http://www.pc.gov.au/projects/study/major-projects/draft
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The Productivity Commission Report into major developments is deeply disappointing, profoundly flawed and should not be used as the basis for any decisions on assessment and approval of major projects without substantial and fundamental changes.

- It fails to address or answer the critical issue of whether the environmental objectives of current environmental laws are being met. Assessing whether there is duplication, inefficiency, excessive costs, excessive regulation, disproportionate conditions and offsets (as the PC and most developers claim) is utterly contingent on understanding the real world impacts of assessments and decisions that are made;

- The Report ignores the obligation to examine and assess 'the efficiency and effectiveness with which Australia DAA regulations and processes achieve the protection of social, economic, heritage, cultural and environmental assets compared with comparable international systems '
- The report purports to evaluate the ***objectives*** of legislation, not the efficacy of processes to deliver on objectives.

- Accepts as correct claims made by developers regarding costs, excessive conditions, duplication, increased regulatory burden and inappropriate offsets with no critical analysis and no data;

- Makes no attempt to determine whether resources dedicated to assessment, implementation and enforcement have kept pace (in quantity and quality) with what they describe as 'more numerous, bigger and more complex projects'

- Makes comparison with other developed countries that are 'politically, economically and socially similar' but ignores environmental differences

- Analyses the questions of duplication and inefficiency without regard to real world mechanics and dynamics;

- Fails to analyse in real world terms whether the states are meeting the requirements of assessing national environmental issues under current assessment bilaterals;

- Fails to analyse whether State Governments are capable of fulfilling national requirements in the event that approval bilaterals are put in place;

- Fails to assess the extent to which current major developments benefit from externalities that are borne by the public and the environment;

- Claims that major developments are 'critical' to our well being with no assessment of the data that might underpin such a claim;

- Assumes bigger developments deserve special treatment, although no evidence is provided to support the notion that big projects contribute significantly more than small businesses;

- Fails to recognise the reality that State Governments are often proponents of major developments, have significant conflicts of interest and are more prone than the Commonwealth to regulatory capture, institutional corruption and individual corruption;

- Fails to analyse the (well established lack of) scientific quality of EIAs and the capacity of major developments to proceed with deeply flawed or absent studies;

- Fails to place major developments in context – at a Federal level, over 99% of all developments are approved;

- Completely misunderstands the nature of offsets;

    1. The reality that destroying area A while protecting area B still results in a net loss of habitat;

    2. That rehabilitation of an area as an offset is the only way to ensure no net loss and as Professor Hugh Possingham has pointed out, no one ever, anywhere, has succeeded in fully rehabilitating habitat;

    3. Fails to examine the fact that many offsets are ludicrous (eg building a boat ramp to offset loss of fisheries habitat)

    4. Fails to examine the nature and effectiveness of offsets despite years of offsets being used;

- Is so obsessed with the theoretical mechanics of approving major developments it fails to examine real world situations at all;

- Expresses support for a Queensland 'risk based' law that will open up to 2 million hectares of land in Queensland to renewed landclearing with no assessment at all of the environmental or climate implications;

- Speaks endlessly of the cost to industry – not once (that I found) to the costs to the environment of major projects. There is no Cost Benefit Analysis – despite this being a forte of the BCA and Prod Comm.

- Supports the concept of strategic assessments (which it notes are 'broadly focussed with a low level of detail') on the grounds that it has the potential to reduce the scale and cost of subsequent project-based assessments (which may or may not occur):

    1. Refers to Access Economics Cost/Benefit Analysis of Strategic Assessments, which assumed 'benefits' would be the same under 'normal' or strategic' assessment, and measured costs solely in terms of bureaucrat hours!

    2. Notes that consultation is important for strategic assessments - but fails to note the virtually total lack of consultation by the Qld government in the current GBRWHA SA

    3. Notes that SAs enable Cumulative impact Assessments - but fails to address the fact that the work currently referred to proponents (and accepted by government) are NOT CIAs and provide no means of identifying 'death by a thousand cuts' or trigger levels.

    4. Fails to assess whether Sas have resulted in improved environmental outcomes, including assessment of cumulative impacts.

It fails utterly to answer the primary questions underlying the environmental issues relating to development assessment and development approvals.

Are those laws meeting their environmental objectives?
If the answer is no (likely in light of the declining trends identified in every State of the Environment report since inception in 1996), then you cannot address the claims of undue delay, cost and duplication until the reasons for the failures of environmental laws are established. Reducing burdens on business without knowing the failings of current environmental protection simply makes no sense.

