

SUBMISSION TO THE EPBC ACT REVIEW

ANON-QJCP-UGHD-P

Organisation

Business Council of Australia

State or Territory

National

Attachment provided?

Yes

Do you give permission for your submission to be published?

Yes – with my name and/or organisation

SUBMISSION RESPONSES

This submission was provided as an attachment only. The attachment is provided on the following pages of this document.

SUBMISSION

The independent review of the
Environment Protection and
Biodiversity Conservation Act
1999

May 2020

CONTENTS

Introduction	2
About the EPBC Act	3
Making it easier to invest in Australia	3
Recommendations	6
Policy discussion	8
1. Pre-application	8
Investing in regtech solutions	8
Greater use of strategic assessments	8
Lead agency framework	9
2. Assessment phase	10
Reducing the scope for uncertainty	10
Unnecessary duplication	11
Digitise processes under the EPBC Act	13
3. Post-approvals	14
Performance reporting	14
Offsets	15
Improving the appeals process	16

EXECUTIVE SUMMARY

A simplified, transparent, predictable, cost-effective and efficient national environmental approval system will deliver better outcomes for the environment, for the community, for businesses looking to invest in Australia and create jobs.

The *Environment Protection and Biodiversity Conservation Act 1999* and the associated regulations total over 1400 pages. The complex legislative system created by these laws does not promote optimal environmental outcomes, and also fails to provide project proponents with the predictability needed to invest in large job-creating projects.

Double-handling of applications, procedural complexity, and an absence of clear lines of accountability do not create the regulatory system needed to ensure the effective protection of Australia's environmental assets. In simple terms, complexity does not equate to better outcomes.

Comprehensive strategic assessments of development regions coupled with commensurate funding for threatened specific recovery and management and the availability of state-of-the-art biodiversity, eco-system and threatened species databases will provide the resources and the transparent and scientific evidence that is needed to properly protect Australia's unique biodiversity and natural resources.

Government investment in such tools also allows for all parties to understand where development is permissible and what is required for subsequent Environmental Impact Statements (EIS).

Providing this information upfront empowers and incentivises project proponents to structure their development activities in a way that maximises environmental protection and fosters strong community support for the project.

To ensure strong environmental protection does not result in long and unnecessary approval delays, the EPBC Act assessment system should have the following elements in place:

- A 'tell us once' culture and process for information sharing that is adhered to by federal and state agencies to avoid unnecessary duplication and proponents having to provide the same information on multiple occasions.
- Digitised processes wherever possible to limit unnecessary delays, promote efficiency and streamline information flows.
- Key approval milestones published online to promote adherence to statutory timeframes and so proponents and stakeholders have better visibility of the progress of project applications.

This review provides a once-in-a-decade opportunity to ensure Australia's national environmental protection system is fit for purpose and capable of delivering the environmental outcomes Australians expect.

In addition, pragmatic changes aimed at increasing transparency and predictability within the system will help incentivise the job-creating private investment Australia needs.

GOAL

Federal environmental law reform should aim to achieve:

A predictable, cost-effective, simple and clear environmental protection system that enhances accountability, establishes clear environmental standards and avoids unnecessary complexity and double-handling, to deliver better environmental outcomes for the nation.

PRINCIPLES

Federal environmental law and governance must be based on the following principles:

1. Enhancing the protection of Australia's environmental assets, including preventing the damage caused by invasive species identified in the Listed Key Threatening Processes.¹
2. Making appropriate use of modern technology to ensure processes are digital wherever possible in order to boost transparency, promote adherence to a 'tell us once' culture and increase efficiency of information flow.
3. Incentivising project proponents to structure their plans to meet clearly defined environmental outcomes from the outset.
4. Safeguarding the natural and Indigenous cultural values of Australia's protected areas and places of heritage status.
5. Ensuring communities have early engagement in the environment protection process and understand why decisions are made.
6. The development of an integrated, national and bipartisan energy and climate change policy framework is needed to ensure Australia meets its emission reduction commitments. Strong action on climate change should be pursued outside the EPBC Act's legislative framework.
7. Ensuring environmental impact assessment guidelines are clear and simple, therefore promoting predictability for business and better environmental outcomes.
8. Allowing for holistic environmental management on a regional and/or catchment scale, which includes consideration of cumulative environmental impacts rather than disconnected environmental assessments undertaken project-by-project.
9. Making baseline environmental data on matters such as threatened species and biodiversity areas publicly available, reducing the time it takes to complete an environmental assessment and adding to the bank of available knowledge.
10. Approval timeframes and key milestones are published online to identify decision-making bottlenecks and incentivise efficiency-enhancing process improvements.
11. Appeal processes are efficiently designed to ensure challenges have a clear and genuine basis that requires judicial determination.
12. Ensuring adequate and expert resourcing is provided to associated government institutions.

¹ Listed Key Threatening Processes: www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl

About the EPBC Act

While all levels of government regulate activities to protect the environment, the EPBC Act regulates activities that are likely to have a significant impact on a matter of national environmental significance. The EPBC Act also seeks to protect World Heritage assets and recognises the role of Indigenous people in the conservation of Australia's biodiversity.

