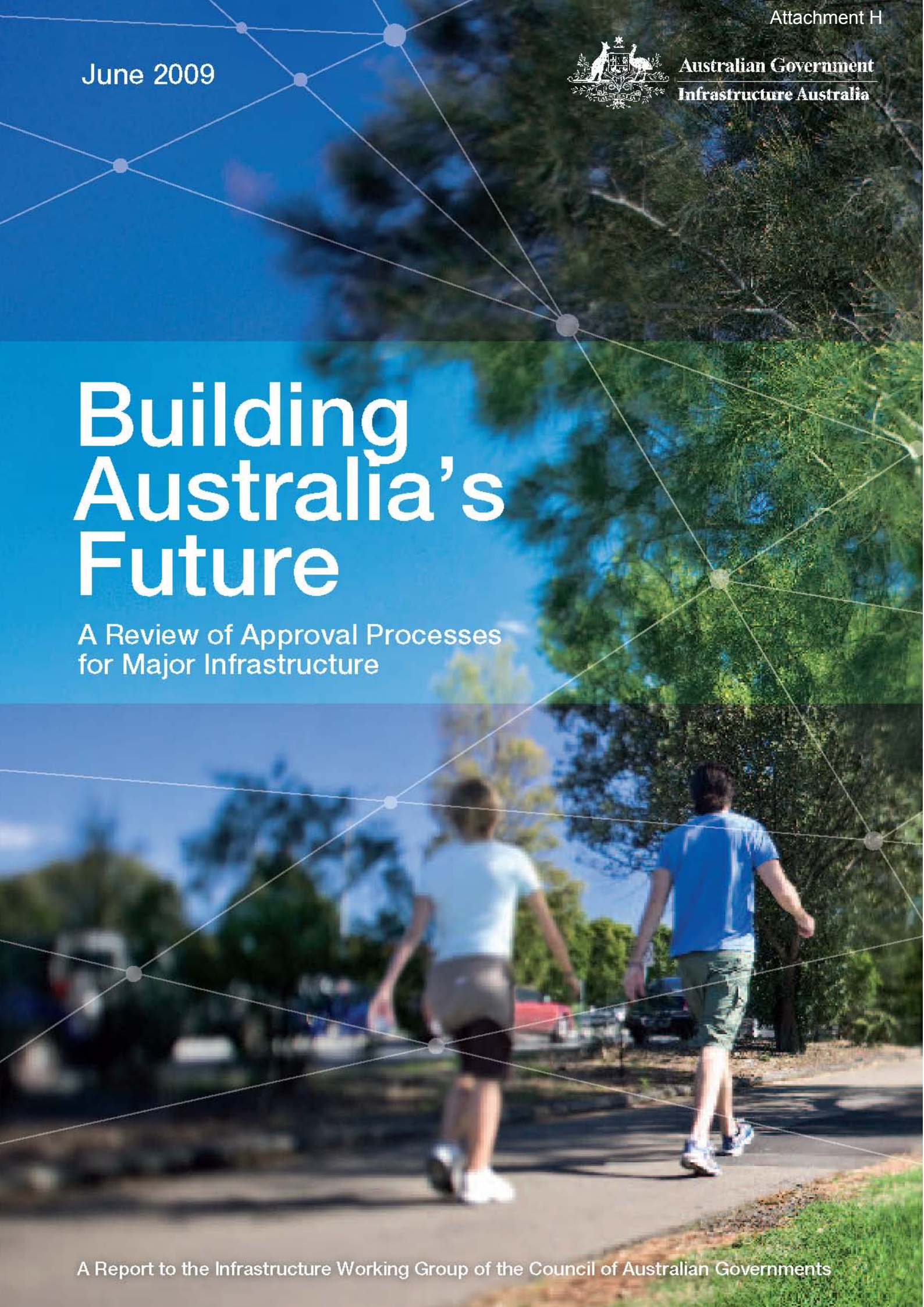
Attachment H

June 2009

Australian Government
Infrastructure Australia

Building Australia's Future

A Review of Approval Processes for Major Infrastructure



A Report to the Infrastructure Working Group of the Council of Australian Governments

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Executive Summary

The objective of this report is to provide recommendations for achieving greater uniformity and efficiency in planning, environmental and other approval processes for major national infrastructure by reviewing current planning and development approvals processes in all Australian jurisdictions. The review draws upon process maps, a literature survey (including previous reports and reviews), interviews with stakeholders, and case studies nominated by the States.

The principal finding is that current Australia-wide approval processes for major infrastructure projects are characterised by three key problems: (1) fragmented processes that contain disparate approvals with differing objectives at all levels of government; (2) multiple layers of approval and decision-making that operate both between and within levels of government; and (3) a lack of strategic planning. These features reduce timeliness and add to financial costs.
Major project approvals are generally found to take over two years (27 months) and, whilst not widely regarded as excessively protracted, it is nevertheless considered that there is scope for improvement.

Strategically, the proposed approach provides better management of processes within existing frameworks by integrating multiple layers of decision-making and disparate approvals into a consolidated process at the State/Territory level.

Consequently, the recommendations seek to:

- strengthen State/Territory processes by advocating a consolidated process and project approval framework; and
- reduce multiple layers of environmental and planning approvals by integrating agreed local government and Commonwealth assessment and approval functions (primarily Environment Protection and Biodiversity Conservation Act 1999 (Cth) approvals).

An associated difficulty with current arrangements is that much of the focus of existing processes is at the project level. Whilst some States and Territories have directed significant effort to regional and corridor planning, more attention is required to developing State and Territory wide and national strategic planning frameworks which should inform and provide context to the development and assessment of nationally significant infrastructure projects. Consequently, in the absence of these frameworks, individual project assessments may endure delays and complications if they become the subject of strategic policy debates which should occur elsewhere.

As a first step in improving these arrangements, COAG has established a Taskforce to examine existing strategic planning frameworks within jurisdictions to ensure they support the ongoing integration of State/Territory and national infrastructure in major metropolitan cities with land use planning and urban development.

Strategic framework

Introduction

1 Introduction

In late 2008, the Infrastructure Working Group (IWG) of the Council of Australian Governments identified

"... a need to review the efficiency and efficacy of current processes for the environmental assessment and approval of major infrastructure projects."

In initiating the review, the IWG was mindful of the efforts of Australian Governments to expand their infrastructure programs, both to meet long term national needs, and to provide a stimulus in the difficult economic environment currently facing the nation. Specifically, the IWG identified the objective of this review as:

"... to prepare a paper for the IWG setting out options for achieving greater uniformity and efficiency in planning, environmental and other approval processes for major national infrastructure, consistent with the IWG's objectives of identifying blockages to productive investment...Options will be aimed at reducing time, cost and complexity in approvals processes, providing greater transparency and certainty for major infrastructure providers and achieving efficiencies in government processes."

The review will assess impediments to investment arising from approvals processes and identify opportunities to:

- Reduce duplication, complexity and timeframes for approvals arising where more than one jurisdiction is involved in approvals for a project;
- Achieve greater consistency between jurisdictions in approvals processes; and
- Simplify, streamline or otherwise improve processes within and between jurisdictions.

The IWG endorsed terms of reference for the review in December 2008. The terms of reference are set out in full at Appendix A.

Consistent with the terms of reference, four main types of infrastructure are considered in this report:

- **Transport** – for example, intra- and interstate highways, key urban and regional road corridors, passenger and rail freight networks, key bulk and container ports;
- **Energy** – for example, electricity generation facilities, electricity and gas transmission and distribution networks, gas production, treatment and storage facilities;
- **Water** – for example, water capture, storage and treatment facilities, water distribution networks, wastewater treatment facilities; and
- **Communications** – for example, fixed line telephone and broadband, mobile and wireless networks.

This report, consistent with its term of reference, is only concerned with infrastructure that is – due its scale or strategic importance or implications – considered to be of national significance.

1.1 Conduct of the Review

The review has been overseen by the Major Infrastructure Approvals Process (MIAP) Sub-Group of the IWG (the Sub-Group). Membership of the Sub-Group is listed in Appendix B. The MIAP Subgroup was responsible for overseeing the direction of the review and the content of this Report. Responsibility for operational conduct of the review and drafting of this Report rested with Infrastructure Australia.

1.2 Structure of this Report

Following this introduction, Chapter 2 identifies a set of principles that has been utilised to guide infrastructure approval processes. Whilst there is particular interest in the timeliness and efficiency of these processes, the principles explored in this project include a range of other considerations, such as the transparency and effectiveness of approval processes, which are important to various stakeholders in the assessment of major projects.

Chapter 3 provides a high level outline and comparison of current approval processes used around Australia. The chapter is supported by a supplementary report which provide more detail about those processes. The focus of Chapter 3 is not to comment on the virtues or otherwise of individual jurisdictions' processes but simply to highlight areas of commonality and difference.

Chapter 4 examines the data informing analysis of existing approval processes. The evidence base consists primarily of: (1) case studies, (2) a survey of the literature (including previous reports and reviews) and (3) interviews with key stakeholders. Eight case studies nominated by State Governments were selected with a view to:

- achieving geographic representation, thus illustrating the practical operation of jurisdictions' different approval processes; and
- reflecting a diverse range of sectors; namely, roads, water, freight rail, ports, and electricity.

Chapter 5 examines recent international experiences with reform of project approval processes, primarily in the United Kingdom, New Zealand and Canada. Chapter 5 also discusses current and emerging Commonwealth and State and Territory reforms, and various models for further reform. It draws together a range of options for reform.

Chapter 6 brings the report to a conclusion with a set of findings and recommendations to the IWG of the Council of Australian Governments.

1.3 Relationships to Other Reviews

Broader environmental planning and development assessment processes are presently the subject of other reviews and initiatives by Australian governments. Those reviews focus primarily on processes for the assessment of private development proposals, such as housing, factories and commercial/retail development. This review is focussed on assessment processes for public infrastructure, although that infrastructure may be developed by private parties, for example through Public-Private Partnerships (PPP).

Clearly, there are relationships between the assessment process for private development and public infrastructure. Typically, generic legislation applies to both forms of development. In assessing current major infrastructure approval processes and in developing options for reform, the Sub-Group has endeavoured to ensure that its findings and recommendations are compatible with those arising from the other reviews.

The review has sought to build on and complement (rather than duplicate) related work in progress by various jurisdictions, including that of the COAG Business Regulation and Competition Working Group (BRCWG), the Local Government and Planning Ministers' Council (LGPMC), and, in particular, the review of the EPBC Act being conducted by Dr Allan Hawke.

The Sub-Group has met with Dr Hawke and, in addition, an intergovernmental committee of Australian Commonwealth Government agencies was established to facilitate whole-of-government input to the review. It will be a matter for IWG and COAG to determine how best to pursue the EPBC-related recommendations from this review, either by way of initial administrative changes and/or advice to Dr Hawke in the context of his review.

Output 2 of the National Partnership Agreement to Deliver a Seamless National Economy Implementation Plan requires COAG's BRCWG to oversee finalisation of assessment bilateral agreements between the Commonwealth Government and Victoria and the Australian Capital Territory respectively. In addition, the BRCWG is due to report to COAG by mid-2009 on implementation plans on opportunities for approvals bilateral agreements and strategic assessments.[1]

1.4 Terminology

The term "approval processes" has been used in this report as a short hand reference to the various processes for the environmental, planning, land use and heritage assessment of projects. Clearly, there is no guarantee that a project approval will necessarily be the result of those processes. It is, after all, open to a relevant decision-maker to refuse approval or consent for a project, or to attach significant conditions to any approval. Use of the term 'approval processes' in this report should not be interpreted as a presumption that the processes will automatically lead to a project being approved.

Methodology for Assessing Current and Prospective Processes

2 Methodology for Assessing Current and Prospective Processes

2.1 Methodology

In recent years, various reports and reviews have commented on the appropriateness of environmental and planning approval processes. These reviews have mainly focused on overarching processes, rather than any specific issues relating to major infrastructure.

Concerns about the timeliness of approval processes continue to be raised with governments. Some of the public submissions to Infrastructure Australia in 2008 also raised similar concerns. However, the information underpinning past reviews – and underpinning public submissions and statements – has often been limited. There has been little specific data cited to substantiate contentions that the current processes are slow, costly, or otherwise problematic. Accordingly, a feature of this review has been to identify specific data to substantiate observations about existing approval processes.

An initial priority of the review involved an attempt to clearly document the existing environmental and other approval processes followed by various government jurisdictions around Australia.

The following information sources were used to obtain data on existing systems and comparative information about approval systems in other jurisdictions:

1 Eight case studies nominated by State governments were analysed and were the subject of both literature surveys and interviews with stakeholders involved in those case studies;

2 A literature survey of both local and international reports, journal articles and submissions;

3 A series of one-on-one, confidential interviews with various stakeholders involved in major infrastructure approval processes was conducted to obtain information that participants felt could not otherwise be provided;

4 A workshop organised with Infrastructure Partnerships Australia, where specialists who have worked on major infrastructure projects – lawyers, planners, consultants and bankers – had an opportunity to share experiences and suggest areas for reform; and

5 Information on a range of major projects that have been assessed under current processes.

This chapter describes the principles used to guide consideration of current approval processes and potential reforms to those processes. There is widespread interest in ensuring that approval processes are efficient and deliver timely decisions, particularly in the current economic climate. Infrastructure investment has the ability to stimulate economic activity, and a range of parties are therefore keen to ensure that approval processes do not delay that investment.

Equally, though, there is a public interest in ensuring that a project's impacts are properly understood before any decision is taken to proceed, and that the impacts are appropriately addressed. In addition, over the past 20-30 years, expectations have grown in relation to processes for public and stakeholder involvement in planning and approval processes. It is now widely accepted that members of the public should have an opportunity to comment on applications to develop major infrastructure projects.

Given these competing demands, it was necessary to adopt a range of generally accepted principles through which those processes could be considered.

2.2 The Principles

Principles such as equity, efficiency, transparency and effectiveness have been used in other areas of regulatory or policy reform. The same broad principles were used in this review. In other words:

- Are the processes seen to be fair and equitable, both in terms of allowing different parties to participate in the process, and the capacity of the processes to produce outcomes that appropriately balance different public policy interests?
- Are the processes efficient in terms of financial costs and the time of those involved? Do the approval processes deliver outputs (decisions) expeditiously, bearing in mind the need to address other expectations?
- Do the processes operate in a transparent and open manner, that is, are the processes themselves clear? Are decisions made following a balanced consideration of information that is of a quality, breadth and depth that is relevant to the project in question?
- Are the processes effective? Do they deliver what they are intended to deliver, i.e. ensuring that policy objectives are upheld whilst delivering balanced approvals for soundly conceived projects? Do they result in 'good' projects? Are the processes 'fit for purpose', and do they enjoy broad, on-going support?

Arguably, for an approvals system to be enduring, it must be able to satisfy all four of these broad principles. Processes that do not meet these principles are liable to be criticised and subject to change. Consequently, the principles utilised by this review reflect these best practice principles, adopted by contemporary environmental assessment literature[2] as well as by current State and Territory reviews of respective environmental assessment and approvals systems[3]. The Development Assessment Forum (DAF), which advises the COAG Local Government and Planning Ministers' Council, has proposed 'ten leading practices' to guide the reform of development assessment systems across Australia.[4]

DAF Ten Leading Practices

1 **Effective policy development** – elected representatives should be responsible for the development of planning policies.

2 **Objective rules and tests** – development assessment requirements and criteria should be written as objective rules and tests that are clearly linked to stated policy intentions.

3 **Built-in improvement mechanisms** – each jurisdiction should systematically and actively review its policies and objective rules and tests to ensure that they remain relevant, effective, efficiently administered, and consistent across the jurisdiction.

4 **Track-based assessment** – Development applications should be streamed into an assessment 'track' that corresponds with the level of assessment required to make an appropriately informed decision. The criteria and content for each track is standard.

5 **A single point of assessment** – Only one body, which may include other relevant government agencies and entities, should assess an application, using consistent policy and objective rules and tests. Referrals should be limited only to those agencies with a statutory role relevant to the application. Referral should be for advice only. A referral authority should only be able to give directions where this avoids the need for a separate approval process. Referral agencies should specify their requirements in advance and comply with clear response times.

6 **Notification** – Where assessment involves evaluating a proposal against competing policy objectives, opportunities for third-party involvement may be provided.

7 **Private sector involvement** – private sector should have a role in development assessment.

8 **Professional determination for most applications** – most development applications should be assessed and determined by professional staff or private sector experts...Ministers may have call-in powers for applications of state or territory significance provided criteria are documented and known in advance.

9 **Applicant appeals** – An applicant should be able to seek a review of discretionary decisions. A review of a decision should only be against the same policies and objective rules and tests as the first assessment.

10 **Third party appeals** – Opportunities for third party appeals should not be provided where applications are wholly assessed against objective rules and tests. Opportunities for third party appeals may be provided in limited other cases. Where provided a review of a decision should only be against the same policies and objectives rules and tests as the first assessment.

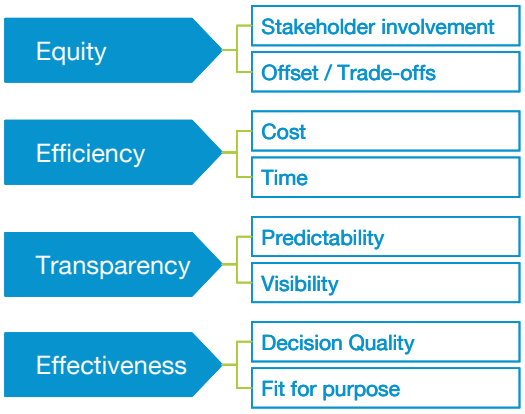
Figure 2.1 below shows the four principles adopted for the purposes of this review. The following text sets out in more detail the range of considerations and issues associated with each of the principles.

2.2.1 Equity Principle

Stakeholder Involvement – whether the process provides reasonable opportunities for public involvement, both during the feasibility stage and during statutory approval processes.

Offsets/Trade-offs – whether the process provides a reasonable opportunity for the differential impacts of particular projects to be impartially assessed and appropriate trade-offs to be reached.

Figure 2.1: Approval Process Principles Used in the Review



2.2.2 Efficiency Principle

Cost – the cost to proponents and other stakeholders in participating in the process: Are the processes focusing resources on the most critical issues?

Time – the time taken to reach decisions: in particular, are significant decisions or trade-offs made in an expeditious manner? Are multiple approval processes dealt with simultaneously or in sequence? Are multiple parties considering the same issues, that is, is there overlap between processes?

2.2.3 Transparency Principle

Predictability – whether the process itself is clearly understood by a range of stakeholders/participants and not just a few 'expert insiders'. Does the process deliver decisions in a known timeframe, rather than an open-ended process?

Visibility – whether decisions, especially major decisions about the scope, impact and mitigation measures associated with a project, are based on credible/verifiable information. Whether the process enables project proponents and stakeholders to understand clearly where the project is in that process, i.e. it enables proponents and others to track projects through the process. Is the process visible, objective, robust and independent?

2.2.4 Effectiveness Principle

Decision Quality – does the process support innovation and whole-of-government environmental, social and economic policy objectives?

Fitness for Purpose – Is the process capable of being tailored to fit the circumstances of particular projects, i.e. it recognises that some projects may require detailed (possibly lengthy) processes, while others will not? If so, is there evidence that this flexibility is being utilised appropriately? Is there adequate technical and resource capability within relevant agencies to undertake these processes?

2.3 Application of the Principles

To varying degrees, all of the principles are qualitative in nature and involve some level of judgement. Consequently, the principles should be understood as a 'lens' through which to consider various sources of information on major infrastructure approval processes. The principles have been used in considering information and insights drawn from the eight case studies; the literature on approval processes; international experiences; and the interviews with stakeholders.

Current Approval Processes

3 Current Approval Processes

Chapter 3 provides a high level outline and comparison of current approval processes used around Australia. The chapter is supported by appendices which provide more detail and a supplementary report which provides even more detail about those processes. As noted, the purpose of Chapter 3 is not to comment on the virtues or otherwise of the existing processes but simply to highlight areas of commonality and difference.

The statutory elements of the approvals processes are described first. Non-statutory, facilitative elements of those projects are then discussed. Overall observations are provided at the end of the chapter.

3.1 Process Mapping

In broad terms, all major infrastructure projects pass through a common approval process, regardless of jurisdiction. In general, the process (for government-sponsored infrastructure) is as follows:

1 projects are meant to have their genesis in some form of strategic plan or policy statement (although this step may not be followed);

2 project concepts or ideas emerging from those plans and statements are then taken through a period of project development, where the scope of the project, its benefits, costs and impacts are progressively refined to the point where decisions are taken to
(1) include the project in government budgets and forward estimates, and
(2) commence environmental approval and other processes;

3 a preferred concept (or concepts) for the project is subjected to an environmental assessment (which may include other statutory 'land use planning' processes such as zoning and development assessment);

4 the project is approved by a relevant party, usually subject to conditions; and

5 other consequential approvals (or approvals under other legislation) are then obtained.

Again, broadly speaking, similar processes are followed for privately-sponsored infrastructure. The key differences lie in the initial phases, where commercial imperatives and decisions (rather than government policy and budgets) drive the process. Even so, private proponents will also respond, at least in some measure, to statements of government policy, and may seek various forms of support from government (for example, complementary infrastructure or financial assistance).

While there are areas of commonality, each State and Territory in Australia presents a different planning assessment and determination system. This reflects the reality that each State/Territory (and the Australian Commonwealth Government) has introduced its own legislation dealing with planning, environmental assessment and development control.

To understand these processes and their commonalities and differences, the major infrastructure approval processes of each State and Territory have been 'mapped'. More detailed reports on the results of this process mapping are included in the supplementary report.

The number, range and depth of current approval processes is extensive so it has been necessary to produce summaries of these processes. These are provided in Appendix B. The summaries focus on the assessment and determination processes which are most commonly employed to assess major projects.

The process maps set out the current, legislated or prescribed assessment regimes (including environmental assessment processes) across each of the eight jurisdictions. In addition, the maps describe process interactions between the following process elements within each jurisdiction:

1 Requirements for environmental approvals (e.g. licenses, works approvals and permits) that are requirements of particular legislation or environmental protection agencies);

2 Acquisition of, and access to, land during the pre-feasibility and assessment stages of the infrastructure development process;

3 Native title; and

4 Heritage legislation interactions (Indigenous and Non-Indigenous Heritage).

The process maps are based on information from State and Territory planning departments across each State or Territory. The focus of this effort was to capture the processes used for major infrastructure development approvals. Each of these process maps has been reviewed and endorsed by the State or Territory planning agencies[5].

The processes described in this chapter, as well as in the summaries contained in Appendix B and the full process map reports contained in the Supplementary Report, reflect the systems in place as at February 2009 for the Northern Territory, South Australia, Tasmania, Victoria and Western Australia and March 2009 for the Australian Capital Territory and Queensland. Several governments (Northern Territory, Tasmania, Victoria, New South Wales and Western Australia) are currently undertaking (or have recently completed) their own partial or full reviews of environmental and planning assessment and determination processes (in part or of the full process). These reviews may subsequently result in changes to the documented processes.

3.2 Strategic Planning Processes

In order to address the importance of developing strategic planning, at its meeting of 30 April 2009, COAG agreed to establish a Taskforce to examine existing strategic planning frameworks within jurisdictions to ensure they support the ongoing integration of state and national infrastructure in major metropolitan cities with land use planning and urban development. This work programme will recognise that the States have clear responsibility for land use planning within their jurisdictions; that the Commonwealth has an interest in the efficient operation of national infrastructure; and that efficient infrastructure and improvements to our cities require the better integration of major city land use planning with state and national transport, energy, water and social infrastructure investment plans. The Taskforce will report to COAG by the end of 2009 on the outcomes of this work programme.

In order to underscore the importance which the Australian Commonwealth Government attaches to the need to enhance strategic, nationally coordinated frameworks in infrastructure planning, the Government noted, in its budget document *Nation Building for the Future (2009)*, that:

The Government will leverage its direct investment in Australia's economic infrastructure by continuing to implement a strategic, nationally coordinated approach to the future development, integration and planning of Australia's critical infrastructure in consultation with the Council of Australian Governments and Infrastructure Australia[6].

3.2.1 The Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Under the EPBC Act, jurisdictions can engage the strategic assessment provisions of the Act to assess strategic planning instruments they have, or will be developing, and these are usually regional in character. A strategic assessment can occur early in the planning process and looks at the potential impact of actions stemming from one (or more) policy, plan or programme. These may include, but are not limited to strategic land use plans, regional plans and policies, and infrastructure plans and policies.

A recent example, relating to urban development and related infrastructure, would include the Melbourne Urban Growth Boundary strategic assessment which is looking at potential impacts of actions stemming from revising the Urban Growth Boundary as described in *Melbourne @ 5 Million*, which details Melbourne's latest planning update, and related projects identified in the Victorian Transport Plan. The Victorian *Environment Effects Act 1978* looks at matters of state/regional significance only. As there are potential impacts from the program on matters protected by the EPBC Act, a strategic assessment under the Act was selected as the most appropriate assessment approach.

It is also noted that the COAG BRCWG has recommended greater use of the strategic assessment provisions of the EPBC Act as a means of harmonising the Commonwealth and State/Territory environmental assessment and approval processes.

3.2.2 South Australia

South Australia's Strategic Plan (SASP) is the state's primary directional document. SASP has 98 specific targets under six broad objectives: Growing Prosperity, Improving Wellbeing, Attaining Sustainability, Fostering Creativity and Innovation, Building Communities and Expanding Opportunity. Progress against SASP targets is reported every two years and the plan is updated every four years.

'Beneath' SASP sit specific 'action' plans which facilitate achieving the SASP targets. These include the Strategic Infrastructure Plan for South Australia, the State Natural Resource Management Plan and the Housing Plan for South Australia.

The Planning Strategy for South Australia is the specific document providing direction on land use and development in the state over the medium to long term (10-30 years) to achieve SASP targets. The Planning Strategy also reflects infrastructure priorities set out in the Strategic Infrastructure Plan for South Australia.

3.2.3 Queensland

The Queensland Government is building a better future for the south-east region through the SEQ Regional Plan (SEQRP) and the supporting SEQ Infrastructure Plan and Program (SEQIPP). SEQIPP outlines infrastructure priorities for SEQ to 2026 and is updated annually.

SEQIPP 2008 includes an investment of around $107 billion (inclusive of federal government contributions and other revenue sources). This investment includes more than $83.5 billion in road, rail and public transport projects (including investigations), nearly $8 billion in water infrastructure, $3.5 billion spending on energy, $5.2 billion in health infrastructure, $3.5 billion on education and training, $3.3 billion in justice and corrective services, $176 million in industry development and over $100 million in sport and recreation. It is the most significant and ambitious capital program in Queensland history with 32 projects worth over $1 billion each.

SEQIPP utilises a long established capital monitoring process through Queensland Treasury to coordinate budget prioritisation and the Forward Estimates. SEQRP and SEQIPP allows decision makers to take advantage of opportunities across the program – including sequencing and packaging of infrastructure investment within the context of regional strategic goals and objectives.

The success of strategic planning in SEQ is being extended to other regional areas of Queensland.

3.2.4 New South Wales

Major infrastructure projects usually, but not always, arise out of strategic regional planning where broad land use planning urban settlement strategy is formed. This process can occur over years and involve extensive public discussion and debate. Agencies with responsibility for delivery of the major infrastructure to support government policy develop forward programs and priorities for consideration of Cabinet. An individual project is further defined through budget processes and government commitments to delivery of the project is confirmed when the project is listed on the NSW State Infrastructure Strategy.

3.3 Key Elements of Project Approval Processes in each of the Jurisdictions

The process maps confirm some variability across jurisdictions' assessment and approval processes for major infrastructure projects. Appendix C provides an overview of these jurisdictional systems, highlighting key similarities and differences across certain process elements. The main elements provided in the Appendix are:

- whether the system has a specific assessment and approval process for 'major projects';
- whether such specified approval process(es) are in fact utilised to assess 'major projects';
- which are the most commonly employed processes to assess 'major infrastructure projects';
- whether the most commonly employed process is an integrated process or staged process with separate environmental and planning assessment components;
- who constitutes the consent authority;
- whether the process specifically removes the requirements to obtain other approvals, permits and licences;
- whether, in relation to the EPBC Act 1999, there are bilateral agreements[7] or approval bilaterals[8] in place;
- whether the most commonly employed process applies equally for private and State agency proponents;
- the categories of projects which are able to be assessed under the process, i.e. is there a specific, legislated definition of relevant projects, or is the classification based on broad discretionary powers; and
- whether appeal rights exist within the process.

3.3.1 Process Elements of the State/Territory Systems

The jurisdictions' statutory approval systems incorporate up to four basic process 'elements' which need to be followed for a major infrastructure project to proceed. The basic processes are:

- a zoning amendment process, (if the project is not permissible under the existing land use zoning)[9];
- general development planning assessment process;
- an Environmental Impact Assessment (EIA) process;
- other approvals required under other legislation, e.g. noise permits; and
- land acquisition processes.

As shown in Appendix B and the process maps in the supplementary report, each of the State or Territory systems integrates and consolidates these processes to varying degrees. Integration and consolidation typically involves the processes (or some of the processes) being combined into one process pathway with one authority providing process management as well as approval or refusal.

Figure 3.1 aims to identify how many of the jurisdictional level processes have been integrated into one process by showing the 'integrated processes' in an overall process representational blue box. It does not seek to present a temporal illustration of the process, that is, the sequence in which the processes unfold. Rather, the figure aims to identify the degree of integration or fragmentation of the 'high level' processes, that is, whether particular elements in the larger process are consolidated into a single approval.

