CCIWA Report 2023

Green Web

How environmental approvals could trap Australian investment

Chamber of Commerce and Industry WA

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Executive Summary

The Chamber of Commerce and Industry WA (CCIWA) strongly believes that Western Australia is uniquely positioned to take advantage of key global economic opportunities.

Our vast lands and natural resources mean we could dominate in strategically vital industries including LNG, carbon capture and storage, renewable energy, critical minerals, as well as fisheries, agriculture and tourism. WA is also competitively positioned as a low-cost energy jurisdiction, critical to activating new areas of emerging opportunity, such as downstream processing and advanced manufacturing. We also stand at the forefront of efforts to build out national space and defence industries.

To take these opportunities, what our economy needs above all is significant amounts of business investment. The global competition for capital is however heating up, with the US Inflation Reduction Act the highest profile example.

Western Australia and Australia cannot compete on the size of subsidies on offer in places like the United States. But what it can do is ensure that its regulatory regimes are as efficient and competitive as possible. That is very much in our control.

Unfortunately, Australia is competing for global capital with one arm tied behind its back. Regulatory regimes, particularly with respect to environmental approvals, are taking far too long and application of the rules is increasingly unpredictable. Businesses are highly frustrated with the time taken to achieve approvals at both the State and Federal levels. Shifting regulatory creep, onerous consultation requirements, significant resourcing constraints within the regulators, and a culture of indecisiveness within the Western Australian Environmental Protection Authority (EPA) serves to compound the challenges businesses face in getting projects approved.

With respect to community engagement, approval agencies are increasingly requiring extensive engagement for simple projects with limited risk, with the EPA in particular increasingly considering heritage matters that can be appropriately managed under heritage laws.

While robust regulation and consultation is needed to future-proof our unique environment and cultural heritage, a sensible balance is needed. No one wins when excessive, duplicative, lengthy, conflicting and unduly complex requirements are placed on business.

Another key area of movement is the Federal Government's "Nature Positive" agenda. Potential reforms include changes to offsets policy, expansion of the remit of the Federal Government, and the establishment of a national Environmental Protection Agency that can make unilateral decisions without Government considering the broader social and economic benefits of a project. The implications of the Federal Court's NOPSEMA decision regarding what constitutes a "relevant person" for consultation in the context of offshore projects is equally significant.[1]

Faster, clearer and more streamlined approvals – while maintaining robust standards of oversight – would put Western Australia in a much stronger position to take its opportunities. By contrast, delays and excessive and impractical red and green tape costs our economy, in jobs, capital and foregone development.

In this report, we outline what is at stake with a detailed analysis of the pipeline of projects subject to environmental approval. Around $318 billion worth of current and future investment is identified. To ensure we take as much of these opportunities as possible, we present practical reform proposals, which strike a balance between protecting the environment, and ensuring we don't squander the significant economic opportunity before us.

[1] The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is Australia's independent expert regulator for health and safety, structural (well) integrity and environmental management for all offshore energy operations and greenhouse gas storage activities in Commonwealth waters. NOPSEMA ensures that offshore projects are consistent with the principles of ecologically sustainable development as set out in section 3A of the EPBC Act.

Our approach

The report first outlines the already complex patchwork of regulation today, before exploring the real experience of WA's business community in seeking to navigate Australia's proliferating regulatory approval requirements. The report mainly focuses on environmental regulations, however given their increasing interface with other laws, such as those relating to cultural heritage, other aspects of regulation are also covered.

Critically, the report carefully explores the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) reforms, including the proposed new offset policy, the new national EPA, and consultation requirements. The Federal Court's NOPSEMA decision is also examined, as are businesses' experiences engaging with the State's regulatory framework, namely with respect to WA's EPA.

The report then outlines what is at stake for the WA and national economies, identifying the pipeline of projects set to grow and diversify WA's economy. Multiple sources of evidence and information are drawn on to form this picture, including CCIWA's membership and project databases, information generously shared by the Association of Mining and Exploration Companies, and other publicly available information from company and Government websites.

Further rigour was gained through a survey of the WA business community. We use this information to identify the economic consequences of delays to environmental approvals, including its impact on jobs, economic growth, capital expenditure and diversification opportunities. This also informs our qualitative assessment on the risk to other economic opportunities, such as diversification and the development of emerging industries.

Throughout this report, we use de-identified case-studies to tell the story of the challenges companies experience in seeking to work with regulatory authorities. We also incorporate direct quotes from one-on-one meetings held with proponents across various sectors, including resources, agriculture, transport, and utilities, as well as government and Traditional Owners.

These stakeholders have been deeply considered in sharing their experiences, compelled to share their concerns on the basis that significant investment that should underpin WA's future is at risk.

A confusing patchwork of regulations – the current state of play

WA businesses are increasingly concerned about Australia's proliferating regulatory approvals. They face increasing complexity, onerous requirements and lengthy delays to bring on new assets, extend projects, or replace mines.

On top of problems with the current system, there are concerns with the Federal Government's impending environmental reforms, with the potential for regulatory creep, duplication and misalignment, onerous requirements, and delays to critical investment pipelines. There is also uncertainty in the WA business community around the State Government's regulatory approvals framework, notably how the EPA undertakes its statutory responsibilities.

Activists are also increasingly using climate litigation and appeals, in some cases through parties not directly impacted, to stall projects.

Federal Government regulation

At the Federal level, the EPBC Act is the principle legislative instrument for the protection of Australia's environment, focusing on natural and culturally significant places, biodiverse hot spots, and processes to protect threatened species and Australia's ecological communities. An environmental assessment is only supposed to be triggered under the EPBC Act when there is a potential conflict with a matter of national environmental significance. In some circumstances, through bilateral agreements or a process of accreditation, States and Territories may have statutory responsibility over environmental assessments and approvals.

For the offshore gas industry and anything related to environment plans associated with carbon capture and storage, the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* is the principle legislative instrument, regulated by NOPSEMA at the Federal level. Among other requirements, this sets out consultation requirements with respect to the development, and subsequent approval, of Environment Plans.

State Government's approvals web

At the State level, management of the environment in WA is governed by the *Environmental Protection Act 1986* (EP Act), with Part IV (environmental impact assessments) and Part V (regulation of emissions and discharges) of most relevance to industry. The State Government has also announced plans to introduce a legislative framework that facilitates carbon capture and storage in State onshore areas and State waters. However, these are yet to be drafted.

The approvals journey with the State is complicated, involving multiple WA Government departments and a statutory authority, including:

- Department of Mines, Industry, Resources and Safety (DMIRS) for mining approvals;
- Department of Water and Environmental Regulation (DWER) for water and environmental assessments;
- Department of Biodiversity, Conservation and Attractions (DBCA) for environmental assessments that impact conservation and ecologically significant areas;
- Department of Planning, Lands and Heritage (DPLH) for cultural heritage surveys;
- Department of Jobs, Trade, Science and Innovation (JTSI) for lead agency facilitation; and
- Environmental Protection Authority (EPA) for environmental recommendations.

Each of the above agencies all assess and consider to some degree the same factors as part of their own approvals and as part of being consulted by each other. Each are also 'decision-making authorities' for the purposes of EPA assessments, resulting in the same project being considered multiple times by the same agency for the same environmental and heritage matters. This results in a consultation loop both on the approval itself as well as through multiple rounds of draft submissions to agencies.

The effort varies depending on the type of project, for example, whether a project is exploratory, the development of a mine, or a project of strategic

significance to Australia. Further regulatory requirements also exist if the project involves transport, port and road infrastructure.

It is not just the regulatory framework causing problems – it is also approval agencies losing sight of the purpose of key parts of the legislative framework. For example, key elements of Part IV of the Environmental Protection Act require the EPA to focus on proposals likely to have a *significant* effect on the environment. With a proliferation of requests for information on minor changes and proposals, the EPA has clearly lost sight of these provisions.

In WA today, a typical mining approval is claimed by Government to take about 13-14 months to navigate State approvals[2], and 24 months for Federal requirements (the latter of which includes the 18-month window to prepare information, but not including 'stop the clock' provisions).[3] The reality however is much different, with reports from industry that assessments are taking three to four years. The time taken to receive an approval depends on a range of factors, including the complexity of the project, the natural and cultural barriers present, the propensity for regulators to call for endless rounds of reviews and new questions, negotiations with Traditional Owners, the adequacy of the environmental assessment documentation, the number of "requests for further information" as well as resourcing constraints within Departments.

Proponents are now experiencing, on average, delays of up to just under two years – for more complex projects, this is even longer.