The EPBC Act came into operation in July 2000 as the federal government's central piece of environmental legislation, replacing various pieces of environmental law that were in place at the time.²

Among other policy goals, introduction of the EPBC Act in 1999 was aimed at:

- improving the efficiency and timeliness of environmental and development approvals processes, and
- providing greater transparency and certainty in decision making in relation to development proposals.³

Protecting Australia's environment and ensuring Australia remains a competitive and attractive investment destination was not intended to be mutually exclusive under the EPBC Act. Much of Australia's economy depends on balancing the needs of the environment with development. Well-planned development can enhance environmental and economic outcomes.

In this submission, the Business Council proposes sensible reforms that will foster better community engagement and maintain strong environmental standards while reducing unnecessary regulatory burdens and simplifying processes to promote greater transparency and efficiency.

Making it easier to invest in Australia

Australia's declining competitiveness

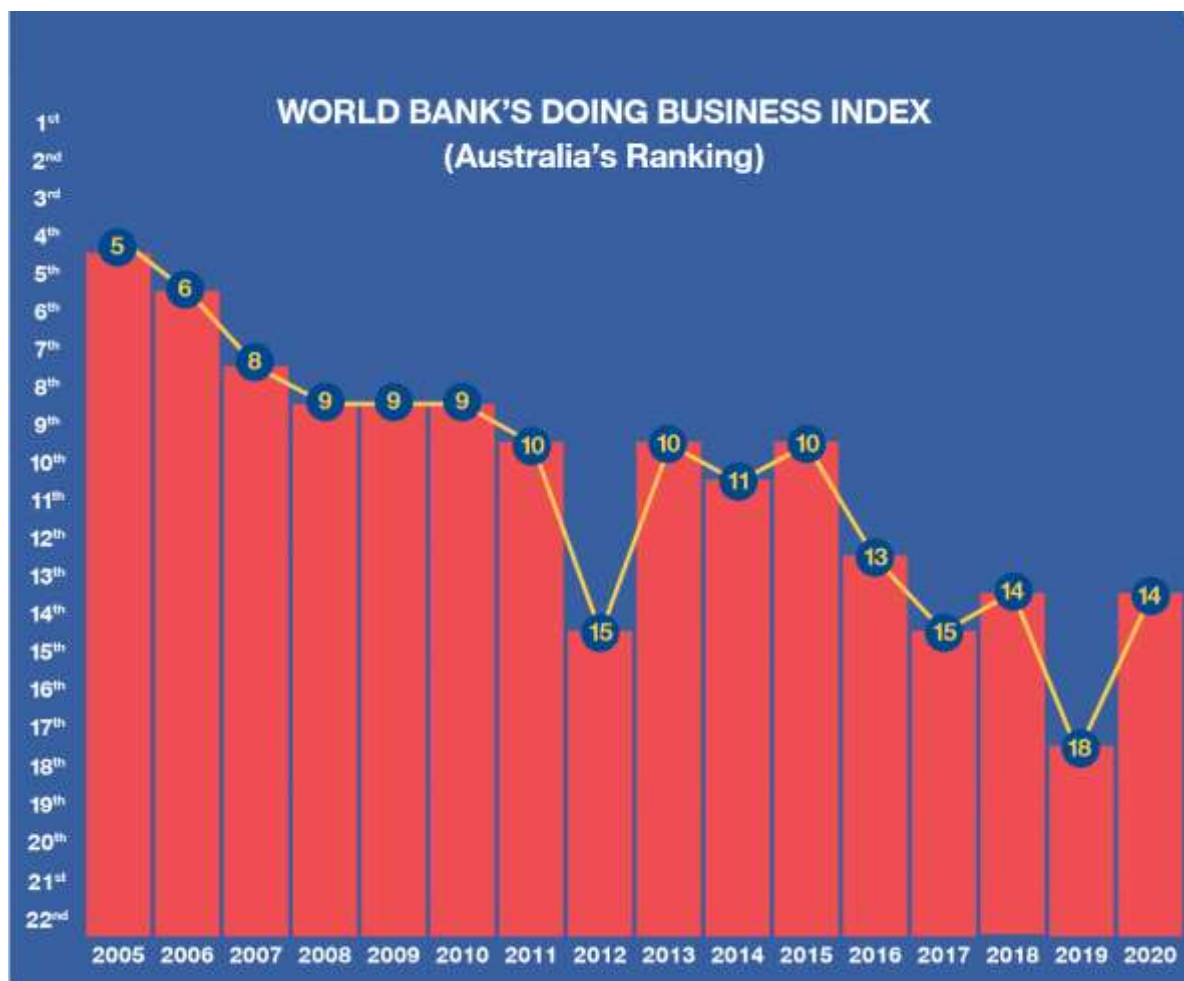
Australia's economy has continued to perform well despite the increasingly burdensome regulatory system. But we can no longer rely on good fortune and we must acknowledge that the complexity of Australia's regulatory framework is deterring private business investment and undermining our international competitiveness.

In 2005, the World Bank ranked Australia 5th on its Ease of Doing Business Index. In 2019 Australia's ranking had fallen to 18th, which was our worst ranking on record.

