Submission on Regulatory Reform:

Turning from the 'why to the 'how'

Submission on Regulatory Reform:

Turning from the 'why to the 'how'

EXECUTIVE SUMMARY

a) Despite recent efforts to improve and streamline processes for major project approvals in Western Australia, the process remains slow, costly and inefficient. Processes are diffuse, with multiple agencies and decision makers considering the same or similar subject matter under multiple laws.

b) Our strongly held view is that what's missing from much of the debate in Australia today around regulatory reform is the potential value in single-agency decision making. Most State systems are based on a model where one lead agency takes a coordinating role but under that model *all* regulatory agencies nevertheless get to have a say in both inputs and outputs.

c) What is plainly absent and needed in the system is simplification and unification into a single process with a single decision maker.

d) We propose root and branch reform that would establish a single approvals agency. The new agency would have power to evaluate and approve a project and control how the project is developed, in terms of the development conditions imposed. The central agency would set a single time frame for evaluation and approval of a project and the consideration of third party views and concerns using a unified, certain and streamlined process to eliminate the use of multiple review forums while ensuring legitimate views and interests are addressed.

e) The proposal will avoid a wholesale re-writing of legislation and the establishment of a duplicate specialist bureaucracy because the central agency would co-ordinate and draw on the advice (with the force of law) of specialist agencies (such as the EPA) in making its decision. Processes under other laws would be "switched off" or modified to facilitate the new approach.

f) The assessment and approval of major projects under environmental laws is often one of the most significant single approvals required for a major project. Under our Federal system and because of the current EPBC Act, there are Constitutional limitations on what can be done to unify the environmental assessment and approvals process. However, the current framework can and should be used to establish a State-Commonwealth agreement under the EPBC Act that addresses the assessment **and** approval of major projects by the new central agency on the advice of the EPA using the new system. This would require the new agency to consider and address not only impacts assessable under the State EP Act, but also the matters of national environmental significance under the EPBC Act.

g) Access to land is another vital matter for the development of major projects, which is currently the subject of multiple laws and administrative regimes, which apply different rights and standards. We propose that land access for infrastructure associated with major projects be capable of being authorised as for public works under current laws.

h) Too often we see regulatory agencies taking a blanket approach when setting a suite of conditions for project approvals. This blanket-style approach means all the potential impacts a project may ever possibly have are assumed to each have an equal probability weighting. Realistically of course, no two potential impacts will ever have exactly the same probability of occurring. What happens when a blanket approach is taken to condition-setting is that regulators will ignore impact differentials and probability differentials and treat all impacts as if they are of the same scale and degree and all have exactly the same probability of occurring. The solution is to have higher regulatory benchmarks applied to those aspects of the development and operation of a project which have a greater chance of impact. There are already solid examples of this risk-based approach evolving in many jurisdictions.

Submission on Regulatory Reform:

Turning from the 'why to the 'how'

TABLE OF CONTENTS

FIGURES

GLOSSARY OF TERMS

Aboriginal Heritage Act	*Aboriginal Heritage Act 1972* (WA)
Dangerous Goods Safety Act	*Dangerous Goods Safety Act 2004* (WA)
EPA	Environmental Protection Authority (WA)
EP Act	*Environment Protection Act 1986* (WA)
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
Government Agreements Act	*Government Agreements Act 1979* (WA)
Mines Safety and Inspection Act	*Mines Safety and Inspection Act 1994* (WA)
Mining Act	*Mining Act 1978* (WA)
OMP	Office of Major Projects (proposed)
Petroleum Pipelines Act	*Petroleum Pipelines Act 1969* (WA)
Port Authorities Act	*Port Authorities Act 1999* (WA)
Public Works Act	*Public Works Act 1902* (WA)
Radiation Safety Act	*Radiation Safety Act 1975* (WA)
RIWI Act	*Rights in Water and Irrigation Act 1914* (WA)
SAT	State Administrative Tribunal
Wildlife Conservation Act	*Wildlife Conservation Act 1950* (WA)

Submission on Regulatory Reform:

Turning from the 'why to the 'how'

1 INTRODUCTION

In 2011 Roy Hill Infrastructure Pty Ltd ("**Roy Hill**") made a submission to the Department of State Development entitled *"The Roy Hill Iron Ore and Infrastructure Projects Approval Analysis"*.

The express purpose of that submission was:

- to highlight the scale and cost of the regulatory burden on major projects in WA
- the deficiencies in the system
- recommendations for its improvement

In other words, the 2011 submission was aimed fairly and squarely at motivating much-needed reform of the approvals systems for major projects.

Now, four years on, we feel the time has come to move beyond the debates on 'why' and spell out the 'how'.

This submission lays out our suggestions for doing just that.

2 NEW MACHINERY FOR MAJOR PROJECTS IN WESTERN AUSTRALIA

2.1 The Problem

Roy Hill recognises the efforts of the State Government to improve regulatory approval processes in Western Australia by changes to the administration of approvals processes as well as some legislative change.

However, current regulatory approval processes for major projects in Western Australia are still:

- slow
- costly
- inefficient

Fundamentally, they are not fit for purpose.

The machinery delivering regulatory approvals for major projects in Western Australia needs re-engineering.

Current processes are too diffuse, with decision making among regulatory agencies typically being polycentric, that is there are too many decision makers involved, making too many separate decisions for any one project.

