Resources Law Network

Resources Sector Regulation
Productivity Commission
Locked Bag 2, Collins Street East
Melbourne VIC 8003

21 August 2020

Dear Sir / Madam

Resources Sector Regulation Draft Report

[1] Thank you for the opportunity to make submissions on the Commission's Draft Report.[1] The submissions are detailed below and, in summary:

(a) commend the Commission's inquiry and Draft Report, and support many of the observations and recommendations in the Draft Report: see paragraphs [53]–[55] (below);

(b) urge the Commission to explicitly identify *how* non-financial aspects feature in its inquiry and analysis ([3]-[8]), which should include principles of ecologically sustainable development: [47]-[52];

(c) emphasise the importance of international standards and materials in informing how Australian resource regulation should occur ([9]-[16]), particularly with regard to revenue funds [15], home state obligations [17], responsible business conduct ([26]-[28]) and free prior informed consent: [31]; and

(d) reiterate that public involvement should not be envisaged as community acceptance and involvement within a pre-determined resources project – instead, community engagement must be part of planning and decision-making *from the beginning*: ; and that may involve decisions that resource extraction does not occur in some places: [30]-[32] & [36]-[39].

[2] The submissions are presented under these headings.

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Specify approach regarding non-financial aspects

[3] The Report repeatedly refers to non-financial aspects (eg. social and environmental impacts) but does not indicate *how* these are measured or understood.

> *'[I]t is generally unlikely to be the case that net community welfare will be maximised by stopping an activity altogether (though there will be exceptions).'* [p91]
>
> *'Leading practice requires that regulations maximise net benefits to the community, with the cost to governments of administering regulations, and to firms of complying with them, being the minimum necessary to achieve policy objectives.'* [p92]
>
> *'[W]hile regulation seeks to ensure that resources sector activities reflect the potential for social and environmental impacts, there is a risk that some of the costs (including delays and uncertainty) imposed on resources companies are higher than necessary. Reducing the level of unnecessary, poorly designed or poorly administered regulation has the potential to improve productivity and living standards.'*[p96]
>
> *'Resources projects are usually subject to environmental conditions or offsets requirements that aim to ensure that the net environmental impact is limited to levels broadly acceptable to the community'* [p116]

[4] It *appears* (although this is not stated explicitly) that the Commission's guidance on this is that governments should do what is socially/politically feasible at the time?

> ***How far should regulation go?***
> *Much of the regulation applying to the resources sector aims to reduce some type of risk — for example, risks of harm to the environment or sites of national or Aboriginal heritage, or risks to health and safety. While market failure may point to a need for intervention, there is no easy way to determine what constitutes a sufficient or reasonable level of risk in the eyes of the community. This is because it is difficult, if not impossible, to quantify community valuations of such detrimental impacts: that is, what people are prepared to give up to avoid them. The community will naturally have expectations that governments and industry will*

> *reduce risks as far as practicable. Governments have to make judgments that balance these expectations against the benefits flowing from resources activities.* [p90]

Such an approach has been problematic for many issues in resource regulation over the last couple of decades – evident in the numerous changes regarding energy and climate policy, fracking, uranium mining, and Indigenous rights, to name a few.

[5] The difficultly may arise from how the Commission focussed its examination, which the Draft Report explained.

> *As required by its Act, the Commission has assessed resources regulation against the objective of improving the welfare of the community as a whole.*
>
> *The main focus of this study is not on the objectives of regulations per se. Rather, the focus is on the process followed in forming regulatory objectives and more specific goals in line with them, and the regulatory approach taken to achieving these.*
>
> *A leading-practice approach to regulation is one that imposes the least burden on businesses and regulators, subject to achieving clear and evidence-based objectives that serve to promote net national benefits.* [p67-68]

[6] If, as the Commission indicates, its objective and assessment of resources regulation is 'improving the welfare of the community as a whole', it seems unusual to ignore the *objectives* of resources regulation and focus on process and minimising burden on business. Take Western Australia as an example (and, given its resources sector contribution approximately doubles the rest of Australia combined,[2] WA's regulation of its resources sector is the quintessential example). The State's mining and petroleum laws do not specify any objective or purpose,[3] which has led to various WA courts divining what they consider are Parliament's intentions when regulating mining.[4] The courts' statements are neither comprehensive nor contemporary. Instead, judicial statements of 'objectives' are at such a general level, that they may support that particular decision but provide limited future guidance.[5] The most recent example, from a June 2020 decision of the Supreme Court, is apposite.

> *The [Mining] Act's primary purpose is to encourage and promote the prospecting and exploration for, and mining of, mineral deposits in the State. Expenditure conditions reflect the policy objective that land with the potential for mining or exploration for minerals should be made available for those purposes. As explained by the Court of Appeal ... other objects of the Act include:*
>
> 1. *Identifying circumstances in which a tenement holder will be allowed to hold a mining tenement without mining or giving it up for others who may wish to actively mine the land.*
> 2. *Protecting tenement holders who have defaulted in compliance with the Act in some minor respect, or because of some circumstances beyond the control of the tenement holder, against loss of the tenement.*

3. *Providing that, in general, the holder of a mining tenement should carry out the relevant mining activity on the tenement.*[6]

[7] It is striking how these purpose and objects – which is how WA courts currently understand WA's *Mining Act* – have no correlation with what the Commission stated as its opening point in the Draft Report: 'There is no question that resources activities should meet reasonable requirements in relation to their impacts on the environment, heritage, worker safety, landowners and communities' [p2].

[8] Of course there are other parts of WA's laws, and agency oversight, which endeavour to address impacts on the environment, heritage, worker safety, landowners and communities. But it is out of step with contemporary understanding that the purpose and object of mining regulation is conceived solely about maximising mining. That is why the Commission must explicitly consider the *objectives* of resources regulation, and help governments and other parties understand how resources regulation can be improved for 'the welfare of the community as a whole' – including future generations.

Learn from guidance and examples beyond Australia

[9] Greater use should be made of international materials informing contemporary resources regulation. Notably absent from the Draft Report is any reference to (and therefore any learning from) these:

(a) the OECD's *Collaborative Strategies for In-Country Shared Value Creation*[7] and *Guiding Principles for Durable Extractive Contracts*;[8]

(b) any materials from the *Intergovernmental Forum on Mining Minerals Metals and Sustainable Development* in particular its framework *Mining and Sustainable Development: managing one to advance the other*,[9]

(c) any materials from the *Natural Resource Governance Institute*, which are explicitly aimed at countries with extensive resources, to help 'achieve sustainable, inclusive development, and that people receive lasting benefits from the extractive sector and experience reduced harms', and particularly relevant are the *Natural Resource Charter*[10] which indicates areas of importance for regulators, and the assessment of Australia in its 2017 report;[11]

(d) the UNEP's 2018 sourcebook *Managing mining for sustainable development*;[12] nor

(e) the February 2020 report of the *International Resource Panel, Mineral Resource Governance in the 21st Century*.[13]

[10] The Draft Report, and the Commission's ability to inform governments and others in making 'better policies in the long term interest of the Australian community', is limited from its avoidance (or ignorance) of these international examples and materials. The consultations record that, outside Australia, the Commission engaged

with only Norway's Ministry of Petroleum and Energy, and two organisations in Canada. This suggests little reliance can be put on the Draft Report's statement and approach that 'Australian regulators appear to be generally at or near the frontier of leading practice regulation globally. Accordingly, most examples of leading practice are sourced from Australian jurisdictions' [p63].

