MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO SENATE SELECT COMMITTEE ON RED TAPE INQUIRY INTO ENVIRONMENTAL APPROVALS

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18 JULY 2017

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EXECUTIVE SUMMARY

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission to the Senate Red Tape Committee inquiry into environmental assessment and approvals.

The Australian minerals industry supports environmental regulation that is both efficient in its operation and effective in achieving the desired outcomes. In this submission, the industry does not seek to remove or diminish environmental standards or safeguards. Rather, the minerals industry seeks only to create a more efficient process in meeting environmental objectives through the removal of unnecessary regulatory burden.

This submission focuses primarily on areas of Commonwealth responsibility, including environmental assessment and approval processes under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The MCA recognises that state and territory processes can also be major drivers of unnecessary regulatory burden however the detailed analysis required for each jurisdiction is outside the scope of this submission.

Red tape significantly impacts industry competitiveness

Australia enjoys a comparative advantage in minerals exports, which must be continually defended by reducing costs, improving productivity and pursuing innovation. Regulatory settings have a profound impact on the minerals industry's cost competitiveness, productivity and capacity to adapt to changing market conditions.

Delays and uncertainty in project approval processes pose a significant risk to the industry's global competitiveness. The costs of delays for projects can be substantial. For example, industry and Productivity Commission (PC) estimates suggest a one year delay to a large 'greenfields' project (of $3 to 4 billion) can reduce the Net Present Value (NPV) of a mining project by between 10 and 13 per cent. For large projects, this could result in an NPV loss of at least $30 million each month.

Capital investment is mobile. Delays and uncertainty in regulatory processes make Australia less attractive for investment compared with jurisdictions with more efficient regulation. For the minerals sector, this diverts investment offshore, impacting the broader economy through reduced national output over the long term.

Principles for effective regulation

The Council of Australian Governments' (COAG) Principles of Good Regulation should guide state, territory and the federal government's approach to regulation. In addition to these criteria, the MCA considers state/territory and Commonwealth governments should be set at the minimum required to achieve environmental objectives without being unduly prescriptive.

The MCA also advocates that regulation be consistently enforceable and administered. Inappropriate or poorly designed regulation should not be excused by presuming administrative 'fixes' that do not resolve fundamental deficiencies.

A recent review of regulatory practices in New South Wales has revealed that despite a commitment to the COAG principles, these have not been implemented.

Mining developments are subject to increasingly complex regulation

Mining developments are subject to local, state/territory and federal government regulations and planning regimes. A study by consultancy firm URS in 2013 identified a substantial increase in state and federal regulation affecting mining approvals between 2006 and 2013.[1] The extent of regulatory 'churn' is highly destabilising for business and undermines community confidence in the rigour of existing processes.

[1] URS, *Update of national audit of regulations influencing mining exploration and project approval processes*, report commissioned by and prepared for the Minerals Council of Australia, 31 May 2013, p. vii.

The continual expansion in regulation has been compounded by the development of additional independent advisory panels at both the Commonwealth and State levels.[2] The 2013 URS report found the trend to establish or expand the mandate of these panels has 'the potential to duplicate the normal assessment processes of government agencies and to undermine the confidence that can be placed in those processes'.[3]

Commonwealth environmental legislation is expanding

Federal environmental law continues to grow. A recent Institute of Public Affairs report found the overall stock of legislation managed by the then Department of Environment increased more than 240 per cent between 2001 and 2014.[4] The MCA supports recent efforts to improve regulatory settings and administration; however the federal government should redouble efforts to reduce the overall stock and complexity of existing legislation wherever possible.

Environmental assessment and approvals should be streamlined

One of the biggest drags on the international competitiveness of Australia's minerals industry is lengthy and costly delays in securing project approvals. Commonwealth and state duplication and poor coordination creates overly complex processes/arrangements and have long been identified as major causes of approval delays and result in substantial additional costs for businesses.

The Productivity Commission has concluded that overlap and duplication between federal and state processes can be greatly reduced without lowering the quality of environmental outcomes.[5]

State processes should be fully accredited under the EPBC Act to create a single assessment and approval process. Monitoring and reporting arrangements can ensure that the federal government retains oversight and high environmental standards continue to be met.[6]

The benefits of streamlined project approvals are significant. Analysis by the then Department of the Environment concluded streamlining federal and state environmental approval processes would save Australian businesses $426 million annually.[7] A 2014 BAEconomics found reducing project delays by one year would add $160 billion to national output by 2025 and create an additional 69,000 jobs.[8] In addition to significant cost-savings to industry, more efficient internal processes reduce government costs as well.

The need to streamline environmental approvals has been recognised by numerous bipartisan reviews over many years. Accordingly, the Parliament should approve the necessary changes to the EPBC Act and allow the one-stop shop reforms to proceed.

Expanding assessment requirements

The collection and analysis of environmental information can be costly and time consuming for proponents. A large environmental impact assessment (EIA) can cost many millions dollars and take a number of years to complete. A recent draft environmental impact statement in the Northern Territory involved the production of over 8,500 pages of documentation, weighing 43 kilograms.

[2] For example, the Independent Expert Scientific Committee for CSG and large coal developments, established under the EPBC Act
[3] URS, *Update of national audit of regulations influencing mining exploration and project approval processes*, report commissioned by and prepared for the Minerals Council of Australia, 31 May 2013, p. ix.
[4] Begg, M, *The growth of federal environmental law*, The Institute of Public Affairs, April 2017, p. 2.
[5] Productivity Commission, *Major Project Development Assessment Processes: Research Report*, Canberra, released on 10 December 2013, pp. 2 and 13.
[6] See Allan Hawke, *The Australian Environment Act: Final report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p. 66f; and the Productivity Commission, op. cit., p.15.
[7] Department of the Environment, *Regulatory cost savings under the one-stop shop for environmental approvals*, Australian Government, Canberra, September 2014, p. 1.
[8] BAEconomics, *The economic gains from streamlining the process of resource project approval*, report commissioned by the Minerals Council of Australia, Canberra, July 2014, p. 1f.

Governments (state and federal) are taking an increasingly risk averse approach to EIA. This has resulted in unnecessarily complex assessment processes and increasing EIA information requirements resulting in wide ranging assessments of all impacts, regardless of materiality or level of risk. This can significantly increase costs for proponents and delay projects without a concomitant benefit in terms of additional environment protection.

Accordingly, the MCA recommends governments place greater emphasis on the implementation of risk-based approaches when determining both the assessment pathway and in setting information requirements appropriate to the action proposed.

The burden of frivolous or vexatious appeals

While not specifically red-tape, but a function of regulatory design, appeal processes require some consideration. Approval decisions for minerals (in particular coal) projects have been subject to increasing appeals, including state level appeals and judicial review under the EPBC Act.

Judicial review processes are important to safeguard the rights and interests of affected individuals and to ensure development assessment and approval processes remain robust. The mining industry supports the rule of law and the right of affected individuals to have their say.

Increasingly, however, industry opponents – often removed from the local community – are deliberately misusing the appeals process to halt or delay projects. While most appeals are not successful, they can delay projects many months or years, providing little environmental benefit but at substantial cost to the project proponent.[9]

Weaknesses in the EPBC Act that allow the minister's approval to be challenged on a technicality but not the substance of the decision can be addressed without weakening environmental protection. A process whereby only challenges that have merit proceed to legal judgement would also reduce unnecessary delays.

Reforms to improve the efficiency of the EPBC Act are needed

The MCA considers the following EPBC Act triggers are highly duplicative of state processes and should be reformed:

- EPBC 'water trigger' - The MCA considers the case for retaining the sector specific EPBC water trigger is weak. The water trigger serves only to provide an additional regulatory approvals 'layer'. Water risks are adequately accounted for in state approval processes.
- Nuclear trigger for uranium mining - The MCA recommends removing uranium mining, milling, decommissioning and rehabilitation from the definition of nuclear actions. Where significant environmental risks are presented, these are already addressed through comprehensive state and territory assessment and approval processes.

State and territory processes also drive unnecessary red tape

The MCA recognises that while reforms to Commonwealth processes are critical, significant unnecessary regulatory burden is also be driven by state and territory processes. Accordingly, the MCA encourages continued effort to reduce unnecessary regulatory burden by all levels of government.