Diagrammatically, the process can be illustrated this way, with each node representing a regulatory agency involved in a major project's notional approvals processes:

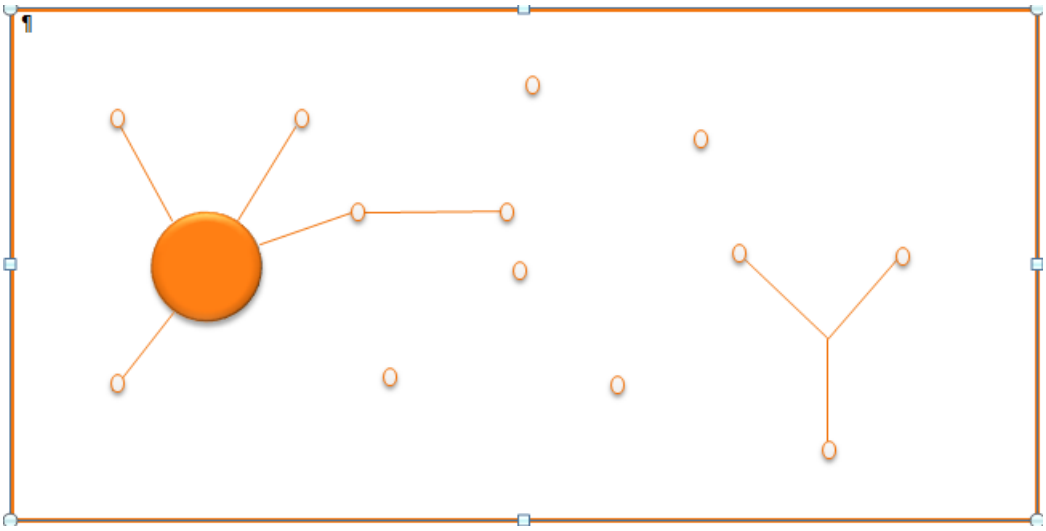

Figure 2-1 The diffuse nature of the current regulatory approvals system

Key:

- **the small orange circles represent individual regulatory agencies which currently participate in the approvals process for major projects – sometimes coordinated by a Lead Agency and at other times operating independently**
- **the large orange circle represents a Lead Agency which has a role coordinating other regulatory agencies**

Linkages in Figure 1 represent collaboration between regulatory agencies, some in a coordinated fashion (such as now occurs with the Department of State Development) and some not. Then there are others again who make standalone decisions on the project.

The net effect of such a system is that proponents of major projects face a multiplicity of processes and regulators in achieving overall project approval. Then, once all those approvals are finally in place, proponents face a plethora of non-aligned and sometimes repetitive and discordant conditions in those approvals which the proponent somehow has to navigate in ways which minimise the risk of non-compliance.

We submit that what is plainly absent from such a system is simplification and unification into a single process with a single decision maker. (We present another figure later in this submission which we feel nicely displays the contrast with the model illustrated in Figure 1.)

It is important at the outset to break down this complexity in the regulatory system into its fundamentals. We see any system revolving around two basic things:

- processes by which regulators ***evaluate and approve*** a proposed project; and
- processes by which regulators ***control*** an approved project.

2.2 The problem in more detail

The number of different approvals required by proponents of major projects, and the different approvals processes to be navigated, has led to a complex system in Western Australia which involves regulatory duplication, lacks efficient agency coordination and can result in significant delay.

Under the current Lead Agency Framework, the Department of Mines and Petroleum is appointed the lead agency for regulation of the resources sector, while the Department of State Development is appointed the lead agency for major resource projects (typically those the subject of a State Agreement).

The appointed Lead Agency has the role of assisting with or coordinating approvals applications across government. However, the appointed Lead Agency does not have any statutory authority to ensure other agencies provide comments or complete other steps in the approval processes by a specified deadline. At best, the Lead Agency agrees proposed timelines with other government agencies to progress parallel processing and facilitate efficiencies in the multiple approval processes.

To illustrate: under the current approvals regime in Western Australia, a proponent which has successfully obtained a Ministerial Statement of approval under Part IV of the EP Act cannot commence productive mining or development on the land until it has obtained all other statutory approvals required to carry out its activities, which will typically include (but are generally not limited to):

a) **a** mining lease or mining leases under the Mining Act;

b) other tenure and access to land as may be required for the project;

c) an approved mining proposal under the Mining Act (to the extent the mining proposal was not lodged and approved together with the mining lease application);

d) where the project is the subject of a State Agreement1, approval of proposals under that agreement;

e) a works approval and operating licence under Part V of the EP Act;

f) a section 18 consent to disturb an Aboriginal site under the Aboriginal Heritage Act;

g) a section 5C licence to take water under the RIWI Act;

h) registration of the mine manager under the Mines Safety and Inspection Act and other safety requirements; and

i) other subsidiary approvals such as dangerous goods licences under the Dangerous Goods Safety Act, a licence to take rare flora under the Wildlife Conservation Act, a licence to operate certain apparatus under the Radiation Safety Act, etc.

Some projects, including those which involve railways or access to port export facilities, require a range of additional and very significant approvals and consents.

Decision making authorities responsible for granting approvals are also constrained by section 41 of the EP Act from granting many approvals until the Ministerial Statement is granted and the Minister issues an authority to the decision making authorities. This implementation process is a fundamental cause of delay for a mining company being able to commence the approved development.

