# 3 Exploration licensing and approvals

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| Key points |
| * Mineral and energy resources are owned by the Crown. Governments control access to, and extraction of, those resources through regulation. Governments also regulate exploration given that it may impact on other land users and uses, the environment, and heritage; including beyond the area being explored. * Explorers have voiced concerns that the regulatory environment in Australia is discouraging exploration by unnecessarily increasing compliance costs, approval times and regulatory uncertainty. * Reforms that would reduce unnecessary burdens on resource explorers include: * appropriate levels of consultation prior to making regulatory changes, in order to promote certainty and confidence in the rules being applied * transparent exercise of ministerial discretion * improved transparency and accountability around approval timelines and decision making * a lead agency in each jurisdiction that, at a minimum, coordinates exploration licensing and related approvals (such as water, environment and heritage approvals), and provides proponents with guidance on the range of approvals that may be required and on how to navigate the approvals processes * mandatory (or at least target) timelines for approvals processes; an electronic approvals tracking system; and public reporting on performance. * A wide range of stakeholders interact with the exploration licensing and approvals system, and these interactions are managed differently across the jurisdictions. Some jurisdictions do not provide for public consultation or even public notification of an exploration licence being considered or granted; others allow submissions to be considered by the decision maker or arbitrated by a tribunal or mining warden. * Judicial review, which considers the legality of a decision, is necessary to protect rights established under law, but vexatious claims can be used by opponents of exploration and industry competitors to delay or frustrate projects. * Courts have powers to dismiss vexatious litigation, or award costs against unsuccessful claimants. * Applicants and others who wish to contest the merits of a decision may in some circumstances do so through mediation or by escalating the decision to another officer within the regulator. These informal dispute resolution mechanisms tend to be preferred because they are faster, cheaper and more accessible than court appeals. |
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This chapter outlines the exploration licensing and approvals regulatory system and its governance. It starts with an overview of the tenement allocation process, the approvals processes that are required before exploration can commence and the conditions attached to exploration licences. The chapter then considers issues related to tenement allocation, the transparency and accountability of decision making, and regulator performance.

## 3.1 The regulatory framework

The sheer volume of legislation governing mineral and energy resource exploration makes the system difficult to describe and synthesise. Legislation is generally delineated according to whether exploration activity is conducted onshore or offshore, and whether the resource category is minerals or petroleum. Accordingly, most jurisdictions have at least four key Acts (listed in table 3.1) and associated regulations.

Further complexity arises from the differential treatment of specific resources. Some resources, for example coal and uranium, have separate legislative regimes in most jurisdictions. Uranium is treated separately because international treaties regulate its sale and use. In the case of coal, the separate legislation reflects the fact that existing knowledge on the location of coal seams dramatically reduces the uncertainty of exploration and allows different requirements to be applied.

The legislation that may apply to a particular exploration venture may, depending on the location and the nature of the proposed exploration activities, also include environmental, Indigenous heritage, natural heritage, health and safety, planning, water, and land clearing regulation. In this regard, the Minerals Council of Australia estimated that industry operators face 144 pieces of primary legislation and 119 pieces of subordinate legislation or guidelines across Australia (sub. 27, p. 39).

Table 3.1 Key legislation governing mineral and energy exploration

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Onshore mineral | Onshore petroleum | Offshore mineral | Offshore petroleum |
| NSW | Mining Act 1992 | Petroleum (Onshore) Act 1991 | Offshore Minerals Act 1999 | Petroleum (Offshore) Act 1982 |
| Vic | Mineral Resources (Sustainable Development) Act 1990 | Petroleum Act 1998 | Underseas Mineral Resources Act 1963 | Offshore Petroleum and Greenhouse Gas Storage Act 2010 |
| Qld | Mineral Resources Act 1989 | Petroleum Act 1923 | Offshore Minerals Act 1998 | Petroleum (Submerged Lands) Act 1982 |
| WA | Mining Act 1978 | Petroleum and Geothermal Energy Resources Act 1967 | Offshore Minerals Act 2003 | Petroleum Submerged Lands Act 1982 |
| SA | Mining Act 1971 | Petroleum and Geothermal Energy Act 2000 | Offshore Minerals Act 2000 | Petroleum (Submerged Lands) Act 1982 |
| Tas | Mineral Resources Development Act 1995 | Mineral Resources Development Act 1995 | Mineral Resources Development Act 1995 | Petroleum (Submerged Lands) Act 1982 |
| NT | Mineral Titles Act 2011 | Petroleum Act 1984 | Mineral Titles Act 2011 | Petroleum (Submerged Lands) Act 1982 |
| Cth | N/A | N/A | Offshore Minerals Act 1994 | Offshore Petroleum and Greenhouse Gas Storage Act 2006 |

### Types of exploration licence allocation mechanisms

The rights to mineral or energy discoveries are potentially valuable assets. As such, governments have processes for allocating exploration licences so that there is a clear basis for determining who owns the rights to any such discoveries. In Australia, the three main ways of allocating exploration licences are: first come first served, work bidding and cash bidding (box 3.1). There are also fossicking and prospecting licences, but since these are small scale and low impact, they are not considered in this inquiry.

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| Box 3.1 Three main approaches used to allocate exploration licences |
| First come first served  First come first served is the most common approach and operates in one of two ways. For areas where exploration is permitted, but there are no active exploration licences, interested parties can apply for an exploration licence. This is most common for the search for minerals in underexplored (or frontier) areas. Alternatively, areas may be released for exploration (either for the first time, or after previous tenements have been surrendered). In such instances, first come first served is typically used if little competition for the tenements is anticipated. The first explorer to apply for an exploration permit will be awarded the licence, so long as they can satisfy the necessary conditions, such as demonstrating the financial and technical capability to undertake the exploration.  Work program bidding  Work program bidding is an allocation mechanism where companies outline what exploration activity they propose to undertake on a tenement. The allocation decision is then based on how well each company’s work program meets policy and regulatory objectives. Work program bids can be complex to assess, given that they can cover many exploration activities including drilling, electrical and chemical testing, and geo physical and remote sensing surveys.  Cash bidding  Under cash bidding — the least used allocation mechanism — explorers are invited to bid an amount for an exploration licence. Cash bidding has typically involved the simultaneous release of multiple exploration blocks. Under a pure cash bidding mechanism, the explorer with the winning bid is able to formulate and develop what it considers to be its optimal exploration program. On some occasions, the conditions for the licence include minimum exploration requirements. Cash bidding has been used intermittently by jurisdictions and has almost exclusively been used for energy exploration licences (table 3.2). |
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Regardless of the tenement allocation mechanism, every jurisdiction requires applicants to submit a work program as part of a licence application, even when it is not used as a deciding factor in allocating licences. Work programs allow regulators to monitor what exploration will be undertaken and where it will be done, which facilitates the administration of environmental, heritage and other regulatory control over exploration activity.

Table 3.2 Use of cash bidding in Australia

|  |  |  |
| --- | --- | --- |
| Jurisdiction | Cash bidding commenced | Cash bidding ceased |
| Commonwealth (offshore petroleum) | 1985 | 1992 |
| South Australia (petroleum) | 2001 | 2001 |
| New South Wales (coal only) | 2006 | 2010 |
| Queensland (both mineral and energy) | 2012 | continuing |
| Commonwealth (offshore petroleum) | 2014a |  |

a Announced policy change.

*Sources*: Alexander and Morton (2002); Cripps (2012); DRET (nd b); Hughes, W., NSW Trade and Investment, pers. comm. 29 April 2013.

### Key stages in the exploration approvals process

After explorers have been allocated their exploration licence or permit, they may also have to consider a range of regulations — such as those on environmental management, the protection of Indigenous and natural heritage, national parks, health and safety, planning, water and land clearing — and apply for any necessary approvals, before exploration can commence. Separate provisions apply to non‑invasive exploration, such as walking an area and taking soil samples, such that impact assessment is not required. Other arrangements, including land access agreements with existing land holders and users, may still be needed even for non‑invasive exploration.

In each jurisdiction there is a multitude of processes for gaining approval to explore. There are, however, broad similarities and figure 3.1 outlines a stylised description of the key stages in the exploration licence approval process.

Figure 3.1 Exploration licensing and approvals

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| Figure 3.1 Exploration licensing and approvals. This figure shows the general process of applying for a licence to explore. |

a A work program must be submitted with the application, but may not be part of the decision‑making process.

#### Public notification

Public notification of the application for an exploration licence is required in all jurisdictions except Queensland, usually by notification in the government gazette or in a local newspaper (table 3.3). In Queensland, public notification for mineral titles is only required under native title procedures.

Legislation establishes when, how and to whom notification should be given. This may be:

* at the application stage or when a licence is granted
* by the applicant or the Minister
* by government gazette, newspaper or directly
* to the public at large or to those with a special interest in the land subject to the exploration licence, for example landowners, occupants or native title holders.

