on development during the assessment process, which is likely to maximise the potential environmental benefits of the assessment but potentially delay the development of specific projects. An alternative option is to allow development to continue, subject to project-by-project approval while the strategic assessment takes place. However, this may diminish the value of the strategic assessment process as it limits its capacity to consider cumulative effects and alternative development options.

Additional layer of regulation

There is a risk that where strategic assessment is not undertaken with a focus on reducing or eliminating the regulatory burden of the DAA process for major projects, that it may lead to an additional layer of ‘green tape’. For instance, a government that undertakes a strategic assessment while retaining all the requirements of their existing project-based DAA process may increase costs for both project proponents and the government itself, while not necessarily producing better outcomes. The Queensland Government submitted that:

Few of the strategic assessments undertaken to date have delivered significant classes of action and most have taken years and years and delivered little benefit. In many

ways, strategic assessments simply duplicate the existing state and local planning processes. (sub. 47, p. 3)

Similarly, Söderman and Kallio (2009, p. 21) reported that in the context of the European experience ‘the SEA process was seen by some authorities as a hindrance to successful planning and a potential burden with no added value’.

Limited potential to reduce the need for subsequent consultation

Strategic assessments often entail broad community consultation, and this enables stakeholders to be engaged in the decisionmaking process at an early stage. However, this may not substantially reduce the need for subsequent consultation regarding individual projects. For example, Runhaar and Driessen (2007, p. 11) in an analysis of four Dutch case studies find that:

The cases did not provide any evidence of SEAs making project environmental impact assessments redundant in subsequent decision-making. In all cases, the struggle with stakeholders will start or continue in the implementation stage of the plan.

Evidence suggests that this outcome most commonly occurs where stakeholders lack ‘buy-in’ to the strategic assessment process. This can result in limited community acceptance of the strategic assessment, and also poor integration of the assessment into the decision process. Commenting on the use of SEA in Ireland, the Irish Environmental Protection Agency found:

Many people perceive SEA as being time- and resource-intensive, and a check list to be completed in order to advance a plan. Where this happens, the SEA and plan-making processes may run in parallel but there is no meaningful integration of SEA and plan-making. Getting buy-in from managers and decision-makers is crucial to SEA integration and effectiveness. (EPA (Ire.) 2012, p. 51)

Cost recovery

As a general rule, cost recovery for government products and services is desirable where: it can be achieved efficiently and cost effectively; the beneficiaries of the product or services are a narrow and identifiable group; and charging is consistent with policy objectives. Under a project-by-project assessment process it is relatively simple to identify the party from which costs can be recovered, as the proponent is clearly the party receiving the private benefit. However, it is more challenging to identify the beneficiaries of a strategic assessment as these assessments apply to future actions and may be carried out by proponents that are not yet known.

Given the nature of strategic assessment, it is often undertaken by government on behalf of the community. As such, the strategic assessment process shifts the cost of

environmental assessment from individual project proponents to the government. This may be partially justified on efficiency grounds — one holistic assessment for a potentially large region as opposed to a number of individual assessments that may duplicate the same information, and may not consider cumulative impacts of development.

The Hawke Review suggested that it was challenging to identify the beneficiaries of a strategic assessment and that:

While it is possible to charge State, Territory or local governments for the assessment of plans, there is a real chance that introducing cost recovery would be a disincentive to undertaking strategic assessments. If the Australian Government decides that encouraging strategic assessment is a policy objective, cost recovery may not be appropriate at this stage. (Hawke 2009)

In the view of the Commission, while it may be appropriate for governments to seek to recover some of the costs of strategic assessments where they generate a private benefit for developers, implementing cost recovery in an efficient and cost-effective manner may be difficult. The process of determining the shares of benefits accruing to developers and the community more broadly from a successful strategic assessment, and then allocating that proportion of the total cost across developers is likely to be impractical in most cases.

11.2 Strategic assessments in practice

The variety of terms used to describe strategic assessment-type processes is broad and there are a number of policy frameworks at the Commonwealth, state and territory level that allow for different strategic assessment approaches. However, as noted by a number of commentators there are few mechanisms for formal strategic assessment in Australia, and those that do exist tend to be discretionary rather than a compulsory part of the planning process ((Kelly, Jackson and Williams 2012); (Ashe and Marsden 2011)).

Strategic assessment under the EPBC Act

The main avenue for strategic assessments to occur under Commonwealth jurisdiction is through the provisions of the EPBC Act (box 11.2). This provides an alternative pathway to project-level assessment for considering matters of national environmental significance. Strategic assessments conducted under the EPBC Act can remove the need for further Commonwealth approval of some subsequent projects in a defined region. They may also reduce the need for State and Territory Government project-level assessment and approval.

A number of reviews have highlighted how strategic assessments can provide a benefit to the community. These include the Hawke Review, which recommended that they play an expanded role, finding that:

Compared to project-specific assessment, these [strategic assessment] approaches have the capacity to address multiple impacts on matters of national environmental significance by different parties or projects, and consider impacts over longer temporal or larger spatial scales. (2009, p. 162)

The Australian Government's response to the Hawke Review noted:

... strategic approaches will better protect matters of national environmental significance, while supporting sustainable development. Strategic approaches also have significant benefits to proponents by increasing certainty and improving investment opportunities at an early stage, and by reducing the need for individual project referrals. (Australian Government 2011b)

Box 11.2 Strategic assessments under Commonwealth law

The *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) provides the opportunity for an assessment of policies, plans and programs (commonly referred to as a strategic assessment). It does this through the operation of s.146 of the Act, whereby the Minister may agree with a person responsible for the adoption or implementation of a policy, plan or program that an assessment be made of the impacts of actions under the policy, plan or program on a matter protected by Part 3 of the EPBC Act (that is, a matter of national environmental significance). Section 146(1A) of the Act also allows for the assessment of the impacts of actions not protected by Part 3 which are to be taken in a state or territory, provided there is agreement between the Environment Minister and the appropriate State or Territory Minister to do so. While s.146 allows for a strategic assessment, its use is discretionary.

In addition, there are some other mechanisms available under Commonwealth law that allow for certain types of developments to be assessed in a strategic manner. These include the airport Master Plans required under the *Airports Act 1996* (Cwlth). An airport Master Plan is a blueprint for the future coordinated development of an airport, and must be approved by the Minister for Transport. The Minister has access to expert independent advice in the assessment of airport Master Plans, particularly in relation to the alignment of a plan with other plans for the region, and other technical advice relating to areas such as environmental issues (especially noise), traffic, economic or urban planning impacts,

EPBC Act strategic assessment process

Strategic assessments under the EPBC Act are typically undertaken by the Australian Government Department of Sustainability, Environment, Water,

Population and Communities (DSEWPAC) and the relevant State or Territory Government. However, the Australian Government can also partner with local governments, members of the urban development industry and mining and resource companies.

As at July 2013, 15 strategic assessments had been commenced, five of which have been approved (table 11.2)⁴. DSEWPAC (sub. 55) reported that the number of strategic assessments had doubled over the past two years. This increase followed the Hawke Review's recommendation for greater use of strategic assessments.

The EPBC Act strategic assessment process can essentially be considered as constituting two broad phases. First, there is an assessment and endorsement of a policy, plan and or program. After this, the Minister for the Environment may approve actions (or classes of actions) that are associated with the endorsed policy, plan or program. It is this second step that potentially allows development to proceed across a large area without further need for individual developments to be referred to or approved by the Australian Government. The approval of actions may be iterative with different classes of actions approved over time as science or management evolves. However, as noted by the Queensland Government:

The strategic assessment process is onerous and at the discretion of the Australian [Government] Minister, who has no limit on the matters that may be considered in making a decision to endorse a Program. Endorsement by itself does not provide any regulatory benefit. Regulatory streamlining benefits are only achieved if actions or class of actions are approved. There are no guidelines on this approval process. (sub. 47, pp. 18–19)

Outcomes of EPBC Act strategic assessments

DSEWPAC reported that over 850 EPBC Act referrals have been avoided through the strategic assessments completed to date (sub. 55, p. 14). According to Access Economics (2011), the strategic assessment undertaken for Melbourne's Urban Growth Boundary removed the need for referral of approximately 252 individual projects over the life of the approved program, and also reduced the monitoring and compliance costs for those individual projects (box 11.3). The assessment process was also reported to have provided a useful framework to consider cumulative environmental impacts, as well as facilitating community involvement in the planning process (DSE (Vic) 2009).

⁴ The number commenced would be 16 if each component of the Great Barrier Reef strategic assessment was counted as a separate assessment.

Table 11.2 Strategic assessments under the EPBC Act

<i>Date commenced</i>	<i>Jurisdiction</i>	<i>Strategic assessment</i>	<i>Status</i>	<i>Expected date of completion</i>
6 February 2008	WA	Browse Basin LNG Precinct	In progress	na
16 September 2008	ACT	Molonglo Valley Plan	Approved: 20 December 2011 ^a	Completed
4 March 2009	Vic	Melbourne Urban Growth Boundary	Approved: 11 June 2010 ^b & 8 July 2010 ^c	Completed
11 November 2009	NSW	Western Sydney growth centres	Approved: 28 February 2012	Completed
15 January 2010	SA	Fire management policy	In progress	September 2013
5 February 2010	Tas	Midlands Water Scheme	Approved: 31 May 2011 ^d , 18 April 2012 ^e , 13 November 2012 ^f	Completed
25 February 2010	Qld	Mount Peter Master Planned Area	In progress	October 2013
18 August 2011	WA	Perth and Peel Region	In progress	March 2014
16 November 2011	NSW	Heathcote Ridge, West Menai	Approved: 24 June 2011	Completed
16 February 2012	Qld	Great Barrier Reef (marine & coastal)	In progress	November 2013
14 August 2012	NSW	Lower Hunter (sustainable regional development)	In progress	na
18 September 2012	WA	BHP Billiton Iron Ore Expansion for the Pilbara Region	In progress	February 2014
20 September 2012	NSW	Upper Hunter (biodiversity plan for coal mining)	In progress	na
2 October 2012	ACT	Gungahlin Urban Development	In progress	na
18 December 2012	WA	Hammersley Iron Ore Pty Ltd (Rio Tinto) Iron Ore Expansion for the Pilbara	In progress	August 2014

^a East Molonglo component. ^b Regional rail link project. ^c 28 precincts within Melbourne's urban growth boundary. ^d Lower South Esk component. ^e Arthur's Pipeline Irrigation Scheme component. ^f Water Access System component. **na** Not available.

Sources: DSEWPAC (2013c, 2013d).

Box 11.3 **Melbourne Urban Growth Boundary Strategic Assessment**

In 2009, the Commonwealth Environment Minister signed an agreement with the Victorian Government to undertake a strategic assessment of the expansion of Melbourne's urban growth boundary. The assessment covered impacts on matters of national environmental significance covered by the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) for a number of 'small' site-based actions across a large urban area, as well as two large infrastructure projects: the Tarneit section of the Regional Rail Link; and the Outer Melbourne Ring/E6 Transport Corridor (these actions are referred to collectively as the Program).

The goal of the assessment was to cut red tape and streamline environmental assessments in implementing the Program. The strategic assessment approach also provided a framework to account for long-term and cumulative environmental impacts and facilitate community involvement in the planning process.

Assessment process

The assessment considered a broad range of environmental assets within the study area. All listed threatened species and ecological communities that could potentially occur within the study area and surrounds were considered. A total of 25 fauna species and 32 flora species listed or nominated for listing under the EPBC Act were identified as potentially occurring within the Program area. Most of these were considered to have a low likelihood of occurrence, while the impact of the Program on others was not considered to be significant. However, for two ecological communities and six threatened species, a significant impact was considered likely.

Both the potential impacts of the Program and mitigation options were considered as part of the assessment process. The mitigation of impacts was based on a hierarchy of avoidance, minimisation, rehabilitation, re-establishment, and offset.

The assessment process also involved substantial public participation:

Participatory processes involving key non-government stakeholders were commenced as early as practicable. This included the establishment and regular meetings of an Environmental Reference Group. Major public consultation was conducted between 17 June and 17 July 2009. Letters were sent to 15 000 landowners and occupiers directly affected by the Program, advertisements were placed in state and national newspapers outlining the Program and inviting participation in eight public information sessions. ... Over 2000 people participated in these information sessions ... (DSE (Vic) 2009, pp. 2–3)

Outcomes

In February 2010, the Commonwealth Environment Minister endorsed the program covering the expansion of the Urban Growth Boundary and the alignments for the Regional Rail Link and the Outer Metropolitan Ring. To enable urban development to occur, actions for the development of Section 2 of the Regional Rail Link and the 28 precincts within the current Urban Growth Boundary were approved.

(Continued next page)

Box 11.3 (continued)

The Minister also approved prescriptions for seven separate matters of national environmental significance (covering the six species identified as likely to experience a significant impact, and a separate prescription for migratory species), setting out the requirements for protection that must be followed in preparing precinct structure plans and for individual developments.

The Victorian Government states that the key outcomes of the strategic assessment have been:

- a single, simplified approvals process under State and Commonwealth legislation applied early in the planning cycle where actions are taken in accordance with the endorsed Program
- increased certainty and reduced cost for development proposals that meet the approval conditions
- a supply of native vegetation and species offsets that developers in the growth areas can purchase from the Victorian Government
- creation of 15 000 hectares of new grassland reserve west of Melbourne and a 1200 hectare grassy woodland reserve north-east of Melbourne, to offset unavoidable clearing required for Melbourne's growth
- adherence to the principles and standards required under Victoria's Native Vegetation Management Framework and species regulations.

The Victorian Government has committed to monitoring and full public reporting on the implementation of the Program and its approval conditions under the Environment Protection and Biodiversity Conservation Act. Public reports on progress in implementing the Program are to be made publically available.

Sources: DSEWPAC (2012e); DSE (Vic) (2009; 2013).

A strategic assessment may also be undertaken to investigate the adequacy of existing policies, plans and programs, as is the case for the Great Barrier Reef strategic assessment that is currently underway (box 11.4). This assessment will consider matters of national environmental significance in the Great Barrier Reef World Heritage Area and adjacent coastal zone. The strategic assessment will be used to identify, plan for and manage existing and emerging risks to assist in the ongoing management of the Great Barrier Reef and adjacent coastal zone. The assessment also addresses the UNESCO World Heritage Committee's recommendation of July 2012 that the Australian Government undertake a comprehensive strategic assessment of the Great Barrier Reef World Heritage Area (GBRMPA nd).

One challenge that this assessment faces is that a number of projects have commenced in and around the Great Barrier Reef, and approval decisions for further developments on a project-by-project basis will continue while the strategic

assessment is undertaken. There are also long-established activities, such as grazing and cropping, that can have environmental impacts that need to be considered. Another challenge will be integrating the coastal and marine components of the assessment.

Box 11.4 Great Barrier Reef strategic assessment

The Australian Government and the Queensland Government formally agreed in February 2012 to undertake a strategic assessment of the Great Barrier Reef World Heritage Area (GBRWHA) and adjacent coastal zone. The assessment has two main components — a marine component and a coastal component. The marine component will be undertaken by the Great Barrier Reef Marine Park Authority (GBRMPA), and will look at the arrangements in place to manage and protect the Great Barrier Reef. The Queensland Government will lead the coastal component, which will look at coastal development (such as planning for urban, industrial and port development).

According to the Department of Sustainability, Environment, Water, Population and Communities (2013b), the assessment will:

... help identify, plan for and manage existing and emerging risks to ensure ongoing protection and management of the unique environmental values of the GBRWHA and adjacent coastal zone. This will be achieved by:

- investigating the adequacy of the existing management arrangements for the GBRWHA
- assessing current and future development policies and planning in the GBRWHA and the adjacent coastal zone and analysing likely direct, indirect and cumulative impacts.

The Queensland Government has suggested that the assessment has the potential to streamline decisionmaking for development within and adjacent to the GBRWHA by removing the need for Commonwealth approval of individual projects.

In February 2012, the Queensland Government and GBRMPA sought public comment on the draft terms of reference for the assessment. The Queensland Government noted that many of the submissions did not address the terms of reference directly but instead argued for a moratorium on development while the strategic assessment was completed. In response, the Government stated that, proponents would not be prevented from referring individual projects for assessment under the existing processes while the strategic assessment was underway. However:

Proponents who refer an action during this period will be expected to meet a high standard of assessment in terms of the level and rigour of information provided, including the consideration of cumulative impacts. (Queensland Government 2012)

A final terms of reference, incorporating the feedback received on the draft terms, was approved by the Australian Government Environment Minister on 30 August 2012. The strategic assessment is expected to take about 12 months to complete, with the public given further opportunities to provide input.

Sources: DSEWPAC (2013b); Queensland Government (2012).

The Commission notes that only a small number of EPBC Act strategic assessments have so far been completed. This makes it difficult to fully evaluate the role that they can play in improving the approval process for major projects. One observation is that, of the strategic assessments under the EPBC Act successfully approved so far, all except one (the Midlands Water Scheme) have been of urban areas, or areas of proposed urban development. This supports the Commission's earlier observations on the importance of baseline data (as data on environmental assets within or near urban areas is at a relatively high level of resolution), and that future developments are usually more predictable in an urban context. However, this is not to suggest that strategic assessment is not worthwhile in a rural or remote context, but the process may take longer to complete.

Overall, early results, while limited, would suggest that EPBC Act strategic assessments can play a positive role in improving social, economic and environmental outcomes and help create a more efficient DAA process. Similar to the Hawke Review, the Commission considers that strategic assessments are more likely to generate positive outcomes when they are integrated with the early stages of the planning process.

State and Territory Government approaches to strategic assessment

At the Australian state and territory level, the experience with strategic assessment is uneven. Some jurisdictions have a range of mechanisms available, while in other jurisdictions there are few formal mechanisms available for strategic assessment (Ashe and Marsden 2011). While some jurisdictions have not developed formal strategic assessment mechanisms, with the exception of the Northern Territory, all have been or are currently involved in strategic assessments through the EPBC Act (table 11.3).

The use by jurisdictions of strategic assessments as an input to planning and as an input to environmental and resource management policy is considered below.

Use in planning

In Europe, strategic assessment is commonly applied to land-use and development plans, with the aim of factoring environmental considerations into decisions about where (and under what conditions) particular types of development should occur. In contrast, the use of strategic assessment for this purpose by State and Territory Governments in Australia (outside the EPBC Act) is limited. While environmental and heritage issues are often considered in strategic planning processes, this is usually done in a partial way. Some formal mechanisms exist for strategic

assessment, but these are infrequently used. Consequently, project-level assessment remains the cornerstone of DAA processes in Australia.

Table 11.3 Use of strategic assessment in Australian states and territories

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Jurisdiction has been involved in a completed strategic assessment under the EPBC Act	✓	✓	✗	✗	✗	✓	✓	✗
Jurisdiction is currently involved in a strategic assessment under the EPBC Act	✓	✗	✓	✓	✓	✗	✓	✗
Jurisdiction has a legislative mechanism that compels the use of strategic assessment	✗	✗	✗	✗	✗	✗	✗	✗
Jurisdiction has a formal, discretionary mechanism to initiate a strategic assessment or SEA	✗	✗	✗	✓ ^a	✗	✗	✓	✗
Jurisdiction incorporates some aspects of strategic assessment into its DAA process	✓	✓	✓	✓	✓	✓	✓	✗

^a In Western Australia, this is referred to as a 'strategic proposal', undertaken by the Western Australian Environmental Protection Agency.

New South Wales

The implementation of formal strategic assessment mechanisms in New South Wales has been a difficult process. For example, prior to July 2009, the *Environmental Planning and Assessment Act 1979* (NSW) had allowed for the development of regional environmental plans (REPs). REPs were considered by some commentators (Ashe and Marsden 2011; Kelly, Jackson and Williams 2012) to constitute a framework for strategic assessment-type processes. However, REPs are no longer part of the hierarchy of environmental planning instruments in New South Wales. The NSW Government states that 'the removal of the REP layer is intended to simplify the State's planning system' (Department of Planning and Infrastructure nd).

Although the state currently lacks a formal mechanism for strategic assessment, the NSW Government has instigated a number of metropolitan and regional plans that have elements of strategic planning and strategic assessment. For instance, the Metropolitan Plan for Sydney 2036 will be implemented through detailed sub-regional plans that will include 'upfront consultation with communities about what culture and heritage they want to protect in their area' (Department of Planning and Infrastructure NSW 2013, p. 18). There are also 'regional strategies' in place for eight areas of regional New South Wales that have been prepared in partnership with local governments. These are intended to identify strategic

priorities that will direct land use planning at the regional level and are to be updated every five years. The NSW Government has also recently put in place a ‘Gateway process’ to provide independent assessment of how mining or coal seam gas proposals would impact the agricultural values of the land on which it is proposed to be located (NSW Government nd). However, this assessment is quite narrow in focus, considering only one dimension of impacts (agricultural land values), whereas a full strategic assessment would consider a broader range of environmental, economic and social values.

Victoria

Victoria lacks a formal framework for strategic assessment. Neither the *Environmental Effects Act 1978* (Vic) or the *Planning and Environment Act 1987* (Vic) explicitly provide for strategic assessment. However, section 12 of the Planning and Environment Act provides a mechanism for examining strategic proposals that require amendments to planning schemes, while section 151 of the Act allows the Minister for Planning to appoint an advisory committee to advise on the merits of a proposal or planning policy issues. Section 151 has been used several times to investigate the merit of strategic proposals (Parliament of Victoria 2011).

Queensland

In Queensland, the Coordinator-General undertakes strategic planning through the creation and planning of State Development Areas (SDAs). SDAs are specific areas created under the *State Development and Public Works Organisation Act 1971* (Qld) to facilitate industrial development, infrastructure corridors and major public infrastructure (Queensland Government, sub. 47). The planning process for the creation of SDAs contains elements of strategic assessment. Each SDA is subject to a development scheme, a regulatory document that controls land use and infrastructure planning and development in the SDA. The development scheme is prepared and administered by the Coordinator-General and covers the following broad areas:

- compatibility of land uses with the objectives of the SDA
- the processes and procedures for the assessment of development, or material change of use, applications
- avoiding or minimising environmental impacts.

Once complete, the scheme overrides local and Queensland Government planning instruments related to the use of land. The Coordinator-General may also prepare

policies to assist in the implementation of an SDA's development scheme (DSDIP (Qld) 2012).

Western Australia

In Western Australia, the *Environment Protection Act 1986* (WA) was amended in 2003 to allow the WA Environmental Protection Authority to assess 'strategic proposals'. A strategic proposal is a proposal that identifies one or more future proposals that may, either individually or in combination, have a significant effect on the environment. According to the Environmental Protection Authority (2012b), strategic proposals can be used as an alternative to case-by-case assessment and are useful to ensure community involvement in the early stages of planning and for the consideration of cumulative impacts. The process may also give rise to more streamlined consideration of future 'derived' proposals that fall within the parameters of the strategic proposal.

However, the Environmental Protection Authority has noted the limited use of these provisions as an alternative to project-based assessment (EPA (WA) 2012a). In light of this, it has published a bulletin to describe its approach and its expectations of proponents of strategic proposals.

South Australia

South Australia is currently in the process of developing a Regional Mining and Infrastructure Plan. The plan covers three regions: the Far North; Eyre and Western; and Yorke and Mid North/Braemar provinces. The regions have been selected as they represent the majority of mining projects in South Australia. The Plan will consider the infrastructure that is best able to facilitate the development of the mining sector in South Australia, and help articulate the means of delivering this infrastructure. As part of the process, stakeholder feedback will be sought on a number of issues that would be included in a strategic assessment, including the regional and community impacts of mining (both positive and negative), the contribution of mining to the economy and any environmental costs. This feedback will be used to develop a priority list of infrastructure projects (DPTI (SA) 2013)

Tasmania

The Tasmanian Government has introduced a planning reform program, a key feature of which is the introduction of regional land use strategies (Tasmanian Government, sub. 53, attachment 1). The development of these strategies has employed elements of strategic assessment. However, the lack of consistent and

accurate environmental data has, in some cases, hampered attempts to develop a pro-active planning approach to the protection of environmental values (STCA 2011)

ACT

Under the *Planning and Development Act 2007* (ACT), a SEA may be prepared when a major policy matter is proposed, such as a major variation to the Territory Plan (the key statutory planning document in the ACT). The ACT Minister for Planning can request a SEA, or the ACT Planning and Land Authority may decide that one is needed. Under the ACT approach, a strategic assessment can be used to:

... assess the environmental benefits and impacts on an area [of the proposed policy or plan], which is an important part of any decision about an area's suitability for future development. It can also recommend how the finding of the assessment should be considered in future planning. (ESDD (ACT) 2013)

Northern Territory

The Commission is not aware of strategic assessment being used in a land-use or development planning context in the Northern Territory.

Use in environmental and resource management policy

While most of the focus on strategic assessment relates to planning, it should be recognised that it is also important for the development of sound environmental and resource management policies. In many cases the type of assessment required is not commonly termed 'strategic assessment', but rather is often simply considered part of best practice policy making. Assessments of this kind can be used to improve regulations that impact on the assessment and approval of major projects, as illustrated by the examples of water planning and native vegetation clearing controls.

Water planning

Under the COAG National Water Initiative (NWI) considerable effort has been put into increasing the number and quality of water plans across Australia. An NWI-consistent water plan: appropriately balances economic, social and environmental considerations; draws on the best available science, socioeconomic analysis and community input; and provides a clear basis for water access

entitlements and allocations (NWC 2011). As such, water planning clearly requires a strategic approach to be taken to the assessment of water resources.