Another common cause of delay arises from the process associated with obtaining a mining lease and other land access.

The above examples do not include the negotiation of private consents and arrangements, which although not granted by Government, are often necessitated by the provisions of Western Australian laws or the terms of approvals and other Government imposed conditions.

Putting aside the delays commonly experienced in navigating native title processes, the grant of a mining lease will be delayed if any objections are lodged by a third party in the Warden's Court. The Mining Act requires objections to be lodged within 35 days after a mining lease application is lodged, however there is no statutory timeframe specified for Warden's Court processes. A mining lease application cannot be progressed until any objections are resolved. In recent years there has been a significant backlog of objections at the Warden's Court which has meant that objections can take months or even upwards of a year to resolve, effectively suspending the progress of the mining lease application for that period.

Just as significantly, Western Australian laws and approvals often require that a multiplicity of consents from third parties in order for a proponent to get access to land the subject of its approvals and tenure. In some instances, further related approvals cannot be obtained until access issues are resolved. This is a source of

[1] An agreement that is subject to the Government Agreements Act

major delay and risk, especially for some projects the subject of State Agreements, and is discussed in further detail in section 4, below.

2.3 The solution

We suggest the cure must be a root and branch reworking of the current system. In fact, we submit that a new standalone system is warranted for major projects in the State.

In our submission that has to mean the process for delivering major approvals in Western Australia must be refashioned away from the polycentric one described at Figure 1 above. Only through inverting that process to the system outlined below will appropriate synthesis and integrity between components in the system deliver the timing and cost efficiencies which are needed.

This centralised architecture can be displayed diagrammatically like this:

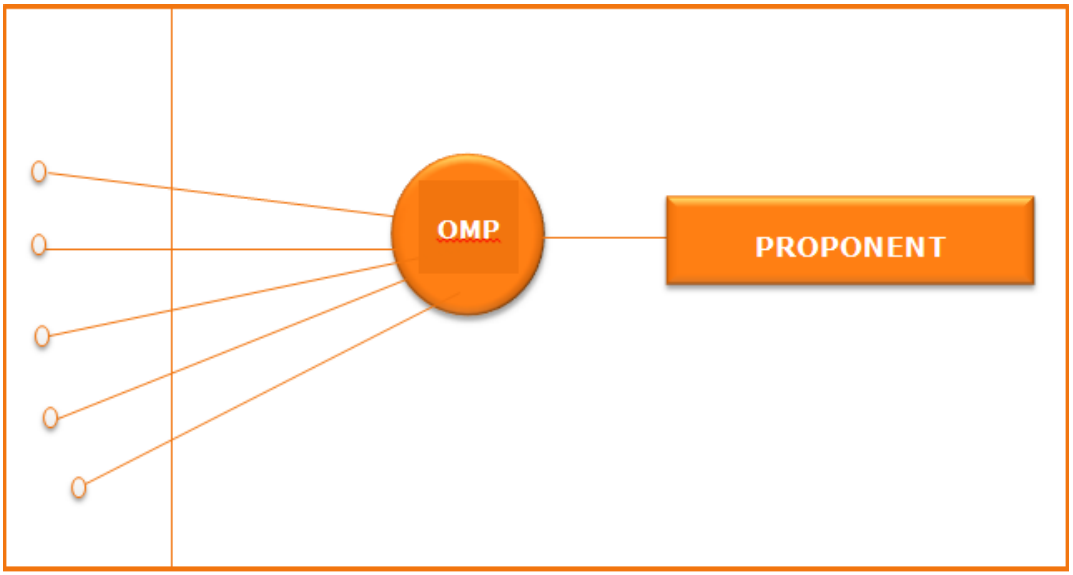

Figure 2-2 Our proposed model for a new system involving an Office of Major Projects

Key:

- **the large orange circle represents a new agency, the Office of Major Projects, which has an exclusive role in evaluating and approving major projects in Western Australia**
- **the small orange circles represent individual regulatory agencies which the OMP can call on for input to assist the OMP evaluate a project but those regulatory agencies do not otherwise play a role in approving any aspect of the project**

The model in Figure 2 shows a proposed new agency, (nominally) an Office of Major Projects, as being the exclusive primary decision maker for all activities and impacts associated with a major project in WA.

Its exclusive power takes on two forms:

- it has the sole power to *evaluate and approve* the component activities and impacts associated with the construction and operation of a major project, and

- it also has the sole power to *control* a major project by determining a single set of conditions applicable to the project. We suggest that this mechanism should also be made available to regularise and streamline the conditions that govern *existing* (as well as new) projects where agreed by the proponent.

Figure 2 highlights the fact that while the OMP will call on other regulatory agencies (represented by the nodes constrained inside the separate box to the left of the figure), those other regulatory agencies play an advisory, supporting role only and are not directly involved in the approval or controlling decisions.