Table 3.3 Notification requirements for exploration licences

Onshore minerals

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  | *NSW* | *Vic* | *Qld* | *WA* | *SA* | *Tas* | *NT* |
| Notice of application for licence in state and local newspaper | ✓ | ✓ |  | ✓ |  |  | ✓**b** |
| Notice of intended grant of licence in state and local newspaper |  |  |  |  | ✓**b** | ✓**b** |  |
| Notice to landowner and occupier of the application for licence **a** |  |  |  | ✓ |  |  | ✓ |

**a** Notice of intention to access private land is addressed in chapter 4. **b** The government (for example the Minister) publishes the notification, paid for by the applicant.

*Sources*: LexisNexis 2013.

#### Public comment

In relation to onshore minerals, all jurisdictions other than New South Wales and Queensland provide for public comment on the granting of an exploration licence or permit. However, there is a variety of arrangements as to when comment is permitted and how the comments are taken into account (table 3.4).

Table 3.4 Scope for public comment on exploration licensing decisions

Onshore minerals

|  |  |
| --- | --- |
| NSW | No provision for public comment |
| Vic | Comments are taken into account by the Minister when considering the application |
| Qld | No provision for public comment |
| WA | Public hearing of objections made by any party |
| SA | Comments are taken into account by the Minister when considering the application |
| Tas | Public hearing of objections; objector must have an estate or interest in the land concerned. Pre‑hearing mediation is encouraged |
| NT | Comments are taken into account by the Minister when considering the application |

*Sources*: LexisNexis 2013.

#### Environmental assessment

The nature of any required environmental assessment will depend on the specific regulations that apply and the environmental sensitivities present at the exploration site. This is discussed in detail in chapter 6. In seeking environmental approval, the proponent is required to outline: the proposal, the potential environmental impacts and their significance, and how they will be managed.

#### Land access arrangements and agreements

Land access arrangements and agreements may also be required before exploration can begin. These agreements may be entered into with owners of farmland, lessees of pastoral land, government bodies responsible for various types of Crown land, traditional owners or others.

Land access is discussed in detail in chapter 4. Land access agreements with traditional owners for the protection of heritage or cultural values may be reached via the Commonwealth *Native Title Act* or various State and Territory heritage or Indigenous land access legislation. These arrangements are discussed in chapter 5.

Once all the necessary approvals and agreements are in place, exploration for mineral or energy resources may commence. Exploration must be conducted in accordance with the legislation and any conditions placed on approvals.

### Licences and licence conditions

Legislation contains different licences for mineral and resource exploration and extraction. Additional to the various conditions imposed through approval processes, licences must comply with basic legislative conditions, for example relating to the land area that can be covered, the duration of the licence and the terms for renewal. These basic conditions are discussed below.

#### Size and duration of exploration tenement

The area which an exploration licence may cover (minimum and maximum size) varies by jurisdiction, by location (onshore or offshore), by resource type (mineral or petroleum) and by other factors such as prospectivity. Most Acts give the Minister power to grant licences outside the stated maxima.

The setting of the duration of licences (and rules for licence renewal) aim to balance the time needed by the explorer to assess an area against the opportunity for new explorers to have access to the land for exploration. Licences are usually granted for three to six years, depending on jurisdiction, location and resource type (table 3.5). The statutory maximum licence period is not always granted (for example, NSW typically allows two or three years for onshore mineral exploration, rather than the maximum of five).

Table 3.5 Maximum duration of an exploration licence a

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Onshore mineral | Onshore petroleum | Offshore mineral | Offshore petroleum |
| NSW | 5 years (s 27) | 6 years (s 31) | 4 years (s 88) | 6 years (s 30) |
| Vic | 5 years (s 13) | 6 years (s 84) | 5 years (s 13) | 6 years (s 84) |
| Qld | 5 years (s 146) | Minister determines (s 18) | 4 years (s 88) | 6 years (s 29) |
| WA | 5 years (s 61) | 6 years (s 39) | 4 years (s 88) | 6 years (s 29) |
| SA | 5 years (s 30A) | 5 years (s 26) | 4 years (s 88) | 6 years (s 28) |
| Tas | 5 years (s 24) | Minister determines (s 24) | 5 years (s 24) | 6 years (s 28) |
| NT | 6 years (s 27) | 5 years (s 22) | 6 years (s 27) | 6 years (s 29) |
| Cth | N/A | N/A | 4 years (s 88) | 6 years (s 102) |

a Reference to legislation in brackets: refer to Acts in table 3.1.

*Source*: Legislation.

#### Relinquishment of land upon renewal of exploration licence

All jurisdictions have different rules around renewal, including the duration of a renewed exploration licence, the number of times a licence can be renewed and the ‘relinquishment’ requirements, which entail the surrender of a certain percentage of the original tenement area (table 3.6). These rules are in place to promote turnover of the tenement and provide opportunities for exploration by other explorers.

Table 3.6 Exploration licence renewal conditions a

Onshore minerals

|  |  |  |
| --- | --- | --- |
|  | Maximum duration | relinquishment |
| NSW | **five years** (s 114); the Act does not specify how many renewals are permitted | half the area, unless the decision maker decides otherwise (s 114) |
| Vic | **five years** (s 32); maximum of two renewals, the second only in exceptional circumstances (s 31) | 25% after two years, a further 35% after four years, a further 20% after seven years and a further 10% after ten years (s 38A) adding to a total of 90% of the original allocation. |
| Qld | **five years** (s 147A) | no relinquishment requirements in legislation (s 147A) |
| WA | **five years** and then for 2 further years (s 61) | 40%, for tenements over 10 blocks (s 65). |
| SA | **five years** (s 30A), and 5 years for a subsequent renewal (s 30AB) | the Minister may reduce the licence area (s 30A) |
| Tas | the Minister may determine the length and conditions of renewal (s 25) | the Minister may determine the length and conditions of renewal (s 25) |
| NT | **two years** (s 30); no stated maximum number of renewals | the licence area is reduced by half every two years of operational exploration (s 29) |

a Reference to legislation in brackets: refer to onshore mineral legislation in table 3.1.

*Source*: Legislation.

Relinquishment policies reflect the nature of exploration activities, which can start across the whole area of a tenement, but after initial survey and drilling activity, tend to focus on the area of the tenement most likely to yield commercial resource deposits. They also aim to reduce ‘land banking’, that is, holding on to tenements without undertaking exploration. It can be difficult for a regulator to separate genuine exploration from land banking, as there are many reasons why exploration might stall, such as drawn‑out land access negotiations, poor weather or delayed availability of exploration equipment.

It is desirable, therefore, to retain flexibility in granting licence extensions and renewals, both in the law and how it is applied, so that explorers can maintain their good standing and not be penalised for events beyond their control. For example, the Association of Mining and Exploration Companies (AMEC) favours a substantial compliance approach to assess whether the proponent has met the work program requirements:

… the application may state that … the proponent’s goal is to spend $4 million and drill 25 holes. However, due to unforeseen circumstances the proponent spends $4 million and only drills 10 holes. While in strict breach of the conditions, AMEC argues they have substantially met them. In this case there would be no penalty. (sub. 24, p. 11)

AMEC recognises that the timeframes are a compromise between the need for turnover by the government and the need for certainty for the explorer. However, there needs to be flexibility in the system to allow extensions of tenements under extenuating circumstances and unforeseen events. (sub. 24, p. 9)

Flexibility in the law is generally maintained by listing considerations for renewal and including a ‘catch‑all’ factor such as ‘unforseen circumstances’ (an example is in box 3.2).

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| Box 3.2 Grounds for licence renewal in Western Australia |
| The requirements for renewal of exploration licences are set out under the WA *Mining Act* and associated regulations:  … the Minister may, if satisfied that a prescribed ground for extension exists, extend the term of an exploration licence … (*Mining Act 1978* (WA), s 61).  The following are grounds for extension:   * difficulties or delays — caused by regulations, heritage surveys, weather, etc. * the work already carried out under the licence justifies further exploration * the Minister considers the tenement has been unworkable for a significant duration of time, for any reason. (*Mining Regulations 1981* (WA) s 23AB) |
|  |
|  |

#### Retention licences

Retention licences (sometimes called assessment leases or mineral development licences) allow an explorer to maintain an interest in land that is not yet commercially viable for resource extraction. For example, the New South Wales legislation dealing with onshore petroleum states:

An assessment lease is designed to allow retention of rights over an area in which a significant petroleum deposit has been identified, if mining the deposit is not commercially viable in the short term but there is a reasonable prospect that it will be in the longer term. The holder is allowed to continue prospecting operations and to recover petroleum in the course of assessing the viability of commercial mining. (*Petroleum (Onshore) Act 1991* (NSW) s 33)

Rules concerning the length of tenure and other requirements vary across jurisdictions. Policy makers face the same tradeoff in making retention licences short enough to discourage land banking and long enough to enable companies to make commercial decisions to maximise the value of their asset.