Meanwhile the State Government is increasingly imposing cost recovery initiatives on industry. From industry's perspective, the increasing and significant burden of cost recovery should be accompanied by improved resourcing performance. Performance however is getting worse, not better.

Western Australian governments, on both sides of politics, have introduced initiatives designed to streamline approvals. While well-intentioned, these initiatives have not achieved their intent, with multiple reports that approvals timelines for major resources projects have blown out in recent years. It is hoped that recent State Government initiatives, such as the creation of a Green Approvals Unit in JTSI, can start to make a difference.

[2] WA Government Department of Mines, Industry Regulation and Safety. Timeframes: Exploration and prospecting approval journey, accessed June-July 2023

[3] CW Government Department of Climate Change, Energy, Environment and Water. Referrals and environmental assessments under EPBC Act, accessed June-July 2023.

Regulatory proliferation now threatens investment

Despite these efforts there is clearly more work to do to address the pain points and sources of frustration within the State's regulatory approvals framework.

The emerging and additional concern is proliferating Federal regulation related to the Federal Government's impending reforms to the EPBC Act.

EPBC Act reform – the 'Nature Positive' Agenda

The Federal Government is embarking on the most comprehensive remaking of the national environmental law since the EPBC Act was first introduced in 1999. It is premised on creating a 'nature positive' agenda, as the Federal Environment Minister Tanya Plibersek explains:

> "When we reform our environmental laws, we will take them from being nature negative, where we oversee an overall decline in our environment, to nature positive, where we protect our land and leave it in a better state than we found it."[4]

There are several critical features of this proposed new environmental agenda, including:

- A series of new National Environmental Standards to ensure environmental laws deliver 'nature positive' outcomes, including for *Matters of National Environmental Significance (MNES), Regional Planning, Community Engagement, Environmental offsets and consultation requirements with First Nations People;*
- A new offsets regime based on the 'no-net loss principle'[5], which has four key components:

[4] Federal Environment Minister in DCCEEW, 2022. Nature Positive Plan: better for the environment, better for business

[5] 'No net loss' is a common principle within environmental policy, particularly ecological restoration, and seeks to counteract the negative impacts of development on biodiversity and wetlands.

1) avoidance of sensitive areas, 2) mitigation through detailed prescriptions, 3) secure 'like-for-like' offsets, and 4) provide a conservation payment of sufficient magnitude to set a price signal for environmental protection and conservation;

- A new national Environmental Protection Agency which, critically, will have powers to make its own decisions on project applications;
- A Nature Repair Market to bring more private and philanthropic money into conservation and restoration; and
- The establishment of regional planning zones which identifies areas of protected status (red), areas where development can occur but restoration is required (orange) and areas where sustainable development can take place (green).

As a result, the Federal Government is now lifting expectations, creating new hurdles and requirements, including additional consultation requirements. This is at odds with Western Australia's global reputation as a jurisdiction that already ensures rigorous regulatory oversight of major project approvals.

As it currently stands, where there are matters of national environmental significance, onshore projects are referred to the Commonwealth for approval by the Federal Environment Minister. As of 2022-23, projects in WA constituted 27% of all EPBC Act decisions, the most of any State. There are currently 24 projects with Major Project Status, of which 50% are in WA.[6] [7] Arguably, WA has the most to lose from the Federal Government's proposed new environmental agenda.

At the same time as these new environmental reforms are being progressed, offshore project proponents are also grappling with the recent Federal Court's decision to overturn NOPSEMA's decision to grant environmental approval for Santos' Drilling Plan for the Barossa gas project. This was due to a failure to adequately consult with all "relevant persons". [8] [9]

While this relates specifically to the offshore petroleum industry as well as greenhouse gas storage and wind turbine projects, this may be a catalyst for what determines consultation requirements for any major project across the economy. The Federal Government is currently engaging with NOPSEMA to ensure "robust consultation requirements are communicated to industry".[10]

[6] Commonwealth, 2023. Current Major Projects

[7] The Commonwealth also has a Major Project Facilitation Agency which provides approval support for projects over $20 million in capital investments. Projects can also be awarded Major Project Status, with a value in excess of $50 million in capital investment and are of national significance through contribution to strategic priorities, economic growth, employment and/or regional Australia.

[8] The Barossa Field is an offshore gas-condensate field in the Timor Sea, approximately 138 kilometres north of the Tiwi Islands. The traditional owners of the Tiwi Islands include the Munupi clan, who consider its traditional lands to also include the "sea country" (ie: the Timor Sea), for which they have longstanding spiritual and cultural connections. Santos submitted its Environmental Plan without engaging these TOs.

[9] Commercial Bar Association of Victoria. 2023. Who must be consulted? The Full Federal Court on environment plans for offshore petroleum projects - Lexology.

[10] Australian Government, 2022. Court ruling provides clear guidance on consultation requirements.

A national agenda out of touch with reality

WA businesses well understand the importance of rigorous cultural and environmental oversight. It is very much a part of 'business as usual' in the West. These longstanding processes – supported by the community and industry – are at risk of being thrown out.

Our engagement with businesses across industry has highlighted concern that the proposed new Federal environmental laws could be a backwards step. If the new reforms get the policy and regulatory processes wrong, there is a significant risk of inflicting significant economic harm with no improvement in environmental outcomes.

A new national Environmental Protection Agency may do more harm than good

First, with respect to the new national EPA, the extent to which social and economic considerations will be factored into the process is a key concern. In WA, the State's EPA makes an assessment based on environmental grounds to the State's Minister for Environment, and the Minister and the Government of the day, via the Cabinet, will make the final decision by balancing the environmental, social and economic benefits as a whole.

Under this new potential Federal regime however, there is considerable concern that the social and economic context will not be considered. While the Minister has 'call-in' powers to approve projects on social and economic grounds, it is expected these powers would be used as an exception, rather than the rule. And without a formal social and economic assessment, involving Federal Cabinet and/or Commonwealth Treasury, WA's investment pipeline is likely to be impacted. This is highlighted by a WA business:

"If the new national EPA makes a determination through an environmental lens, then there is a significant risk that WA projects won't get up, regardless of how economically significant they are. Given the nature of our industry, our projects get up on social and economic grounds."

A further complication with respect to this new national EPA is a view apparently held by Federal regulators that the east coast is highly populated, with considerable urban sprawl and degradation. This positions WA in the minds of east-coast decision makers as having some of the last remaining critical habitats in Australia, which need to be protected.

Nature positive – what does it mean?

While robust environmental practices are essential and underpin a company's social licence to operate in WA, given the extractive nature of projects in WA, future investment is at risk of being bogged down by an impractical environmental agenda.

For example, with respect to the proposed 'nature positive' mandate, one WA business described the concept as "terrifying", because resource extraction, by its very nature, has an environmental impact:

"What the Federal Government is looking at imposing is very 'east-coast centric'. There's no acknowledgement of the unique environment that we live in here in WA. The 'nature positive' concept is the … elephant in the room, there will always be an environmental impact in our industry. This will simply be impossible to achieve."

While the Government's reforms are currently under active consultation with selected parties, proponents currently engaged with the Federal regulator on environmental assessments suggest a quasi-model is already in place. For example, proponents report the Federal regulator's doggedness in applying a "zero risk of loss" or "no net loss" as being particularly problematic, which has created a very high, impractical benchmark, as one WA business explains:

"The Department is introducing 'zero risk of loss' as the default for all projects by stealth. This is not based on any science or logic."

Offset regime off-putting for investment

The Federal Government's proposed new offset regime is also considered a serious red flag for industry, where proponents will need to go to considerable lengths to find scientifically verified "like-for-like offsets" and demonstrate a net environmental benefit, or pay into a conservation fund – which for some businesses would be inconsistent with their ESG frameworks.

One of the key areas of concern here is the extent to which offsets will need to be delivered and secured before Federal approval is granted. A suitable, scientifically verified offset involves finding an available parcel of land that has similar habitat – for example, areas with similar ratios of unique possum species, nesting Carnaby cockatoos, orchids and jarrah trees. This adds considerably to costs, delays and layers of complexity, as one business explains:

"We are concerned that you'll need to find the offset land, secure it, get it surveyed and demonstrate with scientific certainty that it's 'like-for-like' prior to clearing. This is a multi-year process, perhaps four to five years."

Many businesses already report considerable challenges with identifying available parcels of land to offset for perpetuity, and in some cases, the offset is considerably larger than the impacted footprint – adding further challenges to identifying suitable land to offset into the future.