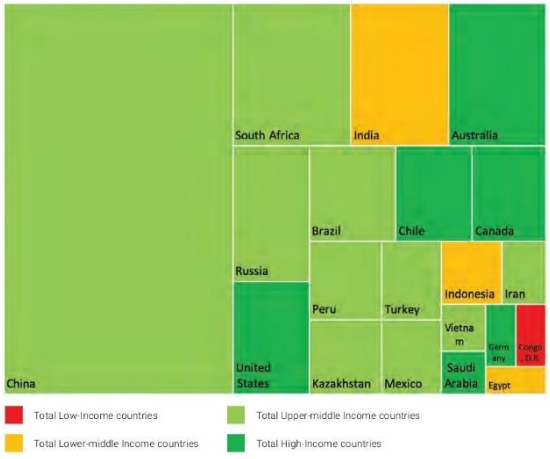
[11] The shortcomings of this approach were explained in our earlier submission.

> … *Australia does not have some innate aptitude in resources regulation and development. What occurred previously could not occur now because of technological and social changes. The technological changes have meant what used to be necessary development of local capacity (jobs, businesses, communities) has decreased or disappeared with the increased mechanisation and better transport enabling most goods or services being flown in. The social changes involve increased awareness and regulation of resources operations and their impacts – as compared to historically where there were fewer expectations or controls around environment, labour relations, workplace safety, international investment, or social impacts (to name just a few).*
>
> *This means that, if Australia's contemporary resource regulation is to best contribute to the long-term interest of the Australian community, then there must be close examination of the developments and guidance globally rather than simply continuing Australian regulatory forms and practices which originated in a different time and context.*[14]

[12] The problems from essentially limiting one's understanding to 'what has happened in Australia' is apparent from a recent report of the International Resource Panel.[15] This contains important comparisons for assessing the achievements of Australia's resources sector. Certainly, Australia *has* gained much money and economic value by extracting and exporting raw material. But that masks more serious implications in the longer term. *If* natural resources are being depleted, then the regulatory system should *ensure* that there are guaranteed and enduring benefits for the community from that.

[13] Three diagrams starkly indicate these dynamics, and should focus the Commissions' attention on how and where resources regulation needs improvement.

Share of (non-energy) resource production, top 20 countries[16]

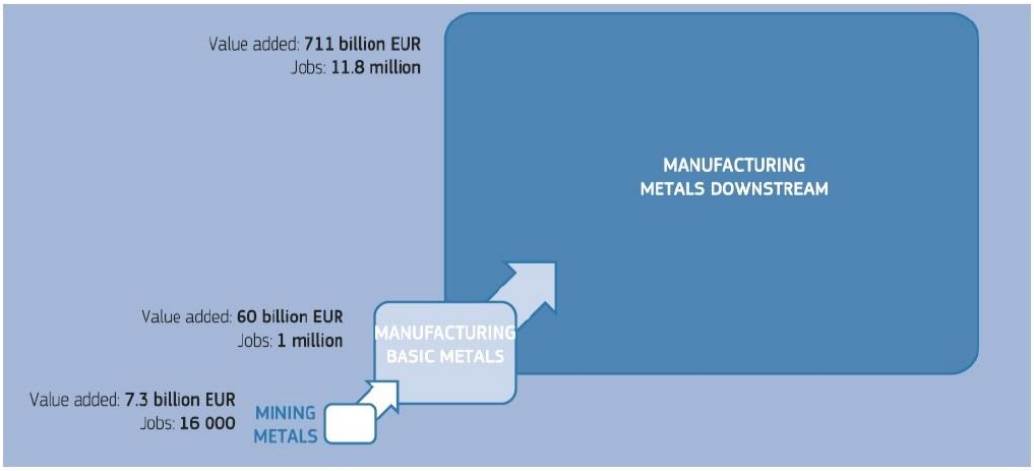


Resources contribution from top 25 mineral export dependent countries[17]

Rank	Country	Income Group	Export Value (% of total exports)	Production value (% of GDP)
1	DRC	LI	80.9	14.7
2	Chile	HI	57.0	9.5
3	Australia	HI	56.7	11.9
4	Mongolia	UMI	80.4	16.7
5	Papua New Guinea	LMI	37.9	14
6	Zambia	LMI	75.1	7.6
7	Peru	UMI	53.8	5.8
8	Burkina Faso	LI	49.6	6.0
9	Mali	LI	65.7	5.3
10	Guyana	LMI	61.2	10.5
11	South Africa	UMI	38.2	7.1
12	Botswana	UMI	91.3	12.8
13	Guinea	LI	52.1	8.8
14	Mauritania	LMI	58.1	10.2
15	Eritrea	LI	38.6	9.0
16	Namibia	UMI	50.3	6.9
17	Ghana	LMI	23.0	4.1
18	Lao PDR	LMI	36.5	3.3
19	Sierra Leone	LI	93.6	14.9
20	Uzbekistan	LMI	30.5	3.1
21	Suriname	UMI	33.8	6.0
22	Tanzania	LI	38.1	1.5
23	Kazakhstan	UMI	10.0	4.2
24	Liberia	LI	39.3	11.3
25	Central African Rep.	LI	39.1	N/A

(HI = High Income, UMI: Upper Middle-Income, LMI: Lower Middle-Income, LI: Low-Income groups - as defined by the World Bank).

EU value-added from manufacturing[18]



[14] What these diagrams indicate is:

(a) Australia's $ value from resources production was the fourth highest in the world;[19]

(b) but, of those top 20 countries, *none* which are commonly used as relevant comparators (in terms of economic development, eg. Canada, USA, Germany) are as resource-export dependent as Australia;

(c) Australia ranked 6th in the export-dependent 'top 25' countries, the only other OECD country was Chile, and most of the other countries in that list were lower (or lower middle) income countries; and

(d) European Union data shows the much higher greater economic contribution which has been achieved from manufacturing and downstream activities (in comparison to what produced from the mining).

[15] We note the Commission consulted Norway's Ministry of Petroleum and Energy in preparing the Draft Report. We expect, therefore, the Commission would be aware of that country's sovereign wealth fund developed from oil revenue (commencing in 1996) and the fund now earning more than the country's oil revenues.[20] The Government's fund explains: 'Oil revenue has been very important for Norway, but one day the oil will run out. The aim of the fund is to ensure that we use this money responsibly, think long-term and so safeguard the future of the Norwegian economy'.[21] These aims and achievements, through Norway's resource regulation greatly benefit that nation's future. As an example of issues with revenue management we draw the Commission's attention to the fact that that ratings agency Moody's downgraded Western Australia's credit rating from AAA to AA1 in 2014 and further downgraded it to AA2 in 2016, in connection with (among other things) the commodity price slump at that time.[22] These examples of revenue management is one aspect of resources regulation – and its productivity for the community – which we expect the Commission will consider. We reiterate an aspect from our earlier submission.