The main themes of this desired outcome are:

a) Single project evaluation, approval and condition-setting

Rather than having a multiplicity of regulatory agencies all evaluating and approving a proposed project or elements of it to varying degrees, there would be a single agency – the OMP – empowered to exclusively evaluate and approve all components of the project and, through that approval, set the single suite of parameters which would regulate the project.

b) A single approvals timeline

The OMP would:

- set a single, bespoke, end-to-end timetable for delivery of the approval for all elements of the project; and
- this would be done in conjunction with the project proponent

2.4 The machinery which would deliver the solution

We submit that the kind of machinery which would deliver this style of centralised architecture for regulatory approvals processes would include the following:

a) A Western Australian 'Office of Major Projects'

At the heart of the new machinery would be a new regulatory agency, the Office of Major Projects, which would be empowered and equipped as the decision maker for regulatory approvals for major projects in WA, both in terms of determining project evaluation and approval as well as determining project controls.

In other words, it alone would evaluate all aspects of a major project and its impacts - positive and negative - and then, if it approves the project, set the regulatory parameters within which the project would be designed, constructed and operated.

Rather than duplicate resources in existing government agencies, the OMP would be able to draw on those resources to inform its own processes on the advice of the various agencies. However, those other agencies would provide external inputs to the OMP's decisions which would determine the evaluation of the project and the setting of an appropriate set of regulatory controls on the project. This would operate for the purposes of all applicable legislation.

b) The machinery: legislative aspects

In the reworking of legislation to deliver this new system it would be important for the adjusted legislation to:

- establish the OMP as a new regulatory agency
- confer on it exclusive power to evaluate, approve and condition activities and impacts of designated major projects in the State

Submission on Regulatory Reform:

Turning from the 'why to the 'how'

This would in turn drive the need for consequential adjustments to be made in other legislation such as:

- adjustments to current legislation to 'switch off' or modify the application of regulatory processes which the proponent or regulatory agencies might otherwise face over activities and impacts associated with major projects (post those amendments, such processes would only apply to activities and impacts associated with less significant projects and activities)
- processes 'switched off' or modified in this way for major projects would include those relating to making applications, requesting and providing information, undertaking impact assessments, evaluating projects and their impacts, and approving or conditioning activities and impacts
- other processes to be 'switched off' or modified would include any obligations a proponent of a major project may otherwise have to seek and obtain approvals from any other State or Local Government regulatory agencies, besides the OMP, for all and any activities and impacts associated with a major project

New legislative provisions would need to expressly establish the new processes by which:

- proponents would apply to the OMP for major project approval including the parameters which a project would need to meet in order for it to be designated as a major project (likely including some sort of public interest test)
- proponents would provide information to the OMP about the major project, its component activities and their impacts
- set the hard and fast timelines the OMP would have to meet when it evaluated, approved and conditioned a major project
- confer power on the OMP to compel other regulatory agencies to assist the OMP with advice relevant to its deliberations (and set timelines within which the other regulatory agencies had to provide that advice) to address

The changes would not require the establishment of a full specialist bureaucracy to mirror the functions of agencies whose decisions are "switched off" or modified in whole or in part. OMP would use the specialist agencies to carry out their own functions and thereby provide advice to OMP rather than make their own decisions. By way of example, the EPA would remain responsible for undertaking the work necessary to consider the matters required under Part IV of the EP Act, but its advice would be given to OMP within a mandated time frame and the final decision made by OMP.

Why this approach to legislative change?

A clear benefit of setting up new OMP-specific legislative machinery and generically 'switching off' or modifying the reach of current legislative provisions into major projects processes, is that it avoids the need to identify, provision-by-provision, the elements of various pieces of legislation which would need amending.

We submit this makes the Government's task much simpler while at the same time increasing confidence that generic provisions will not be inadvertently missed.

There are alternatives to our proposed approach, which would represent a more incremental improvement by strengthening but not fundamentally changing the existing system, including:

Ministerial call-in power (where the Premier or the Minister for State Development had the power to take over the approval, evaluation and condition-setting roles out of the hands of

other regulatory agencies into his or her own)

Ministerial step-in power (where the Premier or the Minister for State Development has a power to step-in to decide any single process point among the evaluation, approval and condition-setting of a major project)

Ministerial power to direct other regulatory agencies to make a decision in the time specified in the direction

However, each of these options will rely on the exercise of Ministerial discretion (which is generally used sparingly) and thereby add to the Ministerial administrative burden. We therefore believe these alternatives will not result in the step change that is needed.

c) The machinery: a sensible scope for third party involvement

While we appreciate that no major project can ever have absolute and universal support, given the self-evident public interest attached to major projects, the legislation establishing the OMP should also specify those process portals through which third parties would and would not have opportunities to engage in the regulatory process.

We submit that an appropriate scope would be one sensibly designed:

- to give third parties the opportunity to provide input to the OMP at a point in time after sufficient project fundamentals have been established but before a project has reached a stage where the cost of designing and evaluating scope change – for the proponent or the OMP – becomes disproportionately large;
- to constrain such input to those who are legitimately and demonstrably stakeholders in the project; and
- to give such third parties that opportunity at a single process point.

In further recognition of the public interest of the establishment of designated major projects in Western Australia and their significant investment risk, the legislation establishing the OMP and its processes should contain provisions which rule out multiple access to judicial review and other legal challenges by disaffected parties.