For some WA businesses, they are not just concerned about the direct impact on their future operations, but how this new regime will affect them indirectly via delays to essential infrastructure. As one WA business explains, the delivery of high-voltage power lines by Western Power in the next few years is critical for businesses connected to the South West Interconnected System (SWIS):

"We are concerned that Western Power will be bogged down by this new offset regime. If they can't get high-voltage power lines in place in the next few years, this will impact our timelines and the investments we make going forward."

CASE STUDY 1:

When regulation stifles investment

This business is seeking to execute an infrastructure project in regional Western Australia that requires clearing approvals and an offset. The business chose to have the clearance approval undertaken as a 'bilateral assessment', which allows DWER to conduct a single process to assess the proposed actions of the project on behalf of the Australian Government, permitted under the EPBC Act.

The general advantage of a bilateral or accredited assessment approach is removing the need for a separate assessment by both Departments, reducing duplication, and allowing the final decision by the Federal Minister on whether to approve an action to be informed by the EPA environmental assessment report.

Despite following the bilateral process, the approvals process has been significantly frustrated by the Federal Department (DCCEEW) requesting information already provided to DWER and failing to follow the advice of WA experts within DWER on the Threatened Ecological Community (TEC) which is being impacted by the project.

This project has been delayed by a significant period of time, with the business having to respond to ongoing requests for information from the Federal Department. The environmental approvals referral process first commenced in early 2021, and at the time of writing is still unapproved.

Similarly, the ability of Horizon Power to deliver transmission infrastructure required for expansion of the North West Interconnected System (NWIS) – critical for the development of renewable energy projects in WA's north west – is also subject to these complex and lengthy environmental approvals.

WA businesses are also concerned about the potential for further duplication, as it appears the Federal regulator is already duplicating – and overriding – the State's existing offset policies, seemingly on the basis that WA may not be up to the task of implementing and maintaining standards. This can result in contradictory offsets, approval conditions and other requirements. With a new independent EPA being proposed at the national level, the scope for contradictory requirements is set to expand.

As it currently stands, WA businesses report a range of frustrations with the Federal regulator with respect to how offset regulations are being applied.

One of the key issues is the unwillingness to accept evidence based on a WA-specific context and published scientific papers from WA, as well as the advice of DWER experts, as highlighted in case study 1. We've heard of multiple reports of DCCEEW undertaking its own assessment even though it should be using a WA assessment report. There are also increasing reports of regulatory creep, whereby the Federal regulator is increasingly considering matters outside its remit (matters of national environmental significance).

Another issue raised is a refusal to accept WA's wetlands offset policy, with no clarity as to the failings or shortcomings of the policy that would preclude its use.

For the Federal regulator, wetlands are deemed critical habitats that must be protected. As such, there is already an insistence on proponents finding 'like-for-like' wetlands as offset properties. For one WA business, this has seen them "haggling with the Department" after years of paperwork. Another WA business suggests that projects "simply won't get up" if the Federal regulator continues to take an unreasonable and hardline approach to wetlands.

What a new offset regime does offer however is hope that there are clear and consistent guidelines and rules of application, as frustrations exist with how the Federal regulator currently engages with industry and the process of applying offset regulations. CCIWA has heard numerous examples of the rules around offsets changing late in the approvals process.

Consultation requirements lengthening

The Federal Government's new environmental agenda not only captures new environmental hurdles, but also looks to set new standards (the National Indigenous Consultation Standard) with respect to engagement and consultation. CCIWA and its members consider that there should be robust public consultation on major projects, particularly with Traditional Owners. Consultation standards must however ensure that processes are as efficient as possible, for the benefit of project proponents as well as Traditional Owner groups. Beyond this, there are some specific issues that must be dealt with following the Federal Court's decision about what constitutes a "relevant person" for the purposes of consultation.

Federal Court rules that consultation requires more consultation

In this case, the Court ruled against NOPSEMA's approval of Santos' Drilling Plan on the basis that an individual from the Munupi clan on the Tiwi Islands (which are located approximately 140 kilometres from the drilling activity) was not directly consulted. The Court subsequently ruled that the "functions, interests or activities" should be broadly construed to promote the objects of the Offshore Environment Regulations, and that 'interests' are not confined to only legal interests (i.e. such as property rights) and include a traditional connection to sea country.

NOPSEMA has since released new guidance material with the aim of providing clarity to industry on the legal requirements for consultation. In the guideline, they have defined "functions, activities, and interests" as the following:[11]

- Functions: refers to "a power or duty to do something";
- Activities: to be read broadly and is broader than the definition of 'activity' in regulation 4 of the Environment Regulations and is likely directed to what the relevant person is already doing; and
- Interests: to be construed as conforming with the accepted concept of "interest" in other areas of public administrative law, and includes "any interest possessed by an individual, whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation".

The Court's decision has caused alarm, and concern is mounting across industry due to an ongoing lack of certainty and clarity over the details of who to consult and what constitutes adequate consultation of all "relevant persons".

The need for urgent reform of the offshore approvals regime was further highlighted in September 2023, when the Federal Court ruled that NOPSEMA invalidly exercised its powers by granting conditional approval to Woodside Energy's Scarborough Project Seismic Survey Environment Plan.

The ongoing uncertainty has caused significant delays for key energy projects, with a backlog of more than 40 offshore project Environment Plans under assessment by NOPSEMA as of October 2023. The full scale of impacts will be the subject of a full environmental management review by Resources Minister Madeleine King, to be held later this year.[12]

The practical effect is significant, with consultation requirements now having "exponentially increased", extending beyond the operational area to now also include any relevant person identified within the broader environmental context that may be impacted by, for example, the highly unlikely event of an oil spill.

Project proponents now face considerable uncertainty and delay as to when and/or if their Environment Plans will be approved. While approval for major gas projects, which are critical to our future energy supply, remain in limbo, the costs from delays are also mounting, with some companies having vessels and equipment on standby, costing millions of dollars a day.[13]

[11] NOPSEMA, 2023. Consultation in the course of preparing an environment plan guideline.

[12] Graeber, J, 2023. Offshore gas probe to tackle project logjam fears.

[13] Battersby, A. 2022. Back to the drawing board: Santos loses landmark court case on Barossa gas project offshore Australia

Other offshore activities have also been called off entirely, due to there being no line of sight to receipt of an environmental approval.

While robust environmental and consultation standards are expected, project proponents need clarity and certainty over regulatory expectations.

At present, project proponents are facing considerable delay and uncertainty, which create investment risks:

"Three or four years ago, the consultation process used to take 6 months; we are now looking at around 18 months to two years."

Industry's ability to deliver new gas projects, sustain existing facilities and decommission offshore infrastructure has become significantly more complicated, without any apparent benefits to stakeholders. In addition, while future gas supply is one area of concern, delays with respect to the approval of carbon capture and storage projects and offshore wind projects are also being impacted by these new consultation requirements. With offshore wind and carbon capture and storage part of the suite of technologies to address carbon dioxide emissions, this could have a measurable impact on Australia's and the private sector's net zero targets.[14] [15]

[14] King, M. New offshore greenhouse gas storage acreage to help cut emissions, Media Statement, 29 August 2023.
[15] Graeber, J, 2023. Offshore gas probe to tackle project logjam fears.

All in the name of efficiency and effectiveness

While the Federal Government justifies its new environmental regime as "speeding up decisions and making it easier for companies to do the right thing", many businesses argue this does not match reality. At this stage, there appears little regard for the economic impact of onerous expectations and requirements likely to be placed on business, and the impact this will have on future investment in WA. There is a high risk that the implementation of an impractical agenda will squeeze the pipeline of investments, particularly mine replacement, as these WA businesses highlight:

"The Federal Government is going to make it so much harder to get projects up and running in WA."

"You're looking at doubling approval times. You used to be able to get a major project up in WA over 2-3 years (on top of the 2-3 years to navigate State processes). We are now looking at 10 years for a major project."

Our growing concern is that not only is the role of business in growing and diversifying the economy increasingly misunderstood by Government, so too is its primary responsibility in decarbonising the economy. It is difficult to read recent regulatory initiatives at the Federal level in any other way. These changes could provide a much more challenging environment for businesses in WA – and indeed elsewhere in Australia – and hasten the flow of capital to other markets, such as the Americas, where incentives and regulatory reform are driving a new era of investment. This concern extends across a range of policy areas[16], but in the case of environmental matters, the implementation of a 'zero risk of loss' is a case in point where it may be considered antithetical to the operation of entire industries.

Another example is the extension of new marine parks around Macquarie Island and net fishing bans in Queensland. The Federal Environmental Minister's decisions largely disregarded the concerns of the sustainable fisheries industry, which provides livelihoods, particularly in regional coastal communities, as well as in food security and fisheries management.

[16] Most notably, in the case of a suite of problematic industrial relations reforms and intervention into the east coast gas market.

