PRODUCTIVITY COMMISSION INQUIRY ON RESOURCES SECTOR REGULATION

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NSW MINERALS COUNCIL

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1 Executive Summary

The NSW Minerals Council (NSWMC) welcomes the opportunity to contribute to the Productivity Commission Issues Paper (September 2019) on Resources Sector Regulation. The review of regulation of the resources sector is timely given an increasing trend in timeframes, duplicative processes implemented by the Independent Planning Commission and on top of this, a recent number of concerning decisions relating to mining projects in NSW which have created considerable uncertainty for the industry.

NSWMC also supports the submission of the national peak body for mining, the Minerals Council of Australia, which addresses the wide range of matters outlined in the Issues Paper.

The NSW mining industry continues to be a significant contributor to the strong economy in NSW and Australia.

Mining is a $25 billion industry in NSW, and coal is NSW's most valuable export worth $19.7 billion (NSW budget papers 2019). Mining underpins the strength of regional economies across the state and has significant flow on benefits to other industries. The NSW mining industry:

- Is the state's largest export industry by value;
- Directly employs around 40,000 people in NSW, according to the ABS[1], and supports the jobs of many thousands more people indirectly;
- Directly spent over $10.7 billion on goods and services, wages and salaries, local government payments and community contributions in NSW during 2017/18[2];
- Supports over 7,135 businesses throughout NSW[3];
- Generated over $2 billion in royalties in 2018-19, with over $8 billion forecast over the forward estimates[4].

Regulation plays an important role in maintaining a strong economy, however over-regulation or restrictive government policies have the potential to create an excessive burden and red tape for businesses, creating an unattractive investment environment.

The resources sector is subject to more regulatory requirements than most other industries in Australia. Regulatory requirements cover all stages of industry activity – from grant of tenure, exploration, extraction, processing, transport and mine closure through to relinquishment of tenure. This stems in part from the nature and location of mining, and its potential social and environmental impacts. Yet it also reflects a vast accumulation of decisions by governments at all levels in Australia, often without regard to clear policy principles or good process.

There is a significant history of initiatives to improve the making and application of regulation of the resources sector at both the NSW and Commonwealth levels. While there will always be opportunities to make improvements, considerable benefits could be realised by a more disciplined application to those initiatives already in place, as well as what barriers exist to implementing reforms identified through previous reviews.

A review of regulatory reforms that had been undertaken between 2011 and 2017 in NSW alone highlighted the extent the NSW mining industry has been subject to continuous and wide-ranging regulatory changes across many portfolios. In this six-year period NSWMC identified at least 109

[1] Australian Bureau of Statistics -Labour Force Statistics
[2] NSW Minerals Council Expenditure Impact Survey 2017-18
[3] NSW Minerals Council Expenditure Impact Survey 2017-18
[4] 2019 NSW Budget Papers

separate regulatory or policy changes that affected the NSW mining industry since March 2011, requiring at least 168 separate industry submissions by the NSWMC, across multiple portfolios.

More recently, a number of determinations of mining projects in NSW have highlighted deficiencies in the NSW planning system and regulatory framework where resources projects, despite years of thorough assessment, peer review, compliance with government policy and recommendation for approval from the Planning Department and multiple government agencies, the independent determination body is ignoring the assessments, peer reviews and recommendations and making determinations which are inconsistent with government policy. Further, a comparison between projects evidences a lack of consistency in the approach being taken.

The regulatory onslaught, combined with uncertain decision making for resource projects, continues to have a direct impact on the reputation of NSW and Australia as a place for investment. According to the Fraser Institute's annual global survey of mining executives, NSW's ranking as a global destination for mining investment based on policy perceptions has fallen from 19th in 2011 to 47th of 83 jurisdictions in 2018, which is behind every other Australian jurisdiction.[5]

This submission provides commentary in response to the questions that have been put forward in the Issues Paper. In addition, and to support the Productivity Commission in undertaking its review, please find attached submissions the NSWMC has previously made to:

- NSW Government Independent Review of the NSW Regulatory Policy Framework – Issues Paper (November 2016) – Appendix A
- Commonwealth Government Productivity Commission review into Major Project Development Assessment Processes (April 2013) – Appendix B

These submissions are directly relevant to the current review being undertaken by the Productivity Commission, and provide:

- Guiding principles for reforms
- Recommendations for matters that should be taken into consideration
- Case studies critiquing regulatory practices in NSW

The 2016 NSWMC submission on the NSW Government Independent Review of the NSW Regulatory Policy Framework contains a number of detailed case studies of regulation making processes that the NSWMC and our members have been involved in in recent years. These case studies highlight a lack of consideration of best practice in making regulatory policy. As illustrated by the case studies there is inconsistent practice both across and within agencies, and the level of best practice is not linked, as may be expected, to the significance and seriousness of impacts of the regulatory proposal. Additional case studies can also be found at Appendix D.

NSWMC and its members accept there should be a rigorous regulatory and assessment process for resources projects. However, the ever-evolving complexity and duplication of the regulatory framework is inconsistent with good practice and if left unresolved, will continue to impact on investor confidence in Australia Australia.

NSWMC and its members look forward to further engagement with the Productivity Commission as it undertakes its review, including the scheduled release of a Discussion Paper for public consultation in March 2020.

[5] www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2018.pdf

2 About the NSW Mineral Council

The NSW Minerals Council (NSWMC) is a not for profit, peak industry association representing the State's $25 billion minerals industry. NSWMC provides a single, united voice on behalf of our 100 member companies: 40 full members (producers and explorers), 25 associate members (junior explorers) and 35 associate members (service providers) and works closely with government, industry groups, stakeholders and the community to foster a dynamic, efficient and sustainable minerals industry in NSW.

NSWMC is a major stakeholder in many of the environmental, social, regulatory and economic issues critical to the sustainable development of NSW.

3 The NSW Mining Industry

Mining is a $25 billion industry in NSW, and coal is NSW's most valuable export worth $19.7 billion (NSW budget papers 2019).

Mining companies directly injected $10.7 billion into NSW through spending on salaries, wages and business purchases supporting 7,135 businesses across the state in 2017-18 (NSW Minerals Council Expenditure Survey 2017-18).

The economic contribution of this direct spending is critical to many towns and communities across large parts of regional NSW.

- Far West - 29% of Gross Regional Product (GRP)
- Hunter - 18% of GRP
- Central West - 11% of GRP
- North West - 8.5 % of GRP
- Illawarra - 8% of GRP

More broadly, the people of NSW receive a dividend no matter where they live, with record mining royalties of $2.1 billion this year or around $8 billion over the forward estimates, just higher than the total of the NSW Budget surpluses forecast over the same period. In order to maintain this economic bedrock for NSW over the long term and to meet the ongoing forecast demand for NSW's high quality coal into the future, new mining projects are needed to replace mines that will come to the end of their operating lives.

Importantly, NSW resource projects need to attract critical investment funding and compete for that investment with other projects in other states and around the world. However, the complex regulatory framework and the planning system is increasingly becoming an obstacle to investment in NSW.

3.1 Investment in mining in NSW is falling

The economic benefits the mining industry delivers are not guaranteed. The mining industry requires a constant flow of investment to sustain existing operations and is competing with many other jurisdictions for a fixed pool of capital that funds exploration and the development of new mines.

Industry regulation is a key factor affecting Australia's competitiveness as an investment destination as it influences investors' perceptions of Australia as a place to do business and can lead to higher operating costs for mining projects.

Over the last 15 years, investment in mining in NSW has fallen which would be attributed to a range of factors, including regulatory burden of doing business.

5 year period	NSW Capital expenditure - Mining
2004-2009	$11.7 bn
2009-2014	$22.4 bn
2014-2019	$8.2 bn

Source: ABS, *Private New Capital Expenditure and Expected Expenditure, Australia, Mar 2019*

There are numerous mining project proposals in various stages of development in NSW, including those currently in the planning system, which have the potential to deliver billions in investment to the state and tens of thousands of jobs over the coming decades.

However, the regulatory environment continues to become more complex, assessment timeframes in the NSW planning system for mining projects have increased significantly and the system itself has become unpredictable and an obstacle to investment. This regulatory environment risks driving away investment and putting these projects and the jobs and economic benefits they will bring in jeopardy.

A stable and certain regulatory environment is critical to ensure projects that are currently in the planning pipeline proceed to development, and new projects are attracted to the State.

4 Outcomes from past productivity reviews

There have been multiple reviews undertaken by both the State and Commonwealth governments over recent years which consider the regulation of the resources sector and the assessment processes for major projects.

These reviews are typically initiated in response to concerns around the regulatory system which are increasingly resulting in lengthy and uncertain assessment processes and outcomes. As documented by the resources sector on multiple occasions, these impacts will continue to affect the productivity of the resources industry, adding additional resource and cost burdens often for little discernible benefit, and directly affecting the ability for Australia to attract investment in resource projects.

The resources industry understands and supports the need for a comprehensive regulatory framework and a transparent and robust environmental assessment process. However, it's imperative the right balance is achieved that accounts for the cost of doing business and investment certainty.

Industry submissions to past State and Commonwealth reviews have consistently provided similar responses to the issues raised, and the recommendations for regulatory reform that could be used to deliver genuine improvements for the resources sector. Despite best intentions however, there are limited examples of reforms which have resulted in comprehensive and lasting improvements for the industry. It seems that any gains achieved are quickly eroded by additional layers and complexity of regulation at both the State and Commonwealth levels.

It's recommended the review includes a stocktake of recommendations or improvements identified in previous reviews at both the State and Commonwealth levels to identify what reforms have taken place, and importantly what are the barriers to achieving beneficial reform for the resources sector.

Given the level of resources and effort expended on these past reviews by government, industry and others, it seems prudent to measure outcomes that have been achieved, and what actions could be taken to improve the chances of achieving meaningful outcomes going forward.

4.1 Previous NSWMC Submissions to Productivity Reviews

To support the Productivity Commission in undertaking its review, please find attached submissions the NSWMC has previously made to:

- NSW Government Independent Review of the NSW Regulatory Policy Framework – Issues Paper (November 2016) – Appendix A.
- Commonwealth Government Productivity Commission review into Major Project Development Assessment Processes (April 2013) – Appendix B

The 2016 NSWMC submission on the NSW Government Independent Review of the NSW Regulatory Policy Framework contains a number of detailed case studies of regulation making processes that the NSWMC and our members have been involved in in recent years. These include case studies on:

- Biodiversity Conservation Bill 2016 (NSW)
- Resources Legislation Package – Reforms to the Mining Act 1992 (NSW) and the Mining Regulations (2010) (NSW)
- Review of the Mine Subsidence Compensation Act 1961 (NSW)
- State Environmental Planning Policy (Mining, Petroleum Production and Extractive Activities) 2007
- Change in policy relating to non-road diesel emissions

The case studies highlight consideration of best practice in making regulatory policy, inconsistent practice both across and within agencies, and how the level of best practice is not linked, as may be expected, to the significance and seriousness of impacts of the regulatory proposal. Additional case studies have also been provided on more recent regulatory reforms and include:

- NSW Government Environmental Impact Assessment Improvement Project
- Safe Work Australia review of Workplace Exposure Standards

The additional case studies can be found at Attachment D.

5 The NSW Planning Assessment System

Recent events relating to the assessment and determination of mining projects in NSW have highlighted the high level of risk resources projects face as a result of the regulatory framework and the planning system. These examples are provided to the Productivity Commission to highlight the serious impacts that duplicated and complex regulation, combined with poor determination governance arrangements can have on investment.

5.1 Rigorous and Complex Process

Like other jurisdictions in Australia, the assessment process for resources projects are comprehensive involving rigorous consideration over many years against multiple pieces of State, Commonwealth and local legislation, regulations, policies and guidelines as projects evolve through inception, exploration, approvals, operation, closure and rehabilitation phases.

Obtaining exploration licences, development approvals and all secondary approvals (such as management plans, additional licences, local government approvals) results in hundreds of separate and often overlapping requirements.

Diagram 1 from the NSW Common Ground website highlights the multiple stages involved in developing a resource project in NSW. This includes years of engagement with multiple government agencies, stakeholder consultation and public notification, compliance and auditing requirements etc. http://commonground.nsw.gov.au/joomla/images/commonground/posters/171113_TitlesProcess_v2.5_web.pdf

Diagram 2 also highlights the complex assessment system for resource projects in NSW, including multiple referrals to State and Commonwealth independent expert panels, multiple public consultation processes, and consideration by multiple government agencies.

In addition to the above comprehensive and rigorous requirements, resources projects are often subject to court proceedings at both the State and Commonwealth levels which adds further risk, delay and uncertainty for projects. The Carmichael mine site example outlined in the Issues Paper (Box 5, page 13) is one of many resources projects that have been subject to multiple legal challenges. Duplicated and complex regulation increases the opportunity for legal challenges against resources projects as a result of the additional duplicated process steps required, and the increased level of uncertainty and inconsistency within the regulation itself.