This does not mean that third party rights will be nullified. Rather, the scope for third party involvement would be streamlined and co-ordinated. Review of an overall approval decision or an element of it could (for example) be the subject of SAT (or perhaps a single judicial) review, rather than the multiplicity of statutory review mechanisms currently available in relation to the different approvals. Any right to review or appeal would need to be carefully constructed to enable proper scrutiny of the decision making process, but not open up a full merits review (as is currently the case with many SAT matters).

d) The machinery: administrative aspects

We fully recognise that the legislative adjustment can only ever be one part of the story behind successful regulatory change. The other very important aspect will be the resourcing of the OMP and the design of appropriate processes by which it operates and interacts across numerous regulatory agencies at both the State Government and Local Government levels. We acknowledge the progress made by the State in recent years of reforming the administrative approach of some agencies in Western Australia. This experience provides a good underpinning for reform.

Submission on Regulatory Reform:

Turning from the 'why to the 'how'

We submit that some appropriate administrative processes which would need to be designed into the new system are:

- formulation of appropriate policies and guidelines on issues specifically relevant to the regulatory approval of major projects;
- necessarily, this would include how general policies and guidelines would and would not have application to major projects;
- appointment of individual OMP project managers to operate as champions for each project and be accountable for delivering the OMP's evaluation and approval decisions in accordance with legislative time constraints;
- those same OMP project managers to be responsible for liaising with proponent teams and advisers at all times to ensure there is effective and responsive communication and visibility of OMP functions, deliberations and progress; and
- written action plans for a major project to be agreed in advance between the OMP and proponent representatives straight after an application for approval is submitted.

e) Administrative matters: project evaluation

A much-needed streamlining of evaluation of major projects in Western Australia would see:

- establishment of clear ground rules for how impact assessment for major projects is to be scoped and carried out;
- consistent application of those ground rules with the OMP making further requests of the proponent and for information on the project and its impacts being considered the exception rather than the rule; and
- the scope of impact assessments being rigorously contained to only those assessments that deliver real value to the OMP's evaluation.

f) Administrative matters: condition-setting

Current best practice condition-setting among regulators dictates that, at a minimum, all constraints on a project should be:

- outcome-focused by simply outlining the 'envelope' of impact limits an activity is to achieve, rather than prescribing how an activity is to be conducted in order to produce that result; and
- limited to those activities and impacts which genuinely present with some material element of risk, rather than taking a 'cookie-cutter' approach to conditioning. (See further discussion at Section below.)

g) Administrative support – resourcing

No approvals system can function effectively without appropriately skilled and trained human resources.

There are many talented people already working within government agencies already. However, over the last decade of the resources boom, there was a significant train of highly trained and skilled personnel to the private sector. The cooling of the resources boom combined with the minimisation of duplication within agencies that should flow from the reforms we propose would enable:

- the transfer of skilled personnel where there is redundant capacity resulting from the elimination of duplication; and
- recruitment of additional skilled people into government agencies.

3 NEW MACHINERY FOR FEDERAL ENVIRONMENTAL APPROVALS IN WESTERN AUSTRALIA

3.1 The problems

a) Introduction

As well as facing issues with the Western Australian State regime, major projects also face significant issues at the federal level. Indeed the duality of regulation presented by our federal system of government lies at the heart of this next issue.

The problems faced by major projects in Western Australia include:

- Major projects having to get approvals from both the Western Australian Government and the Federal Government to do the same thing.
- Proponents spending significant time and money doing that and to no one's benefit and no benefit to the environment.
- Western Australian approvals and federal approvals containing separate sets of conditions, sometimes with significant inconsistencies between the sets.
- Project proponents simultaneously having to comply with and manage both sets of conditions, whether or not there are any inconsistencies.

b) How the Western Australian Government and the Federal Government both came to set rules in the same area

In short:

- State Governments have traditionally controlled major projects.
- The Federal Government is given exclusive powers under the Australian Constitution of 1901 to make certain laws and, nowadays, often relies on one of those –its power to make laws controlling corporations - to make laws in many areas, including environmental protection.
- The Federal Government introduced the EPBC Act in 2000 and it requires process where major projects are likely to have impacts on one or more of nine designated matters of national environmental significance (which include, among other things, fauna and flora listed as protected at the national level).
- Despite there being almost identical processes in WA, this federal process requires major projects to carry out detailed environmental impact assessment and have that rigorously evaluated by the Federal Department of the Environment before a project is approved with controlling provisions.

3.2 Legal and political limitations

Absent new Commonwealth legislation, the potential scope for reform in this area is necessarily limited.

The constraints arise from the current provisions of the EPBC Act. They facilitate agreements being negotiated between the Federal Government and any State Government in order to hand evaluation and approval of projects to the State Government.

But the EPBC Act also dictates that, whenever this mechanism is used in relation to approvals (as opposed to evaluation of impact assessment), both Houses of Parliament in Canberra are to be given the opportunity to vet the content of the inter-government agreement.

This means that the parties holding the balance of power in the current Senate can block any such agreements. The Greens and the Palmer United Party agreed in November 2014 to do so. It remains to be seen whether or not that remains the case, especially with subsequent PUP defections.

Beyond that, reforms in this area would have to be delivered through amendment to the EPBC Act (such as removing the requirement to have both Houses of Parliament vet inter-governmental deal or otherwise).

Any legislative reforms that the Federal Government could be persuaded to pursue on this could only be achieved with sufficient political support in the Senate.

3.3 The solution

Subject to the necessary political will, our desire is simply to have all approvals for major projects delivered through the OMP (acting on the advice of the EPA), even though it would be established as an agency of the Western Australian State Government.