[9] Productivity Commission, *Major Project Development Assessment Processes: final research report*, Canberra, released on 10 November 2013, p. 258.

1. INTRODUCTION

The MCA welcomes the opportunity to provide a submission to the Senate Red Tape Committee inquiry into environmental assessment and approvals.

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally and socially responsible and attuned to its communities' needs and expectations.

The Australian minerals industry supports environmental regulation that is both efficient in its operation and effective in achieving the desired outcomes. Both community confidence and certainty for business are critical benchmarks for effective regulation.

In this submission, the MCA does not seek to remove or diminish environmental standards or safeguards. Rather, the minerals industry seeks only to create a more streamlined process in meeting environmental outcomes through the removal of costly duplication and unnecessary regulatory burden.

A range of inquiries into the issue of red tape and environmental (development) approvals have been undertaken over recent years. Specifically, the MCA wishes to draw the Committee's attention to the following relevant inquiries:

- The House of Representatives Standing Committee on the Environment - Inquiry into Streamlining environmental regulation, 'green tape', and one stop shops.[10]
- PC inquiry into Major Project Approvals Processes, 2013.[11]
- Senate Environment and Communications Committee inquiry into the EPBC Amendment (Bilateral Agreement Implementation) Bill 2014.[12]

The MCA recognises that state and territory processes can also contribute to unnecessary regulatory burden; however an adequate treatment of this would require a level of analysis beyond the scope of this submission. Accordingly, this submission will focus primarily on areas of Commonwealth environmental assessment and approval processes and in particular responsibilities under EPBC Act

[10] House of Representatives Standing Committee on the Environment, *Inquiry into Streamlining environmental regulation, 'green tape', and one stop shops*, report tabled 23 February 2015.
[11] Productivity Commission, *Major Project Development Assessment Processes: Research Report*, Canberra, released on 10 December 2013.
[12] Senate Environment and Communications Committee inquiry into the *EPBC Amendment (Bilateral Agreement Implementation) Bill 2014 and Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014*, report tabled 23 June 2014.

2. REDUCING UNNECESSARY RED TAPE – THE ECONOMIC IMPERATIVE

- Inefficient and unnecessary regulatory 'burden' affects industry, the community and the economy as a whole. Costs to industry can be substantial - a one year delay can reduce the net present value of a large 'green fields' project by up to 13 per cent.
- Capital investment is mobile. Delays and uncertainty in regulatory processes increases business risk, making Australia less attractive for investment and putting at impacting on the minerals industry's global competitiveness and the broader economy.

2.1 The role of regulation

Effective regulation is essential for achieving the objectives of a modern state. Regulation can be pro-competitive and advantageous to the community in ways that promote growth in productivity and living standards. Good regulation is also important to protect heritage, biodiversity and other environmental values and instilling community confidence in state/territory and federal governance.

Unnecessary regulatory 'burden' occurs where ineffective, inefficient regulation relative to minimum effective regulation increases the compliance costs to industry and impacts productivity without tangible benefit. These costs represent a loss to the affected industry, the community and the economy as a whole, including through increased costs to government.

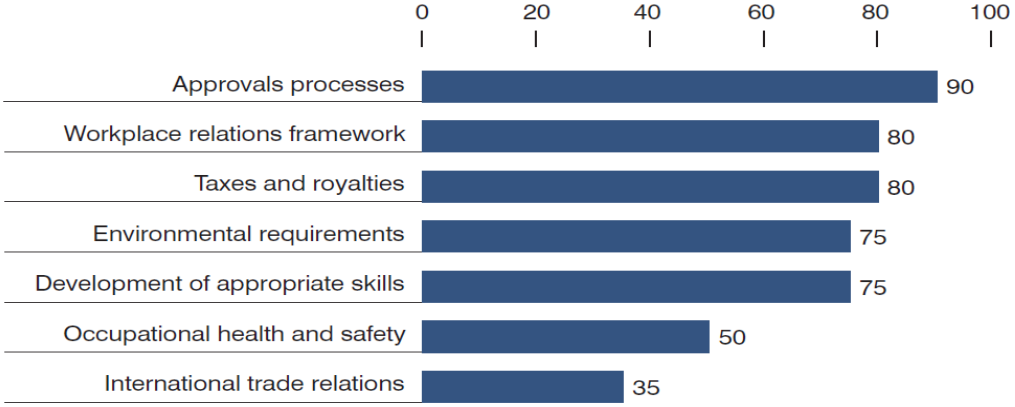
2.2 The importance of effective and efficient regulation

Australia enjoys a comparative advantage in minerals exports, which must be continually defended by reducing costs, improving productivity and pursuing innovation. Regulatory settings have a profound impact on the minerals industry's cost competitiveness, productivity and capacity to adapt to changing market conditions.

To seize future opportunities, Australian mining must be more cost competitive, productive and flexible across the full length of the minerals supply chain – from exploration and initial project development through to shipment. The Productivity Commission warns that 'Without a lift in productivity to counteract the fall in the terms of trade, slower per capita GDP growth is likely to prevail in the years to come, relative to the growth that occurred in the period 2000–2010.'[13]

A comprehensive productivity survey of MCA member companies has identified required areas of policy focus to improve the industry's productivity performance. Approvals processes and inefficient environmental regulation in general were nominated as the area of greatest policy concern, followed (with equal frequency) by the industrial relations framework and royalties and taxes (Chart 1).

Chart 1: Areas nominated as 'important' or 'very important' to improving productivity (percentage of respondents, multiple responses)



Source: Survey of MCA member companies

[13] Productivity Commission, *PC Productivity Update 2016*, Canberra, released on 26 April 2016, p. 18.

2.3 Investment attraction and international competitiveness

The Fraser Institute annual survey of mining and exploration companies ranks international mining jurisdictions for investment attractiveness. Part of this survey includes a policy perception index (PPI). The PPI score is based on 15 policy variables including uncertainty in administration, interpretation and enforcement of regulations, environmental regulations; regulatory duplication and inconsistencies and a range of other issues including labour issues and taxation. Matters such as political stability and geological information are also included, but these are areas where Australia is likely to perform well.

While noting the evolution of Fraser Institute methodologies and fluctuations in the total number of jurisdictions included in the survey (between 96 and 122), the PPI index provides an indication of the relative policy competitiveness between jurisdictions (Table 1 below).

Table 1 - Policy Perception Index – Fraser Institute Annual Survey - 2016[14]

		Score					Rank				
		2016	2015	2014	2013	2012	2016	2015	2014	2013	2012
Australia	New South Wales	63.91	69.12	75.01	78.49	77.93	66/104	51/109	41/122	37/112	27/96
	Northern Territory	85.70	85.15	82.72	86.22	84.20	22/104	21/109	23/122	20/112	17/96
	Queensland	78.50	79.19	78.10	81.40	77.02	36/104	32/109	33/122	28/112	32/96
	South Australia	87.05	85.50	86.78	88.30	83.33	21/104	20/109	17/122	15/112	19/96
	Tasmania	81.51	78.34	73.08	78.99	67.01	32/104	34/109	49/122	34/112	51/96
	Victoria	73.80	72.91	76.09	79.64	76.03	42/104	43/109	37/122	31/112	33/96
	Western Australia	93.20	91.53	90.83	94.19	85.00	9/104	8/109	12/122	8/112	16/96

Only Western Australia ranks in the top ten jurisdictions for PPI, coming in at no. 9. It should be noted that Western Australia would rank No.1 for mineral potential should best practice regulation be in place.[15]

With respect to other Australian jurisdictions, there has been a gradual slide in rankings across the jurisdictions since 2012. Most notably, New South Wales has slid from a ranking of 27 to 66 and Victoria from 31 to 42 in only four years. Tasmania is the only jurisdiction to make significant improvements in that time. Queensland, a major resource state, has also fallen from 32 to 36 in PPI ranking.

Notwithstanding the limitations of the survey, the PPI index illustrates the strong link between regulatory settings and the impact of red tape on the ability for a jurisdiction to attract future investment.

The Australian economy is more dependent on mineral extraction relative to similar developed countries.[16] Accordingly, our ability to compete internationally for investment is a critical factor for the future wealth of the nation.