5.2 Duplicated Assessment

There are number of areas of the NSW assessment process which are subject to duplicated processes either internally, or between State and Commonwealth assessment process. Examples include:

- *NSW Mining and Petroleum gateway Panel* - Established in 2013, the role of the Panel is to assess the agricultural impacts of State significant mining or coal seam gas (CSG) proposals located on Strategic Agricultural Land before a development application is lodged, which includes consultation with the Commonwealth Independent Expert Scientific Committee. Once the applicant has a Gateway certificate, they can then proceed with a development application which will then be subject to a full merit assessment under the Environmental Planning & Assessment Act 1979 (EP&A Act). Issues assessed as part of the Gateway process are then re-assessed under both the NSW EP&A Act assessment process and the EPBC Act assessment process.
- *The EPBC Act water trigger for coal seam gas and large mining projects* - The Productivity Commission has previously noted the water trigger adds an extra layer of regulation where it is not obvious existing laws are deficient or the approach taken by the Commonwealth

Diagram 1: Common Ground

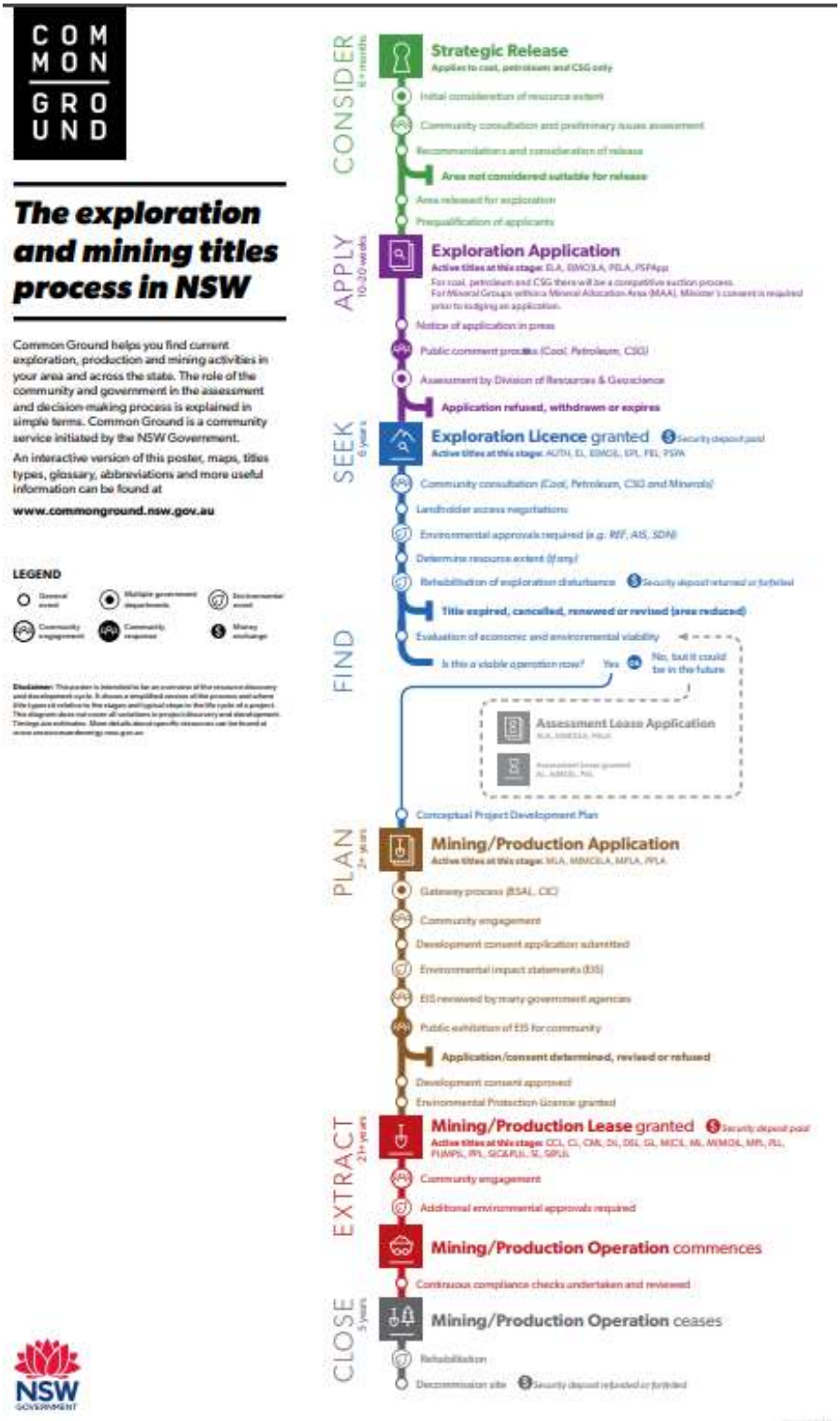
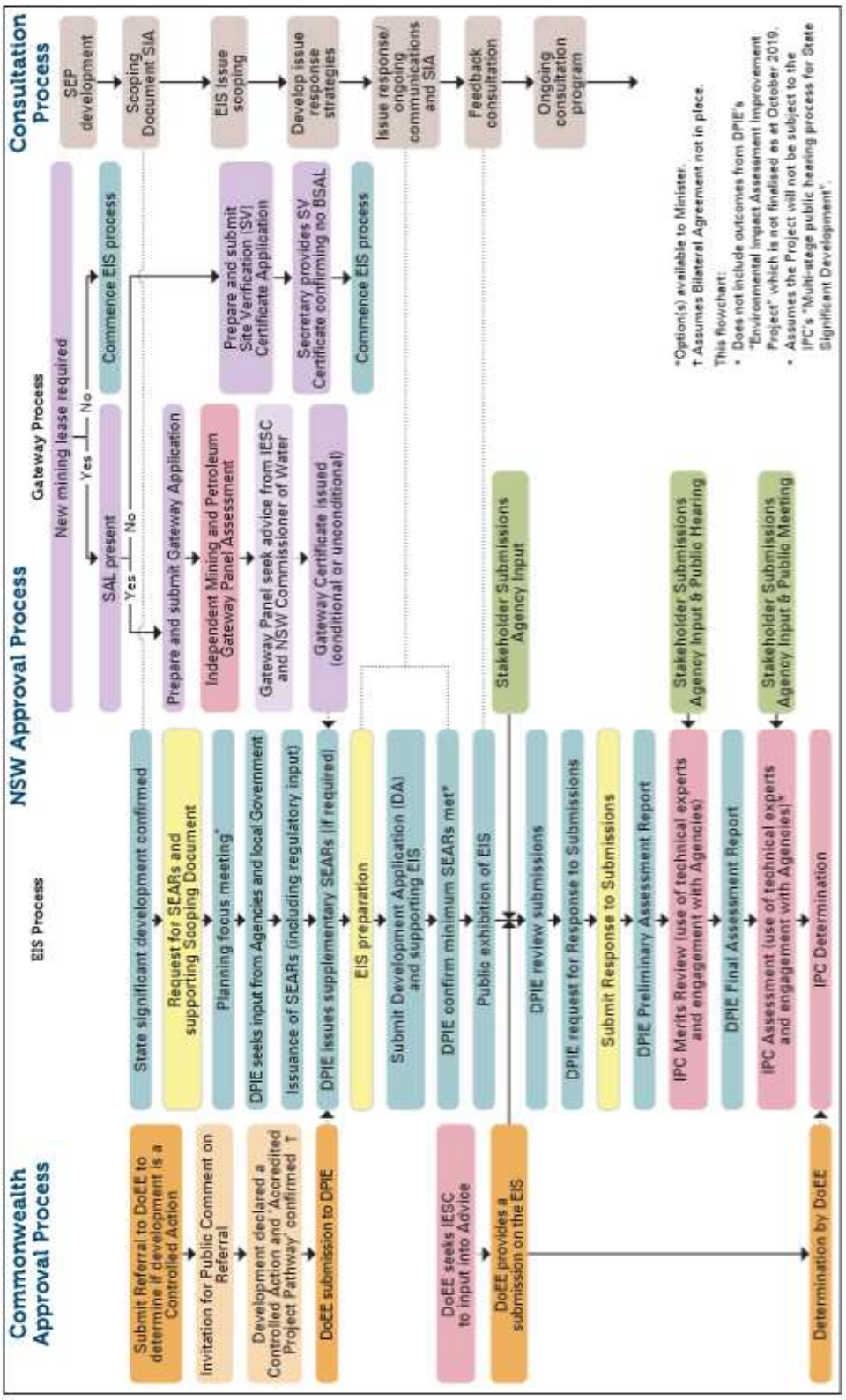


Diagram 2: NSW Approval Process – SSD



- Government is the most fit for purpose to achieve the intended outcomes. In simple terms, the EPBC Act water trigger assessment directly duplicates the water assessment undertaken by the NSW State Government.

5.3 The role of the NSW Independent Planning Commission (IPC)

NSW is the only jurisdiction to have an independent determination authority for State Significant Development projects. A number of recent determinations of mining projects by the IPC has highlighted significant deficiencies with the current assessment and determination process in NSW. There is clear duplication of assessment processes between the Department of Planning and the IPC which also has its own two stage assessment process within the already complicated system. There's often a lack of clarity on assessment standards and policies, with the IPC proposing new issues and standards for assessment that are outside existing NSW Government parameters, either during or towards the final stages of project assessment.

There are examples where the IPC has ignored the recommendations of the Department of Planning and either refused projects, or imposed conditions that were contrary to government policy. The following three projects were recently determined by the Commission and highlight the complex, lengthy and uncertain nature of the assessment outcomes in NSW.

- **Bylong Project** - after 9 years developing the project to a cost of over $700 million, including over 5 years of environmental assessment, the IPC determined to refuse the $1.3 billion project despite the Department of Planning and 14 separate government agencies recommending the project could be approved.
- **United Wambo Project** - after more than 3 years of environmental assessment, the IPC approved the application with a condition that limited trade with other countries based on downstream greenhouse gas emissions which are generated in other countries, despite the government explicitly advising the IPC in writing the approach being taken was inconsistent with existing government policy. By comparison, the Rix's Creek mining project (over 4 years of environmental assessment) was approved 3 months after United Wambo and did not include the same condition which highlights the inconsistent approach being taken by the IPC.
- **Dartbrook Project** – despite being relatively minor, involving recommencing an existing approved mine which has been in care and maintenance for several years, the IPC issued a limited consent contrary to the Department of Planning recommendation which they acknowledged was uneconomic as it did not grant the 5 year extension in operation time required. Furthermore, the uneconomic consent imposed new financial liabilities on the proponent, as well as taking away elements of the existing approved operation, despite the acceptance the project might not be able to proceed.

5.4 Increasing planning assessment timeframes

Analysis undertaken by the NSWMC indicates assessment timeframes for mining projects in the NSW planning system has increased. In the five years to 2014 there were five new greenfield resource projects assessed and four approved. The average assessment timeframe was just over 400 days. From 2016 there have been seven new projects assessed and four approved, with assessment taking over twice as long at almost 1000 days on average. These timeframes do not include the NSW Mining and Petroleum Gateway Panel process, pre-lodgement assessment requirements or Commonwealth related approval processes which all add further time.

Examples of the length of time taken for greenfield mining projects in NSW include:

- Bylong project (refusal) – 1,460 days
- Rocky Hill (refusal) – 1,583 days

- United Wambo (approval subject to trade restriction condition) – 1,120 days

For example, the recently refused Bylong project highlights the complexity associated with assessment of resources projects in NSW and the length assessment time:

- Multiple independent expert panels
    - Mining and Petroleum gateway Panel,
    - Independent Expert Scientific Committee twice
    - Independent Planning Commission twice
- Multiple public consultation and public hearing/meetings – both State and Commonwealth
- Gateway Certificate valid for 5 years which expired during the assessment period and required an amendment to a State Environmental Planning Policy to ensure the determination authority had the legal ability to determine the project
- After years of assessment, the IPC undertake its own assessment of the project including the use of technical experts, re-exhibiting issues for public comment, and continued acceptance of submissions for the public and stakeholders despite formal consultation periods having closed
- Despite a recommendation for approval from the Planning Department and 14 separate agencies, the IPC refused the project.

Similar increases in assessment times have also been experienced on project extensions. In the five years to 2014 there were nine extensions assessed, with an average assessment time frame of around 400 days. From 2016 there have been 11 extensions assessed, with those approvals taking an average of around 600 days.

Examples include:

- Rix's Creek 1,430 days
- Airly mine extension 822 days
- Invincible extension 518 days

With regard to the Rix's Creek extension project which took over four years, due to the length of time taken to finalise the assessment and the significant risk that existing operations would have to cease, the applicant was forced to lodge a minor modification application seeking a nine month extension to its existing approval to ensure there was sufficient time for the larger extension assessment to be finalised. This highlights the lengthy and unpredictable nature of the regulatory assessment process.

There has also been a significant increase in assessment times for modification applications for resources projects in NSW, including minor administrative modifications.

The increasing trend in assessment times are a direct result of increasingly complex and layered regulation, as well as duplication of assessment processes between the Department of Planning and the IPC which in addition to the Department of Planning's comprehensive consultation process, has its own two stage assessment process involving public meetings and consultation within the already complicated system, as well as the engagement of technical experts to re-prosecute issues the Department of Planning has already assessed.

In addition to the general cost and uncertainty associated with increasing assessment timeframes, there are examples where the rules have changed while a project has been under assessment over multiple years. Most recently this occurred when the NSW Government implemented its new Biodiversity Conservation reforms in 2016/17 which resulted in comprehensive changes to assessment methodologies and offsetting requirements. These recently introduced changes are continuing to effect projects which were either under assessment at the time, or were approved prior

to the regulation changes, and were then required to recalculate biodiversity impacts using the new methodology, or seek conversions through the NSW Environment Department.

5.5 Assessment of Downstream Greenhouse Gas Emissions

A recent Land and Environment Court determination refused the Rocky Hill coal mine for a range of reasons, including downstream (scope 3) greenhouse gas emissions and contribution to global climate change. The approach taken in the decision relied on a Court imposed greenhouse gas accounting scheme that effectively double counted downstream emissions, which is inconsistent with the accounting framework for the Paris Agreement and not mandated in any NSW or Commonwealth Government policy.

In response to the Land and Environment Court decision in February 2019, the NSW Independent Planning Commission has used this to guide its assessment of subsequent mining projects, referencing the judgement in a range of projects, despite receiving explicit advice from the Planning Department the approach being taken was inconsistent with State Government policy. Projects include:

- **United Wambo Project** - Imposed a condition of consent on the project limiting international trade to countries that are signatories to the Paris Agreement or have similar policies despite being advised in writing by the Planning Secretary the proposed approach was inconsistent with Government policy
- **Bylong Project** - Included downstream emissions as a reason for refusal and did not consider that the emissions of the Project would be minimised as the coal was proposed to be used in South Korea (which is a signatory country of the Paris Agreement), which is an entirely inconsistent approach to that taken by the IPC for the United Wambo and Rix's Creek projects.
- **Dartbrook Project** – Included downstream emissions as a reason to refuse the additional five-year extension proposed to the existing approved mine
- **Rix's Creek Project** – Approved but did not impose any downstream gas emission condition despite the project being similar to the United Wambo project, which highlights the lack of consistency.

5.6 Post Approval Uncertainty

The process for navigating post approval requirements for mining projects is becoming increasingly uncertain. Mining projects are often approved with multiple post-determination conditions requiring approvals from other agencies before they can proceed. This is becoming increasingly difficult and time consuming, with limited accountability or transparency. Proponents are increasingly frustrated at the lack of a responsible body/authority they can approach to have matters resolved in a structured and timely manner.

Under the NSW assessment process, there has been a noticeable increase in post approval requirements necessitating further approval or consultation with various Agencies, which is in addition to the multiple approvals required under various other legislation (e.g. Water Management Act, Protection of the Environment Operations Act). Examples of NSW resource projects where there are multiple post approval requirements include:

- Untied Wambo (2019) – 23 conditions requiring separate additional approvals
- Wallarah 2 (2018) – 32 conditions requiring separate additional approvals
- Vickery Coal project (2014) – 14 conditions requiring separate additional approvals
- Moolarben (2007) – 20 conditions requiring separate additional approvals

- Anvil Hill Project (2007) – 17 conditions requiring separate additional approvals

There can be significant delays in the granting of a Mining Lease as a post approval requirement. For example:

- Wilpinjong – SSD approval April 2017, Mining Lease granted December 2018
- Wambo - Mod 17 approval December 2017, Mining Lease still awaiting grant

In addition to the increased time and resources required to resolve post determination issues, the increased reliance on post approval requirements is causing significant uncertainty for operations, particularly where 'incremental approvals' are required for projects to continue operating. For example, certain projects in water catchments in NSW, require separate approvals for each individual longwall panel before mining can continue, which includes referral to an independent panel. There are examples where final approvals have only been granted a matter of days or weeks before longwall operations would otherwise need to cease. Any reduction in post-approvals should not mean that further assessment time and detail is required at approval stage.