² *Environment Protection (Impact of Proposals) Act 1974, National Parks and Wildlife Conservation Act 1975, Whale Protection Act 1980, World Heritage (Properties Conservation) Act 1983 and Endangered Species Protection Act 1992.*

³ Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1998, p. 5

Figure 1: Australia's declining international ranking



Private investment is key

Historically, the private sector has been the main driver of Australia's economic growth and rising living standards. But private sector demand has been subdued the past seven or so years.

Even before the current COVID-19 crisis, over the year to December 2019 new business investment fell 1.2 per cent and as a share of GDP is at its lowest level in over 26 years.

According to the National Australia Bank's Monthly Business Survey published in mid-April, business confidence in March saw its largest decline on record and is now at its weakest level in the history of the survey.⁴

The importance of preserving Australia's environmental assets

One of the greatest economic assets Australia possesses is the unique biodiversity and natural landscapes that Australia is renowned for across the world. These environmental assets need to be protected through the use of modern technology, clear points of regulatory accountability and transparent environmental standards.

⁴ NAB Monthly Business Survey, 14 April 2020

Australia’s ability to attract investment and to maintain key economic activities such as tourism is put at risk by a degrading environment.⁵ Increasing water scarcity, declining numbers of iconic species, degradation of major tourism assets such as the Great Barrier Reef, bushfires and associated poor air quality events directly impact business activities and discourage future investment.⁶

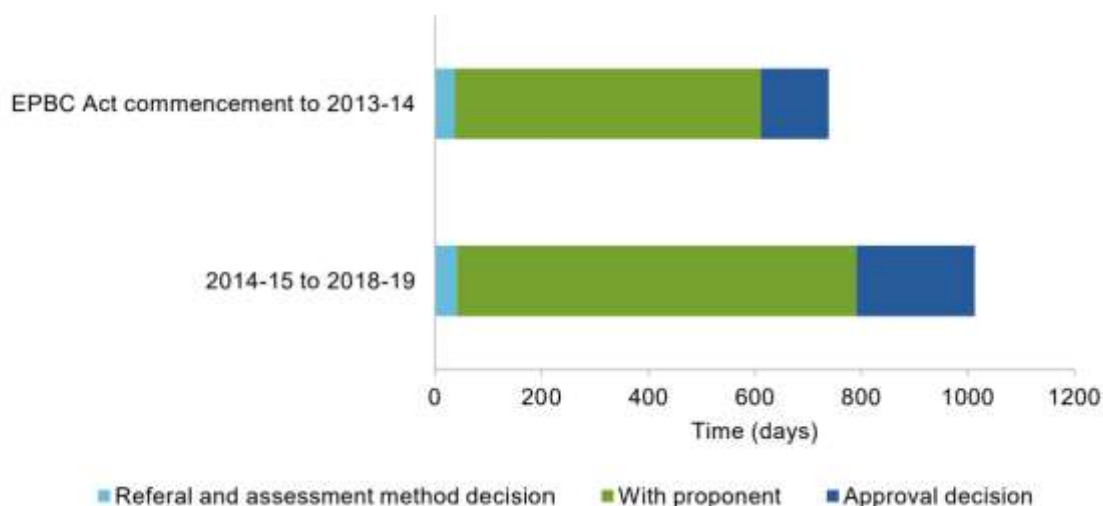
Our ability to demonstrate as a nation that the health of the environment is improving and that key environmental risks are well-managed is critical to our ability to support ongoing economic growth and to increase access to finance.

Reducing unnecessary approval delays

By most estimates, approvals time for an average sized major project in Australia currently take three years. For some projects, approval times have exceeded eight years. Slow approval processes under the EPBC Act is one of the key reasons for delays experienced by the proponents of major projects in Australia.

As can be seen by the analysis recently released by the Productivity Commission, the average time taken for environment approval decisions for resources projects under the EPBC Act has increased significantly in recent years.

Figure 5 Environmental approvals can take years to secure
Average time taken for environmental approval decisions for resources projects under the EPBC Act



Source: Productivity Commission

⁵ <http://www.oecd.org/australia/oecd-environmental-performance-reviews-australia-2019-9789264310452-en.htm>

⁶ Australia State of the Environment Report 2016, Department of Environment

RECOMMENDATIONS

Recommendation 1 – Increased role for strategic assessments

To improve the effectiveness of strategic assessments under the EPBC, the following reforms should be pursued:

- Where appropriate and on a case-by-case basis, strategic assessments should be carried out in areas of environmental significance to provide opportunities for a broader group of actions or land use scenarios that may evolve over time.
- The federal government's Federal Government's 'Guide to undertaking strategic assessments' should be updated to ensure the strategic assessment mechanism achieves the following:
 - Utilises national state-of-the-art databases to clearly identify Indigenous cultural heritage, biodiversity and ecological assets and threatened species.
 - Clear about where and how proponents can undertake permissible development activities, including simple guidance on Environmental Impact Assessment requirements that follow on from the strategic assessment.
- Consideration being given to integrating federal and state strategic assessment processes.

Recommendation 2 – Federal lead agency

Based on the approach used in all states and territories, the Department of Agriculture, Water and the Environment (DpAWE) should establish and appropriately resource a lead agency to specifically process applications made under the EPBC Act.