#### Transition from an exploration licence to a production licence

An exploration or retention licence does not permit commercial scale extraction of resources. Production licences (or mining licences) require further impact assessment and controls that are appropriate to the generally more invasive nature of resource extraction activities. An exploration licence does not guarantee that the conditions will be met for a production licence to be granted. Nonetheless, there is still an expectation that an explorer can apply for a production licence or sell the right to do so to another company.

Only Western Australia provides legal certainty for an explorer wanting to convert an exploration licence into a production licence. In other jurisdictions this happens by convention, to the point that it is generally treated as an effective property right. For example, when uranium exploration and mining was banned in Arkaroola, South Australia, the company with exploration tenements in the area received $5 million compensation from the government (Kelton 2012).

Another example occurred at Adamsfield in Tasmania, where an exploration licence was granted in an area classed as a Conservation Area under State law. The area was subsequently listed as World Heritage by the Commonwealth, which then declared that there would be no mining or mineral exploration allowed (pers. comm. Mineral Resources Tasmania 24 April 2013). The Commonwealth compensated the company for its exploration expenditures and exploration was abandoned.

Both the Western Australian formalised model of linking exploration rights to production rights, and the informal model used elsewhere, appear to be working effectively. The Commission received no information to suggest the contrary.

#### Transferability of title

Junior explorers generally do not have production income; rather in most cases they sell the rights to discovered resources or enter into a joint venture to develop those resources. The ability to transfer ownership of exploration licences is central to this business model.

In all jurisdictions, approval is needed from the Minister or a delegate (or the National Offshore Petroleum Titles Administrator, in the case of the Commonwealth offshore jurisdiction) before title can be legally transferred. In deciding whether to approve the transfer, the same requirements are applied to any entity purchasing minerals or petroleum titles as were applied to the original title holder. The approval requirement allows the regulator to assess the suitability of the prospective title holder (such as their financial and technical resources and track record in exploration).

## 3.2 Issues with the allocation of licences

Industry groups have raised concerns that the rules governing the allocation of, and property rights attached to, exploration licences may be unnecessarily impeding exploration.

These concerns have been raised through submissions and industry consultations with the Commission, and relate to:

* uranium exploration licences (sub. 4)
* the transparency of licence allocation decisions (sub. 13)
* the choice of tenement allocation mechanism (subs. 12, 13 and 24)
* sub‑optimal sized and configured exploration tenements
* competing resource uses (sub. 11)

Each of these concerns is examined below.

### Uranium

The approach to issuing exploration licences for uranium differs from the approach used for other resources. The unique approach to regulation of uranium exploration is in part due to the specific upstream regulation of uranium extraction and export.

Concerns have been raised that in some instances, the procedures and approaches that are used for regulating uranium exploration are not transparent or are based on policies that appear to diverge from good regulatory practices. In particular, inquiry participants have commented on uranium exploration licensing in Victoria and New South Wales.

#### Evolving policy positions since 1983

The authority to regulate uranium exploration and extraction is a state government responsibility. In the Northern Territory, the Australian and Territory Governments share that responsibility — with the Territory Government responsible for all areas outside the *Ranger Project Area*.[[1]](#footnote-1) In regulating uranium exploration and extraction, State and Territory Governments have been guided by the Australian Government’s policies on uranium exports. The importance of federal export policies arises because almost all uranium extracted in Australia is exported.

Between 1983 and 1996, the Australian Government only permitted exports of uranium from three designated mines in South Australia and the Northern Territory (Harris 2011). The first new uranium mine to be approved since the end of the ‘three mines’ policy in 1996 was the Four Mile mine in South Australia, which was approved in 2009.

While the South Australian and Northern Territory governments have permitted uranium exploration and extraction throughout the period since 1983, the approach in other jurisdictions has varied.

* Victoria prohibits uranium exploration and extraction.
* Western Australia permitted uranium exploration, but uranium extraction was banned until 2008.
* Queensland has no legislative restrictions on uranium exploration or extraction. As a matter of policy, uranium exploration has been allowed, but no uranium extraction has been approved since 1982. In 2012, the Queensland government announced they would permit uranium extraction.
* Uranium extraction and exploration in New South Wales was prohibited in 1986. The ban on uranium exploration was overturned in 2012.
* Tasmania does not prohibit uranium exploration and extraction, but there has been no extraction and little exploration undertaken in the state.
* The Australian Government has restricted which mines are licensed to export uranium and the countries to which uranium can be exported:
* Since 1997, the Australian Government has removed the restriction on the number of uranium mines that can be licensed for export.
* Between 1977 and 2011, the Australian government allowed uranium exports only to those countries that are parties to the Treaty on the Non‑Proliferation of Nuclear Weapons. Since 2011, the policy also permits exports to countries that possess nuclear weapons if they ‘provide an assurance that AONM[[2]](#footnote-2) will not be diverted to non‑peaceful or explosive uses and accept coverage of AONM by IAEA safeguards’ (DFAT 2012).

#### Uranium exploration in Victoria

Exploration licences are not allocated for uranium in Victoria because uranium exploration is not permitted in that state. The Australian Uranium Association (AUA) has questioned the appropriateness of this ban on uranium exploration and whether the relevant Act meets best practice regulation principles (sub. 4).

In particular, the AUA has raised doubts as to whether the *Nuclear Activities (Prohibition) Act 1983 (Vic)* (NAPA) is consistent with some of the principles of best practice regulation. The Victorian Government (2011) has developed a guide to regulation that covers issues that are similar to the COAG principles of best practice regulation. As such, the Commission has assessed the concerns raised by the AUA against the Victorian guide.

One of the concerns raised by the AUA (sub. 4) is that a key rationale for the Act relates to an Australian Government responsibility (the non‑proliferation objectives). The stated objectives of the Act are:

…  to protect the health, welfare and safety of the people of Victoria and to limit deterioration of the environment in which they dwell by prohibiting the establishment of nuclear activities and by regulating the possession of certain nuclear materials, in a manner consistent with and conducive to assisting the Commonwealth of Australia in meeting its international nuclear non‑proliferation objectives. (*NAPA s. 3.)*

The operation of the *Customs (Prohibited Exports) Regulations 1958* Act appears sufficient to implement the Australian Government’s non‑proliferation objectives without the assistance of any state or territory legislation.

The AUA (sub. 4) highlights that there is overlap between NAPA and other pieces of legislation, specifically:

* The Commonwealth *Environmental Protection and Biodiversity Conservation Act* (EPBC Act)
* The Commonwealth *Australian Radiation Protection and Nuclear Safety Act* (ARPANS Act)
* The Commonwealth *Safeguards Act*
* The Commonwealth *Customs Act*
* The Victorian *Radiation Act*
* The Victorian *Mineral Resources (Sustainable Development) Act.* (p. 2)

Having multiple Acts cover the same issues does not necessarily indicate poor regulation. The Victorian Government (2011) guide to regulation indicates that the preferred outcome is to avoid duplication of regulation, but when it cannot be avoided, to ensure that the regulations are consistent. However, the existence of overlapping regulation highlights the possibility of unnecessary regulatory burden and/or inconsistent regulation — strengthening the case for a review of the legislation.

The AUA note that the *Nuclear Activities (Prohibitions) Act 1983* has not been reviewed since it was enacted (sub. 4, p. 1). The Victorian Government (2011) guide to regulation highlights the need for regular reviews of regulation.

Government departments and agencies are encouraged to pursue a culture of continuous improvement, and regularly review legislative and regulatory restrictions. (p. 18)

That the NAPA has not been reviewed for over 30 years appears to be inconsistent with the good regulatory practices outlined in the Victorian Government guide.

### Uranium exploration policies in New South Wales

The NSW Government overturned a ban on uranium exploration in 2012 (NSW DTI 2012b). The NSW Mineral Council has raised concerns over the lack of policy guidance and transparency relating to the new policy — including a lack of information on how exploration licences will be allocated. It has called on the NSW Government to:

Clarify the implementation of uranium exploration and ensure it is fair and workable. Limited information has been made available following the legislative change to allow uranium exploration in September 2012. Industry was invited to submit expressions of interest in exploration licences by November 2012, but there has been no information on the progress of the applications. (sub. 11, p. 10)

Administrative difficulties can occur with new regulatory responsibilities. However, many of the concerns raised above relate to poor communication by regulators. These concerns are consistent with those raised more generally in the chapter regarding regulatory practices. Particular concerns about uranium regulations should be addressed by the recommendations proposed by the Commission to address the general deficiencies. Consistent with good regulatory practice, regular reviews of policies are an effective means of identifying unexpected difficulties, and post‑implementation reviews can be especially valuable.

### The transparency of licence allocation decisions

The allocation of mineral and energy exploration permits is vulnerable to influence from vested interests. Australia is generally considered to be a low risk country for exploration and extraction. In the 2012‑13 edition of the Fraser Institute survey of mining companies, Australia was ranked the seventh least problematic country in relation to corruption — behind Finland, New Zealand, Sweden, Norway, Greenland and Canada. However, while concerns over the transparency of allocation decisions in Australia are uncommon, isolated instances of poor regulatory practices can adversely impact the perception of allocation systems more generally — and can discourage exploration in that jurisdiction or across the country.