CASE STUDY 2:

When regulation stifles investment

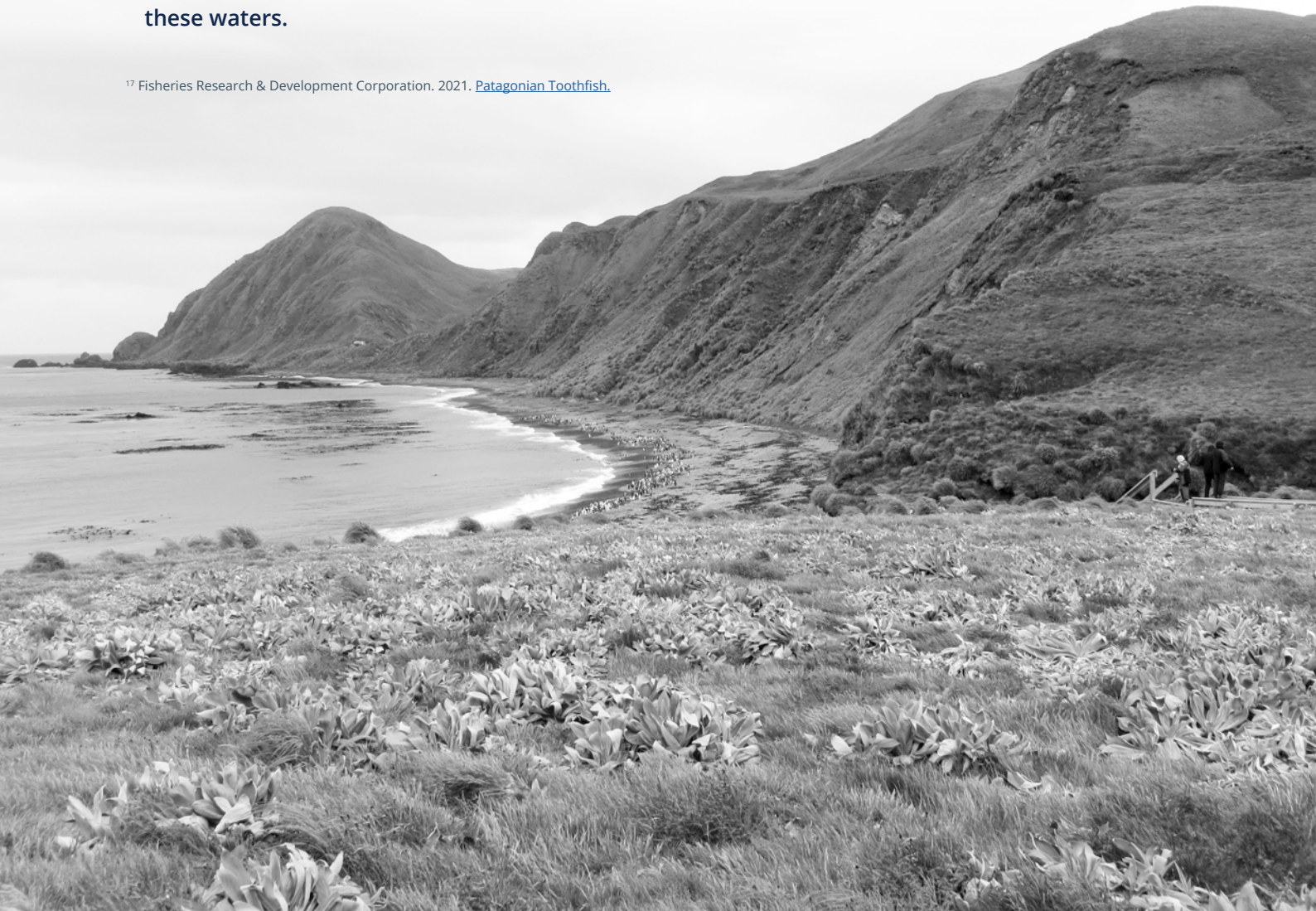
Located in the Southern Pacific waters between Hobart and Antarctica lies Macquarie Island, a world heritage listed island that is home to unique natural diversity and major geo-conservation significance. In 1999, a Marine Park was established, protecting about 162,000 sqm of ocean off the island's south-east coast to protect tracts of the Southern Ocean to enable a protected migratory, feeding and breeding zone for seals, whales, penguins and seabirds. There are specific fish species in these waters as well, including the Patagonian Toothfish, which is classified as a sustainable fish stock[17].

In July 2023, following a short public consultation period, the Federal Government announced its decision to triple the size of the Marine Park, expanding it by an extra 385,000 square kilometres of ocean to fully surround the island.

There are some challenges with this decision, including:

- **93% of the ocean surrounding Macquarie Island will now be closed off to fishing, mining and other extractive activities, leaving just 7% for industry;**
- **As fish stocks are moving south into the high protection areas, the future of commercial fishing in this area will be limited; and**
- **There has been no consideration given to the loss of existing statutory rights to fish in these waters.**

[17] Fisheries Research & Development Corporation. 2021. Patagonian Toothfish.



Regulatory overload and duplication the real threat

As part of its reforms, the Federal Government is seeking to ensure that State and Territory Governments are accredited with a one-touch approvals model, however, this requires States and Territories to demonstrate they can effectively meet the increased environmental standards. If the national EPA believes 'nature positive' outcomes are not being satisfactorily met, it can deny accreditation.

The obvious concern here is how this new Federal regime will work with the State's existing regulatory approvals framework. That is, to what extent will it duplicate, contradict or add further complexity and onerous requirements to the existing statutory responsibilities of the WA EPA as defined within the EP Act (WA).

As noted in the context of the Federal regulator's approach to WA's wetlands offset policy, these new reforms appear to be underpinned by an assumption that the States and Territories are not up to the task of implementing and enforcing rigorous environmental standards.

On the contrary, the WA Government has proved it is better placed than the Commonwealth to facilitate major projects within the State whilst maintaining the highest standards of environmental protection. Further, it is this capacity that has delivered enormous wealth to the nation and ensured the State's outstanding global reputation as a place to invest.

The more the Commonwealth reaches into Western Australian regulatory systems, the longer the timeframes and the greater the risk of imposing an 'east-coast centric model' that is ill-fitted to WA. This would be particularly problematic for WA businesses, because our economy reflects our vast territorial land mass that is heavily oriented towards extractive industries. Given the lack of a coordinated approach and an unwillingness to use State-specific information, this too would be problematic for WA businesses and future investments, as these WA businesses explain:

"We've been told that this won't be to the detriment of project approval timeliness, but there is a belief this will be a more significant hurdle to jump through."

"We've been told the Commonwealth is looking to set how States do the approval process, but everything is suggesting this is just going to be duplication."

The State's regulatory approvals framework must also improve

Businesses are reporting considerable challenges with their engagement with WA's EPA, describing it as "laborious and frustrating" with "ever changing guidelines and shifting goal posts" and ongoing and unrealistic "regulatory creep in assessing green [environmental] and cultural heritage requirements".

Many businesses reflect on the challenges of the EPA as being both cultural and due to inadequate resourcing (ie: skilled staff). Businesses note deterioration in the process over the past five years with the high turnover of long-term employees, resulting in a knowledge and skills deficit, and more concerningly – an unwillingness to work with proponents on environmental applications early in the process. Arbitrary rule changes are made mid-project or assessment in the name of "continuous improvement". Delays are lengthened when assessing officers are overly cautious, referring to other consultants and agencies for further assessment, and issuing seemingly endless requests for further information from proponents for no change in the environmental outcome.

As a result, there appears to be, as one WA business describes, a culture within EPA Services of being overly timorous and cautious:

> "It's easier to make no decision than to be challenged on it later."

As noted above, it is also apparent that regulators are losing sight of the purpose of key parts of the legislative framework. In many instances Part IV of the EP Act requires regulators to focus only on proposals having a 'significant effect' on the environment. With a proliferation of requests for information on minor changes and proposals, no one could claim that this is what occurs in practice.

This has direct impacts including for scheduling of projects, as well as impacting trust with investors, shareholders and directors, and ultimately, the final investment decision, as another WA business explains:

> "This affects scheduling and the capital in the bank. It affects the trust with shareholders and directors... We are behind due to shifting goal posts, and inconclusive science. Some within the Department will say we need this, while others will say something else. Then the Board begins to question the merits of the project."

With Government increasingly imposing significant cost recovery initiatives on industry, it is imperative that more resources are dedicated to dealing with approvals and that reform initiatives are expedited.