3.3.2 Australian Commonwealth Government Processes

In addition to the State and Territory processes, a major infrastructure project may be subjected to various Australian Commonwealth Government requirements. These provisions include:

- EPBC Act 1999;
- Native Title Act 1993 – relating primarily to land acquisition negotiations;
- Aboriginal and Torres Strait Islander Heritage Protection Act 1984; and
- Major Project Facilitation.

Further information on when and how these Commonwealth level native title, heritage and EPBC Act processes can interact with the State or Territory level assessment and approval process for the major infrastructure projects is provided in Appendix E.

The EPBC Act

The EPBC Act is primarily concerned with the protection of matters of national environmental significance. A key objective of the EPBC Act is to promote a cooperative approach towards the protection and management of the environment that involves government, the community landholders and indigenous people. To assist in achieving that aim, and to reduce duplication and overlap in the assessment processes of other jurisdictions, the EPBC Act has the following mechanisms in place.

Significance threshold

- Commonwealth approvals under Part 9 of the EPBC Act are only required in relation to actions that cross a significance threshold test and which relate to matters of national environmental significance.

Requirements to consider State/Territory conditions

- Under s.134(4) of the EPBC Act, in deciding whether to attach conditions to an approval, the Commonwealth Minister must consider relevant conditions which have or are likely to be imposed by a State or Territory.
- Each bilateral agreement also requires the Commonwealth and the relevant State or Territory to cooperate in setting conditions attached to approvals.

Requirements to consult with State/Territory Ministers

- The EPBC Act builds in compulsory requirements for the Commonwealth Environment Minister to consult with State/Territory counterparts in exercising powers under Chapter 4 (environmental assessments and approvals). For example, as soon as practicable after receiving a referral, the Commonwealth Minister must inform and invite comments from the relevant State or Territory Minister (s.74(2)). A similar requirement exists for a final approval decision (s.131).

Strategic Assessments and Approvals

- Under section 146 of the EPBC Act, the Commonwealth Environment Minister can agree with a person responsible for a policy, plan or programme, that an assessment be made of the impacts of actions under that policy, plan or programme for the purposes of the EPBC Act.
- It is a collaborative assessment process undertaken by the Australian Commonwealth Government in conjunction with the person responsible for the adoption or implementation of the policy, plan or programme, for example, a state or local government.
- The Commonwealth Environment Minister, if satisfied that the policy, plan or programme will avoid or mitigate significant impacts on matters of national environmental significance, may issue a declaration that endorses the policy, plan or programme. One the plan is endorsed, the Commonwealth Minister can approve actions or classes of actions and, if those actions are taken in accordance with the policy, plan or programme, they do not require a separate referral.
- In June 2008, the Commonwealth Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett AM MP wrote to each of the State and Territory Ministers with responsibility for planning and the environment in order to seek proposals for the implementation of the Business Regulation and Competition Working Group working plan including in relation to exploring practical opportunities for advancing strategic assessments.

Bilateral Agreements

- The Commonwealth now has assessment bilateral agreements in place with all States and Territories.
- Part 5 of the EPBC Act provides for the Commonwealth Environment Minister, on behalf of the Commonwealth, to enter into bilateral agreements with the States and Territories.
- Bilateral agreements may cover a range of issues, including agreement in relation to the assessment of environmental impacts of proposed actions according to an assessment process under State or Territory legislation.
- Bilateral agreements reduce duplication of environmental impact assessment processes by effectively allowing proposals to be assessed only once in relation to both matters of Commonwealth and State or Territory environmental significance.

Native Title Act 1993 (Cth)

Native title rights are pre-existing (pre-colonial) rights in land and waters held by indigenous peoples and groups as derived from their laws and customs. The native title of a particular group will depend on the traditional laws and customs of those people and may include the right to be consulted about decisions or activities that could affect the enjoyment of native title rights and interests[10]. Native title can have significant impact on a project proposal and more commonly affects proposals in Western Australia, the Northern Territory, Queensland and South Australia.

The Commonwealth Native Title Act 1993 allows for recognition of native title through a claims and mediation process. Native title will only exist in relation to a particular area of land if the indigenous people in question have maintained a continuing connection to their traditional land or waters and their native title rights and interests have not been extinguished (removed) by a grant of tenure or use of land by the Crown or a third party[11].

Proponents and project consent authorities for major infrastructure projects, particularly in rural, regional and remote areas and in some coastal areas, need to consider the impact of project approvals on native title. When considering development assessment applications on land or waters where native title exists or may exist, there are processes that proponents and project consent authorities will need to follow for the project to be valid, or for it to be immune from injunctive action. If these processes are not followed, an activity may be invalid and consent authorities may at some time in the future be exposed to an injunction and/or claims for damages and compensation.

Under the Native Title Act 1993 processes exist which allow for parties to settle native title claims through agreement. The processes include: native title determinations; indigenous land use agreements; and future act agreements. The Act also prescribes that when an agreement cannot be reached between parties that the matter can be settled through litigation in the Federal Court[12].

Aboriginal and Torres Strait Islander Heritage Protection Act (Cth)

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act) creates a power for the Commonwealth Minister (currently the Minister for the Environment, Heritage and the Arts) to respond to requests from indigenous Australians to protect traditional areas and objects from threats. The Minister cannot use the ATSIHP Act to protect an area or object except in response to an application. Any indigenous Australian can make an application. The processes for resolving applications can delay the commencement of projects.

The ATSIHP Act was introduced to encourage the States and Territories to use their laws in the interests of indigenous Australians and to improve their laws if necessary. It can be used to appeal to the Commonwealth when State and Territory planning approval decisions may threaten indigenous heritage. The ATSIHP Act is meant to be used as a last resort, when relevant State and Territory laws are absent or not effective.

Major Project Facilitation Program

The Major Project Facilitation Program is administered by the Department of Infrastructure, Transport, Regional Development and Local Government. Under the programme, the Department provides proponents of eligible major projects with a facilitation service seeking to ensure efficient and timely approvals from the Australian Commonwealth Government.
The service ensures that:

- information on government approval processes is provided;
- all relevant government processes are coordinated so that, as far as possible, they occur simultaneously and without duplication;
- the Government responds to issues raised by the project; and
- assistance in identifying and accessing existing Government programs is provided.

MPF status does not imply any Government guarantee for the commercial success or otherwise of the project, nor does it absolve the project from meeting less than the full statutory and other requisite criteria of relevant approval processes.

Proponents may apply to the Minister for MPF status if their proposed project meets the following three criteria:

1 The project is of strategic significance to Australia:

   a The project will significantly boost Australian industry innovation.

      i Increasing research and development (R&D) and commercialisation capability; and/or

      ii A new application of skills and knowledge; and/or

      iii Technology transfer; and/or

      iv Cluster development.

      v Or, the project will have significant net economic benefit for regional Australia, taking account of a region's investment needs.

OR

2 The project's estimated investment exceeds A$50 million and makes a significant contribution to economic growth, employment and/or infrastructure.

OR

3 The project requires Australian Commonwealth Government approval(s) in order to proceed and/or significant Australian Commonwealth Government involvement through, for example, other Federal programs.

4 The project has sufficient financial resources to complete the Australian Commonwealth Government approval(s) process and can demonstrate the reasonable commercial viability of the project.

3.3.3 Common Elements of the EIA Process

The environmental impact assessment (EIA) process is arguably the most critical of the 'high level' processes described above. By their nature, environmental impact assessment processes tend to require the most exhaustive information, and take the longest time to complete.

Particular aspects of the EIA systems are common across all (or the majority) of the jurisdictions. The components of the EIA process are showed in schematic form in Figure 3.2 and include:

1 a form of notification of the proposed project is lodged with the assessment or consent authority;

2 specification of the requirements for project's Environmental Impact Assessment (EIA). This is commonly undertaken in consultation with agency stakeholders and sometimes in consultation with the public;

3 preparation of the EIA by the proponent;

4 public exhibition of the EIA – both agency stakeholders and the general public can submit – comments on the EIA;

5 preparation of the proponent's response to the comments for submission;

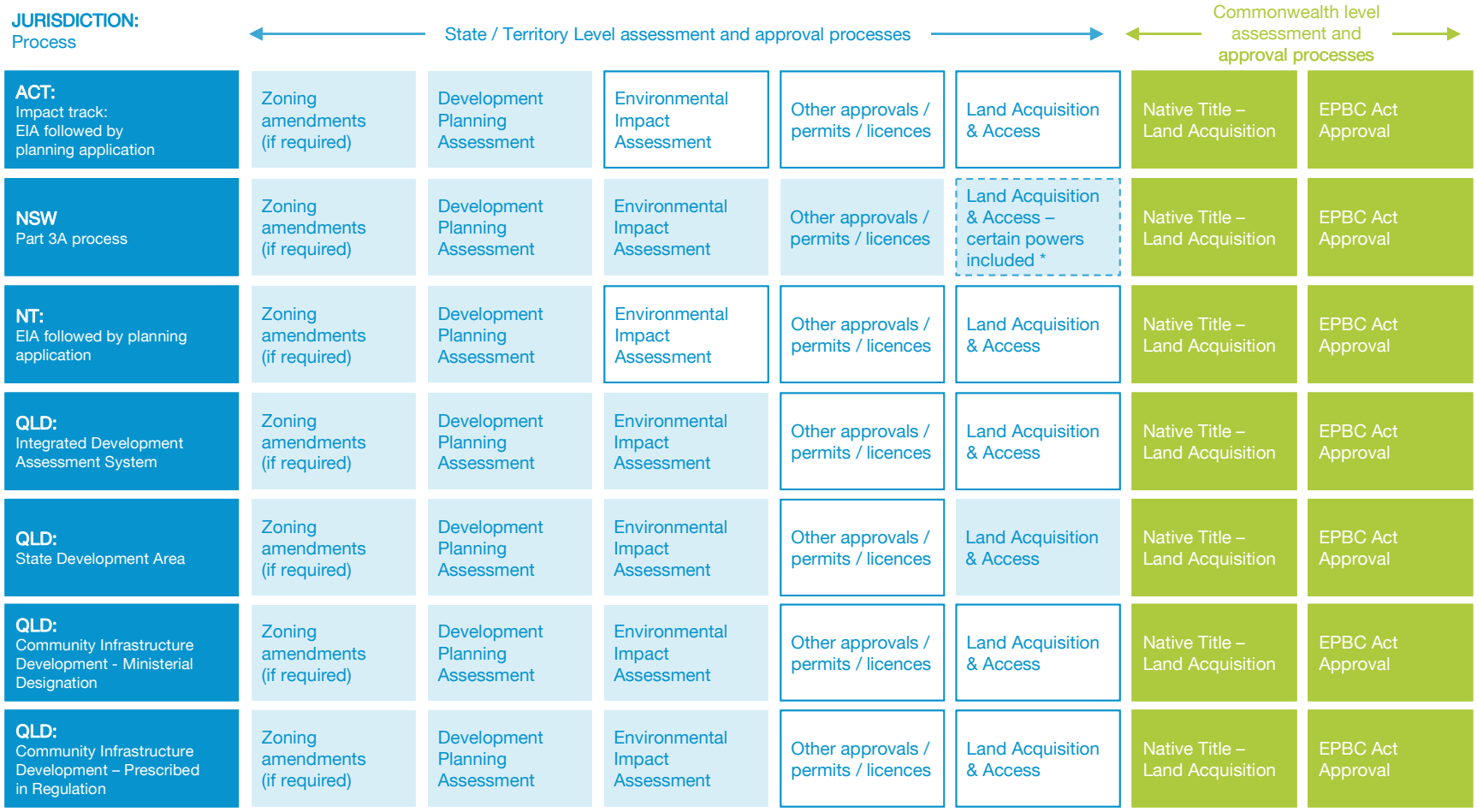
6 assessment of the project application;

7 determination of the project (that is, approved or refused) by the relevant authority or Minister (sometimes following an inquiry process); and

8 for some jurisdictions, an opportunity to revisit the determination either through appeals or inquiries then exists (in some cases, this stage takes place between the assessment and determination stages).

Each of the jurisdictions has taken a different approach with respect to prescribing the timeframes within which each of these stages should be completed. Some of the jurisdictions have legislated timeframes for many of the stages (the Northern Territory, South Australia, New South Wales and Tasmania); others for only a few stages (the Australian Capital Territory, Queensland, South Australia, Western Australia); and, in the case of Victoria, no timeframes have been legislated. Each of the jurisdictions has also adopted a different approach to imposing consequences on either proponents or the authorities when the legislated timeframes are not fulfilled. Figure 3.2 provides examples of the timeframes which are prescribed for certain stages in the process by the jurisdictions and the types of consequences which are prescribed for instances where timeframes are exceeded.

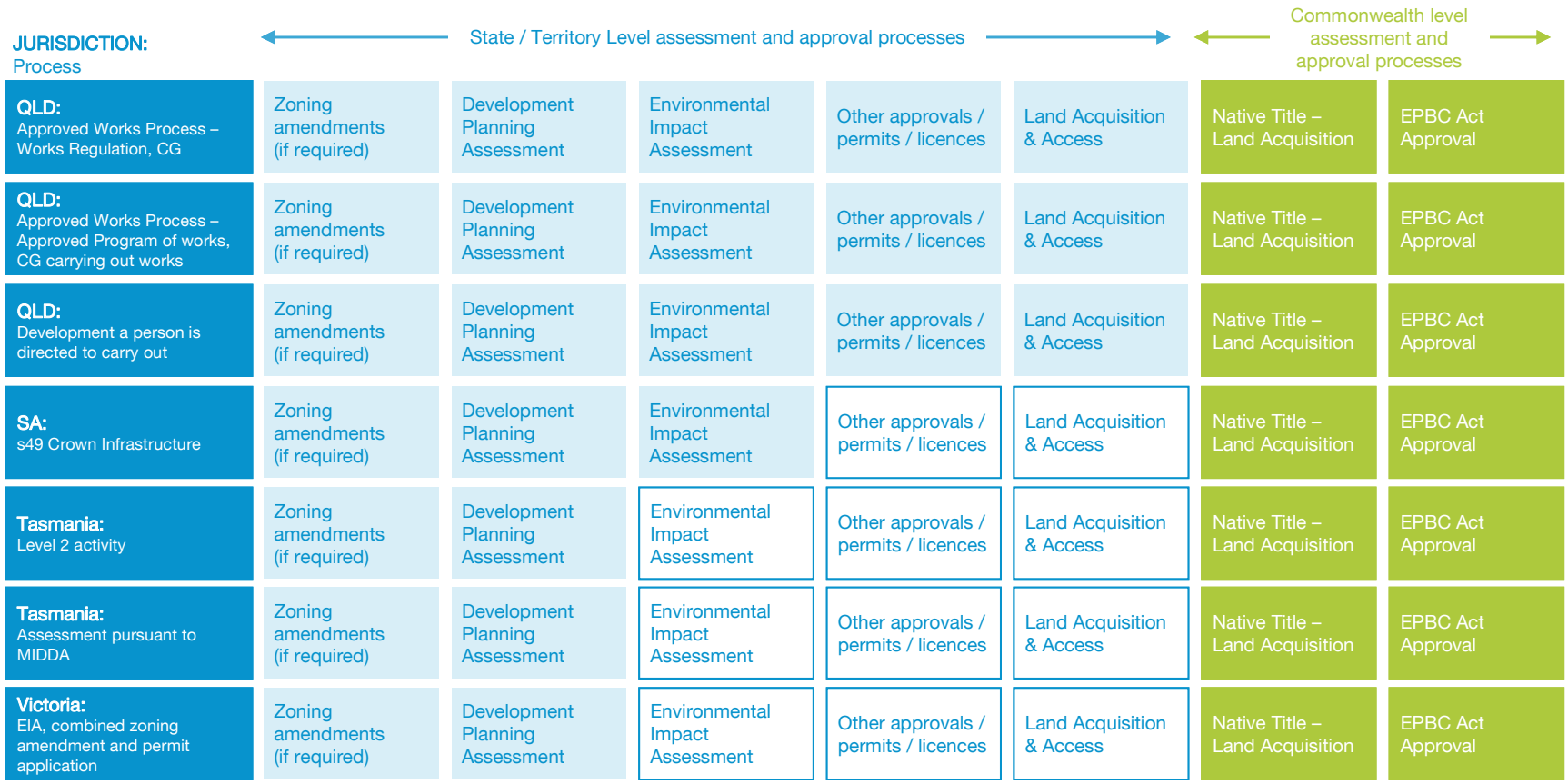
Figure 3.1: Comparison of Process Consolidation Across Jurisdictions



Key

= *Processes which have been integrated into one overall process*

NSW Part 3A process: Relating to Land acquisition and Access: Under Environmental Planning and Assessment Regulation 2000 clause 8F: (1) The consent of the owner of land on which a project is to be carried out is required for a project application unless: (a) the application is made by a public authority, or (b) the application relates to a critical infrastructure project, or (c) the application relates to a mining or petroleum production project, or (d) the application relates to a linear infrastructure project, or (e) the application relates to a project on land with multiple owners designated by the Director-General for the purposes of this clause.


JURISDICTION:
Process
State / Territory Level assessment and approval processes
Commonwealth level assessment and approval processes
QLD: Approved Works Process – Works Regulation, CG
QLD: Approved Works Process – Approved Program of works, CG carrying out works
QLD: Development a person is directed to carry out
SA: s49 Crown Infrastructure
Tasmania: Level 2 activity
Tasmania: Assessment pursuant to MIDDA
Victoria: EIA, combined zoning amendment and permit application
Zoning amendments (if required)
Development Planning Assessment
Environmental Impact Assessment
Other approvals / permits / licences
Land Acquisition & Access
Native Title – Land Acquisition
EPBC Act Approval
Key
= Processes which have been integrated into one overall process

Based on the information in process maps, it is evident that overall caps on timeframes covering the project application stage (that is, from when the EIA requirements are set to the final project determination) are not prescribed by any of the jurisdictions. A difficulty with setting timeframes for such a period is largely related to the EIA process. The complexity of the EIA and timeframes associated with preparing it are very much project-specific.

Some approval processes currently contain provisions for 'clock stoppers' where a party considers that more information is required. However, these can represent potential opportunities for gaming. For example, Clause 109 of the Environmental Planning and Assessment Regulation 2000 (NSW) provides for 'clock stopping' while further information is gathered. There may be scope for considering restricting provisions for 'clock stopping' on approval processes to instances where parties agree to the stoppage.

3.4 Facilitative Mechanisms

3.4.1 South Australia

For some time South Australia has offered a one-stop-shop arrangement to proponents of major investment projects to streamline communications between government agencies and the proponent, and to facilitate the completion of necessary government approvals. Historically, the State's department responsible for industry and economic development has provided this service.

More recently, and following privatisation of some infrastructure and related services in SA, the Department for Transport, Energy and Infrastructure has been responsible for providing the one-stop-shop service for private infrastructure and land development projects.

The government has recently formalised this approach with the establishment of a Case Management secretariat in the Department of Trade and Economic Development to coordinate case management services for major private sector projects.

The Case Management framework incorporates:

- provision of a single point of contact for industry to government departments (for the project at hand);
- the case manager working across state government departments and with Commonwealth, state and local agencies as required;
- ensuring that the State's role in a project is well understood and upheld;
- facilitating a collaborative approach by all State government departments in the process;
- clear identification upfront of the required government approvals and ensuring that agreed timeframes are adhered to; and
- developing strategies to accelerate project delivery timeframes.

Depending on the nature of the project, and the preferences of the project proponent and availability, a case manager is usually allocated from one of the three key government departments that have economic development responsibilities: Department for Transport, Energy and Infrastructure; Department for Trade and Economic Development; and Primary Industries and Resources South Australia.

Case managers have direct access to key staff from appropriate departments, access to the Major Projects Review Cabinet Committee or an Independent Champion (Member of Parliament), and if necessary, other targeted Ministers.

3.4.2 Queensland

The Coordinator-General also performs the role of planning, delivering and coordinating a program of works and planned developments by:

- identifying areas within the State that have the potential to be economic or industrial hubs and developing plans for sustainable growth;
- acquiring land where necessary to ensure critical projects and infrastructure facilities of significance to the State can be progressed; and
- engaging individuals, government departments or government created organisations to carry out development functions and duties.

3.5 Key Findings in Relation to Current Approval Processes

Key findings are:

1 All jurisdictions have at least one process in place for the assessment and approval of major infrastructure projects and some jurisdictions have more than one;

2 Not all of the major infrastructure processes are utilised;

3 In some jurisdictions the processes are integrated but in others they are not;

4 Where processes are not integrated, in some cases the separate processes occur concurrently and in others sequentially;

5 The consent authority is normally the Minister for Planning or a State/Territory planning agency;

6 Processes generally do not incorporate all of the necessary approvals;

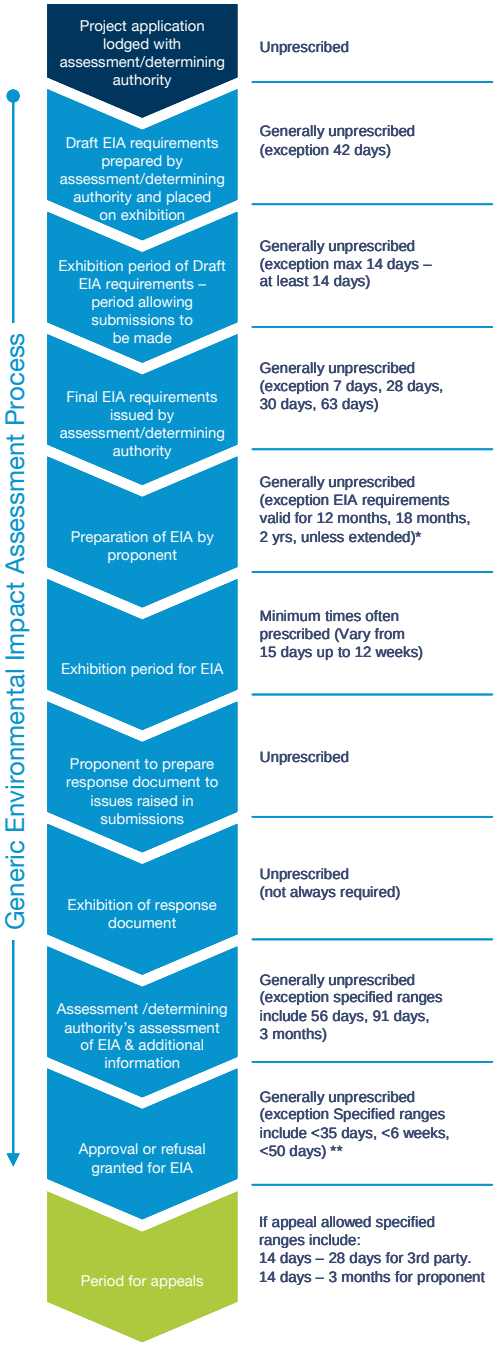
7 The same processes generally apply to infrastructure proposed by public authorities and private proponents;

8 The processes can apply to a wide range of projects, as there is usually some ministerial discretion

9 Appeal rights exist in some jurisdictions, but not in others; and

10 To varying degrees, the Australian Commonwealth Government processes can sit outside those of the States and Territories, thereby creating the potential for additional complexity, uncertainty and additional time in securing all necessary approvals.

Figure 3.2 Generic Environmental Impact Assessment Process Stages



Prescribed timeframes are identified, where available for each of the stages. Footnote references identify the implications which are prescribed if the specified timeframes are not met.

* *In cases where the time is specified, if the timeframe is not met the assessment / determining authority does not have to accept the EIA (i.e. Tasmania & Queensland).*

** *If specified timeframes are not met the project can be deemed to be refused consent (e.g. New South Wales) or deemed to be approved with consent (e.g. Tasmania).*

Issues

4 Issues

Chapter 4 examines the data underlying claims of inadequacies with existing approval processes. The data set consists of the case studies nominated by the States, a survey of the literature (including previous reviews and reports), interviews with key stakeholders, and experiences among certain jurisdictions.

The literature survey examines the many reports and reviews published with a view to synthesising their insights and comments regarding each of the principles identified with respect to each of the jurisdictions.

The interviews with other stakeholders bring an experienced perspective to bear on the issues at the heart of this report. The Victorian experience with recent issues and reforms is examined and the chapter includes a discussion of the effect of the Native Title Act 1993 (Cth) and the EPBC Act.

The chapter concludes with a discussion of the issue of access to Commonwealth Government lands.

4.1 Case Studies

Eight case studies were selected from a set nominated by the States with a view to achieving geographic representation – and thus illustrating the practical operation of jurisdictions' different project approval processes. The case studies also reflect a diverse range of sectors; namely, roads, water, freight rail, ports, gas and electricity. Three of the eight cases involved the operation of the Environment Protection and Biodiversity Act 1999 (Cth). At least four stakeholders were interviewed for each case study wherever possible — the proponent(s), the approval authority(-ies), environmental consultants, and objectors — in order to provide a range of different perspectives of the project. Where it has not been possible to identify or interview a stakeholder, this has been noted.

Three of the eight case studies were deemed to be controlled actions under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act). At least four stakeholders were interviewed for each case study wherever possible — the proponent(s), the approval authority(-ies), environmental consultants, and opponents — in order to provide a range of different perspectives of the project. Where it has not been possible to identify or interview a stakeholder, this has been noted. The literature survey examines the many reports and reviews previously published in this area, with the aim of synthesising their insights and comments regarding each of the principles outlined in Chapter 2.

4.1.1 Kurnell Desalination Plant (NSW)

The Kurnell Desalination Project case study consists of three related projects: (1) the desalination plant; (2) intake and outlet pipelines; and (3) the supply pipeline connecting the plant to the existing water supply network. Each of these is considered in turn. A major projects application for all three components of the Kurnell Desalination Plant was submitted to the NSW Department of Planning on 10 November 2005. The then Minister for Planning declared the entire development to be a critical infrastructure project and authorised the submission of a concept plan on 16 November 2005. The Director-General's Requirements were issued on 18 November 2005 under the Part 3A Major Projects provisions of the Environmental Planning and Assessment Act 1979. The Environmental Assessment of the Concept Plan and the draft Statement of Commitments for the project were lodged in November 2005 and exhibited for 71 days between 24 November 2005 and 3 February 2006. The plan proposed a $2 billion plant for the production of up to 500 megalitres of potable water per day, including intake and outlet pipelines to draw seawater into the plant and return seawater concentrate to the ocean (including tunnelling under Botany Bay National Park); pipelines and/ or tunnels from the plant across Botany Bay to the Sydney Water Corporation water supply system for the distribution of drinking water; and pipelines from the plant to Miranda water supply system for the distribution of drinking water. The project concept enjoyed high levels of political support and a "critical infrastructure" designation by the Minister for Planning was used for the first time.

An Independent Hearing Panel was formed on 29 November 2005 and reported 8 September 2006 with terms of reference including oversight of the NSW Department of Planning and the Sydney Water Corporation's (the proponent) handling of public submissions and whether concerns raised in those submissions were addressed. On 17 February 2006, the Director-General of the NSW Department of Planning directed the Sydney Water Corporation to address issues raised during the exhibition period in a Preferred Project Report, which it received on 17 August 2006. The Preferred Project Report was considered by the Independent Hearing and Assessment Panel as part of its work. The Minister for Planning granted concept plan approval to the entire proposal (all three components) and full project approval for the desalination plant and the intake/outlet pipelines components on 16 November 2006.

As part of the concept plan approval, the Minister required further assessment of the desalinated water supply pipeline. This further assessment was subject to a separate Environmental Assessment which was publicly exhibited 26 April to 28 May 2007. Sydney Water Corporation prepared and lodged a Preferred Project in August 2007 to address issues raised in submissions and to make minor amendments to the project. The desalination water supply pipeline was approved on 22 October 2007.

Secondary approvals were received from NSW Maritime for the construction of a temporary jetty on 2 November 2007; the EPA for an environment protection licence for water discharges on 20 November 2008. Construction is due to end on 28 February 2010.

Under the critical infrastructure designation, additional powers are granted with development consent. For example, this project enabled the construction of a pipeline through a national park, which is an otherwise prohibited action. Some parties considered that efficiencies that were achieved through the critical infrastructure designation were partly offset through the added time and complexity of the Independent Hearing Panel. Moreover, it is claimed that the NSW Department of Environment and Climate Change reversed its initial position and decided to require a licence for noise and other impacts, thus adding to the timeline. Also time consuming was the approval requirement that the proponent consult all affected agencies to gauge the impact of the proposal on their future plans. This might have been better managed through a scoping forum process from the outset.

No consultants were identified for this study. Objectors and environmental authorities declined to be interviewed for this case study.

Key findings from the Kurnell Desalination Plant case study are:

- The project took eleven months from application to the commencement of construction;
- The use of a single, integrated approvals process for the assessment was considered to have enhanced the efficiency of the process; and
- A scoping consultation forum of affected agencies at the outset could have added to both efficiency and effectiveness by enabling better coordination of input.

4.1.2 Southern Sydney Freight Line (NSW)

On 12 April 2006, the Australian Rail Track Corporation (ARTC) submitted an application for developing the Southern Sydney Freight Line (SSFL) at a cost of approximately $400 million. The Director-General's Requirements were issued on 19 April 2006. On 27 April 2006, the ARTC issued its Environmental Impact Statement. The EIS was publicly exhibited from 3 May to 3 July 2006. The Director-General's Report recommending approval was issued in December 2006 and, on 21 December 2006, the NSW Minister for Planning approved the SSFL under Part 3A subject to 76 conditions, including: urban design and landscape; traffic; access; noise and vibration; soils and hydrology (incorporating a flood management study); and level crossings. Two licences in addition to the Part 3A consent were also required: a noise emission licence from the NSW Environment Protection Authority, which was issued on 26 November 2008, and a licence under the Roads Act 1993 (NSW). Construction began on 27 October 2008.