If for instance, one of the reasons for failure of environmental laws to meet their objectives is that the process has become an approval process (99%+ of all EPBC referrals are either sent back to the states or approved) rather than an assessment process, the nature of the questions you must answer will alter. If the

reason is that conditions are not being enforced, then different issues and questions arise. Unfortunately, there is no recent review of the effectiveness (or lack of) of our environmental laws that analyses current legislation – an extraordinary failing in light of the loud complaints regarding regulatory burdens and the clear evidence of chronic declining trends (in addition to the SOE reports, you might examine the evidence provided to the Threatened Species Inquiry – a pretty damning indictment of environmental laws in protecting native species).

I am assuming here that our environmental laws are failing, but even if one assumes they are generally working, what parts are working? Why are they working? What effects will there be if the system is changed? This is not even touched on.

Are the states able to take on national responsibilities? Their interest is not national and they do not have the capacity to look beyond their own borders. There is a reason that the Commonwealth is involved in environmental issues – a reason that is not discussed, a history that is not discussed – that again makes conclusions in this report suspect.

Externalities, for instance, are not mentioned once in the entire report. In discussing major fossil fuel projects, there are numerous externalities that call into question the value of major projects. Environmental harm, human health and subsidies are issues that should be part of a analysis putative burdens on industry in relation to regulatory realities.

“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.” (p100). This demonstrates no understanding of the limitations of a carbon price, either in terms of scope (top 370 polluting companies only) or ambition. The value of complementary measures may be in broader attitudinal change, increased reductions in emissions, increased incentives for a transition to clean energy sources.

This document is so obsessed with the mechanics of development assessment that it virtually ignores the substance.

Support for biobanking ignores much of the literature on offsets that suggests benefits don't exist and that current systems do not monitor or verify benefits.

The report claims that “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.” After years of assessment bilaterals, surely there is data to support this claim of seamlessness. It should be noted that often the State has failed to undertake assessment to a quality that meets Commonwealth standards. There is often conflict between the state and commonwealth standards. And this in the context of legislation where developments are rarely if ever rejected (EPBC Act – 12 rejections in 14 years)

Once again, the PC makes abstract claims not supported by data or history.

“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.” (p59)

This is an utterly incomprehensible statement – how do these 'fast tracks' or facilitations of major projects (often removing the role of environment departments) help achieve ecologically sustainable development? Any evidence supporting this claim would be useful.

It isn't clear from table 3.2 why many of the approvals listed here are secondary. The use of the term would appear in these cases to be inaccurate and misleading.

P 100-101 – the objectives of the Qld Dept of State Development utterly contradict the environmental objectives of both the state and Commonwealth legislation, yet it is this Department that makes decisions onr

major projects.

The notion of a primary and consistent legislative objective is unworkable nor is there evidence that objects clauses drive the decision-making or assessment processes. If one looks at the EPBC objectives it is almost impossible to reconcile them to the 'say yes to everything' outcomes that the EPBC has produced.

The notion that creating greater consistency in objects clauses is going to change development assessment and approval processes is not supported with evidence. The greater likelihood is that in order to achieve greater consistency, the objects clauses will become less specific and higher level, allowing consistency without clarity.

P106 – While ESD is part of some legislation it is not followed, not pursued and not achieved. The Sate of the Environment reporting (which is flawed in many ways) makes clear that almost all environmental indicators are in decline and have been since the inception of reporting in 1996.

p139 – reference to a survey from Andre Macintosh tells you nothing except that those surveyed believe there is duplication. That claim is one of the reasons behind the PC report – it shouldn't be one of the Report's conclusions if it is based on the same anecdotal evidence.

There needs to be far stronger evidence that duplication actually occurs.

"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" (p142). The notion of allowing the Queensland Government to assess developments in the GBR is truly scary – and would make a bad situation (imminent listing as 'in danger') even worse. Much worse. Again, a bit of history would be useful – it was because of the State that the Commonwealth took jurisdiction over the GBRMP. Otherwise it would now be oil wells and a dead reef.

P143 "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:" One need only read work done by the expert water committee formed by the Commonwealth to know instantly that assessments done by the States have been woefully inadequate. This report fails to acknowledge the enormous variation in quality of assessments undertaken. In an abstract sense, there may be duplication IF the assessments being done by all parties are rigorous and scientifically defensible. They are not – and they have never been. This consistent failure to ground anecdotal claims and complaints of industry in real world evidence and experience is a serious and broad shortcoming of this report.

"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'" The PC should perhaps read the white paper that underpinned this extreme legislation. The Qld Govt acknowledged that they didn't have any evidence to support the claim of excessive regulation and excessive costs as a result.