A federal lead agency should ensure the following services are provided:

- case management services that provides proponents with a single point of contact to facilitate the EPBC Act assessment process.
- guidance to proponents on issues such as the Environmental Impact Statement process and matters of national environmental significance, and
- coordination with the lead agencies in state and territories agencies.

Recommendation 3 – Transparent decision-making

The DpAWE should ensure its decisions are consistent by utilising transparent and evidenced-based methodologies that are open to industry and other stakeholder scrutiny.

- For example, all relevant documents (subject to genuine sensitivities) should be posted online at a dedicated assessment page and the various stages of the approval process should be clearly displayed for all parties to see.

Recommendation 4 – Assess Water Trigger

This review of the EPBC Act provides another opportunity to objectively assess the benefits that have been achieved through the introduction of the water trigger and consideration of its current appropriateness at a federal level, given existing laws at state and territory levels consider project impact on water resources.

Recommendation 5 – Improve jurisdictional coordination

5 (a) The federal government should continue to pursue nationally coordinated agreements to streamline and lift the standard of environmental assessment and approval processes by removing duplication between the Australian Government and states and territories.

- For example, the partnership between the federal government and Western Australian government to develop a single digital environmental approvals process and biodiversity database that will be rolled out nationally to efficiently store and share information.

5 (b) In the absence of efficient bilateral assessment and approval agreements and to avoid unnecessary approval delays under the accreditation process, state agencies should be asked to report on key milestones and approval timeframes.

Recommendation 6 – National threatened species management funding and register

The review should consider whether the EPBC Act has the appropriate resources to adequately and efficiently address the key threats to Australia's environment.

A national biodiversity database that is used to store and share comprehensive biodiversity information should be developed by the federal government to improve the protection and earlier intervention for threatened species and their habitats, build up knowledge necessary for environmental protection as well as improve efficiency of threatened species assessments under the EPBC Act.

Recommendation 7 – Digitise processes under the EPBC Act

The review should identify processes and obligations that impose an unnecessary regulatory burden on project proponents. Wherever practicable, digital / online processes should be utilised to improve environmental outcomes, improve efficiency of assessments and lower compliance costs.

- For example, the federal government should consider how it can more effectively capture and share information about Indigenous cultural heritage.

Recommendation 8 – Strict adherence to a 'tell us once' culture

To prevent against duplicative information requests under the EPBC Act, the review should identify all instances where project proponents are made to comply with multiple

request for the same information. This will enable a comprehensive streamlining of information gathering processes to promote a ‘tell us once’ culture.

Recommendation 9 – Use regtech to identify sources of duplication and delays

As part of this review, regtech should be deployed to map out regulatory processes under the EPBC Act and identify sources of duplication and delay.

Recommendation 11 – Introduce real-time approval time reporting

The EPBC Act should be amended to require the publishing of online performance and milestone reporting for assessment being carried out by the DpAWE and to provide summaries of key decisions:

- Approval timeframes should be reasonable and adhered to by government.
- Delays should be relayed to the proponent and updates provided regularly.

Recommendation 11 – Update the federal offset policy document

As part of updating the federal offset policy to ensure it is better coordinated with state-based schemes, the federal government should carry out and make public an analysis of what approaches are working efficiently and effectively at a state level.

Recommendation 12 – Improve the efficiency of appeals under section 487

The appeal process under section 487 should operate in a way to ensure legal approvals of **material** issues are progressed and determined quickly.

For example, improvements to operation of section 487 could include:

- an early and speedy hearing within 90 days of filing a challenge to an EPBC claim to let the court decide whether the challenge has merit
- a requirement that where possible, all appeals for a project are dealt with concurrently, to avoid legal challenges being mounted consecutively, and
- codification of a defence under the Act whereby administrative errors alone cannot invalidate a decision to approve a development, including a clear definition of ‘administrative error’.

POLICY DISCUSSION

We have broken up our discussion into three stages of the approval process

1. Pre-application
2. Assessment
3. Post-approval

1. Pre-application

Encouraging large-scale private investment is crucial to Australia's economy being able to grow again and create the jobs needed to sustain our recovery from COVID-19.

One way in which policy makers can help facilitate large-scale job-creating projects is by ensuring Australia has in place a system that welcomes and encourages investment.

Major projects that need approval under the EPBC Act are a vehicle to help get Australians back to work. Projects that require approval under the EPBC Act are typically large, job-creating projects that create significant employment opportunities for those living in regional Australia - where job opportunities are most sorely needed.

Below we have outlined measures that can improve the EPBC Act's pre-application process, therefore boosting Australia's economic competitiveness and attractiveness as an investment destination.

Greater use of strategic assessments

To provide greater certainty and reduce delays, large regional-scale strategic assessments of our cities and our major resource development areas and related catchments should be utilised more often.

Strategic plans help to ensure that a significant amount of work that needs to be done by a project proponent each time they submit a project application is done upfront. This is particularly relevant to community consultations and determination of environmental targets.

This reduces the need to assess every aspect of every project from scratch, with community and environmental expectations established from the outset. This can reduce the timeframe for the assessment process for each individual project significantly. Where appropriate, project proponents should only need to demonstrate compliance with the strategic plan, rather than re-prosecute the need for development.