Whether or not a high quality water plan is in place can have implications for major project proposals, particularly for resource-related projects. Where a suitable water plan is not in place and a project requires the extraction of considerable quantities of groundwater (for example, for dewatering), it might be necessary to undertake detailed scientific investigation of the likely impacts on the environment and existing users. Following this, a decision would need to be made on whether and under what conditions approval should be granted. Where multiple projects were proposed over time, multiple assessments would be required and these would need to attempt to take cumulative impacts into account. By contrast, if a strategic assessment has been done and a water plan is in place, the process might be as simple as project proponents purchasing a water entitlement.

The issue of water reform was raised by the Minerals Council of Australia, which argued:

... adequate resources must be provided to fully implement the NWI, including the development of 'fit for purpose' planning and entitlement arrangements for the minerals industry where these are not adequately addressed by the existing generic water policies and practices. (sub. 33, p. 30)

The latest biennial assessment of the NWI reported that progress has been made in increasing the proportion of areas covered by water plans and in improving their quality, but that further improvements could be made (NWC 2011). Fermio and Hamstead reported:

There is a view amongst mining stakeholders that water allocation planning has been focused on agricultural and urban water use; and that remote areas where mines are the only significant water-using activity have not been prioritised for investment in water planning. (2012, p. 55)

There are regions where water planning can be particularly beneficial for facilitating resource developments, while managing cumulative impacts. A possible example is the Fortescue Marsh area in Western Australia, where there is potential for the cumulative impacts of dewatering by iron ore mines to affect the groundwater-dependent ecosystem of the Marsh (Fermio and Hamstead 2012).

Regulation of native vegetation clearing

As discussed in chapter 7, proponents of major projects may need to comply with regulations concerning the clearing of native vegetation. Often, this involves undertaking an offsetting action (such as protecting or enhancing the condition of an

area of native vegetation) that compensates for the clearing of vegetation on the development site. This can be costly, with reports of offset prices up to \$370 000 per hectare of high quality vegetation (DSE (Vic) 2012).

From the proponents perspective, it is desirable that the regulations are clear, predictable and not unnecessarily costly. From a communitywide perspective it is desirable that the ratio of the environmental benefit achieved divided by the cost imposed on the proponent is as high as possible. These aims can be advanced by undertaking assessment of the environmental values of the different types of native vegetation across a region or state.

An example of this type of strategic assessment is that conducted for the review of Victoria's native vegetation clearing regulations. This involved developing an interactive model that:

... brings together large amounts of information collected about species presence, habitat quality and connectivity, to determine relative environmental value across the landscape. This model ranks locations for their potential to contribute to the efficient conservation of the full range of Victoria's biodiversity. (DSE (Vic) 2012, p. 23)

Reforms to Victoria's native vegetation clearing regulations that incorporate the use of this model have been announced (DEPI (Vic) 2013). While the Commission has not independently evaluated the model, it would appear that it has enabled the regulations to be reformed in ways that are likely to improve the predictability and speed of decision-making and ensure that offsets more cost-effectively target environmental benefits. Proponents will also be able to more readily obtain information about the biodiversity value of different parcels of land, which could assist them to reduce their costs by siting developments in less environmentally sensitive locations.

This example demonstrates the potential for strategic assessments to lead to improvements in environmental regulations and at the same time improve DAA processes from both a proponent and communitywide perspective.

11.3 The Commission's assessment

While strategic assessment is still a developing area of policy, there is evidence to suggest that it can be a valuable tool for improving DAA processes for major projects. It has the potential to reduce the scale and cost of subsequent project-based assessments of major projects. Strategic assessment can also improve environmental outcomes by considering cumulative impacts at the appropriate scale. As with the Hawke Review, the Commission acknowledges that there are potential risks, but if

properly managed these are likely to be outweighed by the benefits of strategic assessment in many circumstances.

The use of strategic assessment under the EPBC Act has increased over recent years, which is a positive development. It is important to learn from this experience to enable strategic assessment to more fully realise its potential in Australia.

Under the EPBC Act, strategic assessments are used to try to reconcile the overlapping objectives of different levels of government. This gives them a particular character and adds to the difficulty of the task. Strategic assessments conducted solely under State and Territory Government jurisdiction are freer of this type of political tension and may, in time, prove to be highly worthwhile.

While strategic assessment and strategic environmental assessment are terms most commonly used within the planning sphere, assessments of a strategic nature are also important to the development of sound environmental and resource management policies. Such policies can improve the operation of DAA systems by establishing clearer and more predictable requirements for projects and reducing assessments times.

DRAFT RECOMMENDATION 11.1

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

11.4 Strategic planning

Government planning systems guide decisionmaking about the future allocation and development of land. Strategic planning gives structure to this process by identifying long-term goals and targets, and then determining the best approach for achieving them (PC 2011c). The Development Assessment Forum offered the following perspective:

Strategic planning, the level at which long term objectives, policies and directions are chartered, precedes development planning and operational planning ... [It is] a way of achieving a balance between conflicting objectives or priorities and resolving the conflicts between economic, social, environmental and cultural imperatives. (DAF 2001, p. 8)

Strategic planning is relevant to this study because it can assist in streamlining and strengthening the major project DAA process. Strategic planning can also facilitate major projects where it safeguards corridors for future use (for transport or green space for example), or where it prevents encroachment around strategic infrastructure (for example, by providing a buffer zone around ports and airports).

Overview of strategic planning in Australia

Strategic planning is significantly more developed for urban than rural areas, with all jurisdictions having strategic plans for their capital city regions. Commonly the capital city strategic plan forms the apex of the planning hierarchy, with a range of more specific plans sitting underneath (which are meant to be consistent with the goals and targets established by the overarching strategic plan). Some jurisdictions also have a statewide plan, while many have strategic plans for certain regional areas (though coverage varies). South Australia, for example, has a statewide plan, a 30-year plan for greater Adelaide and plans for regional South Australia. The SA State Government Departments described South Australia's strategic planning process as follows:

South Australia's Strategic Plan (SASP) is the state's primary directional document. SASP has 100 specific targets grouped under six interrelated pillars. Progress against SASP targets is reported every two years and the plan is updated every four years.

'Beneath' SASP sit specific 'action' plans which facilitate achieving SASP targets, including the Strategic Infrastructure Plan for South Australia and the South Australian Planning Strategy. The Department for Planning, Transport and Infrastructure (DPTI) has lead responsibility for both of these documents. (sub. 51, p. 26)

The full range of strategic policies, plans and programs that apply to activities in most jurisdictions is vast. Box 11.5 illustrates the complexity of this strategic planning context by outlining the hierarchy of plans applying to the key regional city of Townsville.

Box 11.5 **Complexity of the strategic planning context in Townsville**

Townsville, with a population over 180 000 people, is the largest city in north Queensland. A major service centre and the main centre for government administration outside Brisbane, the city is also a key port and rail transport hub for the region's agricultural and mining industries (including sugar, copper, zinc and nickel). It also hosts significant numbers of Defence personnel at Lavarack Barracks and RAAF Base Townsville.

A selection of strategic plans that may influence project planning in and around the city are outlined below. The selection illustrates the wide array of geographic and sectoral plans and strategies that can comprise a region's strategic planning context.

Australian Government

- National Ports Strategy
- Townsville Airport 20 year Master Plan (under the *Airports Act 1996* (Cwlth))
- Great Barrier Reef Marine Park heritage strategy 2005 and forthcoming strategic assessment
- 2013 Defence White Paper: Australian Defence Force Posture (covering base expansion)
- Mount Isa–Townsville Corridor Strategy 2007 (covering transport)
- National Cycling Strategy

State and/or Local Government

- Townsville State Development Area Development Opportunities Strategy and Development Scheme
- Northern Economic Triangle Infrastructure Plan 2007–2012 (for the Mount Isa, Townsville and Bowen area)
- Great Barrier Reef ports strategy (2012–22)
- Townsville City–Port Strategic Plan 2007
- Port of Townsville Master Plan
- Townsville–Thuringowa Strategy Plan
- Townsville Economic Gateway Strategy 2007
- Townsville City Plan 2005
- Townsville North Queensland Region Destination Tourism Strategy (2012–16)
- Townsville Digital Economy Strategy
- Townsville Coastal Hazard Adaptation Strategy

Other

- Mount Isa to Townsville Economic Zone (MITEZ) 50-year freight infrastructure plan (MITEZ is the peak regional development organisation)

Strategic planning's influence on DAA processes

Typically a project proponent must have 'regard' to the relevant strategic plans in their project application or environmental impact statement. To illustrate, Centrex's public environment report concerning a proposal to develop a port at Sheep Hill in South Australia included discussion of how the project was consistent with the objectives of the SA Strategic Plan, the Regional Plan of the Eyre Peninsula and other related plans (Golder 2012). The SA Government's subsequent assessment report on the project included similar assessments on consistency with these plans (DPTI (SA) 2012).

Comparable requirements operate in other jurisdictions. For example, the Queensland Government (sub. 47) reported that proponents in that state are required to incorporate and respond to strategic planning objectives in their environmental impact statement.

This process of considering the consistency of a project with strategic plans can be a positive one. In some cases, proponents may be able to use strategic plans to help them design projects that are likely to be less contentious and have fewer assessment issues than otherwise. Business SA stated:

Transparent strategic planning by governments could assist some proponents of major projects, particularly in terms of knowing where their project fits in terms of broader economic growth and development goals, as well as possible constraints. Strategic planning is especially important for proponents of infrastructure projects and projects that rely on new or improved infrastructure, such as mining and energy projects. (sub. 4, p. 5)

The first part of this quote refers to factors (such as knowing about development goals and constraints) that can result in proponents configuring their project in such a way that it has an easier passage through DAA processes. The second part refers to benefits from good strategic planning that extend well beyond DAA processes, such as the benefit of locating a mine near to where complementary infrastructure is planned to be built.

There is the possibility that strategic planning can result in some types of development not needing to go through DAA processes at all (so called 'as of right' development). While this is less likely to be feasible or desirable for major projects, there may be aspects of such projects that, if consistent with strategic plans, could be made exempt from the need for assessment and approval.

However, strategic planning does not always lead to more efficient DAA processes for major projects, as pointed out by SA State Government Departments:

Strategic planning is a statutory requirement of the *Development Act 1993* in South Australia, however this does not necessarily assist in reducing the time and cost of major development processes. (sub. 51, p. 27)

Further, the potential for strategic planning to assist with subsequent DAA processes can be lower for resource-related major projects. The NT Government observed:

In the case of mining projects, and to a lesser extent mineral processing projects the site of development is driven by the location of the resource to be developed, which cannot be predicted and planned for ahead of discovery and appraisal. (sub. 46, p. 5)

This assessment was shared by Xstrata Coal:

Whilst strategic plans have the potential to provide more certainty and ensure that land uses are appropriately located, the primary limitations of such plans are that they can take many years to prepare and can never fully contemplate or predict the likely demand for or use of land.

... economically-mineable resources of coal and other mineral resources are contained in a limited number of fixed locations across Australia. A mining company cannot simply pick up its project and take it elsewhere. This is one of the reasons that strategic land-use plans must be flexible in their application and should not prohibit land uses in particular areas. (sub. 50, p. 22)

Sometimes a major project may conflict with a strategic plan, but still be found to be in the public interest. Resolution commonly involves rezoning or amendment to the relevant development plan (often a lengthy process, usually requiring initial and final ministerial agreement to the changes).

Findings of previous studies

Several previous studies have recommended wider (or better) use of strategic planning (COAG Reform Council 2011; LGPMC 2009; PC 2011c).

In 2011, the COAG Reform Council reviewed capital city strategic planning systems across Australia. This involved assessing each cities system against a set of criteria agreed by COAG. The Council reported mixed results across jurisdictions (table 11.4). Adelaide was assessed as mostly consistent, on the evidence presented. Melbourne received no fully consistent assessments, and one 'not consistent' assessment (although Melbourne's results were affected by it being in the process of revising its metropolitan plan following a change of government).

While noting progress in improving strategic planning systems, the Council suggested more work needed to be done:

To differing degrees, all State and Territory Governments have long term, whole-of-government and goal-oriented strategic plans, and all have exhibited strengths and weaknesses in their capital city strategic planning systems. No system has been found wholly consistent with the criteria, which means that further work is needed on the institutional arrangements to deliver integration. (COAG Reform Council 2011, pp. 3–4)

Table 11.4 Consistency of capital city strategic plans with COAG principles, COAG Reform Council findings^a

<i>Criterion</i>	<i>Syd</i>	<i>Melb</i>	<i>Bris</i>	<i>Perth</i>	<i>Adel</i>	<i>Hobart</i>	<i>Canb</i>	<i>Darwin</i>
Integration across functions & agencies	✓ ^R	✓	✓✓	✓✓	✓✓✓	✓ ^R	✓✓	✓ ^R
Consistent hierarchy of plans	✓	✓	✓✓✓	✓✓✓	✓✓✓	✓ ^R	✓✓✓	✓✓
Nationally significant infrastructure	✓	✓	✓✓	✓✓	✓✓✓	✓✓	✓✓✓	✓✓
Nationally significant policy issues	✓✓	✓	✓✓	✓✓	✓✓	✓	✓✓	✓
Strengthen networks between capital cities	✓✓	✓✓	✓✓✓	✓✓	✓✓✓	✓✓✓	✓✓✓	✓✓✓
Planning & sequencing for future growth	✓✓✓	✓✓	✓✓✓	✓✓✓	✓✓✓	✓ ^R	✓✓✓	✓✓
Investment priorities & frameworks	✓	✓	✓	✓	✓✓	✓	✓	✓
Urban design & architecture	✓✓	✓✓	✓	✓	✓✓✓	✓ ^R	✓✓	✓
Accountabilities, timelines & performance measures	✗ ^R	✗	✓	✓ ^R	✓✓✓	✓ ^R	✓	✓ ^R
Intergovernmental cooperation	✓	✓✓	✓✓✓	✓	✓✓✓	✓✓	✓✓	✓✓
Evaluation & review cycles	✓	✓	✓✓✓	✓ ^R	✓✓✓	✗ ^R	✓✓	✓ ^R
Consultation & engagement	✓	✓	✓	✓	✓✓✓	✓	✓✓✓	✓✓

✗ = not consistent; ✓ = partially consistent; ✓✓ = largely consistent; ✓✓✓ = consistent; ^R indicates that a reform is pending that may lead to a system that the Council would consider more consistent than the current finding indicates.

^a The COAG Reform Council noted its assessments should be interpreted with caution, as they primarily measured consistency with criteria not system outcomes. It considered that consistency with the criteria is necessary but not sufficient for successful strategic planning to achieve productive, liveable and sustainable cities. The Council also noted that its assessments had not been adjusted for the scale of the challenges facing each city and that this was a limitation on comparing results across cities.

Source: COAG Reform Council (2011).

One notable criterion on which consistency was generally low was ‘accountabilities, timelines and performance measures’. On this criterion, the Council found:

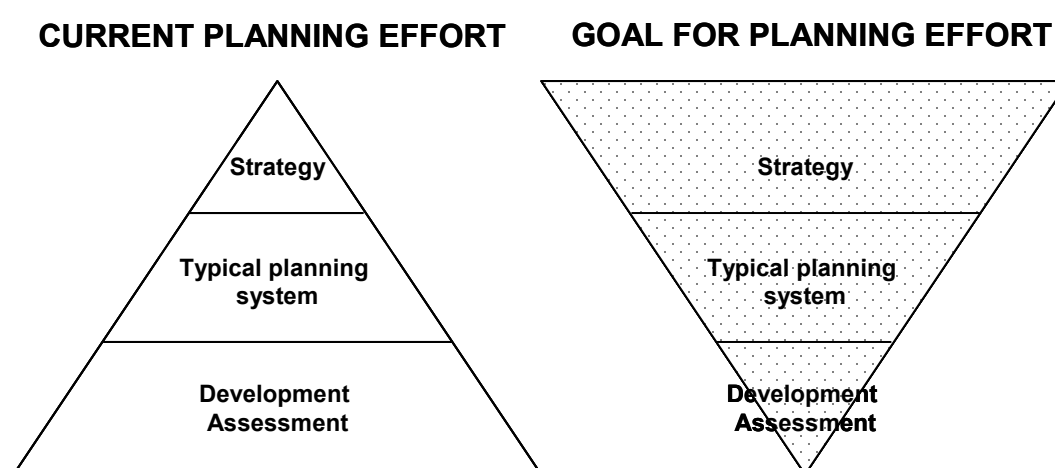
Most jurisdictions were either partially or not consistent ... In many cases, governments only had partial forms of accountability, timelines and performance measures. This was particularly the case for performance measures. (COAG Reform Council 2011, pp. 51–2)

The Commission’s 2011 report on Planning, Zoning and Development Assessments advocated determining as much planning policy as possible early in the planning-to-approval chain. Some key elements towards achieving this were having strategic land-use plans that are:

- not just aspirational but also make broad decisions about where future urban growth will occur, alternative land uses, timing, infrastructure and the provision of services (to contribute to social, economic and environmental objectives)
- integrated across different levels of government and across different government departments and agencies to make consistent decisions about relevant matters, ranging over infrastructure, environment, housing and human services (PC 2011c, p. XLIV)

The approach advocated by the Commission would tend to reshape resource allocation across the planning system towards the goal shown in figure 11.1. The Commission noted that the states and territories had indicated that their reform efforts had been directed at focusing more on the earlier stages of planning

Figure 11.1 Changing the focus of planning efforts



Source: PC (2011c, p. XLIII).

The Local Government and Planning Ministers’ Council (LGPMC) has noted a long list of weaknesses across the planning system, ranging from a lack of understanding of planning’s role, through to governance, coordination and harmonisation issues, to

capacity, skills and knowledge issues and a lack of well-structured community engagement (LGPMC 2009). A further weakness identified by the LGPMC was:

Lack of consensus on appropriate planning horizons to deal with key planning issues, leading to either a short-term focus aligned with political cycles, or a lack of clarity and focus due to unrealistically long planning horizons and commitments to outcomes far in advance of need. (2009, p. 5)

Possible areas for improvement

The Commission considers that the COAG Reform Council review was a significant milestone in efforts to improve all aspects of strategic planning for capital cities and that its findings should be used to help guide reform efforts. In one sense, the current study has a narrower perspective, because the primary interest is in how strategic planning influences major project DAA processes. For this reason, the areas for improvement considered here focus on this concern as it relates to both urban and rural areas. In identifying and analysing possible improvements to strategic planning, the Commission has drawn on the above studies, submissions, overseas experiences with strategic planning (box 11.6) and a range of other sources.

More emphasis on strategic decisionmaking

Some of the difficulties to be overcome relate to institutional arrangements and politics, as illustrated by the challenges of finding new airport sites in Sydney since the 1970s. Infrastructure Australia argued:

Planning agencies tend to be outside the central part of government, and their influence on reform is modest. Metropolitan plans get changed when it suits the political interests of the government of the day or the policy interests of another part of the government. New governments often feel obliged to distance themselves from their predecessor's plans, even though there may be elements in those plans that are worthwhile. This calls into question the long-term integrity and durability of the metropolitan planning process. (IA 2012, p. 49)

There are also challenges in better integrating strategic planning with the rest of the planning process, so that strategic decisions are reflected in lower level decisions. The sectoral approach to infrastructure policy and plan development used in the United Kingdom has potential to assist in this regard (box 11.6).

As pointed out by a number of participants, moving to more streamlined DAA processes may not be desirable if this increases the risk of poor environmental or social outcomes (for example, ANEDO, sub. 14). This insight leads to the remaining two areas for improvement, which are in part about reducing these risks.

Box 11.6 **Lessons from international strategic planning experiences**

Public consultation is important to developing enduring plans

A Grattan Institute report examined city governance in eight cities in North America and Europe that were considered to have been successful in meeting residents' needs (Kelly 2010a). One of the aims of the research was to identify the kinds of decisionmaking arrangements associated with sustained success in cities. The report highlights the importance of public consultation:

Those cities that made tough choices and saw them through had early, genuine, sophisticated, and deep public engagement. This level of engagement is an order of magnitude different from what happens in Australia today. (Kelly 2010a, p. 4).

For example, Kelly (2010a) found that extensive public engagement that asked people 'what they wanted' had been critical to developing a well-supported vision and plan for Vancouver. It was also reported that having only limited opportunity to appeal against planning decisions made it much easier for Vancouver to set a direction and follow it through.

Sectoral plans can help streamline approval processes for major projects

Planning reforms established in the United Kingdom since the passage of the *Planning Act 2008*, provide lessons of direct relevance to major project DAA processes. These reforms launched National Policy Statements, which provide guidelines for the assessment of nationally significant infrastructure projects in specific sectors.

These statements provide clear guidance to authorities (such as the Planning Inspectorate) on how the national government considers assessment should occur (for example, how to assess and balance impacts), and outline relevant policies for consideration. For example, the Energy National Policy Statement identifies a need to invest over £100 billion in the electricity sector by 2020 and outlines the United Kingdom's climate change emissions reduction targets (DECC (UK) 2011, p. 11).

They also indicate, at a high level, the government's predisposition for assessment, in light of its overall policy direction. Examples include:

[The Planning Inspectorate] should start with a presumption in favour of granting consent to applications for energy nationally significant infrastructure projects. (DECC (UK) 2011, p. 44)

[The Planning Inspectorate] should start with a presumption in favour of granting consent to applications for ports development (DfT (UK) 2012, p. 17).

Additionally, the application of conditions to projects is restrained:

[The Planning Inspectorate] should only impose requirements in relation to a development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. (DECC (UK) 2011, p. 45)

The sectoral model used in the United Kingdom has the potential to increase certainty and understanding in the community, and usefully guide development assessment authorities.

Improved consultation

Genuine engagement and consultation with the community and business is essential for effective strategic planning. The finding of the COAG Reform Council suggests that there is considerable scope for improvement, at least in relation to capital cities (table 11.4). Other research suggests that the breadth and depth of consultation in some other countries, particular parts of Canada, substantially exceeds that typically conducted in Australia (Kelly 2010a). It is evident in cities, such as Vancouver, that this can help produce better outcomes by promoting broad community support for decisions made at the strategic level.

The effectiveness of consultation was a theme addressed by Amelia Thorpe from the University of New South Wales (sub. 16), who argued that there is a need for research into effective consultation methods. Specifically, Thorpe highlighted Western Australia's 'Dialogue with the City' consultations for praise, noting the wide range of techniques it deployed.

Thorough analysis of impacts

For strategic planning to produce good results it must be based on the best possible information, including about the environmental impacts of different development scenarios. ANEDO (sub. 14, p. 24) argued that environmental matters were given insufficient attention in strategic planning and that 'independent baseline studies of catchments' environmental qualities, such as water, soil, vegetation, biodiversity, minerals, [and] air quality' should be undertaken for strategic planning purposes.

In the Commission's view, environmental issues are often not adequately considered in strategic planning. Strategic assessment (which is discussed extensively in the earlier sections of this chapter) is a promising tool for analysing environmental and other plan impacts.

DRAFT RECOMMENDATION 11.2

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

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

A Public consultation

In keeping with its standard practice, the Commission has actively encouraged public participation in this study.

- Following receipt of the terms of reference on 7 December 2012, an advertisement was placed in newspapers and a circular was sent to identified interested parties.
- An issues paper was released on 11 February 2013 to assist those wishing to make written submissions. Some 60 written submissions were subsequently received (table A.1). These submissions are available online at: www.pc.gov.au/projects/study/major-projects.
- As detailed in table A.2, meetings were held with a wide range of stakeholders across Australia. These included government departments, companies, industry associations, non-government organisations and academics.
- In addition, teleconferences and meetings were held in the United States, the United Kingdom, France (OECD) and Canada with various government departments, industry associations, non-government organisations and academics (table A.3).
- A roundtable was held in Melbourne on Friday 24 May. A list of participants is provided in table A.4.

The Commission thanks all those who have contributed to this study and now seeks additional input. It welcomes further submissions to discuss the substance of the draft report, including responses to the information requests and draft recommendations and findings.