Managing cultural heritage

One of the main challenges for WA businesses is the EPA's intersection with cultural heritage protection, noting the EPA has a statutory obligation to consider Aboriginal cultural heritage and European heritage issues.[18] In line with the soon-to-be repealed *Aboriginal Cultural Heritage Act 2021*, DPLH has statutory responsibilities with respect to cultural heritage.

This is related to the management of activities that result in direct impacts on Aboriginal cultural heritage, for example, where activity that may destroy or damage an Aboriginal place, object or ancestral remains within an activity area or a cultural landscape of a protected area.

[18] Section 3(1) of the EP Act defines the environment as "living things, their physical, biological and social surroundings, and interactions between all of these". Section 3(2) further defines these 'social surroundings' as including "aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by physical or biological surroundings".

In accordance with the EP Act, the WA EPA has legislative obligations to deal with these direct impacts, but has further responsibility over any indirect impacts, such as, those related to the impact of industrial emissions on rock art outside the development envelope.

In recent times, WA businesses report regulatory proliferation around cultural heritage management to the extent that all departments across the approvals interface now require project proponents to demonstrate engagement with Traditional Owners. The WA EPA has also created onerous requirements in this respect. Whether related to a preliminary environmental review or management plan, a referral assessment, or a section 45C minor change to an existing project, the WA EPA requires project proponents to demonstrate consultation with Traditional Owners, regardless of how technical or complex, or low/high risk, the matter is. There are also requirements for social cultural heritage management plans for Part IV assessments, and reports that Part IV heritage surveys are required across the whole development envelope, regardless of whether the area will be disturbed or not.

As a case in point, this WA business highlighted the need for a more sensible approach, particularly when it comes to low risk and minor changes to existing projects:

> "The EPA could make the decision themselves, but instead, they refer these decisions to the Traditional Owner groups. They don't realise how this compounds existing regulatory challenges, negatively impacts Traditional Owners, and adds further delays to projects."

WA businesses aren't the only stakeholders impacted by these various regulatory demands; equally as significant is the pressure these demands place on Traditional Owners. Many stakeholders report the existence of "consultation fatigue", and the recent NOPSEMA decision regarding what constitutes a 'relevant person' has only added to these pressures.

Robust heritage surveys conducted by suitably qualified heritage advisors are integral to determining how Aboriginal cultural heritage is managed and protected. However, heritage advisors are expected to be appropriately qualified and experienced - with qualifications in anthropology, archaeology or history - all of which are in short supply across the State, including within Academia. This is a particularly challenging path to navigate, as one Aboriginal Corporation explains:

> "It's incredibly hard to get heritage surveys completed in a timely manner, due to resourcing constraints."

Some of the pressures are exacerbated by a lack of coordination by Government proponents. A major project, for example, may require the involvement of various Government proponents, such as water, roads, and power, and these proponents will all seek to engage with Traditional Owners separately, as opposed to doing so in a coordinated 'whole of project' manner.

Regardless, the combination of pressures has a measurable economic impact, as projects are stalling, including major projects. Of most concern, however, is the impact these delays could have on mine replacement, noting the continuation of the production and supply of iron ore is a significant economic activity for WA, as one WA business explains:

> "We normally expect a replacement mine to come online in 4-5 years, however, we could see this double to 8-10 years. We will see significant export tonnes drop out of production and export due to the delay in approvals."

As noted in case study 3, there are examples where the WA EPA's intersection with the cultural heritage space has been problematic, and has yielded negative impacts, not least, by delaying benefits to Traditional Owners.

CASE STUDY 3:

When regulation stifles investment

This WA business engaged directly with Traditional Owners for the development of their project and proceeded to build a strong, positive and constructive working relationship.

The Traditional Owners held the view they are best placed to manage and speak for their cultural heritage. In agreement with the project proponent, comprehensive heritage surveys and the protection, management and ongoing monitoring of cultural heritage would occur on an ongoing basis. This was to be executed by the agreement and formalisation of Aboriginal Cultural Heritage Management Plans, which were required by the soon-to-be repealed Aboriginal Cultural Heritage Act 2021.

However, despite the full support of the Traditional Owners, the WA EPA had concerns with how heritage was being treated with respect to Part IV of the EP Act and stalled providing final approval on the basis that completion of heritage surveys prior to publishing the Environmental Review Document for public consultation was required.

As a result of this technicality, the project was delayed by several months. This delay put the final investment decision at risk by its international investor, but more importantly, it also delayed the full range of benefits being delivered to the Traditional Owners - not only financial - but also the education, training and contracting opportunities, as defined within the Indigenous Land Use Agreement (ILUA).

Land access and availability

Land access has also been raised as a key challenge for WA business, which drives costs, delays, and uncertainty. Proponents find that plans to proceed with the development and use of land, such as Crown land, may require multiple formal approvals. Landgate maintains WA's official register of land ownership, and DPLH has responsibility for all State land use planning and management, in addition to the oversight of Aboriginal cultural heritage and built heritage matters as highlighted previously.

The problem is however, if a proponent is seeking to secure tenure of Crown land under section 88 of the Land Administration Act 1997, which is one of the statutes managed by DPLH, it cannot receive that approval until the EPA has approved the project (this restriction is outlined in section 41 of the EP Act). This means that plans to develop and use land for projects may involve significant costs, delays, and uncertainty as to whether formal approval to access land will be granted to enable the project to proceed to the next stage of the approvals process.

This means that proponents are unable to simultaneously progress approvals across departments to achieve parallel workstreams, which greatly impacts the timeliness of projects. As one WA business noted, the timeframes in the commercial world are nothing like the current regulatory environment:

"Time is of the essence with what we do. If WA does not do better, other countries like Saudi Arabia and Chile, will beat us to it."

State's reputation at risk

There are also concerns from increasing environmental activism, which is increasingly using litigation and appeals to frustrate the efforts of project proponents. Smaller companies such as explorers are being strategically targeted, and a proliferation of campaign-style, pro-forma appeals on a given project (for example, the extension of the North West Shelf) are simply designed to delay and frustrate. While appeals mechanisms are appropriate, it is clear that changes need to be made.

Much of this legal activity is being driven through the Environmental Defenders Office (EDO), which is in part being funded by the Federal Government. By funding the EDO, the Federal Government is in effect undermining WA's efforts to grow and diversify its economy. While there is a role for Government to help fund public education and to assist community groups to understand their rights and how the process works, it is not appropriate that Government in effect supports direct litigation against WA's social and economic interests.

The risk to WA's international standing as a place to invest due to low risk attached to regulatory certainty is real. Indeed, some proponents have also noted that jurisdictions elsewhere in the nation, for example in South Australia and NSW, have recently been simpler to navigate.

A final important area at the State level is the facilitation of carbon capture, utilisation and storage (CCUS) projects. The WA Government has included CCUS as part of its diversification strategy, recognising not just its role in reducing emissions, but also in catalysing industry investment. The Government is now developing a legislative framework for carbon storage in State onshore areas and State waters. However, the drafting of these laws has been delayed, reportedly due to constraints in the Parliamentary Counsel Office. These laws must receive the highest priority and resourcing.

CASE STUDY 4:

When regulation stifles investment

This WA project proponent is currently seeking to develop a major project with the backing of the local Traditional Owners. In late 2021, an application for an "Option to purchase or lease Crown land" under section 88 of the Lands Administration Act 1997 was submitted to DPLH, with the expectation that this would only take three months. As of July 2023, land access for the whole development envelope had not been secured.

To date, the delay has cost this project proponent $4 million in the form of holding costs, payments for land agreements with pastoralists, and payments with respect to their ILUA with Traditional Owners. Most importantly, the delay and uncertainty was a key factor in losing a major investor for the project. The investor was simply not willing to risk capital without security of land tenure, and the project proponents were unable to provide investors with any assurance that they would be successful in seeking land tenure.

Aside from the delay in securing land tenure access, another key issue relates to section 41 (3) of the EP Act (WA). This business has been unable to progress its project because section 41 (3) precludes all other ministers from approving anything until the EPA has approved the project.

What this means is the project proponents will likely face an additional two to three years in navigating regulatory approvals. Unfortunately, however, these project proponents do not have the luxury of time, as securing offtake agreements at the right time (now) will underpin the final investment decision.

What's at risk? The economic and social benefits on the line

Large scale business investment underpins not only WA's economy, but the nation's economy. The direct economic and social benefits include raising the State's capital base, contributing to gross domestic product (GDP), increasing employment and boosting export revenue. The end result is a lift in living standards across Australia, a point that seems increasingly lost on regulators.

Investment in rapidly growing emerging industries – such as critical minerals, science, and space – are also set to bring diversification opportunities to the State. This economic opportunity, however, is being placed at risk by a regulatory approvals framework that is out of touch with the realities of doing business.

