

8 June 2017

Committee Secretary
Red Tape Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Senate Red Tape Committee (Environmental Assessments and Approvals)

Committee Secretary,

We refer to the above inquiry and provide a submission on behalf of the Institute of Public Affairs ('IPA'). Our submission refers to the following terms of reference:

- “a. the effects on compliance costs (in hours and money), economic output, employment and government revenue.”
- “b. any specific areas of red tape that are particularly burdensome, complex, redundant or duplicated across jurisdictions.”

Within those terms of reference, our submission is to enclose three (3) recent research publications and three (3) recent submissions:

1. The Growth of Federal Environmental Law: 1971 to 2016.
2. Section 487: How Activists Use Red Tape to Stop Development and Jobs.
3. Submission to the Productivity Commission Draft Report on the Regulation of Agriculture.
4. Submission to the Agriculture and Environment Committee Queensland.
5. New South Wales Environmental Assessment Improvement Project.
6. On Regulation Productivity and Growth: Reforms to Make Australia More Prosperous.

Australia has experienced 26 years of unbroken economic growth, but with little to show for it. Business investment is declining, and wages growth and new business start-ups are at record lows, while public debt and underemployment are at record highs.

Red tape is the central factor contributing to this economic malaise. The IPA calculated that red tape reduces Australia's economic output by \$176 billion each year, which is equivalent to 11 per cent of GDP. This cost represents forgone human potential. It measures all of the businesses that were never started, the jobs never created, and the time lost adhering to bureaucratic requirements.

For comparison, red tape costs (\$176 billion pa) vastly exceed the costs of major Australian taxes – including personal income tax (\$166 billion in 2013-14), company tax (\$71 billion), the GST (\$56 billion) and payroll tax (\$21 billion).

The costs of red tape to the Australian economy also exceeds major items of government spending, such as social security and welfare (\$156 billion in 2013-14), health care (\$106 billion), education (\$81 billion) and defence (\$22 billion).

A central source of Australia's red tape problem is environment law, approvals, and assessments.

Since the 1970s, environmental law in Australia has expanded and become more centralised. The number of pages of environmental law has increased 80-fold since the first federal environmental department was introduced. In 1971 the Department of Environment, Aborigines and the Arts administered 57 pages of legislation, by 2016 the Department of Environment and Energy administered 4669 pages.

Some examples of projects affected by environmental law demonstrate the extent of the problem:

- The Roy Hill iron ore mine in the Pilbara required more than 4000 separate licences, approvals, and permits for the pre-construction phase alone.
- The Tads Corner Project, the first mining pit to ship coal from the Galilee Basin in Queensland, required 5000 approvals, permits, and licenses.
- The Adani coal mine in central Queensland has spent seven years in the approvals process, endured more than 10 legal challenges, and prepared a 22,000-page Environmental Impact Statement.
- In a 2013 report the Productivity Commission gave the example of a project which was required to meet 1500 government imposed primary conditions and 8000 sub-conditions.
- In Victoria three miners were required to pay at least \$900,000 to offset the loss of native grass resulting from a proposed mine because an orchid could grow there in the future.
- In Western Australia, the discovery of microscopic, blind 'desert prawns' led the Western Australian Environmental Protection Authority to block approval of Cameco's proposed Yeelirrie uranium mine, a project for which BHP had previously paid US\$450 million.

The optimum level of regulation, however, is not zero. The above examples do not represent minimum best practice regulation. These regulations impede project development and lead to significant economic problems.

Australia is operating in an internationally competitive marketplace where capital is highly mobile between jurisdictions. By adding to the cost base of operating in Australia, red tape discourages businesses setting up projects and operations in Australia. This is a key reason why business investment in Australia is lower today (12.2 per cent of GDP) than the average of the economic crisis levels of the Whitlam era (13.7 per cent).

Lower business investment, in turn, reduces the nation's capital stock, which reduces the growth to labour productivity and to wages. Over the past year, for example, private sector wages in Australia grew by a record low 1.7 per cent, which is a pay cut in real terms.