> *Revenue management is an area where Australia has been considerably out-of-step with good practice. The royalties and income created by Australian extractives operations essentially go to the consolidated revenue of the government of the day to spend as it likes and can politically endure. This motivates short-term thinking and spending, and is neither good nor recommended practice.*
>
> *The 2018 UN sourcebook Managing Mining for Sustainable Development has relevant guidance including: "Managing the volatility of resource revenues by using tools such as structural budget rules developed by the International Monetary Fund, and designing and instituting natural resource funds". Resource funds, to ensure resource revenues also provide future benefits, are a common feature in other countries and commentary.*[23]

[16] Contemporary international guidance on resource regulation (noted above) emphasises the approach should be *first* what is required for national development *and then* whether and what role extractives have in that. We urge the Commission to consider these and reflected this in its final report.

[17] Also absent from the Draft report is any assessment, or recommendations, regarding Australia's resources regulation as a 'home state'. That is – requirements regarding Australian registered companies undertaking resources operations overseas. This is

an international legal obligation on Australia[24] and the issue has been recently emphasised by the International Resources Panel.

> *The challenges of extractive resource governance are well known ... All stakeholders in the extractive value chain have a role to play.*
>
> · *Home countries: Home States have much more power over mining companies and thus can mediate the significant power asymmetry between mining companies and host countries. Home countries are also critical to reforming the international trade and investment regimes that constrain the use of the full range of policy instruments to achieve resource-based industrialization at the local level).*[25]

Recommend regulator due diligence <u>before</u> granting mineral rights

[18] The Commission has briefly examined the processes, in various Australian jurisdiction, of how they process applications for resources permits. The analysis and description here is uneven and the Commission's final report would better assist its audience with further attention and explanation. The issues are identified below, followed by our suggestion on where the Commission should progress in this area.

[19] The Draft Report identifies the risks.

> *'[P]oor behaviour [by the tenement holder] can contaminate community sentiment towards resources activity more generally, with an adverse effect on "social licence to operate" '* [p112]
>
> *'If proper due diligence [prior to government granting tenements] is not undertaken, there is a risk that operators who consistently fail to meet environmental or community standards (as reflected in regulation and policy) may still be granted tenements. These operators may once again fail to meet basic compliance requirements in their work…'* [p112]

The Commission acknowledged, however, that 'It is not known how common these issues of repeated non-compliance are' [p112]. Despite this, the Commission did not seek any information regarding that, but rather framed an explicit request that 'The Commission is seeking information on whether there are aspects of mining and petroleum licensing systems that pose a material impediment to investment' [p112].

[20] The report frames 'leading practice' due-diligence as focussed solely on 'repeated non-compliance'. That is not leading practice. Consider, for example, the Minerals Council of Australia (**MCA**)'s 'Enduring Value' principles, which the MCA explain thus.

> *Central to Enduring Value is the relationship between the mining industry and its many stakeholders – employees, shareholders, communities and governments. The Enduring Value principles recognise that these groups have rights and interests that need to be reflected in the ways that companies carry out their business.*
>
> *… The principles include the fundamentals of ethical governance, sound risk management and transparent engagement as well as individual principles relating to health and safety, employee rights, community development and environmental management.*[26]

[21] That is a statement, from the Australian mining industry, of their understanding of how contemporary mining should occur. Similar emphasis can be found in the approach of the Canadian mining industry, [27] the International Council on Mining and Metals,[28] Inter-governmental frameworks,[29] non-government and academic guidance. We suggest to the Commission that *that* is 'leading practice'.

[22] By contrast, granting tenements to anyone on a 'first-come, first-served' basis is from an earlier era, and the Commission's acceptance of it [p108-109]) should be reconsidered in light of the above. The MCA acknowledge there is a 'gap between legal requirements and community expectations'.[30] One way to address that gap is for regulators to obtain greater assurance about benefits (and avoidance of impacts) before granting rights.

[23] The Report suggests WA has a public interest test before granting or assessing the character of licence applicants.[31] This is incorrect. There *is* a public interest basis on which the Minister can terminate or refuse an application,[32] but it is an exception and rarely used. Indeed, WA Government policy makes clear that applications are assessed on a 'first come, first served' basis, and there is no routine assessment of public interest test.[33]

[24] However there is legislative scope for WA to involve more due-diligence in its assessment of tenement applications (as there are in other Australian jurisdictions). In WA, for instance, an exploration right should not be granted 'unless … satisfied that the applicant is able to effectively explore the land',[34] and a mining rights can be granted 'on such terms and conditions as the Minister considers reasonable'.[35] These types of provisions - which historically only considered the technical abilities to move earth - could found a more contemporary approach that considers issues relevant to sustainable development. *That* is what due diligence should involve.

[25] Guidance on what regulators should consider, or require, prior to granting resources rights can be gained from the following.

(a) The OECD's *Guiding Principles for Durable Extractive Contracts*,[36] which also apply where rights are allocated under 'legal systems providing for non-negotiable provisions' (which is the case for most of Australia).[37]

(b) The WA Government has recently published a *Proposed Debarment Regime* (regarding companies seeking government work) which it explains thus: 'We have an obligation to protect and safeguard the use and expenditure of public funds and to maintain public confidence in relation to our contracting. This obligation can only be fulfilled if all parties involved in public procurement work together to create supply chains, founded on sound laws, transparent procurement policies and responsible business practices'.[38]

(c) Due Diligence Guides from the OECD, about responsible business conduct.

Reframe approach to communities and resources regulation

[26] The Draft Report notes 'effective community engagement is crucial for obtaining community support' [p254], that 'there are many guidelines and leading-practice examples of community engagement'[p254], and that 'it is important that participants can see that their engagement has had an impact or influence on the decisions made by the company' because engagement without follow through may lead to stakeholder dissatisfaction [p255]. These observations have merit, but there is a significant omission from the Draft Report, which is the *OECD Guidelines on Multinational Enterprises* and its associated guides on due diligence, particularly the 2017 *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*.[39]

[27] Many of the aspects in the 2017 *Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* correlate with the 'themes' identified in the Draft Report that engagement should be meaningful, transparent, involve diverse and marginalised stakeholders, and be fit-for-purpose.[40] The 2017 Guidance also gives further explanation and details on many of these areas.

[28] These OECD standards are relevant because the Australian Government has internationally committed to 'recommend to multinational enterprises operating in or from their territories the observance of the Guidelines',[41] and non-compliance with the Guidelines can result in examination and conciliation by the Australian National Contact Point (or 'AusNCP' which is part of Commonwealth Treasury).[42] The AusNCP has previously dealt with complaints in relation to the resources sector,[43] and has recently made observations in cases on companies' inconsistency with relevant international standards in their interaction with stakeholders.[44]

[29] In consequence, resources companies who do not comply with the *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* are exposed to complaints to, and mediation and public statements from, the AusNCP.[45] Accordingly, it would be useful for the Productivity Commission to bring these standards to the attention of regulators and companies. Equally, the Commission may wish to reconsider its Draft Finding 9.4 that 'guidance available to companies ... on how to engage with communities and other stakeholders ... cover similar themes, *and there is no one leading practice set of guidelines*'. Given the Australian Government's adherence to the *OECD Guidelines*, that might suggest these have some status as guidelines relevant to the sector and its regulation.

[30] The Commission places much weight, in its analysis of community engagement, on 'social license to operate'. The Draft Report equates this with 'community acceptance' and has sections about 'What effect does a social license to operate have on a business' (p244) and 'What is involved in obtaining a social licence to operate' (p245). This analysis should be re-examined in light of the observations and recommendations of

the International Resources Panel observations and recommendations, which we extract below.