Government objectives are also being compromised by over-regulation, and with it any flow-on benefits for the broader economy. Investment in strategic industrial areas, new energy generation and transmission, rail and road infrastructure, and other public utilities investment like water infrastructure will be increasingly delayed if action is not taken.

The economic benefits delivered by WA projects

WA's economic performance has been supported by surges in business investment, particularly in resources and infrastructure projects. The contribution of these projects to the economy, through construction, export activity and job creation, was one of the reasons why WA experienced a period of significant economic growth between 2010 to 2015 and also underpinned our State's – and the nation's – economic resilience during the COVID-19 pandemic.

There are numerous indirect benefits as well. New projects add to the stock of productive assets – known as capital deepening – which leads to an increase in labour productivity, boosting real wages. Other projects may also be designed to reduce bottlenecks, improving the efficiency of the existing capital stock and current supply chains. The revenue and jobs created from these projects then provide taxation streams to Government in the form of company tax and payroll tax.

The scope of major project investment in WA goes beyond resources, and includes the development of public goods and utilities, such as improvements to transport infrastructure, the expansion of energy transmission networks and the construction of desalination plants. Projects of this nature may underpin the feasibility of other investments – while also improving the living standards of Western Australians both now and in the future. For example, urban road and rail projects improve quality of life through easing congestion, which is forecast to cost Perth $3.6 billion per year by 2031.[19]

WA is also one of two national strategic defence shipbuilding hubs. Defence contracts are typically worth more than $1 billion and provide a stable investment in the local economy over an extended period. For example, the SEA 1180 contract for offshore patrol vessels will see 12 vessels constructed at a total cost of $3.6 billion by 2030, with the majority of these vessels to be constructed in WA.

The push to net zero over the next 30 years has seen a shift in demand towards battery grade minerals and renewable energy sources, both of which WA is uniquely positioned to deliver. WA's abundance of critical minerals, such as lithium, nickel and cobalt, means we can help drive the energy transition.

$318 billion

known investment projects in the pipeline yet to receive environmental approval.

[19] Infrastructure Australia, 2019. Urban Transport Crowding and Congestion

This also creates the prospect of further diversification through the development of downstream processing capabilities, such as refining lithium in the form of lithium hydroxide (and possibly in precursor production).

WA will be integral in providing the energy of the future, not only in terms of supplying gas as a transition fuel, but also with respect to our vast landmass ideal for both wind and solar power (and possible wave energy). Not only are these energy sources themselves, but they have the potential to power large scale hydrogen hubs. WA has been slated as the home for two of the largest hydrogen hubs in the world, and this would place our State at the forefront of the energy transition.

Space is an emerging industry with WA set to be the home of the Square Kilometre Array, one of the world's largest and most capable telescopes and planning underway for the world's first green spaceport in the State.

Lengthy delays, onerous requirements, and undue complexity puts investment in these projects – and future projects – at risk of being reduced in scope or worse, cancelled.

The wait for approval

Proponents report lengthy delays, and there's considerable concern this will worsen. But just how widespread are these concerns, and how much extra time is this adding to an already lengthy and complex process?

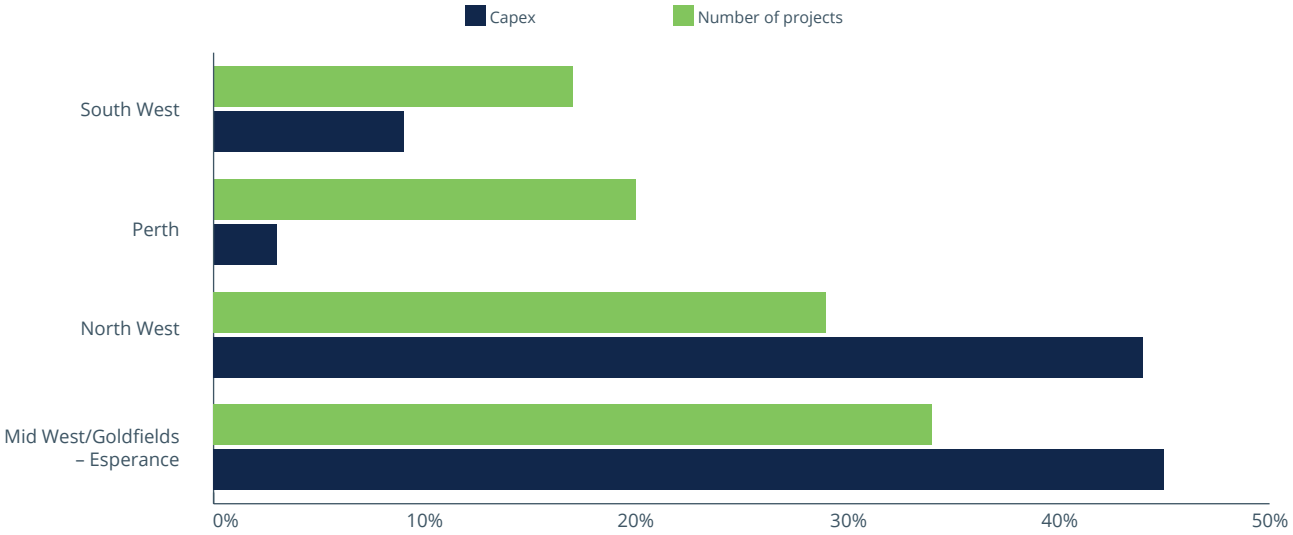
To better understand the scale of this issue, we surveyed a number[20] of businesses in the resources, agriculture, property and transport industries. We found 31% of respondents were either currently trying to obtain, or would soon be looking to obtain an environmental approval for a project. Of this, 95% were seeking approval from State regulatory agencies, while 29% were seeking Federal approval (24% were seeking approval from both).

The majority of investment projects are located in the resource-rich regions of the State, with around one third (34%) located in the Mid West/Goldfields-Esperance region and another 29% in the North West. When viewed in terms of capital expenditure this distribution is even more concentrated, with 89% of project capital expenditure being located within these regions (*see chart 1*). A further 9% is located in the South West, while 3% is in the Perth metropolitan region. Looking at the timing of these projects, 90% of survey respondents expect to start construction in either the second half of 2023 or 2024, while 77% anticipate operations to start between 2024 and 2026. These results show that the risk to WA's economy will be felt significantly over the next few years.

Over recent years, the average length of time for major resources projects to receive environmental approvals is reportedly in the order of 3.5 to 4 years.

However, this does not include projects that are still waiting to be approved. More than two thirds (68%) of survey respondents in the process of seeking approval have reported it is taking longer than anticipated, causing significant delays to their project.

Chart 1:
Geographical distribution of projects requiring environmental approval



[20] Total number of survey respondents was 175

On average, respondents indicated they expect the approvals process to add 1.75 years to their original timeline – in other words, environmental approvals are delaying projects by an average of a year and nine months relative to what was initially anticipated.

The cost of waiting

The cost of waiting is significant, not only for WA business but the economy as well. As the Productivity Commission noted, "unnecessary delays in project commencements can be costly for proponents and the community, and typically dwarf other regulatory costs".[21]

While it is impossible to precisely quantify the aggregate impact of unnecessary delays on economic activity, given the scope of data required, it is possible to derive estimates of projects at risk and the cost of delays.

We estimate that WA has approximately $318 billion worth of known investment projects in the pipeline that are yet to receive environmental approval. These projects are estimated to create around 106,000 jobs within our State. This is the value of investment at risk of being delayed, scaled down or abandoned altogether due to lengthy approval times. Of those survey respondents who indicated approval times were longer than expected, 40% were at risk of abandoning their project as a result, while 25% indicated they were at risk of scaling down their project. On average, projects at risk of being scaled down were estimated to be downsized by 40%. Given the current cost environment and assumptions on project expenditure for some investments, this estimate is likely to be conservative.

The pipeline of projects stems from a wide range of industries including iron ore, critical minerals, renewable energy, utilities, land development, transport, defence, and space. Table 1 outlines our estimate of the quantity of a selection of resources that are at risk of being delayed from production or left undeveloped as a result of delays to the approvals process.