A lack of transparency does not necessarily result in bad policy, but it increases the risks of poorly designed and implemented policies, and in the extreme, increases the risk of corrupt practices. Corruption is most likely to occur when individuals have the means and the motive to obtain gains from misusing their authority. While not directly raising the risk of corruption, the associated concerns the public may have over the integrity of the cash bidding system appears to be one of the issues that the Queensland Resource Council and Queensland Exploration Council have with such an allocation mechanism.

QRC does not support a cash bidding process for exploration tenures. Accepting payments for tenure generates moral hazard, compromising the Government’s ability to be seen to impartially regulate these projects. (sub. 13, p. 5)

A recent statement by the Queensland Resource Council chief executive, Michael Roche provides insight into the reasons for moral hazard concerns.

Nowhere has QRC spoken about corruption in connection to this policy but we do have grave concerns about the implications for community confidence. We have spoken of the implied ‘moral hazard’ of governments accepting large payments from a proponent at the exploration stage and then being expected to adjudicate objectively on a subsequent application from that same proponent for production tenure. (Roche 2013)

The Commission considers that procedures to minimise the risk of corruption should explicitly underpin the allocation of mineral and energy exploration rights. The most effective approach to minimise corruption risks is to utilise transparent systems and to base decisions on objective criteria. Transparency would instil greater confidence in the integrity of the allocation system and provide unsuccessful tenderers with information to identify deficiencies in their own proposals.

The three main approaches used to allocate exploration licences in Australia — first come first served, work program bidding and cash bidding — are based on objective criteria. However, there have been isolated examples of exploration licences being allocated on subjective criteria, most notably opaque administrative assessments of the suitability of different applicants.

draft Recommendation 3.1

Governments should ensure that their authorities responsible for exploration licensing:

* prepare and publish information on the government’s exploration licensing objectives and the criteria by which applications for exploration licences will be assessed
* publish the outcome of exploration licence allocation assessments, including the name of the successful bidder and the reasons why their bid was successful.

### The choice of tenement allocation mechanism

The choice of tenement allocation mechanism may influence the efficiency of exploration. The main concern relates to work program bidding and cash bidding. These allocation mechanisms are most commonly used in Australia when regulators anticipate competition for exploration rights. In such situations, the tenement is granted to the highest bidder. This may be the amount an explorer is willing to pay (cash bidding) or the amount of exploration activity it is willing to undertake on the tenement (work program bidding).

#### Opposing views on work program bidding and cash bidding

The efficiency of the two allocation mechanisms revolves around the amount and nature of exploration that will be undertaken on a tenement. Economists (IC 1992, Henry et. al. 2010 and ACIL Tasman 2012) argue that too much exploration will take place under work program bidding, as explorers inflate their work bids in order to secure access to the exploration tenement.

Economists believe that cash bidding should not lead to an excessive level of exploration. Under a cash bidding system, explorers are free to initially determine and subsequently vary what is an appropriate level of exploration. Under those circumstances, explorers would be unlikely to commit to further exploration of a tenement unless the expected results of such activity were favourable. Cash bidding also enables governments to appropriate in advance some of the rent that would be expected to flow from exploration activities.

In contrast, industry observers are concerned that too little exploration will occur under cash bidding. Both the Australasian Institute of Mining and Metallurgy (sub. 12) and the Queensland Resource Council and Queensland Exploration Council (sub. 13) have highlighted that cash bidding limits the funds that explorers (particularly junior explorers) can spend on undertaking exploration. In particular, AMEC has raised concerns that small and medium explorers will not be able to compete on financial terms with larger players.

[cash bidding]… simply allows the companies with the access to the largest amount of cash to warehouse tenements. In AMEC’s view the proposed cash‑bidding tenure process enshrines a system where those companies with the largest cash reserves win the most prospective tenure, not the company most likely to develop any discovery (sub. 24, p. 10)

#### Evidence of cash bidding and work program bidding in action

To date, Australia has had limited experience with cash bidding. Public data is available on the outcomes of cash bidding on petroleum licences in Commonwealth waters and in South Australia. Very few (if any) bids were received.

* Australia utilised cash bidding for offshore oil exploration tenements between 1985 and 1992, but only eight areas were offered for cash bidding (Maritz 2003)
* South Australia offered some single well blocks in 2001 under cash bidding, but did not receive any bids (Alexander and Morton 2002)
* Between 2006 and 2010, cash bidding was used for coal exploration licences in New South Wales. While detail on the number of bids is not available, it appears that bids were received, with budget documents indicating revenue was generated from exploration licences (New South Wales Government 2010).

This evidence appears to support industry concerns that cash bidding may discourage explorers from bidding for exploration licences. However, similar outcomes have been observed for work program bidding.

The main information available on the outcome of work program bidding is for Commonwealth offshore waters. Over the period between 1985 and 1999, 48 per cent of exploration areas offered for work program bidding were not taken up (figure 3.2) and, even for tenements that did attract bids, single bids were a common occurrence. In the period between 2007 and 2012, over 40 per cent of allocated licences received only a single bid, and older evidence suggests similar trends have occurred in the past (figure 3.3)[[3]](#footnote-3).

Figure 3.2 Offshore petroleum exploration licences

Whether released licences were issued or not

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| --- |
|  |

*Data source*: Geoscience Australia (2012).

Figure 3.3 Bids received and average number of bidsa for offshore petroleum areas

|  |  |
| --- | --- |
|  |  |

a Average number of bids for tenements that received at least one bid.

*Data sources*: Maritz et al. (2010); Geoscience Australia (2012).

The lack of competing bids under both work program bidding and cash bidding allocation systems undermines the rationale for such allocation mechanisms — that is to allocate tenements among competing explorers. It suggests that both mechanisms are being used in many cases where they are not warranted.

The generally low rate of bids for exploration licences under work program bidding and cash bidding could be symptomatic of structural problems associated with allocation mechanisms. Previous reviews of the exploration industry have highlighted that impediments to exploration — stemming from the length of tenure of exploration licences, reporting and activity requirements, and the regulation, taxation and royalty arrangements relating to extraction industries — can reduce the effectiveness of cash bidding as an allocation mechanism (IC 1991, Henry et al 2010, ACIL Tasman 2012).

A specific factor that has affected cash bidding in Australia has been that explorers also need to submit a work program when applying for an exploration licence even under cash bidding (ACIL Tasman 2012). Such requirements are likely to reduce demand for exploration licences issued under cash bidding arrangements, but it is unclear how big a barrier to exploration those work program requirements are. It may soon be possible to determine the scale of burden imposed by work program commitments under cash bidding systems, as offshore petroleum exploration licences will be allocated by cash bidding from 2014, and under that arrangement there will be no minimum exploration requirement during the first term of permits (DRET nd).

A full assessment of exploration tenement allocation mechanisms requires consideration of the link between cash bidding and subsequent royalty payments. However, given that examination of financial barriers to exploration (including royalty and tax arrangements) is excluded from this inquiry’s terms of reference, it has not been possible for the Commission to fully compare the relative merits of alternative allocation mechanisms for exploration licences.

In the Commission’s view, no single method of allocating exploration permits is likely to suit all situations in Australia. However, cash bidding still appears to be superior to work program bidding. Cash bidding will not distort decisions on the amount or type of exploration that will occur. While cash bidding can discourage explorers from applying for exploration licences in some circumstances, work program bidding appears to have similar impacts.

Cash bidding would appear to be most appropriate for highly prospective exploration tenements where the likely rents are known and there is a greater likelihood of multiple potential bidders for the exploration tenement. These situations will usually be in areas where pre‑competitive geoscientific evidence indicates that an exploration tenement will be likely to contain sizable mineral or energy resources.

### Sub‑optimal sized and configured exploration tenements

Governments’ land release strategies, covering the location of tenements, their size and the timing of their release, influence explorers’ interest and the value of the tenements. A challenge faced by governments is to develop a land release strategy that maximises the benefits to the community.

It is not uncommon for exploration tenements to be small in size, odd‑shaped, or both. This usually arises because of the requirement for exploration tenements to be partially relinquished, and is especially the case on tenements that have been previously explored.

The Commission understands that small exploration tenements complicate the efficient scale of exploration efforts. For example, in order to undertake survey work on an odd shaped offshore exploration tenement, a survey ship was required to traverse an adjacent tenement, which is not permitted without the approval of the holder of the adjacent tenement. Moreover, the explorer was not permitted to directly approach the tenement owner, but had to seek approval through the regulator.

Where possible and appropriate, tenements should be of sufficient size to allow the efficient operation of mineral and petroleum exploration sites. Releases of land should be deferred where partially relinquished tenements can subsequently be combined into optimally sized tenements.