5.7 Approval process for exploration in NSW

In NSW, once an exploration title authority is issued under the *Mining Act 1992* the titleholder can:

- Conduct "Exempt" exploration activities without the need for any further approvals (as described in Clause 10 of NSW Environmental Planning Policy (Mining, Petroleum Production & Extractive Industries) 2007)
- Only conduct "Assessable Prospecting Operations" following further approval from the Division of Resources and Geoscience (DRG)

An exploration authority (such as an exploration licence) is subject to a statutory condition that the authority holder must not carry out an "assessable prospecting operation" unless an exploration activity approval has been obtained (sections 23A and 44A).

5.7.1 Activity Approvals

Assessable prospecting operation means any exploration activity that is not exempt development within the meaning of clause 10 of the Mining SEPP.

In NSW concerns have been raised by explorers over the timely receipt of activity approvals. The key issues in relation to activity approvals are:

- Overly conservative trigger levels and impact thresholds for complying exploration activities, which require members to go through the non-complying exploration activity approval process. The additional documentation is an often unnecessary burden for both industry and regulators. As a result, approvals are taking longer and service delivery standards are generally not met. Trigger levels and impact thresholds need to reassessed.
- Approvals need to be less prescriptive and to take into account the uncertain nature of exploration. Many members are being forced to reprepare and lodge activity approval documentation for relatively minor changes to exploration programs.
- There are difficulties tracking progress of applications, particularly when the application must be referred to other agencies, such as DPIE Water. The need for referral to other agencies needs to be assessed and the process streamlined to bring the approval process back within DRG.
- Clarification is needed on what does or doesn't need an activity approval.

5.7.2 Access to Land

Before undertaking any land-based exploration activities in NSW, the authority holder must enter into a written access arrangement with the landholder. The requirement to obtain a written agreement from the landholder prior to undertaking the most basic reconnaissance work is a significant concern to explorers and is inconsistent with other jurisdictions.

5.7.2.1 Land access for low impact exploration

In NSW, explorers are required to go through a lengthy and potentially very expensive land access agreement process to gain entry to land after an exploration title is granted, even if the access is required for low impact activities. These low impact activities are stipulated in exploration licences and include geological mapping, collection of specimens and coring using handheld equipment. Early mineral exploration is usually low impact, therefore there should be a provision for low impact exploration activities to be undertaken with a simple agreement. Prior to legislative changes in 2010, these activities were usually undertaken with a verbal agreement with a landholder.

Low impact exploration activities are generally no more intensive than fossicking. Fossickers in NSW are permitted to undertake comparable activities without a written agreement or compensation arrangements with the landholder. To create a consistent process that reflects the similar nature of fossicking and low impact exploration, there should be no requirement for exploration licence holders, who have already shown technical competence and paid for the privilege of holding an exploration licence as well as a substantial security bond to the Government, to do more than agree to a standard template agreement. Enabling access for low impact activities would also give explorers the opportunity to demonstrate good working practices and build trust and a working relationship with the landholder.

In other States, access for low impact activities is permitted by the completion of a form that is provided to the landholder and/or Government – for example, in Queensland there is a 'Notice of Entry' and in Western Australia a 'Permit to Enter' system. Under the Queensland 'Notice of Entry' system, a titleholder need only give a landholder notice of their plan to enter a property for 'preliminary activities' at least 10 business days before the date they propose to enter the land. A negotiated land access agreement is not required at this stage.

5.7.2.2 Land access for ancillary activities

In NSW, the *Mining Act 1992* does not provide a right of access to land for the purpose of conducting activities ancillary to prospecting (e.g. hydrogeological studies, geotechnical studies, cultural heritage investigations) for the purposes of assessing the feasibility of a project. These ancillary activities are increasingly required prior to the commencement of exploration, however access for this purpose is not allowed as part of the Exploration Licence. This may force a titleholder to prematurely purchase land or progress tenure to an Ancillary Licence (if landholder consent is withheld).

5.7.3 Arbitration

NSW needs a streamlined process for finalising land access agreements for advanced activities (drilling etc.) including:

- Shorter end-to-end process (or accelerated progress, easier to move to Land Court);
- Costs need to be capped or more fairly apportioned between landholder and explorer (currently borne by explorer);
- Consideration of the establishment of a specialist Land Access Commissioner (for guidance, arbitration (pre / post agreement), ombudsman role);
- Assessment Lease may be granted by native title expedited procedure within the power of Minister for *Native Title Act 1994* (Cwth).

6 The NSW Regulatory Environment

A review undertaken by the NSWMC of regulatory reforms undertaken in NSW between 2011 and 2017 highlighted the extent the NSW mining industry has been subject to continuous and wide-ranging regulatory changes across many portfolios, most with additional compliance costs creating a problematic environment to operate effectively and efficiently. Many of these changes had been proposed without adequate consultation and have derived little or no public benefit, while imposing significant additional costs.

In the six-year period NSWMC identified at least 109 separate regulatory or policy changes that affected the NSW mining industry since March 2011, requiring at least 168 separate industry submissions, across multiple portfolios (see Appendix C). The regulatory changes that were identified didn't include regulatory initiatives undertaken since 2017 by the NSW Government, or initiatives undertaken by the Commonwealth government.

Most of these changes have been extremely complex and involve reform across many areas of mining operations. For example, our industry has experienced changes to the planning system, an overhaul of the system for issuing mining leases, changes to workplace health and safety legislation, a new resources regulator, wholesale changes to exploration and land access policies, ongoing changes to biodiversity policies, ongoing changes to environmental regulations, and the proposed complete replacement of the NSW government's policy of mine subsidence claims management.

Many changes have been proposed with little or no consultation, in isolation from other departments and agencies, with token or no regulatory impact assessment, and often justified by a flawed cost-benefit analysis.

In most cases the changes add additional costs to the industry. For example, NSWMC provided economic analysis to the NSW Government undertaken by Deloitte that found existing regulation relating to air quality has industry compliance costs of nearly $170 million per year (2017). Deloitte also found that 'load-based' licensing measures that were under consideration by the EPA would add a further $90 million in additional compliance costs on the NSW mining sector each year.

In addition to compliance costs, at least $38 million in additional fees, charges and levies had been directly imposed on the NSW mining sector since 2011, which is over and above the significant royalties and taxes paid by the industry. The introduction of new policy and regulation also brings legal uncertainty to the already complex regulatory approvals processes.

The industry accepts that the sector is expected to be properly regulated and acknowledge that some of the changes have delivered benefits. However, the scale of change has been excessive and new regulatory measures continue to be proposed which will add even further to resources sector costs and administrative burden.

7 Guiding principles for regulatory reform

NSWMC put forward the following guiding principles to underpin the framework for regulatory reform in NSW in 2016, which have relevance for the Commonwealth Productivity Commission Review into Resources Sector Regulation. The 34 separate recommendations within the submission support these guiding principles and can be found at Appendix A:

- **Effective stakeholder engagement and consultation** is vital to help develop good regulation based on sound scientific and technical evidence, and avoid unintended consequences, as well as building support for outcomes;
- **Collaboration between Governments and agencies** is essential to minimise inconsistencies between regulatory policies and to reduce overlapping regulatory requirements which can place an excessive and unnecessary burden on stakeholders;
- Policy makers and legislative drafters should **avoid the use of overly prescriptive regulation** which may have the unintended consequence of impacting activities beyond the initial purpose or need for the regulation;
- Regulatory reform should always follow a consistent regulatory cycle which can be segmented into four stages or phases, being:
    - initial decision-making;
    - implementation;
    - administration and
    - review.

  Effective management of each of these stages has an important bearing on the overall performance of the existing body of regulation;
- Wherever possible **consistent definitions or approaches** should be used across legislation and regulation to avoid confusion and extra work for businesses than would otherwise be the case; and
- **Detailed cost benefit analysis** should be carried out in respect of new regulation. Many new regulations can have significant cost implications for industry, which are often not fully considered and may be unnecessary to achieve the Government's desired outcome.
- Regulatory regimes should be subject to **meaningful periodic reviews** to ensure they remain current in terms of best practice regulation standards and emerging scientific, technology or other developments.

The following principles were put forward by the NSWMC to the Productivity Commission in 2013 when it undertook its review of the major projects assessment system, which similarly have relevance for the Commonwealth Productivity Commission Review into Resources Sector Regulation:

- **Streamlining of state and Australian government approvals**. This is an area of growing duplication. Accreditation of state government approval processes would provide a very significant gain in productivity. This can be done without posing additional risks to the environment or community.
- **Streamlining and introducing statutory time frames for state-based approval processes**. The NSW State Significant Development process contains very few statutory timeframes. This process can take over three years. While the Department of Planning is the lead agency, other state agencies are required to provide input into the assessment, and this frequently leads to delays. Introducing realistic statutory timeframes would drive a more efficient process and allow for assessment of performance.

- **Streamlining independent review, determination and appeals processes**. In NSW it will be possible for a mining project to be assessed by up to three separate independent bodies (the Gateway Panel, an Independent Planning Commission review panel and a Independent Planning Commission determination panel) and still be subject to merit appeal to the Land and Environment Court by third parties.
- **Legal challenges and appeals add delay, cost and risk** to the development assessment process. The transparency provided by independent review should be an important part of the assessment process. However, as the increasing use of independent assessments/ reviews are designed to ensure better, more transparent decisions are made, this should lead to a reduction of appeal rights for third parties.
- **Streamline post determination approvals**. An efficient major development process should include all subsequent approvals. Allowing any approvals to sit outside the exhaustive major development processes, is inefficient and risks the delay/ failure of a project that has been approved.
- **Ensuring that independent panels are fit for purpose and accountable**. In NSW the Independent Planning Commission undertakes determination of resource projects. Traditionally the role of this panel was to review projects, and accordingly it is comprised of experts. This, along with the delegation at the end of the project has led to concerns that the panel is reopening, and duplicating the assessment process, and often making decisions which are inconsistent with existing government policy and the advice and recommendation of the Department of Planning, despite years of rigorous assessment.
- **Providing clear and transparent assessment policies to guide proponents**. In NSW a lack of clear and transparent assessment policy has been a concern for industry, and has led to unprecedented decisions by both the Independent Planning Commission and the Land and Environment Court. Major project proponents should be able to rely on compliance with clear policy on impacts, mitigation measures and other matters, to assess the viability of the project and determine whether to proceed, alter the project or abandon the project as unviable. Given the long assessment process, the costs and capital at risk, the conditions on which a project will be approved should be clear before the project reaches the determination phase of assessment. This level of certainty benefits the community, government and proponents.
- **Providing assessment processes proportionate with the significance of a project**. Mining is unlike other development. It is a temporary land use and a dynamic form of development subject to changes as knowledge and technology improves. As a dynamic form of development, it is important that mining has access to an efficient process for modifying development consents.
- The consequences of inefficient regulation for the resources sector are extremely significant including a loss of productivity for industry and increased sovereign risk of investing in Australia. Indicators, including international surveys of investment intentions indicate that the inefficient development assessment process is affecting Australia's attractiveness as a location for investment.

8 Response to issues paper information request

The following provides NSWMCs response to questions that have been put forward by the Productivity Commission in the Issues Paper. It's understood Commission will use these responses for the purposes of preparing a Draft Report which will be released for further consultation in March 2020.

Question	NSW Minerals Council's response to questions raised in Issues Paper
Scoping the study and defining key concepts	
Is the Commission's proposed scope for this study appropriate? Is it too broad or too narrow? How should the proposed scope be adjusted?	As noted in the Commission's Issues Paper, there are a number of concurrent government reviews underway that relate to the resources sector. Furthermore, there have been a number of similar reviews (both Commonwealth and State based) and studies in recent years on the topic of regulation affecting resources development. Despite these reviews being extensive and involving considerable effort by stakeholders, the review outcomes are rarely implemented in earnest, and have arguably resulted in few meaningful or productive reforms that have improved regulatory efficiency for the resources sector. The scope for the Inquiry should include: • Investigating whether the existing regulatory framework for resource development in Australia has achieved its objectives of promoting and fostering an innovative and efficient resource sector that is attractive for investment • Consider the outcomes of the previous inquiries relating to the resources sector and provide an update/audit of what reforms have been implemented that have resulted in a reduction of red tape and unnecessary regulatory burden for the resources sector • Identify what the barriers to implementing productive reforms are and options to remove them
Are there other relevant reviews that the Commission should be aware of, including ones being conducted overseas?	As noted above, the Commission should review any other relevant Commonwealth or State based reviews into regulatory practices affecting the resources sector that have been undertaken, and audit what reforms have been implemented that have resulted in the reduction of red tape or regulatory efficiency.
Identifying best practice regulatory approaches	
The Commission is seeking feedback on whether the criteria outlined in table 1 are appropriate for assessing whether regulation is best practice.	The assessment criteria for best-practice regulation are considered to be satisfactory. For information, NSWMC in its submission to the NSW Independent Review of the NSW Regulatory Policy Framework in 2016 outlined the following principles: • Effective stakeholder engagement and consultation is vital to help develop good regulation based on sound scientific and technical evidence, and avoid unintended consequences, as well as building support for outcomes; • Collaboration between Government agencies is essential to minimise inconsistencies between regulatory policies and to reduce overlapping regulatory requirements which can place an excessive and unnecessary burden on stakeholders; • Policy makers and legislative drafters should avoid the use of overly prescriptive regulation which may have the unintended consequence of impacting activities beyond the initial purpose or need for the regulation;