Strategic plans can deliver the following benefits:

- Communities will have earlier and more substantive participation decisions about permissible land uses and environmental impacts.
- Due to the transparent and clearly understood environmental impact analysis, proponents are incentivised to design their developments to meet clear environmental targets.
- Environmental targets can achieve better environmental outcomes because the cumulative impact of all development in the area can be considered, rather than on a case-by-case basis.

- Communities and project proponents will have long-term certainty about the types of permissible development in each area.
- A shorter process can result in significant cost saving benefits.
 - For example, the Melbourne Urban Growth Boundary strategic assessment delivered a single environmental approval for both Victorian environmental regulation and Federal government's EPBC Act. This 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, therefore providing a cost savings of around \$500 million.⁷

However, while there are benefits in some scenarios, in the context of the mining industry where multiple projects may exist in an area and evolve over decades, the EPBC Act and its implementation in relation to strategic assessments needs to be sufficiently flexible and adaptable to change, such that they can apply to all scenarios in the resources sector at both State and Commonwealth level. As per the case of bilateral assessments and approvals, consideration also needs to be given to ensuring integration of State and Commonwealth strategic assessments, so there is only one, not two, assessments and sets of conditions.

The federal government's 'Guide to undertaking strategic assessments' document explains the strategic assessment process under the EPBC Act.⁸ This document was released in 2011 and has only undergone minor variations in 2013. With nearly a decade passed since its initial drafting, the federal government guidance document is due to be updated and the strategic assessment process under the EPBC Act revitalised to ensure it continues to be a realistic way of improving land use decision-making.

Recommendation 1 – Increased role for strategic assessments

To improve the effectiveness of strategic assessments under the EPBC, the following reforms should be pursued:

- Where appropriate and on case-by-case basis, strategic assessments should be carried out in areas of environmental significance to provide opportunities for a broader group of actions or land use scenarios that may evolve over time.
- The federal government's Federal Government's 'Guide to undertaking strategic assessments' should be updated to ensure the strategic assessment mechanism achieves the following:
 - Utilises national state-of-the-art databases to clearly identify Indigenous cultural heritage, biodiversity and ecological assets and threatened species.
 - Clear about where and how proponents can undertake permissible development activities, including simple guidance on Environmental Impact Assessment requirements that follow on from the strategic assessment.
- Consideration being given to integrating federal and state strategic assessment processes.

⁷ Productivity Commission, Major project development assessment processes, PC, Melbourne, November 2013, p. 333

⁸ Department of Sustainability, Environment, Water, Population and Communities, A guide to undertaking strategic assessments, 2013

Lead agency framework

Another way in which the EPBC Act's pre-assessment process could be improved would be through the development of a lead agency system, which provides information to proponents of major projects, including geospatial tools and guidance on the Environmental Impact Statement requirements.

All states and territories currently use a lead agency framework to ensure the approval process is coordinated and to regularly liaise with the project proponent on the progress of the application.

A federal lead agency system under the EPBC Act would improve the way stakeholders perceive and engage in the EPBC Act approval process. To successfully achieve this, a change in service delivery and culture is required. This idea is not new and has been a key plank of recent planning reforms initiated in all states and territories.

Importantly, the development of federal lead agency arrangements is aimed at improving resourcing, coordination and communication within the DpAWE. The Business Council does not support the creation of a federal Environmental Protection Agency. Furthermore, the Minister should retain decision-making authority under the Act.

Recommendation 2 – Federal lead agency

Based on the approach used in all states and territories, the Department of Agriculture, Water and the Environment (DpAWE) should establish and appropriately resource a lead agency to specifically process applications made under the EPBC Act. This agency should ensure the following services are provided:

- case management services that provides proponents with a single point of contact to facilitate the EPBC Act assessment process.
- guidance to proponents on issues such as the Environmental Impact Statement process and matters of national environmental significance, and
- coordination with relevant state and territories agencies.

2. Assessment phase

The assessment process under the EPBC Act is complex, unclear and imposes unnecessary cost and delay. Specifically, the assessment process under the EPBC is characterised by:

- long and uncertain approval timeframes
- high costs in meeting unexpected and overlapping environmental requirements (both in the assessment phase and in conditions of approval), and
- subjective procedures to determine major project eligibility and environmental requirements.

Below we suggest ways in which the EPBC Act assessment process can be improved.

Reducing the scope for uncertainty

The EPBC Act should operate in a way that provides stakeholders with assurances that they will be treated consistently and predictably. Unpredictable regulatory decisions and unclear approval timeframes not only impose significant costs on current project proponents, they create uncertainty for investors and deters future investment in Australia.

Greater certainty and increased predictability, incentivises and enables project proponents to meet clear and unambiguous environmental targets when they are designing their project plans.

Unpredictable regulatory decisions

Origin Energy recently provided the Productivity Commission with an example of how unclear regulatory provisions operate in practice. Origin's Spring Gully (EPBC 2017-7881) and Alfredson (EPBC 2017-7902) projects both proposed the undertaking of similar activities and accordingly, consistent information was provided to the DpAWE as part of the preliminary information for both applications.