3.4 The machinery which would deliver the desired outcome

We fully appreciate that our solution necessitates the involvement of both the Federal Government and the Western Australian State Government.

We also appreciate that there is already legislative machinery sitting inside the EPBC Act which could be activated to deliver the desired outcome.

For context, it is worthwhile reviewing these existing mechanisms.

a) Existing mechanisms designed to reduce federal and State duplication

Since its introduction in 2000, the EPBC Act has contained two processes directed to reducing the scope of the Federal Government's involvement in this arena.

Together they form the basis of the Abbott Government's current "One-Stop Shop" policy.

- One process is focused on regulatory *evaluation* of impacts.
    - For it to work, the Federal Government and the Western Australian Government must negotiate a 'bilateral *assessment* agreement' specifying which of the Western Australian Government's approval processes the Federal Government is prepared to rely on to say environmental impacts have been assessed sufficiently for the Federal Government's processes.
    - There is currently such an agreement in operation.
- The second process is focused on regulatory *approval* of projects.
    - For it to work, the Federal Government and the Western Australian Government must negotiate a 'bilateral *approvals* agreement' specifying which of the Western Australian Government's approval processes the Federal Government is prepared to rely on as satisfying the Federal Government's approvals processes.
    - There is currently a draft of this form of agreement but it has not been finalised and, even if it were, such agreements have to be vetted by both Houses of Federal Parliament and the political impasse in the Senate probably means that the agreement, even if finalised, would not successfully pass the Senate.

If this last mentioned political impasse is resolved there is the potential for major projects in Western Australia to be able to avoid the federal process altogether. (However, if the OMP-style modifications to the Western Australian system were introduced there would be a need to have that new system endorsed in fresh bilateral *assessment* and *approval* agreements between the Western Australian and Federal Governments.)

Unfortunately, we are of the view that the reality is that this impasse will not be resolved, at least not in the near future and, for that reason, suggest an alternative approach.

b) New mechanisms designed to reduce this duplication

Given the political impasse that has developed around the proposed bilateral *approvals* agreement machinery, we suggest there is nevertheless good scope to optimise the use of the bilateral *assessment* agreement machinery to significantly improve on the current limitations proponents of major projects face in the dual State and federal regimes.

- For example, if the Western Australian Government were to adopt the OMP-style modifications to the State system outlined above there could be arrangements put in place – in part through a fresh bilateral *assessment* agreement between the Western Australian and Federal Governments and in part through arrangements outside such an agreement – whereby:
- A proponent's impact assessment work and the OMP's evaluation of that assessment work would be fully credited by the Federal Government as meeting the latter's standards.
- In order to do that, the OMP would have to be appropriately empowered to evaluate impacts not only on matters of STATE environmental significance but also on matters of NATIONAL environmental significance (which is legally feasible as the devolution of that function from the federal to the State level is already done under the current bilateral *assessment* agreement that is in operation between the Western Australian and the Federal Governments).
- In practice, this is the way the system would work: a proponent of a major project in Western Australia would seek and obtain approval of its project from the OMP, undertaking environmental impact assessment as part of that process. The OMP's evaluation of that impact assessment would then be passed to the Federal Environment Department for approval and conditioning.
- That would be the only interface a Western Australian major project would need to have with the federal environmental system, apart from having to trigger the federal process by means of submitting an EPBC referral at the outset.
- As is already the case in many States and Territories, there is increasingly close collaboration between Federal and State regulators around coordination of the content of approval conditions. We support the work that is being done in this regard and would welcome it being formalised in the proposed replacement bilateral *assessment* bilateral.

4 ACCESS TO LAND AND STATE AGREEMENTS.

4.1 Requirements for land access and the current regime

Many major projects require access to land in addition to that which has been historically been the subject of mining tenements or other tenure held by the proponent. This is often the case for liner infrastructure like:

- railways;
- pipelines;
- roads;
- conveyors; and
- jetties and wharves.

There is no consistent or unified regime under Western Australian law for obtaining land access for linear infrastructure. Depending on the type of infrastructure and the nature of the project, access to land may be governed by and subject to approvals processes under any of:

- Land Administration Act
- Mining Act
- Petroleum Pipelines Act
- special Acts of Parliament relating to railways
- Port Authorities Act

Each Act has its own mechanisms for creating interests in or in relation to land, authorising land access and resolving disputes around land land access with third parties. Each regime has different time frames, processes, decision makers and creates different substantive and procedural rights, including rights of review. In some instances, the interaction between the various Acts and their administration is less than clear.

In some cases, the legislation includes means of assessing and paying compensation to affected third parties. Generally (but not always), the assessment and payment of compensation is expressed to operate independently of a decision to grant an interest in or access to land. In other cases, access cannot be obtained until compensation is agreed. In practice, the processes associated with obtaining land access are used as leverage to secure agreements to pay "compensation" much greater than the actual loss suffered.

Major projects commonly involve the use of multiple regimes to secure land access with the consequence that the process is unnecessarily complex, time consuming, expensive and uncertain. Approvals concerning land access are in many respects a microcosm of the issues discussed in section 2, but involve their own unique challenges because of the intersection with third party rights and interests.

4.2 The State Agreement overlay

Many major projects in Western Australia (particularly in the mining and mineral processing sectors) have been established under State Agreements.