2.4 The economic impacts of unnecessary 'red tape' on the mining industry

Mining is subject to more regulatory requirements than most, if not all other industries in Australia. Regulatory requirements cover all stages of industry activity – from grant of tenure, exploration, extraction, processing, transport and mine closure through to relinquishment of tenure. This stems in part from the nature and location of mining, and its potential social and environmental impacts. Yet it

[14] Fraser Institute, *Fraser Institute Annual Survey of Mining Companies 2016*, released 28 February 2017.
[15] Fraser Institute, *Fraser Institute Annual Survey of Mining Companies 2016*, table 3, Mineral Potential Index, released 28 February 2017, p. 20.
[16] World Bank, *Data bank: Total natural resources rents (% of GDP)*, viewed 14 July 2017.

also reflects a vast accumulation of decisions by governments at all levels in Australia, often without regard to clear policy principles or good process. [17]

Delays and uncertainty in project approval processes pose a significant risk to the industry's global competitiveness. A 2012 report by Port Jackson Partners found that Australian thermal coal projects experienced an average project delay of 3.1 years, compared with an average of 1.8 years in other jurisdictions.[18]

The costs of delays for projects can be substantial. For example, industry and PC estimates suggest a one year delay to a large 'greenfields' project (of $3 to 4 billion) can reduce the Net Present Value (NPV) of a mining project by between 10 and 13 per cent. For large projects, this could result in an NPV loss of at least $30 million each month.

Additionally, there are the costs for keeping engineering contractors, consultants, internal resources, and procurement in a 'holding pattern' while delays are being addressed. For a large project these costs can be up to $16 million per month.[19]

In total, delays can increase costs up to $46 million per month to a major greenfields mining project in Australia.

Capital investment is mobile. Delays and uncertainty in regulatory processes increases business risk, making Australia less attractive for investment. For the minerals sector, this diverts investment offshore, impacting the broader economy through reduced national output over the long term.

As the PC has pointed out, unnecessary regulatory burden – including overlapping or inconsistent regulations between jurisdictions – restricts management decisions and discourages investment.[20] Survey evidence from MCA member companies confirms the high cost of these inefficient processes (Box 1).

The impacts of inefficient regulation can flow on to the broader Australian economy. A 2014 BAEconomics study found that reducing project delays by one year would improve the competitiveness of the Australian mining sector, add $160 billion to national output by 2025 and create an additional 69,000 jobs across the economy.[21]

[17] URS, *Update of national audit of regulations influencing mining exploration and project approval processes*, report commissioned by and prepared for the Minerals Council of Australia, 31 May 2013,
[18] Port Jackson Partners, *Opportunity at risk: regaining our competitive edge in minerals resources*, report commissioned by the Minerals Council of Australia, MCA, 16 September 2012, p. 27.
[19] Based on MCA member calculations
[20] Productivity Commission, *Regulation of Australian Agriculture, Draft Report,* released on 21 July 2016, p iv-v.
[21] BAEconomics, *The economic gains from streamlining the process of resource project approval*, report commissioned by and prepared for the Minerals Council of Australia, Canberra, July 2014, pp. 1, 2.

Box 1: The high cost of inefficient approvals processes – evidence from minerals companies

'Average time to achieve new approvals has increased from less than 12 months to more than 4 years due largely to increasingly onerous approvals requirements and increased politicisation of the approvals process.'

'Unable to bring new mines into production to meet the market in appropriate timeframe (i.e. less than 2 years). Result is the market window has been missed.'

'For new operations the approvals process can be challenging, complex and very time consuming – not just the major approvals but all of the secondary approvals, which are ongoing even after production starts.'

'Environmental requirements are limiting productivity in the case where previous approvals impose conditions that are now less relevant and are directing effort to maintain compliance. This also impacts productivity of the regulator where ongoing reports are required to be reviewed and responded to. The other area where productivity is affected is where overlap remains in jurisdictional regulation and assessment.'

'The delay in processing time by the government has caused large inefficiencies and higher costs to be incurred by the proponent whilst waiting for a decision on the [mine] modification. … Overall, the uncertainty of mine approval is also an extreme deterrent to any further investment in exploration for new projects as the prospects for achieving consent for a new greenfields site are questionable, no matter its quality.'

'Continual regulator turnover means also that the education process is constant for the miner/proponent – and delays are inherent due to having to revisit old ground time and time again. Regulators require details on everything so if almost anything changes, delays in approval result.'

Source: Survey of MCA member companies (2016)

3. PRINCIPLES FOR EFFECTIVE REGULATION

- Regulation and policy development should be guided by the COAG principles of best practice regulation.
- Redressing regulatory burden should prioritise addressing the root cause. Administrative fixes should not be relied upon when designing regulation as this creates unnecessary work and complexity for both government and proponents

3.1 COAG Principles of Good Regulation

In focussing on potential reforms to environmental approvals, the MCA's approach is guided by the Council of Australian Governments' (COAG) principles of good regulation that stress:

- Clear intent based on an established case for action;
- Flexibility in instruments, including self-regulatory, co-regulatory and non-regulatory approaches;
- Avoiding restrictions on competition;
- Clear guidance on compliance requirements;
- Reviews of regulation to ensure they remain relevant and effective;
- Consultation with stakeholders.
- Consistency, transparency and proportionality in the exercise of bureaucratic discretion.[22]

In addition to these criteria, the MCA considers that all state and federal government priorities should include minimum effective regulation that is not unduly prescriptive, but is enforceable and can be consistently administered.

Regulation that falls short of these criteria is likely to fail in its objectives, impose unnecessary costs, impede innovation and/or create barriers to efficiency and productivity. It may also cause a loss of community trust and faith in the regulatory process.

3.2 Inappropriate regulation and administrative fixes.

Redressing regulatory burden should prioritise addressing the root cause. Poor regulation can generally not be resolved through superficial administrative fixes. Administrative fixes should not be relied upon when designing regulation as this creates unnecessary work and complexity for both government and proponents and does not align with COAG best practice principles. Furthermore, these administrative arrangements are subject to change without similar rigour that should accompany the development of regulation.

[22] Council of Australian Governments, *Best practice regulation – A guide for ministerial councils and national standard setting bodies*, Department of Prime Minister and Cabinet, October 2007

4. STATE OF REGULATORY BURDEN

- The extent of regulatory 'churn' is highly destabilising for business; undermines community confidence in the rigour of existing processes; and increased the costs of government regulation, often without tangible improvements in assessments or approvals.
- Commonwealth and state/territory governments should redouble efforts to reduce the overall stock and complexity of existing environmental legislation wherever possible.

4.1 Increasing complexity and regulatory 'churn'

Mining developments are subject to local, state and federal government regulation and planning regimes. This can result in many different approvals being required for an individual development.

Approval processes for Adani's Carmichael coal mine in Queensland highlights this complexity. Since 2010 the project has required various approvals under seven different Commonwealth and Queensland Acts. Adani holds over 42 environmental and planning approvals for the Carmichael coal mine, rail, port and supporting infrastructure projects, with over 1800 strict environmental conditions.

A study by consultancy firm URS in 2013 identified a substantial increase in state and federal regulation affecting mining approvals over the six years between 2006 and 2012.[23] These included:

- Six new pieces of legislation.
- Six replacement Acts.
- More than 60 sets of amendments to primary legislation governing approval processes and more than 50 sets of amendments to subordinate legislation.

Despite the impost placed on project proponents, there is little evidence these additional processes have changed environmental outcomes or community confidence.

The complexity of project assessment has increased in part as a result of a plethora of technical/administrative changes that seek to make minor adjustments to the law, regulatory processes, fees and charges. These changes are often the result of political expediency, independent from need identified through thoroughly examining existing regulations. The consequence is additional duplication and regulations with poorly-defined objectives and outcomes.

The extent of regulatory 'churn' is highly destabilising for business; undermines community confidence in the rigour of existing processes; and increased the costs of government regulation, often without tangible improvements in assessments or approvals.