Table A.1 Submissions

<i>Participant</i>	<i>Submission no.</i>
ACIL Tasman	29
AGL Energy	27
Association of Mining and Exploration Companies	42
Australian Airports Association	41
Australian Network of Environmental Defender's Offices	14
Australian Petroleum Production and Exploration Association	17
Australian Uranium Association	34, 52
Brisbane City Council	60
Business Council of Australia	43
Business SA	4
Canberra Airport	31
Capricorn Conservation Council	12
Cardno HRP	20
Cement Concrete and Aggregates Australia	49
Chamber of Commerce and Industry of Western Australia	44
Chamber of Minerals and Energy of Western Australia	18
Department of Infrastructure and Transport	59
Department of Sustainability, Environment, Water, Population and Communities	55
Derrington, Theresa	35
Doctors for the Environment Australia	48
East End Mine Action Group	38
Economists at Large	13
Enthalpy	21
General Electric	9
Hunter, Dr Tina	58
Hunter Valley Coal Chain Coordinator	56
King & Wood Mallesons	39
Local Government Association of South Australia	25
Local Government NSW	36
Mackay Conservation Group	7
Master Builders Australia	24
Medical Association for the Prevention of War	45
Minerals Council of Australia	33
Mueller, Otto	5, 54
Nature Conservation Council of NSW	22
Nature Conservation Society of South Australia	37

(Continued next page)

Table A.1 (continued)

<i>Participant</i>	<i>Submission no.</i>
North Queensland Conservation Council	10
Northern Territory Government	46
NSW Minerals Council	23
Project Management Institute	32
Queensland Government	47
Queensland Resources Council	19
Regional Development Australia Far North Queensland and Torres Strait	26
Scott-Kemmis, Don, Pacific Innovation	6
Schinkel, Maurice	28
South Australian State Government Departments	51
SRA Information Technology	57
Tager, Jeremy	8
Tasmanian Government	53
The Warren Centre for Advanced Engineering	11
Thorpe, Amelia	16
Urban Taskforce Australia	15
UrbanGrowth NSW	40
Wentworth Group of Concerned Scientists	1
Whan, Ian	3
Woodward, Dr Ian	2
WWF Australia	30
Xstrata Coal	50

Table A.2 Meetings

Participant

New South Wales

Infrastructure Australia
Infrastructure NSW
Roads and Maritime Services
Sydney Water
Transport for NSW
Endeavour Energy
Department of Premier and Cabinet (NSW)
Department of Planning and Infrastructure (NSW)
Department of Trade and Investment, Regional Infrastructure and Services (NSW)
Environmental Defender's Office (NSW)
Environment Protection Authority (NSW)
NSW Minerals Council
Property Council of Australia
Sydney Ports
Wentworth Group
Xstrata Coal

Victoria

Australian Conservation Foundation
Port of Melbourne
Business Council of Australia
Department of Planning and Community Development (Vic)
Department of Treasury and Finance (Vic)
Major Projects Victoria
Department of Premier and Cabinet (Vic)
Infrastructure Partnerships Australia
AGL
WWF Australia
Great Barrier Reef Marine Park Authority (teleconference)
BHP Billiton
World Bank

Queensland

Brisbane

Brisbane City Council
Local Government Association of Queensland
Queensland Government
Queensland Resources Council
Brisbane Airport Corporation
Port of Brisbane Corporation
Queensland Conservation Council
Environmental Defenders Office (Qld)
World Wildlife Fund
BG Group (owner of Queensland Gas Company)

(Continued next page)

Table A.2 (continued)

Participant

Gladstone

Capricorn Conservation Council and Gladstone Conservation Council
Gladstone Airport
Gladstone Ports Corporation
Gladstone Regional Council
QER Shale Oil
Santos

South Australia

Australian Rail Track Corporation
Department of Manufacturing, Innovation, Trade, Resources and Energy (SA)
South Australian Chamber of Mines and Energy
Rex Minerals Ltd Hillside Mine

Western Australia

Perth

Office of the Environmental Protection Authority (WA)
Chamber of Minerals and Energy (WA)
Conservation Council of Western Australia
Department of State Development (WA)
Department of Mines and Petroleum (WA)
Yamatji Marpla Aboriginal Corporation
Chevron Australia
Cameco
Herbert Smith Freehills
Sinosteel Midwest
Crosslands Resources
Rosslyn Hill Mining
DLA Piper
National Offshore Petroleum Safety and Environmental Management Authority
National Native Title Tribunal
AngloGold Ashanti Australia
BHP Billiton — Iron ore
SRA Information Technology

Karratha

Dampier Port Authority
Rio Tinto – Cape Lambert Port Operations
Woodside Energy – North West Shelf Project

(Continued next page)

Table A.2 (continued)

Participant

Tasmania

Pitt and Sherry

Mineral Resources Tasmania

Department of Premier and Cabinet (Tas)

Department of Infrastructure, Energy and Resources (Tas)

Department of Primary Industries, Parks, Water and Environment (Tas)

Department of Treasury and Finance (Tas)

Tasmanian Planning Commission

Tasmanian Irrigation

Northern Territory

NT Government

Australian Government and national bodies

Australian Petroleum Production and Exploration Association

Department of Infrastructure and Transport

Minerals Council of Australia

Department of Prime Minister and Cabinet

The Treasury

Department of Finance and Deregulation

Department of Resources, Energy and Tourism

Department of Sustainability, Environment, Water, Population and Communities

Table A.3 International meetings and teleconferences

Participant

Canada

Edmonton

Alberta Energy

Ministry of International and Intergovernmental Relations

Ecojustice

Pembina Institute

Athabascas Chipewyan First Nation NGO

Calgary

National Energy Board

Explorers and Producers Association of Canada

Canadian Association of Petroleum Producers

Fraser Institute

(Continued next page)

Table A.3 (continued)

Participant

Ottawa

Major Projects Management Office

Canadian Environmental Network

Commissioner of the Environment and Sustainable Development, Office of the Auditor General of Canada

The Mining Association of Canada

Canadian Electricity Association

Sierra Club

Natural Resources Canada

Fisheries and Oceans Canada

Aboriginal Affairs and Northern Development Canada

Environment Canada

Canadian Nuclear Safety Commission

Teleconferences

Alberta Government Policy Management Office

Major Projects Management Office

France

Paris

Organisation for Economic Co-operation and Development

International Transport Forum

Conseil d'analyse économique

Mexico

Teleconference

Centro Mario Molina

United Kingdom

London

DLA Piper

Department for Environment, Food and Rural Affairs — Major Infrastructure and Environment Unit

Major Projects Authority

Planning Inspectorate

(Continued next page)

Table A.3 (continued)

<i>Participant</i>
United States
Washington:
World Bank
US Department of Transportation (and related agencies)
US Department of the Interior (and related agencies, including the Bureau of Land Management)
White House Council on Environmental Quality
National Mining Association
Edison Electric Institute
Teleconferences
California State Lands Commission
California Energy Commission
Office of California Governor
Federal Bureau of Land Management – California State Office

Table A.4 **Roundtable participants**

<i>Participant and location</i>	<i>Organisation</i>
Melbourne — 24 May 2013	
John Short	Aurizon Holdings
Ben Stewart	ANZ
Phil Montgomery	BHP Billiton
Emma Covacevich	Clayton UTZ
Mike Rollo	Leighton Holdings
David Stuart-Watt	Parsons Brinckerhoff
Sam Maresh	Rio Tinto Australia
Hilary Mercer	Shell Australia
Cassandra McCarthy	Glencore Xstrata
Steve Bridger	Glencore Xstrata
Jennifer Westacott	Business Council of Australia
Simon Pryor	Business Council of Australia
Matt Garbutt	Business Council of Australia

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B Australian DAA arrangements

This appendix summarises development assessment and approval (DAA) arrangements for major projects in each jurisdiction. Section B.1 describes the arrangements in each jurisdiction. Section B.2 contains a series of tables on assessment and approval authorities, compliance and enforcement responsibilities, and legislation relevant to DAA processes.

Unless otherwise indicated, the material in this appendix is based on Commission analysis of legislation in each jurisdiction, or the Commission's correspondence with individual agencies.

B.1 Overview of major project DAA arrangements by jurisdiction

Commonwealth

Major projects that are likely to have a significant impact on a matter of national environmental significance (MNES), or that are undertaken on Commonwealth land, or by a Commonwealth agency, may be subject to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Under the EPBC Act, there are no assessment and approval pathways of the type existing under State and Territory arrangements, although actions that are likely to have a significant impact on an MNES must be referred to the relevant Commonwealth Minister to determine whether the action is 'controlled' by the Act. If an action is controlled, the Minister determines what assessment process should be used.

The Minister can decide that the action is: clearly unacceptable (and cannot proceed as planned); a controlled action (subject to the full assessment and approval process under the EPBC Act); not a controlled action (provided the action proceeds in the manner specified by the Minister); or not a controlled action (no further action required under the EPBC Act). For actions deemed 'unacceptable', the proponent is notified and may withdraw the action, modify and resubmit, or request the Minister reconsider the decision.

For controlled actions, the next step is to determine the assessment approach. There are seven possible options open to the Minister:

- an assessment under a State or Territory bilateral assessment agreement accredited under the EPBC Act
- an assessment under a State or Territory assessment process accredited under the EPBC Act on a case-by-case basis
- assessment on referral information (that is, assessment is undertaken solely on the information provided on the referral form)
- assessment on preliminary documentation (this includes information on the referral form and any other relevant material identified by the Minister as being necessary to adequately assess a proposed action)
- assessment by environmental impact statement (EIS)
- assessment by public environment report (PER)
- assessment by public inquiry.

Table B.1 shows State and Territory processes accredited for EPBC Act purposes.

Table B.1 Accredited State and Territory assessments

<i>Jurisdiction</i>	<i>Accredited processes</i>	<i>Legislation</i>
New South Wales ^a	This agreement has expired	<i>Environmental Planning and Assessment Act 1979</i>
Victoria	Environmental effects statement Assessment by an Advisory Committee or a joint Advisory Committee/Panel Assessment by permit application Works approval application Bulk water entitlement assessment	<i>Environment Effects Act 1978</i> <i>Planning and Environment Act 1987</i> <i>Planning and Environment Act 1987</i> <i>Environment Protection Act 1970</i> <i>Water Act 1989</i>
Queensland	Environmental impact statement for coordinated projects	<i>Sustainable Planning Act 2009</i> <i>State Development and Public Works Organisation Act 1971</i> <i>Environment Protection Act 1994</i>
Western Australia	Assessment by public environmental review	<i>Environment Protection Act 1986</i>
South Australia	Environmental impact statement, public environment report or development report for 'major projects'	<i>Development Act 1993</i>
Northern Territory	Assessment by environmental impact statement public environmental review Assessment by inquiry	<i>Environmental Assessment Act</i> <i>Northern Territory Inquiries Act</i>
Tasmania	Integrated assessment process for projects of state significance Assessment of development proposal and environmental management plan Assessment process for projects of regional significance	<i>State Policies and Projects Act 1993</i> <i>Environmental Management and Pollution Control Act 1994</i> <i>Land Use Planning and Approvals Act 1993</i>
ACT	Environmental impact statement	<i>Planning and Development Act 2007</i>

^a The New South Wales agreement expired in 2012. The Australian Government has indicated that this agreement will be renewed in 2013.

A major project can also be subject to a range of other Commonwealth regulations requiring assessment and approval relating to environment, heritage, native title and land rights protections, as well as some regulations specific to offshore petroleum extraction and pipeline construction (table B.2).

Table B.2 **Commonwealth legislation affecting major projects**

	<i>Act</i>	<i>Agency</i>	<i>Process/approvals</i>
Environment	<i>Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)</i>	DSEWPAC	Under the EPBC Act, there are two ways of achieving approval for actions that are likely to have a significant impact on a matter of national environmental significance (MNES): Assessment of individual actions An individual action that will have, or is likely to have, a significant impact on a MNES (or any action that will have a significant impact on the environment on Commonwealth land or which is taken on Commonwealth land or by a Commonwealth agency that is likely to have a significant impact on the environment) must be referred to the Minister to determine if it requires assessment and approval under the EPBC Act. Strategic assessments A SA examines the potential impacts of actions under a policy, plan or program (for example, local government plans, regional plans and infrastructure plans). The Minister may endorse the plan and/or approve actions under the plan. The EPBC Act provides several other ways to strategically protect MNES including: • conservation agreements • bilateral agreements • providing the Ministers advice in relation to particular activities (s160) • bioregional planning • World and National Heritage plans.
	<i>Great Barrier Reef Marine Park Act 1975</i>	DSEWPAC	Permits are required for particular activities undertaken in the Great Barrier Reef Marine Park.
	<i>Environment Protection (Sea Dumping) Act 1981</i>	DSEWPAC	Permits are required for sea dumping activities undertaken in Commonwealth waters.
	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	DoIT / AMSA	This Act sets standards for sea pollution/discharge and imposes fines and penalties for breaches of those standards.
	<i>Sea Installations Act 1987</i>	DSEWPAC	Permits are required to construct sea installations in Commonwealth waters.
	<i>Environment Protection (Alligator Rivers Region) Act 1978</i>	DSEWPAC	This Act imposes requirements on proponents of uranium mining projects in the Alligator Rivers region.

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Table B.2 Commonwealth legislation affecting major projects (continued)

	<i>Act</i>	<i>Agency</i>	<i>Process/approvals</i>
Heritage	<i>Australian Heritage Council Act 2003</i>	DSEWPAC	This Act establishes the Australian Heritage Council, which advises the Minister on heritage matters (including the significance of heritage places being considered for listing by the Minister under the EPBC Act).
	<i>Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)</i>	DSEWPAC	World Heritage properties and National Heritage places are identified as MNES under the EPBC Act. Accordingly, any action that will have, or is likely to have, a significant impact on the heritage values of these places must be referred to the Minister to determine if it requires assessment and approval under the EPBC Act.
	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	DSEWPAC	The Minister can make a declaration to protect an area or object of Indigenous heritage from a threat of injury or desecration if a request is made by an Aboriginal or Torres Strait Islander person.
	<i>Protection of Movable Cultural Heritage Act 1986</i>	DRALGAS	Permits are required to export items of cultural heritage from Australia.
	<i>Historic Shipwrecks Act 1976</i>	DSEWPAC	Permits are required to damage or disturb historic shipwrecks or relics, to enter a protected zone around an historic shipwreck site, to transfer possession of a historic shipwreck relic and to remove a historic shipwreck relic from Australia.
Petroleum and pipelines	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>	DRET/ NOPSEMA	Authorisation is required to conduct petroleum exploration and recovery operations, and to construct and operate petroleum and greenhouse gas pipelines, in Commonwealth waters. Authorisations (titles) are granted by the Joint Authority. Petroleum projects undertaken in Commonwealth waters are regulated by NOPSEMA. Approvals and requirements under this regime include an environment plan (including an oil spill contingency plan), a well operations management plan, well activity approvals and a safety case.
	<i>Offshore Minerals Act 1994</i>	DRET	This Act applies to (non-petroleum) mining projects undertaken in Commonwealth waters. There are five different mining authorisations that can be granted by the Joint Authority.

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Table B.2 Commonwealth legislation affecting major projects (continued)

	<i>Act</i>	<i>Agency</i>	<i>Process/approvals</i>
	<i>Petroleum (Timor Sea Treaty) Act 2003</i>	DRET	Petroleum production activities in the Joint Petroleum Development Area (JPDA) (an area in the Timor Sea in which Australia and Timor-Leste jointly manage exploration and development of petroleum resources) are subject to approvals by the Autoridade Nacional do Petroleo (the ANP) (the Timor-Leste National Petroleum Authority) which regulates operations in the JPDA on behalf of both Australia and Timor-Leste.
	<i>Submarine Cables and Pipelines Protection Act 1963</i>	DoIT	Permits are required for activities that may impact on cables and pipelines in Commonwealth waters.
Native title and land rights	<i>Native Title Act 1993</i>	AGD and DFaHCSIA	This law allows for recognition of the native title rights of Indigenous people through a claims and mediation process. Determinations are made by the Federal Court of Australia. Other processes are administered by the Native Title Tribunal.
	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	DFaHCSIA	This Act provides for the transfer of land in the Northern Territory to Aboriginal people, who are represented by Aboriginal Land Councils. Permits are required to access land held under inalienable freehold title.
Others	<i>Airports Act 1996</i>	DoIT	Masters Plans, Environment Strategies and Major Development Plans are subject to approval by the Commonwealth Transport Minister.
	<i>Fisheries Management Act 1991</i>	DAFF/AFMA	Permits are required for taking fish and using boats and equipment in Commonwealth fisheries.

DSEWPAC stands for Department of Sustainability, Environment, Water, Populations and Communities. DRET stands for Department of Resources, Energy and Tourism. NOPSEMA stands for National Offshore Petroleum Safety and Environmental Management Authority. DoIT stands for Department of Infrastructure and Transport. AGD stands for Attorney-General's Department. FaHCSIA stands for Department of Families, Housing, Community Services and Indigenous Affairs. DAFF stands for Department of Agriculture, Fisheries and Forestry. AFMA stands for Australian Fisheries Management Authority. DRALGAS stands for Department of Regional Australia, Local Government, Arts and Sport. AMSA stands for Australian Maritime Safety Authority.

New South Wales

The NSW *Environmental Planning and Assessment Act 1979* (EPA Act) establishes two pathways for major project assessment in NSW:

- the state significant development pathway (SSD) (under Part 4.1 of the EPA Act) is primarily for large-scale private sector projects usually greater than \$30 million
- the state significant infrastructure pathway (SSI) (under Part 5.1 of the EPA Act) is primarily for large public infrastructure projects where a government agency is the proponent.

The NSW State Environmental Planning Policy (State and Regional Development) 2011 sets out a range of criteria defining the types of projects that must be subject to the SSD or SSI pathway. A proponent who believes that their project meets the SSD or SSI criteria typically lodges a preliminary online development application with the NSW Department of Planning and Infrastructure (the Department). The Department makes a preliminary assessment of the project against the criteria and confirms whether the proposal qualifies.

In certain circumstances, the Minister for Planning (the Minister) can ‘declare’ or ‘call-in’ projects that do not meet the criteria as a SSD or SSI. For example, the Minister can ‘call-in’ a project as a SSD, but only after the Minister has obtained, and made public, advice from the Planning Assessment Commission about the state or regional planning significance of the development.

Development applications are processed and assessed within the Department. Once the pathway is confirmed, the Department begins the process for determining the Director-General’s Environmental Assessment Requirements (DGRs) for the project. These specify the scope of issues and other information requirements that must be addressed in the project’s environmental impacts statement (EIS). In setting the DGRs, the Department seeks input from the referral agencies and public authorities (including local councils) that would normally have statutory regulatory and approval responsibilities for the proposed project.

While the Minister is technically the consent authority for SSD and SSI applications, in practice the Department has delegation to make decisions where:

- there are less than 25 objections
- there is local council support, and
- a reportable political donation has not been made.

The Planning Assessment Commission has delegation to make decisions on applications made by proponents as follows (excluding applications made by, or on behalf of, a public authority):

- there are more than 25 objections
- the local council has objected, or
- a reportable political donation has been made.

A declaration of SSI means certain permits or approvals are not required by proponents, such as:

- an approval under Part 4, or an excavation permit under section 139, of the *Heritage Act 1977*
- an Aboriginal heritage impact permit under section 90 of the *National Parks and Wildlife Act 1974*
- an authorisation referred to in section 12 of the *Native Vegetation Act 2003* (or under any Act repealed by that Act) to clear native vegetation or State protected land.

A declaration of SSI also means there are some permits or approvals which, while proponents still need to obtain them, cannot be refused by agencies because their refusal would be inconsistent with the development consent. These include:

- an aquaculture permit under section 144 of the *Fisheries Management Act 1994*
- an approval under section 15 of the *Mine Subsidence Compensation Act 1961*
- a mining lease under the *Mining Act 1992*
- a production lease under the *Petroleum (Onshore) Act 1991*
- an environment protection licence under Chapter 3 of the *Protection of the Environment Operations Act 1997*
- a licence under the *Pipelines Act 1967*.

The Minister can also declare any SSI project as critical state significant infrastructure (CSSI) if he or she considers it is essential for economic, environmental or social reasons. A CSSI declaration means a development

application can be lodged without the consent of landowners, exempts the development application from additional environmental laws, and restricts the availability of merit appeals. The EPA Act prohibits ministerial delegation of CSSI projects.

Victoria

A major project in Victoria can be assessed and approved under a range of regular and designated major project pathways depending on the characteristics of the project and the requirements under the *Planning and Environment Act 1987* (Planning and Environment Act) and other legislation. In particular, the DAA processes for a given project will depend on:

- whether it requires a planning permit, an amendment to a local planning scheme, or a Ministerial Permit under the Planning and Environment Act
- whether the ‘responsible authority’ under the Planning and Environment Act — the authority in charge of administering a planning scheme and granting permits — is a local government, the Minister for Planning (through use of ‘call-in’ powers or Ministerial Permits), or some other authority
- what other DAA processes are required under other state legislation (such as for mining projects under the *Mineral Resources (Sustainable Development) Act 1990*)
- whether an environmental assessment is required under the *Environment Effects Act 1978* (Environment Effects Act)

For major projects that require a planning permit, a project proponent lodges an planning permit application with the local council who assesses and approves the application in accordance with a local planning scheme following processes set out in the Planning and Environment Act.

A major project may also require an amendment to a local planning scheme to allow a planning permit to be approved by a local government. The amendment can be requested by a project proponent, the local government or another planning authority but must be decided by the Minister for Planning following processes set out in the Planning and Environment Act.

The Minister for Planning can call-in a planning permit application that would otherwise be assessed and approved by a local government (under Section 97 of the Planning and Environment Act) or an application to amend a planning scheme (under processes laid out in the Planning and Environment Act, *Heritage Act 1995* and *Victorian Civil and Administrative Tribunal Act 1998*). The criteria for

exercising this call-in power include where a project is of State or regional significance.

Certain large-scale developments or developments in specified areas require a Ministerial Permit from the Minister for Planning. This pathway has been used frequently in recent years, predominantly for large commercial and residential buildings in the City of Melbourne and its surrounds and developments in the State's alpine areas.

Environmental impacts are assessed under a separate environmental assessment process established under the Environment Effects Act. Any responsible authority (local government, Minister or other) that believes a project they are assessing may have significant effects on the environment must refer the planning permit application to the Minister for Planning for a decision on whether an environmental effects statement (EES) is required. Where the Minister determines an EES is required, the proponent must prepare and submit the EES to the Minister for assessment under processes set out in the Environment Effects Act. The Minister's assessment report is sent to the relevant decisionmaking authority to inform them in making a final decision on whether or not to approve the project.

Major transport projects in Victoria are assessed under a dedicated DAA pathway. They must be declared by the Governor under a process set out in the *Major Transport Projects Facilitation Act 2009*.

A project is eligible to be declared if it is: road infrastructure; rail infrastructure; infrastructure that can be used for the movement of persons or goods; a port; a facility at which goods can be loaded or unloaded or temporarily stored; or any project that incorporates one of these types of infrastructure.

The Premier must prepare, and publish in the Government Gazette, project declaration guidelines which are used to determine whether the project is of economic, social or environmental significance to the state or a region.

The Premier, in consultation with the Minister for Planning, assesses the project against the guidelines and if they find it to be of significance, the Premier can recommend declaration to the Governor, who then formally declares the project a major transport project.

Once the project has been declared, the process depends on the level of assessment. For impact management plans, the Minister for Planning assesses and approves the development. For comprehensive impact statements, a committee assesses the development, and the Minister for Planning approves it.

A bill proposing to amend these processes, the Major Transport Projects Facilitation Amendment Bill (East West Link and other projects) 2013, is currently before the Victorian Parliament. Amongst other proposed changes, the bill seeks to: provide increase flexibility to proponents (for example, with regard to allowing variations to project designs); allow some early works to commence sooner; shorten statutory timelines; and streamline administrative arrangements (Napthine 2013).

Queensland

Major projects in Queensland can be assessed and approved under various designated pathways under the *State Development and Public Works Organisation Act 1971* (SDPWO Act). These pathways include:

- *coordinated projects*: developments with complex approval requirements, that are of strategic significance, or that have significant environmental effects, or significant infrastructure requirements (for example, large LNG and mining projects, industrial installations, resorts, ports and transport infrastructure)
- *prescribed developments*: mineral or energy projects of major economic significance, or that require provision of infrastructure which would place an excessive financial burden on the state, or that significantly affect provision of services and facilities by the government
- *prescribed projects*: coordinated projects, projects in a state development area, or projects considered to be economically or socially significant to Queensland or the region in which the project is to be undertaken, or that affect an environmental interest of Queensland or a region, can be declared prescribed projects by the Minister for Planning
- *projects in declared state development areas*: clearly defined areas of land established by the Coordinator-General to promote economic development in Queensland (for example, industrial hubs for large-scale, heavy industry, multi-user infrastructure corridors and major public infrastructure sites)
- *private infrastructure facilities*: projects that are of economic or social significance and have economic or social benefits to a region, or that satisfy an identified need or demand for services (for example, road, railway, bridge or other transport infrastructure, electricity generation, transmission or distribution facilities, oil or gas storage, transmission or distribution facilities).

Major projects with a ‘state interest’ can be called-in and assessed by the Minister for Planning under the *Sustainable Planning Act 2009*. Major urban developments in priority development areas can be assessed under processes set out in the *Economic Development Act 2012*.

Under the *State Development and Public Works Organisation Act 1971* (SDPWOA), a project might be declared a coordinated project if it has:

- complex approval requirements, involving local, state and Australian Governments
- significant environmental effects
- strategic significance to the locality, region or state, including for the infrastructure, economic and social benefits, capital investment or employment opportunities it may provide
- significant infrastructure requirements.

The Coordinator-General can make a declaration in response to an application from a proponent or can declare any project he or she considers justified.

When an environmental impact statement (EIS) is required under the SDPWOA, terms of reference must be developed. The Queensland Government has recently reformed this process by developing shortened, standardised terms of reference for the EIS and reducing state agency input into the draft terms of reference.

Once the EIS has been conducted, the EIS report is publicly exhibited and public submissions can be made. The Coordinator-General is responsible for evaluating the EIS, taking into account public submissions and other material, before preparing an assessment report which is also made public. The proponent may propose changes, which if substantial may prompt the Coordinator-General to require a further EIS assessment with public notice period. The Coordinator-General will then prepare a 'Change Report' which is also made public.

The Coordinator-General provides an assessment report to the decision maker (ordinarily the Department of Environment and Heritage Protection (DEHP)) that recommends whether or not the project should proceed, sets out conditions and offsets for the development approval, and can also recommend conditions that should be imposed on subsequent environmental authorities/permits. DEHP is also responsible for granting some environmental authorities and permits, and imposing conditions on these permits. DEHP can only decide whether or not the project should proceed. If the development is approved, DEHP must accept all the conditions recommended by the Coordinator-General. Any additional conditions it imposes must be consistent with these conditions.