In response, nine comments received from a total of 57 on the Alfredson project were inconsistent when compared to the assessment comments made on the Spring Gully material.

The Department's additional nine comments were extremely onerous for Origin to comply with and imposed a range of additional conditions that were deemed necessary for one project, but not for a very similar project.⁹

To improve transparency, key approval milestones and documents should be posted publicly to ensure all parties are aware of what is required of them at each stage in the process. The New South Wales Government's [Major Project Portal](#) provides clear information on an application's progress, the relevant documents provided to date and key decision milestones.

Recommendation 3 – Transparent information

The DpAWE should ensure its decisions are consistent by utilising transparent and evidenced-based methodologies that are open to industry and other stakeholder scrutiny.

- For example, all relevant documents (subject to genuine sensitivities) should be posted online at a dedicated assessment page and the various stages of the approval process should be clearly displayed for all parties to see.

Unnecessary duplication

Water Trigger amendments

When the EPBC Act came into operation, it was intended that the Federal Government would only add additional regulation where there is a substantive 'gap'.

⁹ Origin Energy submission to Productivity Commission's Resources Sector Regulation – Issues Paper, 2019, p. 2

However, the introduction of the ‘water trigger’ provisions in 2013 is example of how the EPBC Act has been expanded to unnecessarily create duplication for project proponents.

The water trigger means that under the EPBC Act water resources impacted by coal seam gas or large coal mining projects are a matter of national environmental significance.

Environmental assessments carried out a state and territory level already consider the impact on water resources as part of their approval processes, but both state and federal government assessments rely upon the same expert advice in making decisions under the ‘water trigger’ provision of the EPBC Act.

In 2013, the Productivity Commission explained that the water trigger amendment ‘imposes an extra layer of regulation on affected proponents’ in a situation where ‘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 deal with any identified gap in the regulatory framework’.¹⁰

At the time of insertion in 2013, the water trigger amendments were not accompanied by the completion of a Regulatory Impact Statement. However, in 2017 an independent review of the water trigger estimated the additional regulatory costs to business were \$46.8 million annually.¹¹

Because of the limited passage of time, the 2017 independent review was not able to ascertain what benefits had been attained since the 2013 water trigger amendments.

In its recently released Draft Report into Resources Sector Regulation, the Productivity Commission found that the water trigger was creating unnecessary regulatory burden and that the evidence that the water trigger filled a significant regulatory gap is not compelling.¹²

Recommendation 4 – Assess Water Trigger

This review of the EPBC Act provides another opportunity to objectively assess the benefits that have been achieved through the introduction of the water trigger and consideration of its current appropriateness at a federal level, given existing laws at state and territory levels consider project impact on water resources.

Improved jurisdictional coordination

Overlap between federal and state legislation is a common cause of delay and increased compliance costs for business. Bilateral agreements between the federal government and state governments allow the federal Minister for the Environment to rely on specified environmental impact assessment processes of the partner state government when assessing actions under the EPBC Act.

¹⁰ Productivity Commission, Major Project Development Assessment Processes: Research Report, Canberra, November 2019, released 10 December 2013, p. 149.

¹¹ Hunter. S, Independent review of the water trigger legislation, prepared for the Australian Government, tabled in Parliament on 19 June 2017.

¹² Productivity Commission, Resource Sector Regulation: Draft Report, March 2020, p. 39

The establishment of a comprehensive agreements between federal and state jurisdictions, where proponents can seek one assessment and approval through a single process, remains the best practice approach supported by the Business Council. In the absence of such agreements being in place, it is important that other arrangements are working in a coordinated, effective and efficient manner.

For example, there is significant duplication between environmental regulation in Western Australia (i.e. Environmental Protection Act 1986) and at a federal level (EPBC Act).

The bilateral assessment agreement lapsed in 2016, meaning EPBC Act assessments in WA are currently being undertaken via an accredited process (i.e. accredited assessments led by State government bodies inform and can be utilised for Federal environmental approvals). Unfortunately, statutory timeframes are often not being met by State agencies, which means this system is not working as efficiency as it could be.¹³

Recommendation 5 – Improve jurisdictional coordination

5 (a) The federal government should continue to pursue nationally coordinated agreements to streamline and lift the standard of environmental assessment and approval processes by removing duplication between the Australian Government and states and territories.

- For example, the partnership between the federal government and Western Australian government to develop a single digital environmental approvals process and biodiversity database that will be rolled out nationally to efficiently store and share information.

5 (b) In the absence of efficient bilateral assessment and approval agreements and to avoid unnecessary approval delays under the accreditation process, state agencies should be asked to report on key milestones and approval timeframes.

Threatened species

When a proposed project could impact on a threatened species under both federal and state laws, the proponent must comply with both federal and state requirements.

A lack of standardised and centralised environmental databases has led to a need to report to two levels of government, often concurrently.

The Federal Government's announcement in November 2019 that it will partner with the Western Australian government to develop a single digital environmental approvals process and biodiversity database, is a promising development.

At present there is no federal mechanism for tracking or monitoring the state and trends of threatened species habitat. It is important that the EPBC Act has in place mechanisms and commensurate funding that can actively protect ecosystems of national importance to better protect species before they become threatened.