4.2 Growth in independent panels

The increase in regulatory processes has been compounded by the development of additional independent advisory panels at both the Commonwealth and State levels.[24] The 2013 URS report found the trend to establish or expand the mandate of these panels may have adverse impacts. These include 'the potential to duplicate the normal assessment processes of government agencies and to undermine the confidence that can be placed in those processes'.[25]

The report's findings on the establishment of such panels questioned whether they were consistent with COAG principles where the problem with the normal government assessment and approvals process is not determined before taking action.

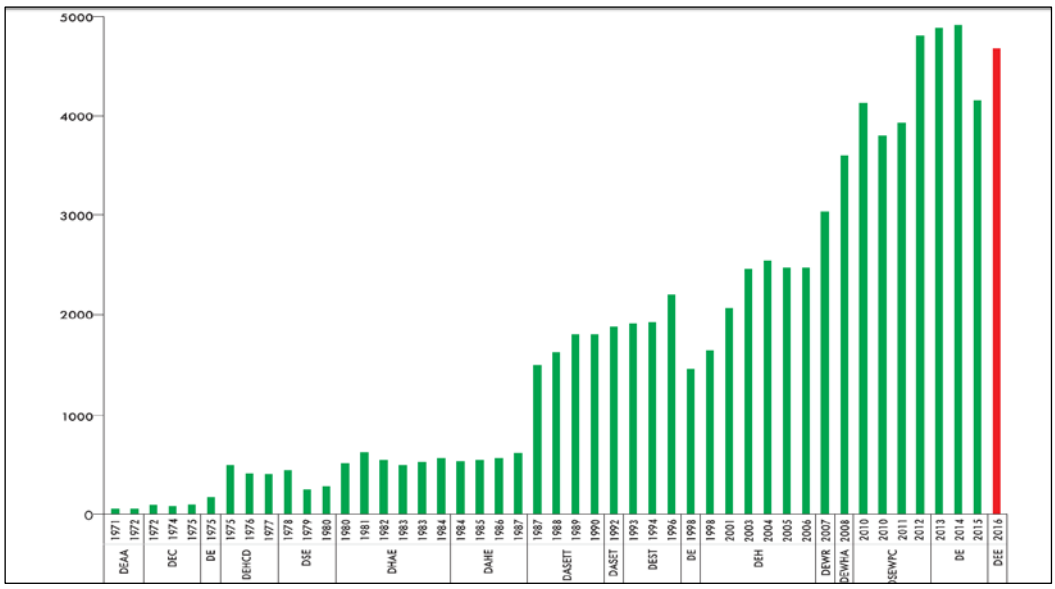
[23] URS, *Update of national audit of regulations influencing mining exploration and project approval processes*, report commissioned by and prepared for the Minerals Council of Australia, 31 May 2013, p. vii.
[24] For example, the Independent Expert Scientific Committee for CSG and large coal developments, established under the EPBC Act
[25] URS, *Update of national audit of regulations influencing mining exploration and project approval processes*, report commissioned by and prepared for the Minerals Council of Australia, 31 May 2013, p. ix.

4.2 Growth in Commonwealth environmental legislation

A recent report by the Institute of Public Affairs provides an overview of the growth of federal environmental law. Using the number of pages of legislation as an 'indicator' of regulatory burden, the report finds that federal environmental regulation has grown significantly in recent decades:[26]

- November 2001 – Not long after the establishment of the EPBC Act the Department of Environment and Heritage administered 2,075 pages of environmental legislation.
- December 2014 – The Department of Environment administered 5,004 pages of legislation.
- July 2015 - Following attempts to reduce unnecessary legislation, the Department of Environment administered 4,143 pages of legislation.
- September 2016 – Upon inclusion of energy, the Department of Environment and Energy administered a total of 4,669 pages of legislation.

Chart 2 – Growth in federal environmental law



Source: Institute for Public Affairs

The MCA supports recent efforts to improve regulatory settings and administration; however the federal government should redouble efforts to reduce the overall stock and complexity of existing environmental legislation wherever possible. This could be undertaken through returning to prior practice and formalising deregulation through periodic review and repeal of redundant regulation.

4.4 Increasing red tape at the state and territory levels

The problem of regulatory 'churn' and increasingly complex, poorly designed or implemented regulation is not limited to the Commonwealth. State-based regulation also suffers from poor regulatory practice.

For example, in New South Wales the mining industry has been subject to 109 separate policy and regulatory changes since March 2011 - a continuous stream of changes across many portfolios, often with poor consultation and leading to increasing compliance and regulatory costs. While not all of these changes relate specifically to environmental assessment and approvals, they underline the significant regulatory burden challenge that faces the minerals industry at the state level.

Reviews have been completed or are underway at the state or territory levels, most recently the independent panel review of the New South Wales policy and regulatory framework. The review

[26] Begg, M, *The growth of federal environmental law*, The Institute of Public Affairs, April 2017, p. 2.

panel's draft report, released in June 2017, contains several recommendations relating to improving the quality of policy and regulation that have relevance across jurisdictions.

Some of the more notable recommendations include:[27]

- Government should move away from a 'regulation first' response. Early consideration should be given to other available options to achieve the specific public policy objectives, recognising that regulation is not always the most appropriate and effective tool to achieve those objectives.
- Government should establish clear objectives, guidelines and accountabilities for regulation and there should be increased focus on outcomes, rather than meeting regulatory outputs.
- Early and effective consultation with relevant stakeholders before should be undertaken before policy positions are fixed.
- The principles of regulatory stewardship should be embedded into government processes to ensure that the stock of regulation is monitored; any issues are identified as they arise and that regulation remains fit-for-purpose, in the public interest and improves over time.
- There is a need for increased scrutiny applied to both the need for regulation and its contents in light of the objectives being sought to be achieved, and requirements for Government agencies to consult on, and identify, the 'what, when and how' in policy evaluations.
- Government agencies should be encouraged to avoid duplication and excessive burdens for business and the community in regulation.

Many of these recommendations reflect the aforementioned COAG best practice principles (see Section 3.1). Accordingly, it is clear that despite the agreed principles being long-established, they are still not being adequately implemented by governments, as illustrated in the above New South Wales example.

[27] Regulatory Policy framework review panel, *Independent review of the NSW regulatory policy framework, draft report for consultation*, May 2017

5. STREAMLINING ENVIRONMENTAL APPROVALS

- Commonwealth and state duplication and poor coordination have long been identified as major causes of approval delays and result in additional costs for businesses. The case for streamlining federal and state/territory environmental approval has been many times over the past decade through various reviews and inquiries.
- The MCA urges Parliament pass suitable legislation that will enable the establishment of a one-stop shop for environmental approvals.
- Regulatory complexity and coordination within state, territory and local government regimes can also be a significant source of delay and efforts should be made to address this at the jurisdictional level.

5.1 Duplication and lack of coordination

One of the biggest drags on the international competitiveness of Australia's minerals industry is lengthy and costly delays in securing project approvals. Duplication and lack of coordination between state/territory and Commonwealth government approval processes are a major cause of unnecessary project delay.

In principle, Commonwealth and state environmental approval processes are responsible for different but related environmental values. While states are responsible for regulating the broad range of intra-state environmental matters associated with a development, the Commonwealth EPBC Act focusses on nine 'triggers' or matters of National Environmental Significance (MNES). These include:

1. World heritage
2. National heritage
3. Wetlands of international significance
4. Listed threatened species and ecological communities.
5. Listed migratory species
6. Commonwealth marine areas
7. The Great Barrier Reef Marine Park
8. Nuclear actions
9. A water resource, in relation to coal seam gas development and large mining development.[28]

Actions by Commonwealth agencies or on Commonwealth land that may affect the environment are also covered by the EPBC Act.

The original intent of the EPBC Act was to enable the Commonwealth to directly regulate in line with Australia's international obligations/conventions – linked to specific MNES. The objects of the Act however, provide for Commonwealth intervention on all environmental matters where Constitutional power allows (e.g. through external affairs or corporations powers).