DRAFT Recommendation 3.2

Where possible, governments should not allocate exploration licences for tenements that would be too small or too irregular a shape for an efficient mine or production wells to be established. The release of exploration tenements should be deferred until tenements of appropriate size and shape can be issued.

#### **Competing resource uses**

An emerging issue is the potential for conflict between coal and coal seam gas exploration and extraction. There is no clear priority between a tenement granted for coal under the *Mining Act 1992* (NSW) or one granted for coal seam gas under the *Petroleum (On‑shore) Act 1991* (NSW). This could have impacts on the operation of coal seam gas and coal projects. The NSW Minerals Council indicated that this tension needs to be resolved in order to prevent ‘…an inefficient jigsaw fit of tenements of differing type and the unnecessary or temporary sterilisation of resources.’ (sub. 11, pp. 7–8) The NSW Minerals Council said that this is part of a review of licence conditions that has been underway for over two years (sub. 11, pp. 10).

Information Request

The Commission is seeking information on the steps being taken to resolve the potential for regulatory tension in relation to co‑located coal and coal seam gas resources.

## 3.3 Issues with regulatory practices

The Commission received a number of submissions raising concerns about administrative processes. Issues include how regulatory change should be managed, rules governing the use of ministerial discretion and appeal processes that exist for decisions relating to exploration licensing.

### Amendment and administration of regulation

Frequent or unexpected regulatory change creates uncertainty for explorers. Given the intrinsically high risks of exploration and significant upfront capital investments, an uncertain regulatory environment can damage investor confidence and weaken exploration spending. David Watkins, a geologist and company director, said:

When someone explores they do it for profit; if this motive is destroyed by changing the goal posts because of public pressure being put onto government officers and ministers it is hardly going to inspire people to spend money in an industry which is traditionally high risk … (sub. 1, p. 1)

COAG Principles of Best Practice Regulation (box 3.3) were agreed upon to assist and improve regulatory decision making. Consistent with these principles, the industry has expressed the need for clarity and certainty in the regulatory framework and for stakeholder consultation before legislative or regulatory changes are decided upon and after they have been implemented.

|  |
| --- |
| Box 3.3 COAG Principles of Best Practice Regulation |
| COAG has agreed that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:   1. establishing a case for action before addressing a problem; 2. a range of feasible policy options must be considered, including self‑regulatory, co‑regulatory and non‑regulatory approaches, and their benefits and costs assessed; 3. adopting the option that generates the greatest net benefit for the community; 4. in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:‑ 5. the benefits of the restrictions to the community as a whole outweigh the costs, and 6. the objectives of the regulation can only be achieved by restricting competition; 7. providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear; 8. ensuring that regulation remains relevant and effective over time; 9. consulting effectively with affected key stakeholders at all stages of the regulatory cycle; and 10. government action should be effective and proportional to the issue being addressed. |
| *Source*: COAG (2007). |
|  |
|  |

These mechanisms help to identify any issues with the proposed changes and options for how they can be resolved. AMEC put it this way:

In order to plan their exploration programs, explorers need clarity and certainty from the regulatory system. In this sense by ‘clarity’, AMEC means the government has articulated its policy position and desired outcome publically and in a manner which is not ambiguous and is easy to understand. By ‘certainty’ AMEC means the policy will remain in force for a timeframe that is relevant and appropriate to business planning and investment decisions. (sub. 24 p. 21)

The Commission has been informed of a number of cases where regulatory changes occurred without consultation or with retrospective application. Recently, for example, a Commonwealth environmental assessment for water impacts was announced without industry consultation and without a regulatory impact statement.

… on 12 March 2013 the Commonwealth Government announced it would add a new approval trigger to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) to require approval for a mining or CSG project with likely significant impacts on water resources. (Thomas 2013)

Another example is the new strategic land use policy in New South Wales which was applied retrospectively to applications that were in process of assessment.

Significant reform was introduced following the Mining Act Regulation 2010 and the recent Strategic Regional Land Use Policy. An example was the introduction of the requirement for an Agricultural Impact Statement for activity approvals from the day the policy was announced. This applied to all approvals (even those where all the application documentation had been submitted) and guidelines on the requirements for the Statement were not released for over two months following the policy announcement. (NSW Minerals Council, sub. 11, pp. 5–6)

A related issue is that frequent regulatory changes increase the costs associated with consultation and staying abreast of the changes. The Minerals Council of Australia said that:

Even where changes were of a technical nature, the persistent “churn” of legislation means that multiple Acts need to be consulted by project proponents and operators seeking to undertake exploration and mining in Australia. Overall the pieces of primary legislation have increased by 53 per cent and the pieces of subsidiary legislation by 80 per cent [between 2006 and 2012]. (sub. 27, p 39)

The Commission’s view is that regulators should be mindful of the compliance burden that even minor changes can, in aggregate, impose on industry participants. All Governments should adhere to principles of best practice regulation, including consultation with key stakeholders at all stages of the regulatory process.

### Transparency of assessment and granting of licences

The Commission notes that a range of stakeholders — both proponents and opponents of exploration — have drawn attention to a lack of transparency in regulatory processes, suggesting that the current requirements do not ensure a public and transparent process.

NSW Irrigators’ said in this regard:

Furthermore, there is considerable public concern about the assessment process undertaken by the Department of Primary Industries. Without having comprehensive public and stakeholder consultation, such one‑sided assessment must be evaluated with caution. (sub. 5, p. 9)

NSW Minerals Council also pointed out:

The processing time for coal applications is particularly long due to their complexity. Currently, all coal exploration licence applications must be competitively tendered when the Government releases specific ‘Coal Allocation Areas’. There have been multiple issues regarding fairness, transparency and lack of industry consultation in the process for mineral allocation areas. The process is marked by the Government as ‘under review’ and is also the subject of a current Independent Commission Against Corruption (ICAC) investigation. (sub. 11, p. 7)

The Australian Network of Environmental Defenders Offices called for improved notification, education, public participation, appeal and compensation rights. Specifically it said this should include:

* ensuring that both mining and planning laws include comprehensive and mandatory rights to public access to information, notification and consultation at all stages (licensing, environmental assessment, approval and post‑approval), including for major projects;
* improving trust and accountability through community rights for merit appeals, judicial review, and ‘open standing’ for enforcement proceedings, including for major projects;
* consultation with Indigenous communities to identify and implement leading practices for tailored engagement strategies and cultural heritage protection;
* establishing a robust, equitable and transparent compensation regime for mine‑affected stakeholders, in addition to comprehensive environmental management;
* improving the clarity and consistency of terminology used across mining laws. (sub. 17, p. 11).

Improvements in the transparency of decision making, including public consultation where appropriate, benefit all stakeholders by clearly articulating rights and responsibilities and highlighting regulatory processes. However governments must consider not only the need for public consultation to underpin public confidence in the regulatory process, but also the cost of any such measures and how to minimise that cost.

### Ministerial discretion

Mineral and resource legislation grants significant ministerial discretion on decisions that restrict or facilitate exploration activities. The Minister’s discretion usually extends to the imposition and variation of conditions attached to an exploration licence (table 3.7).

Some ministerial powers have transparency requirements attached to their use. For instance, in Tasmania, if the Minister refuses to grant an exploration licence or renewal, or varies any conditions subsequent to granting a licence, reasons must be given to the applicant and the applicant can appeal that decision to the Mining Tribunal within 28 days. No other jurisdiction, however, requires reasons to be given for decisions to grant or refuse an initial mineral exploration licence (table 3.8).

The use of ministerial discretion is frequent. For example:

* In NSW legislation, coal is not treated differently, but under legislative powers, the Minister declared a ‘mineral allocation area’[[4]](#footnote-4) for coal over the whole of the state, triggering a tender process for all coal exploration applications. This tender process is subject to an extensive and ongoing investigation of coal exploration licensing by the Independent Commission Against Corruption.
* In Western Australia, the Minister for Aboriginal Affairs has discretion to allow harm to Aboriginal heritage sites under s 18 of the Aboriginal Heritage Act 1972.
* In South Australia, the Minister has discretion to invite tenders for exploration licences, but must base the decision on whether the area is highly prospective (Petroleum and Geothermal Energy Act 2000 (SA) s 16). This allows a limited avenue of procedural appeal if tenders were to be called for any reason other than high prospectivity.

Table 3.7 Conditions on exploration licences

Onshore petroleum

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  | *NSW* | *Vic* | *Qld* | *WA* | *SA* | *Tas* | *NT* |
| Minister can impose conditions | ✓ | ✓ |  | ✓ | ✓ | ✓ | ✓ |
| Minister can vary conditions | ✓ | ✓ |  |  | ✓ | ✓ |  |

*Sources*: LexisNexis 2013; legislation.

The Commission considers that at a minimum all ministerial decisions should be accompanied by a statement of reasons. These statements promote confidence in the administrative process, enable decisions to be properly explained and defended and can foster acceptance even among those who would have preferred a different decision. They also assist individuals in deciding whether to appeal a decision, and assist the appellate body in conducting the appeal.