Coordinated projects are also required to conduct a social impact assessment. Recent reforms mean proponents are no longer required to prepare a social impact management plan, instead the focus is on outcomes-based commitments and mitigation strategies.

Coordinated project proponents are still required to obtain all other secondary development approvals and licences from local authorities and state government agencies.

Western Australia

Major projects in Western Australia can be assessed and approved as a:

- development that must be approved by Development Assessment Panels (DAPs)
- development for which the proponent may elect to have the DAPs or another body determine it
- development that is not eligible to be determined by the DAPs, in which case it will be assessed and approved by the local council and/or the Western Australian Planning Commission (WAPC).

With some exceptions (such as single dwellings), applications for which the estimated cost of development is \$7 million or more (\$15 million or more in the City of Perth) are mandatory DAP applications. There are 15 DAPs, each dealing with a specific region. DAPs comprise a mix of local government representatives and technical experts. Local government representatives are nominated by the relevant local government, and appointed by the Minister. Specialist members are appointed by the Minister.

A project subject to an ultimate approval decision by a DAP may be assessed by the local council, the WAPC, or both, depending on the provisions of the regional planning scheme.

The local government and/or the WAPC assesses the application in accordance with the relevant local or regional planning scheme, including public advertising of the application (if required) and referral to internal and external departments and agencies. The local government and/or the WAPC prepares a 'responsible authority report' containing its recommendations on how the DAP application should be determined and provides it to the DAP. This is intended to be a technical report by their planner, and not an expression of a council's view as to whether they think the application should be approved.

The DAP is required to determine applications in accordance with the provisions of the relevant planning instrument. The DAP is required to determine the application within 60 days (if the application does not require public advertising) or within 90 days (if the application does require public advertising) from the date the DAP development application was received and acknowledged by the local government. The DAP must have regard to, but is not bound to give effect to, the

recommendations included in the report. However, the planning scheme applies to the DAP as to other bodies. The meeting at which the DAP makes its decision is public.

The applicant can seek a review of the DAP's decision by the State Administrative Tribunal. If there is an application before the State Administrative Tribunal, the Minister may call-in this application and determine it him or herself. The Minister is not bound by planning considerations but may make the determination having regard to any other matter, including the public interest, and this decision is not appellable.

The assessment manager (WAPC or the local council) does not conduct the environmental impact assessment associated with major projects. In Western Australia these are the responsibility of the Environmental Protection Authority (EPA). The EPA processes are separate from the development approval process.

Once a significant or strategic proposal has been referred, the EPA has 28 days to decide whether or not to assess it. When it completes an assessment, it will provide a report to the Minister and the decisionmaking authority. The report is also made public. The Minister for Environment will then consult with relevant Ministers (for example, planning and mining) and if possible, agree with them on whether, and how, the proposal should be implemented. If the Ministers cannot agree, the matter is referred to the Cabinet, and their decision cannot be appealed.

Western Australia has adopted a Lead Agency Framework to assist in facilitating the approval of major projects. This means one government agency, such as the Department of Mines and Petroleum for a mining project, assists with or coordinates approvals for a project proposal.

The lead agency is responsible for:

- providing proponents with information on statutory requirements through agency guidelines and referrals
- case-managing and coordinating approvals applications across government for proposals, where appropriate
- assisting proponents to identify the potential impacts of the proposal on matters such as infrastructure, the environment and regional communities as well as the social considerations that arise from the proposal.

South Australia

The two pathways for assessing major projects in South Australia are set out in the *Development Act 1993*:

- the major development or project pathway (under section 46). Major development proposals include a range of private and some publicly funded projects including the desalination plant, port facilities, commercial and residential buildings, and mining operations
- the Crown development and public infrastructure pathway (under section 49) providing for the streamlined assessment of public infrastructure projects (advanced by either public or private proponents). The Crown development and public infrastructure pathway is used primarily for government infrastructure projects but is also available for private projects that are sponsored by a Government agency.

The major developments process is accredited under the Commonwealth EPBC Act bilateral assessment agreement (although the Crown development and public infrastructure pathway process is not). Once a proposal has been declared a ‘major development’ by the Minister under section 46, the development application is referred to the Development Assessment Commission (DAC) — a statutory body established under the *Development Act 1993*.

The DAC then determines which of three levels of further detailed assessment is required:

- an environmental impact statement (EIS) for the most complex proposals, where there are a wide range of issues to be investigated in depth
- a public environmental report (PER) where the issues surrounding the proposal need investigation in depth but are narrower in scope and relatively well known
- a development report (DR), the least complex level of assessment, which relies principally on existing information.

Typically where an EIS is required, the proponent would prepare the EIS and the Department would prepare an assessment report for the Minister, ahead of a decision on the development application by the Government (although some decisions could be delegated to a Minister or the DAC). For Crown development and public infrastructure, the DAC assesses all applications and provides a report to the Minister for Planning, who makes the final decision. If the Minister approves a development that the DAC considers to vary significantly with the local development plan, or if the local council objects, the Minister must submit a report

on the matter to Parliament. There are no appeal rights for the major developments or Crown development and public infrastructure pathways.

Where a project includes one or more activities of environmental significance (*Environmental Protection Act 1993* Schedule 1), assessment documents must be referred to the Environment Protection Authority (EPA) for deliberation and comment. Where such an activity is not proposed, assessment documents may still be referred to the EPA should the assessment authority decide such a referral is necessary to fully understand the potential impacts of a proposal. The EPA also issues environmental permits (although after a development approval has been obtained under section 46, the EPA cannot refuse a required permit).

In South Australia, Case Management facilitates access to regulatory agency personnel on behalf of the proponent, enabling regulatory agencies to be aware of the potential project and to assign resources from the beginning of the assessment process. Case managers typically have established networks within the relevant regulatory agencies.

Tasmania

Tasmanian legislation establishes three main pathways for major projects:

- projects of state significance (under the *State Policies and Projects Act 1993*)
- projects of regional significance (under the *Land Use Planning Approvals Act 1995*)
- major infrastructure development projects (under the *Major Infrastructure Development Approvals Act 1999*), used primarily for large public infrastructure projects such as roads, railways or power lines.

If a project is declared a project of state significance, the Environment Protection Authority (EPA) will not conduct an environmental impact assessment. Instead, the Tasmanian Planning Commission (TPC) conducts an integrated assessment of all the environmental, social, economic and community issues relevant to that project, as well as any other issues as may be prescribed by the Minister. The TPC reports to the Minister ‘as soon as practicable’ on whether the project should proceed and under what conditions. This report is publicly available.

The Minister must make a decision, which can differ from the Commission’s recommendation, within 28 days of receiving the report. There are no criteria in legislation to guide decisions, however they need to be approved by both Houses of Parliament to take effect. The TPC can subsequently specify additional conditions in a report (which also must be publicly available). The Minister must respond to

this report within 28 days. If the new decision diverges from the previous one, it must be provided to both Houses of Parliament.

If a project is declared as a project of regional significance, the TPC appoints a Development Assessment Panel (DAP) to undertake the assessment, including the setting of the scope of the environmental assessment (the Assessment Guidelines), and also refers the project to the EPA. The DAP (and the Minister) receives advice from the EPA on whether the project will be assessed under the *Environmental Management and Pollution Control Act 1994*, the class of assessment required, and the scope of the Assessment Guidelines. The DAP must make a decision about whether to grant a development permit for the project (and under what conditions) as soon as practicable.

If the Minister decides to declare a project to be a major infrastructure project (a decision which is disallowable by Parliament), a combined planning authority is then set up with similar composition to that of a DAP, with representatives from the TPC, councils and an expert. It both assesses the project and decides whether to grant permits to the project and under what conditions. The role of the EPA is the same as for projects of regional significance.

Australian Capital Territory

Under the *Planning and Development Act 2007*, the requirements for assessing development depend on which assessment track the development falls under. When an application for development is made, it can fall under one of three assessment tracks: code track, merit track or impact track.

The code track is the least onerous. Development proposals are approved if they comply with the rules that apply to the proposal.

Development applications in the merit track are considered by the Planning and Land Authority which must consider:

- the objectives for the zone in which the development is proposed to take place
- the suitability of the land for the proposed development
- each representation received in relation to the development
- the advice of any entity to which the application was referred
- any management plan for public land
- the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts.

Merit track applications must also be referred to a number of other agencies as prescribed by the Territory Plan (the key statutory planning document in the ACT), unless their endorsement has been lodged with the development application.

In addition to decision requirements that apply to merit track assessments, development applications in the impact track must include a completed environmental impact statement (EIS). However, the Minister may exempt an application from having to complete an EIS where he or she is satisfied that the expected environmental impact of the development proposal has already been sufficiently addressed by another study. An EIS is also not required if the ACT Conservator of Flora and Fauna or the ACT Heritage Council provides advice that the proposal is not likely to have a significant adverse environmental impact. Where an EIS is required from a proponent, the Planning and Land Authority must prepare an assessment report responding to the EIS.

If a development application is in the impact track, the Planning and Land Authority must refer the application to a number of other agencies, and must take into account any advice received from entities to which the application was referred. Development approval must not be given if this would be inconsistent with any advice given by a referral entity, unless the person approving the application is satisfied that the approval is consistent with the objects of the Territory Plan and that other options, design solutions and alternatives have been considered.

The Territory Plan usually dictates which track the application will fall into, but the application can be allocated to the impact track regardless of what the Territory Plan dictates, if:

- the Minister with planning responsibilities makes a declaration under section 124
- the Health Minister makes a declaration under section 125
- the development is not prohibited or exempt and the Territory Plan does not specify which track is applicable
- the development is a controlled action under the EPBC Act and a bilateral agreement allows the proposal to be assessed by the Territory.

The Minister may call-in any decision if, in the Minister's opinion:

- the application raises a major policy issue
- the application seeks approval for a development that may have a substantial effect on the achievement or development of the object of the Territory Plan
- the approval or refusal of the application would provide a substantial public benefit.

Northern Territory

Approval procedures for major projects in the Northern Territory are consistent with the approval process operating more generally in the Territory. There are major projects teams in the Department of Business and the Department of the Chief Minister, that perform a ‘Lead Agency’ role facilitating approvals through government (but not doing assessments or providing approvals directly).

The NT *Planning Act* defines activities requiring a ‘development consent’. Divisions of the Development Consent Authority assess and approve development applications within their division area. Outside of these areas the consent authority is the Minister. The Minister may also ‘call-in’ applications.

The Planning Minister can also grant Exceptional Development Permits to allow projects that would otherwise be a prohibited development under the Planning Scheme, and this instrument has been used for some major projects.

Zoning maps show the zoning of land in the Northern Territory, and there is a defined range of uses permitted for each zone under the Planning Scheme. Uses in a particular zone may be permitted without the consent of the consent authority, permitted with the consent of the consent authority, or prohibited. There are large areas of the Northern Territory that are unzoned. In the unzoned areas, development provisions of the Planning Scheme do not apply, although land use controls sometimes do.

Environmental assessments are overseen by the NT Environment Protection Authority. Where a project is likely to have a significant impact on the environment, some form of environmental assessment is required. This will take the form of either an environmental impact statement (EIS) or public environmental report (PER), depending on the scale, complexity and impact of the project. The PER process is more limited than for an EIS except where the proposal is being assessed under the bilateral assessment agreement between the Northern Territory and Australian Governments.

The NT EPA assesses the PER or EIS and makes recommendations to the Environment Minister, who passes on the NT EPA’s assessment and recommendations to the responsible portfolio Minister who makes the final decision. In providing it to the responsible Minister, the Environment Minister may make comment on the NT EPA’s assessment report. If the comment is contrary to the assessment report, the Environment Minister must provide notice to the NT EPA of the comment and the reason for it, and table this notice in the Legislative Assembly.

If the responsible Minister makes an approval decision that is contrary to the NT EPA’s assessment report, he or she must provide notice to the NT EPA of the decision with reasons and table this notice in the Legislative Assembly.

Mining projects are regulated under the *Mining Management Act*. For mining projects, following an environmental impact assessment that takes place in the same way as for non-mining projects, all proposed disturbance to the environment must be assessed and approved through a Mining Management Plan overseen by the Department of Mines and Energy. The plan includes responses to recommendations of the environmental impact assessment.

B.2 Jurisdictional tables

The following tables highlight key aspects of the assessment and approval process.

Table B.3 provides information about the assessment and approval authorities in each jurisdiction.

Table B.4 details the Commission’s analysis of responsibility for compliance and enforcement of approval conditions in each jurisdiction.

Table B.5 lists the legislation most likely to impact on major projects. This list is not intended to be fully comprehensive. Importantly, the table highlights legislation potentially affecting any major project, and should not be read as being representative of the regulatory burden affecting any one project.

Table B.3 Assessment and approval authorities

Selected pathways, by jurisdiction

<i>Jurisdiction</i>	<i>Assessment manager</i>	<i>Approval authority</i>	<i>Is the assessor also the approval authority?</i>
Commonwealth			
Matters of national environmental significance (DSEWPAC)	Secretary of the Department of the Environment	Minister for Environment	No
New South Wales			
State significant developments	Department of Planning	Minister delegates to the Planning Assessment Commission or Department of Planning ^a	Sometimes
State significant infrastructure	Department of Planning	Minister delegates to the Planning Assessment Commission or Department of Planning ^a	Sometimes
Critical state significant infrastructure	Department of Planning	Minister for Planning	No
Victoria			
Ministerial call-in Major transport projects	Minister for Planning Assessment committee or Minister for planning	Minister for Planning Planning Minister (on advice from the EPA)	Yes Sometimes, depending on the pathway
Queensland			
Coordinated projects	Department of Environment and Heritage Protection is the assessment manager. However, in practice, the Coordinator-General, as a concurrence agency, conducts the environmental impact assessment and imposes conditions which, if the project is approved, bind the approval authority. ^b	Department of Environment and Heritage Protection	In practice, no
Urban development	Minister for Economic Development	Minister for Economic Development	Yes

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Table B.3 Assessment and approval authorities (continued)

Western Australia			
Development Assessment panel (DAP) projects ^c	Local government/ Western Australian Planning Commission	Development Assessment Panel	No
South Australia			
Major development	Minister	Government, but may delegate ^d	Sometimes
Crown development and public infrastructure	Development Assessment Commission	Minister	No
Tasmania			
Projects of state significance	Tasmanian Planning Commission	Minister and both houses of parliament	No
Projects of regional significance	Development Assessment Panel	Development Assessment Panel	Yes
Major infrastructure projects	Combined Planning Authority	Combined Planning Authority	Yes
Northern Territory			
Development permits	Development Consent Authority	Development Consent Authority	Yes
Exceptional Development Permits (EDPs) ^e	Minister for Planning	Minister for Planning	Yes
Ministerial call-in ^f	Minister for Planning	Minister for Planning	Yes
ACT			
Ordinary development	ACT Planning and Land Authority	ACT Planning and Land Authority	Yes
Ministerial call-in	Minister for Planning	Minister for Planning	Yes

^a While section 23 of the Environmental Planning and Assessment Act 1979 NSW allows the Minister to delegate to the Planning Assessment Commission, the Director-General of the Planning Department, or any other public authority, in practice the Minister for Planning has issued two instruments of delegation clarifying when this delegation will occur. The Department of Planning has delegation to make decisions on State Significant Development or State Significant Infrastructure applications where there are less than 25 objections, the local council has not objected, and a reportable political donation has not been made. The Planning Assessment Commission makes decisions on applications for State Significant Infrastructure or State Significant Development made by private proponents where there are more than 25 objections, a local council has objected, or a reportable political donation has been made.. Delegation of critical state significant infrastructure projects is prohibited. ^b The approval authority cannot impose any conditions that are inconsistent with the conditions imposed by the Coordinator General. ^c A development application with an estimated cost of \$7 million or more (and \$15 million or more in the City of Perth), unless an exclusion, must be determined by a DAP. ^d May delegate to Minister or Development Assessment Commission below size limits specified in the *Development Act 1993*. ^e EDPs can be granted when a development application is inconsistent with a planning scheme. ^f Ministerial call-in operates when the Minister gives a direction to the consent authority, after which the Minister becomes the consent authority.

Table B.4 Monitoring compliance and enforcement responsibilities by jurisdiction

<i>Area of responsibility</i>	<i>Agency involved</i>
New South Wales	
Approvals from Planning Department or Minister	Department of Planning and Infrastructure
Mining and petroleum approvals	Division of Resources and Energy
Heritage	Office of Environment and Heritage Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Indigenous heritage	Office of Environment and Heritage
Crown Land access	Division of Crown Lands
Transport infrastructure	Roads and Maritime Services
Environmental works approvals	Environment Protection Authority
Threatened species	Office of Environment and Heritage
Environment approval conditions and offsets	Office of Environment and Heritage
Explosives and dangerous goods	Environment Protection Authority
Water licences	Office of Water
Noise Pollution	Environment Protection Authority
Victoria	
Mining and petroleum approvals	Department of Environment and Primary Industries
Heritage	Heritage Victoria Department of Planning and Community Development Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Indigenous heritage	Department of Planning and Community Development Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Environmental works approvals	Environment Protection Authority
Threatened species	Department of Environment and Primary Industries
Environment approval conditions and offsets	Environment Protection Authority Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Explosives and dangerous goods	Worksafe Victoria
Water licences	Department of Environment and Primary Industries
Noise pollution	Environment Protection Authority
Queensland	
Coordinator General Approvals	Department of State Development, Infrastructure and Planning

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Table B.4 Monitoring compliance and enforcement responsibilities by jurisdiction (continued)

<i>Area of responsibility</i>	<i>Agency involved</i>
Mining and petroleum approvals	Department of Natural Resources and Mines
Heritage	Department of Environment and Heritage Protection
Indigenous heritage	Department of Environment and Heritage Protection Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Environmental works approvals	Department of Environment and Heritage Protection
Threatened species	Department of Environment and Heritage Protection
Environment approval conditions and offsets	Department of Environment and Heritage Protection Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Explosives and dangerous goods	Department of Transport and Main Roads
Water licences	Department of Natural Resources and Mines
Western Australia	
Mining and petroleum approvals	Department of Mines and Petroleum
Heritage	State Heritage Office
Indigenous heritage	Department of Sustainability, Environment, Water, Population and Communities (Cwlth) Department of Aboriginal Affairs
Crown Land access	Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Environmental works approvals	State Land Services
Threatened species	Department of Environment and Conservation
Environment approval conditions and offsets	Department of Environment and Conservation Environmental Protection Agency
Explosives and dangerous goods	Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Water licences	Department of Mines and Petroleum
Local content	Department of Water
	Department of State Development
South Australia	
Mining and petroleum approvals	Department for Manufacturing, Innovation, Trade, Resources and Energy

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Table B.4 (continued)

<i>Area of responsibility</i>	<i>Agency involved</i>
Heritage	Department of Environment, Water and Natural Resources
Indigenous heritage	Department of Sustainability, Environment, Water, Population and Communities (Cwlth) Aboriginal Affairs and Reconciliation Division
Crown Land access	Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Environmental works approvals	Department of Environment, Water and Natural Resources
Threatened species	Environment Protection Authority
Environment approval conditions and offsets	Department of Environment, Water and Natural Resources Environment Protection Authority Department for Manufacturing, Innovation, Trade, Resources and Energy Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Explosives and dangerous goods	SafeWork SA
Water licences	Department of Environment, Water and Natural Resources
Tasmania	
Mining and petroleum approvals	Mineral Resources Tasmania
Heritage	Tasmanian Heritage Council Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Indigenous heritage	Aboriginal Heritage Tasmania Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Crown Land access	Department of Primary Industries, Parks, Water and Environment
Environmental works approvals	Environment Protection Authority
Threatened species	Department of Primary Industries, Parks, Water and Environment
Environment approval conditions and offsets	Environment Protection Authority Department of Primary Industries, Parks, Water and Environment Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Explosives and dangerous goods	Workplace Standards
Water licences	Department of Primary Industries, Parks, Water and Environment

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Table B.4 Monitoring compliance and enforcement responsibilities by jurisdiction (continued)

<i>Area of responsibility</i>	<i>Agency involved</i>
Australian Capital Territory	
Heritage	ACT Heritage Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Indigenous heritage	ACT Heritage Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Environmental works approvals	Environment Protection Authority
Threatened species	Environment and Sustainable Development Directorate
Environment approval conditions and offsets	Environment and Sustainable Development Directorate Environment Protection Authority Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Explosives and dangerous goods	WorkSafe ACT
Water licences	Environment and Sustainable Development Directorate
Northern Territory	
Mining and petroleum approvals	Department of Mines and Energy
Heritage	The Northern Territory Heritage Council Department of Lands, Planning and the Environment Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Indigenous heritage	The Aboriginal Areas Protection Authority Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Crown Land access	Land and Planning Services
Environmental works approvals	Northern Territory Environment Protection Agency
Threatened species	Department of Land Resource Management
Environment approval conditions and offsets	Northern Territory Environment Protection Agency Department of Sustainability, Environment, Water, Population and Communities (Cwlth)
Explosives and dangerous goods	NT WorkSafe
Water licences	Department of Land Resource Management

Source: Commission analysis.

Table B.5 Legislation relevant to major project assessment and approval processes^a

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Petroleum and pipelines			
Petroleum and pipelines	Commonwealth	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>	Department of Resources, Energy and Tourism
Petroleum and pipelines	Commonwealth	<i>Petroleum (Timor Sea Treaty) Act 2003</i>	Department of Resources, Energy and Tourism
Petroleum and pipelines	NSW	<i>Petroleum (Offshore) Act 1982</i>	NSW Trade and Investment
Petroleum and pipelines	NSW	<i>Petroleum (Onshore) Act 1991</i>	NSW Trade and Investment
Petroleum and pipelines	NSW	<i>Pipelines Act 1967</i>	NSW Trade and Investment
Petroleum and pipelines	Victoria	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2010</i>	Department of Environment and Primary Industries
Petroleum and pipelines	Victoria	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Environment and Primary Industries
Petroleum and pipelines	Victoria	<i>Petroleum Act 1998</i>	Department of Environment and Primary Industries
Petroleum and pipelines	Victoria	<i>Pipelines Act 2005</i>	Department of Environment and Primary Industries
Petroleum and pipelines	Queensland	<i>Petroleum Act 1923</i>	Department of Natural Resources and Mines
Petroleum and pipelines	Queensland	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Natural Resources and Mines
Petroleum and pipelines	Queensland	<i>Petroleum and Gas (Production and Safety) Act 2004</i>	Department of Natural Resources and Mines
Petroleum and pipelines	WA	<i>Barrow Island Act 2003</i>	Department of Mines and Petroleum
Petroleum and pipelines	WA	<i>Petroleum and Geothermal Energy Resources Act 1967.</i>	Department of Mines and Petroleum
Petroleum and pipelines	WA	<i>Petroleum (Submerged Lands) Act 1982.</i>	Department of Mines and Petroleum
Petroleum and pipelines	WA	<i>Petroleum Pipelines Act 1969.</i>	Department of Mines and Petroleum
Petroleum and pipelines	SA	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Petroleum and pipelines	SA	<i>Petroleum and Geothermal Energy Act 2000</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
Petroleum and pipelines	Tasmania	<i>Mineral Resources Development Act 1995</i>	Department of Infrastructure, Energy and Resources
Petroleum and pipelines	Tasmania	<i>Petroleum (Submerged Lands) Act 1982</i>	Department of Infrastructure, Energy and Resources
Petroleum and pipelines	Tasmania	<i>Petroleum Products Emergency Act 1994</i>	Department of Infrastructure, Energy and Resources
Petroleum and pipelines	NT	<i>Energy Pipelines Act 1983</i>	Department of Mines and Energy
Petroleum and pipelines	NT	<i>Petroleum Act 1984</i>	Department of Mines and Energy
Petroleum and pipelines	NT	<i>Petroleum (Submerged Lands) Act 1981</i>	Department of Mines and Energy
Petroleum and pipelines	NT	<i>Geothermal Energy Act 2009</i>	Department of Mines and Energy
Mining and energy			
Nuclear	Commonwealth	<i>Atomic Energy Act 1953</i>	Department of Resources, Energy and Tourism
Nuclear	Commonwealth	<i>Uranium Royalty (Northern Territory) Act 2009</i>	Department of Resources, Energy and Tourism
Nuclear	Commonwealth	<i>Nuclear Non-Proliferation (Safeguards) Act 1987</i>	Australian Safeguards and Non-Proliferation Office
Nuclear	Commonwealth	<i>Australian Radiation Protection and Nuclear Safety Act 1998</i>	Australian Radiation Protection and Nuclear Safety Agency
Nuclear	Commonwealth	<i>Environment Protection (Alligator Rivers Region) Act 1978</i>	Department of Sustainability, Environment, Water, Population and Communities
Nuclear	NSW	<i>Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986</i>	NSW Trade and Investment
Nuclear	NSW	<i>Mining Legislation Amendment (Uranium Exploration) Act 2012</i>	NSW Trade and Investment
Nuclear	Victoria	<i>Nuclear Activities (Prohibitions) Act 1983</i>	Department of Environment and Primary Industries
Nuclear	Queensland	<i>Nuclear Facilities Prohibition Act 2007</i>	Department of Energy and Water Supply
Nuclear	WA	<i>Radiation Safety Act 1975</i>	Department of Health