State Agreements were originally invented (decades ago) as a means of attracting investment in Western Australia by:

a) providing State contractual and legislative support for a project in exchange for an investment commitment;

b) establishing essentially a single centralised approvals mechanism within a defined and expeditious time frame; and

c) modifying other laws to the extent necessary to give effect to the regime established by the State Agreement.

Over time, State Agreements have increasingly lost their function to provide a single and expeditious means of obtaining project approvals and become more instruments of additional regulation. This has meant in some respects the approvals regimes established by State Agreements are more onerous, time consuming and uncertain than those which operate under the general law.

However, State Agreements are sometimes still necessary and appropriate, especially where the general law does not provide a legislative means to undertake a project. Projects involving the establishment of rail and port infrastructure are a major example. The only means of establishing a private railway in Western Australia other than by using a State Agreement is with the authority of a special Act of Parliament.

Since the 2000s, State Agreements for port and rail have established a bespoke form of tenure (based on a miscellaneous licence under the Mining Act) granted in accordance with each State Agreement. These "special rail licences" are the product of a negotiated outcome between the State and each project proponent, and are based on a precedent established in the 2000s.

A feature of special rail licences is that they cannot be used unless the consent of each and every third party with an interest in land affected by the licence is first obtained. This stands in contrast to the ordinary Mining Act regime. A veto on development is effectively given to third parties and inevitably drives behaviours that result in additional delay, expense and uncertainty. The land access regime for railways under State Agreements is to be contrasted with that which applies to railways established under a special Act. In the latter case, the public works provisions of the Land Administration Act and Public Works Act are invoked to facilitate land access for the whole railway.

4.3 The solution

We submit that land access issues for infrastructure associated with major projects should, like the wider approvals processes described in this submission, be subject to a single streamlined approvals process delivered through a single decision maker (OMP), acting on the advice of specialist agencies.

The mechanism to achieve this outcome would be to apply the framework applicable to public works under the Land Administration Act and Public Works Act to major projects, subject to the oversight of OMP and within the framework of major project approvals described in section 2. This will address, in a consistent way:

a) early access to land for feasibility, investigation and works;

b) addressing and where appropriate acquiring third party interests; and

c) the assessment and awarding of reasonable compensation to affected third parties without interfering with the project approval process.

5 TAKING A NEW RISK-BASED APPROACH TO APPROVAL CONDITIONS

5.1 The problem

Too often we see regulatory agencies taking a blanket approach when setting a suite of conditions for project approvals. This blanket-style approach means all the potential environmental impacts a project may ever possibly have are assumed to each have an equal probability weighting.

Realistically of course, no two potential impacts will ever have exactly the same probability of occurring and this is starting to be recognised in some other Australian jurisdictions where regulators are taking *impact differentials* and *probability differentials* into account when designing suites of conditions. (See discussion below at section 5.4.)

What happens when a blanket approach is taken to condition-setting is that regulators will ignore impact differentials and probability differentials and treat all impacts as if they are of the same scale and degree and all have exactly the same probability of occurring.

5.2 The consequences:

- The regulatory decision making process is slowed down while a master set of conditions is developed, taking significant time and resources of the personnel in the regulatory agency (and often the project proponent, as and when they are engaged in that part of the process).
- Typically, the regulatory agency will have a template or precedent bank of conditions – either officially or simply the last set of conditions that was developed for a project of that type – and blindly carry them over from the last such project to the next such project.
- The outcome of that process sets up *compliance management* and *compliance risks* for both the regulatory agency and the project proponent. The regulatory agency has to resource functions tasked with the supervision of the project proponent's compliance (eg environmental audits) and faces administrative and political risk across the full (wide) suite of approval conditions. The proponent equally has to manage compliance and face compliance risk across that entire suite of conditions, while there may be no actual benefit achieved for the environment at all or, where there is environmental impact, it may arise because the attention of regulators and project proponents is spread too thinly across too broad a spectrum of triggers when a narrower spectrum would have produced a more manageable, sensible and less environmentally harmful outcome.

The inefficiencies with this approach are self-evident.

5.3 The solution

The following diagram illustrates how impacts can be segmented according to *the scale and degree of impact* (calibrated on the vertical axis) and the *probability of an impact* of that scale and degree occurring (calibrated on the horizontal axis):