There are several areas where Commonwealth and state assessment and approval overlap. For example, Commonwealth and state environmental approvals can cover similar or related matters (e.g. species or habitat). This overlap will become more commonplace as a single assessment method for threatened species is implemented across Australia further harmonising what is protected between jurisdictions.[29]

While regulatory overlap varies depending on the nature of the MNES, two of these triggers largely or wholly duplicate state assessments. These are:

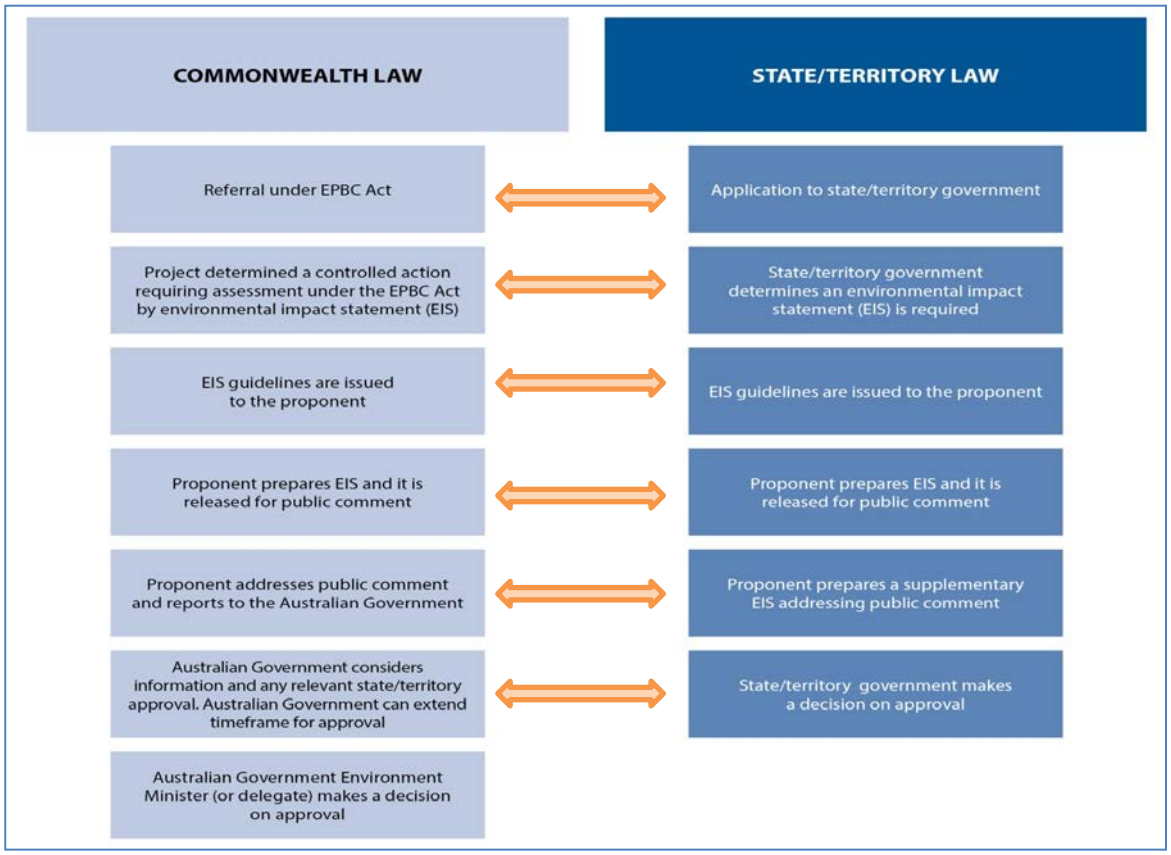
[28] Department of Environment and Energy, *What is protected under the EPBC Act*, viewed 30 June 2017.
[29] Department of Environment and Energy, *Common Assessment Method*, , viewed 30 June 2017

- **A water resource, in relation to coal seam gas and large coal mining development** – Introduced in 2013, the 'water trigger' duplicates state-based assessment and approvals for water. Both state and Commonwealth assessment rely upon the same expert advice in making decisions.
- **Nuclear actions - activities related to nuclear energy, including uranium mining –** This trigger captures uranium mining, milling, rehabilitation and decommissioning. This requires an assessment of 'whole of environment' impacts, thus fully duplicating state assessments.

Further details on these triggers are provided in Section 8.1.

While Commonwealth and state assessments and approvals deal with many but not all of the same matters, these processes are generally equivalent (see Figure 1).

Figure 1 – Commonwealth and State/territory assessment and approval processes



Source: Department of the Environment - Regulatory Cost savings under the one-stop shop, 2014 (arrow notations added)

While ideally these processes would be synchronised, this is usually not the case. Different triggers, timeframes, additional reviews and requests for further information and a lack of efficient inter-agency coordination all contribute to delays (see Case study 1).

Failure by the Commonwealth and State regulators to co-ordinate and align approaches resulting in inconsistencies in:

- Separate Commonwealth and State assessment and approval requirements.
- Misaligned information requirements, resulting in multiple submissions of identical data in multiple formats.
- Setting of duplicative and contradictory conditions.

- Misaligned timeframes for assessment and approval.
- Duplicative/misaligned monitoring and reporting timeframes and requirements.

Given the overlap identified above and commonalities between state, territory and Commonwealth process, there is a clear case for streamlining federal and state/territory environmental approval processes.

Case Study 1 - Duplicative and Inconsistent Process

An MCA member company was required to refer its project to the Western Australian Government and the Commonwealth Government for approval under the EPBC Act. The assessment was carried out under an assessment bilateral agreement, whereby the Western Australian process was accredited by the Commonwealth.

Despite both State and Federal agencies being involved in the assessment process, the then Commonwealth Minister extended the timeframe for decision three times, requiring additional information on matters already addressed and conditioned by the State in its approval of the project. In response, the company was required to rewrite documents provided in the original environmental assessment for submission to the Commonwealth.

One aspect of the project involved designing a tailings storage facility and final landform, the proposal for which was approved by the Western Australian Environmental Protection Authority and other competent authorities. The Commonwealth raised concerns about the design and requested further information, despite those same concerns already being addressed in the WA approved proposal (which was concurrently assessed by both Governments). The Commonwealth then recommended another review of the design and proposed an alternative design option which was inconsistent with Australian design standards and counter to the wishes of the local community.

After rewriting and re-submission of material the Commonwealth accepted the original Western Australia approved proposal. However it conditioned the project by requiring another review by a Commonwealth approved expert, ignoring the independent advice already provided and the role of the Western Australia regulator.

This process resulted in an eight-month delay after the Western Australia Government had completed its assessment and approved the project at significant cost to the proponent.

A key factor in this case was the failure of the Commonwealth to recognise the requirements of the West Australian regulatory regime. Specifically, during the Commonwealth's eight-month delay in consideration of approval, recommendations for project conditions were made that duplicated and even contradicted Western Australia approval conditions aimed at addressing the same issues. This occurred despite these concerns being raised by the Western Australia Government and the proponent.

5.2 The case for streamlined state and federal approvals

Commonwealth and state duplication and poor coordination have long been identified as major causes of approval delays and result in additional costs for businesses. The case for streamlining federal and state/territory environmental approval processes through bilateral agreements or development of a one-stop shop has been made and remade many times over the past decade through various reviews and inquiries. The outcomes from three of the more significant reviews are provided below.

Independent Review of the EPBC Act – Dr Allan Hawke, 2009

The 2009 ten-year independent review of the operation of the EPBC Act provided a framework for more efficient regulation, centred on harmonisation and accreditation of state and territory regimes,

streamlined environmental assessment processes and Commonwealth oversight of accredited systems.[30]

The independent review found 'the Commonwealth should give full faith and accredit state systems that are proven to provide good environmental outcomes…' and where procedural safeguards are in place 'the Commonwealth should retain the option to enter into approval bilateral agreements'.[31]

Review of major development assessment processes – Productivity Commission, 2013

In 2013, the PC undertook a comprehensive review of major project development assessment processes. The review focused on benchmarking Australian processes against international and domestic best practice. The review concluded:

> …overlap and duplication of similar regulatory processes is one obvious source of unnecessary burden for proponents. Australia's federal system of government , where responsibilities for matters (such as environmental regulation) span all levels of government, gives rise to overlap and duplication, which the Commission considers can be greatly reduced without lowering the quality of the environmental outcome.[32]

The PC recommended a 'one project, one assessment, one decision' framework for environmental matters. 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 overlapping and duplicative processes, while ensuring progressive environmental outcomes'.[33]

The PC has concluded this overlap and duplication between federal and state processes can be greatly reduced without lowering the quality of environmental outcomes.[34]

Inquiry into streamlining environmental regulation - House of Representatives Committee, 2015

In 2014, the government instigated a House of Representatives inquiry into streamlining environmental regulation, 'green tape' and one-stop shops examined a range of environmental regulation, including assessment and approval processes.