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Nuclear	WA	<i>Nuclear Activities Regulation Act 1978</i>	Department of State Development
Nuclear	WA	<i>Nuclear Waste Storage and Transportation (Prohibition) Act 1999</i>	Department of Health
Nuclear	SA	<i>Radiation Protection and Control Act 1982</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
Nuclear	SA	<i>Nuclear Waste Storage Facility (Prohibition) Act 2000</i>	Department of Environment, Water and Natural Resources
Minerals	NT	<i>Mineral Royalty Act 1982</i>	Department of Treasury and Finance
Minerals	NT	<i>Mineral Titles Act 2010</i>	Department of Mines and Energy
Minerals	NSW	<i>Mining Act 1992</i>	NSW Trade and Investment
Minerals	NSW	<i>Coal Industry Act 2001</i>	NSW Trade and Investment
Minerals	NSW	<i>Mine Subsidence Compensation Act 1961</i>	NSW Trade and Investment
Minerals	Victoria	<i>Gas Industry Act 2001</i>	Department of Environment and Primary Industries
Energy	Victoria	<i>Geothermal Energy Resources Act 2005</i>	Department of Environment and Primary Industries
Energy	Victoria	<i>Victorian Renewable Energy Act 2006</i>	Essential Services Commission
Minerals	Victoria	<i>Mineral Resources (Sustainable Development) Act 1990</i>	Department of Environment and Primary Industries
Minerals	Queensland	<i>Mineral Resources Act 1989</i>	Department of Natural Resources and Mines
Energy	Queensland	<i>Clean Energy Act 2008</i>	Department of Energy and Water Supply
Minerals	Queensland	<i>Greenhouse Gas Storage Act 2009</i>	Department of Natural Resources and Mines
Energy	Queensland	<i>Geothermal Energy Act 2010</i>	Department of Natural Resources and Mines
Minerals	Queensland	<i>Offshore Minerals Act 1998</i>	Department of Natural Resources and Mines
Minerals	WA	<i>Mining Act 1978</i>	Department of Mines and Petroleum
Energy	WA	<i>Energy Coordination Act 1994</i>	Office of Energy
Minerals	WA	<i>Offshore Minerals Act 2003</i>	Department of Mines and Petroleum

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Minerals	WA	<i>Mining on Private Property Act 1898</i>	Department of Mines and Petroleum
Minerals	SA	<i>Mining Act 1971</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
Minerals	SA	<i>Offshore Minerals Act 2000</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
Minerals	SA	<i>Opal Mining Act 1995</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
Minerals	Tasmania	<i>Gas Act 2000</i>	Office of the Tasmanian Energy Regulator
Energy	Tasmania	<i>Gas Pipelines Act 2000</i>	Office of the Tasmanian Energy Regulator
Minerals	Tasmania	<i>Mineral Resources Development Act 1995</i>	Department of Infrastructure, Energy and Resources
Minerals	Tasmania	<i>Mining (Strategic Prospectivity Zones) Act 1993</i>	Department of Infrastructure, Energy and Resources
Minerals	NT	<i>Mining Management Act 2001</i>	Department of Mines and Energy
Minerals	NT	<i>Mineral Titles Act 2010</i>	Department of Mines and Energy
Transport projects			
Transport	Commonwealth	<i>Airports Act 1996</i>	Department of Infrastructure and Transport
Transport	NSW	<i>Transport Administration Act 1988</i>	Roads and Maritime Services
Transport	NSW	<i>Roads Act 1993</i>	Roads and Maritime Services
Transport	Victoria	<i>Major Transport Projects Facilitation Act 2009</i>	Department of Planning and Community Development
Transport	Victoria	<i>Road Management Act 2004</i>	VicRoads
Transport	Queensland	<i>Transport Infrastructure Act 1994</i>	Department of Transport and Main Roads
Transport	Queensland	<i>Airport Assets (Restructuring and Disposal) Act 2008</i>	Queensland Treasury
Transport	WA	<i>Main Roads Act 1930</i>	Commissioner of Main Roads
Transport	WA	<i>Transport Coordination Act 1966</i>	Department of Transport

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Transport	Tasmania	<i>Highways Act 1951</i>	Department of Infrastructure, Energy and Resources
Transport	Tasmania	<i>Rail Infrastructure Act 2007</i>	Department of Infrastructure, Energy and Resources
Transport	ACT	<i>Public Roads Act 1902</i>	ACT Planning and Land Authority
Local government			
Local government	NSW	<i>Local Government Act 1993</i>	Department of Premier and Cabinet
Local government	Victoria	<i>Local Government Act 1989</i>	Department of Planning and Community Development
Local government	Queensland	<i>Local Government Act 1993</i>	Department of Local Government, Community Recovery and Resilience
Local government	WA	<i>Local Government Act 1995</i>	Department of Local Government and Communities
Local government	SA	<i>Local Government Act 1999</i>	Office for State/Local Government Relations
Local government	Tasmania	<i>Local Government Act 1993</i>	Department of Premier and Cabinet
Local government	NT	<i>NT Local Government Act 1994</i>	Department of Local Government
Development assessment, planning and zoning			
Development	Victoria	<i>Planning and Environment Act 1987</i>	Department of Planning and Community Development
Development	Victoria	<i>Regional Development Victoria Act 2002</i>	Department of Planning and Community Development
Development	Victoria	<i>Urban Renewal Authority Victoria Act 2003</i>	Places Victoria
Development	Victoria	<i>Project Development and Construction Management Act 1994</i>	Department of Treasury and Finance
Development	Queensland	<i>State Development and Public Works Organisation Act 1971</i>	Department of State Development Infrastructure and Planning
Development	Queensland	<i>Sustainable Planning Act 2009</i>	Department of State Development, Infrastructure and Planning

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Development	Queensland	<i>Integrated Planning Act 1997</i>	Department of State Development, Infrastructure and Planning
Development	Queensland	<i>Economic Development Act 2012</i>	Minister for Economic Development
Development	WA	<i>Planning and Development Act 2005</i>	Department of Planning
Development	SA	<i>Development Act 1993</i>	Department of Planning, Transport and Infrastructure
Development	Tasmania	<i>Land Use Planning and Approvals Act 1993</i>	Department of Justice
Development	Tasmania	<i>Tasmanian Planning Commission Act 1997</i>	Tasmanian Planning Commission
Development	Tasmania	<i>Resource Planning and Development Commission Act 1997</i>	Department of Justice
Development	Tasmania	<i>State Policies and Projects Act 1993</i>	Department of Premier and Cabinet; Department of Justice
Development	Tasmania	<i>Approvals (Deadlines) Act 1993</i>	Department of Justice
Development	ACT	<i>Planning and Development Act 2007</i>	ACT Planning and Land Authority
Development	ACT	<i>Australian Capital Territory (Planning and Land Management) Act 1998</i>	ACT Planning and Land Authority
Development	NT	<i>Lands, Planning and Mining Tribunal Act 1998</i>	Department of Justice
Development	NT	<i>Planning Act 1993</i>	Department of Lands, Planning and the Environment
Development	NT	<i>Northern Territory Environment Protection Authority Act 2012</i>	Department of Lands, Planning and the Environment
Development	NT	<i>National Environmental Protection Council (Northern Territory) Act 1994</i>	Department of Lands, Planning and the Environment
Native title, land rights and land acquisition			
Native title	Commonwealth	<i>Native Title Act 1993</i>	Attorney-General's Department
Native title	NSW	<i>Native Title (NSW) Act 1994</i>	Department of Attorney General and Justice

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Native title	Victoria	<i>Land Title Validation Act 1994</i>	Land Titles Office
Native title	Queensland	<i>Native Title (Queensland) Act 1993</i>	Department of Natural Resources and Mines
Native title	WA	<i>Titles (Validation) and Native Title (Effect of Past Acts) Act 1995</i>	Department of the Attorney General
Native title	SA	<i>Native Title (SA) Act 1994</i>	Attorney-General's Department
Native title	Tasmania	<i>Native Title (Tas) Act 1994</i>	Department of Premier and Cabinet
Native title	NT	<i>Validation (Native Title) Act 1994</i>	Department of the Attorney-General and Justice
Land rights	Commonwealth	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	Department of Families, Housing, Community Services and Indigenous Affairs
Land rights	Commonwealth	<i>Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987</i>	Department of Families, Housing, Community Services and Indigenous Affairs
Land rights	Commonwealth	<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>	Department of Families, Housing, Community Services and Indigenous Affairs
Land rights	Commonwealth	<i>Ashmore and Cartier Islands Acceptance Act 1933</i>	Department of Regional Australia, Local Government, Arts and Sport
Land rights	NSW	<i>Aboriginal Land Rights Act 1983</i>	Office of Communities, Aboriginal Affairs
Land rights	Victoria	<i>Aboriginal Lands Act 1970</i>	Department of Planning and Community Development
Land rights	Victoria	<i>Aboriginal Lands Act 1991</i>	Department of Planning and Community Development
Land rights	Victoria	<i>Aboriginal Land (Manatunga Land) Act 1992</i>	Department of Planning and Community Development
Land rights	Queensland	<i>Aboriginal Land Act 1991</i>	Department of Natural Resources and Mines
Land rights	Queensland	<i>Land Act 1994</i>	Department of Natural Resources and Mines
Land access	Queensland	<i>Sugar Industry Act 1999</i>	Department of Agriculture, Forestry and Fisheries
Land rights	Queensland	<i>Torres Strait Islander Land Act 1991</i>	Department of Natural Resources and Mines
Land rights	WA	<i>Regional Development Commissions Act 1993</i>	Department of Regional Development

(Continued next page)

Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Land rights	WA	<i>Land Administration Act 1997</i>	Department of Lands
Land rights	WA	<i>Aboriginal Affairs Planning Authority Act 1972</i>	Department of Aboriginal Affairs
Land rights	WA	<i>Aboriginal Communities Act 1979</i>	Department of Aboriginal Affairs
Land rights	SA	<i>Aboriginal Lands Trust Act 1966</i>	Department of the Premier and Cabinet
Land rights	SA	<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i>	Department of the Premier and Cabinet
Land rights	SA	<i>Maralinga Tjarutja Land Rights Act 1984</i>	Department of the Premier and Cabinet
Land rights	Tasmania	<i>Aboriginal Lands Act 1995</i>	Department of Premier and Cabinet
Land rights	NT	<i>Aboriginal Land Act 1978</i>	Department of Lands, Planning and the Environment
Land rights	NT	<i>Coburg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981</i>	Parks and Wildlife Commission of the Northern Territory
Land rights	NT	<i>Nitmiluk (Katherine Gorge) National Park Act 1989</i>	Parks and Wildlife Commission of the Northern Territory
Land rights	NT	<i>Parks and Reserves (Framework for the Future) Act 2004</i>	Parks and Wildlife Commission of the Northern Territory
Land rights	NT	<i>Minerals (Acquisition) Act 1953</i>	Department of Mines and Energy
Land rights	NT	<i>Crown Lands Act 1992</i>	Department of Lands, Planning and the Environment
Land acquisition	NT	<i>Lands Acquisition Act 1979</i>	Department of Lands, Planning and the Environment
Land rights	NT	<i>Northern Territory Land Corporation Act 1995</i>	Department of Lands, Planning and the Environment
Land acquisition	ACT	<i>Lands Acquisition Act 1994</i>	ACT Planning and Land Authority
Land rights	ACT	<i>Community Title Act 2001</i>	ACT Planning and Land Authority
Heritage and Indigenous Heritage			
Indigenous heritage	Commonwealth	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	Department of Sustainability, Environment, Water, Population and Communities

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Heritage	Commonwealth	<i>Historic Shipwrecks Act 1976</i>	Department of Sustainability, Environment, Water, Population and Communities
Heritage	NSW	<i>Heritage Act 1977</i>	Office of Environment and Heritage
Indigenous heritage	Victoria	<i>Aboriginal Heritage Act 2006</i>	Department of Planning and Community Development
Heritage	Victoria	<i>Heritage Rivers Act 1992</i>	Department of Environment and Primary Industries
Heritage	Victoria	<i>Heritage Act 1995</i>	Heritage Victoria
Indigenous heritage	Queensland	<i>Aboriginal Cultural Heritage Act 2003</i>	Department of Aboriginal and Torres Strait Islander and Multicultural Affairs
Heritage	Queensland	<i>Queensland Heritage Act 1992</i>	Department of Environment and Heritage Protection
Indigenous heritage	Queensland	<i>Torres Strait Islander Cultural Heritage Act 2003</i>	Department of Natural Resources and Mines
Heritage	Queensland	<i>Cape York Peninsula Heritage Act 2007</i>	Department of Environment and Heritage Protection
Indigenous heritage	WA	<i>Aboriginal Heritage (Marandoo) Act 1992</i>	Department of Aboriginal Affairs
Heritage	WA	<i>Maritime Archaeology Act 1973</i>	Western Australian Museum
Indigenous heritage	WA	<i>Aboriginal Heritage Act 1972</i>	Department of Aboriginal Affairs
Heritage	WA	<i>Heritage of WA Act 1990</i>	Heritage Council of Western Australia
Indigenous heritage	SA	<i>Aboriginal Heritage Act 1988</i>	Department of the Premier and Cabinet
Heritage	SA	<i>Heritage Places Act 1993</i>	Department for Environment, Water and Natural Resources
Heritage	SA	<i>Historic Shipwrecks Act 1981</i>	Department for Environment, Water and Natural Resources
Indigenous heritage	Tasmania	<i>Aboriginal Relics Act 1975</i>	Aboriginal Heritage Tasmania
Heritage	Tasmania	<i>Historic Cultural Heritage Act 1995</i>	Tasmanian Heritage Council
	NT	<i>Heritage Act 2011</i>	Department of Lands, Planning and the Environment
Indigenous heritage	NT	<i>Northern Territory Aboriginal Sacred Sites Act 1989</i>	Minister for Regional Development
Heritage	ACT	<i>Heritage Act 2004</i>	ACT Planning and Land Authority

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Environmental protection and impact assessment			
Environment	Commonwealth	<i>Environment Protection and Biodiversity Conservation Act 1999</i>	Department of Sustainability, Environment, Water, Population and Communities
Environment	NSW	<i>Environmental Planning and Assessment Act 1982</i>	Department of Planning and Infrastructure
Environment	NSW	<i>Protection of the Environment Operations Act 1997</i>	Environment Protection Authority
Environment	Victoria	<i>Environment Protection Act 1970</i>	Environment Protection Authority
Environment	Victoria	<i>Victorian Environmental Protection Council Act 2001</i>	Department of Environment and Primary Industries
Environment	Victoria	<i>Environment Effects Act 1978</i>	Department of Planning and Community Development
Environment	Victoria	<i>Environment Protection Act 1978</i>	Environment Protection Authority
Environment	Victoria	<i>Planning and Environment Act 1987</i>	Department of Planning and Community Development
Environment	Queensland	<i>Environment Protection Act 1994</i>	Department of Environment and Heritage Protection
Environment	Queensland	<i>Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012</i>	Department of Environment and Heritage Protection
Environment	WA	<i>Environmental Protection Act 1986</i>	Department of Environment Regulation
Environment	SA	<i>Environment Protection Act 1993</i>	Environment Protection Authority
Environment	Tasmania	<i>Natural Resource Management Act 2002</i>	Department of Primary Industries, Parks, Water and Environment
Environment	Tasmania	<i>Climate Change (State Action) Act 2008</i>	Department of Premier and Cabinet
Environment	NT	<i>Environmental Assessment Act 1982</i>	Department of Lands, Planning and the Environment
Environment	NT	<i>Environmental Offences and Penalties Act 1996</i>	Department of Lands, Planning and the Environment

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Natural resource management			
Environment	NSW	<i>National Parks and Wildlife Act 1974</i>	Office of Environment and Heritage
Environment	NSW	<i>Threatened Species Conservation Act 1995</i>	Office of Environment and Heritage
	NSW	<i>Water Act 1912</i>	NSW Trade and Investment
	NSW	<i>Water Management Act 2000</i>	NSW Trade and Investment
Environment	Victoria	<i>Conservation, Forests and Lands Act 1987</i>	Department of Environment and Primary Industries
Environment	Victoria	<i>Wildlife Act 1975</i>	Department of Environment and Primary Industries
Environment	Victoria	<i>Flora and Fauna Guarantee Act 1988</i>	Department of Environment and Primary Industries
Environment	Victoria	<i>Parks Victoria Act 1998</i>	Department of Environment and Primary Industries
Environment	Queensland	<i>Nature Conservation Act 1992</i>	Department of Environment and Heritage Protection, Department of National Parks, Recreation, Sport and Racing
Environment	Queensland	<i>Fisheries Act 1994</i>	Department of Agriculture, Forestry and Fisheries
Environment	Queensland	<i>Wild Rivers Act 2005</i>	Department of Environment and Heritage Protection
Environment	Queensland	<i>Strategic Cropping Land Act 2011</i>	Department of Natural Resources and Mines
Environment	Queensland	<i>Recreation Areas Management Act 2006</i>	Department of National Parks, Recreation, Sport and Racing
Environment	Queensland	<i>Biodiscovery Act 2004</i>	Department of Environment and Heritage Protection
Environment	Queensland	<i>Plant Protection Act 1989</i>	Department of Agriculture, Forestry and Fisheries
Environment	Queensland	<i>Vegetation Management Act 1989</i>	Department of Natural Resources and Mines

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Environment	Queensland	<i>Fisheries Act 1994</i>	Department of Agriculture, Forestry and Fisheries
Environment	Queensland	<i>Forestry Act 1959</i>	Department of Agriculture, Forestry and Fisheries
Environment	Queensland	<i>Land Protection (Pest and Stock Route Management Act) 2002</i>	Department of Agriculture, Forestry and Fisheries
Environment	Queensland	<i>Animal Care and Protection Act 2001</i>	Department of Agriculture, Forestry and Fisheries
Environment	Queensland	<i>Soil Conservation Act 1986</i>	Department of Natural Resources and Mines
Environment	WA	<i>Soil and Land Conservation Act 1945</i>	Department of Agriculture and Food
Environment	WA	<i>Parks and Reserves Act 1895</i>	Department of Lands
Environment	WA	<i>Reserves (National Parks and Conservation Parks) Act 2004</i>	Department of Parks and Wildlife
Environment	WA	<i>Reserves (National Parks, Conservation Parks, and Other Reserves) Act 2004</i>	Department of Parks and Wildlife
Environment	WA	<i>Reserves (National Parks, Conservation Parks, Nature Reserves and Other Reserves) Act 2004</i>	Department of Parks and Wildlife
Environment	WA	<i>Reserves and Road Closure Act 1977</i>	Department of Lands
Environment	WA	<i>Conservation and Land Management Act 1984</i>	Department of Parks and Wildlife
Environment	WA	<i>Wildlife Conservation Act 1950</i>	Department of Parks and Wildlife
Environment	WA	<i>Land Drainage Act 1925</i>	Department of Water
Environment	WA	<i>Rights in Water and Irrigation Act 1914</i>	Department of Water
Environment	SA	<i>Adelaide Dolphin Sanctuary Act 2005</i>	Department for Environment, Water and Natural Resources
Environment	SA	<i>River Murray Act 2003</i>	Department for Environment, Water and Natural Resources
Environment	SA	<i>Wilderness Protection Act 1992</i>	Department for Environment, Water and Natural Resources
Environment	SA	<i>Public and Environmental Health Act 1987</i>	Department of Health

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Environment	SA	<i>National Parks and Wildlife Act 1972</i>	Department for Environment, Water and Natural Resources
Environment	SA	<i>Natural Resources Management Act 2004</i>	Department for Environment, Water and Natural Resources
Environment	Tasmania	<i>Natural Resource Management Act 2002</i>	Department of Primary Industries, Parks, Water and Environment
Environment	Tasmania	<i>Environmental Management and Pollution Control Act 1994</i>	Environment Protection Authority
Environment	Tasmania	<i>National Parks and Reserve Management Act 2002</i>	Parks and Wildlife Service
Environment	Tasmania	<i>Forest Practices Act 1985</i>	Department of Agriculture, Fisheries and Forestry
Environment	Tasmania	<i>Forestry Act 1920</i>	Department of Agriculture, Fisheries and Forestry
Environment	Tasmania	<i>Living Marine Resources Management Act 1995</i>	Department of Primary Industries, Parks, Water and Environment
Environment	Tasmania	<i>Water Management Act 1999</i>	Department of Primary Industries, Parks, Water and Environment
Environment	NT	<i>Fisheries Act 1988</i>	Department of Primary Industry and Fisheries
Environment	NT	<i>Weeds Management Act 2001</i>	Department of Land Resource Management
Environment	NT	<i>Waste Management and Pollution Control Act 1998</i>	Department of Lands, Planning and the Environment
Environment	NT	<i>Soil Conservation and Land Utilisation Act 1969</i>	Department of Land Resource Management
Marine and coastal			
Environment	Commonwealth	<i>Great Barrier Reef Marine Park Act 1975</i>	Great Barrier reef Marine Park Authority
Environment	Commonwealth	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	Australian Maritime Safety Authority
	Commonwealth	<i>Seas and Submerged Lands Act 1973</i>	Attorney-General's
Environment	Commonwealth	<i>Environment Protection (Sea Dumping) Act 1981</i>	Department of Sustainability, Environment, Water, Population and Communities
Environment	NSW	<i>Marine Parks Act 1997</i>	Office of Environment and Heritage

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Environment	Queensland	<i>Marine Parks Act 2004</i>	Department of National Parks, Recreation, Sport and Racing
Environment	NSW	<i>Coastal Protection Act 1979</i>	Office of Environment and Heritage
Environment	NSW	<i>Marine Pollution Act 1987</i>	Roads and Maritime Services
Environment	NSW	<i>Land and Environment Court Act 1979</i>	Department of Attorney General and Justice
Environment	Victoria	<i>Catchment and Land Protection Act 1994</i>	Department of Environment and Primary Industries
Environment	Victoria	<i>Coastal Management Act 1995</i>	Department of Environment and Primary Industries
Environment	Victoria	<i>Pollution of Waters by Oil and Noxious Substances Act 1986</i>	Environment Protection Authority
Environment	Victoria	<i>Marine (Drug, Alcohol and Pollution Control) Act 1988</i>	Transport Safety Victoria
Environment	Queensland	<i>Coastal Protection and Management Act 1995</i>	Department of Environment and Heritage Protection
Environment	Queensland	<i>Transport Operations (Marine Pollution) Act 1995</i>	Maritime Safety Queensland
Environment	Queensland	<i>Wet Tropics World Heritage Protection and Management Act 1993</i>	Wet Tropics Management Authority
Environment	Queensland	<i>Marine Parks Act 2004</i>	Department of Environment and Heritage Protection
Environment	Queensland	<i>River Improvement Trust Act 1940</i>	Department of Natural Resources and Mines
Environment	Queensland	<i>Water Act 2000</i>	Department of Environment and Heritage Protection, Department of Natural Resources and Mines
Environment	WA	<i>Pollution of Waters by Oil and Noxious Substances Act 1987</i>	Department of Transport
Environment	WA	<i>Western Australian Marine (Sea Dumping) Act 1981</i>	Department of Transport
Environment	WA	<i>Western Australian Marine Act 1982</i>	Department of Transport
Environment	WA	<i>Marine and Harbours Act 1981</i>	Department of Transport

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Environment	SA	<i>Coast Protection Act 1972</i>	Department for Environment, Water and Natural Resources
Environment	Tasmania	<i>Pollution of Waters by Oil and Noxious Substances Act 1987</i>	Environment Protection Authority
Environment	SA	<i>Marine Parks Act 2007</i>	Department for Environment, Water and Natural Resources
Environment	SA	<i>Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987</i>	Department of Planning, Transport and Infrastructure
Environment	NT	<i>Marine Pollution Act 1999</i>	Department of Lands, Planning and the Environment
Occupational health and safety			
OHS	Commonwealth	<i>Occupational Health and Safety Act 1991</i>	ComCare
OHS	Commonwealth	<i>Work Health and Safety Act 2011</i>	ComCare
OHS	NSW	<i>Work Health and Safety Act 2011</i>	Department of Finance and Services
OHS	NSW	<i>Coal Mine Health and Safety Act 2002</i>	NSW Trade and Investment
OHS	NSW	<i>Mine Health and Safety Act 2004</i>	NSW Trade and Investment
OHS	NSW	<i>Explosives Act 2003</i>	Department of Finance and Services
OHS	NSW	<i>Dams Safety Act 1978</i>	Department of Primary Industries
OHS	NSW	<i>Dangerous Goods (Road and Rail Transport) Act 2008</i>	Department of Finance and Services
OHS	Victoria	<i>Rail Safety Act 2006</i>	Transport Safety Victoria
OHS	Victoria	<i>Dangerous Goods Act 1985</i>	WorkSafe Victoria
OHS	Victoria	<i>Marine Safety Act 2010</i>	Transport Safety Victoria
OHS	Victoria	<i>Occupational Health and Safety Act 2004</i>	WorkSafe Victoria
OHS	Victoria	<i>Equipment (Public Safety) Act 1994</i>	WorkSafe Victoria
OHS	Queensland	<i>Work Health and Safety Act 2011</i>	Workplace Health and Safety Queensland
OHS	Queensland	<i>Coal Mining Safety and Health Act 1999</i>	Department of Natural Resources and Mines
OHS	Queensland	<i>Mining and Quarrying Safety and Health Act 1999</i>	Department of Natural Resources and Mines