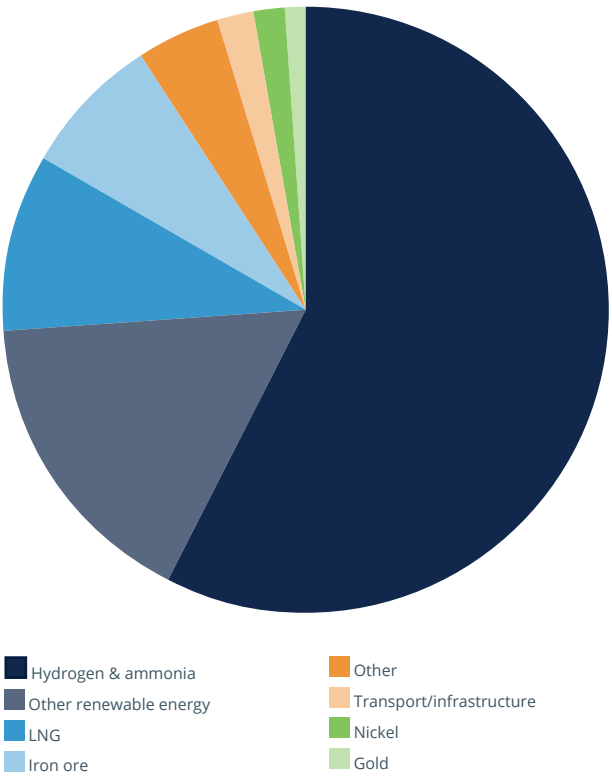
Apart from the overall frustration, delays to projects also create a range of costs. These include, but are not limited to, further costs for completing approvals, hiring consultants, holding materials, and keeping subcontractors and internal resources on.

Table 1
Quantity of resources at risk by project type

Project type	Resources at risk
Iron ore	129 Mt p.a.
Renewable energy	29.8 GW
Hydrogen	16.8 Mt p.a.
Ammonia	15.0 Mt p.a.
Gold	1.1 Moz p.a.
LNG	11.4 Mt p.a.
Nickel	103 kt p.a.

Some businesses reported these costs can amount to $100,000 a month, and up to $1 million per day. These costs increase the risk that a project is abandoned, as each additional cost decreases the economic viability of a project, particularly if these costs are upfront with no immediate return. Indeed, the Productivity Commission has estimated that each year of delay costs a project proponent between 7-18% of a project's net present value[22]. This is most costly if the delay comes after significant upfront costs, such as exploration.

Chart 2:
Approximate capital expenditure by project type ($ billions)



[21] Productivity Commission, 2020. Resources Sector Regulation
[22] Ibid

More importantly, pushing out the start date of a project via longer approval timeframes delays the receipt of revenue, including the taxation, royalty streams and other commercial opportunities that flow to the community. Delayed revenue streams place greater financial pressure on the proponent, particularly if the project feasibility was marginal to begin with. For the Government, this reduces its ability to fund critical services and infrastructure upgrades that benefit the wider community, as well as deteriorating the budget position.

Delays also reduce business' ability to expand and fund new projects, diminishing the future investment pipeline. A more severe consequence could see the project abandoned entirely and the company enter administration, weakening not only the future investment pipeline but the current pipeline as well.

Increased regulatory burden also places potential future investments at risk by decreasing investment attractiveness. While WA is abound with investment opportunities, our international competitiveness hinges on our ability to provide returns commensurate with the costs and efforts involved. Regulatory performance is one significant factor considered in these decisions – as discussed above, increased complexity to the process and time taken to receive approval adds uncertainty to a prospective project and increases associated costs, affecting its commercial viability.

In the race to secure investment, particularly in emerging industries pivotal in the transition to net zero, increasing the regulatory burden in WA gives our competitors a significant head start in acquiring the substantial amount of investment on offer in this sector and pushes back the transition to decarbonisation. Delays in receiving environmental approvals also makes it harder to secure offtake agreements.

In this respect, it is important to note that the shift in capital flows to North America are not simply a function of the Inflation Reduction Act in the United States and the significant tax incentives available in Canada. They are married with determined efforts at both a national and provincial level to fast-track regulation (and to invest in skills).

As we can see, there is a massive amount at stake for the WA economy if the reform to environmental approvals is not forthcoming. Economic growth, jobs, future investment, and diversification opportunities are all at risk of being lost if meaningful change is not realised. We outline our policy recommendations overleaf that will ensure WA's economy remains at the forefront of economic development, rather than being left behind.

Creating firm ground: What needs to change?

The entire WA and national economy would benefit if the regulatory environment worked with the business community, rather than against it. While the community expects robust regulatory regimes, we need to strike a common sense approach to the management and protection of the environment, and broader consultation requirements.[23] It is well known that WA has a robust environmental regime, and is home to companies with significant ESG standards. However, the experience – particularly with respect to the refusal to accept WA's offset policies and the establishment of the national EPA – is tantamount to a "Commonwealth takeover of State laws".[24]

What the Federal Government needs to do

There is a concern that the Nature Positive reforms are being rushed. With so much at stake, it is critical that Government slows down the process and ensures it allows sufficient time for industry to review the proposals and provide input.

In terms of its policy design, we call on the Federal Government to settle on an approach that sensibly balances economic development and environmental protection. It is highly concerning that the new EPA can unilaterally make decisions without consideration of the social and economic benefits of a project. We recommend a formal social and economic analysis is factored into the final decision, with Ministerial and Cabinet responsibility, and the input of Commonwealth Treasury.

We also strongly recommend the Commonwealth design its Nature Positive reforms in a way that ensures a simple and effective approach to bilateral assessments and approvals. WA has proven over generations that it is the expert jurisdiction in managing the trade off between getting major projects up while protecting its environment.

There is also considerable concern surrounding the existing offset regime, as a quasi-model already appears to be adding undue complexity for proponents. The insistence of 'like-for-like' offsets is an onerous and impractical benchmark, which will likely force proponents to pay to offset any environmental damage. While the delays associated with finding, securing and scientifically testing offset land would be a significant cost in itself, the additional costs associated with paying into the conservation fund could be equally as costly. This is also in addition to the cost recovery proposals being considered to fund this new Federal regime.

The Government must also address the uncertainty created by the Federal Court's decision on what constitutes a 'relevant person'. If this decision is allowed to set a precedent for consultation requirements going forward across the economy, it would create a new layer of complexity that would make Australia unattractive to investors.

The economic and social damage can be limited if there is reform of the offshore approvals regime, including reasonable parameters for defining 'relevant persons' with regards to interests and location.

Finally, the Federal Government must review its funding for the Environmental Defenders Office (EDO), which is increasingly helping to drive environmental lawfare. While it is appropriate that Government help to fund community legal education and direct support for genuinely disadvantaged or impoverished litigants, the current activities of the EDO means that Federal Government funding for the organisation is undermining WA's efforts to grow and diversify its economy.

Given the role WA plays in the national economy, our main message to the Federal Government is to consider the economic impact of any new regulations. Australia simply cannot compete with the scale of subsidies on offer within other significant investor hubs, like the US and Canada, so instead, we need to ensure our regulatory regime is as efficient, streamlined, and uncomplicated as possible.

[23] Federal Minister for Environment in Jervis-Bardey, D. 2023. Aboriginal cultural heritage laws: Environment Minister Tanya Plibersek rules out Federal overrule option. The West Australian

[24] Ibid

What the State Government needs to do

The immediate focus of the State Government should be in three areas: (1) get the resourcing of approvals agencies right; (2) better ensure approvals agencies are applying rules as they were intended; and (3) review and reform legislative barriers.

With respect to resourcing, EPA Services, DWER and other regulatory agencies must be adequately funded to ensure they have the skills and know-how to perform their functions. The justification for introducing a significant cost-recovery burden on industry was that it would better ensure agencies are appropriately resourced. At the moment industry is bearing that additional burden for no improvement in performance. The Government also needs to consider the resourcing of the Parliamentary Counsel's Office, and fast-track its efforts to develop new rules for carbon capture and storage, and hydraulic fracturing.