The Committee report provides a broad range of recommendations to improve the efficiency of effectiveness of environmental approval processes. In relation to state and Commonwealth streamlining, the Committee found:

> There are many shortcomings of the current system, which are resulting in inconsistency and ambiguity of legislation and its application, unnecessary delays and costs, overly onerous reporting requirements, and duplication…. The Committee acknowledges that some perceived duplication may be due to different levels of government requiring similar information for different purposes. However the Committee considers there is unnecessary complexity in the current system and therefore much scope for streamlining and identifying efficiencies [35]

On streamlining, the Committee recommends:

> …the Commonwealth continue to conclude bilateral assessment agreements and bilateral approval agreements with outstanding state and territory jurisdictions as quickly as possible.[36]

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[30] A Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Minister for the Environment, Heritage and the Arts, October 2009, pp12-13, 63.
[31] Hawke A, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Minister for the Environment, Heritage and the Arts, October 2009, pp. 66-67.
[32] Productivity Commission, *Major Project Development Assessment Processes: final research report*, Canberra, November 2013, p.13.
[33] Productivity Commission, *Major Project Development Assessment Processes: final research report*, Canberra, November 2013, p.15.
[34] Productivity Commission, *Major Project Development Assessment Processes: Research Report*, Canberra, released on 10 December 2013, p. 13.
[35] House of Representatives Standing Committee on the Environment, *Streamlining environmental legislation – Report - Inquiry into streamlining environmental regulation, 'green tape', and one stop shops*, tabled 23 February 2015, p. 31.
[36] House of Representatives Standing Committee on the Environment, *Streamlining environmental legislation – Report - Inquiry into streamlining environmental regulation, 'green tape', and one stop shops*, tabled 23 February 2015, p. 53.

5.3 One-stop shop for environmental approvals

The MCA strongly supports the government's one-stop shop initiative for environmental approvals to address the unnecessary regulatory burden and delays created by state and Commonwealth duplication and poor alignment of processes.

The government's one-stop shop proposal for environmental approvals would accredit state and territory planning processes under the EPBC Act to create a single environmental assessment and approval process. This is not a new idea, but an enhancement of an existing mechanism within the EPBC Act.

The one-stop shop is an efficiency measure, not a reduction in environmental standards. State government planning processes must meet Commonwealth standards to be accredited. While administered by the states, the Commonwealth will retain a strong monitoring and assurance role and the power to call in projects or agreements should concerns be identified.

A 2014 Department of Environment analysis found the one-stop shop for environmental approvals could be expected to result in regulatory savings to business of over $426 million a year'.[37] Should this be achieved, this would have significant flow on benefits to the broader economy. [38]

The need to streamline environmental approvals has been recognised by numerous reviews over many years. While successive governments have committed to these reforms, their implementation remains outstanding (see Box 2).

To enable the full benefits of the one-stop shop, the Commonwealth must enter into both assessment and approval bilateral agreements under the EPBC Act with individual states and territories. These include:

- Assessment bilateral agreements that allow the Commonwealth to rely upon state assessment, however these agreements are no guarantee of a coordinated process, timeframes or streamlined requirements.
- Approval bilateral agreements that accredit state authorisation processes. This enables states and territory government processes that meet strict Commonwealth criteria to approve developments for EPBC Act requirements, creating a true one-stop shop.

5.4 More to be done

The MCA commends the government for entering into revised assessment bilateral agreements with each of the state and territories and the release of draft approval bilateral agreements.[39]

While there has been some improvement in the coordination of processes, progress on the one-stop shop has stalled. EPBC Act amendments required to fully enable the one-stop shop were introduced by the government in 2014 but did not have sufficient support for passage in the Senate.[40] The MCA urges Parliament to reconsider these important reforms and pass suitable legislation that will enable the establishment of a one-stop shop for environmental approvals.

In addition to EPBC Act reform, there regulatory complexity and coordination within state, territory and local government regimes which can also be a significant source of delay, should also be addressed.

[37] Department of the Environment, *Regulatory Cost Savings under the One-Stop Shop for Environmental Approvals*, September 2014, p. 1.
[38] BAEconomics, *The economic gains from streamlining the process of resource project approval*, report commissioned by and prepared for the Minerals Council of Australia, Canberra, July 2014, pp. 1, 2.
[39] Department of Environment and Energy, *One-stop shop for environmental approvals*, viewed 21 June 2017
[40] EPBC Amendment (Bilateral Agreement Implementation) Bill, 2014

BOX 2 – The long road to streamlined regulation

Establishment and Review of the EPBC Act

July 1999 – EPBC Act established with option for assessment and approval bilateral agreements to minimise duplication and promote a timely, efficient and effective process.

June 2009 – Infrastructure Australia report finds fragmented approvals process increased time and cost for national infrastructure projects. Recommends streamlining EPBC functions.

September 2009 – ANU EPBC survey finds regulatory effort was duplicated without improved environmental outcomes and notes approval delays estimated to have cost up to $820 million over ten years.

October 2009 – Independent (Hawke) Review of EPBC Act recommends harmonisation and streamlining of environmental assessment processes including accrediting state systems that meet Commonwealth standards.

April 2011 – Deloitte Access Economics cost benefit analysis of EPBC reforms for government finds there was an 8 per cent per annum increase in approval delays from 2000 to 2010.

Labor government commits to streamlining of environmental approvals

June 2011 – Release of Labor government response to 2009 Hawke Review. Efficiency is a 'top priority' and the government committed to using assessment and approval bilateral agreements.

April 2012 – COAG Business Advisory Forum (BAF) agrees to address duplicative and cumbersome environmental regulation to lower cost and improve productivity. The COAG BAF committed to developing approval bilaterals by December 2012 and finalising them by March 2013.

April 2012 – Prime Minister Gillard commits to fast-tracking accreditation of state processes to end costly delays resulting from double-handling and duplication.

September 2012 – Port Jackson Partners report for the MCA finds Australian projects were more prone to delays, escalating costs and investment risk. Australian thermal coal approvals take 3.1 years compared with a global average of 1.8 years with delays increasing at 3-4 months per year.

December 2012 – Prime Minister Gillard reverses on reforms.

July 2013 – URS analysis for the MCA finds poorly integrated approvals processes, duplication and inefficiency could be addressed while still delivering on environmental outcomes.

Coalition government commits to streamlining environmental approvals

September 2013 – 2015 – Coalition government commits to a one-stop shop for environmental approvals using assessment and approval bilateral agreements. States enter into an implementation MOU, however enabling EPBC reforms are not passed in the Senate.

December 2013 – PC Report on major project assessments finds reforms are needed to ensure Australia's investment profile and maintain high environmental standards. The report found that community costs were significant and recommended a 'one project, one assessment, one decision' framework underpinned by EPBC bilateral agreements.

August 2014 – BAEconomics study for the MCA finds reducing mining project delays by one year would add $160 billion to national output by 2025 will create 69,000 jobs across the economy.

September 2014 – A Department of the Environment analysis finds that Australia's average time for project approvals is internationally uncompetitive at 37 months. It assessed the one-stop shop would result in regulatory savings to business of over $426 million a year.

February 2015 – House of Representatives committee inquiry on streamlining regulation and 'green tape' finds inefficient environmental regulation and strongly supports a one-stop shop.

6. BURGEONING ASSESSMENT REQUIREMENTS

- The increase in information sought has moved beyond what is required to measure material risks posed by a proposed development. Instead EIA requirements appear to be considered by government as insurance against any conceivable risk, no matter how small.
- The collection and analysis of environmental information can be costly and time consuming for proponents - a large EIA can cost many millions dollars and take a number of years to complete. Accordingly, the requirement for environmental information immaterial to the assessment should be avoided.
- The MCA recommends governments place greater emphasis on the implementation of defensible risk-based approaches when determining both the assessment pathway and in setting information requirements appropriate to the action proposed

A common feature of environmental approvals for mining projects is the requirement for the proponent to provide an environmental impact assessment (EIA) report (also known as an environmental impact statement or EIS) for public consultation and assessment by the regulator. The regulator sets (or approves) the terms of reference for the review based on its understanding of the potential for the project to impact different environmental values (for example, MNES under the EPBC Act).