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
OHS	Queensland	<i>Transport (Rail Safety) Act 2010</i>	Department of Transport and Main Roads
OHS	Queensland	<i>Explosives Act 1999</i>	Department of Natural Resources and Mines
OHS	Queensland	<i>Gene Technology Act 2001</i>	Department of Science, Information Technology, Innovation and the Arts
OHS	Queensland	<i>Biological Control Act 1987</i>	Department of Agriculture, Forestry and Fisheries
OHS	Queensland	<i>Waste Reduction and Recycling Act 2011</i>	Department of Environment and Heritage Protection
OHS	Queensland	<i>Public Health Act 2005</i>	Department of Health
OHS	WA	<i>Jetties Act 1926</i>	Department of Transport
OHS	WA	<i>Port Authorities Act 1999</i>	Department of Transport
OHS	WA	<i>Rail Safety Act 2010</i>	Department of Transport
OHS	WA	<i>Contaminated Sites Act 2003</i>	Department of Environment Regulation
OHS	WA	<i>Mines Safety and Inspection Act 1994</i>	Department of Mines and Petroleum
OHS	WA	<i>Gas Standards Act 1972</i>	Department of Commerce
OHS	WA	<i>Energy Safety Act 2006</i>	Department of Commerce
OHS	WA	<i>Dangerous Goods Safety Act 2004</i>	Department of Mines and Petroleum
OHS	WA	<i>Carbon Rights Act 2003</i>	Department of Environment Regulation
OHS	WA	<i>Occupational Health and Safety Act 1984</i>	Department of Commerce
OHS	SA	<i>Dangerous Substances Act 1979</i>	SafeWork SA
OHS	SA	<i>Work Health and Safety Act 2012</i>	SafeWork SA
OHS	SA	<i>Mines and Works Inspection Act 1920</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
OHS	SA	<i>Explosives Act 1936</i>	Department of Manufacturing, Innovation, Trade, Resources and Energy
OHS	Tasmania	<i>Port Companies Act 1997</i>	Department of Infrastructure, Energy and Resources

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
OHS	Tasmania	<i>Irrigation Clauses Act 1973</i>	Department of Primary Industries, Parks, Water and Environment
OHS	Tasmania	<i>Drains Act 1954</i>	Department of Primary Industries, Parks, Water and Environment
OHS	Tasmania	<i>Dangerous Goods (Road and Rail Transport) Act 2010</i>	Workplace Standards Tasmania
OHS	Tasmania	<i>Work Health and Safety Act 2012</i>	Workplace Standards Tasmania
OHS	NT	<i>Dangerous Goods Act 1998</i>	Department of Business
OHS	NT	<i>Work Health and Safety (National Uniform Legislation) Act 2011</i>	Department of Business
OHS	NT	<i>Radioactive Ores and Concentrates (Packaging and Transport) Act 1980</i>	Department of Business
OHS	NT	<i>Waste Management and Pollution Control Act 1998</i>	Department of Lands, Planning and the Environment
OHS	NT	<i>Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act 2010</i>	Department of Business
OHS	NT	<i>Marine Act 1981</i>	Department of Transport
OHS	ACT	<i>Work Health and Safety Act 2011</i>	Chief Minister and Treasury Directorate
OHS	ACT	<i>Dangerous Substances Act 2004</i>	Chief Minister and Treasury Directorate
OHS	ACT	<i>Machinery Act 1949</i>	Chief Minister and Treasury Directorate
Crown Land access			
Land access	NSW	<i>Crown Lands Act 1989</i>	Department of Primary Industries
Land access	NSW	<i>Crown Lands (Continued Tenures) Act 1989</i>	Department of Primary Industries
Land access	NSW	<i>Western Lands Act 1901</i>	Department of Primary Industries
Land access	Victoria	<i>Land Act 1958</i>	Department of Environment and Primary Industries
Land access	WA	<i>Land Administration Act 1997</i>	Department of Lands
Land access	SA	<i>Crown Land Management Act 2009</i>	Department for Environment, Water and Natural Resources

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Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Land access	Tasmania	<i>Crown Lands Act 1976</i>	Department of Primary Industries, Parks, Water and Environment
Land access	SA	<i>Pastoral Land Management and Conservation Act 1989</i>	Department for Environment, Water and Natural Resources
Land access	NT	<i>Crown Lands Act 1992</i>	Department of Lands, Planning and the Environment
Land access	NT	<i>Pastoral Land Act 1992</i>	Department of Land Resource Management
Other			
Other	Commonwealth	<i>Australian Maritime Safety Authority Act 1990</i>	Australian Maritime Safety Authority
Other	Commonwealth	<i>Coastal Waters (Northern Territory Powers) Act 1980</i>	Attorney-General's Department
Other	Commonwealth	<i>Coastal Waters (Northern Territory Title) Act 1980</i>	Attorney-General's Department
Other	Commonwealth	<i>Clean Energy Act 2011</i>	Clean Energy Regulator
Other	Commonwealth	<i>Coastal Waters (State Powers) Act 1980</i>	Attorney-General's Department
Other	Commonwealth	<i>Coastal Waters (State Title) Act 1980</i>	Attorney-General's Department
Other	Commonwealth	<i>Customs Act 1901</i>	Attorney-General's Department
Other	Commonwealth	<i>Defence Act 1903</i>	Attorney-General's Department
Other	Commonwealth	<i>Energy Efficiencies Opportunities Act 2006</i>	Department of Resources, Energy and Tourism
Other	Commonwealth	<i>National Greenhouse and Energy Reporting Act 2007</i>	Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education
Other	Commonwealth	<i>Navigation Act 1912</i>	Department of Infrastructure and Transport
Other	Commonwealth	<i>Quarantine Act 1908</i>	Department of Agriculture, Fishing and Forestry
Other	Commonwealth	<i>Submarine Cables and Pipelines Protection Act 1963</i>	Australian Maritime Safety Authority
Other	Commonwealth	<i>Maritime Transport and Offshore Facilities Security Act 2003</i>	Department of Infrastructure and Transport
Other	Commonwealth	<i>Competition and Consumer Act 2010</i>	Australian Competition and Consumer Commission

(Continued next page)

Table B.5 Legislation relevant to major project assessment and approval processes^a (continued)

<i>Scope</i>	<i>Jurisdiction</i>	<i>Legislation</i>	<i>Responsible department/agency</i>
Other	Commonwealth	<i>Fair Work (Building Industry) Act 2012</i>	Department of Education, Employment and Workplace Relations
Other	Commonwealth	<i>Foreign Takeovers and Acquisitions Act 1975</i>	Foreign Investment Review Board
Other	Commonwealth	<i>Fair Work Act 2009</i>	Department of Education, Employment and Workplace Relations
Other	Queensland	<i>Queensland Competition Authority Act 1987</i>	Queensland Competition Authority
Other	Queensland	<i>Electricity Act 2004</i>	Department of Energy and Water Supply
Other	Queensland	<i>Gas Supply Act 2003</i>	Department of Energy and Water Supply
Other	Queensland	<i>Queensland Reconstruction Act 2011</i>	Queensland Reconstruction Authority
Other	WA	<i>Railways (Access) Act 1998</i>	Economic Regulation Authority
Other	SA	<i>AustralAsia Railway (Third Party Access) Act 1999</i>	Essential Services Commission of South Australia

^a This list is not intended to be fully comprehensive.

Sources: ComLaw; State and Territory legislation databases; various departmental websites.

C International DAA processes

This appendix provides an overview of development assessment and approval (DAA) processes for major projects in Canada, the United Kingdom, the United States and New Zealand. These countries were chosen because they have similar political systems to Australia, are at roughly equivalent stages of development, and face broadly equivalent challenges in making tradeoffs between commercial, environmental and heritage concerns.

C.1 Canada

Jurisdictional overview

Under the *Constitution Act 1867*, there are three levels of government in Canada with different areas of regulatory responsibility for activities related to major projects (box C.1). Responsibility for certain areas, such as the environment, is not specifically identified and assigned to a level of government under the Act. It may be addressed under various Federal and Provincial legislative powers depending on the nature or scope of the issue.

The jurisdictional division of regulatory powers means that major projects wholly within a Canadian province are typically assessed and determined using Provincial government processes. Projects beyond the boundaries of a province, or that are deemed likely to have significant adverse environmental effects, may also be subject to a Federal environmental assessment and approval process.

Major projects in Canada can require a wide range of permits, licences, agreements and approvals from Federal, Provincial and Municipal regulatory bodies and other stakeholders (including Indigenous peoples and land holders and users). This section gives an overview of key Federal and Provincial DAA processes applying to major projects with a focus on environmental assessments.

Box C.1 **Division of regulatory powers in Canada**

Canada has three levels of government — Federal, Provincial and Municipal — with different areas of legislative responsibility under the *Constitution Act, 1867*.

Federal Government regulatory powers relevant to the assessment and approval of major projects include those relating to:

- navigation/shipping
- sea coast and inland fisheries
- ferries (interprovincial/ international)
- Indians/Indian reserves
- works connecting provinces; beyond boundaries of one province; within a province but to the advantage of Canada/or more than one province.

Provincial Governments' regulatory powers relevant to the assessment and approval of major projects include those relating to:

- natural resource uses
- management of public lands belonging to a province
- property and civil rights
- municipalities.

In addition to 10 provinces, there are three territories with limited regulatory responsibilities granted to them by the Federal Government.

Municipal Governments receive authority from Provincial governments to enable the provision of a range of local services such as libraries, parks, community water systems, local police, and roads.

Across Canada there are also 'band councils', which govern First Nations communities. These elected councils are similar to municipal councils and make decisions that affect their local communities.

Features of Federal processes for major projects

Federal environmental assessments

Any project in Canada classified as a 'designated project' can require a Federal environmental assessment (EA) and approval before it can proceed. Designated projects include:

- projects of a type listed in the Regulations Designating Physical Activities
- projects declared by the Federal Minister of the Environment (CEAA 2013).

Regulations Designating Physical Activities made under *the Canadian Environmental Assessment Act 2012* list project types that are likely to have significant adverse environmental effects and therefore may be subject to a Federal EA. These project types include: electrical generating stations or transmission lines; dams, oil or gas facilities or pipelines; mines or mills; marine terminals, railway lines, public highways, aerodrome or runways; and waste management facilities. The Federal Minister of the Environment may also ‘designate’ a project not identified in the regulations if s/he believes the project may cause adverse environmental effects or if there are public concerns about such effects (CEAA 2013).

There are three statutory bodies that can undertake a Federal EA for a designated project.

- The Canadian Environmental Assessment Agency (CEAA) administers the EA process for designated projects subject to the *Canadian Environmental Assessment Act 2012* (the CEA Act).
- The National Energy Board (NEB) undertakes EAs for designated projects involving activities regulated under the *National Energy Board Act 1959* (the NEB Act) or the *Canada Oil and Gas Operations Act 1985* (box C.2).
- The Canadian Nuclear Safety Commission (CNSC) undertakes EAs for designated projects involving activities regulated under the *Nuclear Safety and Control Act 2000* (CEAA 2013).

Direction of reforms to Federal environmental assessments

The Canadian Parliament legislated a range of reforms to Federal EA processes in June 2012 through the *Jobs and Growth Act, 2012*, which narrowed the scope of the types of projects that could face a Federal EA. Key changes include:

- narrowing the definition of lakes and waterways upon which a Federal EA can be required
- expanding the types of works that can be pre-approved, allowing more ‘low risk’ works (such as docks and boathouses) to proceed without further assessment and approval (Parliament of Canada 2013).

Box C.2 **National Energy Board of Canada**

The National Energy Board (NEB) — an independent Federal statutory agency established under the *National Energy Board Act, 1959* — regulates international and interprovincial aspects of the oil, gas and electric utility industries in Canada, including assessments and approvals for interprovincial and international pipelines and power lines. Projects wholly within a province are not regulated by the NEB.

Key features of the National Energy Board process

Proponents wishing to develop a covered project must apply to the NEB for an assessment and determination. This process includes a number of steps.

- A 'planning and pre-application' phase, which aims to improve proponents' and other stakeholders' understanding of the regulatory processes and requirements before an application is lodged. Pre-application meetings give stakeholders and the regulator the opportunity to share and process information and establish contacts; discuss application requirements; and identify resources relevant to the process.
- A range of public consultation requirements across the regulatory stages including at the project design; construction; operation and maintenance; and abandonment stages. Some proposed projects also require the NEB to hold public hearings.
- An environmental impact assessment undertaken by the NEB (this replaces the environmental assessment process normally undertaken by the Canadian Environmental Assessment Agency).
- A determination of whether a project is denied or can proceed, and if any terms or conditions must be applied. In making a decision, the NEB considers the economic, technical and financial feasibility, and the environmental and socioeconomic impacts of the project.
- Monitoring and enforcement of conditions the NEB attaches to a project from approval to decommissioning stages (including auditing and inspecting construction activities, maintenance and monitoring procedures during operation and procedures during cessation).

Sources: NEB (Can) (2013a, 2013b, 2013c, 2013d).

Further reforms legislated in December 2012 through the *Jobs, Growth and Long-term Prosperity Act 2012* established a new truncated Federal EA process. Key changes include:

- reducing the possible levels of review for an EA from three to two
- allowing the CEAA to screen designated projects to determine whether they require an EA at all¹

¹ Screening does not apply to projects regulated under the *Nuclear Safety and Control Act, 2000*, the *National Energy Board Act, 1959* or the *Canada Oil and Gas Operations Act, 1985*. Such designated projects are automatically required to undergo a Federal environmental assessment.

-
- reducing the number of government agencies involved in carrying out Federal EAs from approximately 40 to three — the CEAA, the NEB and the CNSC
 - focusing Federal EAs on Federal aspects of designated projects by limiting the statutory definition of ‘environmental effects’
 - imposing statutory time limits for EAs. Most standard EAs must be completed in one year, while panel reviews — the alternative Federal EA pathway — are limited to two years
 - authorising the Minister of the Environment to establish a committee to conduct regional environmental assessment for regions that are entirely composed of Federal lands (discussed in appendix E)
 - allowing (in prescribed circumstances) all or part of the Federal EA to be delegated to, or substituted for, a Provincial EA, and allowing (in prescribed circumstances) Federal approval authority to be delegated to a Provincial decision maker (see section on delegation, substitution and equivalency below) (Parliament of Canada 2013).²

Reforms to National Energy Board processes

A range of reforms to the NEB processes was initiated in 2012 through the *Jobs, Growth and Long-term Prosperity Act, 2012* and through amendments to the NEB Act. Key reforms include:

- establishing time limits of 18 months for most NEB applications. This includes 15 months from the date the NEB determines an application is complete until it completes its assessment
- requiring both approvals and denials of projects to go to the Governor in Council (the Federal cabinet) for a decision. The NEB’s report on a project must also include any conditions to be attached to an approval
- requiring that, for projects identified by the CEA Act, the NEB must conduct an EA pursuant to that Act. For projects not covered under the CEA Act, the NEB will continue to conduct EAs under the NEB Act
- making hearings for gas export licences no longer mandatory. In deciding whether to issue a gas export licence, the NEB can no longer consider environmental matters in export applications (Parliament of Canada 2013).

² Substitution and replacement provisions do not apply if a project is being assessed by the Canadian Nuclear Safety Commission or the National Energy Board, or if the project has been referred to a review panel.

Delegation, substitution and equivalency for Federal environmental assessments

The delegation, substitution and equivalency provisions in the CEA Act aim to reduce duplication in regulatory processes where a single project requires more than one EA under Federal law and Provincial law or under an environmental impact assessment regime established under an Aboriginal land claims agreement.

- Delegation allows the responsible Federal authority to delegate to a province the carrying out of any part of the Federal EA (apart from the final decisionmaking).
- Substitution (similar to a bilateral assessment agreement) allows the Federal Minister for the Environment to substitute a Provincial EA process for a Federal EA if:
 - requested to do so by a province, and
 - the Minister is of the opinion that the Provincial process is an appropriate substitute for a Federal EA under the CEA Act, and that conditions contained in the CEA Act regarding factors to be considered, public participation and the submission of an EA report will be fulfilled (CEAA 2013).
- Equivalency (similar to a bilateral approval agreement) allows the Governor in Council (the Federal cabinet), on the recommendation of the Minister for the Environment, to exempt a designated project from the CEA Act, if the Governor in Council is satisfied that:
 - after completion of the assessment, the provincial government will determine whether the designated project is likely to cause significant adverse environmental effects, taking into account appropriate mitigation measures
 - the Provincial government will ensure that mitigation measures and a follow up program are implemented
 - any other conditions that the Minister of the Environment establishes will be met (Parliament of Canada 2013).

Under the equivalency provision, the province carries out the EA and makes the final determination, including any measures to protect components of the environment under Federal authority.

In March 2013, the CEAA entered into a Memorandum of Understanding with the British Columbia Environmental Assessment Office outlining the process by which the Province of British Columbia can substitute its EA process for the Federal EA process where a project requires both. As of June 2013, the Federal Minister of the Environment had approved the substitution of the British Columbia EA process for the Federal EA process for three projects (a liquefied natural gas export terminal and two coal mines) (Osler Legal 2013).

The Major Project Management Office

The Major Project Management Office (MPMO) — established in 2007 — aims to provide overarching project coordination, management and accountability for ‘major resource projects’ operating within the Federal regulatory review process (Government of Canada 2012).

Major resource projects eligible for MPMO assistance are defined (under a Federal Cabinet Directive) as large resource projects that are subject to a comprehensive study, a panel review, or a large or complex multi-jurisdictional screening, as defined under the CEA Act. Typically, these projects involve extracting, processing, refining, producing, distributing, or disposing of natural resources, as well as decommissioning and reclaiming sites used for any of these activities (Government of Canada 2012).

The MPMO’s main roles and responsibilities are to:

- provide a single point of entry into the Federal regulatory system for proponents of major resource projects
- engage in early discussions, distribution of guidance materials and information exchanges with proponents on proposed projects
- develop in collaboration with relevant Federal departments and agencies, consensus-based Project Agreements that articulate the roles and responsibilities of each department and timeline-based performance targets for delivery of process milestones
- track and monitor the Government’s Aboriginal consultation requirements related to the review of major resource projects and maintain the official record of Aboriginal/Crown consultation for the Canadian Government
- implement and manage a transparent monitoring and tracking system for major resource projects as a mechanism with which to monitor and track the progress of any specific project through the regulatory process
- lead collaborative research and policy analysis on short, medium and longer term initiatives to improve the performance of the regulatory system including legislative options, cost recovery, cumulative effects, energy infrastructure corridors, regional assessment and capacity building initiatives/processes (Government of Canada 2012).

The MPMO process includes the development of a Project Agreement — a coordinating tool between interested Federal departments — committing to a timeline and schedule for the completion of the EA, with regular milestones to allow tracking of progress. All agreements contain coordinated work plans that

outline the particular roles and responsibilities of Federal departments and agencies throughout the entire life cycle of a particular regulatory review process. Agreements can include the following coordinated work plans:

- an Environmental Assessment work plan
- an Aboriginal Consultation and Engagement work plan
- a Permitting, Authorizations and Approvals work plan
- a Follow Up and Monitoring work plan.

Project agreements are posted on the internet to promote transparency and the MPMO tracks and reports on the progress of the EA and other regulatory processes, and assists in the resolution of issues to avoid delays (Government of Canada 2012).

Features of Provincial processes for major projects

Major projects wholly within a Canadian province are typically assessed and determined using Provincial level DAA processes, but may also be subject to a Federal EA where they meet the ‘designated project’ criteria set out in the Regulations Designating Physical Activities or are declared by the Federal Minister of the Environment (CEAA 2013). This section gives an overview of recent reforms to DAA processes in the Province of Alberta for upstream oil and gas projects.

Until 2012, responsibilities for the assessment and approval of upstream gas and oil projects in Alberta were spread between an independent regulatory body and three Provincial ministries.

- *The Energy Resources Conservation Board (ERCB)* — an independent Provincial regulator — granted primary approvals for oil and gas projects.
- *The Alberta Ministry of Sustainable Resource Development (SRD)* managed the environmental impact assessment (EIA) process (in parallel with ERCB processes) and granted a range of secondary approvals.
- *The Alberta Ministry of the Environment (Alberta Environment)* developed policies regarding air and water resources and the reclamation and remediation of oil and gas facilities and regulated these areas.
- *The Alberta Ministry of Energy (Alberta Energy)* developed policies regarding energy resources and was responsible for managing Crown mineral rights and royalties (Alberta Energy 2013).

In December 2012, the Alberta Parliament passed the *Alberta Responsible Energy Development Act, 2012* reforming these arrangements (box C.3).

Box C.3 Key Alberta reforms (as at July 2013)

A new policy coordination office

The Policy Management Office (PMO) was established to work with existing policy departments (Alberta Environment, Alberta Sustainable Resource Development (SRD), and Alberta Energy) to:

- integrate and align policy in the province and between Canadian jurisdictions
- provide clear and consistent policy direction to proponents, regulators and the public
- develop a more effective public consultation process
- develop a performance measurement framework to assess the new regulations.

A new single independent regulator

The Alberta Energy Regulator is being established with unified responsibility for development assessment and approval (DAA) processes (taking powers held by Alberta Environment, the SRD, and the Energy Resources Conservation Board (ERCB)). Its functions will include:

- acting as a single point of contact for assessing and determining applications, including Environmental Impact Assessments
- making decisions regarding the disposition of public lands and licensing of water (consistent with public lands and water allocation policies)
- post approval activities (including variances, compliance and monitoring, overseeing suspension, abandonment, and closure and remediation) (details to be finalised)
- establishing a single process for appeals (details to be finalised)
- establishing standards for regulatory processes (such as approval timelines) to provide more predictability to applicants (details to be finalised).

Streamlined public engagement processes

A report reviewing the previous system — Enhancing Assurance — found that the effectiveness of public consultation was limited as it was difficult for interested parties to determine when and how to provide input into policy development and policy assurance processes. The new approach aims to address this by having separate processes for stakeholders with a ‘common interest’ and those with a ‘private interest’.

- Common interest stakeholders wishing to influence general policy questions (such as province-wide land use, water use and environmental management) will be ‘channelled’ into policy development consultations.
- ‘Specified parties’ with private interests who stand to be impacted directly by a specific project will be able to provide input during the DAA processes for an individual project. This will help make project-specific consultations more focused and relevant to the merits of a particular project.

(Continued next page)

Box C.3 (continued)

Integrated risk management framework

The Enhancing Assurance report found that the previous system predominantly used prescriptive ‘command and control’ regulations that did not allow for advances in technology or improved industry practices, and that while Alberta Environment, the SRD, Alberta Energy and the ERCB used risk management processes to varying degrees, they did so in an inconsistent way.

An Integrated Risk Management Framework based on the international ISO 31 000 Risk Management Standard has been developed.

- At the policy development stage, the Framework will be used to evaluate new and existing natural resource policies. It will help assess risks to Alberta’s social, economic and environmental outcomes and assist in determining the best policy approaches to manage those risks.
- At the policy assurance stage, the Framework will be used to identify and assess risks associated with specific oil and gas developments. It will guide regulators’ selection of appropriate policy tools to manage those risks, monitor industry compliance and achievement of desired outcomes.

Performance measurement framework

A performance measurement framework with public reporting requirements is being developed to provide feedback about how the reformed system is performing against objectives. The framework will measure and report the performance of the new regulations publicly and will include:

- defined performance measures that consider the economy, society and the environment
- system benchmarks established internally and through comparison with other jurisdictions
- a system for monitoring and reporting performance measures
- establishment of an arm’s length environmental monitoring agency.

Sources: Alberta Energy (2013); Alberta Government (2010); Responsible Energy Development Act, 2012 (Alberta).

C.2 United Kingdom

Current major project assessment and approval processes

In the United Kingdom, a separate approval process is used for projects deemed to be nationally significant infrastructure. To qualify, projects must be of a particular type (for example, an airport, harbour, reservoir or various types of land transport

and energy infrastructure) and be above a minimum size threshold (for example, gas pipelines must be at least 40 kilometres in length) (Planning Inspectorate (UK) 2012c). In all, there are 16 types of projects that can be deemed nationally significant infrastructure.

The legislative basis for the planning application process for nationally significant infrastructure projects is the *Planning Act 2008* (as amended by the *Localism Act 2011*). The *Planning Act 2008* was introduced to streamline decisionmaking. The Act sets out fixed time frames for the examination and decisionmaking stages of the process.

In April 2012, the Planning Inspectorate became the agency responsible for operating the process in England and, for some types of infrastructure, in Wales (Planning Inspectorate (UK) 2012c). Other arrangements apply in Scotland and Northern Ireland.

Following the Planning Inspectorate's examination, it makes a recommendation to the appropriate Secretary of State (a Secretary of State is a Cabinet Minister in charge of a government department), who makes the decision to grant or refuse development consent (Barclay 2012). The process is summarised in box C.4.