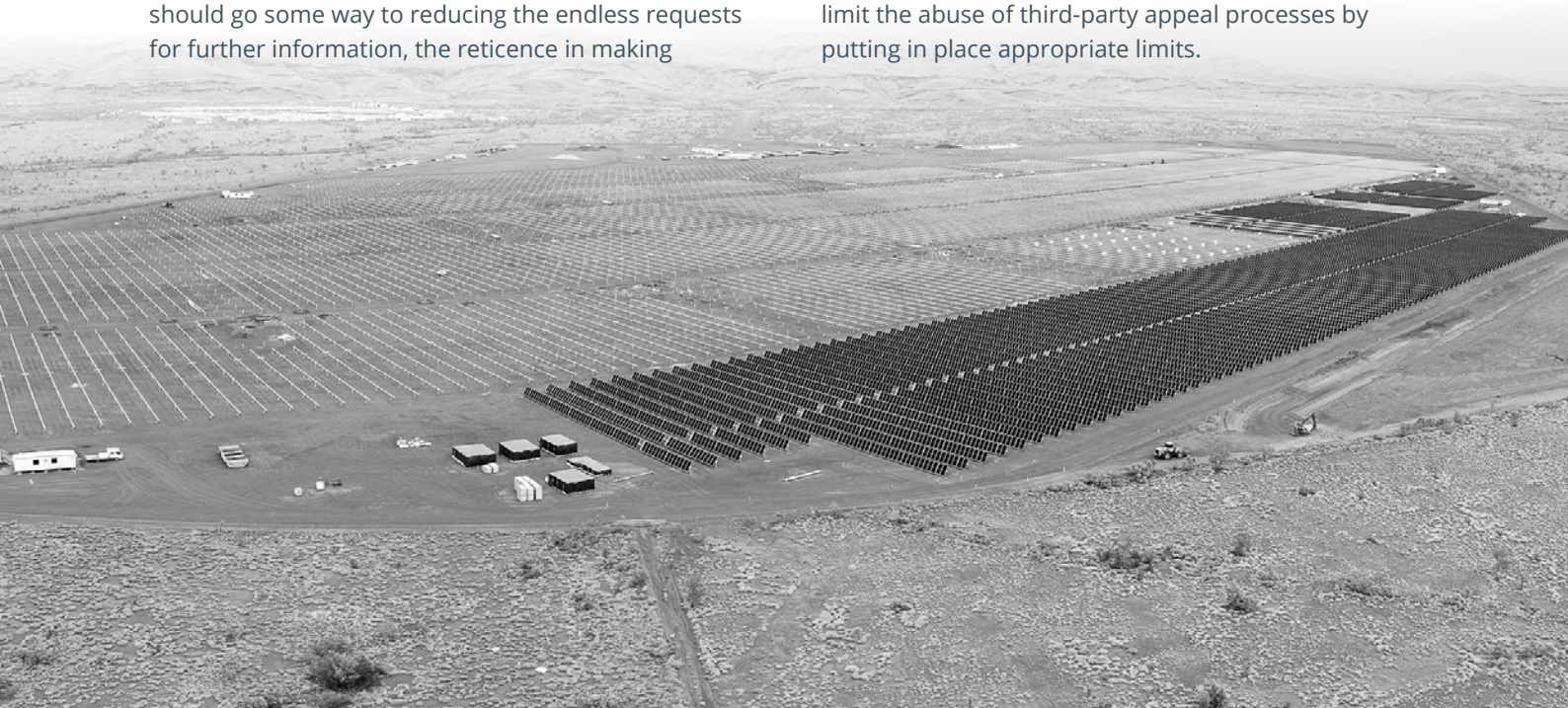
The State Government must also better ensure approval agencies are accountable, and applying rules correctly. The EPA is not applying key parts of Part IV of the EP Act as they were intended, most notably, they are not adhering to the definition of a 'significant proposal' which is defined as a proposal that has a 'significant effect on the environment'. It is also important that approval agencies be better held to account, with meaningful KPIs linked to timely assessment of major projects. The State Government should also focus on developing clear and consistent written guidance for proponents and assessing officers to follow and apply to ensure consistency of application and assessment. A critical part of this should involve working with Traditional Owners, approval agencies and industry to identify a sensible approach to consultation requirements. These efforts should go some way to reducing the endless requests for further information, the reticence in making decisions, and the shifting of goal posts mid-project.

To give effect to the above, the State Government should assess the merits of issuing a Statement of Expectations to approval agencies, as occurs in Tasmania, Victoria and New Zealand. The Statement should direct agencies to focus on a risk-based approach to regulation, with proper regard to key legislative provisions like the need to focus on proposals likely to have a significant effect. The Statement should also require approvals agencies to report against meaningful KPIs, including the time taken to come to a decision on major projects.

In terms of reviewing and reforming legislation, there would be benefit in the State conducting a review into section 41 (3) of the EP Act, which currently prevents the simultaneous advancement of approval workstreams. It is also apparent that the 2020 reforms to section 45C (for amending approved proposals) are not working as intended, which was to improve administrative efficiency. While the above Statement of Expectations could go some way to helping address this, another review and update to the legislation is likely required.

The WA State Government is seeking to address the barriers that exist for green projects with the establishment of a Green Approvals Unit facilitated by JTSI and DWER. We hope to see this model establish a case for significant reform across approval agencies and for all project proponents – whether considered 'green' or otherwise – to benefit. The quicker this occurs the better, as the risk of the new Green Approvals Unit is that it draws experienced approvals people from front line approvals work for other major (non-renewable) projects.

Finally, the State Government should also seek to limit the abuse of third-party appeal processes by putting in place appropriate limits.



Recommendations

Federal Government

Recommendation 1: Nature Positive reform process

The Federal Government should, as part of its Nature Positive reforms, ensure that industry has sufficient time to review the proposals and provide genuine input. Rushing the process will exacerbate the current problems with the approvals system.

Recommendation 2: Nature Positive reform principles

In designing its Nature Positive reforms, the Federal Government should:

- make its highest priority the reduction of timeframes for making a decision on major projects;
- ensure that a formal social and economic analysis is factored into Federal decision making, with Cabinet oversight and the input of Commonwealth Treasury;
- seek to align, where possible, with WA's standards and approach to environmental regulation and oversight, and ensure a simple approach to bilateral assessments and approvals; and
- require the new EPA to provide a recommendation to the Minister, with the Minister making a decision after weighing this against a broader consideration of social and economic impacts.

Recommendation 3: Fixing offshore consultation

The Federal Government should legislate changes to Regulation 11A of the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009, providing greater clarity in relation to consultation requirements.

Recommendation 4: Environmental Defenders Office

The Federal Government should cease funding the Environmental Defenders Office (EDO), and redirect that funding to ensure it solely provides for community legal education and direct support for genuinely disadvantaged or impoverished litigants. The current activities of the EDO mean that Federal Government funding for the organisation is undermining Western Australia's efforts to grow and diversify its economy.

State Government

Recommendation 5: Nature Positive reform

The State Government should work with the Federal Government to limit the aspects of its Nature Positive agenda that would be most damaging for WA.

Recommendation 6: Resourcing

The State Government should seek to ensure that the considerable cost-recovery funding raised from industry results in improved performance. To this end, EPA Services, DWER and other key parts of Government with involvement in approvals must be appropriately resourced. The use of external experts and consultants should be explored for clearing backlogs of approval applications. It should also ensure that key regulatory bodies have a culture where public servants can sensibly balance environmental, social and economic concerns.

continued next page

State Government (continued)

Recommendation 7: Addressing the problems with State approvals

The State Government should enhance the accountability of approval agencies, and ensure they are interpreting key aspects of legislation as intended. To this end, the State Government should make the following a priority.

- Ensure that regulators take a sensible, risk-based approach to regulatory approvals and that consultation obligations with the community are commensurate with the complexity and risk associated with a proposal.
- That key aspects of legislation are interpreted as intended (such as the 'significant effects' under Part IV of the Environmental Protection Act).
- That regulators are kept focused on their core purpose, for example the EPA's involvement in heritage matters is moderated when it is evident that the matters can be managed appropriately under heritage legislation.
- Mandatory reporting against key KPIs, including the delivery of timely decisions for approvals on major projects.

To give effect to the above, the State Government should issue a Statement of Expectations for key approval agencies, and require agencies to issue a Statement of Intent in response. Regardless of whether the State Government introduces a Statement of Expectations, it must address the above-listed matters as a matter of urgency.

Recommendation 8: Legislative review

The State Government should conduct a review into the legislative barriers that currently slow down the approvals process, including:

- section 41 (3) of the Environmental Protection Act, which currently prevents the simultaneous advancement of approval workstreams;
- section 45C of the Environmental Protection Act, to allow quicker decision making for non-significant amendments to approved proposals.

Recommendation 9: Parliamentary Counsel's Office

The State Government must address the ongoing resourcing challenges for the Parliamentary Counsel's Office. It should immediately prioritise the following:

- To accelerate carbon capture, utilisation and storage projects, the State Government should fast-track its *Petroleum Legislation Amendment Bill (B) 2023* and any related regulations.
- To accelerate the potential development of new significant onshore gas projects, the State Government should fast track the updating or replacement of the *Petroleum and Geothermal Energy Resources (Hydraulic Fracturing) Regulations 2017* as well as its proposed code of practice.

Recommendation 10: Preventing abuse of appeal mechanisms

The State Government should seek to prevent abuse of third-party appeal processes by putting in place appropriate limits.

Chamber of Commerce
and Industry WA

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