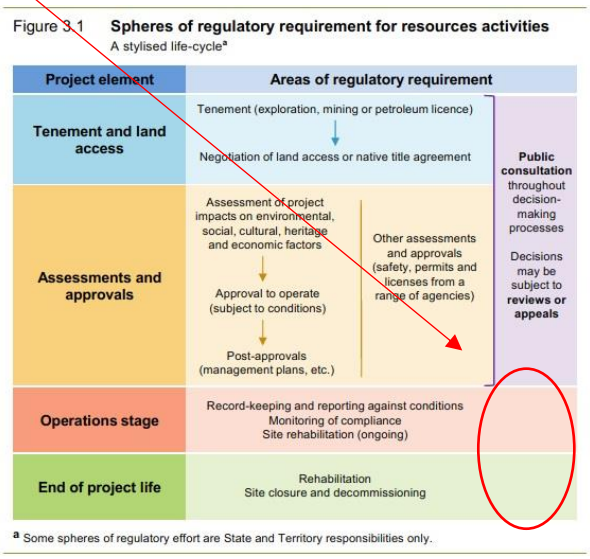
> *The fundamental critique of the SLO [social licence to operate] framework is that it was developed as industry's pragmatic response to business risk. Its agenda is limited to accommodating community demands to the minimum extent necessary to avoid public opposition and social conflict, and the associated costs of reputational damage and operations delays or disruptions. It has been opportunistically used to serve the particular objectives and goals of companies, activists and governments. In essence, SLO defines the minimum of what a mining project can get away with in a particular location.*
>
> ...
>
> *The adoption of the SDGs [Sustainable Development Goals, in 2015[46]] signalled the need to move beyond the concept of the 'social license to operate', which dominated the development discourse in the extractive industry throughout the end of 1990s and mid-2000s.*
>
> ...
>
> *The new framework is the 'Sustainable Development Licence to Operate' (SDLO). The SDLO builds on the Social Licence to Operate (SLO). It is also designed to improve the net societal benefits of mining, and is not necessarily meant to function as a licence in the compulsory or regulatory sense. However, the proposed SDLO extends the SLO concept in several important ways. It addresses a broader subject matter covering the nexus of all environmental, social and economic concerns that fall within the remit of the SDGs and related targets; it is relevant to all actors in the extractive sector across the public, private and civil society sectors; its implementation is a shared responsibility across nations and different actors along the minerals value chain; and it sets out not only minimum standards of practice but also a set of internally consistent principles, policy options and good practices for enhancing the extractive sector's contribution to achieving the SDGs.[47]*

[31] The Draft Report's analysis of free prior informed consent (**FPIC**) is inaccurate. The Commission states 'a lack of consent usually does not prohibit development from proceeding… [but] places the onus on governments and proponents to explain why they have chosen to proceed despite these groups objections' (p281) and 'Some companies may also go beyond the requirements of FPIC and withdraw development proposals if an Indigenous community withholds its consent. The Commission did not encounter examples of this' (p282). The Commission should familiarise itself with the approach of the OECD, ICMM, the World Bank, and the example of the Jabiluka uranium mine and the Mirrar People (whose decisions were respected by Rio Tinto and Energy Resources of Australia[48]).

> *If through its due diligence processes an enterprise concludes that consent is required to proceed with an activity, and the agreed process has not arrived at consent, activities should not proceed unless FPIC is subsequently forthcoming.* [OECD[49]]
>
> *The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from communally held lands and natural resources subject to traditional*

> *ownership or under customary use. If such relocation is unavoidable the client will not proceed with the project unless FPIC has been obtained as described above. [which was...] The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations.* [IFC/World Bank[50]]
>
> *Where ... consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of Indigenous Peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply. In such circumstances, ICMM members will determine whether they ought to remain involved with a project.* [ICMM[51]]

[32] There is a diagram in Draft Report, illustrating the Commission's understanding of community engagement, which may need clarification. The diagram on p95 *appears* to suggest an absence of public engagement after regulatory approvals have been obtained (namely: no role for public consultation throughout the operations and at the end of project. That would be contrary to considerable industry and international guidance which reinforces the importance of engagement *throughout* a project.



[33] We specifically commend and support Commission's analysis on independent bodies and information,[52] and urge this to be maintained in the final report.

[34] We also commend the Commission's observations on misuse of the expedited procedure by the Western Australian Government (by submitting *all* applications for exploration licences to the expedited procedure regardless of the potential impact on native title).

[35] The Commission notes that 'Good guidance helps resources companies to navigate native title', and notes the Australian Government's *Working with Indigenous Communities*. Another guidance of relevance is the OECD's *Due Diligence Guidance for*

Meaningful Stakeholder Engagement in the Extractives Sector,[53] and its Annex B which is specifically on 'Engaging with indigenous peoples'.

Some land should not have resources development

[36] The Commission's report should clearly address t that areas of high conservation or other social values should not be developed, given it is well-accepted internationally *and in the resources sector*.. So, the discussion of 'Where can resources development take place' [p108-109] is not just a question of process in determining *whether* to grant. It is also saying there *should be no grant* in some places.

[37] The way this can feature is not explicitly accommodated in the Draft Report schema that, where there is contested use, the decision should be made by a Minister.[54] There is greater protection. One example of this is through statutory or constitutional protection, such as the case with A Class reserves in WA (ie. mineral right cannot be granted without parliamentary involvement and approval).

[38] The Draft Report has some ambiguity when it references conservation protection, and its practice in WA, by noting the wrong regulatory form for this.

> *Crown land is subject to unique rules for resources activity — in particular, some areas of Crown land are set aside for conservation, and therefore are closed to resources development. However, each State and Territory also has provisions to allow exploration or extraction on this land, sometimes subject to different rules. For example, in Western Australia, previously exempted land does not follow a 'first come, first served' allocation process, but a competitive tender process.* [p132]

[39] The usual procedure, in WA's mining regime, regarding conservation areas is that national parks and similar reserves are not 'exempted land' (at the control of the Mining Minister[55]) but rather these are protected through a prohibition on any mining lease without approval by both houses of parliament.[56] This is a significant distinction, which is overlooked in the Productivity Commission's schema on how to deal with contentious issues and seeing these best decided by an elected parliamentarian rather than an unelected official [p178-179]. The WA process here – not unusual in mining law – shows a third option for decision-making which the Draft Report ignored: that of decisions *above* the Minister (eg. with parliamentary or constitutional protection).

Reconsider, or at least rationalise, the 'market' case in places

[40] In some places, the Commission's analysis refers to market forces, in face of evidence to the contrary.

[41] The Report says 'in the absence of intervention, resources companies are likely to choose the method and rate of resource extraction that maximises overall recovery from the resource (while complying with other regulation)' [p114]. The citation given

in support of that was the Commission's earlier analysis specifically on petroleum, not resources in general. There are several materials inconsistent with the Commission's view here.

(a) Professor Chandler's detailed examination of Norwegian, British and Australia petroleum resource management suggests otherwise. Chandler explains corporate focus is on 'economic or commercial' recovery, and how that can vary according to the operator,[57] rather than 'maximis[ing] overall recovery from the resource' for the state.

(b) The practice of 'high-grading' involves a miner extracting the better quality ore for short-term financial benefit, rather than planning to extract all economically recoverable assets over a longer resource life. There is media and academic reporting and analysis of this,[58] which the Commission may wish to consider.