¹³ Rio Tinto submission to Productivity Commission's Resources Sector Regulation - Issues Paper, 2019, p. 5

Recommendation 6 – National threatened species management funding and register

The review should consider whether the EPBC Act has the appropriate resources to adequately and efficiently address the key threats to Australia’s environment.

A national biodiversity database that is used to store and share comprehensive biodiversity information should be developed by the federal government to improve the protection and earlier intervention for threatened species and their habitats, build up knowledge necessary for environmental protection as well as improve efficiency of threatened species assessments under the EPBC Act.

Digitise processes under the EPBC Act

Regulations that do not achieve their desired purpose, while also imposing unnecessary compliance costs, are regarded as red tape. The EPBC Act is now 20 years old and some of the regulatory processes and obligations are no longer fit for purpose.

For example, applicants are currently required to publish preliminary documentation for community consultation. The legislation requires the applicant provide multiple hard copies at physical locations for public perusal. These documents can be over 4,000 pages, and they are not allowed to be removed from the specific physical location.

This rigid and out of date approach leads to outcomes that are not only undesirable from an environmental perspective (the printing of large documents), it is not the most effective way to foster community engagement.

Very few members of the public will likely read through material presented in such a format. Better community engagement will likely result if digital copies are provided, which allow for word search functions to be performed.

Facilitating effective Indigenous engagement

The Business Council recognises the vital role Australia’s Indigenous peoples have in the management and protection of Australia’s natural environment, and the importance of quality Indigenous engagement in consultation and project approval processes. Our members regularly work closely with local Indigenous communities to effectively manage the impacts of their commercial operations and carry out necessary mitigation activities.

While engagement with relevant Indigenous representative organisations is generally best governed by state legislation, it is important to ensure that engagement with the relevant and appropriate Indigenous representative organisations under the EPBC Act is informed by the best available information.

In its draft report onto Resources Regulation, the Productivity Commission noted that “there currently is a lack of a ‘consistent and comprehensive data’ on Indigenous heritage”¹⁴

¹⁴ Productivity Commission (2020), Resources Sector Regulation, Draft Report, March 2020, pp. 20

To ensure nationally comprehensive information and data on indigenous heritage and places of cultural importance can be made available, greater federal investment in digital resources could help record and safeguard Indigenous cultural heritage.

Recommendation 7 – Digitise processes under the EPBC Act

Wherever practicable, digital / online processes and resources should be utilised to improve environmental outcomes, facilitate more effective community engagement, increase transparency and lower compliance costs.

For example, the federal government should consider how it can more effectively capture and share information about Indigenous cultural heritage.

Investing in regtech solutions

To improve the accuracy and efficiency of processes under the EPBC Act, consolidated online resources and digital tools should be used wherever appropriate.

Regtech solutions, which involves applying technology to improve regulatory efficiency, can be deployed to automate complex administration processes and reduce errors. Regtech solutions have been used by government agencies and regulators in the United States to improve the management of regulatory systems within a federal government structure.

All governments should invest in regtech solutions that deliver more effective regulatory outcomes and reduce long term compliance and administration costs for businesses that are complying with environmental regulation.

Recommendation 8 – Use regtech to identify sources of duplication and delays

Regtech solutions should be deployed to map out regulatory processes under the EPBC Act and identify sources of duplication and delay.

Recommendation 9 – Strict adherence to a ‘tell us once’ culture

To prevent against duplicative information requests under the EPBC Act, the review should identify all instances where project proponents are made to comply with multiple request for the same information. This will enable a comprehensive stocktake of information gathering processes under the EPBC Act to help promote adherence to a ‘tell us once’ culture.

3. Post-approvals

The post-approvals process under the EPBC Act has also been identified by members as an ongoing concern.

This stage in the process is highly discretionary and there are few, if any, avenues for appeal. This means proponents have little scope to challenge unreasonable conditions.

The management plans that flow from conditions are too detailed and unmanageable. Inspections are often performed by multiple agencies in an uncoordinated manner and a lack of coordination of those agencies creates significant duplication and additional compliance costs.

Performance reporting

Reporting of approval times by government agencies enables policy makers to identify approval bottlenecks and incentivises government agencies to address delays by improving internal processes or where required, employing more staff.

While the EPBC Act includes statutory timeframes for approval decisions, there is no requirement for the Department to report on approval times or when regulatory requirements are met by project proponents. Further, the EPBC Act includes various mechanisms that effectively 'stop the clock' (such as requests for more information).

Compounding the effect of approval delays, some EPBC Act approval conditions require a variation process to make them fit for purpose. This process has no statutory timeframes, making assessment timeframes very uncertain. Conditioned management plans that require approval through the post-approval process also have no statutory timeframes. The absence of statutory timeframes reduces business confidence around project commencement, budgets and compliance requirements.¹⁵

Without real time reporting on providing times and strict adherence to statutory timeframes, there is less pressure on agencies to improve their decision-making timeframes. Project proponents have no option but to wait indefinitely for decisions to be made.