The MCA considers it important that EIA provide adequate detail to enable the assessment of significant environmental risks posed by a proposed development. The collection and analysis of environmental information can be costly and time consuming for proponents - a large EIA can cost many millions dollars and take a number of years to complete. Accordingly, the requirement for environmental information immaterial to the assessment should be avoided.

Governments (state and federal) are taking an increasingly risk averse approach to EIA. This has resulted in:

- Projects undergoing lengthy environmental assessment, where other, shorter assessment approaches could be better applied (e.g. particular manner or approval on referral information under the EPBC Act).
- Increasing EIA information requirements resulting in wide ranging assessments of all impacts, regardless of materiality/level of risk.
- Large documents that are less comprehensible to a public audience.

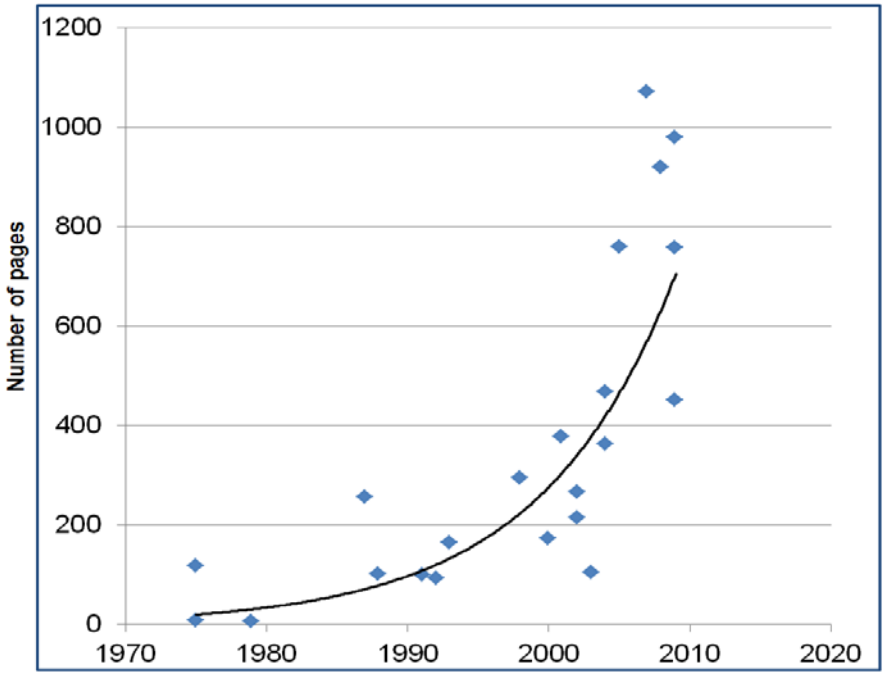
EIA requirements have proliferated over recent decades. This growth in EIA requirements is illustrated in Figure 2 below provided by the Environmental Protection Authority of Western Australia.

The size of EIA documentation for recent mining projects highlights the burgeoning of information requirements:

- EIA documents for the MRM brownfields mine extension project in the Northern Territory consisted of approximately 8,500 pages and weighed more than 43 kilograms.
- EIA documents for Arafura Resources mine, a mid-sized mining development in the Northern Territory consisted of over 3,080 pages with a printed weight of almost 14 kilograms. The supplementary EIA document is already more than 900 pages at the time of writing.

As illustrated in the second example above, substantial and often non-essential supplementary information is often requested by regulators.

Figure 2 - EIA assessment documentation is increasing in length
(Based on a sample of EIAs in WA, 1975–2010)



Source: Productivity Commission, Major Project Development Assessment Processes Report, 2013
Based on data provided by EPA (WA).

The increase in information sought has moved beyond what is required to measure material risks posed by a proposed development. Instead EIA requirements appear to be considered by government as insurance against any conceivable risk, no matter how small.

While regulator policy often highlights the importance of adopting a risk based approach, (for example the Great Barrier Reef Marine Park Authority Environmental Assessment and Management Risk Management Framework), the reality is these approaches are either underutilised or poorly articulated in implementation guidance.

The issue of 'scaling' of assessment requirements was identified in the 2013 PC report into major project assessment and approval processes.[41] The Commission recommended regulators establish approaches to 'scale' aspects based on the risk and significance of expected impacts.

The MCA recommends governments place greater emphasis on the implementation of defensible risk-based approaches when determining both the assessment pathway and in setting information requirements appropriate to the action proposed.

[41] Productivity Commission, *Major Project Development Assessment Processes: final research report*, Canberra, November 2013, p.177.

7. POST-APPROVAL SAFEGUARDS

- Judicial review processes are important to safeguard the rights and interests of affected individuals and to ensure development assessment and approval processes remain robust, – however these processes are being deliberately misused as a tactic to halt or delay projects
- Weaknesses in the EPBC Act that allow the minister's approval to be challenged on a technicality rather than on the substance of the decision should be redressed. A process to ensure that only challenges that have merit are allowed to proceed to legal judgement should also be considered.

While not specifically red-tape, but a function of regulatory design, appeal processes require some consideration. Approval decisions for minerals (in particular coal) projects have been subject to increasing appeals, including state level appeals and judicial review under the EPBC Act.

Judicial review processes are important to safeguard the rights and interests of affected individuals and to ensure development assessment and approval processes remain robust. The mining industry supports the rule of law and the right of affected individuals to have their say.

Increasingly, however, industry opponents – often removed from the local community – are deliberately misusing the appeals process as a tactic to halt or delay projects.[42] Appeals through the Federal Court do not need to be successful in order to delay a project. Most cases are not. The Productivity Commission found that the time between approval and legal judgement for coal projects ranged from 7 months to more than 24 months.[43] Some more high profile projects have been delayed by several years. Such challenges provide little environmental benefit, yet cost the project proponent in terms of delay and expenses.

Where multiple approvals are required (e.g. state and federal) this provides further avenues for appeals and associated delays.

To address these matters, the MCA recommends the following:

- Implementation of processes to ensure that only challenges that have merit are allowed to proceed to legal judgement.
- Redressing weaknesses in the EPBC Act that allow the minister's approval to be challenged on a technicality rather than on the substance of the decision. For example, the minister must personally view a specific statutory conservation advice document rather than simply ensuring the issues raised in the document have been considered and addressed.

[42] For example, Dennis Shanahan, '*Foreign funding for Adani lawsuits*', *The Australian,* 22 October 2016.
[43] Productivity Commission, *Major Project Development Assessment Processes: final research report*, Canberra, released on 10 November 2013, p. 258.

8. EPBC ACT – SPECIFIC MATTERS AND RECOMMENDED REFORMS

- The case for retaining the sector specific EPBC water trigger is weak. The MCA recommends the water trigger legislation be repealed. At a minimum the EPBC Act should be amended to allow the water trigger to be administered by the states under approval bilateral agreements.
- There is no scientific case that would justify default treatment of uranium mining related activities as an MNES. Consideration should be given to removing uranium mining, milling, decommissioning and rehabilitation from the definition of nuclear actions and therefore as a trigger under the EPBC Act.
- A range of improvements to the operation of the EPBC Act should be considered. These include opportunities to reduce insurance referrals, greater use of rapid assessment pathways and the encouragement of financial based environmental offsets.

The MCA has given consideration to a range of reforms that could reduce the regulatory burden illustrated above while delivering on the environmental outcomes sought by regulation. These are provided below.

Most of the following reform recommendations have been previously raised by the MCA in submissions to other inquiries, including the House of Representatives Standing Committee Inquiry into Streamlining environmental regulation, 'green tape', and one stop shops.[44] The MCA considers that many, but not all, of the following issues may be addressed or improved through the full implementation of the one-stop shop reforms.