(c) The WA Auditor General has noted instances where regulator's limited controls results in corporate adjustments affecting the predicted revenues and cash-flow for the state.[59]

[42] The report is replete with references to risk faced by resources companies. That is, of course, quite appropriate for the Commission to consider. However it is important to also bear in mind government risks arising from *insufficient* regulatory control. WA's Auditor General summarised this well in a 2004 report.

> *As well as providing significant opportunities, mining can be a high risk activity for both the private sector and the State. The State faces a wide range of risks including: economic development risk, environmental risk, revenue risk, resource risk, regulatory risk and political risk.*[60]

Environmental assessment and economic/social impacts

[43] The Draft Report summarises 'the environmental approval process…involves weighing the environmental, economic and social impacts of projects against each other to determine whether projects can proceed and if so under what conditions' [p150]. That weighing is important, and it may occur through the environmental approval process in other jurisdictions, but that is not the case in WA. The relevant aspects of the WA mining title processing are summarised below, identifying its shortcomings regarding social impacts. The Commission may wish to consider this in its Final Report.

[44] In WA, the environmental impact assessment process is coordinated by the Environmental Protection Agency (or **EPA**).

(a) The EPA's assessment and report can only address environmental factors, and *not* social or economic aspects of the proposal.[61]

(b) An EPA report on a proposal goes to the Minister to make the decision, and there is also the appeals process. The 'decisionmaker' is not so limited as the EPA, and can consider economic and social matters in making their decision.[62] Who that decisionmaker is depends, on whether there is agreement between various Ministers or not (ie. whether it goes to Cabinet, or remains with the Minister for Environment).

(c) So a proponent's proposal may well address social and economic issues, but the EPA cannot consider those nor base its report on them. A recent decision of the Mining Warden also refused to consider these aspects as part of a 'public interest' examination of whether a mineral title should be granted. These were matters the Warden considered 'best left to the Minister for Mines'.[63]

(d) In the case of a proposed grant (and objections to) a mineral tenement, then, this leaves an unstructured and chaotic process around non-environmental factors and how these are determined by Government. That is through lobbying and advocacy of the Minister.

[45] There is an interesting juxtaposition of two statements in the report, which reveal some ambiguities in relation to how Australia's regulation of resource impacts has fared.

> *On the whole, Australia's resources regulation delivers relatively good environmental outcomes. The 2016 State of the Environment Report noted that Australia's resources regulation was effective, and the 2018 Environmental Performance Index produced by Yale and Columbia Universities ranked Australia's environmental performance at 21st out of 180 countries... DRAFT FINDING 7.1: Environmental report cards indicate that Australia's resources regulation has been effective in delivering relatively good environmental outcomes...* [p190]

> *Little rehabilitation and decommissioning has taken place. ...[S]everal recent reviews and studies have noted that little rehabilitation has occurred in Australia. ... Unger et al. (2012) estimated that there could be more than 50 000 abandoned mine sites in Australia.* [p208-209]

Importance of 'ecologically sustainable'

[46] As noted in the earlier submission by Resources Law Network, the Commission's own summary of its role is 'to help governments make better policies in the long term interest of the Australian community',[64] and 'provid[e] independent research and advice to Government on economic, social and environmental issues affecting the welfare of Australians'.[65] For Australia's contemporary resource regulation to best contribute to the long-term interest of the Australian community, there must be close examination of the developments and guidance globally rather than simply continuing

Australian regulatory forms and practices which originated in a different time and context.

[47] Our earlier submission identified relevant international materials (in addition to those noted above) and also that there are various matters which the Commission *must* consider, specified in the Commissions' Policy Guidelines in its governing statute.

> (1) In the performance of its functions, the Commission must have regard to the need:
>
> (b) to reduce regulation of industry (including regulation by the States, Territories and local government) where this is consistent with the social and economic goals of the Commonwealth Government;
>
> …
>
> (i) to ensure that industry develops in a way that is ecologically sustainable; and
>
> (j) for Australia to meet its international obligations and commitments.[66]

[48] The last of these Guidelines – Australia's international obligations and commitments – raises five areas relevant to the resources sector and its regulation in Australia.

(a) *International investment and trade*, which is an issue the Commission has previously examined.[67]

(b) *Human rights about land use and impacts*, about which there is a useful 2015 collation of the relevant standards and jurisprudence prepared by the UN's Office of the High Commission for Human Rights.[68]

(c) *Encouraging responsible business conduct*, which includes the Australian Government undertaking to recommend that multinational enterprises operating in or from Australia observe the standards in the *OECD Guidelines for Multinational Enterprises*.[69] Particularly relevant here, therefore, is the OECD's further detail on what that involves in the extractives-sector engagement,[70] which should inform the Commission's analysis of regulation in this regard.

(d) *Sustainable development*, with many key aspects of this reflected in the principles of ecologically sustainable development, which are addressed in [50]-[52] below.

(e) *Climate change*, most recently involving the Australian Government's National Determined Contribution (to reduce emissions by at least 26% below 2005 by 2030) and other obligations under the *Paris Agreement* and earlier *UN Framework Convention on Climate Change*.

[49] The Commission's statutory Policy Guidelines also require it to have regard to the need for industry to 'develop... in a way that is ecologically sustainable'. The Commission confirmed how integral this is, in its most recent annual report:

> 'Reflecting its statutory guidelines, *ESD [ecologically sustainable development] principles are integral to the Commission's analytical frameworks*, their weighting depending on the particular inquiry or research topic. The Commission's five year assessment of the Murray Darling Basin Plan is a recent example of work undertaken requiring integration of complex economic, social and environmental considerations.'[71]

That integration is just as relevant to the Commission's examination of the resources sector, given the generational implications of resources regulation. That is: regulatory decisions and approvals regarding a resources development can frequently involve benefits and impacts enduring across many decades.

[50] The Commission makes no reference, in the Draft Report, to 'ecologically sustainable'. The phrase is not defined in the Commission's statute, and the Commission's latest annual report does not explain what are the 'ecologically sustainable development principles' integral to the analytical frameworks which its Policy Guidelines require. The Commonwealth's *National Strategy for Ecologically Sustainable Development* (as endorsed by the Council of Australian Governments) defines ecologically sustainable development as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.[72] This reinforces the centrality of the concept to the Commission's examination of the resources sector: a sector which is quintessentially concerned with the 'using, conserving and enhancing the community's resources'.

[51] The phrase 'ecologically sustainable' features in various Commonwealth statutes, with the most relevant guidance here perhaps from its general definition in the *Environmental Protection and Biodiversity Act 1992*.

> '*The following principles are principles of ecologically sustainable development:*
>
> *(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;*
>
> *(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*
>
> *(c) the principle of inter-generational equity - that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;*
>
> *(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;*
>
> *(e) improved valuation, pricing and incentive mechanisms should be promoted*'.[73]

[52] These five principles are presumably, therefore, integral to the Commission's analytical framework for this resources sector inquiry and will be considered and addressed in its *final* recommendations and report.

Areas of support

[53] The above pages identify aspects of the Draft Report we consider merit closer attention from the Commission, in developing its final report. However there is also much in the Draft Report which we consider useful and important analysis and courage the Commission to replicate in its final report.

(a) Some statements capture the complexities well, and thus could usefully appear in the final report.