As a Commonwealth company, the ARTC activated the Commonwealth Government's involvement through the EPBC Act. On 18 November 2005, the proposal was referred to DEHWA for assessment. On 5 January 2006, DEHWA determined that the Part 3A process under the EPA&A (NSW) would be accredited as the assessment approach. On 13 August 2008, the Commonwealth Minister for the Environment, Heritage and the Arts, under Section 133 of the Act, approved the SSFL with eight conditions, including an Environmental Action Plan (EAP) that covers access, car parks, noise and visual character, level crossings, a Flood Management Study and a Community Amenity Offset Plan covering landscaping and tree planting, public art, street furniture, car parking, lighting to enhance public safety, pedestrian and cycle access.

DEWHA's concern was that, under the proposal, train movements would substantially increase, predominantly at night, and therefore residents had legitimate concerns about noise impacts and these impacts needed to be mitigated. The EAP included the requirement that the noise walls address design features, colour and landscape treatments and graffiti. When the EAP was approved by the Department of the Environment, Water, Heritage and the Arts under the EPBC Act in November 2008, noise walls were not approved. Further approval from the Minister was withheld pending finalisation of noise modelling and the development of detailed designs of the location and length of the noise walls.

In its condition of consent for the Flood Management Study (FMS), the Commonwealth required that the Minister approve "prior to the construction, the FMS required by the NSW Minister for Planning's consent." The FMS " must satisfy the Minister and must be implemented." This was simply a duplication of the NSW Government's conditions of consent.

The Community Amenity Offset Plan (CAOP) required by the Commonwealth was to be approved by the Minister before any construction could begin and necessitated the expenditure of $2 million for landscaping and tree planting, public art, street furniture, car parking, improved lighting, increased pedestrian and cycle access and any other measure raised in public consultation. In submitting that plan, the ARTC was required to demonstrate that the offset required by the conditions was additional to that required by NSW approval requirements. Parties did not, however, consider the Commonwealth's conditions much more onerous than the NSW consent conditions – because, as noted, they actually duplicated many of them (as promoted by the EPBC Act) – but the main difference consisted in the fact that the Commonwealth stipulated a defined monetary value. However, it should be noted that the Commonwealth cannot stipulate a monetary value under the EPBC Act unless the proponent agrees.

Condition 5 of the Commonwealth Minister's consent stated that operation of the SSFL was not to commence until public level crossings at Liverpool Hospital, the southern end of Casula Railway Station, and Sefton Park Junction were closed. The consent noted that "the approval conditions from the New South Wales government (sic) provide a mechanism for alternative vehicle and pedestrian access." Conditions 32, 33 and 34 of the NSW Minister for Planning's consent already cover these crossings.

Despite these duplications of consent conditions, overall, delays were mostly incurred during the pre-application phase rather than the assessment process.

No consultants or objectors were interviewed for this study.

Key findings from the Southern Sydney Freight Line case study include:

- The project took 29½ months between 12 April 2006 and 27 October 2008 from application to the commencement of construction;
- That the EPBC Act may have been viewed as a mechanism for post-approval monitoring by some parties seeking greater stakeholder involvement and as a process for gaming by others; and
- Guidelines clarifying how issues are addressed are essential for effectiveness.

4.1.3 Tugun Bypass (NSW & QLD)

The Tugun Bypass involved the construction and operation of a seven kilometre motorway standard road connecting the Pacific Highway at Tweed Heads in NSW with the Pacific Motorway at Currumbin in Queensland, along an alignment to the west of the Gold Coast Airport main runway. The road includes a four lane bridge and a 334 metre tunnel beneath the southern end of the Gold Coast airport. The project cost $543 million.

The main complexity in the planning process was due to the (uncommon) involvement of three different governments. Commonwealth Government approvals were required under the EPBC Act and the Airports Act 1996. In NSW, in addition to development consent under the Environmental Planning and Assessment Act 1979, approvals were also required under the Threatened Species Conservation Act 1995, the Fisheries Management Act 1994, and the Native Vegetation Conservation Act 1997. In Queensland, in addition to development consent under the Transport Infrastructure Act 1994, approvals were required under the Environmental Protection Act 1994, Nature Conservation Act 1992, Vegetation Management Act 1999, Aboriginal Heritage Act 2003, Integrated Planning Act 1997 and the Transport Planning and Coordination Act 1994. In addition, as the Gold Coast Airport is Commonwealth land leased for 90 years to a private company, the airport operator's approval would also be required. The original agreement for the project between NSW, Queensland and Gold Coast airport, titled "Heads of Agreement – Tugun Bypass Planning Study" was signed in 2000.

The NSW RTA originally applied for project approval for the NSW portion under Division 4 Part 5 of the EP&A Act on 22 September 2004 and received Director-General's Requirements on 1 October 2004. However, due to the introduction of Part 3A provisions on 1 August 2005 and the repealing of Division 4 Part 5, a new application was sought. Consequently, on 6 October 2005, the NSW RTA reapplied to the Director-General for project approval under Part 3A. On 20 October 2005, the Department accredited the assessment process undertaken to date for the project for the purpose of Part 3A, including the previous exhibition of the proponent's responses to submissions.

The first consultation, during which the draft EA was exhibited for three months from 13 December 2004 to 15 March 2005, was accepted for the purpose of the reapplication. The Supplement to the draft EA containing the responses to submissions was issued in October 2005. Approval by the NSW Minister for Planning was granted on 21 December 2005.

The planning process for the Queensland section of the project was carried out under the provisions of the Transport Infrastructure Act 1994 (which empowers Queensland Main Roads to approve road projects). In July 2002, a draft Environment Impact Statement was finalised and, in July 2003, a revised EIS was completed. Due to indecision concerning the preferred alignment, a further EIS was prepared for consultation in December 2004. Between March and September 2005, submissions were assessed and additional studies undertaken. Final approval documents were lodged in October 2005.

Subsequently, on 12 November 2004, the project was referred to the (then) Commonwealth Department of the Environment under the EPBC Act by PacificLink Alliance (the Alliance) — an alliance consisting of Queensland Department of Main Roads, NSW Roads and Traffic Authority, Snowy Mountains Engineering Corporation (SMEC) and Abigroup. The action was deemed to be a controlled action, and approval with conditions was given effect on 23 February 2006. The significant environmental matters were the Long-nosed Potoroo and the Wallum Sedge Froglet, and actions taken on Commonwealth land. The Commonwealth Minister for Transport granted approval under the Airports Act 1996 (Cth) on 23 February 2006 as well.

During post-approval, joint proponent problems (involving NSW RTA and QLD Main Roads) consumed further time. For instance, Part 5 of the EP&A Act (NSW) required that even issues arising after approval would need to be addressed. For example, new fauna issues arising would need to be addressed through supplementary species impact statements. The Commonwealth Department of the Environment's requirements for community offsets also generated some concern as, according to one estimate, fulfilling the Department's requirement for 11 hectares of land for the Wallum Froglet may have added 12 to 15 months to the overall process.

According to the proponents, the Department would not accept management plans in lieu of some portion of the land. However, DEHWA notes that the construction of the project was able to occur concurrently with this approval requirement.

Cultural heritage monitors were engaged for approximately 1,500 person hours on site to oversight the clearing process for items of cultural heritage. After reaching an impasse in negotiations with traditional owners on the draft cultural heritage management plan, QLD Main Roads referred the dispute to the Queensland Land and Resources Tribunal for adjudication in early 2006. The Tribunal upheld the validity of the process in March 2006 and recommended that the cultural heritage management plan be approved. An appeal against that decision was unsuccessful.

Finally, the New South Wales Environmental Defenders Office challenged the legal validity of the approval by the New South Wales Minister for Planning in the NSW Land and Environment Court. The Court dismissed the action in July 2006. Nevertheless, the perception remained among some stakeholders that the submissions to the EIS were not adequately addressed and that the public consultation process was inadequate as it separated overlapping issues – such as the environmental from the social – to the detriment of each, according to these parties. Moreover, it was further felt that there was no follow-up mechanism for addressing concerns after construction was completed and that benchmarking of the environmental health of the site was not sufficiently comprehensive.

The lack of an independent third party to which stakeholders can turn with their concerns during the assessment phase (as opposed to appeals which occur at the completion of the process) was considered a major flaw.

The following factors are considered to have contributed most to delays:

- Land access issues due to the presence of an airport necessitated more costly and time consuming solutions such as the construction of a tunnel;
- Uncertain legislative processes and a lack of hierarchy of approvals (which approvals were prerequisites for others?) resulted in a circuitous process and caused confusion for some time;
- The lack of communication and clarity that prevailed until all parties and approval authorities were finally coordinated through multilateral meetings;
- The differential processes for treating native title issues in the two jurisdictions;
- Prefeasibility studies could have been more substantial in order to anticipate and address risks further along the assessment path, such as groundwater issues; and
- The lack of process flexibility until political will was brought to bear.

Environmental consultants declined to be interviewed for this study.

Key findings from the Tugun Bypass case study are:

- The project took 15 months from application to approval in NSW and 27 months in Queensland;
- That to enhance both timeliness and visibility there is a need for strong political support for a project, particularly where multiple jurisdictions are involved;
- That airport rights are very powerful and can have major implications for land access issues and thus for predictability;
- That there is a need for further harmonisation and coordination of processes between jurisdictions, such as native title, to improve fitness for purpose;
- That the EPBC Act was treated as a means for greater stakeholder involvement and post-approval monitoring by some parties; and
- There may be a useful role for an independent monitor with whom stakeholders can raise their concerns without instigating legal action in order to address perceived need for greater stakeholder involvement.

4.1.4 Abbott Point Coal Terminal Stage 3 Expansion (QLD)

The Ports Corporation of Queensland (PCQ) proposed developing a $680 million Stage 3 expansion (known as X50) of its coal export terminal at Abbott Point, 25 kilometres north-west of Bowen. The X50 expansion would effectively double the existing terminal infrastructure. This would provide a second rail loop and dump station, a second inloading and outloading conveyor stream, a second berth, a second shiploader and additional stockyard capacity. The project would increase the coal handling throughput of Abbot Point from its Stage 2 capacity of 25 million tonnes per annum (Mtpa) to 50 Mtpa, hence the project name X50. The project was deemed not to be a controlled action under the Commonwealth's EPBC Act.

On 11 July 2005, the Abbot Point Coal Terminal Stage 3 Expansion proposal was designated a 'Project of State Significance' under the State Development and Public Works Organisation Act (Qld) by the Queensland Coordinator-General, necessitating an EIS. The Draft Terms of Reference for the EIS were issued for public consultation in July 2005. Final Terms of Reference were issued in October 2005. The Draft EIS was issued for public consultation between 15 March and 28 April 2006. The Coordinator-General received submissions requiring PCQ to prepare a supplementary EIS which was released on 4 December 2006. Following further consultation with agencies, the Queensland Coordinator-General's Report, released on 1 August 2007, assessed that the project could proceed under the Integrated Planning Act subject to several conditions.

These additional conditions include:

- approvals for dust emissions and water discharge from the EPA. The initial standard set by the EPA was considered very onerous to satisfy and would have rendered the project uneconomic, thus time consuming negotiations ensued to achieve a new standard. Moreover, the EPA's available resources for this project were constrained and may have potentially accounted for delays of up to five months.

- Native vegetation and sewage approvals were required from the Department of Natural Resources and Water as was approval for a workers' camp site. Approval for the camp site was essential and the possibility of its refusal would have placed the project and the process to that point in jeopardy.
- Applications for these approvals were submitted in November 2007 and all were approved by February 2008.
- Cultural heritage approval required that PCQ pay meeting and travel expenses for 14 traditional owners as their agreement is required to secure project approval. Cultural heritage assessment costs of approximately $250,000 were incurred.
- Fisheries approval was required from the Department of Primary Industries and Fisheries.

Objectors declined to be interviewed for this study.

The key findings identified in the Abbott Point Coal Terminal case study include:

- The project took 27 months between July 2005 and November 2007 to obtain all of its necessary approvals.
- The role of the Coordinator-General was considered helpful in expediting the process, and that this role might have further added to efficiency had there been an integrated approvals process rather than a multiple approvals process;
- That front loading the process is advantageous to efficiency by ensuring a smoother assessment pathway that runs to course;
- That pre-gathering of base data from the outset can help save time later, particularly where seasonal data is concerned;
- That approval authorities require adequate resources to consider applications, otherwise substantial slippage can occur; and
- That cultural heritage management processes can reduce efficiency by incentivising their own prolongation, adding to time and expense.

4.1.5 EastLink (VIC)

The $2.5 billion EastLink motorway resulted from the amalgamation of two separate projects in September 2002. One was the 4.5 kilometre Eastern Freeway Extension (including 1.6 kilometre twin tunnels) and the other was the Scoresby Freeway which extended for 35 kilometres south from the Maroondah Highway in Ringwood to the Mornington and Frankston Freeways north of Frankston.

By way of background, it had been proposed in the 1990s to undertake what had been the Eastern Freeway Extension of the motorway as a surface road. However, significant community concerns about the damage to the Mullum Mullum Creek caused the government of the day to review VicRoads' proposal for a surface freeway. It was decided following feasibility studies that the project should involve tunnels to protect the bushland of the Mullum Mullum Valley. However, the extent of the tunnels then proposed did not satisfy local concerns and a further review was undertaken in the late 1990s. A satisfactory solution was developed and VicRoads commenced the works in 2001.

The EES for the Eastern Freeway Extension was conducted in 1987 and the EES for the Scoresby Freeway, completed in 1998, took approximately two years and there was some further time taken by the State Minister for Planning to make his recommendation to the Minister for Transport to approve the project. Planning approval to proceed with the latter project was subsequently given during 2000.

The EES process under the Environment Effects Act 1978 (Vic) addresses the environmental and social issues leading to planning approval under the Planning and Environment 1987 (Vic) can be accredited under the EPBC Act. The northern section and the southern section of the Scoresby Freeway were referred separately for consideration under the EPBC Act in February 2002. The northern section of the road was determined to be a non-controlled action in March 2002 and the southern section was determined to be a controlled action. The Commonwealth Minister for the Environment granted approval on 7 May 2003.

The business case on the Scoresby Freeway and Eastern Freeway Extension was conducted in 1998 and recommended formally integrating these into the one project. The Victorian Government agreed to this recommendation in September 2002 and the Mitcham-Frankston Freeway was renamed EastLink. A new statutory authority known as the Southern & Eastern Integrated Transport Authority (SEITA) was created to facilitate the project.

Separate Victorian legislation was required to establish SEITA, the EastLink Project Act 2004 (Vic), and to give necessary powers to SEITA to override local government controls. The only additional permits that were required involved the Environment Protection Authority under the Environmental Protection Act 1970 (Vic). The EPA granted permits on 5 September 2006 for works approval to proceed with the development of the tunnels by ConnectEast, the developer of EastLink. ConnectEast in turn passed the permits to their design and construct contractor, Thiess John Holland.

Following completion of the tunnels, ConnectEast then obtained a licence from the EPA to operate their tunnel ventilation systems. During the development of EastLink, ConnectEast and their contractor had to comply with the conditions imposed by the EPA and Melbourne Water with respect to discharge of water into local creeks and the drainage systems.

The factors that delayed the implementation of this project related to funding arrangements between the Victorian and Commonwealth Governments and the strategic leadership to proceed with the project given the demands and priorities existing on both State and Commonwealth funds. One stakeholder noted the added complexity caused by undertaking the environmental planning phase within the overall strategic planning phase as they are two processes with fundamentally different objectives.

It should also be noted that a series of legal actions on stages of the project by the Public Transport Users Association – whilst not resulting in significant delays – have subsequently been addressed through amendments to the EPBC Act that allow the Minister for the Environment to determine that an action may need to be considered within the context of the project rather than in isolation.

David Stewart, Group Managing Director of the construction company John Holland, recently commented that despite the EastLink Project Act 2004 (Vic):

We've just built the Mitcham to Frankston Freeway in Melbourne and there were 12 local councils and we had to deal with them all and they all had different issues and they were all just as important because every one of them could stop you building a one-kilometre piece of the 50-kilometre freeway. I think in a crisis someone has got to take charge.[13]

Key findings emerging from the EastLink case study are:

- there is a need for more strategic coordination of disparate State and Commonwealth approvals in the context of project's timelines, including to ensure that risks and issues are addressed as early in the process as possible;
- early project planning may have not considered all of the options potentially available as a result of budget constraints, the state of road technology and community values with respect to the environment. Innovative solutions may only become practicable when both government support and an effective design process (e.g. driven by competitive bidding) are available.

4.1.6 South Australian Electricity Network Projects (SA)

These three discrete projects consisted of augmenting the transmission lines and strategic substations in two discrete locations between 2004 and 2008 to improve network stability and capacity, and the development of a wind farm at Snowtown and its connection to the national grid.

The South-East to Snuggery transmission line and substation upgrade involved the construction of a new single circuit 132 kV line from the South-East substation to the Snuggery substation, including a new 132 kV line exit, switchgear, protection and communication equipment at the substations.

The Barossa Transmission Line involved the extension of a 132 kV transmission line to serve growing power demand in the Barossa Valley.

The Snowtown wind farm involved 47 wind turbines on the Barunga Ranges and the associated extension of transmission line to connect into the national power grid.

The first two projects traverse a number of local government areas with strong development controls protecting scenic landscapes and involved extensive public consultation beyond statutory requirements. They also required the compulsory purchase of essential corridors where negotiations failed.

South-East to Snuggery Transmission Line

The Electricity Supply Industry Planning Council and ElectraNet identified the need to reinforce the existing transmission network in the lower south-east of South Australia to meet projected demand in the region. The network provided the electricity transmission supply for all of the electricity loads in the region from Penola to Robe, including the Millicent and Mount Gambier region, and to the Victorian border. It also supplies major industries in the region, such as Kimberly Clark Australia and Auspine, as well as providing connection to the transmission system for the Lake Bonney wind farm. An unplanned outage on the existing 132kV network would have resulted in the disconnection of the whole region lasting until the backup generators at Snuggery could be started — a period of up to 30 minutes. Even then – if the outage occurred at peak use times – the backup system may not have been able to cater for the entire demand. Owing to this instability, Stage 2 of the Lake Bonney wind farm could not connect to the system without network augmentation.

The proposed work connected ElectraNet's Snuggery and South East substations providing the necessary connectivity to support the network at all times. The work needed to be commenced early in 2006 to meet the critical completion date of summer 2009.

ElectraNet committed to the project in August 2003, and lodged their original development applications in December 2003 with the Grant and Wattle Range District Councils for approval through the development application process. Whilst Wattle Range District Council approved the application with minimal conditions, Grant District Council refused to grant provisional development plan consent, instead requiring under-grounding of the line. This would not have been feasible as the investment would not have passed the Australian Competition and Consumer Commission's regulatory test for network investments. Thus, the application was withdrawn in December 2005. ElectraNet appealed to the Environment & Resource Development Court, which took a further eight

months to direct ElectraNet to recommence the process.

However, as the process had taken 32 months to this point and the rules require ElectraNet to build the appropriate infrastructure within five years of identifying the constraint, recommencing the process was not feasible.

Consequently, ElectraNet asked for the project to be given Crown Development and Public Infrastructure status under s. 49 of the Development Act (SA) so the Development Assessment Commission (DAC) could consider the application with its recommendation going to the Minister for Planning for final determination. This enabled the project to be considered on its benefits to the entire South Australian community. A trade-off for securing s. 49 assessment was the requirement that the proponent engage in more extensive community consultation. Another trade-off was that ElectraNet opted for a higher level of supply risk in return for lower visual impact by opting for two transmission cables rather than three. After consultation with the community and the Grant District Council, the project was approved by the DAC. The application was resubmitted in June 2006 and approved in December 2006.

The level of information required by different local governments was vastly different, incurring substantial transaction costs. At one point, Snuggery had three different applications in train; one with Wattle Range District Council, another with Grant District Council and a third with the Development Assessment Commission. One party noted that the system encourages forum shopping and the quantum of increased consultancy fees that that incurs is significant.

Objectors and the Development Assessment Commission declined to be interviewed for this study.

Key findings emerging from the South-East to Snuggery Transmission Line case study are:

- The project took three years to be approved: 32 months negotiating Local Government approvals and an appeal to the ERD Court; and six months from lodging an application under the section 49 approval pathway.
- The key finding to emerge from the case study is the impact that local government approval processes can have on the time and cost of project approvals – especially if approvals from several councils are required and the merits of integrated approvals processes (such as South Australia's section 49 process) in such situations.

Barossa Transmission Line

The chosen method to augment supply was a new 132 kV line from the Templars substation to the Dorrien substation. The chosen route for the line (based on costs and on minimising visual, environmental, heritage and social impacts) followed an existing 33kV and low voltage lines through the tourism areas of Seppeltsfield and Marananga.

While the upgrade was supported by the community, they objected to the visual impact and requested the line be under-grounded or, alternatively, a circuitous route be taken — both prohibitively expensive options. ElectraNet sought Government assistance in ensuring the supply to the Barossa was not compromised. The South Australian Government supported the project by declaring it a Crown Development or Public Infrastructure project under Section 49 of the Development Act 1993 (SA).

The company committed to the project in October 2003, the application was lodged in May 2005 and approved in December 2005. Native Vegetation Council approval was issued concurrently with development approval. Construction commenced in December 2006 and the line was energised in July 2006.

Extensive public consultation and design compromise saw the low voltage lines removed, the 132 and 33 kV lines strung on common slim line wide spaced poles but the route retained. The total visual impact was reduced by the common pole network. The redesigned project was recommended for approval by the DAC and the new transmission line constructed with minimal problems.

Objectors and the Development Assessment Commission declined to be interviewed for this study.

Key findings emerging from the Barossa Transmission Line case study are:

The project took seven months to be approved. The key finding indentified was the importance of engaging with the community in consultation early improved outcomes relating to transparency and equity.

Snowtown Wind Farm

The Snowtown wind farm involves 47 wind turbines on the Barunga Ranges and the associated extension of transmission line to connect into the national power grid. The wind farm cost approximately $220 million, has an installed capacity of 98.7MW and consists of 47 Suzlon 2.1MW turbines.

The proponent, TrustPower, rejected taking the s 49 approval pathway and instead submitted a development application to the local council for the construction and operation of the wind farm. TrustPower generated community support by implementing a local jobs programme as well as an indigenous careers programme. Additional approval was also required to connect the wind farm's output to the National Electricity Market. The application was submitted to Wakefield Council in October 2003 and approved in January 2004. Construction began in April 2007 and was completed in November 2008.

TrustPower worked very closely with Wakefield Council and the Snowtown Community Management Committee during the development of the project, to ensure that any community issues had an opportunity to be addressed. TrustPower invested approximately $1.2 million directly into the Snowtown community through fees paid to landowners and to businesses for the supply of goods and services. This does not include benefits from flow-on effects.

Substantial investment of approximately 0.2 per cent of total project costs were made in the cultural heritage assessment process for cultural heritage monitors for site clearance as well as ongoing cultural assessment. Another expense was incurred in installing aviation beacons on the towers to secure Civil Aviation Safety Authority approval – a condition of council development consent. The beacons are considered by members of the community to reduce visual amenity through their intensity and lighting pattern.

Key findings emerging from the Snowtown Wind Farm case study are:

The project took three months to be approved. Key issues emerging from the Snowtown case study was that the design of the cultural heritage management process can act to incentivise its own prolongation, adding to timelines and cost.

4.1.7 Summary of the Key Findings from the Case Studies

1 That integrated and coordinated approvals processes can enhance timeliness and predictability

- The use of the 'one stop shop' integrated approvals process for the assessment is considered to be particularly effective for efficiency and predictability. The function of a Coordinator-General is helpful in expediting the process. This function could be further enhanced through a single, integrated approvals process.

2 That providing high level strategic direction can help with the efficiency of the process

- The need for strong political support for a project, particularly where multiple jurisdictions are involved.

3 That emphasising the front-end and pre-feasibility stages more strongly can help improve effectiveness and efficiency

- Front loading the process with time and resources is advantageous in ensuring a smoother assessment pathway that runs to course. Pre-gathering of base data from the outset can help save time later, particularly where seasonal data is concerned.
- Stronger scoping documents help to identify the requirements for the environmental statement more robustly at the front end of the assessment process, minimising the risk of approval authorities adding to timeframes by requiring further information and studies.

4 That redesigning incentives within systems could help enhance efficiency

- The design of some processes can act to incentivise prolongation of the process, adding to inefficiency.

5 That engaging the community earlier and better can help improve transparency

- A key lesson highlighted is the need to engage the community and other stakeholders early on the assessment pathway of a project.

4.2 Survey of the Major Project Approval Processes Literature

There have been long standing concerns over the impact that the costs, delays, complexity and consistency of Australia's development approvals processes may have on infrastructure investment[14].

In 1991, the Productivity Commission's predecessor – the Industry Commission – noted that:

Despite frequent reviews and commitments by governments to change, approval processes continue to impose an unnecessary cost burden on proponents of major projects…Existing procedures usually involve dealing with a multiplicity of Federal, State and Local government agencies, some of which have overlapping responsibilities…As a result, approval processes are characterised by high levels of uncertainty. Uncertainty as to what agencies and what requirements must be satisfied; uncertainty about the time taken to obtain a decision; and uncertainty as to whether further conditions will be imposed after approval is given. Ultimately this increases project costs and decreases competitiveness.[15]

In 2008, the Productivity Commission[16] again noted that:

The aspects of approvals processes that are considered to contribute to delays and uncertainty include:

- complexity in approvals processes;
- duplication, inconsistency or poor coordination between regulatory agencies;
- inconsistency in the interpretation of regulation within and across jurisdictions; and poor incentives for government agencies to deliver timely decisions.

The Prime Minister's Exports and Infrastructure Taskforce (2005) also found 'poor levels of coordination, inconsistencies of approach and regulatory duplication' contributing to delays in assessing infrastructure proposals and suggested that they might be addressed through the application of the:

> ...one stop shop' approach — where there is a single point of contact for project facilitation and approvals — in each jurisdiction. The single point of contact would provide proponents with information, advice and support to assist with necessary government approvals; identify the sequence and timings for key approvals; and identify relevant government programmes that may assist the project. Preferably, a single minister should have the responsibility for obtaining all necessary state approvals and conveying them to the project proponent.[17]

However, it should be noted that this approach poses a potential risk to independent and defensible decision-making in combining project facilitation (where there is a tendency to advocate for the project) and project (statutory) approvals (that is: assessments and conditions).

In its 2006 report *The Potential Benefits of the National Reform Agenda*, the Productivity Commission estimated that a 20 per cent reduction in Australian compliance costs — including unwieldy and untimely development approval processes — could deliver benefits to the economy of as much as $8 billion.

Subsequently, at its April 2007 meeting the Council of Australian Governments reaffirmed its commitment to streamlining development assessment processes by charging the Commonwealth Minister for the Environment and Water Resources with developing '...a proposal, in consultation with the States and Territories, for a more harmonised and efficient system of environmental assessment and approval as soon as possible.[18]

This section will survey the literature concerning jurisdictions' approval processes through the 'lens' of the four best practice principles.[19] As noted, a number of jurisdictions have recently completed or are undertaking major planning and infrastructure reforms and have utilised the same principles employed in this review.[20]

The first observation to be made is that, overall, the literature does not point to any one large obstacle that is hindering the development of major infrastructure projects but instead identifies a collection of smaller impediments which – taken together – represent a significant hindrance to approving major infrastructure. It is also noteworthy that the literature does not pay equal attention to each of the principles so that the volume of literature dedicated to each principle represents a useful barometer of its relative importance. The principle of the highest order according to volume is the principle of timeliness, suggesting that it is at least perceived to be of most concern. Timeliness is closely followed by the principle of predictability, suggesting perceived concerns over the certainty or 'knowability' of the various approval processes. These are followed by substantially less literature dedicated to costs and visibility. The flexibility of the processes and the quality of decision-making do not appear to be perceived as significant concerns.

Another feature worth noting about the literature is the lack of specific examples to substantiate claims made regarding the shortcomings of approvals processes. Also lacking are identified standards to which processes should aspire and which might therefore be considered enhancements to the processes.

4.2.1 Principle 1 – Equity

Sub-principle 1a: Stakeholder Involvement

NSW

The Infrastructure Implementation Group chaired by the former NSW Coordinator-General, David Richmond, identified many major infrastructure proponents that have been criticised for failing to adequately consult and engage with stakeholders and the wider community at more frequent intervals than only during the environmental impact statement phase.[21]

In addition, the report criticises the lack of a clear policy for the disclosure of contracts and other documents of interest to the public.[22] Its recommendations for change include continual project consultation during the life of the project from conception to operation.

Victoria

The Department of Sustainability and Environment's (2006) review found that there appears to be wide ranging interpretation of what is reasonable notification of development assessments resulting in confusion in the community and proponents.[23]

Queensland

Queensland has two legislative processes for major project assessment: the State Development and Public Works Act and the Integrated Planning Act. The Queensland Government's (2007) review of the Integrated Planning Act found that there is 'poor community awareness and engagement' in planning processes generally and '…an over-reliance on adversarial involvement in subsequent, individual, development applications.[24] The report proceeds to observe that 'Community confidence in planning is undermined when opposition to development proposals fails because the proposal, contrary to expectations, is assessed as consistent with a planning scheme of which the community has little ownership.'