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	• Regulatory reform should always follow a consistent regulatory cycle which can be segmented into four stages or phases, being (1) initial decision-making; (2) implementation; (3) administration and (4) review. Effective management of each of these stages has an important bearing on the overall performance of the existing body of regulation; • Wherever possible consistent definitions should be used across all legislation in NSW to avoid confusion and extra work for businesses than would otherwise be the case; and • Regulatory regimes should be subject to periodic reviews to ensure they remain current in terms of best practice regulation standards and emerging scientific, technology or other developments.
To what extent are current regulatory processes consistent with best practice?	
The Commission is seeking feedback on how jurisdictions design regulation that affects the resources sector. Information and examples, including case studies, of effective and best practice approaches and those that are problematic would be appreciated. *In particular, the Commission is interested in whether:* • *approaches to consultation are amenable to best practice community engagement* • *regulatory objectives are clearly defined and articulated, and conflicting objectives are minimised or*	The NSW Government undertook an Independent Review of the NSW Regulatory Policy Framework in 2016. The NSW review has several similarities to the review being undertaken by the Productivity Commission. The NSWMC submission to the Independent Review of the NSW Regulatory Policy Framework (2016), which is attached for your information, includes a number of NSW specific case studies addressing: • Purpose of the regulatory reform • What process was followed to introduce the reforms • What consultation was undertaken with stakeholders and the broader community • What was done well • What could have been done better In addition, NSWMC has prepared additional case studies on the following more recent reforms (Attachment D): • Review of the Workplace Exposure Standards currently being undertaken by Safe Work Australia • Environmental Impact Assessment Improvement Project being undertaken by NSW Government **Approaches to consultation** - Currently consultation efforts are often inadequate and there is in many cases a lack of consultation at critical stages, including when different regulatory reform options are initially considered. Industry and the community should be given sufficient notice of the scheduled staged review of regulation and this information, as well as consultation processes, should be available on a publicly accessible centralised website. More in-depth and focused consultation is needed when developing or reviewing specific regulation. To ensure adequate opportunity is provided to industry to engage in the policy and regulation making process and so Government's decision making can be guided by input from stakeholders, Government agencies should meet with stakeholders prior to a policy position being finalised and being converted into draft legislation. The relevant Government agency should consider the use of working groups, or other similar forums, to engage with industry regularly and thoroughly in respect of government regulatory objectives. Draft reports with preliminary findings or recommendation should be made public and tested so that stakeholders can have input and regulators

Question	NSW Minerals Council's response to questions raised in Issues Paper
managed across different regulations • *regulatory 'creep' occurs* • *regulation is overly complex or prescriptive* • *regulations are subject to rigorous assessment and effective review processes.*	can receive the benefit of technical and industry knowledge and experience. Significant regulatory reforms should be placed on public exhibition for a minimum period of one month so that industry has sufficient time to provide considered responses. **Regulatory objectives are not clearly defined** – Often the intent or purpose of new or changes to existing regulation are poorly defined. There are recent examples in the resources sector at both the NSW Government and Commonwealth levels where additional regulation has been imposed for arguably political reasons in response to perceived concerns, without necessarily resulting in improved environmental outcomes. Examples include the EPBC Act water trigger and the NSW Government Gateway Panel (both discussed further below). In both circumstances the additional processes and assessment requirements duplicate existing assessment requirements across different regulations. In both instances, there was very limited consideration given to conflict or duplication with other regulation, the effect of targeting resource projects despite other activities having similar effects, the additional cost and time impact, and the actual benefits likely to be achieved. A more recent example is the Safe Work Australia review of workplace exposure standards which is looking at the limits to which workers can be exposed to hazardous chemicals. The process will review over 700 workplace exposure standards. Due to the volume of reviews being undertaken the workplace exposure standards will be released in batches of around 50 or so for consultation. This raises questions about the ability for various industries to effectively review the proposed standards, practicality of implementation, the actual need for the revised standards based on risk, as well as a robust cost benefit analysis for industries in total. **Regulatory creep** – The resources industry is arguably the most heavily regulated sector in Australia. Ongoing regulatory creep is a chief concern in the regulation of the resources sector and receives little attention in reviewing the efficacy of existing or proposed regulation. Additional regulation has been increasingly imposed in isolation to resolve public concerns, without due consideration of the outcomes likely to be achieved, or what other more fit-for-purpose options are available. Examples of regulatory creep include: • The EPBC Act water trigger for coal seam gas and large mining projects. The Productivity Commission has previously noted the water trigger adds an extra layer of regulation where it is not obvious existing laws are deficient or the approach taken by the Commonwealth Government is the most fit for purpose to achieve the intended outcomes. In simple terms, the EPBC Act water trigger assessment directly duplicates the water assessment undertaken by the NSW State Government. • The introduction of the NSW Mining and Petroleum Gateway Panel which was established in 2013. The role of the Panel is to assess the agricultural impacts of State significant mining or coal seam gas (CSG) proposals located on Strategic Agricultural Land before a development application is lodged, which includes consultation with the Commonwealth Independent Expert Scientific Committee. Once the applicant has a Gateway certificate, they can then proceed with a development application which will then be subject to a full merit assessment under the *Environmental Planning & Assessment Act 1979* (EP&A Act). All issues assessed as part of the Gateway process are then re-assessed under both the NSW EP&A Act assessment process and the EPBC Act assessment process.

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	• Environmental Impact Assessment Requirements have increased significantly over recent time as all layers of government take an increasingly risk-averse approach, generally resulting in increased assessment requirements often for little gain in environmental outcomes. A recent example in NSW includes the NSW Governments response to an NSW Land and Environment Court judgement (Rocky Hill) in early 2019 which cited climate change, and specifically scope 3 emissions, as one of the reasons for refusal. The NSW Independent Planning Commission has subsequently used the emission arguments in the judgement either as grounds for refusal of projects (amongst others), or to impose conditions on a project which limits international trade under certain conditions. There is a clear need for Governments to set practical policy and regulation related to the resources sector. Predictable, strong, stable, efficient and streamlined regulatory regimes are an important part of maintaining continued investment. In Australia, the resources sector continues to be exposed to increased regulatory intervention on a range of issues, as well as greater public scrutiny. In recent years the resources sector has seen a dramatic increase in ad hoc, reactive regulatory measures at both the State and Commonwealth levels which don't necessarily represent good public policy development. The net result has been a reduction in the effectiveness and efficiency of the regulatory regime for resource projects, which ultimately leads to the weakening of business certainty and investor confidence. A review of regulatory reforms that had been undertaken in NSW between 2011 and 2017 highlighted the extent the NSW mining industry has been subject continuous and wide-ranging regulatory changes across many portfolios, most with additional compliance costs creating a problematic environment to operate effectively and efficiently. Many of these changes were proposed without adequate consultation and had derived little or no public benefit, while imposing significant additional costs. In the 6 year period, the NSWMC identified at least 109 separate regulatory or policy changes that affected the NSW mining industry since March 2011, requiring at least 168 separate industry submissions, across multiple portfolios. The regulatory changes identified above do not include regulatory initiatives that have been undertaken since 2017 by the NSW Government, or those initiatives undertaken by the Commonwealth Government. **Regulatory duplication** – Duplication of regulation, compliance and enforcement of the resources sector is common in both NSW, as well as between NSW and the Commonwealth. Within NSW, there are numerous examples of duplication including: • Regulatory responsibility for resource projects – The Department of Planning, the independent Environment Protection Authority and the NSW Resources Regulator all have a primary role in regulating the resources sector. In addition, there are a range of other agencies responsible for related activities such as the Department of Industry, WaterNSW and the local councils. Often the interests and objectives of the various organisations overlap including on areas such as rehabilitation, compliance and enforcement of conditions of consent, noise and air quality monitoring, water licence requirements etc. • Assessment of resource projects – Duplication of assessment processes by various bodies is a significant challenge facing the NSW planning system and left unresolved will continue to impact on the ability for the State to attract investment into the sector. For example, over a five-year period, the Bylong project was subject to:

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	○ Reviews by three separate NSW based Independent Expert Panels (Mining & Petroleum Gateway Panel, Planning Assessment Commission Panel, Independent Planning Commission Panel) as well as the Commonwealth Independent Expert Scientific Committee on two separate occasions; ○ Five separate public consultation periods between the NSW and Commonwealth, two of which involved public hearings and meetings; ○ Re-assessment of a range of key issues by the Independent Planning Commission despite several years of assessment by the Department of Planning and relevant government agencies. This included the IPC undertaking an independent groundwater review, and an independent heritage review. At the NSW and Commonwealth level, the best example of duplication of function for no clear additional benefit is the 'water trigger', whereby a project is now referred to the Commonwealth Department of Environment and Energy, who subsequently refer to the Independent Expert Scientific Committee for its recommendation. **Regulation is overly complex or prescriptive** - Regulation and policies for resource project assessment are often overly prescriptive and may unnecessarily limit the ability to identify flexible options for both the regulator and a proponent to identify fit-for-purpose responses. Multiple guidelines and policies also exist to support these assessments which, while useful are often used prescriptively, rather than guidance as intended. The issue is magnified when projects are subject to both the State and Commonwealth regulatory requirements, approval regimes and compliance requirements. The prescriptive approach typically results in a focus on process rather than the outcomes sought by the regulation or policy. This approach to prescriptive regulation for resource projects manifests itself through project approval conditions, which have themselves become increasingly numerous and prescriptive, and are often seen as a yardstick to demonstrate how effective government regulation is. In addition to the cost and time burden for proponents to resolve the various and disparate post approval requirements, the multiple and prescriptive conditions result in significant and resource intensive compliance effort by both the proponent and the regulator, often for little environmental gain. Under the NSW assessment process, there has been a noticeable increase in post approval requirements necessitating further approval or consultation with various Agencies, which is in addition to the multiple approvals required under various other legislation (e.g. Water Management Act, Environment Protection Act). Examples of NSW resource projects include: • Untied Wambo (2019) – 23 conditions requiring separate additional approvals • Wallarah 2 – 32 conditions requiring separate additional approvals • Vickery Coal project (2014) – 14 conditions requiring separate additional approvals • Moolarben (2007) – 20 conditions requiring separate additional approvals • Anvil Hill Project (2007) – 17 conditions requiring separate additional approvals

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	Review of regulation – The ongoing review of the effectiveness of specific regulation is critical to ensure that regulation remains appropriate and relevant for current markets and technologies and fit-for-purpose in the context of current community and business expectations. However, the review of both State and Commonwealth legislation is often left to the last minute before the required statutory date and as a result a thorough review of regulation is often not carried out. Furthermore, given the limited time that is allocated to this exercise, insufficient and often tokenistic stakeholder and community consultation is undertaken, leading to a 'tick the box approach' and an outcome in many cases that the regulation is simply re-made without meaningful consideration of the alternatives, or impact of the regulation. Additionally, whilst a regulation may have been appropriate at the time it was made, the accumulation of regulations over time can lead to a situation where existing regulation is no longer effective and results in often unintended costs and burdens on industry or the community. For a review process to be effective, the agency responsible for the regulation needs to be adequately resourced to ensure that reviews are thorough and extensive, and that full and proper consultation with industry, stakeholders and the community is carried out in respect of the review. Furthermore, where possible, sequencing of reviews and reforms should be considered so that related regulations are considered in a complementary and efficient way. Stakeholders need sufficient warning of sunsetting regulation and reviews to coordinate their efforts and participate effectively in consultation processes. The following principles (outlined in the NSW Regulatory Reforms Report) for review of regulation should include: • Establishing a clear and transparent process to manage the flow of sunsetting legislation well in advance • Make the timetable for sunsetting legislation publicly available at least 18 months prior to sunset • Enable the packaging of regulations that are overlapping or addressing similar issues even if it means bringing forward the review of some legislation due to sunset later (and vice versa). • Implement effective filtering or 'triage' processes which identify which regulations (or bundles) are likely to impose high costs or have unintended consequences that warrant a more in-depth review • Engage with business and the community in the 'triage' assessment, and more widely in checking the proposed treatment of the regulations for sunset • For regulation with 'high' impacts, provide for a review that will: ○ demonstrate the case for remaking the regulation ○ examine whether alternatives could achieve the objectives at lower cost ○ become the basis for a RIS for re-made or amended regulation. NSWMC supports the above principles and would encourage all levels of Government to implement them as part of the periodic review of regulation. In addition, regulators should be well placed to detect costs and problems in regulations they administer, and where they are not the authors of the regulation, to advise policy departments about these issues. These costs and problems may include the way regulations are applied and enforced. To ensure that the regulators remain aware of

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	the costs and problems in the administration of regulations, there needs to be systematic consultation and requests for feedback from industry. In this regard, regular surveys, blogs or working groups would all be useful tools for regulators to enhance consultation processes. The outcomes of this consultation should then drive further development and review of regulation where significant costs and impacts are identified. Where reviews of specific regulation have been undertaken and recommendations made, there should be some accountable reporting process on what changes were made and why, to ensure the process is meaningful and not simply an administrative exercise.
What are the consequences of identified instances of poor regulatory design for regulatory outcomes, investment in the sector and broader community outcomes?	As noted in the Issues Paper, increasing complexity, along with regulatory creep create uncertainty which ultimately affects the ability to attract investment. This is particularly the case for the resources sector, which is a global industry, with companies having options to choose where they invest in projects. Resource companies compete for a limited pool of global capital to develop new projects in Australia. Inefficient regulation that unnecessarily increases costs can severely impact a project's commercial viability, forcing investment dollars elsewhere. The recent refusal of the Bylong mine project highlights the potential consequences. KEPCO, a Korean Government majority owned company spent 9 years and over $700 million investing in the Bylong project. After 5 years of impact assessment for the proposed $1.3 billion project, the NSW Independent Planning Commission (the determination authority) refused the project despite the Department of Planning and 14 separate government agencies supporting the project and a recommendation for approval. It's vital that both State and Commonwealth levels of Government deliver and maintain a transparent, accountable, stable and predictable political and fiscal environment for investment, including streamlined and effective regulatory processes for resource projects. Australia's future economic prosperity will continue to depend on the ability to attract ongoing investment across a range of industry sectors.
How could identified shortcomings be remedied?	Refer to the principles for regulatory reform outlined in the NSW submission to the Productivity Review undertaken in 2016/17 by the NSW Government which provide a number of suggestions to improve regulatory reform. In addition, consideration should be given to reviewing initiatives proposed in past reviews and what barriers there were to implement beneficial outcomes.
Efficiency, transparency and accountability of decision making	
The Commission is seeking feedback on approaches to regulator	At a time when mining investment is needed to deliver projects and jobs for regional NSW, the NSW planning assessment system is taking longer, becoming more complex and uncertain, and proposing new conditions that will drive away investment and damage the economy. Despite recent attempts by the NSW Government to improve timeframes and assessment

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governance in jurisdictions in Australia and overseas. Information and examples, including case studies, of both effective and best practice approaches as well as those that are problematic would be appreciated.	certainty, the process remains complex and uncertain and timeframes are blowing out. If the issues are not addressed in the short term, NSW's attractiveness for resource investment will be damaged. In the last 6 months, a number of decisions for large resource projects in NSW has exposed the significant risk of the current assessment and determination process for resource projects. Recent decisions include: • **Bylong Project** – Refused by the Independent Planning Commission after 5 years of assessment and despite a recommendation for approval from the Department of Planning and 14 separate NSW Government Agencies • **United Wambo Project** – The Independent Planning Commission imposed a greenhouse gas emission condition of approval limiting international trade to countries who are signatories to the Paris Agreement or where they have similar policies, despite the NSW Government clarifying the condition was inconsistent with government policy • **Dartbrook Project** – Partial consent to recommence mining activities in an existing approved mine granted by the Independent Planning Commission, which they acknowledged would be uneconomic, despite the fact the Department of Planning and all relevant agencies recommended full consent be granted. The NSWMC has raised these serious issues with the NSW Government and is seeking: • Reform of the IPC's role and processes to ensure the stated public policies of the elected government are the primary factor in project assessment rather than the views of an unelected independent planning panel and to ensure the IPC does not duplicate the comprehensive assessment role undertaken by the Planning Secretary on behalf of the Commission. • Legislative and policy certainty on the assessment of greenhouse gas emissions to ensure the NSW assessment process is consistent with the NDC of the Australian Government and the Paris Agreement greenhouse gas accounting framework to avoid double-counting of scope 3 emissions. • Improve assessment timeframes by removing duplicated and redundant assessment process steps, such as multiple IPC hearings and ensuring the IPC does not duplicate the comprehensive assessment role undertaken by the Planning Secretary on behalf of the Commission. • Improve post determination certainty once a project has been granted approval by delivering a coordination role to ensure all post determination requirements are resolved in a timely manner and consistent with the terms of the original approval. The need for urgent reform to the NSW planning system for dealing with resource projects comes after years of policy churn, increasing regulatory and process requirements such as the Strategic Regional Land Use Policy, the Aquifer Interference Policy, EPBC Act Water Trigger and the NSW Gateway Panel, changes to the major project assessment process including repeal of Part 3A in 2011, and the role of the Independent Planning Commission determining major projects. The inconsistency and uncertainty of the assessment process which has been most recently highlighted by recent determination of resource projects is damaging NSW's and Australia's ability to attract investment.