Pre-application

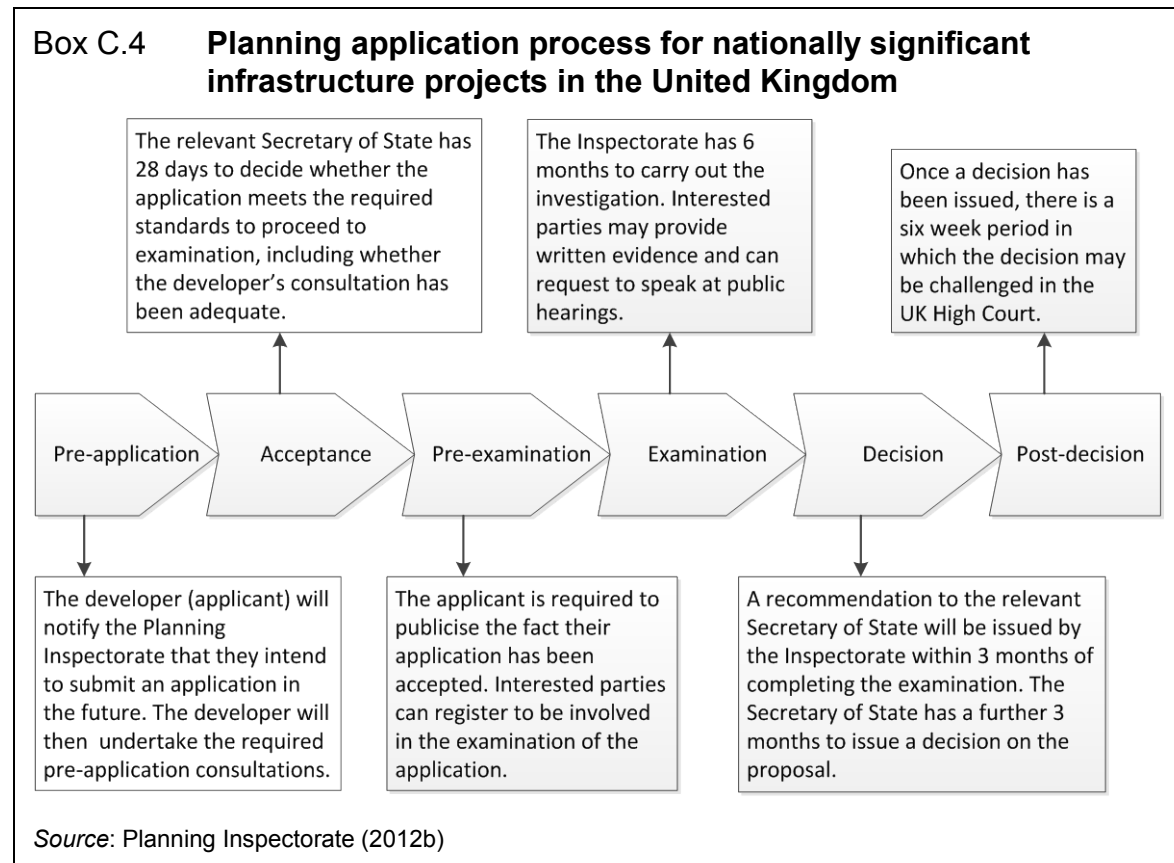
Before submitting an application to the Planning Inspectorate, the developer is required under the *Planning Act* to carry out consultation on their proposal. The pre-application process is considered a crucial part of the overall assessment process (DCLG (UK) 2013b).

Without adequate consultation, the subsequent application will not be accepted when it is submitted. If the Secretary of State determines that the consultation is inadequate, he or she can recommend that the applicant carries out more consultation activity before the application can be accepted. Once a scheme is in examination there is limited scope to make changes to what has been included in the draft Development Consent Order. This is why it is important that issues are made known and explored during the pre-application consultation ... (DCLG (UK) 2013b, p. 5)

National Infrastructure Planning Portal

Before carrying out this consultation, the developer notifies the Planning Inspectorate that they intend to submit an application in the future. The Inspectorate will then add the project to the Programme of Projects on the National Infrastructure Planning Portal, a publically accessible website (Planning Inspectorate (UK) 2012c). The Portal is used to record details of the project, application

documents, procedural advice given by the Inspectorate in relation to the project, and key project approval milestones.



Consultation

The *Planning Act* requires certain bodies and groups of people to be consulted at the pre-application stage. The Act allows for flexibility in the precise form that consultation may take, depending on local circumstances and the needs of the project itself (DCLG (UK) 2013b). The developer may be required to consult with:

- relevant local authorities
- persons who own, occupy or have an interest in the land in question where the development is proposed, or who could be affected by the project in such a way that they may be able to make a claim for compensation
- local communities that may be affected by the proposed project.

For offshore projects that do not feature any terrestrial development (such as offshore wind farms), there are no statutory requirements to consult specific local authorities. However, applicants for offshore projects should consider and consult

with communities in the vicinity of the proposed project about its potential visual, economic and social impacts (DCLG (UK) 2013b).

Before formally consulting people living in the vicinity of the project, the developer is required to prepare a Statement of Community Consultation (SOCC), having first consulted with the relevant local authorities about what it should contain. The SOCC details the consultation the developer intends to undertake with the local community about their project. The developer is required to publish a notice stating where and when the SOCC can be inspected (Planning Inspectorate (UK) 2012c).

The *Planning Act* provides a minimum 28 days for consultation. However, this period of consultation may be longer for larger or more complex projects. Where responses from those consulted are not received within the set deadline for consultation, the applicant is not obliged to take these responses into account in their application (DCLG (UK) 2013b).

Environmental Impact Assessment

Most nationally significant infrastructure projects will fall within the scope of the EIA Directive, and will require an Environmental Statement to be prepared and submitted as part of the application pack. Under the *Planning Act*, the EIA process is governed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. These regulations ensure that the pre-application publicity and consultation requirements for the EIA are consistent with those of the Planning Act (DCLG (UK) 2013b).

Acceptance

Acceptance means that an application can proceed to examination. The acceptance stage begins when a developer submits a formal application for development consent to the Planning Inspectorate. There follows a period of up to 28 days for the relevant Secretary of State to consider whether the application meets the standards required for formal examination. (Planning Inspectorate (UK) 2012a). Applicants are required to produce a consultation report as part of their application, detailing how they have complied with the consultation requirements of the *Planning Act*. The Secretary of State will consider this report when deciding whether or not the applicant has complied with the pre-application consultation requirements, and ultimately, whether or not an application can be accepted (DCLG (UK) 2013b).

Pre-examination

If an application is formally accepted by the Secretary of State, then the pre-examination phase will commence. The applicant (developer) is required to publicise the fact that their application has been accepted and the arrangements for interested parties to make representation about the proposed development.

At this stage, interested parties must register with the Planning Inspectorate to have their views considered by the Examining Authority. At least 28 days must be provided for people to register. As part of the registration process, parties may provide a written summary of what they agree and/or disagree with in the application. This is known as a ‘representation’. The Examining Authority may disregard representations that are vexatious or frivolous, or deal with the merits of national policy rather than the project under application. The Examining Authority may also disregard representations that relate just to compensation for compulsory acquisition (rather than the justification or need for such acquisition). After the deadline for registration has passed, the Examining Authority has 21 days to review the application and all relevant representations and identify the principal issues for examination. The Planning Inspectorate will publish all relevant representations on the National Infrastructure Portal (Planning Inspectorate (UK) 2012c).

Examination

The examination of applications for development consent can be conducted either by a group of three or more appointed persons (‘Inspectors’), or by a single Inspector, depending on the complexity of the project and the level of public interest in the outcome. The Secretary of State makes this decision.

Where it seems likely that evidence to be given about an application will be of a level of complexity outside the normal experience of the persons appointed to examine the application, one or more assessors may be appointed to advise and assist the Inspectors (DCLG (UK) 2012).

The Examining Authority is required to invite the applicant, local authorities and other interested parties to a preliminary meeting to help determine how the application should be examined (DCLG (UK) 2012). The Examining Authority has a statutory duty to complete its examination within six months of the Preliminary Meeting. The examination is a form of legal process, during which consideration is given to relevant matters, including the representations of all interested parties, any evidence submitted and answers provided to questions set out in writing and explained at hearings (Planning Inspectorate (UK) 2012c).

During the examination stage, all interested parties are invited to provide further written evidence, if they wish, about the issues identified in their representations. The Examining Authority is likely to put written questions to the applicant and other interested parties to clarify points made or to seek additional information. All interested parties also have the opportunity to comment on the representations of others, and to respond to any comments made on their representations. While the examination is mainly a written process, in certain circumstances the Examination Authority may decide to hold hearings (Planning Inspectorate (UK) 2012c). It is also common practice for Inspectors to make site visits during this process (DCLG (UK) 2012).

Decision

The Examining Authority has three months from the end of the examination to make a recommendation to the Secretary of State. The Secretary of State then has a further three months to take a decision. The Secretary of State does not have to abide by the recommendation of the Examining Authority. The Secretary of State may disagree on any matter of fact mentioned in, or appearing to be material to, a conclusion reached by the Examining Authority, or may consider new evidence or any new matter of fact (DCLG (UK) 2012). For example, recently the Secretary of State for Energy and Climate Change refused approval for a proposed gas storage facility in Lancashire, despite a recommendation for approval from the Planning Inspectorate. Consent was refused on the grounds that the application ‘failed to demonstrate the suitability of the site’s geology’ (BBC 2013).

Post-decision

There is no right of appeal against the Secretary of State’s decision. However, once a decision has been issued, there is a six week period in which application may be made to the courts for judicial review (Planning Inspectorate (UK) 2012b).

Views on the performance of the system

Time frames are largely being met

The Planning Inspectorate’s 2012-13 annual report stated:

In 2012-13 formal applications were submitted on 16 projects and we received notification of 19 pre-application projects. We issued Environmental Impact Assessment (EIA) scoping opinions on 30 applications and screening opinions on 2 further cases. 13 applications were accepted for examination (acceptance decisions) and

15 completed the examination - recommendations were submitted to the Secretary of State on 9. All these were within the statutory time limits set down. (Planning Inspectorate (UK) 2013, p. 16)

The report indicates that Secretary of State decisions were also being made within statutory time limits.

Walker (2013a) reported that ‘from the start of the examination until a decision is issued takes up to a year, which is how the regime was intended to work, and should provide comfort to future users of the regime’.

However, judicial review challenges are quite common and this is adding to time frames in some cases. Recent projects subject to judicial review include the Hinkley Point C nuclear power station in Somerset, the Heysham to M6 link road in Lancashire and the Rookery South ‘energy from waste’ project in Bedfordshire. The Hinkley Point decision is being appealed by An Taisce, an Irish heritage charity, on the grounds that the UK Government had not consulted with the Irish people before granting consent (Geoghegan 2013).

Environmental and other regulations are imposing relatively high costs

A recent review of major infrastructure projects in the United Kingdom found that the United Kingdom ‘is an expensive place in which to build infrastructure’ (HM Treasury 2010), with the United Kingdom consistently ranked among the most expensive countries in Western Europe to build infrastructure. These higher costs are largely due to factors other than higher labour, plant and material input costs:

Comparison of labour, plant and material input costs with Northern European countries indicate the UK is generally comparable and that input costs are not a significant driver of higher infrastructure costs. (HM Treasury 2010)

While the report noted that in some instances the higher costs were a result of the United Kingdom’s greater density of population and high land costs, as compared to other European countries, the report also noted that some of the higher costs could be attributed to policy. Specifically, the report cited the United Kingdom’s approach to addressing environmental and ecological concerns, noting that:

[w]hile these systems [compliance and consent regimes] are individually designed to protect the environment, heritage, the rights of citizens and ensure high quality, safe infrastructure, the cumulative cost impact is considerable. (HM Treasury 2010)

Compliance with environmental regulations and related third party constraints was estimated to add as much as 10 to 15 per cent to the cost of infrastructure (HM Treasury 2010).

Recent and prospective reforms

The UK *Planning Act 2008* was introduced to speed up approval processes for key infrastructure following a series of high profile proposals that took several years to be approved. For example, consent for Terminal 5 at Heathrow airport took eight years from the time a planning application was formally lodged (Falconer 2001). The reforms included:

- developing a series of National Policy Statements, that set out in advance government objectives for the development of nationally significant infrastructure in particular sectors
- requiring consultation be undertaken before an application was submitted
- reducing the use of public inquiries and hearings, and relying more on written submissions
- introducing fixed time frames for considering applications
- approval by the examining body, rather than a Minister (Walker 2013b).

The *Localism Act 2011*, reinstated Ministerial approval, but left many other aspects of these reforms unchanged.

More recently, the UK Government announced that the process that applies to nationally significant infrastructure will be widened to cover the most significant business and commercial projects (Boles 2013). Consultations have occurred on this proposal and the Government intends to bring forward draft regulations by October 2013 (DCLG (UK) 2013a).

C.3 United States

Context

As a federation, most powers related to regulating aspects of major projects are reserved to the states. Planning powers, however, are predominantly applied by local government through the exercise of zoning (which is given effect under the policing head of power reserved for the states but delegated to the municipal level (Cullingworth and Caves 2009, pp. 78–79).

Further, two particular features of US land ownership are notable for their implications for major project assessment and approval. First, activities on Native American lands can be regulated differently, as tribes are considered ‘domestic dependent nations’ and operate as sovereign governments subject to Federal

authority. Second, mineral rights are not always reserved to the state. Individual surface owners often own the subsurface mineral rights (though they may have on-sold or leased them separately from the surface rights). Mineral rights are also frequently owned by the Federal government, especially in Western states. (The Federal Bureau of Land Management manages around 13 per cent of the total US land surface, mostly in Western regions.)

Key features of assessment and approval processes

The regulatory regimes that can apply to major projects in the US are extraordinarily complex, and can depend on which levels of government are involved (box C.5). The following section focuses primarily on the key environmental assessment processes that may apply.

Box C.5 US regulatory complexity — geothermal road mapping project

Against the backdrop of uncertainty around the US geothermal permit process, in April 2012 the US Government established a project team to develop working roadmaps of existing relevant permitting processes (for agency, industry and policymaker use).

As of July 2013, the team had published over 450 different flow charts detailing potential processes or permits that a geothermal project may have to comply with, including:

- 20 general process flow charts (ranging from exploration to water access overviews)
- over 40 US Government flow charts (ranging from 'Tribal Land Leasing' to 'Bald & Golden Eagle Permits')
- over 390 state process flow charts (ranging from Alaskan 'Right of Ways' to Idaho's 'Well Abandonment Process'). In California alone, 29 flowcharts were listed.

These processes just cover the geothermal relevant processes of the US Government and 10 largely western states (where most geothermal resources are). Additional or altered processes can apply for non-geothermal projects.

Source: DOE (US) (2013b).

Key Federal processes

While the states have the most prominent role in regulating major projects, the Federal Government also plays a part in certain circumstances. Most prominently this occurs through the need for a Federal EIA. This can occur where Federal land or any Federal decision maker or agency is involved.

The National Environmental Policy Act 1970

A highly influential and much replicated statute, *the National Environmental Policy Act 1970* (NEPA) was legislated to protect and enhance the environment. It established a series of national environmental policies and related action-forcing provisions, and created the Council of Environmental Quality (CEQ) (an agency in the Executive Office of the President). CEQ is responsible for environmental policy coordination, monitoring and reporting, and the operation of the Act. It advises the President on environmental matters and sets the regulations for how NEPA operates, including the EIA process.

NEPA's action-forcing provisions are primarily procedural, and most obviously manifest in a requirement for Federal agencies to conduct an EIA for Federal actions that significantly affect the environment. NEPA requires that Federal decision makers consider the potential environmental consequences of their proposed action, and any reasonable alternatives, before deciding whether and in what form to take an action. While this EIA process provides more information on environmental impacts, it does not require decision makers to choose a project formulation with the least environmental impacts. The Environmental Protection Agency (EPA), a sister agency of CEQ, has a role in reviewing EIAs. EIAs deemed inadequate are referred to CEQ. Federal agencies complying with NEPA often require the proponent to prepare and submit adequate application information to help in preparing the NEPA analyses and documentation.

Collaboration with tribal, state and local governments is encouraged to reduce duplication. Regulations 'explicitly provide for Federal agencies to conduct joint planning processes, joint environmental research ... and joint environmental assessments' (DOE (US) 2013c). State and Federal EIAs are thus sometimes combined into one document (since they can have similar elements for the most part).

Key State law

As the most populous State, and one with a prominent environmental regulatory regime, California has been chosen as an illustrative example for relevant state regulatory regimes.

The California Environmental Quality Act 1970

Similar to NEPA, the *California Environmental Quality Act 1970* (CEQA) has been a significant influence on environmental law in other jurisdictions. A number of

other US States have laws similar to CEQA (although their scope is usually narrower).

CEQA requires State Government agencies to consider (primarily through EIA) the environmental consequences of certain projects before approving their plans. It applies to any action when a project requires discretionary approval by a state or local governmental body.

CEQA is wider in scope than NEPA. NEPA applies only to projects receiving Federal funding or approval by Federal agencies, while CEQA applies to projects receiving any form of state or local approval, permit, or oversight. (Thus, development projects in California funded only by private sources and not requiring approval by a Federal agency would be exempt from NEPA, but would likely be subject to CEQA.)

Moreover, unlike the NEPA process, CEQA has:

... substantive provisions beyond mere procedural requirements which means the State may halt a project that on balance is not advantageous for the environment and human health. (DOE (US) 2013a)

That said, a State agency may sometimes approve a project which causes significant environmental damage. In this case:

... the agency must make findings which clearly explain the circumstances surrounding the project analysis and the approval. Then, the agency must explain their decision to approve the project, despite expected environmental damage, by adopting a Statement of Overriding Considerations. This type of statement points out the reasons why a project's benefits outweigh its environmental costs. (San Luis Obispo County 2013)

Reform directions

The Commission is aware that legislative reforms have been mooted, but have yet to gain enough support for passage, both federally and in California. For example, as of mid-July 2013, the US House was scheduled to consider H.R. 761: *the National Strategic and Critical Minerals Production Act of 2013* (which aims to streamline Federal permitting for resources projects. It supersedes a similar Act (H.R. 4402) that failed to gain enough support to be signed into law in 2012. Meanwhile, the Commission is aware that the California legislature has canvassed possible reforms to CEQA. However, none have yet gained sufficient support. In the absence of legislative reform, the US Administration has focused on both administrative changes and efforts to enhance access to information. For example, in February 2013 President Obama announced a goal of cutting timelines in half for

major infrastructure projects (such as highways, bridges, railways, ports, waterways, pipelines and renewable energy):

[The] modernization effort will achieve time savings ... while ensuring projects create better outcomes for communities and the environment. The effort will ... [expand the] use of integrated planning, landscape and watershed-level mitigation, information technology, and publication of public timelines for permitting and review decisions to improve transparency and predictability. (White House 2013)

The changes have also occurred against the backdrop of the President signing a number of key orders to promote streamlined Federal permitting, including:

- the 31 August 2011 Presidential Memorandum — Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review
- the 22 March 2012 Executive Order — Improving Performance of Federal Permitting and Review of Infrastructure Projects
- the 17 May 2013 Presidential Memorandum — Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures.

Other reforms to Federal US DAA processes involving administrative changes and improved information provision have been implemented recently.

Administrative changes

- Promoting internal coordination within government, particularly amongst Federal agencies with a notable role in permits
 - Specific examples, include a 2009 Memorandum of Understanding (MOU) between nine Federal Agencies to speed approval of new transmission lines. This was followed by the interagency ‘Rapid Response Team for Transmission’ initiative, which aims ‘to improve the overall quality and timeliness of electric transmission infrastructure permitting, review, and consultation by the Federal government on both Federal and non-Federal lands’ (CEQ nd).
 - There have also been efforts to increase federal–state coordination, particularly through the use of MOUs.
 - ... For example, CEQ has worked with the Western (States) Governors Association to reduce duplication on assessments and other permitting matters.

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- ... Additionally, the Department of the Interior has signed a 2009 MOU with the State of California, which is assisting in the development of renewable energy projects.
- Greater reporting and transparency
 - A new annual Report to the President on approaches to cut timelines and improve outcomes for Federal permitting of infrastructure projects has been initiated.
 - The Office of Budget Management now tracks the progress of large scale projects, like transmission lines and highways, which has helped put pressure on agencies to improve performance in providing approvals.
 - A new ‘Federal infrastructure permitting dashboard’ website has enhanced public transparency.
 - Evaluation of internal processes
 - Collectively, the above initiatives have increased pressure on agencies to examine their own procedures. For example, the Department of Transportation initiated an internal improvement program called ‘Every Day Counts’ in 2010 to shorten ‘the time needed to complete highway projects through the use of new technologies and innovative processes’ (DOT (US) 2012). This initiative has caused the department to systematically review the efficiency of their permitting processes.

Information provision

- Better baseline data, including accessible electronic information systems
 - US agencies have developed web tools to access geospatial databases in real time to help facilitate the environmental review process.
 - While certain databases and inventories are currently only available to government users, the US Environmental Protection Agency’s ‘NEPAssist’ tool is publicly accessible. This ‘provides immediate screening of environmental assessment indicators for a user-defined area of interest. These features contribute to a streamlined review process that potentially raises important environmental issues at the earliest stages of project development’ (EPA (US) 2012).
- Better information on regulatory processes at the pre-application stage (to assist applicants to have everything in place before actually putting in an application)
 - Regulatory roadmaps are being developed to help proponents (and regulators) understand permitting requirements (for example, the Geothermal Regulatory Roadmap (box C.5)).

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- CEQ is working on a pre-application tool kit to make Federal processes easier to navigate.
 - CEQ is also apparently progressing efforts to encourage pre-application meetings and coordination amongst Federal agencies and applicants, to provide greater regulatory certainty and get things going through early information provision.

C.4 New Zealand

Key features of the DAA framework

The *Resource Management Act 1991* (RMA) is the key legislation governing the assessment and approval of development in New Zealand, including major projects. It replaced in whole or part more than 20 major statutes and 50 other laws related to the environment: ‘a collection of uncoordinated approaches, with many conflicts, gaps and overlaps’ (MfE (NZ) 2013, p. 12).

Introduced in 1991, the RMA was ‘in international terms ... the first real attempt to institute a planning system that was built on a concept of sustainability’ (Miller 2011, p. 1). Its purpose is ‘sustainable management’ — that is, the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while:

- sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations
- safeguarding the life supporting capacity of air, water, soil, and ecosystems
- avoiding, remedying or mitigating any adverse effects of activities on the environment (s. 5).

In addition, the principles of the RMA include:

- matters of national importance that must be recognised and provided for, including:
 - the preservation of the natural character of the coastal environment, wetlands, lakes and rivers and protection of them from inappropriate subdivision, use and development
 - the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development

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- the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna
 - the relationship of Maori and their culture and traditions with their ancestral lands, water and sites
 - the protection of historic heritage from inappropriate subdivision, use and development
 - the protection of protected customary rights (s. 6)
 - matters that all decisions ‘shall have particular regard to, including:
 - kaitiakitanga³
 - efficient use and development of natural and physical resources
 - efficiency of the end use of energy
 - amenity values
 - finite characteristics of natural and physical resources
 - the habitat of trout and salmon (a proxy for water quality)
 - climate change
 - renewable energy (s. 7)
 - taking into account the principles of the Treaty of Waitangi (s. 8).

Most decisions under the RMA are made by local government, but within a framework that flows from the national level (via statements determined by the central government, such as national environmental standards and national policy), through to regional policy statements and plans, and then to district plans and rules (determined by local government).

The RMA:

- imposes a statutory requirement on regional councils to prepare regional policy statements, and regional coastal plans, which must give effect to national policy statements
- requires territorial councils to prepare district plans for resource management within their local areas, which must not only give effect to national policy statements of central government but also regional policy statements by regional councils.

3 The traditional Maori system of environmental guardianship is kaitiakitanga, which is a way of managing the environment based on the traditional Maori world view.

The RMA allows all consent decisions about a project to be considered in one process. This aims to reduce costs otherwise associated with applications for multiple permits. It brings together in one Act broader coverage of the social, environmental, heritage and Indigenous issues than is the case in Australian legislation.

Nevertheless, the RMA has been criticised:

The Government continues to hear concerns that resource management processes are cumbersome, costly and time consuming, and that the system is uncertain, difficult to predict and highly litigious. The system seems to be difficult for many to understand and use, and is discouraging investment and innovation. The outcomes delivered under the RMA are failing to meet New Zealanders' expectations. (MfE (NZ) 2013, p. 6)

Proposals of national significance

While local authorities are the principal decision makers under the RMA, the Act provides for the Minister for the Environment to make a direction that a proposal is of national significance and refer it to a board of inquiry (appointed by the Minister) or to the Environment Court for a decision. The Minister does not decide whether these proposals should be approved.

Factors the Minister may consider, when deciding whether the proposal has national significance, include whether the matter has:

- aroused widespread public concern
- involves significant use of natural and physical resources
- is relevant to New Zealand's international obligations
- will help the Crown fulfil public health, welfare, security or safety obligations or functions
- is likely to contribute to significant changes to the environment
- relates to network utilities extending to more than one district or region (s 142(3)).

For nationally significant proposals that have been lodged with a local authority, the Minister can be formally requested to intervene in a decisionmaking process by either the applicant for the proposal or the local authority that would normally make the decision. Alternatively, the Minister can choose to intervene on his/her own volition. Applicants with proposals that they consider are of national significance can also lodge directly with the recently established Environmental Protection Authority (EPA).

If the Minister calls in a proposal that has been lodged with a local authority, he or she can make a direction that the matter is referred for consideration and decision to an independent board of inquiry (the Minister appoints members to the Board), or to the Environment Court. In either case, the local authority will no longer have the role of deciding the matter. Examples of call-ins in the last five years include proposals for the Turitea, Waikato and Te Waka wind farms, the Upper North Island Grid Upgrades and the Te Mihi geothermal power station (MfE (NZ) 2011).

If the matter has been lodged with the EPA, the EPA must make a recommendation to the Minister on whether it considers the proposal to be of national significance, and whether it should be referred to a Board of Inquiry, the Environment Court or the local authority for consideration and decision.