Tasmania

The Tasmanian Government's recent Review of the Tasmanian Planning System (2009) noted that under the Projects of State Significance arrangements there are no further opportunities for review or appeal once a project has been 'fast-tracked'. However, despite the existence of this pathway for 14 years, only two projects have ever been assessed and approved as, the report ironically notes, assessments are longer and more thorough under this pathway.[25]

Sub-principle 1b: Trade-off Mechanisms

NSW

The Infrastructure Implementation Group's (2005) *Review of Future Provision of Motorways in NSW* found that the current Roads and Traffic Authority of NSW procurement approach, whilst technically rigorous, constrains the Cabinet's opportunity to review the policy and trade-offs in the light of the tender bids as each project progresses.[26] The central difficulty is the lack of equivalent rigor to environmental impacts for the social, economic and other impacts with which to inform government decisions concerning trade-offs.

4.2.2 Principle 2 – Efficiency

Sub-principle 2a: Costs

NSW

Major infrastructure projects in NSW often have more planning conditions attached than in other jurisdictions, adding to complexity, costs and delay. By way of comparison, planning approval for Melbourne's CityLink imposed 50 conditions whilst Sydney's Cross City Tunnel was subject to 292 conditions and the Lane Cove Tunnel to 259.[27] In the case of the Cross City Tunnel, these conditions of planning approval incurred a cost of approximately $51 million and some conditions will generate ongoing recurrent costs.[28]

Another criticism relating to costs has been directed at government approaches advocating 'no cost to government' positions which may generate onerous additional costs for infrastructure proponents.[29] Whilst this observation may have been directed more at the commercial stance taken by governments in some tenders/negotiations over PPP projects, it is relevant to this report insofar as proponents are likely to view some environmental consent conditions as risks that should be borne by government.

Victoria

In one example cited by the Minerals Council of Australia, the environmental effects statement for Donald Mineral Sands project near Horsham cost $2.3 million as it was commenced in December 2005 and not submitted to Government until December 2007.[30] The Minerals Council also makes reference to the International Power project to develop the West Field of the Hazelwood Mine (stage 2) which included the relocation of the Morwell River and a State highway and commenced with an EES request in December 2002:

> The EES Panel commenced public hearings in July 2004 and in September 2005 the Minister for Planning's Assessment was determined. However, it was not until October 2005 that the last of the critical subsequent approvals granted. The EES and associated approvals cost the company $4.5 million and generated approximately 14.5 shelf metres of documents and a total of 442 specific regulatory obligations that the company must comply with.[31]

South Australia

The South Australian Government's recent Planning and Development Review (2008) similarly found that

> South Australia's planning system is unnecessarily complex, as evidenced by more than 17,000 pages of planning regulations in 68 Development Plans, the legislation and the Planning Strategy. Complexity drives uncertainty and means ordinary South Australians cannot easily navigate the system. The development approvals system in that State is excessively complex, thus increasing costs and uncertainty for the community.[32]

Sub-principle 2b: Time

The time taken to assess applications for major infrastructure projects is extremely important, as it can have significant costs, mainly in the form of capital holding costs such as interest on loans. A number of industry participants claim that inefficiencies in development approval processes continue to result in unnecessary delays and increased uncertainty.[33]

South Australia

As one means of addressing lengthy assessment processes, the South Australian Government's review of its planning system recommended the introduction of clear performance standards for assessment decision timeframes.[34] Other measures include providing for rezoning and development approval in one step and reviewing the feasibility of further integrating approvals under other legislation into the development approval process.[35]

Victoria

The substantial timeframes associated with development assessments in Victoria were considered to be of concern. In particular, the 2006 review identified referrals between agencies and regulators as a major source of delays and suggested more extensive use of technology as one means of addressing them.[36] The Victorian Competition and Efficiency Commission's (2009) review also finds that cumbersome environmental regulation can be a source of economic drag and suggests addressing delays through a variety of options. These options include the selective application of timelines, public reporting of performance, equipping the minister with a call-in power, requiring the minister to publish reasons for granting extensions, and integrating environmental assessment and project approvals into the one consent.[37]

Queensland

The Queensland Government has identified concerns that development assessment timeframes were not being complied with by decision-makers.[38] New legislation is being proposed to enable the Minister to direct that a decision be made if the time taken is considered unreasonable.[39]

Western Australia

In Western Australia, one means of helping to streamline the major project development assessment process in response to its 2002 review, has been to establish a 'one stop shop' in the form of the Development Approvals Coordinator. However, in a recent report, the Western Australia Auditor-General found that 90 per cent of environmental impact assessments still take almost 3½ years to be approved.[40] One possible reason for this lengthy period according to the Auditor-General, is that agencies and proponents are reluctant to commit resources to concurrent processing of applications prior to environmental approvals being finalised as environmental approvals are primary.[41] The Government of Western Australia's (2009) consultation paper Building a Better Planning System finds that the issue of timeliness for major projects continues to be of concern.[42]

Tasmania

The Tasmanian Government's recent review of the planning system finds that the Projects of State Significance pathway as a whole does not have a set time for completion. Consequently, the review recommends that timelines may be extended with the agreement of the proponent but the practice (which is not actually required by the legislation) of seeking public input to the draft Integrated Impact Statement be discontinued as it adds four weeks to the process.[43] The review further finds that the majority of cases 'called in' as projects of State Significance' for approval by Parliament do not result in a faster approval process although they do remove any further appeal right thereby providing a 'one stop shop'.[44] Moreover, the review recommends that 'call in' powers should be defined for particular projects, including those beyond the capacity of the local government to assess.[45]

Australia

In its submission to the Independent Review of the EPBC Act (Cth), the Government of Western Australia notes that, despite the existence of bilateral agreements between the Commonwealth and Western Australia, these are rarely utilised, leading to separate approvals under the EPBC Act and thus delays for major projects.[46]

The Government of Western Australia also notes that, as the EPBC Act does not allow assessments of planning schemes or rezoning, Commonwealth assessment is likely to be later in the planning process. It suggests consideration be given to involving the Commonwealth and the EPBC Act at an earlier strategic planning stage.

Table 4.1 shows that, according to data from DEWHA, the number of projects and assessment methods used for projects that have been deemed to be controlled actions under the EPBC Act following signing of an assessment bilateral agreement between a state and the Commonwealth Government.

For example, of the 42 projects in New South Wales that have been deemed to be a controlled action under the EPBC Act, 20 of these projects have been assessed under a bilateral agreement process.

Table 4.1: Projects and Assessment Methods under the EPBC Act

Jurisdiction/ Assessment method	Accredited assessment	Bilateral Agreement	Environmental Impact Statement	Assessment on Preliminary Documentation	Public Environment Report	Assessment on Referral Information	Total projects
NSW	2	20		12	6	2	42
NT	1	16		6	1		24
Qld	22	53	7	64	7	1	154
SA	1		1	3	1		6
Tas	1	2	1	6		1	11
WA	6	32	5	47	5	2	97
Total Projects	33	123	14	138	20	6	334

Note: Victoria and the ACT signed Bilateral Agreements in May 2009 so have not been included in this table.
Source: DEWHA 2009

The Senate Standing Committee (2009) received a number of submissions that were critical of the large role afforded by the EPBC Act to ministerial discretion — at least eight major decisions are at the minister's discretion.[47] However, it is unclear how the report's draft recommendation to expand the scope of merits review is likely to deliver greater timeliness in decision making. DEWHA advises that the report also noted that 'the dissatisfaction expressed by stakeholders relates to a minority of decisions, typically regarding proposals that are already controversial before the Act comes into play. The committee formed the impression that in some of these cases, dissatisfaction with ministerial decisions was not clearly related to evidence regarding matters of national environmental significance.'[48]

In its 2007 report, Performance Benchmarking in Australian Industry, the Productivity Commission examined the performance of three unidentified jurisdictions' processes with respect to timeliness. Table 4.2 provides a useful snapshot of its key findings. The assessment found that all of the jurisdictions fared well in most aspects of timeliness, flexibility and stakeholder involvement that were rated, but they also showed some key aspect that was rated very poor.

Table 4.2: Measures of Timeliness (Productivity Commission 2007)[49]

Indicators	Jurisdiction A[1]	Jurisdiction B[2]	Jurisdiction C[3]
Quantitative measures			
Proportion of decisions on referrals within statutory timeframe – total (per cent)	89	n.r.	n.r.
Proportion of controlled action/general terms of approval within statutory timeframes (per cent)	57	92	n.r.
Mean number of weeks from setting level of assessment to EPA report	n.r.	n.r.	103
Mean number of weeks to complete EPA report	n.r.	n.r.	7
Contextual information			
Background information			
Number of applications	360	n.r.	468
Number of decisions made	346	n.r.	n.r.
Number requiring assessment	63	n.r.	47
Number of assessments completed in the year	28	96	40
Incentive structures			
Legislated timeframe for assessments	Yes	Yes	Yes
Government stated goals regarding timeliness	No	Yes	Yes
Capacity to 'stop the clock'	Yes	Yes	Yes
Proponents can track progress in the processing of applications electronically	No	No	No
Stakeholder engagement			
Engagement between authority and proponent	Yes	Yes	Yes
Coordinated in setting assessment requirements across whole of government (agency)	Yes	Yes	Yes
Assistance with public consultation	No	No	Yes
Flexibility			
Assessment options commesurate with scale and scope of the project		Yes	Yes
Appeals processes			
Clear guidelines for appeals/challenges	Yes	No	No
Appeals mechanisms incorporated into approvals process	No	No	No
Indicators taken from expert assessment[4]			
Timelines	4	4	2
Stakeholder input and appeals	1	4	4
Government agency capacity	1	4	3

Notes:

1) Jurisdiction B reports on all referrals received under the relevant environmental protection legislation
2) Jurisdiction B reports on all environmental approvals provided as part of a streamlined planning approval process
3) Jurisdiction C reports quantitative data on the timeliness of environmental approvals for major projects
4) Expert assessments were taken from Scorecard of Mining Project Approval Processes (URS 2006b). The numbers represent ratings out of five. A score of '1' reflects that jurisdiction is 'poor' against the assessment criteria, and a score of '5' essentially reflects 'best practice'. N.r. not reported.

The Productivity Commission's recent (2009) report, *Review of Regulatory Burden on the Upstream Petroleum Sector*, finds that the current regulatory arrangements governing this sector are complex and that:

...there is solid evidence that the current regulatory framework imposes a significant burden on the upstream petroleum sector. Although compliance costs are large (sometimes amounting to millions of dollars for a project), they are typically modest relative to the total project costs. Delays, on the other hand, impose far more significant burdens because they can increase project costs, reduce flexibility in responding to market conditions, impede financing of projects, and defer production and revenues...The Commission estimates that expediting the regulatory approval process for a major project by one year could increase the net present value of returns by 10-20 per cent simply by bringing forward income streams...[50]

Recent Projects and Timelines

As noted, timeliness is the most featured issue when it comes to considering the efficiency of approval processes. In order to understand the current situation with respect to timeliness better, State and Territories were requested to supply timelines for their ten most recent major projects. Table 4.3 shows that project timeframes can vary substantially – not only between – but also within jurisdictions, depending on the nature of the project. However, the reader should note that a substantial period of time (routinely between 12 and 18 months) is spent in preparing the environmental assessment documentation. Consequently, the average period of time should be read with that fact in mind.

Table 4.3 Timelines for Recent Infrastructure Projects by Jurisdiction

	No projects provided	Between years	Months										Average time (months)
			Project #1	#2	#3	#4	#5	#6	#7	#8	#9	#10	
ACT	0	–	–	–	–	–	–	–	–	–	–	–	–
NSW	10	2007-2009	10.5	17.5	21	29.5	22	20	27	28	22.5	9	20.7
NT	0	–	–	–	–	–	–	–	–	–	–	–	–
QLD	10	2005-2007	27	34	19	24	12	24	12	12	19	10	19.3
SA	6	2006-2009	10	5	4	4	4	3					5[1]
TAS	0	–	–	–	–	–	–	–	–	–	–	–	–
VIC	10	2002-2008	14	15	8	10	39	9	5	7	12	26	14.5
WA	5	2005-2007	22	19	42	22	29						26.8
UK	5	1993 – 2005	86	41	37	43	27						46.8

Notes:

1) Only the South Australian project 1 timeline includes the preparation of the environmental impact statement and exhibition of guidelines. Projects 2-5 do not include the time involved in the preparation of the Environmental Impact Statement (EIS) – this is completed prior to lodging the application

4.2.3 Principle 3 – Transparency

Sub-principle 3a: Predictability

Inconsistent administration of approval processes can create uncertainty and, therefore, risks to business. With increased unpredictability, businesses are less able to plan for the likely timeframe for the assessment. It is important to note that this principle is strictly concerned with the predictability of the process and not with the outcome of an application.

NSW

The Infrastructure Implementation Group is critical of the NSW major projects assessment process for failing to be properly aligned with the key Government decision-making processes.[51]
In particular, the lack of alignment between explicit project objectives and the objectives that the planning process sets out to achieve was commented upon. The report recommended that – to aid predictability – the Cabinet Standing Committee on Infrastructure and Planning agree to a consolidated set of environmental amenity principles and standards for the construction and operational phases of major infrastructure projects. In addition, the Minister for Planning should undertake an appraisal of the project identifying the potential key planning, environmental and community impact factors and matters which could have a significant bearing on a later full assessment. This recommendation also points to the importance of strategic direction stemming from the Cabinet level.

Victoria

The Victorian Government's (2006) planning review Cutting red tape in planning has noted that 'many submissions raised concerns that the standards to be met are not clearly set out in planning schemes' thus adding to delay and uncertainty.[52]

Queensland

The Queensland Government's (2007) review found that many State agencies use informal mechanisms to articulate their interests in planning and development assessment rather than formal mechanisms, and that this generates uncertainty and difficulty for the community and proponents.[53]

The Queensland Government has responded to this finding by requiring that only formal State planning instruments be used in order to provide greater clarity and predictability. It is proposed that state agency interests must be expressed in a formal state instrument to be considered as part of the assessment process. The Integrated Planning Assessment process also requires information to be made available in the public domain, to provide some transparency and public reporting.
The development of regional plans (South East Queensland Plan, Far North Queensland Plan, Central West Plan, North West plan, Maranoa and District Plan and South West Plan) is part of the operational and cultural reform underway to improve planning predictability at a regional level.[54]

South Australia

The South Australian Planning and Development Review (2008) found that while the processes and systems for dealing with State significant development are generally strong, there is some complexity and uncertainty in the pathways available for different types of projects.[55]
To improve certainty and transparency, the review recommended that information be provided that clearly articulates the pathways and processes for significant development and further recommends performance standards for assessment decisions.[56]

Western Australia

The Western Australia Auditor-General (2008) also found that the integrated planning approvals system introduced in 2004 has not delivered the intended benefit of improved certainty of process. In large part, he found this has been due to the fact that, unlike environmental and cultural heritage impacts of resources projects, there are no formal legislated processes for assessing the social and economic impacts, adding to uncertainty for proponents.[57] To a lesser extent, this has been due to the lack of clear criteria for the designation of what constitutes a 'major project' and thus which specific projects are eligible to receive coordination assistance.[58]

The Government of Western Australia's (2009) consultation paper notes that:

There is significant overlap and duplication between planning and environmental legislation (and also between Commonwealth and State environmental legislation). The legislative amendments introduced to the Environment Protection Act 1986 (EP Act) in 1996 are not considered to have succeeded in integrating approvals nor in providing certainty. The EP Act is considered to be more powerful than the planning legislation and, as a result, environmental considerations tend to predominate in determining planning outcomes…[also] the current policy environment that relates to approvals is complex, overlapping and in places conflicting.[59]

Australia

The Productivity Commission's (2007) report notes that, despite general support for the principles and framework of environment regulations such as the EPBC Act (Cth), there can be a lack of clarity and transparency in decision-making processes that lead to uncertainty about how an action referred for Commonwealth consideration will be assessed.[60] The Regulation Taskforce (2006) further notes that, under the Act, legislation and guidelines that define the 'significant impact' trigger for a referral are unclear.[61] One submission to the Productivity Commission's review suggested that the introduction of the Act had served to make development approval processes 'more cumbersome' and 'no longer certain'.[62]

Sub-principle 3b: Visibility

The Productivity Commission (2007) received submissions identifying development assessment processes' lack of clarity of policy objectives accompanied by the increased use of discretion in assessing and determining applications as major concerns.[63]

Western Australia

Western Australia's Auditor-General found that major projects could not be tracked across government agencies to inform proponents as to their progress.[64] The Productivity Commission (2007) considered that one potential method of expediting development assessments could be the use of electronic tracking mechanisms to allow applicants to track applications' progress.

South Australia

Similarly, the South Australian Planning and Development Review Committee had difficulty in obtaining accurate information on the performance of the South Australian planning system. To provide greater transparency, the Committee proposed that consideration be given to developing a system for monitoring and reporting on the assessment of significant developments.[65]

4.2.4 Principle 4 – Effectiveness

Sub-principle 4a: Decision Quality

No major concerns have been identified relating to the quality and accessibility of the information upon which development determinations are based, although it is worth noting that there are no minimum information requirements clearly specified in statutes.

Sub-principle 4b: Fitness for Purpose

Approvals processes should have sufficient flexibility to ensure that assessment processes are aligned with the complexity and risks associated with the project in question. Flexibility is also important because it allows scope for applicants to amend applications if circumstances change.

Queensland

The 2007 review of the Queensland development assessment system found it to have exceedingly inflexible and inconsistent arrangements for modifying development applications.[66]

4.3 Stakeholder Consultations

Extensive informal discussions (Chatham House Rules) were held with industry stakeholders from Brisbane, Sydney, Melbourne and Perth in the months of March and April 2009. Industry participants included environmental lawyers, planners, professional consultants and member of transport infrastructure construction industries. The issues raised are summarised below.

In addition, informal consultation with a range of public sector infrastructure proponents across most jurisdictions was undertaken in early 2009. Issues arising from these discussions are included below.

4.3.1 Strategic Analysis & Planning

Inadequate Strategic Planning

A lack of strategic infrastructure and land use planning frameworks is causing difficulties in key areas.

- **Delayed and limited engagement of the private sector**

  For example, the full benefit of building a new intermodal transport terminal will only be realised if surrounding land use planning is appropriate as are road and rail connections and interstate terminal connections.

  Currently high level land use and network plans are generally not in place at national, interstate or state-wide levels. The resulting levels of uncertainty and risk mean the private sector is reluctant to pursue the development of individual projects in isolation. Comprehensive strategic planning of land use and infrastructure networks are a critical prerequisite for the identification and development of individual projects.

- **Exhaustive and lengthy project approval processes**

  Individual projects are frequently the subject of exhaustive assessment processes at the project approval level because of the need to compensate for the absence of a comprehensively assessed and planned strategic context.

  It was suggested a thorough strategic justification be required before a project is submitted for planning approval rather than having the project approval process attempt to address the strategic context by default.

- **Lack of inter-state and State-wide strategic planning**

  The current lack of strategic planning frequently results in inadequate levels of timely corridor planning and land acquisition ahead of individual project identification and development.

EPBC Strategic Assessments

Scope for significantly greater use of strategic assessments under the EPBC Act was identified. Involvement by the Commonwealth Government in strategic assessments was suggested as a measure for streamlining project approvals by reducing the need for project level assessment under the EPBC Act.

4.3.2 Project Approval Processes

Approval Conditions

Concerns were expressed in regard to:

- Seemingly arbitrary and excessive standards imposed by way of approval conditions particularly those involving compensatory habitat and sewage standards.
- The need for some means of cost-effectiveness/ benefit testing of approval conditions imposed by regulatory agencies.

Separation of functions

The potential for conflicts of interest was identified in those jurisdictions where planning agencies were both the planner and the approval authority. The need to effectively separate those powers was highlighted.

Secondary Permits

Comment was made that environmental assessment and planning approval alone does not allow proponents to commence work and that additional layers of secondary permits and interface agreements were also required, which frequently add significantly to overall approvals timeframes. Some means of harmonising and integrating secondary approvals into the core planning approval process is required. Generally the issue is that at least two layers (in some cases, three layers) of approvals for projects is needed. The objective should be to have one consolidated layer.

Environment Protection & Biodiversity Conservation Act 1999 (Cth)

- **Planning Approvals and Innovative Projects**

  Essentially what is at issue is the inability of a planning approval granted in respect of a base project proposal to accommodate later changes in the innovation solutions flowing from the subsequent procurement (tender) process.

  It is suggested that what is needed at the planning approval end of the process is a more concept based approval with the inherent flexibility to allow evolution in the project proposals without requiring further iterations in the assessment process.

- **Threatened Species and Heritage Listings**

  A key set of difficulties revolves around the Commonwealth and the States/Territories establishing different heritage and threatened species listings. Another area of significant inconsistency between the two levels of government is that of offsets policy. Harmonisation across jurisdictions in these areas is seen as a significant opportunity for improvement.

- **Assessment Bilateral Agreements**

  Whilst assessment bilateral agreements are in place with most jurisdictions, stakeholders remain concerned that additional assessment tasks and approval represent another layer of process at the Commonwealth level.

  What is needed are approval bilateral agreements that accredit the entirety of State processes, including the approval decisions and conditions.

- **Inconsistent Administration**

  Inconsistent behaviour by different administrative teams results in significant uncertainty regarding application of the Act and, at the extreme, micro-management and the repetition of studies previously undertaken.

4.3.3 Whole of Government Culture

Coordination of Government functions

There are also issues around the co-operation between agencies of government at both Commonwealth and State and Territory levels. The institutionalisation of specialist government functions has led to organisations often at odds with each other, and focussed on process rather than a whole-of-government outcome delivery. Specifically, individual agencies' process agendas all too often appear to take priority over the delivery of project outcomes. Consequently, effective coordination of government functions that ensures the delivery of major projects is regarded as critical.

A Sense of Urgency

Another critical issue is the lack of urgency with which infrastructure regulators are considered to frequently approach decision-making. In particular, the criticism is often levelled that regulators do not sufficiently appreciate that the length of time incurred in reaching a decision directly affects the holding costs of capital. Given that infrastructure projects regularly involve overall costs of many hundreds of millions of dollars, capital holding costs can be high and time-sensitive.

Furthermore, infrastructure projects demand that equipment and other inputs be ordered well in advance of the required time. Consequently, any slippage in timelines can result in costly transactions with suppliers of inputs.

Regulating for Outcomes

Another important lesson identified by both public and private proponents concerns the culture of regulating for processes rather than for outcomes. Specifically, the critical issue is that regulators too frequently regulate activities by prescribing the means through which proponents should address impacts and risks. However, in the experience of proponents, the downside risk of this approach is that the possibility of more innovative solutions emerging is negated and the focus on achieving better outcomes is diminished.

4.4 Experiences with Commonwealth Government Involvement

4.4.1 Application of the EPBC Act

This section illustrates some practical concerns with the operation of the EPBC Act by drawing upon the Western Australian Government's experiences.

Western Australia

Despite the existence of bilateral agreements for assessment between the Commonwealth Government and Western Australia, these are rarely "triggered", leading to separate approvals under the EPBC Act and consequently delays for major projects. Requirements for bilateral agreements are highly prescriptive and prevent accreditation of some Western Australian environmental assessment. Western Australia believes that increased use of bilaterally accredited management arrangements or bilaterally accredited authorisation processes would result in better planning and environmental outcomes that promote sustainable development.

As the EPBC Act does not allow assessments of planning schemes or rezoning, Commonwealth assessment is likely to be later in the planning process of the development of urban land. This is occurring at subdivision or development approval stage after varying levels of State approvals have already been obtained.

The Government of Western Australia has also expressed concern that the Commonwealth's approach to offsets results in delays, uncertainty and higher development costs. Offsets have been required involving land that is already zoned urban, which has a much higher value than non-urban land. From an environmental perspective and given the cost of purchasing urban zoned land, better outcomes for nationally listed species may often be achieved through reservations on rural and non-urban zoned land. The recent example of the Fiona Stanley Hospital provides a relevant case study of the way in which the EPBC Act is being applied in practice, and illustrates the improvements required. The site of the hospital is located near the recently completed Perth to Mandurah railway line.

The offsets package that was required by the Commonwealth under the EPBC Act involved the conservation of five hectares of adjacent urban zoned land. The cost of this land is estimated at approximately $10 million. The offset area is prime residential land, directly adjacent to the railway line, and therefore ideal for the development of sustainable housing. To illustrate the impact of this policy on the overall level of habitat protection, it should be noted that $10 million could have instead been used to purchase 3,000 – 4,000 hectares of land on the western edge of the wheatbelt (in the new Norcia or Beverley area for example).

It should be noted that once decisions on land development through rezoning have been made, the responsibility for obtaining approvals under the EPBC Act falls to the proponent of individual projects rather than the State Government. Individual proponents have limited capacity to achieve strategic reservations for biodiversity conservation and (generally) no capacity to manage these areas into the future. This has the effect of involving the State Government on behalf of developers, both in terms of negotiating outcomes sought by the Commonwealth and the ongoing management of areas set aside.

Western Australia is also concerned at the lack of clarity and consistency of requirements to determine the need for referral, and in particular, what constitutes significant impact and critical habitat for threatened species, and the application of timelines to address controlled actions. The Western Australian Department for Planning and Infrastructure is aware of cases where proponents are reluctant to refer their projects as they are concerned at the time taken for a project to be approved if it is declared to be a controlled action. The process could be improved with EPBC Act compliance officers being dedicated to individual States so that timely and transparent referral processes are practised and the State agencies involved with the process are kept regularly updated on the outcomes of impact assessment procedures.

4.4.2 Native Title

This section examines Western Australia's experiences with the operation of the Native Title Act 1993 (Cth).

Section 24 MD(6B) specifies that native title holders and claimants have a right to object to the creation or variation of a right to mine for the purpose of constructing an infrastructure facility. This provision only empowers native title claimants and holders who lodge an objection to refer the matter to an independent body. This can make negotiations difficult. It is considered that provision should be made for any party to refer a matter to an independent person for hearing.

Section 64 JA covers reservations and leases yet legal advice obtained by the Government of Western Australia suggests that Aboriginal Lands Trust (ALT) reserves are not covered by section 64 JA. Land held by the ALT under the Aboriginal Affairs Planning Authority Act (WA) 1972 covers approximately 12 per cent of State land.

Section 24JB(2) relates to public works. Legal advice suggests that public works to deliver services to indigenous communities on ALT reserves risks extinguishing native title. This section could be amended to enable the non-extinguishment principle to apply.

These two sections affect WA's ability to comply with the COAG Partnership on Remote Indigenous Housing. More generally, it is noted that issues relating to whether native title exists, the identity of the native title holder adds to proponent uncertainty and frequently delays approvals. This is particularly material for state significant infrastructure projects.

The link between industry agreements and resolution of native title claims is worthy of further detailed consideration. Could these agreements be used to provide incentives for the resolution of native title claims? For example, a requirement could be introduced for benefits derived from industry agreements to be held in trust until the native title claim is resolved. Also, consideration could be given as to how the benefits are distributed following the resolution of the claim.

4.4.3 Aboriginal and Torres Strait Islander Heritage Protection Act (Cth)

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act) creates a power for the Commonwealth Minister (currently the Minister for the Environment, Heritage and the Arts) to respond to requests from indigenous Australians to protect traditional areas and objects from threats. The Minister cannot use the ATSIHP Act to protect an area or object except in response to an application. Any indigenous Australian can make an application. The processes for resolving applications can delay the commencement of projects.

The ATSIHP Act was introduced to encourage the States and Territories to use their laws in the interests of indigenous Australians and to improve their laws if necessary. It can be used to appeal to the Commonwealth when State and Territory planning approval decisions may threaten indigenous heritage. The ATSIHP Act is meant to be used as a last resort, when relevant State and Territory laws are absent or not effective.

As part of the independent review of the EPBC Act, the Commonwealth Government has called for comments on whether there are opportunities to harmonise the indigenous heritage protection legislation in the EPBC Act, the ATSIHP Act, and also the Protection of Movable Cultural Heritage Act 1986.

4.4.4 Access to Commonwealth and State and Territory Land

Concerns have been raised by some parties about the difficulties involved in securing access to Commonwealth Government land for major infrastructure purposes as no State or Territory can access Commonwealth land without Commonwealth Government approval. To illustrate using one example, a jurisdiction found it extremely difficult to secure access to land controlled by the Department of Defence for the purpose of running an essential electricity transmission line through the property. This section discusses jurisdictions' experiences with this issue.

South Australia

Negotiations with the Commonwealth Government to access the vast areas of South Australia owned and/or regulated by the Australian Commonwealth Government for defence purposes, such as the Woomera Prohibited Area, can be a major source of delay and uncertainty in the development of major infrastructure.

Major infrastructure traversing these defence areas is of national and State significance, including national AusLink rail and road corridors, major intrastate freight transport networks and energy, transport and telecommunications infrastructure supporting mines of State and/or national significance, such as Prominent Hill and Olympic Dam.

Parties, including the South Australian Government, seeking to develop major infrastructure or undertake energy and mineral exploration in these areas must seek Commonwealth Government approval. These negotiations are undertaken on a case by case basis and tend to be protracted and unpredictable.

To provide for higher levels of efficiency, greater certainty, and well-balanced outcomes for all parties, options for consideration include developing principles to guide land access negotiations. These principles might include that land access negotiations should be undertaken in good faith; be undertaken within reasonable timeframes; provide for upfront articulation of criteria that infrastructure proposals must meet to be compatible with Australian Commonwealth Government land uses.

Queensland – Aerospace and Defence Support Centre

The proposed Aerospace and Defence Support Centre (ADSC-A) is a 183 hectare master planned fully serviced industrial estate adjoining the RAAF Base Amberley (Airbase) specifically designed for the manufacture, maintenance, repair and overhaul of fixed and rotary wing aircraft and aircraft components associated with the Australian Defence Force as well as other defence and aerospace industry proponents.