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For example, the Commission is interested in whether: *the roles, responsibilities and requirements of different regulatory agencies are clear and duplication is avoided, including through* - *models for coordination, or aspects thereof, and strategic assessments (in particular, their feasibility and how they can best be used to improve efficiency)* *decision makers are accountable, including through* - *review processes that avoid unnecessarily long delays in approval processes* *regulators are independent, for example:* - *decision making models (in*	**Duplicated roles and responsibilities** – The issue of duplication between State and Commonwealth assessment processes has been identified as one of the key areas where regulatory efficiencies could be achieved. However, and despite best intentions, there remains little progress in this area that has resulted in meaningful improvements for the resources sector. The clearest examples continue to be: • The EPBC Act water trigger – this is a direct duplication of the state-based assessment and approvals for water. Both the state and Commonwealth rely on the same expert advice • EPBC Act species and habitat assessment. Commonwealth and state environmental approvals often cover similar or related matters NSWMC supports the existing Bilateral Assessment Agreement for biodiversity related matters between the State and the Commonwealth. Whilst this is a positive start, there remains duplication between the Commonwealth and state biodiversity assessment process, and the water trigger assessment remains duplicated almost in its entirety. In NSW there is also the issue of the Independent Planning Commission which is responsible for determining the majority of resource projects. Whilst the role of the Commission is to determine projects after the Department of Planning has finalised its assessment, they have increasingly reassessed projects, despite the comprehensive and rigorous assessment undertaken by the Department over multiple years. Recent decisions by the Commission members have highlighted significant concerns with its role including: • Significant addition to assessment times as the Commission undertake its own assessment, often engaging its own technical consultants, and seeking additional information from the proponent after years of assessment and consideration by the Department of Planning (e.g. Bylong refusal after 5 years of assessment and a recommendation for approval) • Ignoring years of thorough assessment, and the recommendation by multiple government agencies and the Department of Planning, and either refusing projects, or imposing conditions which are inconsistent with government policy (e.g. United Wambo condition imposing trade restrictions based on downstream emissions despite Government clarifying the approach was inconsistent with existing policy) • Unelected officials making determinations which are contrary to the recommendations of government agencies and government policy (e.g. Dartbrook limited approval effectively making the project uneconomic despite a recommendation for approval). As outlined in previous reviews on the assessment system, options to address duplicated process between the Commonwealth and state government include: • Bilateral Assessment & Approval Agreements - including the water trigger related assessment • Strategic assessments – e.g Strategic assessment agreement for the western Sydney growth centres. Note in NSW significant time and resources were spent developing an Upper Hunter Strategic Assessment which would have resulted in significant time and cost savings for resource projects as well as certainty of outcomes. However, despite best intentions and the significant resources spent, the process stalled due to legal disagreement relating to the water trigger

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particular, whether (and why) resources approvals are best determined by an independent body or at Ministerial level) *regulators are adequately resourced and have necessary capabilities (in particular, the extent to which any under resourcing of regulatory agencies is contributing to approval delays).* *The Commission is also interested in the different approaches agencies have taken to recover costs. Should 'user pays' be applied more broadly?*	**Accountability of decision makers** – In NSW, the Independent Planning Commission is responsible for determining the majority of resource projects. Whilst the role of the Commission is to determine projects following the Department of Planning assessment, the Commission has increasingly reassessed projects. As noted elsewhere, recent decisions by the Commission have highlighted significant concerns over its accountability, particularly where they have ignored the Department of Planning recommendation or government advice regarding policy settings. More generally, there is little incentive to finalise assessments within a timely and efficient manner, and within specified timeframes. The lack of accountability amongst regulatory officials in terms of engagement with project proponents and a poor record for timely, clear, informed and constructive advice, exacerbates project proponent costs and certainty. The performance of regulators is often not monitored and measured and as such it is difficult to benchmark performance against timeframes, engagement effectiveness and the consistency in which the regulation has been applied. The complex and layered regulatory environment for the resources sector, and the assessment and decision-making process also creates an environment that is conducive to legal challenges. Similar to the experiences outlined in Box 5 – Legal Challenges to the Carmichael mine site (page 13 of the Productivity Commission Issues Paper), proponents of significant mining projects in NSW factor in the likelihood of legal challenges to their projects after experiencing years of the rigorous assessment process. Legal challenges will often be bought about as part of an orchestrated campaign designed to frustrate the proponent and the industry more generally, and result in additional costs and delays. The prescriptive nature of conditions, and duplicated regulatory requirements also impacts on mining operations which are subject to strict compliance requirements. Whilst the mining industry understands the need for monitoring and compliance, there needs to be a sensible risk-based approach. **Decision making model** – As outlined, in NSW, the majority of resource projects are determined by the Independent Planning Commission, following a lengthy and comprehensive assessment by the Department of Planning and multiple government agencies. A number of recent decisions by the Independent Planning Commission which effectively ignored the recommendation for approval by the Department and refused projects or imposed conditions contrary to government advice and policy have once again highlighted uncertainty risks associated with independent determination bodies. At the time of preparing the Issues Paper, the role of the NSW Independent Planning Commission is being reviewed by the NSW Productivity Commissioner. The terms of reference for the review can be found at: http://productivity.nsw.gov.au/ipc-review Considering the investment uncertainty and risk to jobs and investment in NSW, the NSWMC is seeking reforms to the role and processes of the NSW Independent Planning Commission to: • Consistent with other States, return the determining responsibility to the elected Government through the Minister, based on recommendations from a reformed IPC and the advice of the Department of Planning. • Ensure the stated public policies of the elected government are the primary factor in project assessment rather than the views of an unelected planning panel.

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	• Ensure the IPC does not duplicate the comprehensive assessment role undertaken by the Planning Secretary on behalf of the Commission. • Ensure the assessment, the recommendation and any draft conditions where approval is recommended, and any recommendation made by the Planning Secretary on behalf of the Commission is given proportionally greater weight than any other assessments that are undertaken by the Commission. At present, the Independent Planning Commission is involved at multiple stages of the assessment process, including the final stages where further consultation and public meetings are held despite the often years of assessment that has occurred already. Experience has shown a proponent is often required to re-address questions or issues that the proponent has already addressed at earlier stages of the approval process. This duplication is obviously very inefficient and arises from the the Independent Planning Commission operating independently and duplicating the assessment process undertaken by the Department of Planning. **Regulators are adequately resourced** – The lack of adequate and suitable resources (both staff and financial) within government agencies to process applications remains an ongoing issue. Despite the best efforts of Departments, the level of experience and resourcing in the major project assessment teams is often not commensurate with the complexity and extent of the issues that arise in connection with major resource projects. Feedback from proponents indicate they are often confronted with Government agency staff who have little major project management/facilitation experience, may not have worked outside of Government, may not be suitably qualified or experienced to deal with coordinating major project approvals, and often prefer to operate as a "letterbox" facilitating other Government agencies concerns as opposed to taking responsibility and accountability for managing and resolving issues. The resourcing of Government departments and agencies is an important issue for the Productivity Commission to consider. **Recovery of costs –** The NSW regulatory framework for the resources sector relies heavily on the 'user pays' principle through both the mining licences, mining operations and assessment processes. There are a range of fees and levies proponents in NSW are exposed to including (but not limited to): Administration levies, annual rental fees, land access arbitration costs, mine safety levy, mine compensation fund levy, EPA risk based licensing fee, load based licensing, funding Upper Hunter & Gunnedah air quality monitoring network, significant application assessment fees, planning reform fee, IPC assessment and public hearing fees, mining lease application fees, biobanking application and agreement fees among others. The resources industry pays significant fees, taxes and levies. However there is concern the contributions are not being directed to programs or efforts to improve or streamline the regulatory framework.
What have been the consequences of identified instances of poor regulatory governance,	In NSW, and as outlined elsewhere, the most extreme example of the consequences of poor regulatory practice and governance has been the refusal of the Bylong project by the NSW Independent Planning Commission. After Kepco spent 9 years of investing over $700 million to develop its project, including 5 years of environmental assessment resulting in a recommendation of approval from the Department of Planning and 14 separate government agencies, the Commissioners

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including unnecessary duplication, for regulatory efficacy and efficiency and for investment in the sector?	based on their own assessment determined to refuse the project. As outlined above, in the last 6 months in NSW there have been other examples where the Independent Planning Commission has chosen to ignore the Department assessment or government advice on policy, ultimately creating significant uncertainty in the assessment processes including: • United Wambo Project • Dartbrook Project • Rix's Creek Extension Project Another example in NSW includes post approval requirements for longwall mining in water catchments, whereby despite the lengthy and rigorous assessment process, additional individual longwall panel approvals are required before mining can take place. The industry is acutely aware of the sensitivity and value of the drinking water catchments, and the need for rigorous assessment. However, the current 'incremental approval' approach for individual longwall underground panels creates unacceptable risks to the continuity of mining. The Independent Expert Panel for Mining in the Catchment (Panel) endorses NSW Department of Planning's approach of approving longwall panels at particular mines on an incremental basis in the light of existing and emerging information and knowledge gaps that have the potential to jeopardise compliance with performance measures. While the general approach of reviewing new information and granting secondary approvals in stages over the life of a mine is reasonable in appropriate circumstances, the approach to incremental approvals creates significant risks for the continuity of mining operations. The industry acknowledges that the primary and secondary approval process must be rigorous. However, it is also critical that a pragmatic, timely and transparent assessment and approval process is adopted to ensure that the industry has adequate lead time to justify significant investments on mining capital and for employment certainty for workforces across the region. There are examples where final approvals have only been granted a matter of days or weeks before longwall operations would otherwise need to cease. There are critical time factors involved in making mine planning and operational decisions that must be considered and receiving approvals at such a late stage creates significant uncertainty for mining operations. Changes to the approach for incremental approvals are required so that companies and regulators are not in a continual cycle of short-term approvals that are only granted immediately before they are required. The Panel is a relatively new creation and adds to a range of other agencies and experts that have a role in the assessment process such as the Commonwealth Independent Expert Scientific Committee, independent experts commissioned by the Department of Planning, the Independent Planning Commission. The industry acknowledges the importance of robust independent peer review in the assessment process for mining projects in the catchment. However, it is important that this is undertaken in a transparent and efficient manner that avoids duplication. To date, how the Panel undertakes its assessment function has been poorly defined, as has the scope of the Panel's reviews and how this integrates with other reviews that are undertaken in the assessment process. These additional processes cause significant additional cost and resources for the proponents, as well as uncertainty.

Question	NSW Minerals Council's response to questions raised in Issues Paper
	Assessment processes for resource projects impose significant (sometimes redundant or duplicated) compliance costs on proponents, which have undoubtedly increased in recent times. Significant compliance costs result from multiple State Government agencies having compliance responsibilities and enforcement powers with respect to resources projects. Overlapping areas of responsibility between agencies and across jurisdictions often generates conflicting compliance requirements and differing compliance obligations being owed to a variety of State Government agencies. Processes which facilitate such an unaccountable and uncertain approach to decision making will damage both NSW and Australia's reputation as a place to do business.
How could identified shortcomings be remedied?	Refer to the principles for major project assessment reform outlined in the NSWMC submission to the Productivity Commission Review undertaken in 2013 by the Commonwealth Government which provides a number of suggestions to improve regulatory reform. In addition, the submission prepared by XSTRATA on the same review titled - XSTRATA COAL, Submission to Productivity Commission - Major project development assessment processes April 2013 provides a comprehensive range of recommendations for improvements and should be referred to: www.pc.gov.au/inquiries/completed/major-projects/submissions/submissions-test/submission-counter/sub050-major-projects.pdf Consideration should also be given to reviewing initiatives proposed in past reviews and what barriers there were to implement beneficial outcomes.
Issues with regulator conduct	
The Commission is seeking feedback on regulator conduct in jurisdictions in Australia and overseas. Information and examples, including case studies, of both effective and best practice approaches, as well as those that are problematic, would be appreciated. *For example, the Commission is interested in whether:*	Assessment processes for resource projects impose significant (sometimes redundant or duplicated) compliance costs on proponents, which have undoubtedly increased in recent times. Significant compliance costs result from multiple State Government agencies having compliance responsibilities and enforcement powers with respect to resources projects. Overlapping areas of responsibility between agencies and across jurisdictions often generates conflicting compliance requirements and differing compliance obligations being owed to a variety of State Government agencies. For example, in NSW the Department of Planning, the independent Environment Protection Authority and the Resources Regulator all have compliance roles under separate legislative requirements, but with often competing interests. Duplication of legislation covering common areas often results in a single incident triggering multiple breaches of legislation with multiple enforcement actions by different agencies and the imposition of multiple criminal penalties by agencies or the Courts. Furthermore, most project approvals contain a significant number of conditions attached to project approvals and management plans. Many of these conditions require documents or plans to be prepared and subsequently approved by, or to the satisfaction of, the consent authority or State agencies prior to work commencing. Satisfaction of these conditions often takes months, and in many cases significantly delays the commencement of the development for which approval has been granted (often after a lengthy application and assessment process taking several years). These further delays add to the uncertainty and create an additional element of commercial risk that is difficult to predict when making investment decisions.