> *The environment, sites of cultural and heritage significance, project workers, landowners and surrounding communities can suffer detrimental impacts. For this reason, resource activities are strictly regulated to ensure net benefits flow to the Australian community as a whole.* [p61]
>
> *[M]ineral and energy resources are owned by the Australian people through their governments (the Crown). The Australian, State and Territory governments have a responsibility to ensure that those resources are used in a manner that best promotes the community's wellbeing.* [p102]
>
> *[R]egulatory coordination has improved over the past decade* [p181]

(b) We also commend the Commission's findings that 'There needs to be transparency in the nature of the government's relationship with regulators to ensure that elected officials are not able to unduly affect regulated outcomes in ways that are not immediately obvious.' (p312), and suggest given its importance that it should also be reflected in a recommendation.

(c) The Commission's attention to regulator funding is important. However effective resource regulation needs to move beyond urging governments *to consider whether* resourcing is sufficient (p317), and actually *ensure* resourcing is sufficient. We suggest the latter would be a more appropriate recommendation for the Commission's final report.

[54] The Draft Report includes a section about 'lawfare', in which the Commission reaffirms its position that legal standing (to be involved in court proceedings) should be afforded to those parties who have taken a substantial interest in the assessments process [p180]. The Draft Report noted that third party appeal rights have not opened the floodgates; and the Commission may wish to also note the courts can and do control proceedings before them by dismissing claims/objections without merit[74] and also awarding costs (including indemnity costs and costs against lawyers) against objectors.[75] These aspects may assist the Commission's final report. Additionally, the Commission may also wish to consider that use of court proceedings to achieve non-legal aims is not something which occurs solely against resources companies, and there is use of SLAPP lawsuits ('Strategic Law Suits Against Public Participation') by companies aimed at quelling objections.[76]

[55] We endorse the comments by the EDO on the Draft Report, that:

> *'[A]gree and support the Commission's draft recommendations in relation to ensuring that regulators are adequately funded and resourced, providing better public access to data, undertaking appropriate due diligence of the compliance record of potential resource operators and providing publicly accessible information about environmental offsets. We also share the Commission's concerns about jurisdictions (including the Commonwealth's regulation of the offshore petroleum industry) that lack an adequate system of rehabilitation bonds or financial assurance to ensure that the costs of rehabilitating end-of-life resources sites is not transferred to the tax-payer.'*

Conclusions

[56] Our submissions are summarised in paragraph [1] above. We reiterate the point in our earlier submission that regulation of the resources sector is complex, and that 'recommendations are easily made at the international or academic level because those authors do not have to actually implement that regulatory regime, nor manage competing interests. Nevertheless, international guidance and standards do provide a useful measure and ideas for improvements in domestic mining regulation'.[77] The Commission is ideally placed – with its expertise– to provide important, independent research and advice to government on economic, social and environmental issues affecting the welfare of Australians. We look forward to seeing the Commission's Final Report.

About Resources Law Network

[57] Resources Law Network is network of practising lawyers, barristers and academics[78] who recognise that the development and use of resources (minerals, petroleum, renewables) is a vitally important activity for any society. The Network members also believe that good regulation maximises the benefits and minimises the negative impacts of resource extraction, and recognise the rule of law in achieving that balance. This submission has been written by, and is the sole responsibility of, John Southalan and Joe Fardin whose experience and contact details are summarised below.

(a) John Southalan is an adjunct academic who writes and teaches on various aspects of resources regulation, and is also a barrister in resources law disputes.

(b) Joe Fardin was Associate Director at the Centre for Mining, Energy and Natural Resources Law at the University of Western Australia, and consults internationally on sectoral reform in mining regulation.

[58] For transparency, we intend to make this submission available on the website of the Resources Law Network. If you have any concerns regarding that, please let us know by 15 September 2020.

[59] We would be happy to expand on any issues covered in this letter. If you have any questions regarding this submission, please contact John Southalan in the first instance.

Yours faithfully

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Endnotes

[1] Productivity Commission, *Resources Sector Regulation Draft Report*, March 2020 (**Draft Report**).

[2] CME, *National Factsheet* (Chamber of Minerals & Energy Western Australia, 2019)

[3] 'Many nations with large extractives sectors have a government policy about resource management and development. Western Australia has been an anomaly as it has not had a general mining policy ([the mines departments] have policies on specific areas, eg., Abandoned Mines; Enforcement, Programme of Work [for] Prospecting Policy; [environmental performance] Bonds. As WA governments change, there have also been changing policies in relation to fracking, mining in national parks, and uranium mining) and, unlike other jurisdictions, WA's Mining Act does not specify its objectives.': John Southalan, 'WA and National Policy Guidance on Extractives Regulation' (2019) 38(1) *Australian Resources & Energy LJ* 73, 75.

[4] eg.

- 'The primary object of the Mining Act is to encourage and promote the prospecting and exploration for, and mining of, mineral deposits in the State': *Re Minister for Resources; ex p Cazaly Iron* [2007] WASCA 175, [70], Buss JA (Wheeler & Pullin JJA agreeing).
- 'the object of the Mining Act is to encourage and to promote prospecting and exploration for, the mining of, mineral deposits in the State': *Pangolin Resources -v- Minister for Mines and Petroleum* [2012] WASC 343, [10].
- 'An underlying principle of the *Mining Act 1978* is to provide for ground turnover …so that ground is explored and either converted to mining lease or surrendered': *ex p Devant P/L -v- Mines Minster* (unreported decision of the WA Full Court, 18 December 1996, BC9606232) per Steytler J (agreed by Kennedy & Pidgeon JJ).

[5] eg. 'What then is the "subject matter and scope and purpose" of the *Mining Act 1978* (WA)? The subject matter and scope and purpose of an Act of Parliament can be identified at various levels of generality. Thus, at an unhelpfully general level, this legislation, as its long title suggests, is legislation "relating to mining". ... The legislation also has the purpose of defining circumstances in which mining tenements and applications for tenements may be processed, granted, terminated or forfeited. Rowland J in *Nova Resources* (1995) said that **the "primary" object and aim of the legislation is "to ensure as far as practicable that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration"**. It is true that this is one of the primary objects of the Act. **However**, the adjective "primary" used by Rowland J acknowledges that **there are other objects and aims. Another object reflected in the Act is, in one sense, contrary to the primary object.** This object is found in provisions in the Act which excuse tenement holders in certain

circumstances from making land with known potential for mining, or which is worthy of exploration, available for mining or exploration. Some of these provisions have been in the Mining Act 1975 or its predecessor for a long time, and other provisions have been added more recently, perhaps to reflect the fact that the mining industry in Western Australia has increasingly matured and now involves the investment of billions of dollars.': *Re Minister for Resources; ex p Cazaly Iron* [2007] WASCA 175, [20]-[21] per Pullin JA.

[6] *Siberia Mining -v- Warden O'Sullivan* [2020] WASC 214, [7] (emphasis added)

[7] OECD, *Collaborative Strategies for In-Country Shared Value Creation* (Secretary-General of the OECD, 2016, Organisation for Economic Co-operation & Development)

[8] OECD, *Guiding Principles for Durable Extractive Contracts* (Governing Board of the OECD Development Centre, 2020, Organisation for Economic Co-operation & Development)

[9] IGF, *Mining and Sustainable Development: managing one to advance the other* (Intergovernmental Forum on Mining Minerals Metals and Sustainable Development, 2013, Intergovernmental Forum Secretariat (Foreign Affairs, Trade and Development Canada)).