P 150 – in recommending a one stop shop, the PC notes the risk of regulatory capture. Perhaps the PC would benefit from assessing whether regulatory capture is already a problem. For instance, what was once an 'assessment' process is no conceived by developers and the PC as an 'approval' process. This is a significant shift in perspective – one that reflects the power of the development industry and the lack of influence of the environmental sector. How often are State Governments proponents in major developments?

There is an assumption that the bigger the project, the bigger the benefits and the more Governments should invest in ensuring it proceeds. This biased treatment of 'big' is not supported by any evidence.

P152, Recommendation 7.4 – The PC recommends the establishment of a major project coordination office. Having extensive experience in Queensland (including working for the Qld Dept of Environment), the major projects department and its processes are deeply flawed, deeply biased towards development, rife with

conflicts of interest (the state is often the developer), indifferent to and ignorant of environmental issues and generally responsible for lousy decisions and a development at any cost culture. This kind of recommendation is virtually abstract – it assumes these agencies will work properly but fails to examine an historical reality that is deeply disturbing.

Section 7.4 – quality of regulators. The BCA complains that regulators often do not have the technical expertise needed to assess projects. This is true but not just in the way BCA suggests. Assessment documents are not science. They frequently lack rigour, they are not peer reviewed, they are not audited for accuracy or predictive value; environmental consultants are paid by and directed proponents often leading to conclusions and recommendations that are not supported by evidence; data collected during the process that is contrary to an approval is often not published (and there is no requirement that such negative data be provided to the regulators); results are often altered. There is a long history of criticism of environmental assessment because of the poor quality of the work that is provided. Lack of knowledge or data is ignored and rarely required to be acquired as part of the process. Regulators are not working to environmental objectives but to development objectives and the only contested space are the conditions of approval (and offsets). There is no chance of protecting the environment or reversing well established declines in biodiversity, water quality etc, if everything that is proposed is permitted. Currently, under the EPBC Act 99%+ of all proposals that come to the Commonwealth are either permitted or deemed not national matters. In the 14 years of the EPBC Act, only 12 projects have been rejected – many because of public reaction. This is not an Act that protects the environment – and our regulators are not committed to doing so – despite the Act's objectives.

It should be noted that in the assessment process currently, proponents enter into negotiations with regulators during what is otherwise a public process. They negotiate terms of reference, conditions, design, offsets. The public is excluded from these off the record processes – this fosters a culture of approval; a culture of excluding those potentially most affected by a development and exacerbating some of the conflicts that occur between communities, developers and government.

Fully support the idea of independent regulators of impact assessment (Recommendation 7.5). An NEC should also have powers to accredit (or remove accreditation) for environmental consultants. Impact assessments should be subject to a proper peer review process. The NEC should also become responsible for State of the Environment Reporting and this data should become the basis for establishing baselines, trends, triggers and responses. The objectives of the NEC should be based on ensuring that declines in environmental indicators are reversed.

The reality of impact assessment is that it often relies on desk top studies, makes conclusions without data, rarely undertakes new studies, often relies on limited data, ignores data deficiencies.

p160 “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” - So, clearly the first question that needs to be answered is are regulatory objectives being met?

In the case of the EPBC, the answer is clearly no. In addition to the broadscale evidence of continuing (and often) rapid decline in environmental indicators, we have the reality that EIA are not audited, cumulative, long term, distal and synergistic impacts of multiple approvals are not assessed; baselines are not historical but contemporary meaning there is degradation creep (ie the baselines are increasingly degraded) and there is not even any recognition that major projects cause major impacts.

It is correct that scaling of regulatory requirements is difficult, but contrary to the complaints of proponents, there are indications that insufficient work is being done – both in scope and quality. For instance, major projects are now almost always broken up – a major mine that includes water infrastructure, power infrastructure, rail lines, ports, dredging, dumping and shipping is never assessed as a single project. The effect of this is to fragment impacts, reducing their apparent scale and resulting in an entirely misleading perspective of the overall impacts of the development. It has been a longstanding complaint that EIAs do not assess cumulative impacts nor long term change. This should be basic work in EIAs – but isn't.

Time after time, business interests are cited as wanting costs to be directed at areas of highest risk but any assessment of the environmental cost impacts of development will demonstrate that proponents do not pay

most of the externalities associated with their developments. This includes climate impacts, cost of depletion or contamination of groundwater, costs (never quantified) of loss of threatened and native species, costs associated with the introduction of weeds and feral species, costs associated with activities such as sea dumping.

The citing of Queensland's new vegetation code as an example of risk based management is laughable. Really, the PC needs to get away from its desk. The new vegetation management framework in Queensland is based on opening up to 2m ha of land previously protected to clearing. This includes remnant and regrowth areas – and the notion that it is based on risk is unsupportable. It relies on self assessment – notoriously dubious and limited in effectiveness.