Transparency could be improved by a legislative requirement to give reasons for every decision and to specify what reasons are to be relied on in the event of an appeal in those cases where the Minister failed to make a decision (such as the reasons set out by the recommending authority in their ministerial brief).

If the legislation required reasons to be given, any decision made without reasons would be appealable on procedural grounds, as would any decision based on irrelevant considerations. Decisions that were properly made with relevant reasons would not be appealable on the merits of the decision, thus preserving the power of the Minister to exercise discretion, but would allow public discussion of those reasons, enhancing community confidence in the regulatory process.

There are many examples of this kind of requirement to give reasons. A formulation such as the following, based on the *Aged Care Act 1997* (Cth) (s 85‑3) could be applied to the exploration sector:

If this Act requires the Minister to notify a person of the making of a decision, the notice must include reasons for the decision.

The exact formulation would have to take into account how Ministerial discretion is worded in each specific Act. This requirement would increase transparency without requiring an onerous level of detail in reasons given.

DRAFT Recommendation 3.3

***If an Act requires the Minister to notify a person of a decision regarding an exploration licence, the Act should require that the notice include the reasons for the decision.***

#### Transfer of title: exploration and other tenements

In all jurisdictions, ministerial approval is needed before ownership of exploration or other licences can be legally transferred. This approval process is guided, in most jurisdictions, by considerations the Minister must or may take into account.

In New South Wales and Tasmania, the ministerial discretion includes the power to amend or add to the licence conditions (*Mining Act 1992* (NSW) s 121(4); *Mineral Resources Development Act 1995* (Tas) s 33(1)(a)).

The Commission considers that transfer of title should not be a trigger to reassess the licence and add further conditions. Rather, the basis of the decision to renew an exploration licence should be limited to the prospective title holder and whether that entity meets all the regulatory requirements.

### Concerns with appeal processes

Appeal processes ensure that redress is available if regulatory powers are not exercised in accordance with the law. This promotes certainty of process (where the legislation specifies a process for decision making) and confidence that the regulations will be enforced in a non‑discriminatory manner among all parties.

There are two types of legal review: a review of the merits of a decision, which looks at whether the outcome of the decision was correct or preferable; and judicial review, which looks only at the legality of the decision‑making process.

Judicial review is available in all jurisdictions. However, by its nature, judicial review is limited to procedural issues such as whether the decision maker considered all the items the legislation required him or her to consider. If the decision maker made the appropriate considerations, the courts cannot review the conclusions thus arrived upon.

The scope to dispute the merits of the decision to grant an exploration licence varies across jurisdictions (table 3.8). In Tasmania, only those whose property interests are affected can apply to prevent the granting of an exploration licence, while in Western Australia, any party can apply for a review. In both Western Australia and Tasmania, the court considers the issues prior to the finalisation of a decision to grant or refuse an exploration licence. Other jurisdictions do not permit a review of the merits of a decision to grant an exploration licence, although third party objections to the grant of an exploration licence will be taken into account by the decision maker in Victoria and the Northern Territory.

Table 3.8 Objections to exploration licence decisions a

Onshore minerals

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Third party can object to grant of licence | Third party objection is considered by: | Minister must provide reasons for decision to grant/refuse | Applicant can appeal refusal to grant licence |
| NSW | No |  | No, s 22 | No |
| Vic | Yes, any third party, s 24 | Minister, s 25 | No, s 25 | ‘Disputes’ are heard by the mining warden, ss 4, 97 |
| Qld | No |  | No, s 136 | No |
| WA | Yes, any third party, s 59(1) | Mining warden, s 59 | No, s 59(6) | No |
| SA | No |  | No, s 28 | No |
| Tas | Yes, landowners only, ss 15 and 17(2) | Mining Tribunal, s 128(v) | Yes, to applicant if application is refused, s 17(3)(b) | No b |
| NT | Yes, landowners may object and any third party may make a submission, s 71 | Minister, s 78 | No, s 78 | No |

a Reference to legislation in brackets: refer to onshore mineral legislation in table 3.1. b A refusal to grant a licence renewal (but not the initial grant of a licence) can be appealed to the mining tribunal, s 25.

*Source*: Legislation.

#### Cost of appeals

Formal courts can prove difficult to access for individuals or small businesses due to the cost of obtaining legal representation and the potential for long delays at various stages of the process. Thus courts, including land and environment courts, can be perceived as favouring the party with the greater financial resources and legal expertise. Less formal alternatives for obtaining redress are discussed below.

Appeals can delay the start of exploration for long periods of time. This is often the case if, for example, the statement of claims is amended multiple times or the court or tribunal has a long backlog of cases. The potential for delay applies not only to generic courts, but also to resource‑sector specific appeal bodies, such as mining wardens. Box 3.4 contains an example of delay caused by an appeal that was ultimately unsuccessful.

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| --- |
| Box 3.4 Impact of appeal processes on time delay — case study |
| Gas explorer AGL resumed work on its Gloucester Gas Project in September 2012 after almost a year’s delay caused by an unsuccessful legal challenge in the NSW Land and Environment Court, and more scientific assessments.  AGL said that exploration work would enable a better assessment of the natural gas potential of the area and more information on hydrogeology. However Barrington Gloucester Stroud Preservation Alliance spokesman Graeme Healy said only an independent study that addressed all aspects of the area’s hydrology could determine if it was safe to proceed at all.  Stage one of the project (about 110 wells) was approved, but a residents’ blockade following the legal challenge stopped work. A review of the company’s surface and underground water studies for stage one recommended more studies and further delayed the project. |
| *Source*: Thompson 2012. |
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#### Vexatious litigation

‘Vexatious litigation’ is legal action without merit (and often with a low likelihood of success), brought before the courts to harm the defendant in some way, for example by delaying or frustrating a project. For instance, objectors may apply to the courts for review of an issue even if that issue is otherwise dealt with by the assessment process. This may require explorers to go through essentially the same assessment twice, leading to the creation of a parallel assessment process and the potential for stakeholders to engage in ‘forum shopping’ for the decision maker most likely to be sympathetic to their cause.

Appeal processes also have the potential to be ‘gamed’ to frustrate projects. For example, the Australian anti‑coal movement has an overt strategy of ‘lodging legal challenges’ to delay projects and therefore cause companies to give up, down‑scale or lose investment. They describe it thus:

Our strategy is essentially to ‘disrupt and delay’ key projects and infrastructure while gradually eroding public and political support for the industry … (Hepburn et al. 2011, p. 5)

#### Issues relating to resource‑sector specific review bodies

Some jurisdictions have review bodies (such as mining wardens) established under resource legislation to deal with resource‑specific issues. They are intended to be less formal and thus faster and less expensive than review by generic courts. However, various concerns have been raised in other reviews that are yet to be resolved.

A Victorian parliamentary inquiry (Government of Victoria 2012) recommended that the functions of the Victorian Mining Warden be divided up and the dispute resolution function be assigned to the Small Business Commissioner. This was partially due to the high cost and declining number of disputes and also because of the conflict caused by assigning both executive and judicial functions to the Warden. The Mining Warden currently continues to exercise these functions.

The WA Mining Warden was created to be fast, inexpensive and informal. However, the Keating review (Independent Review Committee 2002) found evidence of avoidable delay and unnecessarily wide jurisdiction, thus increasing the cost of litigation. Recommendations made in that report to address these concerns do not appear to have been fully addressed.

Appeals lodged through the WA Mining Warden can cause substantial delays and cost to an explorer even when the objections are unfounded or out of scope. The WA Ministerial inquiry into greenfields exploration (Bowler 2002) supported the recommendations of the Keating review, and additionally recommended a bond system to avoid frivolous litigation, with the bond refundable if the action is successful or deemed by the Warden to have been a serious action. This recommendation has not been implemented. Objections to exploration licences can be lodged online with the WA Mining Warden, and no fee or bond is payable.

#### Mediation and internal review as alternatives to merits review

Land access disputes between explorers and other land users such as farmers are more likely to undergo mediation than formal review in the courts. Mediation is where parties discuss the issues with the help of an impartial negotiator, who does not impose a solution but rather assists the parties in reaching an outcome they can agree to. Land access dispute resolution mechanisms vary between jurisdictions and are discussed in chapter 4. They are designed to be much faster, cheaper and less formal than review by the courts.

Issues that arise between a regulator and a licence applicant are also unlikely to proceed to a court hearing, due to the time and cost involved. In such cases, a complaints or appeals mechanism internal to the regulator is generally more cost effective and appropriate. AMEC highlighted the need for escalation mechanisms within the regulator:

The ability of a proponent to escalate an assessment or approval decision in a timely and orderly manner from the assessing officer to higher levels of the agency is a key component of an efficient approvals system. The experience of AMEC members has been one of frustration at the seemingly ad hoc nature and slow manner in which regulatory agencies approach a proponent’s appeal for a review of the administrative decision. (sub. 24, p. 22)

#### Deterrents to vexatious litigation

Courts and tribunals have various powers to deal with the potential for vexatious litigation.