[10] NRGI, *Natural Resource Charter* (Natural Resource Governance Institute, 2014, Natural Resource Governance Institute) which can be further applied with the framework assessment tool: NRGI, *Natural Resource Charter Benchmarking Framework* (David Manley and Rob Pitman, 2017, Natural Resource Governance Institute).

[11] NRGI, *Resource Governance Index* (Natural Resource Governance Institute, 2017, Natural Resource Governance Institute)

[12] UNEP, *Managing mining for sustainable development: A sourcebook* (Uyanga Gankhuyag and Fabrice Gregoire, 2018, United Nations Development Programme).

[13] International Resource Panel, *Mineral Resource Governance in the 21st Century: Gearing extractive industries towards sustainable development* (Elias Ayuk, Antonio Pedro and Paul Ekins, 2020, UN Environment Programme).

[14] John Southalan and Joe Fardin, *Resources Sector Regulation Issues Paper* (Resources Law Network, 2019), [6]-[7] (the evidence and support for these statements is omitted in this quote but were contained in the 2019 submission).

[15] International Resource Panel (above n13).

[16] From International Resource Panel (above n13), 65 which explains 'diagram of the relative share of the world non-energy minerals and metals production, 2016, by value in current $ US, of the 20 largest minerals and metals producing countries; Altogether the production value of these countries represented 73% of the world production'.

[17] From International Resource Panel (above n13), 70.

[18] From International Resource Panel (above n13), 73 which explains 'shows the year 2012 in terms of the value added and the direct employment in the EU mining industry, the downstream manufacturing of basic metals and then the industries depending on minerals and metals - with huge multiplier effects. These reflect the current outcome of more than 250 years of industrial history on the European continent'.

[19] Australia is sixth highest if mineral fuels were included (data International Resource Panel (above n13), 62).

[20] Offshore Energy Today, *Norway's oil fund now worth NOK 10 trillion* (2019)

[21] https://www.nbim.no/en/the-fund/about-the-fund/ (accessed 20 Aug 2020).

[22] The credit rating has since been improved, see WA Gov, *Moody's reaffirms WA's credit rating* (Treasurer, 2017, Government of Western Australia).

[23] Southalan and Fardin (above n14, [20(e)].

[24] eg. as part of its obligations under treaties dealing with economic social cultural rights and also children, extracted below.

- From the Committee on the Rights of the Child, *Concluding Observations: Australia*, (UN doc CRC/C/AUS/CO/4, 28 August 2012):

27. The Committee is concerned at reports on Australian mining companies´ participation and complicity in serious violations of human rights in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji, where children have been victims of evictions, land dispossession and killings. ... Furthermore, while acknowledging the existence of a voluntary code of conduct on a sustainable environment by the Australian Mining Council (¨Enduring Values¨), the Committee notes the inadequacy of this in preventing direct and/or indirect human rights violations by Australian mining enterprises.

'28. ...[T]he Committee recommends that the State party [Australia]:

(a) Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations;

(b) Take measures to strengthen cooperation with countries in which Australian companies or their subsidiaries operate to ensure respect for child rights, prevention and protection against abuses and accountability;

(c) Establish that human rights impact assessment, including child rights impact assessments, are conducted prior to the conclusion of trade agreements with a view to ensuring that measures are taken to prevent child rights violations from occurring and establish the mechanisms for the Export Credit Agency of Australia to deal with the risk of abuses to human rights before it provides insurance or guarantees to facilitate investments abroad'.

- From Committee on Economic Social & Cultural Rights, *Concluding Observations: Australia*, (UN doc E/C.12/AUS/CO/5, 11 July 2017).

'14. The Committee recommends that the State party [Australia]:

(a) Establish a clear regulatory framework for companies operating in the State party to ensure that their activities do not negatively affect the enjoyment of economic, social and cultural rights, inter alia, by developing a national action plan on business and human rights;

(b) Take all necessary measures to ensure the legal liability of companies based in or managed from the State party's territory regarding violations of economic, social and cultural rights by their activities conducted abroad, or resulting from the activities of their subsidiaries or business partners where these companies have failed to exercise due diligence;

...

(d) Reinforce effective mechanisms to investigate complaints filed against private companies and take effective measures to ensure access to justice for victims...'

[25] International Resource Panel (above n13), 191.

[26] MCA, *Enduring Value* (2015, Minerals Council of Australia), 4.

[27] MAC, *Towards Sustainable Mining 101: A Primer* (2019, Mining Association of Canada)

[28] ICMM, *10 Principles* (International Council on Mining and Metals, 2003)

[29] See n7–13 above.

[30] MCA (above n26), 4.

[31] Draft Report, p111.

[32] *Mining Act 1978* (WA), s111A. The 'exceptionality' of this is evident in that any Ministerial contemplating of using the power first requires procedural fairness to the applicant: *Connected IO Ltd -V- Paterson* [2019] WASCA 70, [65] per Buss P, Murphy & Beech JJA. This reinforces it is *not* applied as routine by the Department as a step in determining whether to grant.

[33] eg. see p7-8 of *Leading practice principles for a sustainable resources sector: A Western Australian perspective* (Government of Western Australia, 2018).

[34] *Mining Act 1978* (WA), s57(3).

[35] *Mining Act 1978* (WA), s71.

[36] OECD (above n8)

[37] OECD (above n8), Preamble 1.

[38] https://www.wa.gov.au/government/publications/proposed-western-australian-debarment-regime (accessed 20 Aug 2020)

[39] OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (OECD Secretariat, 2017, Organisation for Economic Co-Operation and Development)

[40] AUS Gov, *Resources Sector Regulation* (Productivity Commission, 2020, Australian Government), 255.

[41] Adhering Governments, *Declaration on International Investment and Multinational Enterprises*, adopted 21 Jun 1976, OECD/LEGAL/0144, revised 2011 (1976), I.

[42] The complaint and examination procedures, around corporate non-compliance with the OECD Guidelines, are set out in AusNCP *Complaint Procedures* (Treasury, 2019).

[43] eg. AusNCP, *Statement on BHP Billiton – Cerrejon Coal Specific Instance* (Australian National Contact Point, 2009, Department of Treasury); AusNCP, *Statement: Specific Instance complaint CFMEU – Xstrata Coal Pty Ltd – Industrial Relations/Employment Practices/Marketing Arrangements* (Australian National Contact Point, 2011, Department of Treasury); AusNCP, *Statement - Specific instance regarding Australian miner in South Africa* (Australian National Contact Point, 2013, Department of Treasury).

[44] eg. AusNCP, *Final Statement: Specific Instance by Australian Women Without Borders against Mercer PR* (Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, 2019, Treasury); AusNCP, *Final Statement: Specific Instance by Equitable Cambodia and Inclusive Development International regarding ANZ Group* (Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, 2018, Treasury).