We note that EPBC Act assessment processes are cost recovered from the proponents. This reinforces the importance of ensuring regulation is both efficient and effective in design and implementation.

8.1 EPBC Act Triggers

The MCA considers the following triggers are highly duplicative of state processes and should be reformed.

'Water Trigger' for coal seam gas and large coal mining developments

The 'water trigger' for coal seam gas and large coal mining developments was introduced into the EPBC Act in 2013. Contrary to COAG principles of best practice regulation, the trigger was introduced without a regulatory impact statement despite being a new sector specific MNES with significant ramifications in the operation of the EPBC Act. Furthermore, affected industries were not consulted prior to the Bill being considered by Parliament.

The ambiguity in the design of the water trigger has led to the capture of almost all coal mining approvals (including minor amendments of existing mine plans). This can place an unnecessary burden on industry resources, delay site improvement works and interrupt the continuity of existing operations.

The mining industry is comprehensively regulated for environmental and water impacts at the state level. Major coal mining states, including New South Wales and Queensland have industry or water specific policies in place for the assessment and management of potential impacts from development. Furthermore, both the state and the Commonwealth assessment rely upon the same advice from the Independent Expert Scientific Committee. The trigger has effectively created a second approval for the same matter.

[44] Minerals Council of Australia, *Submission to the House of Representatives Standing Committee Inquiry into Streamlining environmental regulation, 'green tape', and one stop shops*, 1 May 2014

The MCA recently made a submission to an independent review of the water trigger .[45] The review found the additional regulatory costs of the water trigger borne by business were significant and estimated at $46.8 million annually. The independent review concluded this was acceptable despite the review not being able to ascertain whether the water trigger has achieved any of its aims - either improved environmental outcomes or enhanced community confidence.

The review also suggests duplication created by the water trigger was not a significant issue given it was managed through administrative arrangements. The MCA considers the fact regulators are managing the legislation as well as they can to reduce duplication should not be used to justify this conclusion. Regulatory activity should not be a measure of the regulatory outcome, particularly where costs are borne by the proponent.

The MCA considers the case for retaining the sector specific EPBC water trigger is weak. The water trigger serves only to provide an additional regulatory approvals 'layer'. Should the trigger be removed, the existing levels of protection would be maintained.

The MCA recommends the water trigger legislation be repealed. If the water trigger is not repealed, the EPBC Act should be amended to allow the water trigger to be administered by the states under approval bilateral agreements. This would bring the water trigger into line with all other comparable MNES.

Nuclear Actions trigger definition

Some activities currently captured under the nuclear actions trigger including uranium mining, milling, decommissioning and rehabilitation. There is no scientific case that would justify default treatment of uranium mining related activities as an MNES. Where significant environmental risks are presented, these are addressed through comprehensive state and territory assessment and approval processes.

Unlike other MNES (with the exception of actions on Commonwealth lands, marine waters and actions by Commonwealth agencies), the nuclear trigger requires 'whole of environment' impacts to be considered, thus fully duplicating state assessment and approval processes.

The 2016 South Australian Nuclear Fuel Cycle Royal Commission found that 'existing regulatory approvals processes for new uranium mines are unnecessarily duplicative at the state and federal levels' and recommended 'that the South Australian Government pursue the simplification of state and federal mining approval requirements for radioactive ores, to deliver a single assessment and approvals process'.[46]

Accordingly, the MCA recommends consideration should be given to removing uranium mining, milling, decommissioning and rehabilitation from the definition of nuclear actions and therefore as a trigger under the EPBC Act.

8.2 Administrative Improvements

Information Requirements

The scoping document developed as a terms of reference for the EIA should more strongly bind the regulator as to which matters are to be addressed. Such an approach would give the proponent certainty on the methodology and information requirements to enable a proper assessment of the project. This is particularly important to avoid the regulator increasing the scope of the assessment, driven by political pressure rather than material changes which may impact on the environment. This scope-creep in turn impacts negatively impacts on statutory timeframes due to the utilisation of 'stop the clock' procedures.

[45] Hunter. S, *Independent review of the water trigger legislation*, prepared for the Australian Government, tabled in Parliament on19 June 2017, and Minerals Council of Australia, *Submission to the independent review of the EPBC water trigger*, 25 February 2016.
[46] Nuclear Fuel Cycle Royal Commission, Government of South Australia, *Nuclear Fuel Cycle Royal Commission Report*, 2016, p.xiv.

Insurance referrals

The lack of certainty for proponents when determining whether or not a project is likely to have an impact on a MNES, coupled with a tough penalty regime for failure to refer as well as the potential for a project to attract requirements under the Act if additional MNES are subsequently established creates what are commonly known as 'insurance referrals'. Subsequent requirements if they were to materially change a project scope could require re-assessment/new assessment by state regulators further increasing costs and delays.

It is the MCA's experience that 'insurance referrals' are made in the absence of firm guidance and defence provisions allowing for reasonable discretion by proponents. Between 2000 and 2012, over half of all EPBC Act referrals were determined to be 'not a controlled action' and the processing of many of these represents an unnecessary and avoidable diversion of Department of Environment and Energy resources.

Accordingly, consideration should be given to providing stronger guidance and defence for proponents who do not refer, but can demonstrate they acted in good faith. Legislative amendments may also be necessary to address provisions in the EPBC Act that encourage insurance referrals. For example projects which have receive a 'not a controlled action' determination will be exempt from the retrospective application of the Act related to the future listing of MNES.

Model conditions

The MCA recommends consideration be given to developing 'model conditions' for MNES. The extent to which other conditions should be added to what is in a model authority should focus solely on those matters that are unique to projects and their environment. The minerals industry considers such an approach is to be critical to streamlining approvals that are largely structured around a core set of activities undertaken by the minerals industry. This would also enable expediting of approvals, especially for those projects undertaken in 'brownfield' areas or where existing planning arrangements have designated the land use as appropriate for mining or development.

Significant Impact Test

The significant impact test under the EPBC Act should take account of pre-existing land use in the region (e.g. brownfield development). This in turn would determine the level of documentation required to be prepared for project assessment, as is the case with state processes. For example, activities on an existing mine lease may be approved subject to the preparation of appropriate documentation (e.g. public environment report) or a preliminary assessment; while activities that involve new technologies or development of 'greenfield' areas may require a full EIA process.

Consistency in making referrals

An EPBC Act 'referrals manager' could be established to provide advice on referral requirements. The referrals manager must be sufficiently senior to provide formal advice to proponents on what projects should be referred under the EPBC Act. The centralisation of referrals would also assist in ensuring consistency in decision making within the Commonwealth/state agency. This arrangement may need to be reviewed in light of the future operation of approvals bilateral agreements.

8.3 Greater Use of Existing Approval Mechanisms

Particular manner provisions

The MCA recommends existing activities/land uses should be better recognised through the increased use of 'particular manner' provisions within the EPBC Act. In addition, model conditions should be developed to facilitate this and the capacity should be provided for approval of projects subject to a management plan which may include the use of environmental offsets (although this may require legislative change).

Approval on referral information

The MCA recommends increased use of 'approval on referral information' processes for 'approval ready' proposals - The MCA advocates a return to prior practice by the Commonwealth where proponents were provided with guidance and assistance to vary projects in collaboration with Government to avoid the project being considered a 'controlled action'.

Environmental Offsets

It is important Commonwealth offset requirements are not considered in isolation, but rather mutually reinforce the offset requirements of State/Territory governments. Accordingly, processes for determining offsets should be consistent at the state and Commonwealth levels and should result in a single offset requirement.

Greater flexibility is required in the composition of offset proposals to enable the achievement of the desired environmental outcome at least cost and contributing to more strategic environmental objectives. Offset development should also be complementary to the range of government and non-government conservation activities taking place within a region, including catchment management, wildlife corridor development and to support the quality and management of the existing conservation estate.

One option would be to provide an offset 'fund' option for proponents or otherwise enabling the use of state-based offset funds to satisfy EPBC Act requirements. This would enable offset contributions to more effectively target strategic goals and link with existing conservation activities. This would assist regions, such as the Hunter Valley in New South Wales where the capacity to secure suitable land tenure for long-term conservation purposes under offset requirements can be difficult.