The development site is jointly owned by Minister for Industrial Development of Queensland and the Commonwealth Department of Defence (COMDEF). It was always acknowledged from the outset that there would be significant security, operational and management issues that required consideration by COMDEF before it was in a position to endorse the proposal for the ADSC-A, however, the time taken has been longer than anticipated.

COMDEF signalled its endorsement "in principle" for the ADSC-A in 2003 and more recently in December 2006 and September 2007. At a meeting with COMDEF senior personnel, on 12 December 2008 in Canberra, verbal assurances were given to progress the sale of the Defence land to the State. Queensland finally received the endorsement of COMDEF for the land site required on 23 February 2009. Typically any land that is surplus to requirements of COMDEF can only be disposed through a public tender process. There have however been discussions with COMDEF on alternative purchase options to overcome this protracted process when dealing with priority matters between the State and Commonwealth.

Interacting with the COMDEF has involved numerous levels of personnel including the RAAF Amberley Base Commander, the Defence Regional Corporate Services at Enoggera, and Strategic Planning and Estate Development in Canberra. Dealing with the various elements of COMDEF together with changing personnel has lead to repetitive processes.

There still remain a number of other issues that need to be resolved and could potentially delay this project.

Options for Reform

5 Options for Reform

Chapter 4 analysed the various approval processes and identified potential deficiencies with regard to efficiency and predictability. Chapter 5 examines both Australian and international attempts to address these concerns.

5.1 International Experiences

This chapter examines recent experiences with major project approval processes in the United Kingdom, New Zealand, Canada and the European Union. Topically, the United Kingdom, New Zealand and Canadian processes have all undergone recent reform to address concerns over timeliness and predictability. However, with these international experiences too there is a significant lack of specific examples to substantiate claims made regarding the shortcomings of approvals processes.

5.1.1 The United Kingdom

Concerns over the efficiency, transparency and effectiveness of development assessment and planning systems are by no means confined to Australia. The United Kingdom's Review of Land Use Planning (2006) identified similar concerns and found that multiple, overlapping development consents were undermining the effectiveness of the system. The following particular concerns[67] were identified:

- stakeholder involvement was compromised by complex and lengthy consultations, favouring resource-rich organisations over community groups and the consultation process was often characterised by the adversarial nature of the inquiry system;
- planning decisions were considered (especially by business) to be taking too long and costing too much largely due to the need for multiple consents;
- project approvals were seen to be produced in an inconsistent and unreliable manner;
- planning policy was considered to have become unnecessarily complex and unwieldy involving multiple decision-makers, thus compromising predictability and visibility; and
- the lack of an overall strategic planning context to inform the development of infrastructure projects.

Table 5.1: United Kingdom Case Studies of Major Transport Decision Timings (months taken)

Scheme	Years	Application to inquiry	Length of inquiry	Close of inquiry to receipt of report	Receipt of report to decision	Total time
M6 Toll Road	1992-1997	28	16	17	4(+20*)	65(85)
Heathrow Terminal 5	1993-2001	27	46	21	11	86
London International Freight Exchange	1999-2002	13	7	6	15	41
Upgrade of West Coast main line	2000-2003	11	11	7	8	37
Dibden Bay Port	2000-2004	14	13	9	7	43
Camden Town tube rebuilding	2003-2005	11	5	5	6	27

* The additional time was the result of a legal challenge
Source: Barker Review of Land Use Planning (2006)

That review recommended introducing a new system for dealing with major infrastructure projects which involves the publication of national policy statements, streamlining the decision-making procedures and rationalising the different consent regimes.[68]

The United Kingdom Government responded in 2008 by legislating for the creation of the Infrastructure Planning Commission as the consent authority for major infrastructure projects within a strategic context set by national policy statements developed by the Government and subject to Parliamentary scrutiny. National policy statements are intended to provide strategic planning context by setting out the Government's objectives for the development of nationally significant infrastructure in a particular sector and even particular locations, and how it can be integrated with its other economic, environmental and social objectives to deliver sustainable development. Nationally significant infrastructure projects are determined in the statute by their size or can be designated by ministers.[69] In addition, multiple consent regimes have been rationalised into a single, unified application pathway.

5.1.2 New Zealand

The Resource Management Act 1991 (NZ)[70] (RMA) is the primary environmental planning legislation in New Zealand. The RMA requires the establishment of environmental standards for water, air emissions and land use on a catchment management basis. Six classes of development exist:

- permitted without consent;
- controlled requiring consent;
- restricted discretionary requiring consent;
- discretionary requiring consent;
- non-complying requiring consent; and
- prohibited.

The Minister for the Environment may call-in applications for resource consents where these relate to a proposal of national significance. Anyone can request the Minister to intervene in a matter of national significance.

Central to the RMA are two key principles about the community's involvement in decision-making: 1) that decisions on environmental matters are most appropriately made by the communities directly affected by those decisions, and (2) that community participation is vital to effective resource management. Overall, the guiding principle for stakeholder involvement is that of subsidiarity.

However, the RMA explicitly does not require that any person be consulted regarding a resource consent. The consent authority can decide whether to notify stakeholders of an application. The RMA defers to the extensive case law that determines the elements of good consultation. However, in practice, rights of appeal are very strong and can add significant amounts of times to an approvals process.

With regard to timeliness, the RMA provides consent authorities with an extendable time frame of 70 days to process notified resource applications and 20 days for non-notified applications. Applications can be considered by different authorities concurrently. A recent review by the New Zealand Ministry of the Environment of the RMA's performance in processing consents found that the system generated excessive complexity and inadequate tracking of consents.[71] Moreover, the rights afforded to objectors essentially can recommence the assessment process.

On 15 December 2008, the New Zealand Government established an RMA Technical Advisory Group to advise on streamlining and simplifying the RMA; reducing costs and delays; and providing priority consenting of priority projects with a view to introducing a reform bill by 26 February 2009. On 3 February 2009, the New Zealand Prime Minister described the RMA as

'...a handbrake on growth. It has led to uncertainty around developments and stalled projects, including those of national importance. We need to unlock that lost growth potential and untangle the red tape suffocating everyone from homeowners to businesses.'[72]

The Resource Management (Simplifying and Streamlining) Amendment Bill 2009, which is presently out for public comment, proposes to introduce the following relevant major reforms:

- removing the right of a trade competitor to object to an application if it is deemed to be motivated by competition;
- filing fees and punitive costs be increased to discourage vexatious objections;
- removing certain consultation phases and limiting objection and appeal rights;
- the Environment Protection Authority may designate any application of 'national significance' and refer it to a board of inquiry for investigation within nine months, unless extended by the Minister;
- establish an Environmental Protection Authority with regulatory functions and delegated approval powers whilst retaining the Ministry for the Environment with a policy role; and
- limiting regulators' 'stop the clock' provisions.

5.1.3 Canada

Canadian development assessment processes have also come in for criticism on several fronts.[73] First, the regulatory review and approval process is not regarded as collaborative but based on a quasi-judicial process which is highly formal and utilises adversarial proceedings dominated by technical discussion — all features not considered to be conducive to wide stakeholder engagement. Second, the requirements of the process are vague in parts and there is substantial scope for the exercise of discretion. Third, the multiplicity of different actors and consents involved add to cost and lengthiness. Fourth, whilst the information provided to aid consideration of proposals is thought to be adequate, it has attracted criticism because it is almost entirely provided by proponents rather than objective third parties. The final criticism concerns the lack of transparency generated by the absence of explicit criteria upon which decision-makers should base their decisions.

The Government of Canada has responded to concerns about timeliness and predictability by issuing its (2008) "Cabinet Directive on Implementing the Canadian Environmental Assessment Act"[74] which stipulates that approval authorities are to abide by the timelines set by the Federal Environmental Assessment Coordinator and requires the Environmental Assessment Agency to help facilitate coordination. The directive further requires that the Minister for the Environment's annual report to Parliament comment on the performance of the agencies with regard to this directive. The directive is supported by a Memorandum of Understanding between agencies clarifying the roles and undertakings of each with regard to their functions under the Act.

In addition, to support its infrastructure programme, the Government of Canada has recently gazetted provisions that, until March 2011, exempt infrastructure projects under the Building Canada plan costing less than C$10 million from federal environmental assessment and also empower the federal Minister for the Environment to permit substitution of a provincial assessment for a federal one.[75]

5.1.4 Europe

The EIA Directive (Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC) requires that projects likely to have significant effects on the environment by virtue of their nature, size or location are made subject to an assessment of their environmental effects. However, it remains open to member states to define the project categories that require assessment within the general guidance of categories identified in Annex 1 of the Directive. Questions concerning the efficiency of the environmental planning system and its role in national economic performance are currently the subject of some debate in Ireland.[76]

5.2 Nation Building and Jobs Plan Implementation Arrangements

This section discusses the arrangements that have or are currently being implemented as part the Nation Building and Jobs Plan. The Special Council of Australian Governments Meeting of 5 February 2009 required that, as part of arrangements for the Nation Building and Jobs Plan, that all jurisdictions appoint coordinators-general to oversee and coordinate implementation of the Plan. It should be noted that some jurisdictions already had established the role of a Coordinator-General, although their powers vary substantially between jurisdictions. This section discusses individual jurisdictions' regulatory responses to implement the Nation Building and Jobs Plan.

5.2.1 NSW

NSW has responded with special legislation (the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009) to fast track project approvals where normal assessment and approvals processes will pose a risk to timely project delivery. The NSW Government has appointed an Infrastructure Coordinator-General under the Act to chair a taskforce of key agencies, including the departments of the Premier, Treasury, Housing and Education.

5.2.2 Queensland

Queensland has appointed a State Coordinator to assist stakeholder departments to deliver programs of work in accordance with expenditure targets agreed between the Commonwealth and State Governments. The State Coordinator will also:

- provide a central point of contact for external stakeholders;
- coordinate the plan with the Capital Works Program to minimise overlap and maximise value for money outcomes;
- liaise with the Local Government Association and the Bulk Grants Authority to assist in delivering components of the Plan;
- ensure that allocation of work to the construction industry occurs in a coordinated way across Queensland to make best use of local resources;
- ensure allocation of work aligns with those areas of Queensland experiencing higher levels of unemployment as a result of the global economic crisis; and
- coordinate consolidated program reporting.

Recent Integrated Planning Act 1997 amendments to the planning scheme have allowed building work for the Commonwealth Government Nation Building and Jobs Plan – Building the Education Revolution (BER) funds to be specifically exempt from assessment by local governments under their planning schemes.

5.2.3 Western Australia

The Western Australia Government has established a State Coordination Group to oversight implementation of the Plan. The Group is chaired by its Coordinator-General and includes representatives of the Department of Premier and Cabinet, Treasury and Finance, Education and Training, Housing, Main Roads, and Energy.

The WA Planning Commission will delegate its approval functions for primary school development to Building Management and Works (BMW). BMW (acting on behalf of the Department of Education and Training) will continue to consult with local government prior to an application being lodged with local governments for comment, and once works commence. The Department of Planning and Infrastructure will assist BMW with the development of standard planning conditions to be imposed on any approval. BMW will be required to report to WAPC on its performance as a condition of the delegation arrangements.

With regard to housing, the Department of Housing is piloting measures to facilitate streamlined approval of single and group developments in areas subject to regional schemes (public housing works outside of scheme areas do not require Council or WAPC approval). Under these arrangements, the department completes a self assessment form which outlines the development proposal and level of compliance required under the local town planning scheme, R-Codes and related planning policies. This information is provided to the local authority with 7 days allowed for comment. Applications are then lodged with the Department of Planning and Infrastructure, which forwards applications to the Planning Commission for approval. This approach has resulted in development applications being assessed and approved within significantly shorter timeframes.

In the longer term, amendment to the Metropolitan Region Scheme is considered the optimal solution to provide certainty and overcome delays in agencies obtaining approvals for public works. The scope of such an amendment would need to be developed in consultation with local government, the Department of Planning and Infrastructure and affected agencies.

5.2.4 South Australia

Amendments have been made to the Development Regulations 2008 made under the Development Act 1993 (SA), to ensure timely delivery of the Nation Building Plan projects. The normal development approval process, requiring the input of several government and or local government agencies, has been removed for projects funded by the Nation Building Plan and will be managed by the Office of the Coordinator-General.

Any building development specifically approved by South Australia's Coordinator-General for the purposes of the Nation Building Plan will be exempt from the consultation and approval processes prescribed in the Development Act concerning requirements for planning rules consent. However, State heritage protections remain in force and exemptions will not be available for any project on the site of a State Heritage place. Requirements for building rules consent remain in place for all projects.

The following process will apply for applicants seeking the Coordinator-General's approval and thus exemption from the planning rules consent process. For all Nation Building Plan projects, the applicant should submit to the Office of the State Coordinator-General detailed plans of the project and a statement of compliance against checklist criteria. If all relevant details are provided and all criteria are met, the Coordinator-General will issue the required approval.

In circumstances where any of the checklist criteria are not satisfactorily met, officers from the Department of Planning and Local Government will be asked to advise the Coordinator-General on any issues or concerns with the proposal. The Coordinator-General will also work closely with the Local Government Association to ensure community projects put forward by local Councils can benefit from the fast-tracked approvals process.

These exceptions to South Australia's planning regulations will expire at the end of 2012, when they are no longer required to implement projects funded from the Nation Building Plan.

5.2.5 Australian Capital Territory

The ACT Government has established a Stimulus Package Taskforce to oversee implementation of the Plan. The Group is headed by the Coordinator-General and includes representatives from the Department of Housing and Community Services, Department of Education and Training, Department of Territory and Municipal Services, Department of Environment, Climate Change, Energy and Water, Department of Treasury, and the ACT Planning and Land Authority.

The ACT Government introduced planning reforms in March 2008 based on the Development Assessment Forum's leading practice model and helped streamline many of the cumbersome development assessment processes and exempt some forms of development from requiring development approval. These reforms will assist implementation of the stimulus package.

Whilst some changes have been necessary in order to facilitate the Nation Building and Jobs Plan, these have been delivered primarily through regulations to the Planning and Development Act 2007. For example, in order to deliver the education component, regulations have commenced that exempt specified works on school sites from requiring a DA and that limit public notification and exempt third party appeals on projects that do require a DA because they do not meet parameters for an exemption or that trigger consideration under the Heritage Act 2004.

5.2.6 Tasmania

Tasmania has established a governance structure to complement the national Coordinators-General oversight group. An Assistant Coordinator-General has been appointed on a full-time basis to support the State's Coordinator-General, and relevant agencies have nominated a Coordinating Officer for each of the programs being implemented under the Nation Building and Jobs Plan.

New planning legislation, the Nation Building and Jobs Plan Facilitation (Tasmania) Act 2009, has been established to fast track approvals for projects funded under the National Partnership Agreement on the Nation Building and Jobs Plan: Building Prosperity for the Future ('the NPA'). The Act may be used to exempt NPA projects from the State's existing land use planning legislation and provide an alternative, streamlined planning process. All other relevant permits and approvals (e.g., building, plumbing, heritage etc) required for works to commence, however, still apply.

Changes to the Treasurer's Instructions and Public Works Committee Act 1914 have also been introduced to help streamline procurement and parliamentary approval processes for infrastructure projects under the Nation Building and Jobs Plan.

5.3 Current State/Territory and Commonwealth Initiatives

The performance of environmental assessment and planning systems is widely acknowledged as integral to the delivery of infrastructure and economic performance more generally and therefore, as noted, many jurisdictions are undertaking or have recently completed reviews of their systems. These include Victoria, Western Australia, South Australia, Tasmania, and the Northern Territory. Each of these will be discussed in turn.

5.3.1 Victoria

A key finding of the Victoria Department of Transport study *East West Link Needs Assessment (2008)* was that many projects planned need to be accelerated or expanded resulting in the imperative for a new, comprehensive transport plan for Victoria. The Victorian Government accepted this recommendation, however, it also considered that the current requirements for a multitude of consents and approvals potentially compromises its ability to be responsive to current and future transport challenges and are in dire need of reform. In many respects, the Victorian Government has identified issues and potential options for reform at a State level that are very similar to the exercise undertaken in this report by the Infrastructure Working Group.

The example of the Echuca-Moama Bridge serves to illustrate concerns about the inconsistency of approvals. In 2001, the Assessment Panel approved the Western alignment option for a second bridge across the Murray River but the Aboriginal Cultural Heritage parties empowered under the legislation supported the Eastern alignment option, leaving the proponent (VicRoads) with no approved option with which it could proceed. In response to the risk of inconsistent approvals such as this, project proponents choose not to seek approvals concurrently but instead wait until key approvals have been obtained before seeking other necessary approvals. The effect of this 'coping mechanism' is to elongate the time period necessary to gain regulatory approvals.

In addition, the assessment and approvals processes remain separated so that, regardless of a project's assessment, there is no obligation to accept it for the purpose of making a determination. With regard to timeliness, some regulatory processes have prescribed timeframes in relation to some components yet other components are discretionary or unlimited. Finally, concerns were also identified in relation to the power of utilities to delay major infrastructure due to their necessary interest and involvement in the development of projects.

It is within this context that the Victorian Government is considering options for reform of the environmental assessment and planning system as it applies to major infrastructure projects.

Among the options considered for the Major Transport Projects Facilitation Bill 2009 is the establishment of a consolidated "one-stop shop" assessment and approval regime for major infrastructure projects. This regime would provide an alternative means to gain the multitude of necessary consents and approvals that are typically required by major transport projects before they are permitted to be undertaken (that is, planning, environmental and heritage approvals); and make available an array of project delivery powers to project proponents that can be utilised to gain rights in relation to land that may be required; or infrastructure that may be in need of modification or relocation in order to enable the undertaking of the major transport project.

Under this option, the Governor-in-Council (GIC) can declare an infrastructure proposal to be a 'major project'. Once so declared, the project can be assessed using a Comprehensive Impact Statement (CIS) under a single, integrated pathway so that approvals can be coordinated in the form of a single project consent with the Minister for Planning retaining approval powers. An alternative Impact Management Plan (IMP) is provided for when approvals do not require public consultation and for when land required for a major transport project has already been reserved.

This significant reform is further supported by strengthening project delivery powers with respect to (1) access to necessary land, including rezoning and (2) interfacing with utilities that are impacted and therefore have an interest in the project. These latter issues are imperative because land access issues can hinder project delivery substantially as illustrated by the South Australian experience at 4.5. Equally, utility companies have the power to impede major projects because they must consent to relocation and/or modification of their infrastructure. This power and the opportunity to use it can also substantially delay project delivery. A potential reform may include requiring utilities to engage with proposals at an early stage and to require their disclosure of relevant information to assist with minimising disruption to service delivery.

This could take the form of requiring parties to reach an agreement articulating their respective obligations regarding utility relocation or modifications and, in the event of not being able to reach an agreement within a prescribed time, a binding dispute resolution process could be activated rather than further delaying the project's delivery.

Other complementary reforms include providing two opportunities for public consultation and input with the trade-off that rights of appeal be limited to determinations, and limiting or removing merits review and/or judicial review of determinations.

5.3.2 Western Australia

The Government of Western Australia recently issued its consultation paper Building a Better Planning System (2009) in which it identifies process complexity, delays and lack of coordination as the major issues to be addressed. Key options for reform considered include instituting ministerial call-in powers for major projects and the development of a State Infrastructure Strategy in order to provide a strategic planning framework with which to contextualise project proposals.

5.3.3 South Australia

In June 2007 the South Australian Government initiated a review of the South Australian planning system. A final report was released in June 2008. The recommendations are being implemented through a three-year program and include:

- streamlining zoning and state significant development processes, and updating the building code to adopt increased sustainability measures;
- new Regional Plans for all areas of the State, including a new 30-year Plan for Greater Adelaide (to be released in mid-2009) which will build on major investment in public transport and transit oriented developments;
- five new Regional Plans for country SA, including Structure Plans to guide the long-term growth and development of large regional towns and cities;
- creating better government and governing arrangements to ensure delivery of all the initiatives in a coordinated way.

5.3.4 Tasmania

The Government of Tasmania conducted its review of the planning system in early 2009 and its key recommendations include implementing 'call-in' powers for major infrastructure projects; that 'called-in' projects be assessed by regional panels; and consideration of fixed timelines.

5.3.5 The Northern Territory

The Northern Territory Government has tasked its Environmental Protection Authority (EPA) with undertaking a review of the environmental impact assessment procedures for major development proposals. The final recommendations are to include a comparative analysis of processes in other jurisdictions and countries to identify best practice processes for environmental impact assessment. The EPA is preparing a discussion paper for release during 2009. [77]

5.3.6 Australian Capital Territory

The current planning system came into effect on 31 March 2008. Under these reforms, the ACT's planning legislation, development approval processes as well as the structure of the Territory Plan changed to reflect the Development Assessment Forum's leading practice model (discussed in section 2.2).

The ACT Government, through the ACT Planning and Land Authority, has now commenced a policy review of the Territory Plan to further streamline the planning system. This review will examine all parts of the Territory Plan to identify policies that may need amending and any new provisions that need to be added to ensure the plan is a contemporary planning document. Initial outcomes of the review will be revised single dwelling and multi-unit housing development codes, a revised and enhance subdivision code and revisions to the Access and Mobility General Code and the Community and Recreation Facilities Location Guidelines General Code.

5.3.7 Queensland

As part of delivering a contemporary planning and development system the Queensland Government is currently undertaking a reform of the State's planning and development system. The reform agenda has been established under the Planning for a Prosperous Queensland: A reform agenda for planning and development in the Smart State implementation agenda (August 2007).

A critical component of these reforms is the introduction of new planning legislation which is anticipated to be operation in late 2009. The aim of the reform is to move the focus from the planning process to the delivery of sustainable outcomes.

5.3.8 New South Wales

NSW completed a review of assessment processes in 2004-2005. This review led to implementation of the new Part 3A assessment process for major development (including major infrastructure) projects. Since this major legislative reform, NSW has continued with ongoing administrative improvements to the operation of major infrastructure project approvals including the recent introduction of a case management program.

5.3.9 Commonwealth Government

Below is a summary of the rationale for the range of reform options recommended in Chapter 6. It is considered that the consent authority for major infrastructure projects should be a State/Territory Minister or an official public servant reporting directly to that Minister as:

- the evidence shows that political support and strategic direction are important factors in the successful delivery of an infrastructure project and engaging the Minister would provide a means of securing these;
- there are political consequences to major infrastructure project decisions and it would be in the interests of transparency and equity to retain accountability as well as responsibility with the Minister; and
- intergovernmental issues are likely to be present that are best considered, coordinated and addressed at the highest levels of government.

5.4 Potential Commonwealth/ State Models of Reform

This section considers six different options for reform to the development assessment and approval processes that apply to major infrastructure projects, namely; the status quo, guidelines, model law, referral of powers to the Commonwealth Government, and Commonwealth legislation.

5.4.1 Status Quo

This option is the base case of retaining the current set of individual jurisdictional development assessment and approval processes, and the attendant shortcomings identified in this report.

5.4.2 Guidelines

This option would require the agreement of jurisdictions to adhere to national guidelines for the assessment and approval of major projects. The interests of transparency would be better served if any divergence from the guidelines were to require explanation.

The use of agreed national guidelines is common in the delivery of many health care services, such as clinical practices, and other services of a technical or safety-related nature. The National Health and Medical Research Council has been active in developing a range of health care guidelines. Examples include the Australian Drinking Water Guidelines (2004) and the Dietary Guidelines for Older Australians (2003).

The Environment Protection and Heritage Council, the Natural Resources Management Ministerial Council and the National Health and Medical Research Council have developed the four Australian Guidelines for Recycled Water Modules agreed by the Australian Commonwealth and State and Territory Governments to form the comprehensive national framework for water recycling, which ensure the application of minimum safety standards.[78]

The strength of this model is its ability to deliver enhanced national consistency in policy areas that are historically delivered at a State/Territory level. Approval processes for major infrastructure projects is one such area.

5.4.3 Intergovernmental Funding Agreement

This option consists of attaching funding to a set of agreed reforms that require implementation. Precedents for such an option include the National Competition Policy Payments under the intergovernmental National Competition Policy agreements of April 1995 and the current National Partnership Payments.

Under the Implementation Agreement, the Commonwealth Government undertook to make ongoing National Competition Policy payments (NCP-payments) to each State and Territory over the period 1997-98 to 2005-06, subject to that State or Territory making satisfactory progress against related agreed reform obligations. There were two components to the NCP payments: a guarantee to maintain the real per capital value of the Financial Assistance Grants (FAG) pool to each State and Territory and an indexed competition payment.

A central element of the new framework introduced by the Commonwealth Government in 2008-09 is the provision of new incentive payments to drive reforms, known as National Partnership reward payments. National Partnership reward payments will be provided to the States which deliver reform progress. These reward payments will be structured in a way that encourages the achievement of ambitious performance benchmarks. The achievement of these benchmarks will be assessed by the independent COAG Reform Council, in order to provide transparency and enhance accountability in the performance assessment process, and supported by the COAG Reform Fund to channel National Partnership reform payments to the States.

The strength of the model is that it can clearly identify the projects in question and provides a nation-building context to these projects, particularly when combined with model guidelines.

5.4.4 Model Law

This option would require jurisdictions to legislate a model law for the common assessment and approval of major projects. Precedents for considering this option include rail safety legislation and occupational health and safety legislation.

In response to the fact that there are seven rail safety regulators throughout the country and six different rail safety acts[79], the Australian Transport Council endorsed a national model law for rail safety provisions to facilitate national consistency in each State and Territory. The model provisions may be varied where necessary to conform to local legal policy requirements and legislative drafting practice. Also, maximum penalty levels for offences are not specified in the model bill due to the need for penalty levels to be consistent with each State's and Territory's monetary penalty policy.

On 4 April 2008, the Australian Commonwealth Government announced a national review of each jurisdictions' occupational health and safety laws with a view to developing a Model Law that is capable of being adopted in each jurisdiction. The Model Law is scheduled for agreement by the Commonwealth, States and Territories in September 2009. In conducting the review, the terms of reference require the panel to pay particular attention to identifying areas of best practice, commonality and inconsistency between jurisdictions.[80]

The strength of this model is that it would provide the highest level of clarity of processes whilst retaining responsibility at the State/Territory level. The disadvantage is that it would require substantial amounts of time to achieve and may be a substantially more complex solution than required.

5.4.5 Referral of Powers

The jurisdictions could refer their powers over the assessment and approval processes for major infrastructure projects to the Commonwealth Government so that a uniform national process could be applied. Precedents for such an option include the referral of jurisdictions' corporate regulation powers resulting in the Corporations Act 2001 (Cth).

In 1989 the Commonwealth passed legislation to establish a national scheme of companies and securities regulation based upon the corporations power of the Constitution (s 51(xx)). However, the High Court struck this legislation down in New South Wales v The Commonwealth (1990) (the incorporations case) by finding that s 51(xx) only relates to 'formed corporations' and that as a consequence it was constitutionally invalid for the Commonwealth to rely on the section to legislate in respect of the incorporation of companies. Under the 1997 Corporations Agreement, the Commonwealth revised the cooperative scheme in the Corporations Act 1989 (Cth) and each State and the Northern Territory also had a uniform Corporations Act which applies the national Corporations law in each of those jurisdictions.

However, in the case of The Queen v Hughes (2000), the High Court made clear the principle that in enacting legislation accepting the conferral of powers by State law on a Commonwealth Officer or agency, the Commonwealth law must be supported by an appropriate head of power.[81] The Commonwealth Government responded with its preferred option; namely, the referral of powers from the States under s 51 (xxxvii). Under this section, States can refer matters to the Commonwealth Parliament and the Commonwealth Parliament may pass laws about them. It is not necessary for all States to refer a matter to the Commonwealth. If only some States make a reference, the Commonwealth law can apply in those States. Once the law is passed, it may be 'adopted' by the Parliaments of other States and so come into effect there as well.

The Commonwealth identified several advantages to this option, namely that it could be achieved quickly; would provide certainty and restore confidence; would avoid the complexity of previous schemes; would enable the continued involvement of the States under a new Corporations Agreement; and would enable all the corporate law jurisdiction of the Federal Court to be restored.

In 2001, the States passed referral legislation enabling the Commonwealth's enactment of the Corporations Act 2001 (Cth). The referrals last for five years but may be terminated earlier or extended by proclamation. The Territories are included through virtue of the Commonwealth Parliament's constitutional power to legislate for those jurisdictions under s 122.

It is considered that land use planning and assessment processes are traditional powers of the States and Territories because these responsibilities are best located at the level in the interests of efficiency. Consequently, there are no major efficiency dividends to be achieved by relocating these to the Commonwealth Government level.

5.4.6 Australian Commonwealth Government Legislation

This option would involve the Commonwealth Parliament introducing legislation for the assessment and approval of major projects, without the need for referrals. However, unless the Federal Court were to assume complete responsibility for hearing these matters, there may be potential concerns with the issue of cross-vesting, that is, the jurisdiction of State courts to enforce a Commonwealth law that will require address.[82]

Similarly, it is considered that land use planning and assessment processes are traditional powers of the States and Territories because these responsibilities are best located there in the interests of efficiency and, consequently, there are no major efficiency dividends to be achieved by relocating these to the Commonwealth Government level.

Conclusion

Chapter 5 reviewed both Australian and international attempts to address potential deficiencies with regard to efficiency and predictability of approval processes. It finds that reforms have commonly sought to enhance coordination and integration through specially charged coordination roles and greater integration of approval processes. Chapter 6 will respond to the findings identified in this review with a set of recommendations.