Low wages growth has contributed to a decline in the living standards for many Australians, with real net national disposable income per capita decreasing by 1.4 per cent from 2001 to 2017.

A lack of business investment is also a key contributing factor to low employment growth. Recent analysis by Adam Creighton in *The Australian* showed that the true unemployment rate in Australia is closer to 15 per cent, rather than the officially reported 5.7 per cent, when those who are marginally attached to the workforce are accounted for. Similarly, the underemployment rate, which measures the proportion of those who are employed who wish to work more hours, is a record high 9.2 per cent.

Further, environmental green tape can raise the cost of new businesses entering the market, which discourages entrepreneurship. Since 2004, Australia's population over the age of 15 has grown 22 per cent, yet the number of new businesses opening has dropped 5 per cent. Fewer business entries have the ancillary effect of reducing competition, which leads to higher prices, lower quality, and less innovation.

A further aspect to the IPA's research has been to examine the political economy context of how individuals and groups interact and use environmental law. Our research has demonstrated that environmental red tape is not just a problem in and of itself, but also because it opens up the potential for vexatious litigation. Particular legal provisions enable environmental activists to impose burdens on others, such as through section 487 of the EPBC Act (see below). This holds back Australian prosperity and undermines the integrity of the law.

Below we summarise three major areas of red tape within environmental assessments and approvals (green lawfare, the water trigger, and native vegetation), as well as summarising an alternative approach to the approvals process.

GREEN LAWFARE (S. 487 OF THE EPBC ACT)

Section 487 (s. 487) of the Environment Protection and Biodiversity Conservation (EPBC) Act extends special legal privileges to green groups to challenge federal environmental project approvals, even when their private rights are not directly affected by that project.

The original motivation of the provision was to provide an added ‘safeguard’ to the major project approvals process by allowing those with a purported interest in the environment to legally challenge projects thought to have been wrongly implemented.

However, this privilege has been abused by green groups who use s. 487 to engage in lawfare – the use of the legal system for ideological anti-development activism.

Indeed, some eighty-seven per cent (twenty-eight out of thirty-two) of s. 487 challenges which have proceeded to judgement have been rejected in court. Of those four challenges that have been successful, just one resulted in a substantial alteration to the Minister’s original decision. A more legitimate use of s. 487 would have seen a far higher success rate.

Section 487 provides an asymmetry: Green groups do not need to win a case in court in order for their activism to have been successful. Their aim is to disrupt and delay projects—particularly coal, or coal-enabling infrastructure—to make them, and future projects, commercially unviable. This strategy was outlined by green groups, including Greenpeace, in the document *Stopping the Australian Coal Export Boom*.

The key strategy outlined is to ‘disrupt and delay’ key projects, while gradually eroding public and political support for the industry. To do this, green groups will ‘get in front of the critical projects to slow them down in the approval process’ by undertaking ‘significant investment in legal capacity’ in order to engage in sustained legal battles.

Holding projects up in court reduces profitability, employment, investment and government revenue and royalties. Some projects never go ahead due to heightened risk of legal challenges and consequent higher capital costs.

Delaying or preventing projects in Australia harms the environment: Australia has cleaner coal than the rest of the world. Fewer coal mines in Australia means more coal mines overseas, which will result in a lower quality environment. Delaying or preventing projects—if applied on a global scale—can also affect the dependable and affordable supply of energy to developing nations.

Since the introduction of the EPBC Act in 2000, major projects have spent approximately 7500 cumulative days, or 20 years, in court as a result of challenges brought under s. 487. The IPA estimates these delays have cost the Australian economy as much as \$1.2 billion.

This estimate is likely to underestimate the total cost to Australia from s. 487, as it doesn't capture all flow-on effects to employment, investment and higher capital costs to future projects as a result of heightened risk. As the Business Council of Australia noted 'these costs [of project delays] are ultimately borne by the community in economic activity is foregone, which leads to lower income and employment.'