If the Minister decides to call in a proposal, he/she must give a direction in writing, stating the reasons for referring the matter to a Board of Inquiry or to the Environment Court. The EPA serves the Minister's direction on the local authority and applicant. The EPA also gives public notice of the Minister's direction and receives submissions on the proposal.

If the Minister makes a direction that the matter will be processed by the local authority, the Minister may still intervene in the process. For example, the Minister may make a submission on the matter for the Crown, appoint a project coordinator to advise the local authority on anything relating to the matter, or appoint an additional hearings commissioner.

If the matter is referred to a Board of Inquiry, as soon as practicable after the inquiry has been completed, the Board prepares a draft decision and produces a draft report which states the reasons for its decision. After inviting comments on 'minor or technical' aspects of the report, the Board produces a final report and decision. That is, the Board is the ultimate approval authority.

If the matter is referred to the Environment Court, the Court must have regard to the Minister's reasons for making a direction in relation to the matter, and must apply relevant sections of the RMA as if it were a consent authority.

A decision by a Board of Inquiry or the Environment Court may be challenged only by an appeal to the High Court on a question of law. If that decision is challenged, a further appeal may be taken to the Supreme Court or the Court of Appeal on a question of law, but only with the leave of the Supreme Court.

Reporting on implementing the RMA

Every two years the Ministry for the Environment surveys local authorities in New Zealand about key aspects of RMA implementation. The survey does not separate the processing of proposals of national significance, but has data about the approval process in general.

Five key facts from the 2010–2011 survey were:

- 36 154 resource consent applications were processed through to a decision
- 0.56 per cent (203) of resource consent applications were declined
- 6 per cent (2263) of resource consent applications were notified in some way (publicly notified and limited notified)
- 95 per cent of resource consent applications were processed on time. Section 37 was used to extend the time limits for 15 per cent of all resource consent applications
- 68 per cent of consents that required monitoring were actually monitored.

The survey also monitors the use of good practice by local authorities to improve performance in resource management functions (MfE (NZ) 2011).

Reform directions

There have been 17 amendment Acts for the RMA since 1993, and a further Bill is currently being considered by New Zealand's Parliament. The New Zealand Government has a program for further streamlining the RMA and improving decisionmaking:

... the Government is hearing that, in practice, every step of the current resource management system has become overly complex and unclear. There is a concern that focus under the RMA has shifted too far towards avoiding effects on the environment and that too little emphasis is being placed on using planning to deliver positive outcomes — this is a particular concern in urban areas. (MfE (NZ) 2013, p. 12)

Phase One

The first phase was completed in 2009 and streamlined decisionmaking for projects of national significance (MfE (NZ) 2013). One main element of these reforms was the establishment of an EPA, as previously there was no dedicated authority to receive or process applications that were of national significance. Other elements included providing more guidance about what would likely be of national

significance — in particular those projects involving key infrastructure — and making some procedural changes to one of the decision pathways.

Phase one involved a range of other changes.

- The Environment Court can award security for costs, in order to make appellants think carefully about the merits of their appeal.
- Parties that are trade competitors of an applicant cannot make a submission, except when they are affected by an environmental effect and this is not related to trade competition. Damages can be awarded against parties who participate for trade competition reasons.
- Councils' ability to stop the clock has been reduced except with the agreement of the applicant. The council must consider the interests of those affected by the extension and its duty to avoid unreasonable delay.
- Councils must discount charges for processing resource consents outside of statutory timeframes.
- Fines for noncompliance with the RMA have been increased.
- Applicants can choose whether their application is considered by elected representatives or by an independent commissioner(s) (MfE (NZ) 2009).

Phase two

Phase two of the reforms aims to improve the operation of the RMA and resource management more broadly, including in freshwater management and use, planning for natural hazards and for urban land supply.

In 2011, the New Zealand Government established a Technical Advisory Group to provide independent advice to the Minister for the Environment on any changes needed to sections 6 and 7 of the RMA, to improve the functioning of the legislation in the light of: 20 years' experience of its operation; the Government's environmental and economic objectives; and the broader second phase of resource management reforms.

The Technical Advisory Group found:

- the RMA's principles give greater weight to the sustainable management of natural and physical resources, than to social, cultural and economic matters. As well, some ambiguity in the wording of sections 6 and 7 makes it unclear whether and how to weight the matters within or between the sections.
- sections 6 and 7 do not include nationally significant matters – such as natural hazards, urban design and related housing affordability issues – or investment in major infrastructure beyond renewable energy. Each of these is important to

consider in present day planning, and a national view is needed because their impacts cross regional and local boundaries. One result is uncertainty for local decisionmakers who may then turn to the courts to make final decisions. (MfE (NZ) 2013, p. 20)

In addition to these broad issues, the New Zealand Government sees a range of process oriented problems that need to be resolved (box C.6).

Box C.6 Areas targeted for further reform in New Zealand

The Government has identified problems that need to be resolved:

- inefficient duplication of effort in developing plans, and unnecessary variation and complexity in planning documentation, creating problems for engagement, understanding and compliance
- a lack of clear, up to date national guidance on matters of national importance leaving such issues to be resolved at local levels coupled with a highly devolved decisionmaking system that has led to tension between national and local objectives and the development of inconsistent approaches to these matters across the country
- insufficient attention being paid to meeting future needs as opposed to mitigating impacts
- over reliance on consents and Environment Court appeals in attempting to resolve fundamental tensions over resource uses/values that would be better addressed at the plan stage
- high costs of securing and complying with decisions, particularly consent decisions that are not commensurate with actual impacts
- a lack of predictability in decision making – in both plans and consents – particularly affecting those needing decisions
- inflexibility in the application and enforcement of the Resource Management Act processes, leading to disproportionate costs and requirements, particularly for small projects.

Source: MfE (NZ) (2013).

The New Zealand Government has proposed a package of reforms that includes:

- changing the principles underpinning the RMA, to reinforce that decision makers must have regard to a balance of environmental, social, economic and cultural values and priorities for resource management
- improving the way central government responds to issues of national importance and promotes greater national direction and consistency where needed
- clarification and an extension of central government powers to direct plan changes

-
- creating fewer and better resource management plans, based on a national template, so that users of the resource management system would no longer need to refer to multiple planning documents
 - changing the Environment Court's procedures, to enable faster resolution of proceedings
 - limiting the scope of conditions that councils can impose when granting resource consent
 - changing consent appeals from de novo to merit by way of rehearing
 - expanding the issues that the Minister can call in as nationally significant, by giving the Minister the power to designate nationally important issues (this is conditional on the creation of a new consenting body)
 - enabling more effective and meaningful Maori participation in resource management planning
 - creating an 'expectations system' for what councils are expected to deliver, and monitoring performance against these expectations.

The New Zealand Government expects to make decisions in mid-2013, leading to the passage of a resource management Bill by the end of 2013 (MfE (NZ) 2013).

D Overview of international rankings reports

There are a number of publicly available reports that rank Australia or its States and Territories against other jurisdictions in areas related to development assessment and approval (DAA) processes. Most of these reports adopt a perception survey approach and attempt to translate this information into some sort of comparative quantitative indicator(s) that can be used to rank jurisdictions.

Some of the reports survey broad regulatory performance, while others take an industry perspective (for example, attractiveness of jurisdictions for mining investment). Most of the reports do not directly measure the efficiency and effectiveness of DAA processes.

Australia compares favourably with other countries. Australia ranks 10th out of 185 countries in the World Bank's *Doing Business Report* (a proxy for the efficiency of regulatory processes) and 20th out of 144 countries in the World Economic Forum's *Global Competitiveness Report*. Resource-related surveys also indicate that Australia is a preferred location for mining investment and has a regulatory framework that is supportive of investment. For example, Behre Dolbear's *Ranking of Countries for Mining Investment* ranked Australia as the best destination (out of 25 countries) for mining investment for the last three years.

Within Australia, surveys that compare the regulatory performance of Australian jurisdictions generally rank Western Australia, South Australia or the Northern Territory highest.

Table D.1 summarises the focus and key findings of these surveys.

Table D.1 **An overview of international surveys that rank regulatory performance**

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
Survey of Mining Companies 2012-13 <i>Fraser Institute</i>	This survey ranks the mining investment climate of 96 jurisdictions around the world. Jurisdictions are assigned scores for each of 17 policy factors, covering: • regulatory certainty • regulatory duplication and inconsistencies • uncertainty with respect to land use or claims • infrastructure (access to roads, power availability and so on) • political stability and level of corruption. The factors are aggregated for each jurisdiction into a Policy Potential Index to provide an overall score.	The top ranked jurisdictions were Finland, Sweden and Alberta (Canada). The best ranked Australian jurisdiction was Western Australia (15th overall) and the lowest ranked Australian jurisdiction was Tasmania (49th overall). Western Australia and the Northern Territory scored relatively well as jurisdictions that encourage investment by reducing uncertainty concerning the administration, interpretation, and enforcement of existing regulations, but generally Australia does not rank as well on avoiding regulatory duplication and inconsistencies.
Global Petroleum Survey 2012 <i>Fraser Institute</i>	This survey ranks 147 jurisdictions around the world in relation to the barriers to investment in upstream oil and gas exploration and production. Jurisdictions were assigned scores for each of 18 factors, covering: • regulatory uncertainty • cost of regulatory compliance • trade barriers • infrastructure • political stability and corruption. The All-Inclusive Composite Index for each jurisdiction is derived from the equally-weighted scores for each factor.	The top ranked jurisdictions were Oklahoma (USA), Mississippi (USA) and Texas (USA). The highest ranked Australian jurisdiction was South Australia (29th overall) and the lowest ranked Australian jurisdiction was New South Wales at 63rd. In general, Australian jurisdictions performed relatively poorly in terms of regulatory environment, with the highest performing jurisdiction (New South Wales) ranked 47th and the lowest performing jurisdiction (South Australia) ranked 116th.

(Continued next page)

Table D.1 (continued)

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
2013 Ranking of Countries for Political Risk: Where Not to Invest <i>Behre Dolbear</i>	This report ranks 25 countries on their attractiveness as global mining investment destinations. Seven criteria are used: • economic system • political system • social issues affecting mining in the country • delays in receiving permits • the degree of corruption • stability of currency • competitiveness of the country's tax policy.	Australia ranks as the 'best destination' for mining investment of all 25 countries. Its position as the best destination is unchanged over the last three years. Within the specific criteria, Australia is also ranked as: • being the most effective at managing social issues • having the fewest permitting delays.
National audit of regulations influencing mining exploration and project approval processes (draft) <i>URS Australia Pty Ltd</i> (cited in MCA, sub 33)	This report covers the scope and application of laws that affect the minerals sector in Australia and New Zealand. Each jurisdiction was rated out of five for various criteria, covering the design of policies and regulations and the administration of the process for each approval/permitting/access requirement. The scores are aggregated to yield rankings, including an overall ranking of individual jurisdictions.	Unnecessary delays and duplication in processes were found to negatively impact mining projects in Australia. Overall, the ratings of all Australian jurisdictions fell between 2006 and 2012, which is attributed to the increase in the amount of legislation applicable to the minerals sector. South Australia ranks the highest, with an average score of 3.7 out of 5 across all criteria. This is closely followed by New South Wales, Victoria, Queensland and New Zealand.
Doing Business 2013 <i>World Bank and International Finance Corporation</i>	This report ranks 185 economies in terms of ease of doing business generally as well as an assessment of 11 specific regulatory areas, including the ease of: • starting a business • dealing with construction permits • getting credit • enforcing contracts • trading across borders.	The highest ranked economies were Singapore, Hong Kong and New Zealand. Overall, Australia ranked 10th. On dealing with construction permits, Australia is ranked 11th. It was estimated that the process of dealing with construction permits in Australia involved 11 procedures and took 112 days.

(Continued next page)

Table D.1 (continued)

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
The Global Competitiveness Report 2012-13 <i>World Economic Forum</i>	This report calculates a Global Competitiveness Index for 144 countries as a weighted average of different 'pillars', including: • institutions • infrastructure • macroeconomic environment • health and primary education • higher education and training • goods market efficiency • labour market efficiency • financial market development • technological readiness • market size • business sophistication • innovation.	The best ranked jurisdictions were Switzerland and Singapore. Overall, Australia was ranked 20th. However, Australia performs relatively poorly on individual measures related to development assessment and approval processes. Australia is ranked: • 96th on the burden of complying with government regulation • 29th on the transparency of government policymaking • 56th on government provision of services to help businesses boost their economic performance • 18th on the efficiency of the legal framework in settling disputes • 19th on the efficiency of the legal framework in allowing private businesses to challenge the legality of government actions and/or regulations.
Development Assessment Report Card 2012 <i>Property Council of Australia</i>	This report evaluates each Australian jurisdiction's planning system against the Development Assessment Forum (DAF) leading practice principles, namely: • effective policy development • objective rules and tests • built-in improvement mechanisms • track-based assessment • single point of assessment • notification • private sector involvement • professional determination for most applications • applicant appeals • third-party appeals.	The Northern Territory was ranked the best of the Australian jurisdictions in terms of a consistent improvement program and commitment to the DAF principles. Western Australia also made significant improvement between 2010 and 2012.

(Continued next page)

Table D.1 (continued)

<i>Report</i>	<i>Focus</i>	<i>Key findings</i>
DAF Reform Implementation Report Card (2012) <i>Property Council of Australia</i>	The progress of each Australian jurisdiction in implementing the planning reforms outlined by the DAF leading practice principles.	The Northern Territory was ranked the best jurisdiction overall, which is largely attributed to its single level of planning control. South Australia made the most advances by setting policies and strategies and providing planning direction to local government. New South Wales scored the lowest, notwithstanding the major reforms already put in place, but has the most potential for improvement if announced reforms are implemented.

Sources: (Behre Dolbear 2013; Fraser Institute 2012; Fraser Institute 2013; URS Australia Pty Ltd nd; World Bank and International Finance Corporation 2013; PCA 2012a, 2012b; WEF 2013)

E International use of strategic assessment

E.1 European Union

Within the European Union, Strategic Environmental Assessment (SEA) has been mandatory for certain types of plans and programs since 2001 under Directive 2001/42/EC, known as the ‘SEA Directive’. A directive is a legislative Act of the European Union that requires member states to achieve a particular result, but typically does not dictate the means of achieving that result. Failure to comply with the Directive may result in the European Commission initiating legal action against the member state in the European Court of Justice.

The SEA Directive covers plans and programs that are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste, waste water management, telecommunications, tourism, town and country planning or land use. For plans and programs not covered by these categories, European Union member states have to carry out a screening procedure to determine whether the plans and programs are likely to have significant environmental effects.

Governments within EU member states can choose to go further than the minimum requirements of the SEA Directive, as for example Scotland has (see below). Other EU member states, such as Sweden, have chosen to only comply with the minimum requirements of the directive. Since July 2004, Swedish law has contained provisions requiring certain government plans and programs to be subject to SEA (EPA (Swe) 2010).

Sadler and Jurkeviciute (2011) noted a number of leading practices that have contributed to successful SEA outcomes in the European Union:

- adequate procedural and methodological guidance is provided to practitioners
- the public is properly consulted
- there are checks and balances for SEA quality, such as independent review
- reasonable alternatives are identified and considered (for example, alternative locations for development should be genuinely considered, rather than undertaken during report preparation to meet requirements)

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- cumulative and large-scale impacts are considered.

However, they suggested that there are some areas where EU nations need to improve, such as monitoring and compliance:

Not much seems to be known about practice in monitoring environmental effects of plans and programs ... or reviewing environmental reports to ensure they are of 'sufficient quality to meet the requirements of the Directive' – both of which are critical to gaining a firmer understanding of SEA effectiveness. (Sadler and Jurkeviciute 2011, p. 142)

Overall, they found that the implementation of the SEA Directive in the European Union has been mixed, 'proceeding at very different speeds in member states' (Sadler and Jurkeviciute 2011, p. 144). This accords with the observations of the Commission. The Commission has focused on the application of the SEA Directive in the United Kingdom, and more specifically, Scotland, which is considered by some researchers to have the most comprehensive application of SEA (Kelly, Jackson and Williams 2012).

United Kingdom

As an EU member state, the United Kingdom has legislation in place that addresses the requirements of the SEA Directive. The UK Office of the Deputy Prime Minister (2005, p. 14) reported that the UK SEA approach places an emphasis on the following areas in particular:

- Collecting and presenting information on the environmental baseline and current problems, and their likely future evolution.
- Predicting significant environmental effects of the plan or program, including those of strategic alternatives.
- Addressing adverse environmental effects through mitigation measures.
- Consulting the public and authorities with environmental responsibilities as part of the assessment process.
- Monitoring the environmental effects of the plan or program during its implementation.

However, SEA regulations and practice differ between England, Scotland, Wales and Northern Ireland and consequently the types of plans and programs that require a SEA varies across the UK (Office of the Deputy Prime Minister (UK) 2005). For example, in England the Department of Communities and Local Government is the lead department on SEA and has prepared regulations to implement the SEA Directive. In Wales, the National Assembly for Wales has prepared Regulations for SEA of Welsh plans and programs, while in Northern Ireland, the Department of the

Environment for Northern Ireland has prepared regulations to implement the SEA Directive (EA (UK) 2013).

Of all the constituent parts of the United Kingdom, Scotland has the most comprehensive application of strategic assessment techniques. In Scotland, the *Environmental Assessment (Scotland) Act 2005* (SEA Act), an Act of the Scottish Parliament, governs the implementation of the SEA Directive. This Act makes SEA a statutory requirement for virtually all aspects of Scottish policy formation. Kelly, Jackson and Williams (2012) argued:

[Scotland] currently represents the most comprehensive application of this technique to public sector policies, plans and programs, not just within the EU but across all the members of the Organisation for Economic Co-operation and Development. (p. 1)

The Scottish SEA experience

The Scottish Government has been an advocate of the value of the SEA approach. It argues that it has been an ‘important statutory step’ that can add value to development planning ‘by stimulating creative and lateral thinking, helping to challenge traditional views and facilitating fuller consideration of the environmental effects of policies and proposals’ (Scottish Government 2010, p. 1). The Scottish Government (2006, p. 4) argued that SEA achieves this by:

- systematically assessing and monitoring the significant environmental effects of public sector strategies, plans and programs
- ensuring that expertise and views are sought at various points in the process from Scottish National Heritage, Scottish Environment Protection Agency, Historic Scotland and the public
- requiring a public statement as to how opinions have been taken into account.

From July 2004 to 1 January 2011, some 555 policies, plans and programs affecting Scotland were subject to at least one formal stage of SEA. Of these, 159 were screened out on the basis that they are unlikely to lead to significant environmental effects, while 396 went on to be subject to a full SEA (EPA (Scot.) 2011).

The Scottish SEA process involves a number of steps with formal requirements that must be undertaken according to statutory or agreed timelines. A SEA is instigated by a responsible authority, that is, the authority responsible for the policies, plans and programs as determined by the SEA Act (such as the Scottish Government or a local council). The responsible authority must consult with the statutory consultation bodies under the Act and a report must be produced on how their responses have been taken into account (EPA (Scot.) 2011). The stages of the Scottish SEA process are described in box E.1. The progress of all Scottish SEA

consultations can be tracked through a publically accessible online portal, the SEA Database. The SEA Database also holds all formal submissions to the assessment, and the government responses to those submissions (Historic Scotland nd).

Box E.1 Main stages of the Scottish SEA process

The Scottish strategic environmental assessment (SEA) process has a number of steps.

- *Screening*: the responsible authority establishes whether the policy, plan or strategy is likely to have a significant environmental impact. Having formed an opinion, it must formally consult with the consultation authorities to seek their views prior to making a determination about undertaking a SEA. The consultation authorities are Scottish Natural Heritage, Scottish Environment Protection Agency and Historic Scotland. Certain categories of policies, plans and programs automatically require a SEA and therefore screening is not required.
- *Scoping*: formal consultation is undertaken with the consultation authorities to identify the scope and level of detail needed in the assessment, including the proposed period of consultation.
- *Assessment*: the assessment has to describe the effects on the environment of the policies, plans or programs and their reasonable alternatives. Environmental data collection will have been ongoing through these stages and an environmental report must be prepared.
- *Stakeholder engagement*: formal public consultation is required on the draft environmental report and on draft policies, plans and programs.
- *Post-adoption*: the responsible authority is required to make a statement on how the consultation responses and findings have been taken into account in the preparation of the policies, plans and programs.
- *Monitoring*: to ascertain the effectiveness of mitigation measures, as well as providing for the identification of any unforeseen adverse effects at an early stage.

Source: EPA (Scot.) (2011).

A recent review of the SEA process found that, while it was not as efficient as it could be, SEA had considerable potential to improve the quality of Scottish policies, plans and programs (EPA (Scot.) 2011). The report identified a number of positive aspects of the Scottish approach, including:

- improved transparency of decisionmaking in respect of environmental issues
- clearly defined requirements and procedures of the SEA Act
- regular consultation (a requirement considered important by stakeholders).

However, the report also identified a number of negative aspects to the Scottish SEA process, including:

- some stakeholders perceived that SEA had limited influence over policies, plans and programs
- consideration and evaluation of the effect on the environment of different alternatives is not undertaken in a rigorous manner
- SEA is sometimes treated as a ‘bolt-on’ process rather than being effectively integrated, and stakeholder engagement may be poor
- benefits are not always clear and immediate and this can lead to a lack of ‘buy in’ to the process by some stakeholders, or it may potentially be viewed as an inconvenience rather than an opportunity
- considerable resources are required to undertake a SEA appropriately, the process is time consuming, and the output is often complex.

A survey of Scottish SEA practitioners undertaken as part of the review found that around 40 per cent believed that SEA led to better environmental outcomes, around 35 per cent were unsure and 25 per cent disagreed that the process led to better outcomes (EPA (Scot.) 2011).

E.2 Canada

In Canada, regional environmental assessments incorporate aspects of strategic assessment, as they focus on the development potential of a geographic area, and include an examination of cumulative impacts under different development scenarios. The Canadian *Environmental Assessment Act 2012* provides the Minister of the Environment with authority to establish a committee to conduct a regional assessment for areas that are entirely composed of federal lands. The Minister may also establish a committee jointly with one or more provincial governments to conduct a regional study outside of federal lands (Natural Resources Canada, pers. comm., 8 June 2013).

At this stage, no regional environmental assessments have been started under the Environmental Assessment Act. However, a regional environmental assessment of the Beaufort Sea in Canada’s far north was instigated by the Canadian Government in August 2010 to facilitate socioeconomic and scientific research to inform regulatory decisions for potential offshore exploration and development activities in the region. It is a multi-stakeholder initiative, involving Inuvialuit communities, industry, federal and territorial governments, academia and regulators. The intention is to support effective and efficient regulatory decisionmaking by providing the

necessary scientific and socioeconomic information to all stakeholders (Aboriginal Affairs and Northern Development Canada 2012). The assessment is currently in progress and is expected to be completed within the next two years.

In addition, some Canadian provinces undertake SEAs for offshore developments. In these cases, SEAs must be undertaken prior to issuing exploration licences for oil and gas. These assessments are undertaken by the jurisdictions' petroleum board (the Canada–Newfoundland and Labrador Offshore Petroleum Board and the Canada–Nova Scotia Offshore Petroleum Board are two examples). These boards have used the SEA tool to analyse broad geographic areas and identify areas of particular environmental sensitivity that should be avoided or protected through mitigation measures. Assessments are also used to identify information gaps, and can assist efforts to assess project-specific environmental effects (Natural Resources Canada, pers. comm., 8 June 2013).

Alberta

The Government of Alberta intends to develop regional plans for seven different regions. These plans are intended to set environmental limits, conserve sensitive land from development and provide certainty to developers. The plans are also intended to assist in a shift to 'cumulative effects management' (Environment and Sustainable Resource Development Alberta 2013). The plans are legally binding. Only one regional plan (for the Lower Athabasca Region) has been approved, with the regional planning process not yet commenced for five of the seven regions.

The Lower Athabasca Regional Plan became effective 1 September 2012. The Albertan Government (Environment and Sustainable Resource Development Alberta 2012) has reported the successful outcomes of the plan as follows:

- More than 10 000 Albertans, including individuals and representatives from Aboriginal organisations, industry, municipalities and environmental organisations, were engaged in land-use planning over a three year period.
- The plan sets regional environmental limits for air and surface water quality and groundwater management. It also establishes six new conservation areas and protects important caribou habitat. The plan also establishes environmental monitoring frameworks, and commitments to engage with the Indigenous population in environmental planning decisions.
- The plan addresses infrastructure challenges and sets strategies to plan for both urban growth and the continued growth of the oil sands industry within the region.

E.3 United States

While the United States was the first country to require the use of environmental impact assessments for individual major projects through the *National Environmental Policy Act 1969*, to date, strategic assessment in the United States has been relatively underused (Clark, Mahoney and Pierce 2011). Clark, Mahoney and Pierce (2011) outlined a number of challenges to the wider application of strategic assessments in the United States.

- US regulatory organisations are not sufficiently cohesive to work together at a strategic level.
- Current organisational frameworks do not support cohesive consideration of projects that have cross-jurisdiction impacts.
- There are limited environmental data available at the regional level to support strategic decisionmaking.
- Decision makers are risk averse in situations where future developments are uncertain.
- There is a limited pool of professionals qualified to prepare strategic assessments.
- The risk of litigation if strategic assessment is flawed.

Overall, Clark, Mahoney and Pierce (2011) concluded that strategic assessment may result in improved decisionmaking in the United States, but there would need to be more acceptance of the process by those involved in environmental impact assessments before it becomes more widely used.