Question	NSW Minerals Council's response to questions raised in Issues Paper
regulators' processes are clear, predictable, open and transparent *regulatory outcomes are consistent with their intended objectives, including whether compliance and enforcement mechanisms have been effective, for example* *- with respect to: compliance effort; the use of information to test compliance with approval conditions; rehabilitation processes; and the design and monitoring of offsets* *unnecessary costs and delays have been minimised and how this has been achieved (for example, through statutory timelines)*	**Clarity of regulator processes** – The layered and duplicated nature of regulation around resource projects creates a level of uncertainty and confusion for all stakeholders including proponents, agencies and the community. Within this environment, the multiple individual agencies tasked with compliance and enforcement of the respective overlapping legislation often operate in isolation from other compliance and enforcement activities. *Example*: Determination of a controlled action for koala in an area dominated by Leptospermum shrub that indicated the Commonwealth assessment officer followed a very specific interpretation of habitat examples in the Conservation Advice that had no relevance whatsoever to the project area and ignored the project's avoidance measures in higher quality habitat. This outcome was not predictable and caused delays, additional consultation and assessment. *Example*: Blanket inclusion of MNES previously recorded in the broader locality for a controlled action decision, ignoring actual habitat in the impact area, indicating that the assessment prepared by ecological professionals was effectively ignored in the EPBC Act Referral documentation. The determination of a significant impact on these MNES by the Department was unclear and not transparent. *Example*: Onerous requirements for demonstrating offset adequacy for a simple modification to an offset strategy following approval. A simple offset land swap was proposed with the Commonwealth assessment officer requesting onerous re-assessment that was inconsistent with the original approved assessment. The officer indicated that an "evolution of the interpretation of the offsets policy" was the driver for the additional information required. This was not clear, predictable, open or transparent. **Consistency of Regulator Outcomes** – Where there are complicated and duplicated regulations and processes (e.g. offsets, water assessment) there is a higher likelihood of inconsistencies both amongst agencies, and between the State and Commonwealth jurisdictions. *Example*: Interpretation of the Central Hunter CEEC mapping requirements in the Conservation Advice has been written and interpreted in a manner that results in perverse outcomes (including areas of dense bulloak forest) resulting in the potential conservation of poor-quality ecosystems at the expense of other higher quality areas. This also resulted in tensions between Commonwealth and State authorities in the correct interpretation of the mapping requirements. *Example*: No acceptance of ecological mine rehabilitation as an offsetting option. An opportunity exists to drive better rehabilitation outcomes in the long-term for highly mined regions (e.g. Central Hunter) by requiring proponents to have lower offset burdens where it can be demonstrated that mine rehabilitation conforms to threatened ecological communities.

Question	NSW Minerals Council's response to questions raised in Issues Paper
	Currently, this proposal is not accepted by the Department. This lacks strategic planning and misses an opportunity for real long-term conservation outcomes which is the overall intent of the EPBC Act Offsets Policy. **Unnecessary costs and delays** - Where accreditation of state assessment methods is not in place (current situation with the NSW BAM), assessment outcomes and offset strategies can be duplicated and drive unnecessarily high offset and assessment requirements. Furthermore, the interpretation and requirements of the EPBC Act Offsets Policy is often inconsistent between projects and Commonwealth assessment officers, resulting in back-and-forth negotiations and significant delays to project assessment timeframes and approvals. *Example*: Interpretation of swift parrot habitat in the Hunter and application of EPBC Act Offsets Policy. Swift parrot was recorded near the site, foraging in Eucalyptus crebra and the offsets proposed included substantial areas of E. crebra. The Department determined that this was not a like-for-like offset due to the offset areas containing less-mature vegetation and that E. crebra was not listed in the recovery plan as a key foraging species. Furthermore, the need to address the specific age of the vegetation/habitat was a key change and overreach of the EPBC Act Offset Policy. This reluctance to accept on-ground experience and need to assess habitats by age resulted in the project requiring an additional offset site to satisfy its Commonwealth offset requirements.
What have been the consequences of identified instances of poor regulator conduct, including inconsistency, inadequate enforcement and unduly protracted processes, for investment in the sector?	There has undoubtedly been an increase in cost associated with regulatory related issues around compliance and enforcement associated with: • Preparing the comprehensive Environmental Impact Statement for assessment • The engagement of multiple technical experts covering a wider range of areas to provide additional information in response to requests for information or independent reviews • Preparation of numerous management plans as part of any post determination requirement which are required to be reviewed regularly (sometimes annually). Costs include upfront preparation of the plans and ongoing review ad reporting costs • Periodic auditing of management plans and compliance with conditions of consent as pre requirements of conditions of consent • Reporting on and auditing other statutory approvals and licences. For example, in NSW each mining operation is currently required to report on its environmental performance to at least three separate Government agencies including water licences, environment protection licences and mining lease licences, and the format for such reports are is different for each agency despite the information being largely the same

Question	NSW Minerals Council's response to questions raised in Issues Paper
	• The imposition of approval conditions under the EPBC Act also increases compliance costs across Australia, particularly when those such approval conditions duplicate or impose additional requirements that are similar to State or Territory requirements • Time and resources associated with compliance activities of multiple government agencies including auditing requirements, site inspections, responding to issues etc • Regulators taking a stringent overly legalistic approach as opposed to other available options which could achieve the same outcome in a more efficient manner, irrespective of the level of risk associated with an issue • Often variations/inconsistencies in the way safety assessment programs have been administered, making it unclear if the original objectives are being met • Increasing practice of issuing prohibition Notices or Penalty Infringement Notices as the standard way of doing business, even in situations where the issue is minor and arguably not warranted • The Regulator often presuming an offence has occurred without affording the proponent or operator an opportunity to explain the circumstances • Strict adherence to a stick rather than carrot approach in circumstances where not warranted, leading to unreasonable outcomes. • Officers of Resources Regulator lacking in experience and understanding of the exploration sector. Or the expertise of the regulator is often not relevant to the present project or the issue being dealt with - issues arise where a person undertaking an inspection has expertise in an area and incorrectly makes recommendations based on this expertise, even if not relevant to the present context of the situation. • Delays in project approvals • Uncertainty for proponents, loss of staff, costs to company. • Significant additional costs for assessments and offsets potentially making the project unviable. • Lack of confidence in likelihood of achieving an approval despite presenting a reasonable assessment and offset strategy = hesitation for further investment.
How could identified shortcomings be remedied?	• Ensure that Commonwealth assessment officers have real-world experience and context for large complex projects as well as the appropriate expertise to critique and assess project applications (i.e. expertise and experience in biodiversity if assessing the adequacy of biodiversity MNES). • Ensure that Commonwealth assessment officers consistently apply the EPBC Act policies and determination of what constitutes habitat for MNES – internal training and procedures. • Revise the EPBC Act Offsets Policy to ensure consistency.

Question	NSW Minerals Council's response to questions raised in Issues Paper
Best Practice Community engagement and benefit sharing	
The Commission is seeking examples of both effective and best practice community engagement and benefit sharing practices, including with Indigenous communities, in Australia and internationally, and examples that are problematic. *What are key drivers of good or poor outcomes? How could identified shortcomings be remedied?*	**Community consultation** - The mining industry in NSW understands and appreciates the value of effective and meaningful engagement and communication with the communities it operates within. The industry also recognises its responsibility to support the socioeconomic development of the communities and regions in which it operates. Many companies take a broad view, seeking to ensure shared benefit from minerals development from both direct involvement (e.g. local employment, training and procurement) and voluntary social investment to support broader community development. Community engagement by companies typically commences well before plans are developed for submission to the government for its determination and continue throughout the life of the project. Whilst there are statutory requirements to undertake engagement at various steps of the process, most companies recognise the value of developing and maintaining positive long-term relationships within the communities they operate in. This also includes Indigenous communities as part of the local community, and as Native Title claimants. Community engagement requirements commence at the exploration stage and are a requirement of an exploration licence issued by the government. As a project evolves and becomes more certain, there are increasing statutory requirements to engage with the community and relevant stakeholders. This will include community presentations, site tours, newsletters, e-mails, recording of community concerns and responses etc. In addition, most companies will undertake additional community initiatives and engagement to build long term relationships. This will often include hosting community events, sponsorships of local community groups as well as partnering with the local council or businesses on other community initiatives. Prior to a resource project being lodged for development assessment, a proponent must be able to demonstrate to the Government that they have undertaken reasonable consultation with the local community. The assessment of resource projects in NSW are open and transparent. Stakeholders and local communities are afforded numerous opportunities to provide feedback on a proposed project. In NSW this includes: • SIA Scoping Study as part of the Scoping Document lodged with the request for SEARs. • The EIS exhibition period (28 days) – interested parties can make a written submission • No 1 Independent Planning Commission public meeting – interested parties can make a written submission as well as present at a public meeting • No 2 Independent Planning Commission public meeting for determination -– interested parties can make a written submission as well as present at a public meeting • In addition, both the Independent Planning Commission and the Department of Planning will accept and consider submissions at any time during the process • Continued engagement by the proponent through formal community consultative committees which often engage independent facilitators • The EPBC Act referral is subject to a separate Commonwealth initiated public consultation process.

Question	NSW Minerals Council's response to questions raised in Issues Paper
	If a project is approved, conditions of consent in NSW require the ongoing role of the independently chaired community consultative committees. These committees will typically operate for the life of the mine, and are required to report annually to the Department of Planning, and are subject to NSW Government guidelines in terms of how they operate and are administered. Whilst industry acknowledges that community and stakeholder engagement is an important part of the assessment and development process for resource projects, there are circumstances where consultation processes are used to frustrate and delay the process. For example, NSW resource projects are referred to the Independent Planning Commission if they receive 25 or more submissions, irrespective of the complexity of the project. Subsequently all resource projects are typically referred to the Commission as groups opposed to mining projects will organise more than 25 submissions. The Independent Planning Commission process itself, particularly public hearing and public meetings, often provides a platform for groups opposed to mining projects generally. It's essential that communities are consulted in a way which is meaningful in order to achieve outcomes that are truly reflective of the views of the wider community. **Benefit Sharing Practices** – The NSW Government has implemented the Resources for Regions scheme which is designed to deliver a share of the royalties accrued form resource projects back to mining affected communities. The Resources for Regions program is an important source of additional funding for mine-affected local councils to invest in local infrastructure and complements the significant investment by mining companies in the form of Voluntary Planning Agreements, roads upgrades and direct investment in local communities. Despite mining's significant contribution to NSW Government revenue, including royalties of $1.8 billion in 2018, there has been a history of insufficient and inadequate investment by the NSW Government in public infrastructure, facilities and services in mining communities. While the Resources for Regions program has been a good first step in providing a much-needed source of additional infrastructure funding to many regional mining communities, the amount and certainty of funding has varied from year to year. NSWMC supports mining communities having the certainty of a long-term, sustainable funding model from existing revenue streams to support public infrastructure investment. In addition to the Resources for Regions scheme, resource projects contribute significantly to local communities through voluntary planning agreements, which includes a community contribution component to the local council which is used to fund community initiatives. This is negotiated on a case by case basis between the proponent and the local council. For example, as part of the Bylong project, KEPCO agreed to contribute a total of almost $9 million over 27 years to Mid-Western Regional Council for community facilities (www.mudgeeguardian.com.au/story/3992894/kepco-commits-895m-to-the-mudgee-region/). **Indigenous Communities and Mining** - The resources sector recognises and respects these rights and interests and proudly partners with Aboriginal and Torres Strait Islander groups and communities, including Traditional Owner groups, on exploration and development of minerals projects across Australia. As reported in the Australian, Australia wide there have been over 1,900 land use agreements between Indigenous peoples and the mining industry delivering demonstrable economic and social benefits and supporting protection of cultural and environmental heritage. Indeed, partnerships are increasingly focused on supporting Indigenous Australians to preserve, strengthen and share culture within community and

Question	NSW Minerals Council's response to questions raised in Issues Paper
	across generations. As outlined in the Closing the Gap Report, the resources sector now directly employs around 6,600 Indigenous Australians –2.5 times more than in 2006 and significantly greater than the 1.5 times growth in non-Indigenous employment. There are many good examples of long-term relationships between the NSW minerals industry and Indigenous communities. Our industry works closely with communities who provide important cultural and heritage information in given areas so that a full picture of the values and history is understood, and appropriate responses identified before any mining can commence. For example, Glencore has established a number of cultural heritage conservation areas including the Yorks Creek Conservation Area in the NSW Hunter Valley. The Yorks Creek Voluntary Conservation Area, which commenced in 1994, was the first voluntary conservation agreement in the Hunter Valley formalising the protection of significant Aboriginal sites. The area covers 28.5 hectares along Yorks Creek adjacent to Glencore's Mt Owen mine and contains artefact scatters and open camps sites and hearths. The local Aboriginal community has access to the site, which provides a significant area where learning about Aboriginal culture can take place. NSW Minerals Council and our members work continuously alongside Indigenous Community groups to help close the employment gap and support Aboriginal-owned businesses. We are proud partners of the Clontarf Foundation and the Girls' Academy - two organisations supporting young Indigenous men and women, through mentoring and training to improve the education, discipline, life skills, self-esteem and employment prospects of young Aboriginal and Torres Strait Islander men and women. Individual mining operations across NSW are making a commitment to supporting the skills and employment prospects of Aboriginal communities, often through developing a Reconciliation Action Plan (RAP). For example, Whitehaven Coal launched a Reconciliation Action Plan (RAP) in 2015 that the company continues to build upon. 12% of Whitehaven's workforce identify as Indigenous Australian or Torres Strait Islander. Whitehaven Coal won the NSW Mineral Council's 2016 award for Community Excellence in Aboriginal Employment & Enterprise Development. A number of other companies have developed RAPs including BHP, Glencore, Thiess and Centennial Coal. Along with our member companies, we also provide career support and guidance to Indigenous Australians in the mining and construction industries and work closely with Indigenous communities in our areas of operation.

Appendix A - NSW Government Independent Review of the NSW Regulatory Policy Framework – Issues Paper (November 2016)

INDEPENDENT REVIEW OF THE NSW REGULATORY POLICY FRAMEWORK

NSW MINERALS COUNCIL SUBMISSION

15 December 2016

NSW MINERALS COUNCIL

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Contents

Executive Summary

The NSW Minerals Council (**NSW Minerals Council**) welcomes the opportunity to provide a submission to the Regulation Policy Framework Review Panel in respect of the Independent Review of the NSW Regulatory Policy Framework, and supports the Government's review of the regulation making processes in NSW.

The NSW mining industry continues to be a significant contributor to the strong economy in NSW. Regulation plays an important role in maintaining a strong economy, however over-regulation or restrictive government policies have the potential to create an excessive burden and red tape for businesses.