Great uptake of risk based approaches as recommended by the PC, particularly based on self assessment, won't work. Once again the PC has abstracted mechanical solutions without understanding either real world workings or impacts. Time after time, EIAs conclude there is little or no risk in a particular activity based on shoddy assessments and lack of data.

P164: "Participants suggested that approval conditions have become more prescriptive and onerous over time without improving environmental outcomes".

One wonders how participants know that there hasn't been an improvement in environmental outcomes when no on audits whether environmental outcomes promised by conditions or offsets are measured or audited.

One of the current problems with conditions is that they are frequently imposed in order to secure information that should have been part of the EIA – studies to determine the presence of a species for instance, or studies to identify the best way to manage a development adjacent to a Ramsar wetland. This is incredibly poor practice that means the public is removed from the process (their is no public process relating to condition or their implementation and enforcement) and that decisions are being taken with only partial information (information gathered after approval is definitely not best practice).

Offsets
"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)." (p168)

Bluntly, offsets are a sham and there is zero evidence that they result in any environmental benefit or even just maintaining the status quo. Hugh Possingham has pointed out that 'Biodiversity is not fungible, it is not possible to trade it from one place to another and hope to retain its value; biodiversity is dependent on where it is in the landscape (place) and when it is (time).' He explained how biodiversity ultimately loses from offsets: 'I'm going to conserve this 1000 hectares if you let me destroy that 1000 – in the end that just means we destroy half of everything
that is left, which isn't at all acceptable. If you were to turn 1000 hectares into bare ground, or urban development, then you should have to turn bare ground into 1000 hectares of native vegetation. Show me somebody who has done that; show me somebody that reconstructed an ecosystem from scratch. Nobody's done that. Ever!'

Before even suggesting that offsets are a legitimate option, the PC should do some work – audit the offsets that have been issued; are the offsets legitimate?

Consider a recent offset in the Great Barrier Reef related to coal port expansion. Dredging is going to destroy some seagrass beds. Proponents are required then to protect seagrass beds elsewhere. The problem, however, is that ALL seagrass beds in the GBRMP are already protected. When asked how this could be justified as an offset, GBRMPA replied that the seagrass beds would have better protection. Considering that seagrass beds are quite dynamic and not settled in a single spot, and considering existing protections, this kind of offset is a joke. And it happens regularly.

Take for example, the loss of fisheries habitat for a development in North Queensland. The offset required was the building of a boat ramp.

Take the recent offset claim by the Townsville Port Authority where they claim a breakwall dumped in the Great Barrier Reef World Heritage Area should be considered sufficient to offset ALL the damage associated with the Port expansion.

Perhaps the PC should address the question whether offsets are protecting the species and habitat that are being damaged elsewhere? Were these offset areas already providing protection – and so there is in fact a net loss of biodiversity? Is there any evidence that indirect offsets are protecting biodiversity?

And as to the comment that offsets may impose costs on the proponent. That is true. And to this exent I would agree with many of the comments made by proponents – that the ways in which EIA are conducted are excessive and useless – but for different reasons. EIA is not protecting the environment – it is allowing its destruction and mechanisms such as offsets and condition (including conditions requiring studies which should have been done as part of the assessment) are fig leafs that give a pretence that something is being done.

A useful recommendation would be a register of all offsets imposed; what damage the offsets are offsetting; monitoring and audit requirements and any reports into the utility of the offsets used.

Recommendation 7.8 - this review must include an analysis of existing offsets and their effectiveness.

There should be regulatory requirements for offsets that meet the basic realities of ecology and maximum requirements of transparency, auditing, enforcement and rights to challenge.

The notion that we know enough to play this kind of trading game with areas we are destroying is reprehensible and a scam.

P166 “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)” And the reality, ignored by the PC, is that there is no evidence that either of these offsets would have any beneficial impacts on the species or habitat involved. A moratorium on offsets should be imposed immediately until a full audit of all offsets has been undertaken.

Legislative status of conditions and offsets.
There is no right to challenge conditions imposed or to seek enforcement of conditions that are not working. For instance, the conditions imposed on the proponents for the Paradise Dam in order to ensure the survival of the lungfish were to build fish transfer devices allowing the fish to travel up and downstream. The devices didn't work. After 5 years of monitoring, warnings of the extinction of the lungfish were being made because the devices were either not operating or killing lungfish. The response of Sewpac to questions on notice seeking to know if the Department was going to take any action was, no, we deem the conditions satisfied because the devices were built. Having consulted lawyers in regards to this, I have been advised there is no recourse. Outrageous.

This is simply not quality work – the PC is capable of much better.

Jeremy Tager
3 September 2013