* First, they can dismiss vexatious litigation if it can be established that the application is without merit, very unlikely to succeed or commercially motivated.
* Second, if a case proceeds but is ultimately unsuccessful, the court can award costs to the defendant to reimburse legal expenses incurred. This discourages vexatious litigation, as costs can be high. However, for an explorer, often the cost of delay is more significant than the legal costs of defending the case.

A third option, recommended in the Bowler Review (2002), is the use of bonds, payable on application to the court (described above). However this could be seen to limit judicial review to only those with sufficient financial means to pay the bond upfront.

There is no comprehensive solution to prevent vexatious and costly litigation; however, these approaches can reduce its likelihood or impact. Judicial review can be costly but is an important safeguard for the legal rights of both proponents and opponents of exploration.

## 3.4 Concerns with regulator performance

### Funding and staffing

Regulator staffing issues have been particularly acute in recent years due to the resources boom, which has led to a sharp rise in applications for tenements and related applications (such as for work program approval). At the same time, increased competition from explorers and mining companies for similarly skilled staff has reduced the available supply of some labour skills (see discussion in chapter 8).

The Commission heard frequent assertions that faster, lower cost and higher quality assessments would be made if regulators were better staffed. Specific complaints related to the movement of staff within agencies and lack of industry experience. David Watkins, a geologist and company director, said:

Government officers now tend to be career public servants with no direct industry experience. They tend to have come straight from an education institution, know it all and do not take kindly to criticism, being shown to being wrong and not knowing the subject. (sub. 1, p. 2)

The Australian Petroleum Production & Exploration Association said:

Given the growth of the industry in Australia, the changes in offshore petroleum regulatory structure and the ongoing government turnover of staff, industry remains to be convinced that government officials have the requisite skills to assess the types and volume of approvals that are now required. (sub. 22, p. 15)

##### Reforms underway

A number of participants to this inquiry commented on the underfunding of regulatory agencies. For example, the NSW Minerals Council considers the NSW Division of Resources and Energy to be underfunded (sub. 11, p. 9). Additional fees and levies introduced in New South Wales in July 2012 were partially designed to address this funding shortage. It remains to be seen whether this change has been effective.

The Queensland Government is reforming its exploration licensing system to reduce regulatory costs (both for the regulators and those who are regulated) in response to the rapid increase in exploration permits in recent years and subsequent ‘…enormous increase in the number of variation applications’ (sub. 25, p. 11). This reform includes separating departmental resources according to coal, mineral and petroleum assessments, thus allowing for specialisation and the development of human capital. The Queensland Government said:

As an element of the Streamlining Approvals Project, the [Queensland] Government is building a refined service delivery model involving three centres (hubs) of dedicated resource expertise – for coal; minerals; and petroleum – with an exclusive focus on assessment. Dedicated staff will concentrate on the assessment of applications within their dedicated sector. This will foster the development of sector specific expertise and ensure that field officers’ time is spent working directly with industry. (sub. 25 p. 10)

In some cases, regulatory bottle necks are created because specific regulators that form part of a chain of approvals are underfunded or under resourced compared to the core regulator (usually the mining department). Adequate, skilled staffing is something governments must address so that exploration proponents, communities and other stakeholders can be confident that the regulations in place are being properly administered.

### Lead agencies

The regulation of resource exploration can become quite complex where a project requires multiple approvals from separate regulators. Good communication and coordination among regulators, proponents and other stakeholders are essential for reducing approval times and costs and for ease of navigating the system.

All jurisdictions have adopted what is termed a ‘lead agency’ approach. The lead agency is the key regulator of exploration licences and a project proponent’s central point of contact. However, the functions of lead agencies differ between jurisdictions.

Some lead agencies assign a case manager to each project to liaise with the proponent and guide the project through all the necessary approvals. The lead agency determines what approvals are necessary and either conducts the assessment itself or passes the relevant information to other agencies.

For example, in Western Australia, the Department of Mines and Petroleum (DMP) is responsible for coordinating exploration approvals and providing a single point of entry for applicants. Projects are assigned a case manager or team according to how complex the approvals process is likely to be. The DMP said:

DMP’s electronic online tracking system automatically notifies other key approval agencies involved in the assessment process. In general, other agencies have a target of 20 business days to respond to DMP. (sub. 29, p. 9)

Mineral Resources Tasmania is a lead agency that is empowered to make all the relevant exploration state approvals and consults with other state agencies rather than referring stages of the approval process to those agencies.

The Department of Primary Industries in Victoria advises proponents of all the necessary consents and approvals, providing a single point of information, but it does not always coordinate the approval process. The lead agency model in Victoria is currently under review and two questions being asked are whether the role should be more formalised and whether more detailed information about approval processes should be made available to proponents (Vic DPI 2011).

Despite apparent use of a lead agency model in New South Wales, the NSW Minerals Council highlighted gaps:

Conditions of exploration licences in NSW often necessitate an explorer to sequentially notify or seek approval from a number of differing Government agencies, offices or departments. For example, an approval for a drill program is generally required from the Minister administering the Mining Act 1992. Conditions of the licence might then necessitate notification or approval from the Sydney Catchment Authority, the Office of Environment and Heritage and the Environment Protection Authority (each of which may impose further conditions on the proposed drill program). This slows down and complicates the exploration approval process as well as introducing additional uncertainty to the process. (sub. 11, p. 8)

In Commonwealth waters, exploration is administered under a lead agency model through the National Offshore Petroleum Titles Administrator as the single point of contact for all title related issues.

Explorers, particularly junior explorers, prefer to work with a lead agency. While lead agencies exist in all jurisdictions in various forms, some industry participants have called for further development of this model. AMEC commented:

As an aspirational goal AMEC would like to see a one‑stop‑shop approvals system for exploration and that this should lie within the relevant agency for the regulation of minerals exploration and mining. (sub. 24 p. 21)

Similarly the Australian Uranium Association forwarded the following model for project assessment:

Operating ideally through a single point of contact between the company and authorities and regardless of how many governments and authorities are involved, authorities engage with the company as far as possible with a unified approach, notwithstanding the different legislative and political conditions under which they may operate (sub. 4, attachment 2, p. 1)

The practice of assigning case managers to each project, as in Western Australia, is favoured by explorers but may require additional funding for agencies taking on the lead role. For example, the Northern Territory does not assign case managers:

With around 600 exploration applications per year it is not possible to assign case managers to guide each exploration (applicants) application through the system. Information on requirements can be readily obtained from the department and assistance is provided on request. There are private agencies which have contracts to case manage exploration applications. (NT Department of Mines and Energy, pers. comm., 12 April 2013)

A lead agency is much better placed than an individual explorer to determine the range of approvals that may be required, who they may be required from and the nature of what must be done to gain approval. Inadequate guidance in this area discourages new entrants and therefore competition for tenements, by providing an informational advantage to explorers who are already familiar with the system. Up‑front information helps explorers to avoid delays arising from failing to satisfy unknown regulatory requirements and being required to resubmit material to regulators. It also facilitates informed business decisions as to whether to proceed with a project.

draft Recommendation 3.4

Where not already implemented, governments should ensure that at a minimum their lead agencies responsible for exploration, coordinate exploration licensing and related approvals (such as environment and heritage approvals). This should include the provision of guidance on the range of approvals that may be required, and on how to navigate the approvals processes.

### Enforcement

Regulators have many enforcement tools available to them. These include ‘soft’ tools such as persuasion, inspections and verbal and written warnings as well as ‘hard’ tools such as fines, licensing cancellations and ultimately prosecution.

Leading practice in the area of regulatory enforcement looks to combine the use of these tools under the concept of ‘escalating enforcement’. Under this model, regulators focus on education and apply punitive measures only for repeated or very serious breaches.

Without effective assessment and enforcement, conditions placed on exploration activities become ineffective. Some participants highlighted the lack of enforcement by regulators. In one example, it was reported that the regulator did not act upon community complaints of unauthorised discharges of coal‑seam gas (CSG) water and treated water. The Australian Network of Environmental Defenders Offices pointed out that:

In its May 2012 report, the NSW [Legislative Council] CSG Inquiry concluded:

It is inexcusable that this pollution went undetected by NSW Government authorities, despite community complaints, until [the company that took over the exploration tenement] admitted many months later that a breach had occurred. … This incident demonstrates the weakness in Government monitoring and enforcement activities … . (sub. 17 p. 14)

### Approval timelines

Delays associated with approvals processes can impose significant costs on explorers. Moreover, uncertainty about the time regulatory approvals may take creates difficulties for explorers scheduling their equipment requirements (such as drilling rigs and sonar equipped vessels) in the least cost manner.