There is a significant history of initiatives to improve the making of regulation at both the NSW and Commonwealth levels. While there are opportunities to make improvements, considerable benefits would be realised by a more disciplined application to those initiatives already in place.

This submission contains five detailed case studies of regulation making processes that the NSW Minerals Council and our members have been involved in in recent years. These case studies highlight a lack of consideration of the best practice in making regulatory policy. As illustrated by the case studies there is inconsistent practice both across and within agencies, and the level of best practice is not linked, as may be expected, to the significance and seriousness of impacts of the regulatory proposal.

While the reasons for departure from best practice are often a combination of factors, there are relatively simple improvements that could be made to provide greater rigour, transparency and responsiveness to the process. To implement these changes there will need to be adequate resourcing provided to agencies, and realistic timeframes allowed for the development of regulation.

The NSW Minerals Council members are pleased to see that the NSW Government recognises that there are opportunities for improving the regulatory policy framework and looks forward to working with the NSW Government under the reformed system.

About this submission

This submission makes 34 recommendations on the improvement of the regulatory policy making process in NSW.

In order to provide the best evidence based recommendations to the Independent Review, this submission focuses on a selection of cases studies of regulation making in NSW impacting on the mining industry.

In addition the submission provides a flow chart of the regulation making process and highlights where improvements, as evidenced by the case studies, could be made.

Finally the submission addresses the specific questions posed in the discussion paper and where relevant related these back to the case studies.

About New South Wales Minerals Council

The NSW Minerals Council is the peak industry association representing the State's $21 billion minerals industry. The NSW Minerals Council provides a single, united voice on behalf of our 85 members, ranging from junior exploration companies to international mining companies, as well as associated service providers. Mining has, and will continue to be, a key economic driver for NSW. The NSW Minerals Council works closely with government, industry groups, stakeholders and the community to foster a strong and sustainable minerals industry in NSW.

Regulatory Reform

Guiding principles for reform for the NSW regulatory policy framework

The NSW Minerals Council welcomes the recent introduction of the '*NSW Guide to Better Regulation'* (**Better Regulation Guide**) issued by the Department of Services & Innovation in October 2016. The primary purpose of the Better Regulation Guide is to assist Government agencies *'to develop regulation which is required, reasonable and responsive to the economic, social, and environmental needs of NSW.'*

In addition to the principles outlined on Page 6 of the Better Regulation Guide, the NSW Minerals Council recommends the following guiding principles to underpin the framework for regulatory reform in NSW:

- *effective stakeholder engagement and consultation is vital to help develop good regulation based on sound scientific and technical evidence, and avoid unintended consequences, as well as building support for outcomes;*
- *collaboration between Government agencies is essential to minimise inconsistencies between regulatory policies and to reduce overlapping regulatory requirements which can place an excessive and unnecessary burden on stakeholders;*
- *policy makers and legislative drafters should avoid the use of overly prescriptive regulation which may have the unintended consequence of impacting activities beyond the initial purpose or need for the regulation;*
- *regulatory reform should always follow a consistent regulatory cycle which can be segmented into four stages or phases, being (1) initial decision-making; (2) implementation; (3) administration and (4) review. Effective management of each of these stages has an important bearing on the overall performance of the existing body of regulation;*
- *wherever possible consistent definitions should be used across all legislation in NSW to avoid confusion and extra work for businesses than would otherwise be the case; and*
- *regulatory regimes should be subject to periodic reviews to ensure they remain current in terms of best practice regulation standards and emerging scientific, technology or other developments.*

It is fundamental that the NSW Government adopts guiding principles of this nature as the foundation for future regulatory reforms in NSW in order to promote regulatory transparency and administrative efficiency.

Recommendations

The NSW Minerals Council provides the following recommendations to the Regulation Policy Framework Review Panel to improve Government regulation in NSW.

General recommendations

1. There should be consideration of how resourcing and time constraints experienced by agencies impact on the capacity to meet current best practice and any proposed improvements. Adequate resourcing and time should be provided to agencies to undertake consultation on, and development of regulatory proposals.
2. The Better Regulation Principles should be considered and publicly addressed throughout the development of regulatory proposals and should be expressly addressed early in consultation materials.

Independent regulatory reviews

3. Before any significant regulatory reform is introduced, the NSW Government should establish an independent review panel to consult with relevant Government agencies, industry bodies, non-Government organisations and the broader community to identify areas requiring reform.
4. Third party reviews should be encouraged as an effective way for industry and the community to provide ideas for reform in an objective and independent process.
5. The terms of reference provided to all independent review panels should require a thorough consideration of the economic consequences of any reform for businesses operating in NSW, as well as the broader State's economy.
6. The mining industry should be targeted for an overarching regulatory review, similar in scope to the current review being conducted by the Productivity Commission of the 'Regulation of Agriculture'. The mining industry is the largest exporter in NSW and contributes significant revenue to NSW. The sector is highly complex and dynamic but currently embedded in a significant amount of excessive regulation and red tape.
7. To identify priority areas for regulatory reform on an ongoing basis, the NSW Minerals Council advocates for the use of public 'stock-takes' whereby business is invited to make suggestions (or complaints) about regulation that imposes excessive compliance costs or other problems. The suggestions can then be tested with the responsible agencies and draft findings and recommendations prepared in response to feedback received.

Legislation Review Committee process

8. The Legislation Review Committee (**Committee**) process under the *Legislation Review Act 1987 (NSW)* requires amendment so that:
    a. an express obligation exists for recommendations of the Committee to be considered by either Cabinet or both Houses of Parliament in considering proposed legislation or regulation. If concerns are expressed by the Committee and the legislation or regulation is passed or allowed, the decision-makers should be required to publish grounds as to why it has made that decision;
    b. a Bill may not be passed unless the Committee has reported on the Bill;
    c. the review of regulation by the Committee occurs prior to consideration by Cabinet; and
    d. the functions of the Committee in respect of Bills are expanded to consider whether Bill may have an adverse impact on the business community.

Stakeholder consultation

9. Industry and the community should be given at least three months notice of the scheduled staged repeal of regulation and this information, as well as consultation processes, should be available on a publically accessible centralised website.

10. Currently consultation efforts are often inadequate and there is in many cases a lack of consultation at critical stages, including when different regulatory reform options are initially considered. More in-depth and focused consultation is needed when developing or reviewing specific regulation.
11. To ensure adequate opportunity is provided to industry to engage in the policy and regulation making process and so Government's decision making can be guided by input from stakeholders, Government agencies should meet with stakeholders prior to a policy position being finalised and being converted into draft legislation. The relevant Government agency should consider the use of working groups, or other similar forums, to engage with industry regularly and thoroughly in respect of government regulatory objectives.
12. Draft reports with preliminary findings or recommendation should be made public and tested so that stakeholders can have input and regulators can receive the benefit of technical and industry knowledge and experience.
13. All significant regulatory reforms should be placed on public exhibition for a minimum period of one month so that industry has sufficient time to provide considered responses.

Regulatory reform teams and inter-agency communications

14. Specific teams should be in place within the relevant Government agency for the purposes of regulation preparation and review and inter-agency communications should be encouraged to minimise the regulatory burden and duplication on those impacted by regulation. Regulatory review and implementation should be overseen by a central Government body (ideally Treasury) to ensure consistency in quality and processes across various NSW Government Departments.
15. The NSW government through a central oversight body (ideally Treasury) should create online platforms whereby business and the community can provide feedback to Government on current regulation. Feedback may be gathered through mechanisms such as electronic surveys and 'blogs' where issues or questions regarding regulation can be raised and considered as they arise. The feedback from industry should also be used to test whether regulations reflect best practice methods and reflect the most up-to-date technological and scientific methods. The outcomes of this consultation should then drive further development and review of regulation where significant costs and impacts are identified.

Release of reform packages

16. For legislation reform packages (comprised of for example a Bill, regulations and other supporting instruments) the full package of proposed reforms should be released for consultation at the same time so that industry and the community can assess the full extent of the implications of the package as whole.
17. When significant proposed legislation is released, a clear and plain English note should be provided explaining the intent and impact of each provision of the legislation. Without an explanation being provided, industry must undertake this exercise themselves at a substantial cost.

Robust Regulatory Impact Statement

18. A detailed cost benefit analysis should be carried out by the relevant Government agency in respect of each new provision that is proposed as part of any significant regulatory reform. Many new regulations can have significant cost implications for industry, which are often not fully considered and may be unnecessary to achieve the Government's desired outcome.
19. The exemptions from the need for a Regulatory Impact Statement (**RIS**) should be revised to ensure that matters that may have significant impacts on industry do not 'fall through the cracks'.
20. A short form impact assessment tool should accompany a RIS. This should be changed to a table format which addresses the following:
    a. intent of regulation;
    b. impact on business (costs and benefits);
    c. impact on the community (costs and benefits).

21. This document should be in plain English and designed to assist business and the community understand the impacts of the regulation presented in a clear and concise manner.

Periodic regulatory reviews

22. For any new regulations (e.g. the Biodiversity Conservation Regulation once made) the review period should be 12 months or at the latest 2 years as inherently there are 'teething issues' associated with new regulation that need to be properly addressed as soon as possible (and well before 5 years).
23. The 'good design principles of sunset programs' identified in the Productivity Commission report entitled '*Identifying and Evaluating Regulatory Reforms'* dated December 2011 (**Regulation Reforms Report**)) should be adhered to in NSW in respect of the staged repeal process.
24. Where possible, sequencing of reviews and reforms should be considered so that related regulations are considered in a complementary and efficient way.
25. For regulation where the impacts on business or the community are likely to be significant, post implementation monitoring and reviews should be undertaken within 2 years in addition to (and not instead of) the RIS that is prepared prior to implementation. These reviews should focus on the impacts of regulation on industry and community, the effectiveness of regulation in achieving its objectives and feedback from industry on administration, compliance and enforcement of regulation.

Innovation and best practice in regulatory reforms

26. Benchmarking of regulatory best practice is critical in ensuring that NSW remains competitive and continues to attract both domestic and foreign investment. Appropriate tools for benchmarking include surveys and business focus groups. Government decision making should also be guided by NSW's performance in comparative publications including the Fraser Institute Survey of Mining Companies 2015.
27. The NSW Government should invest in ongoing training to ensure that decision-makers have the knowledge and experience to work with industry in preparing and implementing best practice regulation. Regular consultation and cooperation between regulation reform and compliance teams should be encouraged to avoid duplication and improve effective regulation.
28. To promote regulatory transparency and administrative efficiency the NSW Government should move to a system of online lodgment of mining tenement applications and tracking of applications.
29. The NSW Government should introduce a regulatory review register where the community can find out in a centralised location proposed review dates for regulation, draft recommendations, final recommendations, government response and resulting regulatory changes.
30. For significant regulatory reviews and reforms the relevant NSW Government agency should use a digital platform where a plain English explanation is provided of each provision of a proposed regulation and the platform provides an ability for industry or the community to ask questions prior to a submission being lodged.
31. Where possible, proposed regulatory review actions, including technical documents such as draft methodologies or calculators, should be tested with stakeholders before being finalised and implemented.
32. Regulators should report clearly on a centralised online platform on the outcomes (both positive and negative) that are being achieved by regulation after it is implemented, including performance against regulatory timeframes such as approval timeframes.
33. Streamlining of reporting and auditing requirements should be encouraged so that less reports are required and all reports are collected through a central online portal administered by one central agency.
34. Overlapping legislation between levels of Government should be addressed, including through inter-jurisdictional agreements such as Bilateral Agreements.

Case Studies

The NSW Minerals Council has prepared a number of case studies to illustrate examples of recent regulatory reform processes implemented by various NSW Government agencies over the last two years. These case studies highlight the stakeholder consultation that has been undertaken as well as practices that worked well and areas for improvement.

Case Study 1: Biodiversity Conservation Bill 2016 (NSW)

What was the purpose of the regulatory reform?

The Biodiversity Conservation Reform Package (**Biodiversity Package**) was released by the NSW Government in May 2016 to overhaul the existing legislative framework for biodiversity conservation and native vegetation management in NSW. The Biodiversity Package is made up of the following key components:

- *Biodiversity Conservation Bill 2016 (NSW)* (**BC Bill**);
- the *Local Land Services Amendment Bill 2016 (NSW)* (**LLS Amendment Bill**); and
- Biodiversity Assessment Method (**BAM**).

According to the explanatory note, the purpose of the BC Bill is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future.

The Biodiversity Package is significant because of the proposed replacement of a number of long-standing pieces of environmental legislation, including the Threatened Species Conservation Act 1995 (NSW) (**TSC Act**) and the Native Vegetation Act 2003 (NSW) (**NV Act**) as well as the animal and plant provisions of the National Parks and Wildlife Act 1974 (NSW) (**NP&W Act**).

What process was followed to introduce the reforms?

The following process preceded the introduction of the Biodiversity Package:

Date	Event
June 2014	The establishment of the NSW Independent Biodiversity Legislation Review Panel (**Review Panel**) to undertake a comprehensive review of the TSC Act, NV Act and related biodiversity legislation due to the fact that the current legislative framework has become fragmented, overly complex and process driven.
18 December 2014	The release of 'A review of biodiversity legislation in NSW – final report' (Final Report) prepared by the Review Panel which recommended wide spread reforms to biodiversity and conservation legislation in NSW.
3 May 2016	The Biodiversity Package was placed on public exhibition with submissions due by 28 June 2016 (a period of 8 weeks).
May 2016 - October 2016	Ongoing consultation between the Office of Environment and Heritage (**OEH**), the Department of Planning and Environment (**DPE**) and stakeholders.
9 November 2016	The BC Bill and LLS Amendment Bill were introduced into Parliament on 9 November 2016 and declared to be urgent. The Bills were passed on 17 November 2016.
23 November 2016	The BC Act and LLS Amendment Act were assented to.

What consultation was undertaken with stakeholders and the broader community?

The Terms of Reference for the Review Panel stipulated that the Review Panel was to ensure thorough engagement with all interested stakeholders, including landholders, industry, developers, councils, non-government organisations and members of Parliament. The Final Report indicates that the Review Panel received 1069 submissions, which includes 395 submissions and 674 form letters. Of the 395 submissions received, 288 were from individuals, 59 from non-government organisations, 36 from government agencies, local councils, and advisory bodies, and 12 from industry groups. The NSW Minerals Council prepared a submission as part of this process. The Review Panel then met with a number of key stakeholders following the formal submission period. The NSW Minerals Council met with the Review Panel at this time and was provided an opportunity to discuss their concerns and recommendations in more detail. Based on these submissions a detailed report was prepared to summarise and analyse the submissions received. This Submissions Report formed an annexure to the Review Panel's Final Report.