As a best practice example, the Victorian Government's *'Know your council'* website provides an easy to use tool to compare the time taken by all metropolitan councils to determine planning applications. The New South Wales Department of Planning, Industry and Environment has recently announced its intention to report on performance against timelines for post-approvals.

Recommendation 10 – Introduce real-time approval time reporting

The EPBC Act should be amended to require the publishing of online performance and milestone reporting for assessment being carried out by the DpAWE's lead agency for EPBC approvals, and to provide summaries of key decisions.

- Approval timeframes should be reasonable and adhered to by government.
- Delays must be relayed to the proponent and updates provided regularly.

Offsets

While members recognise the importance of biodiversity offsets to address impacts as part of the application of the mitigation hierarchy, defining and implementing appropriate area-based offsets is challenging.¹⁶ The timing of approvals for Offset Management Plan approvals are becoming one of the biggest risks of delays to the commencement of projects in the mining sector.¹⁷

The differences and complexities across state and federal regulations also make offset requirements difficult to predict or plan for.

Australia needs a nationally consistent approach to offsets, one that is characterised by allowing for the use of new technology and innovative practices and is outcomes focused to ensure all offsets deliver a genuine conservation benefit.

This review process should consider the development of a national uniform approach to offsets and how this might be agreed within the current legislative and jurisdictional framework.

Aligning state and federal offset requirements should be done by moving towards best practice processes. The following approaches should be considered to form part of the development of a nationally consistent approach to environmental offsets.

- The Western Australian government is in the process of establishing the Pilbara Environmental Offsets Fund to provide a more effective offset funding mechanism with a lower management burden for proponents. EPBC Act requirements for offsets should leverage from the fund to reduce duplication in offset requirements.¹⁸
- In New South Wales, the Biodiversity Offsets Scheme is unique in that the Biodiversity Stewardship Agreements allows for the generation of biodiversity credits, which are in-perpetuity. This means the biodiversity will remain protected even if the relevant land is sold, as payments will continue for the new owner.

Adopting the approach taken in the Condition-setting Policy

In March 2020, the federal government released the 'Condition-setting Policy'.¹⁹ The Condition-setting Policy aims to streamline the regulatory process under the EPBC Act by avoiding duplicative or unnecessary approval conditions between jurisdictions. The policy will apply in circumstances where state or territory conditions appropriately manage the environmental impacts on a matter of national environmental significance.

This approach should be applauded, as it will help to lower the regulatory burden while maintaining strong environmental standards. A similar approach should be used for updating the federal government's offset policy guidance document, which was released in 2012²⁰ and is due to be updated.

¹⁶ Rio Tinto submission to Productivity Commission's Resources Sector Regulation - Issues Paper, 2019, p. 6

¹⁷ Anglo American submission to the Productivity Commission's Resource Sector Regulation – Issues Paper, 2019, p.10

¹⁸ Rio Tinto submission to Productivity Commission's Resources Sector Regulation - Issues Paper, 2019, p. 6

¹⁹ 'Environment Protection and Biodiversity Conservation Act 1999— Condition-setting Policy, Commonwealth of Australia 2020'.

²⁰ Department of Sustainability, Environment, Water, Population and Communities, Environment Protection and Biodiversity Conservation Act 1999 - Environmental Offsets Policy, October 2012

Recommendation 11 – Update the federal offset policy document

As part of updating the federal offset policy to ensure it is better coordinated with state-based schemes, the federal government should carry out and make public an analysis of what approaches are working efficiently and effectively at a state level.

Improving the appeals process

Section 487 of the EPBC Act gives third party appeal rights to persons engaged in ‘a series of environmental conservation or research activities in Australia’ within the past two years.

While it is important that there is legal oversight of approval decisions made under the EPBC Act, the swift and efficient resolution of legal challenges is needed to ensure projects are not unnecessarily delayed by repeated and administrative appeals.

The efficacy of s 487 should be assessed as part of this review to ensure it strikes an appropriate balance between allowing substantive appeals that improve decision-making and environmental outcomes, while providing project proponents with certainty as to when the project will be able to proceed.

To this effect, this review should be looking to clarify the roles and responsibilities in the community consultation process to strengthen community participation in strategic and environmental assessments, improve the robustness of decision-making processes and lessen the impact of immaterial administrative errors.

Recommendation 12 – Improve the efficiency of appeals under section 487

The appeal process under section 487 should operate in a way to ensure legal approvals of **material** issues are progressed and determined quickly.

For example, improvements to operation of section 487 could include:

- an early and speedy hearing within 90 days of filing a challenge to an EPBC claim to let the court decide whether the challenge has merit
- a requirement that all appeals for a project which are based on substantially the same grounds are lodged and dealt with concurrently, to avoid legal challenges on the same grounds being mounted consecutively, and
- codification of a defence under the Act whereby administrative errors alone cannot invalidate an approval decision, including a clear definition of ‘administrative error’.

BUSINESS COUNCIL OF AUSTRALIA

42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au

© Copyright May 2020 Business Council of Australia ABN 75 008 483 216

All rights reserved. No part of this publication may be reproduced or used in any way without acknowledgement to the Business Council of Australia.

The Business Council of Australia has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, the BCA is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, the BCA disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.