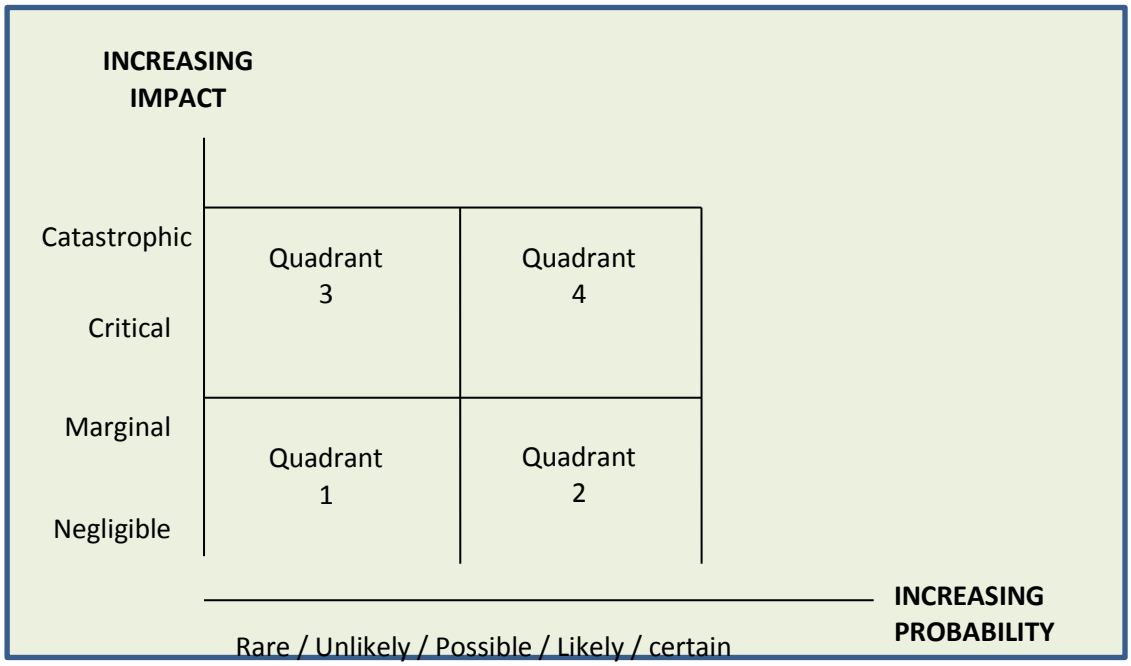

Figure 5-1 How different impacts have different probabilities of occurring

The above diagram does nothing more than deploy the same matrix that is commonly used in risk analysis.

In the setting of regulatory approvals and the design of their conditions, it sensibly takes the regulator's focus to the development of conditions around those impacts which are of such a scale and degree AND probability that dictates it is entirely appropriate to manage the probability of that impact occurring by designing an appropriate condition or set of conditions for it. This may be, for example, that set of impacts which appear in Quadrant 4 of Diagram 3.

That should be contrasted with how a regulator should sensibly approach those impacts in Quadrant 1 of Diagram 3 where it may be entirely justifiable not to worry about conditioning those impacts at all (or only conditioning them in a general way in the approval document).

In a sense this solution is an application of the general precautionary principle in that it reflects an approach where higher regulatory benchmarks are applied to those aspects of the development and operation of a project which have a greater chance of environmental impact.

5.4 The machinery which would deliver the desired solution

As with implementation of other aspects of our proposed reforms, the machinery which would best deliver a new risk-based approach to setting approval conditions would be a mix of legislative adjustment and administrative reform.

a) Legislative aspects

To put the legal position beyond doubt, it would be beneficial to have a requirement in legislation (at least for approval conditions to be set by the proposed OMP) that approval conditions only be set on a risk-based approach.

This would do two things: it would ensure that the OMP clearly had the power to use that approach while at the same time mandating that this is the only approach the OMP could use in setting approval conditions.

b) Administrative aspects

We see two administrative elements as paramount to ensuring the risk-based approach to approval condition-setting is properly and fully implemented – at least as far as the functions of the OMP are concerned:

- *policies and procedures* – appropriate policies and procedures would need to be developed and promulgated to make the risk-based approach clear at the officer level. All staff would need to be trained in how to carry out their evaluations transparently and in how to be able to demonstrate their rationale behind any proposed condition in terms of a) why the condition is necessary at all and b) why that condition is appropriately formulated in the way proposed
- *capability-building* – only the right kind of people at officer level would be able to implement these changes consistently and not pay lip service to such a fundamental shift in approach. This may entail revised selection criteria for staff, the provision of good training and equipping staff with the right sort of tools and support needed for the new approach. The shift may require people with a more sophisticated attitude, people who can take comparative comfort in dealing with ambiguities and people who can exercise sound judgement rather than simply defaulting to a risk-averse approach and to assuming all decisions are binary.

  The risk-based approach certainly fits very comfortably with our views of how the OMP might be staffed and might operate. It would be able to ensure a consistent application of the risk-based approach and would look at projects in a holistic way, evaluating a project's impacts simultaneously from an environmental, social and economic perspective.

5.5 A quick look at other jurisdictions

As you may be aware, there are already solid examples of this risk-based approach evolving in other jurisdictions.

a) The Federal Department of Environment (and New South Wales)

Earlier this year the Federal Department of the Environment issued a draft conditions policy under the EPBC Act expressly focusing on a risk-based approach to environmental regulation as part of the Federal Government's work on bilateral assessment agreements with each State and Territory.

For ease of reference, here is a link to the Federal Department of the Environment's webpage on this issue (which contains a link to its February 2015 draft conditions policy):

http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/condition-setting-assessment

We note in passing the fact that the Federal Government has stated it is taking this initiative in the context of bilateral assessment agreements in each State and Territory (commencing in New South Wales – see webpage link above for detail). This of course may well naturally lead to the risk-based approach to condition-setting rolling out across the country and becoming a new national norm in environmental regulation.

Submission on Regulatory Reform:

Turning from the 'why to the 'how'

b) Queensland

The new regulatory strategy which has been implemented by the Queensland Department of Environment and Heritage Protection also very much takes a risk-based approach to environmental regulation.

Again for ease of reference, here is a link to its May 2014 strategy document:

https://www.ehp.qld.gov.au/management/planning-guidelines/policies/regulatory-strategy.html

Submission on Regulatory Reform:

Turning from the 'why to the 'how'