Findings and Recommendations

6 Findings and Recommendations

6.1 Findings of the Review

1 All State and Territories are already working to improve their assessment and approval processes; however, they could benefit from further strengthening and streamlining.

2 The institutionalisation of specialist government functions has led to organisations often at odds with each other, and focussed on process rather than a whole-of-government outcome delivery.

3 Current approval processes for major infrastructure projects throughout Australia are characterised by fragmented processes that contain disparate approvals and need to continue progressing toward an integrated approach to environmental and planning approvals assessment.

4 These features combine to reduce timeliness and add to financial costs. Timeframes for major project approvals are generally found to take over two years. Whilst not widely regarded as excessively protracted, it is nevertheless considered that there is scope for improvement.

5 Current processes involve multiple layers of approval and decision-making that operate both between levels of government and within levels of government.

6 An associated difficulty with current arrangements is that much of the focus of existing processes is at the project level. Whilst some States and Territories have directed significant effort to regional and corridor planning, more attention is required to developing State and Territory wide, and national, strategic planning frameworks which should inform and provide context to the development and assessment of nationally significant infrastructure projects.

As a first step in improving these arrangements, COAG has established a Taskforce to examine existing strategic planning frameworks within jurisdictions to ensure they support the ongoing integration of state and national infrastructure in major metropolitan cities with land-use planning and urban development.

6.2 Recommendations

Preamble

Strategically, the proposed approach provides better management of processes within existing frameworks by integrating multiple layers of decision-making and disparate approvals into a consolidated process at the State/Territory level. Consequently, the recommendations seek to:

1 strengthen State/Territory processes by advocating a consolidated process and project approval framework; and

2 reduce multiple layers of environmental and planning approvals by integrating agreed local government and Commonwealth assessment and approval functions (primarily *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* approvals).

Recommendations

Recommendations for the COAG Infrastructure Working Group are:

Project issues

1 Funding agreements between the Australian Government and State and Territory Governments of designated infrastructure projects require that projects be assessed and determined through an integrated process that consolidates land use zoning, development assessment and environmental assessment, and any other assessment approvals in the one project approval document. This consolidated process would also provide target time periods for completion of each of its discrete stages.

2 For the purposes of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, the Commonwealth and State and Territory Governments agree to work collaboratively to develop national standards (including common listings of rare and endangered species and heritage) that apply to the planning, development and determination of designated infrastructure projects.

3 The Australian Government and State and Territory Governments conclude strategic assessments, and approvals and assessments bilateral agreements under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* to ensure that State and Territory approval processes and assessments are accredited for the purposes of the Act so as to minimise duplication between levels of government, as agreed by the National Partnership Agreement to Deliver a Seamless National Economy.

Strategic issues

4 The Australian Government and State and Territory Government incorporate strategic assessments under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* into the process for regional planning, and that the strategic approvals resulting from those assessments obviate the need for any further approvals under the Act for developments within those regions.

5 That the scope of the COAG Taskforce established to examine existing strategic planning frameworks in major metropolitan cities be extended to include strategic planning at State and Territory-wide and national levels.

Whole-of-government issues

6.1 State and Territory Governments consider establishing a function within their jurisdiction to coordinate nationally significant infrastructure projects, either by way of a designated role or the designation of such a function to an existing role, to coordinate the development of strategic infrastructure across the jurisdiction.

6.2 Similarly, the Australian Government's Infrastructure Coordinator be designated to coordinate Commonwealth input into nationally significant infrastructure projects.

Implementation issues

7 All jurisdictions report publicly on the progress of assessments for designated infrastructure projects.

8 The Australian Government and State and Territory Governments report annually to the COAG Reform Council on progress with:

- 8.1 the implementation of the recommendations from this review; and
- 8.2 the assessment of applications for designated infrastructure projects.

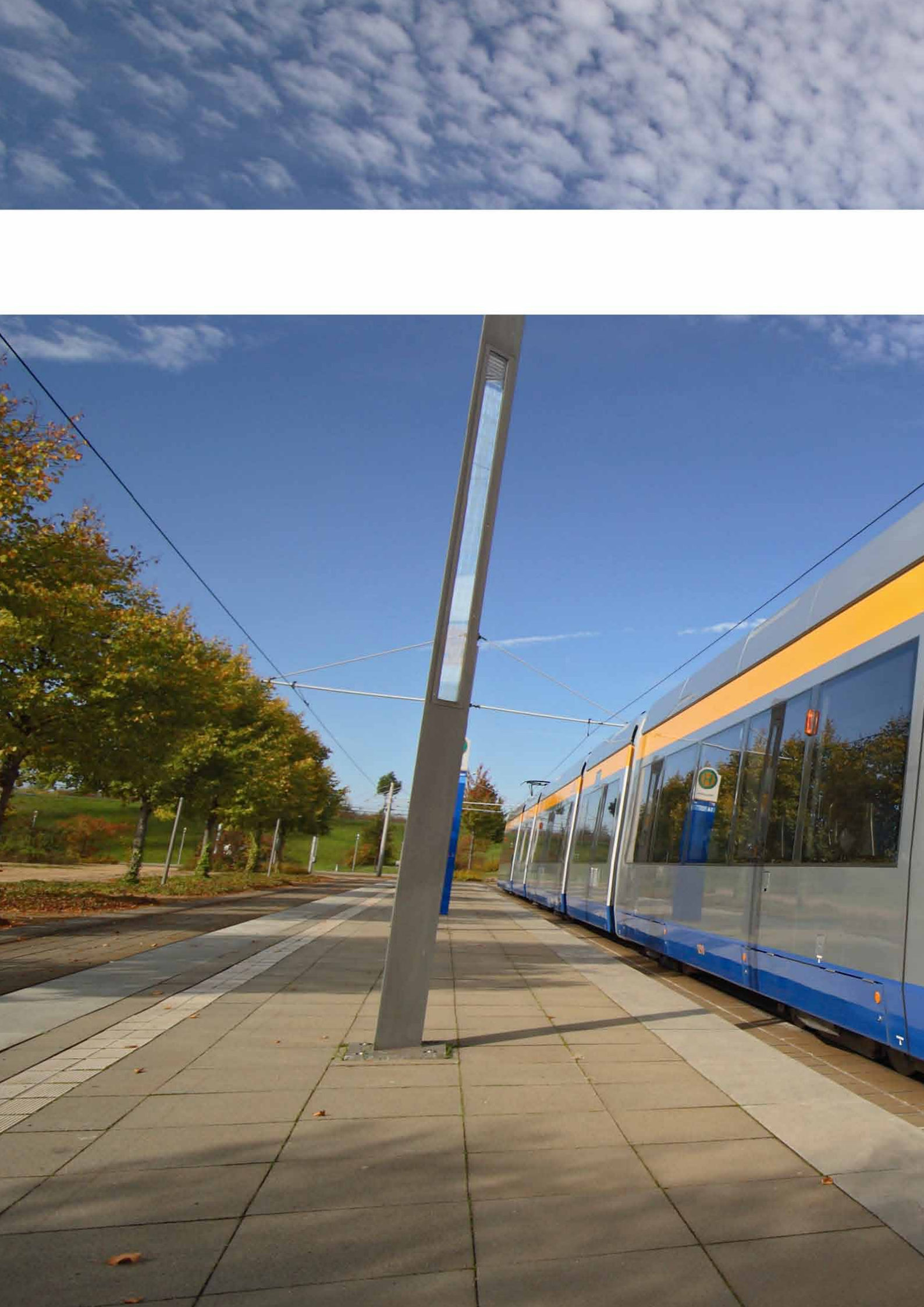
9 The COAG Reform Council report in three years on progress with:

- 9.1 the implementation of recommendations from this review; and
- 9.2 the assessment of major infrastructure projects in that time.

10 The Infrastructure Working Group develop an implementation plan for this programme of reforms based on the principles endorsed by COAG.

11 The Infrastructure Working Group report in three years on:

- 11.1 the effectiveness of recommendations from this review; and
- 11.2 the need for further reform



Appendices

Appendix A

COAG Review of Major Infrastructure Approvals Processes

COAG Infrastructure Working Group – Major Infrastructure Approvals Sub-Group

Scope and Programme for a Review of Approval Processes for Major Infrastructure 19 November 2008

Summary

This document and the attached program provide for the Major Infrastructure Approvals Sub Group of the COAG Infrastructure Working Group (IWG) to manage a review of major infrastructure approval processes for the IWG's consideration and endorsement, prior to a report being submitted for consideration by COAG. Infrastructure Australia, on behalf of the Sub Group, will engage a consultant and legal advice to assist in this task. The program provides the Infrastructure Working Group time to report to the March 2009 COAG meeting. The program also provides for the project to be staged. This allows the Sub Group to reinforce the project's focus on major (principally nationally significant) infrastructure, whilst refining that focus as information and conclusions are drawn from initial stages of the project.

Background

Various inquiries, e.g. the recent Mortimer Review of Exports Policies and Programmes, have suggested that planning and regulatory processes for nationally significant infrastructure are limiting Australia's productive capacity. Similarly, some submissions to Infrastructure Australia have highlighted concerns around planning and approval processes for major infrastructure projects. Approval processes for major infrastructure are considered complex, sometimes resulting in significant delays, as well as imposing unreasonable costs and risks to project delivery. Inefficiencies and uncertainty can arise at several points in the development process, ranging from requirements to satisfy complex and numerous conditions during initial application, to lengthy assessment and approvals processes, and, finally, through appeals processes.

However, the submissions do not provide sufficient detail or evidence on the nature or extent of the problems or their likely causes. Equally, it is unclear whether any problems are systemic and common-place, or peculiar to particular projects. The review needs to address these information gaps and provide the evidence-base for any recommendations to COAG.

Agreement was reached at previous meetings of the IWG on the need to assess planning and environmental processes associated with major infrastructure. A sub-group of the IWG was established to progress this work. An initial report to the October 2008 IWG meeting identified a range of conclusions and issues relevant to the review, including:

- The desirability of improving the alignment of strategic planning and infrastructure planning
- Most States and Territories have some process for dealing with projects of 'major significance', though the details of those processes vary somewhat
- A view from some States and Territories that existing processes provide a reasonable means of facilitating major development
- The need for improved processes associated with environmental assessment, notably the co-ordination of State environmental impact assessment processes with those under the Commonwealth Environmental Protection and Biodiversity Conservation Act.
- Issues in gaining access to Commonwealth land, notably that held by the Department of Defence

Whilst it was apparent that there was some need for collaborative work in this area, the scope of the review and the need to avoid duplication with other review processes were highlighted as issues requiring closer attention.

Scope of the Review

The comments from various reviews and submissions, and the initial report to the IWG, confirm there is scope to further streamline and improve the efficiency and consistency of approval processes for major national infrastructure, and arguments for federal involvement to assist in improving these processes. Governments from all jurisdictions are looking to implement major, nation building infrastructure programs. Focussed and efficient approval processes are necessary to ensure these programs can begin to stimulate the national economy as quickly as possible, whilst meeting other national objectives.

The objective of this review is to prepare a paper for the IWG's setting out options for achieving greater uniformity and efficiency in planning, environmental and other approval processes for major national infrastructure, consistent with the IWG's objectives of identifying blockages to productive investment. Subject to the IWG's views, the paper and associated recommendations will be forwarded to COAG for consideration. Options will be aimed at reducing time, cost and complexity in approvals processes, providing greater transparency and certainty for major infrastructure providers and achieving efficiencies in government processes.

The review will assess impediments to investment arising from approvals processes and identify opportunities to:

- reduce duplication, complexity and timeframes for approvals arising where more than one jurisdiction is involved in approvals for a project;
- achieve greater consistency between jurisdictions in approvals processes;
- simplify, streamline or otherwise improve processes within and between jurisdictions.

The report to the October 2008 IWG meeting highlighted the need to focus any review of approval processes on those that bear on infrastructure that is judged to be of national significance. For the moment, it is proposed that the Sub-Group's work will be limited in focus to major infrastructure in the following areas:

- **Transport** – intra and interstate highways, key urban and regional road corridors, passenger and rail freight networks, key bulk and container ports;
- **Energy** – electricity generation facilities, electricity and gas transmission and distribution networks, gas production, treatment and storage facilities;
- **Water** – water capture, storage and treatment facilities, water distribution networks, wastewater treatment facilities;
- **Communications** – fixed line telephone and broadband, mobile and wireless networks.

Comments in the schedules of existing State provisions in the papers for the October 2008 IWG meeting, and in the associated list of 'systemic issues', suggested some concern that a review may reach into areas that State and territory governments felt were either:

- beyond the scope of this present review (eg approval processes for major private developments such as commercial/retail development), or
- potentially covered through other reviews, eg reviews under the Business Reform and Competition Working Group of COAG into broader processes of development control affecting private development.

Limiting the review to major (principally nationally significant) infrastructure achieves two ends. Firstly, it minimises the risk of overlap with other review processes. Secondly, the focus on national infrastructure minimises the risk of the review being required to address matters that may delay the review.

To build up the 'evidence base', it is intended to interview some major infrastructure owners and providers about their experiences. It is expected these will provide case studies of what is thought to 'work' and 'not work'. Current infrastructure approval processes will be mapped to understand where the cost and time delays occur and why. The process mapping will draw upon information from the interviews with infrastructure owners/providers, as well as other sources of information.

Potential reforms of national infrastructure approval processes will need to embrace all elements of those processes, including:

- planning and development approvals;
- environmental approvals (e.g. licences for operational noise levels);
- heritage;
- native title; and
- land acquisition/access to land (e.g. to undertake necessary investigations).

The review will address these processes. The review will not address commercial regulatory approvals, e.g. access determinations, although it will be mindful of those processes, for example if they affect the other processes covered by this review.

The review will also address models for community engagement during planning and approval processes, including assessing the potential to streamline multiple consultation processes. Different engagement models, including those at the earliest stages of project development, may provide an effective means of addressing community concerns around particular projects and minimising project risks.

Interface with Other Review Processes

The review will seek to build on and complement (rather than duplicate) related work in progress by various jurisdictions, including that of the COAG Business Regulation and Competition Working Group (BRCWG), the Local Government and Planning Ministers' Council (LGPMC), and, in particular, the recently announced review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC) Act by a panel led by Dr Allan Hawke. The Sub-Group has noted that the panel is due to report to the Australian Minister for the Environment, Heritage and Arts by 31 October 2009. The Sub-Group anticipates there will formal and informal liaison between the team reviewing the EPBC Act and this review of major infrastructure approval processes.

The paper arising from this review will focus on identifying systemic issues or impediments relevant to major infrastructure approval processes only, and options for moving forward, which are not being addressed elsewhere. These reforms may include:

- Administrative improvements (i.e. guidelines, directions, definitions) to ensure earlier satisfaction of agreed conditions by relevant agencies;
- Legislative changes;
- Processes and relationships required to administer legislation; and
- Potential bilateral and/or multi-lateral agreements.

Arguably, the processes for general development assessment cannot be completely divorced from those that might be put in place for major infrastructure. For example, the planning approval processes may exist under common legislation (as it already does in some jurisdictions). That said, it should be possible to keep the current review targeted on infrastructure projects of major (national) significance. The processes that may be established (or confirmed) from this review may also be applied to other infrastructure of State/Territory significance, though that would be a decision for the relevant jurisdiction.

Project Governance, Resourcing and Programme

The Major Infrastructure Approvals Sub-Group will guide and oversee the review. At a day to day level, Infrastructure Australia will manage the process and engage a legal adviser and consultant to assist in undertaking the review. A consultant is required to provide dedicated resources to complete the review. Legal advice will be required, both to assist in understanding the range of existing processes, and, subject to the Sub-Group's guidance, to assist in developing and evaluating options for reform. In turn, Infrastructure Australia would seek commitment by the States/Territories to ensure that the consultant/legal adviser has adequate access to staff as required for input into the review.

The attached program outlines the proposed scope, budget and timetable to undertake this work. The Sub-Group would meet or convene via teleconference at various points through the review progress. The program provides for the project to be staged, thus allowing the Sub Group to reinforce the project's focus on major, nationally significant infrastructure, whilst refining that focus as information and conclusions are drawn from initial stages of the project. If appropriate, these meetings may act as 'hold points' during the review, i.e. to ensure that further work does not proceed until the Sub-Group has considered progress and endorsed further steps.

The program provides for a draft report to be considered by the full IWG in late January 2009 and again in mid-February 2009. These meetings are timed to provide all jurisdictions with an opportunity for internal review of the draft report to COAG. Whilst the precise date for the March 2009 COAG meeting is unknown at this time, the proposed program is aimed at providing the IWG with time to report to the March 2009 COAG meeting.

Appendix B

Jurisdictional Major Infrastructure Approval Process Summaries

The following sections provide a condensed summary of the assessment and approval processes for each of the jurisdictions. These summaries focus on the assessment and approval processes which are most commonly employed to assess and approve such projects.

The processes described below reflect the systems which were in place as at February 2009 (and March 2009 for QLD and NSW). Many of the jurisdictions are currently undertaking their own reviews of the environmental and planning assessment and approval processes (in part or of the full process) (namely NT, SA, Tasmania, Victoria and WA). A summary of what is involved in each review is provided in each of the relevant summary sections.

B.1 Australian Capital Territory

The processes for assessing major infrastructure projects in the Australian Capital Territory (ACT) is administrated and regulated by either the ACT Government or the Commonwealth Government, or, in some instances, a combination of the two governments (if the project overlaps jurisdictions).

ACT Government

The ACT Government, through the ACT Planning and Land Authority (ACTPLA), administers the ACT Planning and Development Act 2007. Under this new piece of legislation (brought into force in March 2008), there are two key processes ('tracks') which can be employed for project assessment. These include impact track assessment and merit track assessment.

Major infrastructure projects are only assessed under the impact track assessment process if the proposal triggers Schedule 4 of the Planning and Development Act 2007 or is listed in the relevant Territory Plan development table for the zone as impact assessable. Within the impact track process, there exist two sub-processes: the Environmental Impact Statement (EIS) process and the Development Application (DA) process.

Under the impact track assessment process, a scoped EIS must be undertaken and completed prior to a proponent being able to lodge a DA for determination by the ACTPLA. An impact track DA must not be approved unless an EIS has been completed, or this requirement has been exempted by the Minister. The scope of the EIS is determined by ACTPLA in accordance with requirements set out in the Planning and Development Regulation 2007. Following a public consultation period and any required update of the EIS by the proponent, ACTPLA, assesses the EIS and gives it to the Planning Minister and, if relevant, the Minister administering the Public Health Act, for determination whether to establish a panel of inquiry.

If the relevant Minister does not determine to establish a panel of inquiry within 15 working days of receiving the EIS, or advises ACTPLA that no further action is required, then the EIS is complete. The completed EIS is then used as supporting documentation to the DA.

Once the DA is lodged, it is publicly notified and then assessed and determined by the ACTPLA. For certain projects, the Minister for Planning may 'call in' the DA in order to determine the application. The Minister is able to 'call in' projects which in the Minister's opinion:

- raise a major policy issue;
- seek approval for a development that may have a substantial effect on the achievement or development of the object of the Territory Plan as set out in the Statement of Strategic Directions and objectives for each zone to which the application relates; and
- the approval or refusal of the application would provide a substantial public benefit. Appeal rights exist for proponents and third parties only if the Minister has not 'called-in' the DA.

Commonwealth Government

The Commonwealth Government, through the National Capital Authority (NCA), administers the Australian Capital Territory (Planning and Land Management) Act 1988. Under this legislation, there is one key process which can be employed to assess major infrastructure projects: the Commonwealth works approval process. This process applies to designated lands[83] as identified in the National Capital Plan. The NCA considers the formal application and, once it is satisfied that all relevant matters have been resolved and the proposal is in accordance with the National Capital Plan, issues a formal works approval.

It is noted that in certain circumstances, if both jurisdictions are affected, project assessment may be required from both the ACT and Commonwealth Governments. The relationship between the NCA and the ACTPLA has caused duplication of processes in the past hence, in July 2008, recommendations[84] to resolve planning duplication included the Commonwealth to consider amendments to the Australian Capital Territory (Planning and Land Management) Act to permit the NCA and ACTPLA to negotiate a memorandum of understanding to delegate the planning jurisdiction for Territory Land which has designated status.

B.2 New South Wales

The main piece of legislation governing the development assessment and approval process in New South Wales (NSW) is the Environmental Planning and Assessment Act 1979 (EP&A Act). This legislation integrates the planning and environmental assessment processes into one system with one consent authority.

Under the EP&A Act, developments are able to be considered under three different parts of the Act: Part 3A, Part 4 or Part 5. Major infrastructure projects would most commonly be assessed under the Part 3A process, hence Parts 4 and 5 are not discussed further. Proposals are considered under Part 3A if it is a class of development detailed within the State Environmental Planning Policy (SEPP) (Major Projects) 2005, or if it has been declared and gazetted by the Minister for Planning to be a Part 3A project. The Minister's powers to declare projects are broad: a project can be declared if in the Minister's opinion, it is of state or regional environmental planning significance. The Minister for Planning is the consent authority for the majority of applications under Part 3A.

Part 3A was introduced in August 2005 with the purpose of streamlining the approval process for 'major projects' in NSW. Within the Part 3A process, a development proposal can be assessed as a 'concept plan' or at a 'project level'. Project level approvals respond to the Minister assessing an application for approval to carry out a project under Part 3A of the Act, where the full detail of the project is assessed. A 'Concept Plan' application permits a proponent to submit the basic scope and assessment of a project upfront, and for a bankable, in-principle agreement to be granted ahead of detailed design and assessment.

It is important to note that a Concept Plan must still demonstrate that a proposal can be undertaken within acceptable environmental and public health and amenity standards, but provides an opportunity for a proponent to provide details of the project and its impacts through a subsequent project approval process (as distinct from the initial concept approval process).

A Concept Plan is particularly useful in the case of large or complicated proposals, or where the details of a proposal may be subject to further consideration in future, for example in technology selection or tender processes where innovation may be required. In granting approval to a Concept Plan, the Minister for Planning may concurrently grant project approval for all or part of the proposal, and may specify the planning process and assessment requirements for subsequent project approval phases if deemed necessary.

The Minister may also declare a development to be of 'critical infrastructure' status under Part 3A of the EP&A Act where a major project is considered "essential to the State for economic, social or environmental reasons'. This declaration provides certainty in the delivery of the project, ensuring the 'timely and efficient delivery of essential infrastructure projects'. The environmental assessment process for critical infrastructure projects is the same as for any other major project; however, there is an exclusion of proponent or objector appeals in respect of the determination of an application for approval of the project and exclusion of third-party appeals against the project under this Act or other environment protection legislation.

The Part 3A process requires that an Environmental Assessment (EA) report is prepared by the proponent for the project. The EP&A Act does not prescribe the process for, or the required contents of the EA; however it does require that the Director-General of the Department of Planning prepare Director General Requirements (DGRs) which the EA must address. The DGRs are prepared following the project application being lodged.

The Part 3A process removes the requirements on the proponent to obtain certain approvals under other legislation which may be otherwise required. Under the EP&A Act the proponent is still required to obtain a selection of approvals prior to project approval being granted by the Minister of Planning. However, the granting of these approvals is not able to be refused and the approval terms must be substantially consistent with the Part 3A approval terms.

There are limited rights of appeals within the Part 3A process. These appeal rights exist if there has been determination at the 'project level' (applicable for both the proponent and third parties) or at the 'concept plan' level (applicable to the proponent only), not if the project was a 'critical infrastructure' project as discussed above.

B.3 Northern Territory

The Environmental Assessment Act 1982 (the EA Act), the Environmental Assessment Administrative Procedures 1984 (Administrative Procedures), the Planning Act and the Planning Regulations are the primary pieces of legislation governing the development approval and environmental assessment processes in the Northern Territory (NT).

Importantly, other than for the clearing of native vegetation and for subdivision of land the Northern Territory Planning Scheme applies only to zoned land. Less than one per cent of the Territory is zoned, primarily the urban centres. Major infrastructure projects on unzoned land fall outside the operation of the Planning Act and Scheme unless clearing and or subdivision is proposed. The Planning Scheme does not require development approval for roads of any description.

Projects which have the potential to significantly affect the environment will also need to progress through the environmental assessment process under the EA Act. The Minister for Natural Resources, Environment, and Heritage is the determining authority as to whether a proposed project will have a significant effect. For projects that require approval under the Planning Act this, is generally established early in the development assessment process, prior to the development application being lodged. If a project needs to progress through the environmental assessment process, the development assessment process stops and will not recommence until the environmental assessment process has reached completion. This is a consequence of the fact that the completed environmental assessment documentation is required as supporting information in the development application stage of the development assessment process.

This documentation is required to be taken into account by the consent authority when it is determining whether to grant development consent to the project.

Under the EA Act, there are two levels of environmental assessment which can be undertaken, a Public Environmental Report (PER) or an Environmental Impact Statement (EIS). The requirements for either a PER or EIS is dependent on the sensitivity of the local environment, the scale of the project and the likely impacts associated with the development. The more demanding EIS level is required for projects likely to have the greater impact. The environmental assessment would assist in determining the other permits, approvals and licences which would need to be sought under other legislation and gained before the overall development consent to the project is granted.

The consent authority for the development assessment process is either a Development Consent Authority (DCA) or the Minister for Planning and Infrastructure. The Minister has the power to 'call in' a project, for which the DCA is the normal consent authority at any time before it is determined by the DCA. There are no guidelines restricting the types of projects which this Minister can 'call in'.

If the Minister uses the 'call in' power, there is no appeal allowed on the decision. In all other cases, appeal rights exist for proponents and, in limited circumstances, for third parties who lodged submissions against the project.

The NT government is currently undertaking a review of the environmental impact assessment procedures. The Environmental Protection Authority (EPA) has been tasked with investigating:

"the environmental assessment and approval processes outlined in the Environmental Assessment Act for major development proposals and recommend improvements for Government's consideration."[85]

The final recommendations are to include a comparative analysis of processes in other jurisdictions and countries to identify best practice processes for environmental impact assessment. The EPA is preparing a discussion paper for release in April 2009.[86]

B.4 Queensland

The most consistently used process consists of the 'significant project declaration' for environmental assessment and one of the planning assessment methods, determined by the type and scale of the project. Under the State Development and Public Works Organisation Act (SDPWO) 1971, a 'significant project' declaration can be made. If this is done, the Coordinator General (CG) then manages the environment impact statement (EIS) component of the approval process. The Act confers the CG with significant powers to manage major projects approval processes on a whole-of-government basis. The CG ultimately assesses the EIS and prepares a report on the proposed project which is used by the relevant development assessment process manager. The assessment of major infrastructure projects in Queensland (QLD) is generally carried out in a staged manner if the 'significant project' designation is made. The environmental assessment determination informs the planning assessment determination.

Public transport projects are exempt from the EIS process and, instead, undertake a voluntary Concept Design and Impact Management Plan (CDIMP) process. A CDIMP is commonly developed by the Queensland Department of Transport to assist Government with decision-making with public transport major infrastructure projects. The CDIMP is a voluntary process which is common practice and not required under Queensland legislation. A CDIMP will typically:

- describe the project scope;
- assess the potential economic benefits and environmental and community impacts of the project; and
- propose measures to maximise benefits and effectively manage potential impacts.

A wide programme of consultation and engagement with the community and stakeholders accompanies this process. Community feedback gathered will be incorporated into the development of the concept design, assessment of potential benefits and impacts, and identification of mitigation measures.

Ministerial designations of community infrastructure (CID) are commonly used for State infrastructure. Under Chapter 2 of Part 6 of the Integrated Planning Act 1997 (Qld), community infrastructure (which may include major infrastructure projects) may be designated in which case development in accordance with the designation is exempt from assessment against the planning scheme but may require other approvals from State agencies. Prior environmental assessment and public consultation is required. With regard to environmental approval, the most commonly used process is set out under Section 2.6.7 (3) of the Integrated Planning Act 1997. This sets out requirements for environmental assessment and public consultation in order to allow ministerial designation of the land.

Under Part 6 of the State Development & Public Works Organisation Act 1971 (Qld), an area can be declared a State Development Area and the use of land controlled by a development scheme developed by the CG. Development applications are assessed and determined by the CG. Other aspects of development (e.g. building approvals) are controlled through the normal planning process.

For strategic port lands, the process set out under Section 285 (3) of the Transport Infrastructure Act 1994 (Qld) (TIA) allows the port authority responsible for the relevant strategic port land to be the development assessment manager for any work that is wholly contained within the strategic port land or partially located within the strategic port land and which is not within the local government's tidal land or another port authority's port land tidal area (Schedule 8A, Table 2 Schedule 8 of IPA refers).

It should also be noted that, under Queensland's Integrated Planning Act 1997 (IPA), assessment is required against the different Acts and is integrated into a single process under the Queensland Integrated Development Assessment Scheme (IDAS).

B.5 South Australia

The Development Act 1993 (the Act) and Development Regulations 2008 (the Regulations) are the main pieces of legislation to facilitate planning and development in South Australia (SA).

There are four main types of development assessment pathways under the provisions of the Act and Regulations which could be employed to facilitate infrastructure project assessment and determination. The pathways include:

1 Standard Local Government Assessment (covering the following categories of development: Complying Development, Non-Complying Development and Merit Development).

2 Major Developments or Projects (Section 46 of the Act).

3 Crown Development and Public Infrastructure (Section 49 of the Act) / Electricity Infrastructure Development (Section 49A of the Act).

4 Road project which are exempt under the Act.

Pathways 3 and 4 are the most commonly employed assessment and approval processes for major infrastructure projects.