[45] See n42 above. For transparency, we note John Southalan has the role of Independent Examiner of the Australian National Contact Point (to manage complaints made about implementation of the Guidelines). This submission is not, however, written in that capacity.
[46] UN, *Transforming our world: the 2030 Agenda for Sustainable Development* (General Assembly, 2015, United Nations).
[47] International Resource Panel (above n13), 262-266.
[48] eg. ERA, *Case study of the strategic importance of Australia's uranium resources* (Energy Resources of Australia Ltd, 2005, House of Representatives Standing Committee on Industry and Resources, Australian Parliament). 'Under the Jabiluka Long-Term Care and Maintenance Agreement between the Aboriginal traditional owners of the area - the Mirrar people - and Jabiluka Mineral Lease holders Energy Resources Australia (ERA), no mining activity will be conducted on the lease without the informed written consent of the Mirrar. This agreement formalises the commitment made in September 2002 by then Rio Tinto chairperson Sir Robert Wilson, that there would be no mining at Jabiluka without the consent of the Mirrar. The Mirrar, through their representative organisation Gundjehmi Aboriginal Corporation, spent the following 18 months seeking that commitment in writing - resulting in this agreement. The agreement also sets out provisions for the Jabiluka mine decline to be back-filled, although this has already been done - the hole in the ground that was created when uranium ore was dug out of the site in the late 1990s was filled in with the ore in late 2003': https://www.atns.net.au/agreement.asp?EntityID=1988 (accessed 21 Aug 2020).
[49] OECD (above n39), 98.
[50] IFC, *Performance Standards on Environmental and Social Sustainability* (International Finance Corporation, 2012)'Performance Standard 7 Indigenous Peoples', [15] & [12].
[51] ICMM, *Position Statement on Indigenous Peoples and Mining* (International Council on Mining and Metals, 2013), 4.
[52] 'Public debate about the environmental and social impacts of projects is important for ensuring a strong regulatory environment, but it is also important that debate makes use of factual and comprehensive information. Crucially, information must be perceived as independent of those who stand to gain from resources projects. Establishing agencies as 'honest brokers' or 'trusted advisors' can help to progress public policy debates when there is no values consensus and high levels of uncertainty in the community' (p120).
[53] OECD (above n39).
[54] eg. 'the Commission maintains the view that primary approval decisions involving 'tradeoffs between competing environmental, social and economic values'...are best made by elected representatives': Draft Report, 166 (referring to the Commission's 2013 report, which talked of a decision by 'the Minister', not by Parliament of broader elected representatives).
[55] Under *Mining Act 1978* (WA), s19, as noted in the Hunt & Kavenagh commentary the Commission referenced.
[56] *Mining Act 1978* (WA), s24(4) which requires resolution of both houses of parliament (who can also set conditions) for the grant of any mining lease on the various conservation and other reserves listed in s24(1)(a)&(b).
[57] John Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (2018, Edward Elgar Publishing), 164-167 and 168-171 which specifically examines Australia's regime and diverges from the Commission's assessment that 'resources companies are likely to …maximise… overall recovery from the resource'.
[58] eg. Kathryn Diss, *Iron ore high-grading by junior miners fighting price slump being questioned by analysts* (2015, ABC News) (media reports of WA practices); Phillip Stothard and David Laurence, 'Application of a large-screen immersive visualisation system to demonstrate sustainable mining practices principles' (2014) 123(4) *Mining Technology* 199, 202 and Kosim Gandataruna and Kirsty Haymon, 'A dream denied? Mining legislation and the Constitution in Indonesia' (2011) 47(2) (2011/08/01) *Bulletin of Indonesian Economic Studies* 221, 229 (academic analysis). We also bring the Commission's attention to a contrary view, from two decades earlier: M Lemieux, 'Surface mine reserve definition and the high-grading fallacy' (2000) 52(2) (Feb 2000) *Mining Engineering* 48, 48 ('The high-grading charge … is a reflex reaction based on the politically correct good intentions to "preserve-the-resources-for-our-children-philosophy". … Not wasting capital on low or no-return resource recovery must become, not only the correct economic decisions, but also the politically correct mining policy'). That perspective should have limited weight given more contemporary understandings of sustainable development.
[59] *Developing the State: The Management of State Agreement Acts* (Government of Western Australia, 2004), 24.
[60] WA Gov (above n59), 23-24.
[61] eg. *Conservation Council -v- Minister for Environment* [2019] WASCA 102, [99] & [130] per Buss P & Beech JA; [150] per Pritchard JA; confirming the existing approach since *Coastal Waters Alliance of Western Australia v Environmental Protection Authority; ex p. Coastal Waters Alliance* 90 LGERA 136.
[62] Ibid.
[63] *Polaris Metals -v- Wilderness Society* [2017] WAMW 21, [89]-[94] per Warden O'Sullivan.
[64] Commission's *Issues Paper*, ii.
[65] https://www.pc.gov.au/ (accessed 16 October 2019).

[66] *Productivity Commission Act 1998* (Cth), s8.
[67] *Trade and Assistance Review 2013-14* (Australian Government, 2015), ch 7.
[68] UN, *Land and Human Rights: Standards and Applications* (Office of the High Commissioner of Human Rights, 2015, United Nations).
[69] Required by the *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, art I, and the details of the Guidelines are contained in Annex 1 of that Declaration (see OECD, *OECD Guidelines for Multinational Enterprises* (Adhering Governments, 2011, Organisation for Economic Co-operation & Development)).
[70] OECD (above n39).
[71] *Annual Report 2018-19* (Australian Government, 2019), 39 (emphasis added).
[72] *National Strategy for Ecologically Sustainable Development* (Australian Government, 1992), Part 1. While that is a 1992 document, it remains current, eg see www.environment.gov.au/resource/guidelines-section-516a-reporting-environment-protection-and-biodiversity-conservation-act (accessed 17 October 2019). In 2018, the Australian Government confirmed: 'Australia is committed to the Sustainable Development Goals (SDGs) as a universal, global approach to reduce poverty, promote sustainable development and ensure the peace and prosperity of people across the world. The SDGs reflect things that Australians value highly and seek to protect, like a clean and safe environment, access to opportunity and services, human rights, strong and accessible institutions, inclusive economies, diverse and supportive communities and our Aboriginal and Torres Strait Islander cultures and heritage.': *Report on the Implementation of the Sustainable Development Goals* (Australian Government, 2018), 6.
[73] *Environment Protection and Biodiversity Conservation Act 1999* (Cwth), s3A.
[74] eg. *Hail Creek Coal v Michelmore* [2020] QLC 16, [35].
[75] eg. *Kemppi v Adani Mining (No 2)* [2019] FCAFC 117, [107]; *Oakey Coal Action Alliance v New Acland Coal* [2019] QCA 238, [19].
[76] eg. Greg Ogle, 'Beating a SLAPP Suit' (2007) 32(2) *Alternative Law J* 71 and Daniel Murphy and Lee Moerman, 'SLAPPing accountability out of the public sphere' (2018) 31(6) *Accounting, Auditing & Accountability J* 1774, 1777 ('In Australia, there have been a large number of SLAPP suits issued since the early 1990s. Perhaps the most recognised Australian SLAPP was issued by the "Gunns" logging company against a group of Tasmanian environmental activists who became known as the "Gunns 20". The Gunns' SLAPP was ultimately unsuccessful; however, it did "drag on" from 2004 for six years until the company finally conceded, resulting in significant court costs and damages being awarded to the defendant activists').
[77] John Southalan, 'Mining the International Guidance on Mining' (2018) 59 (20 September 2018) *Advances in Economics, Business and Management Research* 165, 165.
[78] Further information available at https://resourceslawnetwork.com/about/