The climatic conditions where exploration occurs can sometimes mean the time period suitable for exploration activity is limited, for example during the cooler, dryer months in northern Australia. Delays in approvals processes of only a few months may mean the whole exploration season is lost. AMEC pointed to these costs in its submission:

The adage that ‘time is money’ is nowhere more pronounced than in the exploration industry. … Explorers have small windows of opportunity to actually explore or undertake preliminary studies. If delays … result in them missing their window, they are often forced to wait until the same time the following year. This is in addition to issues such as inclement weather conditions, drill rig equipment and crew availability and the remote location of the tenement. (sub. 24, p. 3)

The Commission received numerous examples of the extensive time taken to process exploration licence or renewal applications.

* The average approvals time for an exploration licence in Queensland in 2011 exceeded 20 months for coal permits and 25 months for minerals permits (QEC 2012, p. 24).
* New South Wales has a target indicator of 90 per cent of exploration licences assessed within 60 days. However, the NSW Minerals Council said that the average elapsed time is close to 250 days. It also indicated that even renewing exploration licences can be time consuming, with five to 12 months being the most common timeframe, and a single renewal that took three years to process (sub. 11, pp. 6‑7).
* In Western Australia in the first quarter of 2013, 98 per cent of mineral exploration licences were assessed within the target 65 business days, but none of the petroleum exploration permits met the target of 120 business days (out of five permits finalised) (WA DMP 2013a).
* The WA Department of Mines and Petroleum has produced a Gantt chart showing that the minimum time it would take to get an approval to explore for uranium would be 358 days (sub. 24, p. 17).

#### Measuring approval timelines

The first step to reducing timelines is measuring them and setting targets. Making that data public would improve transparency and accountability and ultimately help to improve the timeliness of decisions. The Commission, in its inquiry into upstream petroleum, found that one of the major unnecessary burdens arising from the current regulatory regime is:

A lack of clear and certain administrative timelines contained in laws or regulations … Where timelines do exist for regulators there is a lack of compliance or enforcement mechanisms, and in many cases poor transparency and reporting of regulators’ performance against legislative timelines. (PC 2009, p. 228)

The National Offshore Petroleum Safety and Environmental Management Authority has timelines specified in regulations or guidelines (for example, 30 days for environmental assessment, or reasons provided for delay). However most regulators either do not have target or mandatory timelines, or targets are not public or are not reported.

Western Australia is an exception, with publically available information and reports on key performance figures, including number of approvals received and processed and the percentage processed within the target timeframe on the department’s website (WA DMP 2013a). This can lead to the identification of areas of poor performance and subsequently drive efficiency improvements. For example, in the first quarter of 2013, only half of the 43 native vegetation clearing permits finalised met the target 60 elapsed days (not business days) for assessment, leading the regulator to note that internal restructuring would be managed to address this delay (WA DMP 2013a).

WA Department of Mines and Petroleum (pers. comm. 12 April 2013) indicated that one of the corollary benefits of reporting was aligning terminology across departments and divisions. This involves a short‑term cost, but has transparency and efficiency benefits both for the regulator, the regulated and the public. Specifically, consistent use of terminology reduces confusion for explorers and other stakeholders, and could enable regulators to share information technology or other resources. Consistency reduces the potential for misunderstanding and thus facilitates communication among all parties.

Target assessment timeframes have been introduced in Queensland, including specific targets to reduce current timeframes by six months for mineral or coal exploration permits (a time saving of up to 65 per cent) and three months for exploration permit applications with code compliant assessment and exclusive of native title (a time saving of up to 25 per cent) (sub. 25, p. 10).

However, in measuring time taken, measurement is suspended (the ‘clock’ is stopped) when the applicant is required to provide more information or the application is being assessed by another government agency. This means that the total time to acquire a licence often remains unmeasured or at least unreported. AMEC has called for whole of government timeframes such that the clock would not be stopped while the application was with government (sub. 24, p. 22). The Commission supports such an approach and suggests that at a minimum, whole of government reporting should be available through the lead agency, stating the average time elapsed while applications were being assessed by other agencies.

Reporting should be done as transparently as possible, with methodological information available to describe the design of performance indicators (sub. 24, p. 23). The Commission’s view is that reporting should include:

* the number of applications received and finalised, separated into types of application (including exploration licence applications and subsequent applications, for example for detailed environmental and work program approval)
* percentage of applications meeting target timeframes
* average and median time taken, separated into total elapsed time and time when the ‘clock’ was stopped because the regulator was waiting on further information from the applicant.

draft Recommendation 3.5

Governments should ensure that their regulators publish target timeframes for approval processes, including exploration licensing and related approvals (for example environmental and heritage approvals). The lead agency for exploration should publish whole-of-government performance reports against these timeframes on their website.

#### Online approval systems

A further measure to improve timeliness and transparency is introducing an electronic approvals tracking system, which allows applicants to log in to a website and monitor the progress of their application. This has the added benefit of establishing IT systems that can then be used for reporting, which is recommended above (draft recommendation 3.5).

Electronic lodgement and online tracking are available in Western Australia and Queensland (box 3.5). Furthermore, the WA Government has committed to expanding this tracking system, which will allow applicants to track the progress of their approvals, regardless of which government department is evaluating them (WA Liberals, p. 5). The WA Department of Mines and Petroleum said that:

Online lodgement provides more certainty and reduces approval timelines for proponents and reduces administrative handling and costs for government. (2013, p. 2)

The Commission, in its review of the upstream petroleum sector, noted that a tracking system has the potential to apply a greater degree of accountability to decision makers and proponents, as it would be clear which party (if any) was the cause of delays (PC 2009, p. 283). This information could then be used to address regulatory bottlenecks or inefficiencies over time.

AMEC noted that as well as improving the efficiency, effectiveness, openness, transparency and accountability of the approvals process, the use of contemporary information communication technology creates benefits such as:

* reducing paper use,
* provision of real‑time information,
* improved proponent and regulator relations,
* increased agency productivity,
* improved agency demand responses, and
* improved collaboration, integration and sharing of information between agencies (sub. 24, p. 23)

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| Box 3.5 Queensland’s online service delivery |
| The Queensland Government is continuing to develop its online service delivery platform, ‘MyMines’. Online lodgements commenced in late 2012, and allows participants to view information pertaining to the status of their tenures. Further work is being done to increase integration with various related systems. This will provide:   * improved search functions and the ability to respond to the applicant to provide further details or omit others * a consolidated view of all the proponents applications for resource approvals * a projection of timeframes for the finalisation of approval processes. |
| *Source*: (Queensland DNRM sub. 25, p. 9). |
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In other jurisdictions, applications must be lodged by mail, email or in person, and the only way to track the progress of an application is to contact the regulator. However, the administrative costs of online tracking may outweigh the benefits in jurisdictions that receive a much smaller number of applications. Such jurisdictions should conduct further analysis before committing to this approach.

#### A second best solution — increasing tenement licence duration

The best solution to overcome the increase in compliance costs created by regulatory delays is to reduce those delays by tackling the source of the problem, and that has been the focus of the Commission’s recommendations. If these delays cannot be reduced sufficiently and are significantly truncating the time explorers may have available to undertake their exploration activities due to their licence period restrictions then additional solutions may be required. These could include:

* increasing the tenement licence period by one year
* increasing the tenement by a period of time that reflects the increase in the time taken for regulatory compliance
* starting the tenement period after all approvals have been granted and exploration can commence.

There are concerns with all of these options. A one‑year increase is unlikely to be appropriate for all exploration types and all jurisdictions. Allowing tenement duration to begin from the time approvals and agreements are in place would allow proponents to hold up the process if they wanted to delay exploration, thus facilitating land banking.

Calculating the average delay incurred after a tenement is granted would be possible if tracking and reporting of approval timeframes was implemented or expanded in all jurisdictions to include the approvals required post‑grant of exploration licence, in line with draft recommendation 3.5 above. However, data collected on delays may reveal a significant range of approval times for different types of projects. For example, the time taken to reach land access agreements differs significantly depending on whether native title is involved. Therefore an increase in tenement length by the amount of the average delay could end up being unsatisfactory in the majority of cases.

Information Request

The Commission is seeking more information on the most appropriate way to change exploration tenure so that the time taken for regulatory compliance does not detract from the time to explore.

1. Uranium exploration and mining within the Ranger Project Area is regulated under the *Atomic Energy Act 1953*. [↑](#footnote-ref-1)
2. Australian obligated nuclear material [↑](#footnote-ref-2)
3. The information for the period 2007 to 2012 comes from various editions of *Australian Petroleum News* published by the Department of Resources, Energy and Tourism and its predecessors. While the Geoscience Australia data does not directly indicate the number of bids received, any year in which the average number of bids per allocated release area is less than two must comprise at least one area with a single bid. For years with an average number of bids less than 1.5, the majority of allocated areas must have received a single bid. [↑](#footnote-ref-3)
4. Under the *Mining Act 1992* (NSW), an area may be declared a ‘mineral allocation area’ in relation to all minerals or specified minerals. If land is declared a mineral allocation area, applications for exploration licences over that land are not permitted except with the Minister’s consent (section 13). The Minister may invite tenders for an exploration licence in such areas (section 14). [↑](#footnote-ref-4)