Pathway 3 processes are applicable to projects being carried out by state agencies or for state agencies for the provision of public infrastructure (except where exemptions are noted in regulations). This assessment method is commonly employed for assessing and determining major infrastructure projects. Under this assessment process, the Development Assessment Commission (DAC) is the assessment body and the Minister responsible for the Act is the approval body. The proponent is required to submit a project application to the DAC. The development application is required to cover both environmental and planning issues. The DAC does not set guidelines for proponents to accord with in the development application as they do under the Section 46 process.

However, the project specific application is required to accord with the prescribed requirements set out in the Regulations, the planning policies set out in the relevant Development Plan and be in the form determined by the Minister. To further determine the project specific application requirements, engagement with government agencies is required to:

- understand the project specific issues to be addressed in an application;
- scope required technical studies; and
- discuss the submission documentation structure and how the issues are to be addressed.

Once submitted the development application is provided to relevant referral agencies and local government and placed on public exhibition (if development costs exceed $4 million). Following these stages, the DAC prepares a report for the Minister on the development. The Minister then determines whether to grant consent for the development. No appeals rights by proponents or the public are afforded by the Minister under this assessment pathway. However, if a council objects or the DAC determines that a development is seriously at variance with the Development Plan, the Minister must prepare a report and cause it to be laid before both houses of Parliament.

Pathway 4 relates to road infrastructure projects. These projects are exempt from assessment under the Act, and the assessment of these projects are coordinated by the Department of Transport, Energy and Infrastructure as part of an internal project approval framework. For major projects, the environmental impact assessment is included in the planning process and documented in an Environmental Report and Environmental Management Plan. As a result of this being an internal departmental process this is not discussed further in this chapter.

In June 2007 the South Australian Government initiated a review of the South Australian planning system with a final report being released in June 2008. The recommendations are being implemented through a three-year program and include:

- streamlining zoning and state significant development processes, and updating the building code to adopt increased sustainability measures;
- new regional plans for all areas of the State, including a new 30-year Plan for Greater Adelaide (to be released mid-2009) which will build on major investment in public transport and transit oriented developments and five new Regional Plans for country SA, including Structure Plans to guide the long-term growth and development of large regional towns and cities;
- streamlining assessments and approvals for residential developments (commenced 1 March 2009); and
- creating better government and governing arrangements to ensure delivery of all the initiatives in a coordinated way.

B.6 Tasmania

Planning and development in Tasmania is regulated by a suite of legislation known as the Resource Management and Planning System (RMPS). The RMPS aims to provide an integrated approach to planning and environmental assessment of land and water based activities. The system regulates use and development of land by assessing applications for permits against council planning schemes and the State's planning legislation.

The Land Use Planning & Approvals Act (LUPAA) 1993 is the principal piece of legislation underpinning the RMPS. The LUPAA forms the basis for many of the main development assessment processes used for major infrastructure projects. The LUPAA provides for the management of planning schemes and the development assessment process, including development applications, appeals and enforcements.

Within the RMPS, there are development assessment pathways under which infrastructure projects might be assessed and determined. The process applicable to a particular development depends on the nature and extent of the development and the scale of its likely impacts. The pathways are:

1 Level 1 activity assessment

2 Level 2 activity assessment

3 Level 3 activity assessment – Projects of State Significance

4 Major Infrastructure Development assessment pursuant to the Major Infrastructure Development Approvals Act 1999 (MIDAA)

5 Dam permit assessments for dam developments.

Of these processes, only pathways (3) and (4) are commonly employed to determine major infrastructure projects. Level 2 activities are assessed in accordance with:

- the LUPPA (primarily under s57 which deals with 'discretionary development') for planning issues;
- Environmental Management & Pollution Control Act (EMPCA) 1994 for environmental issues; and
- include activities (as listed under the EMPCA) that must be subject to a formal Environmental Impact Assessment (EIA).

These activities are often related to 'throughput' or the intensity of a development over a set period. In addition to the activities listed under the EMPCA, the Director of the Environmental Protection Authority (EPA) also has the power to 'call in' a non-level 2 activity for assessment as if it were a level 2 activity. Within this level of assessment, there are three subclasses. The type of environmental assessment document required to be prepared depends on the subclass. Either an Environmental Effects Report (EER) or Development Proposal and Environmental Management Plan are required with the latter being required for projects with more complex environmental issues.

The EER provides information about the proponent, the project, the potential environmental impacts and their management. An EER can generally be prepared by the proponent without specialist support. The DPEMP provides details of the project, describes the existing environment in the vicinity of the project site, identifies all significant environmental, social and economic effects associated with the project and details proposed measures to avoid or reduce potential adverse effects. A DPEMP will generally be prepared by an environmental consultant.[87]

The second process, Major Infrastructure Developments, involves projects being assessed in accordance with MIDAA and also involves employing a LUPPA process. The MIDAA does not provide for an entirely different assessment process but a mechanism for streamlining certain projects along an existing process. The process relates to the assessment and determination of significant 'linear' projects (i.e roads, pipelines, railways, etc) that would require development approval from several local government councils. The MIDAA provides the mechanism to allow a single combined planning authority to establish the set of assessment criteria and to facilitate the assessment process. Under the MIDAA, following the Minister's consultation with councils and relevant government agencies, the Minister can recommend to the Governor that a project be declared a Major Infrastructure Project. Following this declaration, the application is fundamentally assessed through a discretionary development process defined by LUPAA but with the CPA as the consent authority rather than numerous local governments.

On 5 March 2008, the Tasmanian Government announced a review into Tasmania's planning system, with a view to streamlining decision making. The Terms of Reference for the Review required recommendations on streamlining planning system decision making by reviewing the allocation of roles and functions of the Minister, State agencies, and statutory bodies. A report on this review with recommendations was published on 13 February 2009 [88]

B.7 Victoria

The Victorian planning framework is generally comprised of three key assessment and approval processes which operate in a coordinated manner. The three processes are set out under the Environment Effects Act 1978, the Planning and Environment Act 1987, and the Environment Protection Act 1970 (EP Act). These approvals processes apply, but are not limited, to major projects and include:

1 Environment Effects Statements (EES) – this is the environmental assessment process which provides supporting information to be considered within the project planning approval process (see 2 below);

2 Planning permits and amendments to planning schemes – this is the planning permit process and planning scheme amendment process enabling project approval. Where an EES has been proposed, the planning approval is informed by the Minister's assessment; and

3 Works approvals for industrial projects defined as "scheduled premises" under the EP Act – this is a separate approval process, supported by the assessment provided by through the EES process.

EES:

The EES itself is not a decision making process but rather an assessment process incorporating technical and community input. Any project that could have significant environmental effects is required to be referred to the Minister for Planning for a decision on whether an EES is required. The Minister's assessment of the project informs the decision making process for the statutory approvals of planning permits, amendments to planning schemes and works approvals. The EES process includes the provision of EES scoping requirement which guides the proponent as to the key environmental issues and level of environmental assessment required. Public consultation on the proposed scope is carried out before it is approved. The EES is prepared and submitted to the Minister for Planning and then put on public exhibition.

An Inquiry or Panel can be appointed by the Minister to evaluate certain issues associated with the EES. The Minister ultimately prepares an assessment of the EES (which may require certain conditions to be met) and provides this to the planning and works approval consent authorities.

Planning permits and amendments to planning schemes:

A change in the use of land or development of land triggers the need for a planning permit depending on the zoning of the existing planning scheme. Planning permits are generally lodged with the local Council which is the 'responsible authority' (i.e. the decision maker) authorised to implement the municipal planning scheme. However, the Minister for Planning or some other person or authority may be specified in the planning scheme as a responsible authority (i.e. for precincts of particular strategic importance).

To facilitate integrated planning for projects that have the potential to raise a major issue of policy, the Minister may 'call in' planning permit applications under section 97B[89] of the Planning and Environment Act 1987. A permit 'call in' requires a panel to be appointed under section 153 of the Planning and Environment Act 1987 to consider any submissions or objections. Where a planning scheme amendment and assessment under the Environment Effects Act 1978 is required, the panel would conduct a combined process. Where a planning scheme needs to be amended before a project can proceed, the local council must obtain the consent of the Minister for Planning to prepare an amendment to the planning scheme.

Works approvals

EPA works approvals are covered under the EP Act. In general, a Works Approval is required for works at a scheduled premises that will result in:

- discharge of waste to the environment;
- increase in, or alteration to, an existing discharge;
- change in the way waste is treated; or
- change in the way waste is stored.

Summary

The current process for approving major infrastructure projects in Victoria applies to all types of infrastructure, including the sub-classes of energy, telecommunications, transport and water. There are some additional approvals or variations in processes required by other Victorian legislation that applies to a specific sub-class of infrastructure or legislative mechanisms that relate to cultural heritage, compulsory acquisition, and other works approvals (e.g. pipelines).

B.8 Western Australia

The Western Australian (WA) approvals process is the 'Integrated Project Approvals System' (IPAS) with guidance provided by the Department of State Development (DSD), whose primary function is to coordinate the integrated approvals system for major projects. Within the IPAS three stages have been defined:

1. Proponent Consultation

Consultation by the proponent with stakeholders, including local community and government agencies, to identify and discuss issues of public and government concern, potential impacts, the means to address these, and the number and type of approvals required.

2. Agency Scoping

Negotiation and agreement between project proponents and government agencies on the information required to consider approval, and timelines for doing so. The project proponent then prepares, as agreed, documentation for assessment by agencies.

3. Development Assessment

Government agencies and decision makers assess the detailed proposals and grant relevant approvals where appropriate and within agreed timelines.

The approvals system for major infrastructure projects in WA requires discrete approvals prescribed by an extensive range of statutes.

Administration of approvals processes that include environmental, planning, Aboriginal heritage and mining legislation is the responsibility of several WA Government and Australian Commonwealth Government departments and statutory authorities. The detail and level of scrutiny in the approvals process depend on features such as the size, scope, location, proposed activities and impacts of the proposal.

The Environmental Protection Act 1986 (EP Act) provides for the Environmental Protection Authority (EPA) to carry out environmental impacts assessment (EIA) of proposals that may have a "significant effect on the environment". Any proposal that may have a "significant effect on the environment" must be referred to the EPA for assessment. The levels of assessment relevant to major infrastructure projects are likely to be either a Public Environmental Review (PER) or an Environmental Review and Management Program (ERMP). The Minister for Environment gives project approval, and the Minister may set legally binding conditions under which the proposal can proceed.

The Planning and Development Act 2005 (PD Act) is the primary statute covering land use planning in WA. Under this legislation, there is a separate approval system for gaining development approval. Responsibility for development approvals under the PD Act rests with either the local government authority (LGA) or the Western Australian Planning Commission (WAPC). Land use approvals are administered by LGAs within Town Planning Schemes, and by the WAPC within Regional Schemes. If the WAPC considers that developments within Town Planning Scheme areas may have regional significance, it may retain development control or require local government to refer applications to the WAPC.

In November 2008, the Premier indicated that the approvals processes in WA would be improved on a continuous basis, and the Minister for Mines and Petroleum convened an Industry Working Group to give advice on potential improvement to existing mining and resource development approvals. It is anticipated that the Industry Working Group will submit their advice in April 2009. The Government of Western Australia released a consultation paper on the planning process in March 2009.

B.9 Membership of Major Infrastructure Approvals Process (MIAP) Sub-Group

Chair **Colin Jensen** Coordinator-General and Director General	Department of Infrastructure and Planning, Queensland
Dianne Leeson	Department of Premier and Cabinet, New South Wales
Simon Hollingsworth	Department of Premier and Cabinet, Victoria
Sue Morrell	Municipal Services, Australian Capital Territory
Mala Dharmananda	Department of the Premier and Cabinet, Western Australia
Christine Bierbaum	Department of Transport, Energy and Infrastructure, South Australia
Rod Applegate	Department of Planning and Infrastructure, Northern Territory
Brian Risby	Government of Tasmania
Mark Flanigan, Commonwealth Government, Canberra	Department of Environment, Water, Heritage and the Arts
Kim Salisbury, Commonwealth Government, Canberra	Australian Treasury
Vanessa Goodspeed, Commonwealth Government, Canberra	Department of Transport, Regional Development and Local Government
Michael Deegan, Commonwealth Government, Sydney	Infrastructure Australia
Stephen Alchin, Commonwealth Government, Sydney	Infrastructure Australia
Flavio Romano, Commonwealth Government, Sydney	Infrastructure Australia
Mark Addis, Commonwealth Government, Sydney	Infrastructure Australia

Appendix C

Comparison Overview of Jurisdictional Approval System

1.	Is there an assessment and approval process in place which has been specifically implemented to assess a class of 'major projects'?	
SA	Yes – full process	• Section 46 of the Development Act 1993: Major Development Project Assessment.
WA	Yes – in a form	• Under the Integrated Project Approvals System (IPAS) there is a coordinated pathway which incorporates assistance from the Department of State Development. • This system involves the same environmental and planning assessment and planning approval pathways employed for all projects however.
VIC	Yes – in part for the planning assessment component of the process.	• Victoria has an integrated planning and environmental assessment process for proposals that require an EES.
ACT	Yes – in part for the planning assessment component of the process.	• In the ACT there is a specific assessment pathway for projects which are likely to contribute a specific level of impacts – the distinction is not specifically for 'major projects' it is impact based. • The system allows the Minister to 'call-in' the project to determine the planning stage of the process. This is the part of the process specific to 'major projects'. • The other stages in the process are standard and not specific to a major project assessment.
NSW	Yes – full process.	• Part 3A of the Environmental Planning & Assessment Act 1979 is specifically for major project assessment. • Within this system there are three options either 'Project level', 'Concept Plan' or 'Critical Infrastructure Project' approval.

1.	Is there an assessment and approval process in place which has been specifically implemented to assess a class of 'major projects'?	
QLD	Yes – for the environmental assessment component of process.	• Under the State Development & Public Works Organisation Act 1971 (Qld) a 'significant project' declaration can be made. If this is done, the Coordinator-General (CG) then manages the environmental impact statement (EIS) component of the approval process. Under Part 5A of the State Development & Public Works Organisation Act 1971 (Qld) the CG may supervise and intervene in the assessment and approval of a 'prescribed project' although the normal assessment processes and criteria are not varied by this process. However, if the Coordinator-General calls in the decision there are no appeal rights. If the prescribed project is also a critical infrastructure project, the ability to seek judicial review under the Judicial Review Act 1991 is also removed. • Under Part 6 of the State Development & Public Works Organisation Act 1971 (Qld), an area can be declared a State Development Area and the use of land controlled by a development scheme developed by the CG. Development applications are assessed and determined by the CG. Other aspects of development (e.g. building approvals) are controlled through the normal planning process. • Under Chapter 2 of Part 5 of the Integrated Planning Act 1997 (Qld), community infrastructure (which may include major infrastructure projects) may be designated in which case development in accordance with the designation is exempt from assessment against the planning scheme but may require other approvals from State agencies. Prior environmental assessment and public consultation is required. • Under the Integrated Planning Act 1997 (Qld), a designation of land for community infrastructure is exempt development, to the extent the development is either or both of the following (a) self-assessable development or assessable development under a planning scheme; and (b) the reconfiguration of a lot. The process for ministerial and local government designations is established under Chapter 2, Part 6 of the IPA. • A Concept Design and Impact Management Plan (CDIMP) is commonly developed by the Queensland Department of Transport to assist Government with decision-making with public transport major infrastructure projects. The CDIMP is a voluntary process which is common practice and not required under Queensland legislation. A CDIMP will typically: – describe the project scope; – assess the potential economic benefits and environmental a d community impacts of the project; and – propose measures to maximise benefits and effectively manage potential impacts. • A wide program me of consultation and engagement with the community and stakeholders accompanies this process. Community feedback gathered will be incorporated into the development of the concept design, assessment of potential benefits and impacts, and identification of mitigation measures. • Under the Transport Infrastructure Act 1994 (Qld), the Minister may direct a port authority to develop a land use plan for strategic port lands ('port authority lands') defined in that Act. All proposed development, including major port infrastructure, within the strategic port lands is assessed against the land use plan with the exception of material changes of use not permitted under the land use plan. Such development is assessed under IPA.
TAS	Yes – for the environmental assessment component of process.	• Project of State Significant (POSS) - level 3 activity assessment under State Policies and Projects Act 1993; and • Major Infrastructure Development pursuant to the Major Infrastructure Development Approvals Act 1999 process.
NT	No	• The environmental assessment process is not specific to a major project assessment. Rather, it is environmental impact level specific.

2.	Is this process commonly employed to assess 'major infrastructure projects'?	
SA	No	–
WA	Yes	–
VIC	Yes	–
ACT	Yes	–
NSW	Yes	–
QLD	Yes	• 'Community Infrastructure' (under Schedule 5 of IPA) establishes common forms of community infrastructure. Information on all designations is available on DIP's internet site (www.dip.qld.gov.au). • The CDIMP process is commonly used for major public transport infrastructure projects.
TAS	No / Yes	• No – to the POSS process. • Yes – for the Major Infrastructure Development pursuant to the Major Infrastructure Development Approvals Act 1999 process.
NT	Not applicable	

3.	What is the most commonly employed process?
SA	• Section 49 of the Development Act 1993: Crown development & Public Infrastructure.
WA	• Integrated Project Approvals System (IPAS) - all projects go through this system but the IPAS coordinated pathway with assistance from the DSD is the system where major infrastructure project assessments would likely be facilitated. It would include an environmental assessment phase (under the Environment Protection Act 1986) and then a planning assessment phase (under the Planning and Development Act 2005).
VIC	• EES for environmental impacts assessment (under the Environment Effects Act 1978). Followed by the Minister to approve the permit application in conjunction with a planning scheme amendment (no 'call-in' power required in this case) (both prescribed under the Planning and Environment Act 1987). And finally a works approval process (under the Environment Protection Act 1970).
ACT	• Impact Track assessment with EIS stage carried out (Planning and Development Act 2007).
NSW	• Part 3A of the Environmental Planning & Assessment Act 1979 - either 'Project level', 'Concept Plan' or 'Critical Infrastructure Project' approval.
QLD	• The most consistently used process consists of the significant project declaration for environmental assessment and one of the planning assessment methods, determined by the type and scale of the project. • Ministerial designations of community infrastructure (CID) are commonly used for State infrastructure. With regard to environmental approval, the most commonly used process is set out under Section 2.6.7 (3) of IPA. This sets out requirements for environmental assessment and public consultation in order to allow Ministerial designation of the land. Environmental assessment and public consultation must be carried out in accordance with guidelines, either made or approved, by the Chief Executive of the Department administering IPA. Public transport projects are exempt from the EIS process and, instead, undertake a voluntary CDIMP process. • For strategic port lands, the process set out under Section 285 (3) of the Transport Infrastructure Act 1994 (Qld) (TIA) allows the port authority responsible for the relevant strategic port land to be the development assessment manager for any work that is wholly contained within the strategic port land or partially located within the strategic port land and which is not within the local government's tidal land or another port authority's port land tidal area (Schedule 8A, Table 2 Schedule 8 of IPA refers).
TAS	• Major Infrastructure Development Approval process pursuant to Major Infrastructure Development Approvals Act 1999: including an environmental approval stage and then a planning approval stage. • Level 2 activity assessment: This requires environmental assessment under the Environmental Management Pollution Control Act 1994 and planning assessment under the Land Use Planning Approvals Act 1993).
NT	• Environmental assessment stage (under the Environmental Assessment Act 1982) and then the planning assessment stage where required.

4	Does the most commonly employed process deal with environmental assessment and planning assessment and approvals in the one integrated process or are they dealt with in a staged and separate manner?
SA	• Integrated.
WA	• Staged process with an environmental approval stage and then a planning focused stage.
VIC	• Separate processes run parallel to make up the overall process. The EES process must be completed first with the assessment under this process affecting the other two process outcomes.
ACT	• Staged process under the one piece of legislation. • It is a sequential process where if an EIS is required, it must be completed prior to the development assessment stage commencing.
NSW	• Integrated.
QLD	• Staged process - generally environmental assessment and the planning assessments are carried out in a staged manner if the 'significant project' designation is made. The environmental assessment determination informs the planning assessment determination. • Environmental assessment must be considered as part of the Ministerial designation process. Any State required development assessment occurs after the designation. Environmental assessment is built into the planning scheme amendment process. (Refer to Chapter 2, Part 6 of IPA).
TAS	• Staged process with an environmental approval stage and then a planning focused stage. • Staged process with an environmental approval stage and then a planning focused stage.
NT	• Staged process with an environmental approval stage and then a planning focused stage where required.

5.	For the most commonly employed assessment process who acts as the 'consent authority'?
SA	• Minister for Urban Development and Planning
WA	• Two staged process: Environmental assessment consent by Minister for Environment. • Planning determination stage consent authority is either LGA or WA Planning Commission.
VIC	• Staged process: Environmental assessment consent by Minister for Planning. • Planning determination stage consent authority is either LGA or Minister for Planning if DA 'called-in'. • Where required, Works Approval consent given by the Environment Protection Authority.
ACT	• Two staged process: ACTPLA (ACT Planning Authority) manages the environmental assessment process, but the Minister for Planning accepts the EIS. ACTPLA or Minister for Planning (if the DA has been 'called-in') is planning consent authority.
NSW	• Minister for Planning
QLD	• Significant Project' EIS assessment stage: – Coordinator General. • Development Approval stage: – Relevant assessment manager (i.e local government for planning issues, EPA for mines etc). • CID Planning assessment and approval stage. • State Minister (and Local Government designations). • Development approvals other than under the planning scheme still required from assessment manager. • Standard IDAS assessment applies. • SDA Planning assessment and decision for use of land • Coordinator General • Development approvals for other aspects of development (e.g. building approvals etc) required from relevant assessment manager
TAS	• **Two staged process:** The EPA is the consent authority for the environmental assessment component whilst the planning assessment component is determined by the CPA (Combined Planning Authority – constituted of affected council members) or RPDC (Resource Planning & Development Commission). • **Two staged process:** The EPA is the consent authority for the environmental assessment component whilst the planning assessment component is determined by the relevant Local Council.
NT	• **Two staged process:** First stage: environmental assessment is required and approval given by Minister for Natural Resources, Environment and Heritage. Second stage: planning assessment and approval stage consent authority is Development Consent Authority (DCA) or Minister for Planning if DA called in.

6.	Does the most commonly employed process remove the requirement to obtain other environmental based approvals/ permits/licences/ etc?		
SA	No	• Under S49(16), if the Minister approves a development, no other procedure or requirement relating to the assessment of the development under the Development Act 1993 applies and no other development authorisation (including a certificate or approval under Part 6) is required. For projects approved under this section, the EPA cannot refuse a licence (under the SA EP Act), for those projects requiring one. • There still exists a requirement to obtain approvals under other pieces of legislation e.g. Heritage Places Act 1993, Aboriginal Heritage Act 1988, etc.	
WA	No	–	
VIC	No	–	
ACT	No	–	
NSW		• The Part 3A process has removed the requirement to obtain 8 prescribed approvals/permits. • The process also specifies that a range of other acts cannot apply to the project and prevent or interfere with the carrying out of an approved 'critical infrastructure' designated project. • 7 other legislative requirements (approvals, etc) are identified as needing addressing however they are not able to be refused if the project is approved under Part 3A – further the approvals must be substantially consistent with the Part 3A approval.	
QLD	No	• With regard to electricity infrastructure projects, under Section 112A of the Electricity Act 1994 (Qld), the clearing of native vegetation on freehold land is exempt development if the clearing is for operating works for a transmission entity or distribution entity on land that has a CID. • A development permit for vegetation clearing is not required for a "specified activity" which includes a State controlled road. Busway and light rail infrastructure are not taken to be State controlled roads under the TIA.	• If a CID (environmental assessment) is approved, the use of the land in accordance with the designation, is taken to be a use of land in accordance with the approved development scheme. Under development schemes the use of the land by a public sector entity in relation to community infrastructure is typically exempt from the requirement to make a development application.
TAS	No		
NT	No		

Relating to the EPBC Act are the following in place:

7.	Relating to the EPBC Act are the following in place: Bilateral agreements accrediting the environmental assessment process?		
SA	Yes	• Agreement in place but it does not accredit the s49 assessment process.	
WA	Yes	–	
VIC	Yes	–	
ACT	Yes	–	
NSW	Yes	–	
QLD	Yes	• Chapter 5 Part 8 of IPA integrates • Commonwealth process into IDAS where chief executive decides an EIS is required.	• a) if declared a significant project. • b) The Agreement also accredits Chapter 5 Part 8 of IPA and integrates the Commonwealth environmental assessment process into IDAS. Under this process, the Chief Executive may decide an EIS is relevant and required, for example: in the case of a development other than a material change of use (for building work or operational works); or development under a CID).
TAS	Yes	• Yes	• Yes
NT	Yes	–	

8.	Relating to the EPBC Act are the following in place: Approved bilateral with an agreed management plan	
SA	No	–
WA	No	–
VIC	No	–
ACT	No	–
NSW	Yes	• Covers the Sydney Opera House.
QLD	No	–
TAS	No	–
NT	No	–

9.	Does this most commonly employed process apply equally for private and State agency proponents?	
SA	Yes	• This process is applicable where the proponent is a: – State agencies or – Private company (including if the project is to be undertaken in partnership or joint venture with the State) who obtains 'sponsorship' by a State Agency and where the development is for public infrastructure as defined under the Development Act 1993.
WA	Yes	–
VIC	Yes	–
ACT	Yes	–
NSW	Yes	–
QLD	No	Approved works process: • (This is identified as a State agency specific process pathway). • The CG may be authorised and directed by the Governor in Council to undertake certain works by the passing of a regulation or the gazettal of a program of approved works ('works') under the SDPWO Act. • A 'local body' may similarly be directed by the Governor in Council to undertake certain works by the passing of a regulation under the SDPWO Act (refer Part 6, Divisions 3 and 4 of the SDPWO Act). • The SDPWO Act defines a 'local body' to mean a government owned corporation, a statutory body as defined under the Statutory Bodies Financial Arrangements Act 1982 (Qld), another body established under an Act, a corporation whose shares are wholly owned by the State, by the State and local governments, or by local governments, and a subsidiary of such a corporation. • 'Works' is widely defined under the SDPWO Act to mean the whole and every part of any work, project, service, utility, undertaking or function that the Crown, the CG or other person or body who represents the Crown, or any local body that is or has undertaken or is or may be authorised under any Act to undertake, as well as is included or is proposed to be included by the CG, as well as works designated in a program of works, or that is classified by the CG as 'works'.
TAS	Yes	–
NT	Yes	–

10.	What projects are able to be assessed under the most commonly employed process (statutory triggers)?
SA	• Applicable to projects being carried out by State agencies, by State agencies for the provision of public infrastructure and other persons proposing to carry out development initiated or supported by a State agency for the purposes of the provision of public infrastructure. Note: There are specific exemptions for developments of a smaller scale from this process and further, the construction or alteration of a road, street or thoroughfare on land undertaken by the Crown, a council or other public authority are not defined as development under the Development Act, and hence process does not apply.
WA	• There are no statutory criteria/triggers.
VIC	• All projects can be assessed through the combined permit/amendment/environmental assessment by a Panel. • Section 97B prescribes that applications may be 'called-in' if it appears to the Minister- (a) that the application raises a major issue of policy and that the determination of the application may have a substantial effect on the achievement or development of planning objectives; or (b) that the decision on the application has been unreasonably delayed to the disadvantage of the applicant; or (c) that the use or development to which the application relates is also required to be considered by the Minister under another Act or regulation and that consideration would be facilitated by the referral of the application to the Minister.
ACT	• To be assessed in the 'Impact track assessment process' the project would either be: – identified in the Territory plan as being one, – identified in schedule 4 of the PD Act, – declared by the minister to be one. • Once in the 'Impact Track assessment process' the Minister for planning can 'call in' a DA which in the opinion of the Minister the: – The application raises a major policy issue, – The application seeks approval for a development that may have a substantial effect on the achievement or development of the object of the Territory Plan as set out in the Statement of Strategic Directions and objectives for each zone to which the application relates, – The approval or refusal of the application would provide a substantial public benefit.
NSW	The SEPP (Major Projects) 2005 requires projects to be considered under Part 3A of the Act if: • It is a development which will occur on a site specified in Schedule 2 of the SEPP. • It is a type of development to occur on a State Significant Site identified in Schedule 3 of the SEPP. • It is a type of development class identified in Schedule 1 of the SEPP. Group 8 of this schedule specifies applicable classes of developments relating to major infrastructure. Under s 75B(2) of the EP&A Act a development proposal can be declared and gazetted by the minister if it is: • A major infrastructure or other development which, in the minister's opinion, is of state or regional environmental planning significance or Major infrastructure or other development where: – the proponent is also the determining authority, and – the development, except for Part 3A, would require an environmental impact assessment to be carried out. The Minister may declare a project to also be critical infrastructure if he/she is of the opinion that the development is essential for the State for economic, environmental or social reasons.