In estimating flow-on costs, BAEconomics found that reducing project delays by one year would add \$160 billion to national output by 2025, and add 69,000 jobs across the economy over that period. Many of these jobs would be in rural and regional areas.

The IPA recommends that s. 487 of the EPBC Act be repealed.

WATER TRIGGER

The 'water trigger' in the EPBC Act requires all large coal and coal seam gas projects which may affect a water resource to receive approval from the Federal Environment Minister. However, the water trigger is not intended to protect water sources. It is based on a 'political agenda with no environmental dividend.'

Rather the water trigger exists to slow the development of coal seam gas and large coal mines specifically (hence why the water trigger does not apply to other activities, which also affect water, such as in agriculture).

The water trigger is an example of the broader problem with EPBC Act: green activists use it to feed in an ever increasing number of conditions and requirements, with the long-run aim of capturing every major project in Australia.

The IPA recommends the water trigger in the EPBC Act be repealed.

NATIVE VEGETATION

Every state currently regulates the clearing of native vegetation. Many of the restrictions on native vegetation are burdensome to landowners, and prevent them from more efficiently managing their own property.

For instance, three gold miners in Victoria were recently asked to pay \$900,000 to remove grass on their ‘treeless and badly eroded’ land because an orchid was growing seven kilometers away.

Examples of native vegetation legislation such as this are clearly above minimum best practice regulation. That is, reforming native vegetation legislation could achieve better biodiversity outcomes at a lower cost.

As with all environmental law, debates over land clearing legislation must acknowledge the central trade-off between economic growth and development, and maintaining or even expanding biodiversity.

The recent proposed changes to native vegetation laws in Queensland are a case in point. As we have noted in the attached submission, the proposed changes would have stifled our most productive farmers, breached the principle of the rule of law, and ultimately increased business uncertainty and decrease business investment over the long term.

The IPA recommends regulators move towards market-based approaches to native vegetation regulation, where governments compensate landowners for eroding their property rights in the name of environmental protection.

A market-based approach to native vegetation regulation would be an important step in placing the cost of red tape and overregulation onto governments, rather than onto industry.

ALTERNATIVES TO ENVIRONMENTAL IMPACT ASSESSMENTS

The central objective of government policy is to ensure resources are being put to the highest value use for society. This often means government intervention should be limited to providing rule of law, enforcing contracts, protecting private property, and addressing bona-fide market failures.

It is often assumed that Environmental Impact Assessments are a necessary tool for providing information to decision makers in helping them decide on project approvals. Rather than accepting this premise, it is important to examine if it is true.

To this end, the central question we should consider is: are EIAs the most cost-effective way of achieving a balance between environmental conservation and economic development that provides a net benefit to Australia?

There are good reasons to believe EIAs do not deliver net benefits. In particular, EIAs:

- Are a costly process which delay the implementation of high-value projects.
- Are used by green groups to slow development.
- Have created an industry of their own, which is taking resources from more productive activities.
- Results in cost-shifting from government to the private sector.

The IPA believes alternatives to Environmental Impact Assessments, which can meet the objectives of environmental protection and economic development, should be considered. One approach is to replace EIAs with direct third party or government acquisition of environmental goods.

Under this alternative system, any project which formerly required the provision of an environmental impact statement would be replaced by the following: the government would announce the details a project (i.e. a proposed mine); the public has 8-weeks to respond, including to provide information relating to concerns about the impact the project could have on environmental amenity (i.e. project x would result in y per cent reduction in a certain tree which serves as a habitat for an endangered species); this information is then made publicly available; an eight-week period would follow where government and/or other community groups negotiate with project proponents relating to the acquisition of environmental amenities.

This approach would provide certain timeframes, reduce delays and ensure those who receive the benefits of environmental conservation are unable to push the costs of its provision onto others.

The IPA trusts that our contributions will be of assistance to the Committee. We would be pleased to answer any questions. Please do not hesitate to contact us: in writing to Level 2, 410 Collins Street, Melbourne, 3000; by telephone on (03) 9600 4744; or by email to dwild@ipa.org.au.

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