10.	What projects are able to be assessed under the most commonly employed process (statutory triggers)?		
QLD	Significant projects • The Coordinator General (CG) can declare a project to be a significant project based on one or more of the following criteria: – complex approval requirements, including local, State and Australian Commonwealth Government involvement would otherwise apply; – a high level of investment in the State; – potential effects on infrastructure and/or the environment; – provision of substantial employment opportunities; – strategic significance to a locality, region or the State.	CID • A State Minister may designate a CID if: – the proposal is defined as a community infrastructure under Schedule 5 of IPA; – the development meets one or more of the functions under s.2.6.2 (test of public benefit) of IPA.	SDA • The regulation may declare any part of the State or any area over which the State claims jurisdiction, to be an SDA, if the Governor in Council is satisfied that the public interest or general welfare of persons resident in any part of the State requires it. SDAs have been used for the following: large scale industrial development of regional State and national significance; infrastructure corridors (for example: water and gas pipelines) and major public projects (for example: the New Queensland Children's Hospital – refer: http://www.dip.qld.gov.au/land/queensland-children-s-hospital-state-development-area.html).
TAS	• Minister recommends to the Governor to make an order declaring Major Infrastructure Project. • Project must be wholly or principally comprising the construction of one of more of the following: road, railway, pipeline, power line, telecommunications cable or link, such other linear infrastructure as may be prescribed	• Level 2 activities are listed in Schedule 2 of the Environmental Management Pollution Control Act 1994. Definitions are related to 'throughput' or the intensity of a development over a set period. • In addition to the listed activities the EPA Director is able to 'call-in' non 'level 2' activities if he/she deems it appropriate.	
NT	• The Planning Act applies to all major infrastructure on zoned land. • The need for and level of any environmental assessment is as determined by the Minister.		

11.	Do appeal rights exist within this commonly employed process?
SA	• No appeal rights exist.
WA	• For the environmental assessment phase: Any person may lodge an appeal with the Minister for the Environment against the contents and/or recommendations of the EPA's assessment report within 14 days of the publication of the report. Once the Minister has determined any appeals – There is no further appeal to the Ministers decision for approving or refusing the project. • Planning assessment phase: Applications not determined within 60 days (if made to the WAPC under a regional planning scheme) or 90 days (if made to an LGA under a local planning scheme) of lodgement are deemed to be refused. Appeals can commence after this – the appeal process is prescribed in legislation. • Once the Minister has determined the appeal there is no further appeals.
VIC	• Applicant has up to 60 days and objector has up to 21 days after approval issued. • If the Minister uses 'call-in' powers for permit application determination then no third party appeal rights exist.
ACT	• Proponent can ask ACTPLA for reconsideration within 20 days of decision being made (or a longer period if allowed by ACTPLA) if ACTPLA determined the project. • If the Minister determined the project (using call-in' powers) no appeal rights exist.
NSW	• Major Project approval – 3rd party appeals are allowed within 28 days of decision. Proponent appeals are allowed within 3 months of decision. • Concept Plan approval – No 3rd party appeals. Proponent appeals are allowed within 3 months of decision. • Critical Infrastructure Approval - no appeal rights exist.
QLD	Significant Project' EIS assessment • There are no appeal rights against the CG's report. However it should be noted that conditions set by the CG are concurrence conditions and therefore can be appealed under IPA. • Any appeal rights under primary legislation retained (e.g. appeal on merits under IDAS). CDIMP • As the Concept Design and Impact Management Plan (CDIMP) is a voluntary process which is common practice and not required under Queensland legislation, there is no legal decision against which to appeal. However, under a CDIMP, community consultation is sought and integrated into the plan. CID • There are no appeal rights against the making of a Community Infrastructure Designation but other required development approvals may have appeal rights. • Possibility of a declaratory relief on procedural issues. Prescribed Projects • If the CG steps in to make the decision for a prescribed project there are no merit appeal rights. If a prescribed project is also a critical infrastructure project, the ability to seek relief under the Judicial Review Act 1991 (Qld) is excluded. SDA • There are no appeal rights against the CG's decision on a material change of use application but other required development approvals may have appeal rights.
TAS	• 3rd party and proponent may appeal within 14 days of decision. • 3rd party and proponent may appeal within 14 days of decision.
NT	• If determined by the Development Consent authority (or Minister - not using 'call-in ' powers) 3rd party may appeal within 14 days of the determination where such rights exist. • Proponent appeal within 28 days of the determination. • If Minister employs 'call-in ' power - no appeal rights exist.

Appendix D

Australian Government Solicitor Advice

Extract of advice provided by the Australian Government Solicitor to Infrastructure Australia dated 16 March 2009.
Access to land and compulsory acquisition of land for Infrastructure Australia projects

- Infrastructure Australia's interest in public infrastructure relates specifically to transport infrastructure, energy infrastructure, communications infrastructure and water infrastructure (see also the definition of 'nationally significant infrastructure' in s.3 of the Infrastructure Australia Act 2008).
- In each State and self-governing Territory there are general land acquisition laws which deal with matters relating to the acquisition of land by agencies of the State or Territory. The land acquisition Acts are:
  - Australian Capital Territory: Lands Acquisition Act 1994 (ACT LAA)
  - Northern Territory: Lands Acquisition Act (NT LAA)
  - New South Wales: Land Acquisition (Just Terms Compensation) Act 1991 (NSW LAA). (The Public Works Act 1912 (NSW PWA) is also an important component of the land acquisition regime applicable in that State.)
  - Queensland: Acquisition of Land Act 1967 (Qld ALA)
  - South Australia: Land Acquisition Act 1969 (SA LAA)
  - Tasmania: Land Acquisition Act 1993 (Tas LAA)
  - Victoria: Land Acquisition and Compensation Act 1986 (Vic LACA)
  - Western Australia: Part 9 of the Land Administration Act 1997 (WA LAA)
- We note that this advice does not deal in detail with the acquisition of land by agreement. Nor does it address the resumption of land which is subject to a Crown lease, pastoral lease or similar interest. It also does not address the compulsory acquisition of land by, or for the purpose of, conferring interests in land on private entities.
- As this advice involves the interpretation of State and Territory legislation, we strongly recommend that you consult with officials of a relevant State or Territory before acting in reliance on the advice. Also, as the advice is general in nature, we recommend that you consider the specific circumstances of any particular proposal and obtain tailored advice in relation to that proposal.

Summary of advice

Question 1

- In each jurisdiction, what, if any, powers/rights do State/Territory governments have to enter/gain access to land which may be:
  - owned/occupied by the Commonwealth;
  - owned/occupied by a private citizen;
  - owned/occupied by a local government body; and/or
  - subject to native title rights,

  for the purpose of undertaking preliminary studies/assessments to determine the land's suitability for development of public infrastructure and the owner/occupier/holder of native title rights has refused to allow such access?

Short Answer 1

- With the exception of New South Wales, each land acquisition Act confers powers on relevant government authorities and authorised persons to enter onto land.
- The powers to enter onto land conferred by the land acquisitions Acts are exercisable for particular purposes. Although there is some uncertainty in the case of the Qld ALA, the SA LAA and the Vic LACA, we think that the authorised purposes include ascertaining whether the land is suitable for the development of public infrastructure, in circumstances where the proposed infrastructure is a purpose for which the land may be acquired. The situations in which State and Territory laws authorise the acquisition of land for the development of public infrastructure are discussed in our answer to question 2.
- In New South Wales, powers to enter onto land are conferred by other legislation, such as the NSW PWA. We think that it is not clear whether the power of entry under the NSW PWA may be used to access land to assess its suitability for the development of public infrastructure. It is arguable that this power is only exercisable after land has already been acquired, or at least has been identified as suitable for the carrying out of a public work. We suggest you consult with relevant State officials to obtain their views on this issue.
- Where land may be entered to assess its suitability for public infrastructure purposes, the permissible activities generally include the undertaking of preliminary studies and assessments to determine the suitability of the land for the development of public infrastructure. For example, the allowed activities generally include making surveys, taking samples, and digging and boring.
- In most cases, procedures involving the giving of notice to owners and occupiers of land must be followed prior to entry. There are also provisions requiring the payment of compensation for damage caused by the exercise of powers of entry.

Land owned/occupied by the Commonwealth

- The question whether land that is owned or occupied by the Commonwealth may be entered to assess its suitability for public infrastructure will be influenced by the nature of the Commonwealth's rights in relation to that land, the types of activities undertaken there, and the legislation under which the relevant Commonwealth agency operates. As a general comment, we think it is likely that there would be many situations where the power to enter land could not be exercised in relation to land that is owned or occupied by the Commonwealth. We would be pleased to provide advice in relation to any particular situations of interest to you.

Land owned/occupied by a private citizen

- The powers to enter land to assess its suitability for public infrastructure purposes are exercisable in each jurisdiction in relation to privately owned land.

Land owned /occupied by a local government body

- The powers to enter land to assess its suitability for public infrastructure purposes are available in each jurisdiction in relation to land owned or occupied by local government bodies.

Land subject to native title rights and interests

- Ultimately, each State or Territory will have to be satisfied about the application of its land acquisition legislation to enter onto land that is subject to native title, having regard to the Native Title Act 1993 (Cth) (NTA). However, in our view, where each State and Territory has the power, under its land acquisition legislation, to enter land for the purpose of assessing its suitability for public infrastructure, that power may be exercised in relation to land that is subject to native title. Generally, but not always, entry must take place in accordance with an authorisation.

- It is possible that some forms of entry, or its authorisation, might be regarded as a 'low impact future act' for the purposes of the NTA. This is unclear, but in any event we think that entry, or its authorisation, would satisfy the 'freehold test' and therefore be valid for NTA purposes. Certain procedural requirements might need to be satisfied before entry, or its authorisation, takes place, and there might be an entitlement to compensation for damage or loss suffered. The non-extinguishment principle would apply to the entry, or its authorisation.

Question 2

- In each jurisdiction, what, if any, powers/rights do State/Territory governments have to compulsorily acquire land which is:
  - owned by the Commonwealth;
  - owned by a private citizen;
  - owned by a local government body;
  - and/or subject to native title rights,

  for the purpose of developing public infrastructure?

Short Answer 2

- In all Australian jurisdictions, the compulsory acquisition of land by or on behalf of a government or government agency may be authorised in circumstances where the proposed use of the land is within the powers and functions of the relevant government or agency. At the end of this advice is a table non-exhaustively listing legislation in each jurisdiction which we have identified as potentially containing relevant powers and functions.
- The ACT, NT[90] and Tasmanian[91] land acquisition Acts authorise the compulsory acquisition of land by a relevant government generally for the purpose of the development of public infrastructure, including transport, water, energy and communications infrastructure.
- Under the Qld ALA, land may be compulsorily acquired for specific purposes. These include purposes relating to transportation and water. They also include purposes relating to electrical works (which would include some energy infrastructure) as well as 'works for any public works' (which might include other energy and communications infrastructure), works that the constructing authority is authorised under any Act or resolution of Parliament to construct or erect, works 'for the purposes of any Act', and works for any purpose specified in regulations. Potentially, those purposes include infrastructure of the kind you have asked about.
- The WA LAA authorises the compulsory acquisition of land by the WA government for the purposes of a 'public work', which in this context includes various kinds of transport and water infrastructure, and other works which State instrumentalities are authorised to undertake by any WA Act (potentially including energy or communications infrastructure).
- The land acquisition Acts of New South Wales, South Australia and Victoria do not in themselves authorise the compulsory acquisition of land. In these jurisdictions, additional legislation is required to in order to authorise the compulsory acquisition of land by a government agency (which must then be carried out in accordance with the relevant land acquisition Act) for the purpose of public infrastructure. For example, the NSW PWA authorises the compulsory acquisition of land in that State for public infrastructure (frequently requiring the approval of the NSW Legislative Assembly), and where an acquisition is authorised under that Act, the land may be acquired in accordance with the NSW LAA.
- The State and Territory land acquisition Acts set out procedures for the acquisition of land by State and Territory governments. Under these laws, land may be acquired either compulsorily or by agreement.

Generally, the acquisition of land by compulsory process involves:

  - notifying the holders of relevant interests in the land of the proposal to acquire the land;
  - in jurisdictions other than New South Wales and Victoria, the potential for those persons to object or seek merits review of the proposal; and
  - the publication of a notice by which the land is acquired.

- The land acquisition Acts also set out principles and procedures for determining the amount of compensation that is payable to the holders of interests in land that is compulsorily acquired.

Land owned by the Commonwealth

- We think it is doubtful whether a State or Territory could compulsorily acquire an interest in land that the Commonwealth has acquired in accordance with the Lands Acquisition Act 1989 (Cth) (Cth LAA) or its predecessors. In contrast, we think that a State or Territory could acquire an interest in land that is held by the Commonwealth with the Commonwealth's agreement, subject to the Commonwealth complying with Part X of the Cth LAA.

Land owned/occupied by a private citizen

- Land that is privately owned may be subjected to the compulsory acquisition procedures set out in the land acquisition Acts of the various jurisdictions.

Land owned/occupied by a local government body

- In general, land that is owned or occupied by local government bodies in the various jurisdictions may also be compulsorily acquired. However, in New South Wales there are constraints on the power to acquire local government land that is subject to a restriction or dedication which can only be removed by an Act.

Land subject to native title rights and interests

- Ultimately, each State or Territory will have to be satisfied about the application of its land acquisition legislation to native title, and the effect of an acquisition under that legislation on native title, having regard to the NTA. However, in our view, each State and Territory has the power, under its land acquisition legislation, to compulsorily acquire native title rights and interests in relation to land, although the position is clearer in some of the States and Territories.
- In our view, a compulsory acquisition of native title by a State or Territory under their respective land acquisition legislation would be valid for native title purposes so long as the State or Territory complied with the procedural requirements in the NTA. The procedural requirements in the NTA range from a 'right to negotiate' to giving the native title holders and any registered native title claimants the same procedural rights that they would have if they instead held ordinary title (i.e., generally freehold) to the land concerned.
- Generally, the compulsory acquisition would extinguish native title, so long as the State or Territory compulsorily acquired all the rights and interests in the land (i.e., both native title and non native title rights) and the practices and procedures adopted in acquiring the native title do not cause the native title holders any greater disadvantage than is caused to the holders of non native title interests.
- In any other case, native title will not be extinguished and instead the 'non extinguishment principle' will apply to the compulsory acquisition. Despite this, we think that there is a good argument that the State or Territory will acquire a right to use and deal with the relevant land freed from the effect of native title. However, this could create an element of uncertainty that is inconsistent with the primary reason for the acquisition of the land, being certainty that the land can be used for the purpose for which it is acquired.
- Where native title is extinguished by a compulsory acquisition, the native title holders will be entitled to just terms compensation for the acquisition, either in accordance with the relevant State or Territory land acquisition legislation or Division 5, Part 2 of the NTA.

Appendix E

Native Title and Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Native Title & Commonwealth Environment Protection and Biodiversity Conservation Act 1999

The findings from the examination of the interactions of Commonwealth Native title Act 1993, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) processes with the jurisdictional level processes are provided in summary below.

Native Title

The general interaction between native title and project approvals across Australia is common in each of the eight jurisdictions. The text below provides an overview of the general interactions between native title and the other approval processes and describes options for project proponents to address native title if encountered within a potential project's boundary.

The frequency of major projects encountering native title issues is somewhat greater in WA, NT, SA and QLD than in NSW, ACT, Victoria and Tasmania.

Native title interactions with potential projects:

Native title rights are pre-existing (pre-colonial) rights in land and waters held by Indigenous peoples and groups as derived from their laws and customs. The native title of a particular group will depend on the traditional laws and customs of those people and may include the right to be consulted about decisions or activities that could affect the enjoyment of native title rights and interests.[92]

The Commonwealth Native Title Act 1993 allows for recognition of native title through a claims and mediation process. Native title will only exist in relation to a particular area of land if the indigenous people in question have maintained a continuing connection to their traditional land or waters and their native title rights and interests have not been extinguished (removed) by a grant of tenure or use of land by the Crown or a third party.[93] Native title has been wholly extinguished on areas such as:

- Privately owned land (including family homes and privately owned freehold farms);
- Residential, commercial, community purpose and certain other leases; and
- Areas where governments have built roads, schools and other public works on or before 23 December 1996.[94]

Based on this, native title may exist on:

- Unallocated Crown land;
- State forests, possibly some National Parks, public reserves and certain land reserved for particular purposes or uses depending on when and under what legislation such parks or reserves were made (this will vary between states/territories);
- Land set aside for the benefit of or granted to Aboriginal and Torres Strait Islander people;
- Oceans, seas, reefs, lakes and inland waters; and
- Some leases, such as non-exclusive pastoral and agricultural leases, depending on the State/Territory legislation under which they were issued.[95]

Proponents and project consent authorities for major infrastructure projects, particularly in rural, regional and remote areas and in some coastal areas, need to consider the impact of project approvals on native title. When considering development assessment applications on land or waters where native title exists or may exist, there are processes that proponents and project consent authorities will need to follow for the project to be valid, or for it to be immune from injunctive action. If these processes are not followed, an activity may be invalid and consent authorities may at some time in the future be exposed to an injunction and/or claims for damages and compensation.

Under the Native Title Act 1993 processes exist which allow for parties to settle native title claims through agreement. The processes include:

- Native title determinations
- Indigenous land use agreements
- Future act agreements.

The Act also prescribes that when an agreement cannot be reached between parties that the matter can be settled through litigation in the Federal Court.[96]

Native title determinations:

The National Native Title Tribunal describes these determinations as follows:

'A native title determination is a decision by a court that native title does or does not exist in an area. The court can make the determination following an agreement between parties to a native title claim, if it is satisfied that the native title claimants have proved their continuous connection to the claimed area. Determinations made under these circumstances are called consent determinations. Where parties cannot reach agreement the Court will decide in the favour of one party in a litigated determination'.[97]

Indigenous Land Use Agreements:

An indigenous land use agreement (ILUA) is an agreement between a native title group and other parties about the use and management of certain parcels of land and waters to enable exploration and other future acts.

The ILUAs are a useful tool to facilitate project approvals at an earlier stage of a project. The ILUAs 'allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances'.[98]

ILUAs can be negotiated over areas where native title has, or has not yet, been determined to exist. They provide an opportunity for native title holders, industry or government to agree on matters involving native title without the need for a determination of native title by the Federal Court. They can be part of a native title determination, or settled separately from a native title claim.[99]

Once an agreement has been formed, the parties must apply to the Registrar of the Tribunal to have the agreement registered. Once registered, the agreement binds all native title holders to the terms of the agreement, even those who are not a party to the agreement, so long as it remains on the Register.'

Future act agreements:

The NNTT define 'future acts' as:

'A proposal to do something (e.g. pass legislation or permit a development on a particular area) that will affect native title (or would if the act were valid to that extent) by extinguishing it or creating interests that are inconsistent with the continued existence, enjoyment or exercise of native title'[100].

In order to allow activities to occur on particular lands before determinations of native title are decided on for those parcel(s) of land a system was devised which would allow for agreements to be reached between claimants and other parties and which would be applicable to both during the claim process and after the native title is recognised. The system produces 'future act agreements'.

Under Division 3 – Future acts, of the Native Title Act 1993, there are two options for dealing with native title and public infrastructure projects. The applicability of the options will depend on the type of project being proposed and the likely impact of the proposed development on the native title area. The options are specified in sections 24KA and 24 MD6. The section 24 MD6 process leads to acquisition of native title, whist the section 24KA provides for suppression of native title for the life of the infrastructure.

Summary:

Native title claims do not necessarily need to be resolved in order for environmental and planning approvals to be obtained. Negotiations over native title can continue for long periods after the environmental and planning approvals processes are finalised and can result in delays in projects commencing on site.

The reaching of agreements between parties over native title can be the aspect of the 'overall major infrastructure approval process' which requires the greatest period of time. This is particularly relevant in those jurisdictions – NT, QLD, SA and WA – where a large proportion of projects raise native title issues.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 is the principal legislation for the preservation and protection of areas and objects of particular significance to Indigenous people at the Commonwealth level. This act applies to all States and Territories, and operates in addition to State legislation.

This Act provides for the protection of 'significant Aboriginal areas' and 'significant Aboriginal objects'. A 'significant Aboriginal area' is defined in this Act to mean an area of particular significance to Aboriginals in accordance with Aboriginal tradition. A 'significant Aboriginal object' is defined to mean an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition.

An Aboriginal area and an Aboriginal object will only receive protection where the Minister makes a declaration under this act in relation to the area or object. The Minister is able to make an 'emergency declaration' in relation to 'significant Aboriginal areas' that are under serious and immediate threat pursuant to section 9 of the Aboriginal and Torres Strait Islander Heritage Protection 1984.
A declaration under section 9 may only have effect for a period not exceeding 30 days and may be extended by the Minister to a maximum of 60 days in total. The Minister is also able to make a 'final' declaration under section 10 where satisfied that the area or object or class of objects is significant and is under threat of injury or desecration.
A declaration pursuant to section 10 has effect for as long as is specified in the declaration and may be expressed to be a permanent declaration. There have been five declarations under section 10 of the Act, of which one is still in effect (to protect Junction Waterhole in the Northern Territory from the proposed construction of a dam until 2012).

This Act contains offence provisions for contravening a declaration. There is no 'permit' for carrying out activities in areas subject to declarations under the Act – if an area is subject to a declaration made pursuant to the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, no activity may be conducted in contravention of that declaration.

Environment Protection and Biodiversity Conservation Act 1999(Cth)

Under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), actions with the potential to have a significant impact on matters of National Environmental Significance (NES) or on the environment on Commonwealth land (whether or not the action is occurring directly on Commonwealth land) must be referred to the Commonwealth Department of Environment, Water, Heritage and the Arts (DEWHA) to determine whether it is a 'controlled action' and if a Commonwealth approval is required.

The matters of NES under the EPBC Act are listed as:

- Listed threatened species and communities
- Migratory species protected under international agreements
- Ramsar wetlands of international importance
- The Commonwealth marine environment
- World Heritage properties
- National Heritage places
- Nuclear actions.

Seeking approval for a 'controlled action' under the EPBC Act from the Australian Government does not exempt the action from requiring assessment and approval under State or Territory legislation. As a result, environmental assessment and approval of an action often has to occur at State /Territory and Commonwealth levels, and in turn two assessments dealing with the same action can take place. The EPBC Act also sets out the timeframes that apply to different stages of the referral, assessment and approval processes.[101]

To simplify and reduce duplication of effort in the process of assessing and approving actions which fall into the category of 'controlled actions', bilateral agreements between the Australian Government and States/Territories can be entered into.

The DEHWA website details bilateral agreements as follows:

'A key function of bilateral agreements is to reduce duplication of environmental assessment and regulation between the Commonwealth and states/territories. Bilateral agreements allow the Commonwealth to 'accredit' particular state/territory assessment processes and, in some cases, state/territory approval decisions.

In effect, bilateral agreements allow the Commonwealth to delegate to the states/territories the responsibility for conducting environmental assessments under the EPBC Act and, in certain circumstances, the responsibility for granting environmental approvals under the EPBC Act. Bilateral agreements may also deal with various other matters, such as management plans for World Heritage properties and cooperation on monitoring and enforcement.

To be accredited, a state/territory process will need to meet 'best practice' criteria.

If a proposed action is covered by an assessment bilateral, then that action is assessed under the accredited state/territory process. After assessment, the proposed action still requires approval from the Commonwealth Minister under the EPBC Act.

If a proposed action is covered by an approval bilateral, then it will be assessed and approved by the state/territory in accordance with an agreed management plan. No further approval is required from the Minister under the EPBC Act.'[102]

Table E.1 summarises the existence of bilateral agreements in each of the jurisdictions, the assessment process which is accredited under the agreement and the date each agreement came into force. The only approval bilateral in force relates to the Sydney Opera House and is noted in the NSW section of the table below.

Table E.1: Bilateral agreements in place in each of the jurisdictions

Jurisdiction	Bilateral Agreement in place	Assessment process accredited[103]	Date Agreement came into force
Australian Capital Territory	Yes Regarding environmental impact assessment	Preparation of an Environmental Impact Statement with or without an associated inquiry panel report under the Planning and Development Act 2007(ACT)	May 2009
New South Wales	Yes 2 are in force Regarding environmental impact assessment Relating to the Sydney Opera House	• Environmental assessments under Part 3A, 4 (including evaluation of matters in accordance with s79C) or 5 of the Environmental Planning & Assessment Act 1979 • Relating to actions approved and taken in accordance with the bilaterally accredited Management Plan	18 January 2007 2 December 2005
Northern Territory	Yes Regarding environmental impact assessment	Environmental assessment: • by PER or EIS under the NT Environmental Assessment Act, or • by an inquiry carried out under the NT Inquiries Act	28 May 2007
Queensland	Yes Regarding environmental impact assessment	Environmental assessment including: • **Class 1:** actions assessed under Chapter 5, Part 7A of the QLD Integrated Planning Act 1997 and the Integrated Planning Regulation • **Class 2:** projects that are assessed under Part 4 of the QLD State Development and Public Works Organisation Act 1971 and the State Development and Public Works Organisation Regulation 1999 • **Class 3:** actions that are assessed under Part 1 of Chapter 3 of the QLD Environmental Protection Act 1994 and the Environmental Protection Regulation 1998	13 August 2004
South Australia	Yes Regarding environmental impact assessment	Environmental assessment by EIS, PER or DR under section 46 (Major Developments or Project) of the Development Act 1993	2 July 2008

Jurisdiction	Bilateral Agreement in place	Assessment process accredited	Date Agreement came into force
Tasmania	Yes Regarding environmental impact assessment	Environmental assessment • under the State Policies & Projects Act 1993 • under the Environmental Management and Pollution Control Act 1994	12 December 2005
Victoria	Yes Regarding environmental impact assessment	Assessment by Environment Effects Statement under the Victorian Environment Effects Act 1978 Assessment by an Advisory Committee or a joint Advisory Committee/Panel under the Planning and Environment Act 1987 Assessment by permit application under the Planning and Environment Act 1987 Assessment under the Environment Protection Act 1970 Assessment by a Panel under the Water Act 1989	May 2009
Western Australia	Yes Regarding environmental impact assessment	Environmental assessment by PER or ERMP under the Environmental Protection Act 1986	8 August 2007

Source: Commonwealth Department Environment Water Heritage and the Arts, 2009

Table E.2: Time Limits for Decisions under the EPBC Act

Detail of timeframes in EPBC Act are as follows:

Assessments and Approvals	
Controlled action decision [s75] Assessment approach decision [s87] Clearly unacceptable decision [74B]	20 business days from receipt of referral
Assessment on referral information [s93]	recommendation report to be provided to the Minister within 30 business days of the assessment approach decision [s87]
Timeframe for preparation of assessment guidelines: • PER [s96A(4)] • EIS [s101A(4)]	20 business days after the assessment approach decision or the invitation to comment period.
Public comment periods: • Assessment on referral information [s93(3)] • Preliminary documentation [s95(2)] • PER [s98(3)] • EIS [s103(3)]	• 10 business days • period specified by the Minister (not less than 10 business days) • period specified by the Minister (no less than 20 business days) • period specified by the Minister (no less than 20 business days)
Approval decision [s130(1)]: • Referral information • Assessment report from an accredited assessment or bilateral • Preliminary documentation • PER • EIS • Inquiry	• 20 business days • 30 business days • 40 business days • 40 business days • 40 business days • 40 business days
Species and Communities Listings	
Minister's decision on listing [s194Q]	90 business days after receiving TSSC assessment (Minister may extend period in writing)
Reasons for decision	
Under AD(JR) Act 1977 [s13(2)]/EPBC Act [s77(4)] (controlled action)	28 days

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7 Bilateral agreements allow the Commonwealth to 'accredit' particular State/Territory assessment processes and, in some cases, State/Territory approval decisions.

8 If a proposed action is covered by an approval bilateral, then it will be assessed and approved by the State/Territory in accordance with an agreed management plan.

9 In addition to basic information on land acquisition and access to land processes which is provided in each of the jurisdictional process maps, legal advice was sought to address key questions relating to land acquisition and land access in each of the jurisdictions. An extract of this advice – the short answer responses – is included as Appendix D.

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Glossary

ACTPLA	ACT Planning and Land Authority
ARTC	Australian Rail Track Corporation
ATSIHP Act	Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
BMW	Building Management and Works (WA)
BRCWG	COAG Business Regulation and Competition Working Group
CAOP	Community Amenity Offset Plan
CDIMP	Concept Design and Impact Management Plan (QLD)
CG	Co-ordinator General
CIS	Comprehensive Impact Statement (VIC)
CPA	Combined Planning Authority (TAS)
DA	Development Application
DAC	Development Assessment Commission
DAF	Development Assessment Forum
DEHWA	Commonwealth Department of the Environment, Water, Heritage and the Arts
DGRs	Director-General Requirements
DPEMP	Development Proposal and Environmental Management Plan (TAS)
EA	Environmental Assessment
EAP	Environmental Action Plan
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EER	Environmental Effects Report (TAS)
EES	Environmental Effects Statement
EPA	Environment(al) Protection Authority
EPA&A	Environmental Protection and Assessment Act 1979 (NSW)
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999 (Cth)
ERMP	Environmental Review and Management Program
FMS	Flood Management Study
ILUA	Indigenous Land Use Agreement
IMP	Impact Management Plan (VIC)
IPAS	Integrated Project Approvals System (WA)
IWG	Infrastructure Working Group of COAG
LUPAA	Land Use Planning and Approvals Act 1993 (TAS)
MIDAA	Major Infrastructure Development Approvals Act 1999 (TAS)
NCA	National Capital Authority
NES	National Environmental Significance (under the Environment Protection and Biodiversity Conservation Act 1999 (Cth))
NNTT	National Native Title Tribunal
PCQ	Ports Corporation of Queensland
PER	Public Environmental Report
PPP	Public Private Partnerships
RMPS	Resource Management and Planning System (TAS)
RTA	Roads and Traffic Authority (NSW)
SASP	South Australia's Strategic Plan
SEITA	Southern and Eastern Integrated Transport Authority (VIC)
SMEC	Snowy Mountains Engineering Corporation
SSFL	Southern Sydney Freight Line
WAPC	WA Planning Commission

Contacts

Infrastructure Australia
GPO Box 594
CANBERRA ACT 2601
AUSTRALIA

Telephone: (02) 8114 1900
Fax: (02) 8114 1932
Email: mail@infrastructureaustralia.gov.au
Web: www.infrastructureaustralia.gov.au

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