Following the release of the Biodiversity Package for public exhibition, the OEH conducted a number of community information sessions, technical workshops and webinars across NSW during the consultation period engaging over 1,000 participants, including a workshop specifically for the mining industry conducted at the offices of the NSW Minerals Council. The community were invited to make submissions online or by post. A total of 7166 submissions were received in relation to the Biodiversity Package, including approximately 6000 form submissions.

The OEH website indicates that consultation 'will continue as the enabling Regulation, tools and products to support the legislation are developed during 2017'.

What was done well?

From the outset, a thorough process was established for the review of the existing biodiversity related legislation including:

- The Review Panel being supported by an interagency Senior Officers Group (SOG). The SOG was established to provide whole-of-government input to the review and identify interactions with related policy and legislative frameworks;
- The OEH provided secretariat support to the operations of the Review Panel and the SOG to ensure that appropriate resources were allocated for this initial exercise;
- The NSW Government has maintained and regularly updated a website which provides specific information and documents in relation to the biodiversity reforms and how the community can get involved in the process;
- The NSW Government also released a number of 'submission guides' to provide stakeholders with plain English summaries of key aspects of the Biodiversity Package on issues such as native vegetation regulatory mapping, private conservation land and simplifying land management; and
- The OEH provided adequate time for consultation on the Reforms Package, and met with key stakeholders and industry and community groups to give those groups an opportunity to discuss their specific views and concerns in detail. In meeting with industry groups, the OEH ensured that all key members of the legislative reform team were present as well as representatives from other key government agencies, for example the Department of Planning and Environment (**DPE**).

What could have been done better?

Whilst the NSW Government's biodiversity reforms have been the subject of extensive review and consultation, there are nevertheless a number of area for improvement, namely:

- The Biodiversity Package was placed on public exhibition in May 2016 without a number of key components of the regulatory reforms, in particular the Regulations associated with the BC Act and LLS Amendment Bill and the tested BAM. Without these products/completed products, it was very difficult to assess the package in totality and to undertake case studies to identify whether assessment and offsetting under the reforms would be appropriate and how it would compare to the status quo. This is equally the case for the Government, in road testing the proposed legislation before it commences;
- Very limited information was provided as part of the Biodiversity Package in relation to the proposed Biodiversity Conservation Fund (**BCF**) and the calculator that is being developed to convert a credit to a cash amount that will be paid to BCF. The NSW mining industry has long been a supporter of the concept of a fund that developers can pay into met their offset obligations. A sustainable fund is a win-win for business and the environment. However, on the limited information available during the exhibition period for the BC Bill, it was difficult to comment on this important element of the package. Subsequent consultation on the fund calculator confirmed fears that it would be prohibitively expensive for most mining projects;
- Following the consultation period, industry groups, including the NSW Minerals Council, were not provided with information as to how their concerns and recommendations provided in their respective submissions had been addressed by OEH in the final Bill that went before Parliament. The result is that many of the key recommendations made by the NSW Minerals Council have not been adequately addressed in the final legislation (as passed);
- The BC Bill has been passed by the NSW Parliament with very few transitional provisions. It is vital that the Government consults on these provisions before the Biodiversity Package is finalised and implemented. In addition, given that the BAM and BAM calculator will be new and introduce many new concepts that are not contained in the FBA, there should be a period of administrative application of the BAM and its tools and this needs to be provided for in the transitional provisions;
- The OEH has had limited resources to undertake a very significant reform process. The allocation of sufficient Government resources to the process is essential for ensuring that legislative reforms are effective and adequate consideration is given to stakeholder feedback.

Case Study 2 - Resources Legislation Package - Reforms to the Mining Act 1992 (NSW) and the Mining Regulations 2010 (NSW)

What was the purpose of the regulatory reform?

During 2015, there was a significant overhaul of many aspects of the mining and petroleum legislation in NSW (**Resources Legislation Package**), through the introduction of the following Acts:

- The *Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Act 2015 (NSW)* (**Titles Act**);
- The *Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015 (NSW)* (**Harmonisation Act**); and
- The *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015 (NSW)* (**Land Access Act**).

Major changes introduced through these Acts included:

- How and when coal mining and petroleum tenements will be allocated, granted, renewed, transferred and cancelled;
- The negotiation, mediation and arbitration process for access arrangements to enable prospecting operations to be carried out; and
- Compliance and enforcement requirements for mining and petroleum tenements.

The above Acts were supported by the following new regulations which have now commenced:

- The *Mining Legislation Amendment (Harmonisation) Regulation 2016 (NSW)* (**Harmonisation Regulation**); and
- The *Mining Legislation Amendment (Licences for Operational Allocation Purposes) Regulation 2015 (NSW)* (**Operational Licence Allocation Regulation**).

The Mining Legislation Amendment (Arbitration) Regulation 2016 (NSW) (**Arbitration Regulation**) was the subject of further consultation between the Department of Resources and Energy (**DRE**), the NSW Minerals Council and the NSW Farmers Federation during 2016.

The following policy documents were also released by the NSW Government to supplement the Resources Legislation Package, although some of these documents remain in draft form:

- Draft NSW Strategic Release Framework for Coal and Petroleum Exploration;
- Resource Assessment for Potential Coal and Petroleum Exploration Release Areas Policy;
- Guidelines for Applying for a Coal Exploration Licence for Operational Purposes; and
- Draft Land Access Arbitration Procedures.

Subsequent to the above regulations being made, the previous *Mining Regulation 2010 (NSW)* (**Previous Mining Regulation**) was wholly repealed and replaced with the current *Mining Regulation 2016 (NSW)* (**Current Mining Regulation**).

What process was followed to introduce the reforms?

The following process preceded the introduction of the Resources Legislation Package:

Date	Event
15 April 2014	Bret Walker SC was engaged by the NSW Government to undertake a review of the land access arbitration process and issue.
May 2014 – June 2014	Consultation was undertaken with various stakeholders in relation to the review of the Land Access Arbitration Framework.
20 June 2014	Bret Walker SC issued his report titled '*Examination of the Land Access Arbitration Framework – Mining Act 1992 and Petroleum (Onshore) Act 1991'* in which he made 31 recommendations to improve the arbitration land access framework (**Walker Review**).
August 2014	The Government response to the Walker Report was released in which the NSW Government stated that it '*endorsed all the recommendations in the Walker Report … and committed to a process of implementation commencing immediately where possible.'*
August 2014	The Coal Exploration Steering Group (**CESG**) was established by the NSW Government in response to the Independent Commission against Corruption's (**ICAC's**) recommendations to reduce opportunities and incentives for corruption in the state's management of coal resources.
11 September 2015	DRE conducted invitation only briefings to select stakeholders in relation to the draft Titles Bill, Harmonisation Bill and Land Access Bill.
14 September 2015 and 15 September 2015	Consultation drafts of the Titles Bill, Harmonisation Bill and Land Access Bill were released to select stakeholders on a confidential basis. The NSW Minerals Council and the NSW Farmers Federation, together with their legal advisors received copies of these bills from DRE but they were not permitted to provide copies of the draft legislation to their members for review.
24 September 2015	Submissions on the Titles Bill, Harmonisation Bill and Land Access Bill were required to be provided to DRE by 24 September 2015 (i.e. only 10 days after the Bills were selectively released).
15 October 2015	The Titles Bill, Harmonisation Bill and Land Access Bill were introduced into the NSW Government.
2 November 2015	The Titles Bill, Harmonisation Bill and Land Access Bill were assented to by the NSW Government.
25 November 2015	DRE conducted invitation only briefings to select stakeholders in relation to the Harmonisation and Arbitration Regulation and the Operational Licence Allocation Regulation.
18 December 2015	Substantial parts of the Titles Act commenced, together with the Operational Licence Allocation Regulation.
January 2016	Ongoing consultation in relation to the Arbitration Regulation and the draft Land Access Arbitration Procedures.
1 March 2016	Substantial parts of the Harmonisation Act and Land Access Act commenced, together with the Harmonisation Regulation.
12 August 2016	The Previous Mining Regulation was repealed and replaced with the Current Mining Regulation.
1 December 2016	The Land Access Act commenced (the NSW Minerals Council was provided 1 days notice prior to the commencement of this Act).

What consultation was undertaken with stakeholders and the broader community?

In relation to the review of the Land Access Arbitration Framework in early 2014, consultation with the following groups or individuals was facilitated by Mr Jock Laurie, the NSW Land and Water Commissioner, and was undertaken over 20, 26 and 30 May and on 2 June 2014:

- Exploration companies and representatives presently involved in arbitration processes;
- The members of the Arbitration Panel, Ms Patricia Lane, Mr Michael J Lawrence, Mr Phillip Watson and Ms Brydget Barker-Hudson;
- Division of Resources and Energy;
- NSW Law Society;
- The Institute for Arbitrators and Mediators;
- NSW Farmers Association;
- NSW Irrigators Association;
- Rice Growers Australia;
- Cotton Australia;
- NSW Wine Industry Association;
- NSW Minerals Council;
- Australian Petroleum Production and Exploration Association;
- Association of Mining Exploration Companies;
- Southern Highlands Coal Action Group;
- Lock the Gate.

The Minister also invited public submissions to be provided by 23 May 2014. This period was extended to 30 May 2014, with late submissions accepted after this date. A total of 31 submissions were received. Mr Bret Walker took into account all of the submissions and the issues raised in the targeted consultation meetings, in preparing his review.

In contrast to the community engagement that occurred as part of the Walker Review, in relation to the draft legislation, DRE undertook very limited and selective consultation. For example, 'consultation draft' versions of the Titles Bill, Harmonisation Bill and Land Access Bill were provided to select stakeholders such as the NSW Minerals Council and the NSW Farmers Federation on a confidential basis. This meant that these industry bodies were not permitted to distribute copies of the draft legislation to their members for review prior to the legislation being tabled in the NSW Parliament. Furthermore, DRE provided only a period of 10 days for the stakeholders to review and make submissions on draft legislation which was proposed extensive changes to the existing regulatory framework.

What was done well?

The engagement during the Walker Review stage of the process was extensive and transparent. Sufficient time was provided for all parties to provide submissions and additional time was provided.

The Review provided a detailed report and identified generally how submissions made with respect to the Terms of Reference had been considered in the making of recommendations.

What could have been done better?

Overall, the introduction of the Resources Legislation Package provides a number of important examples of deficiencies in a regulatory reform process such as:

- Consultation drafts of the Titles Bill, Harmonisation Bill and Land Access Bill were released to select stakeholders on a confidential basis. As such, the broader community (including individual mining companies) did not have an opportunity to make submissions on the draft legislation at any stage prior to its introduction into the NSW Parliament and consequently there was little transparency in the reform process;
- DRE did not allocate sufficient time between providing draft legislation to stakeholders for review and the Bills being tabled in in the NSW Parliament. A select number of stakeholders were given a period of 10 days to review and understand the implications three new Bills. In total, there was less than one month between the Bills being released for consultation and the legislation being tabled in the NSW Parliament. This is insufficient time for the NSW Government to undertake meaningful consultation and amend the legislation (where appropriate) to address the submissions made;
- DRE failed to give proper consideration to the vast majority of submissions that were made by the NSW Minerals Council. The NSW Minerals Council represents a significant portion of the NSW mining industry and has a very detailed understanding of industry concerns and the impacts of the reforms on businesses in the sector;
- Forms prepared by DRE to supplement the Resources Legislation Package following its commencement, such as new exploration licence application forms, have not reflected the legislative changes that have been introduced. As a result, many of the forms have had to be revised several times, and proponents have been required to lodge additional documents (after lodging their initial applications) due to the constant changes in the forms. This has had significant cost and time delay consequences for proponents.
- A RIS was prepared for the purposes of the review of the Previous Mining Regulation. The RIS is a considerably long document and appears, at first glance, to be a very detailed analysis of the proposed reforms. However, on closer review, it seems that the RIS only considers three options at a high level, being:
    - remake the Previous Mining Regulation as it was;
    - let the Previous Mining Regulation lapse; or
    - make minor amendments to the Previous Mining Regulation.
- The Subordinate Legislation Act 1989 (NSW) provides a process whereby subordinate legislation is reviewed periodically to ensure that it meets current requirements. As such, this process should involve individual consideration of each provision in the Previous Mining Regulation, including a cost benefit analysis of each clause as opposed to only considering the Regulation as a whole. DRE's justification for a lack of a proper review of the Previous Mining Regulation was based on earlier changes that had been made through the introduction of the Harmonisation Regulation and the Operational Licence Allocation Regulation.

Case Study 3 - Review of Mine Subsidence Compensation Act 1961 (NSW)

What was the purpose of the regulatory reform?

The Mine Subsidence Compensation Act 1961 (NSW) (**MSC Act**) aims to mitigate the effects of mine subsidence on the community and to provide property owners with restoration of improvements where damage occurs due to mine subsidence. The MSC Act creates the legal and administrative arrangements for the operation of the Mine Subsidence Board (**MSB**), establishes the Mine Subsidence Compensation Fund, establishes the obligation for payment of levies, provides development control powers for the Board, and defines the nature of work and compensation that the Board can fund.

In early 2016, the NSW Government initiated a review of the MSC Act and its operations, noting there are stakeholder concerns and recognising the MSC Act has not been reviewed for over twenty years (**MSC Act Review**).

The objectives of the MSC Act Review are to ensure that the regulatory framework for mine subsidence in NSW is fair, timely, sustainable and is efficiently administered, both in the approach to mitigation as well as restoration of improvements.

No formal report has been published following the MSC Act Review, however a brief Q&A document was produced describing the proposed changes to the mine subsidence system in NSW (**Q&A Note**). The Q&A Note indicated that given technological advancements and changes in industry practice, a review of the MSC Act and its administration was necessary to ascertain whether it still meets the needs of the community, developers, coal industry and Government.

The Q&A Note indicates that *'these reforms require legislative change. Stakeholder engagement will occur over the coming months to inform the legislative drafting process. It is intended that an amending Bill be provided to Government for further consideration in early 2017. Subject to the Bill being passed in Parliament, the major changes to the levy framework will take effect in 2018'.*

What process was followed to introduce the reforms?

The following process has been followed in relation to the MSC Act Review:

Date	Event
October 2013	ICAC commenced an investigation into a MSB Manager who allegedly received corrupt payments or other benefits as an inducement or reward for showing favourable treatment to building contractors.
9 February 2016	The NSW Department of Finance, Services and Innovation issued the '*Terms of Reference for the Review of the Mine Subsidence Compensation Act 1961 (NSW)'.*
18 March 2016	Submissions were due from industry stakeholders in relation to the MSC Act Review.
23 March 2016	ICAC publishes its findings in relation to the above corruption allegations and made seven corruption prevention recommendations to the MSB to help prevent the recurrence of the conduct exposed in this investigation.
September 2016	A brief Q&A Note was produced describing the proposed changes to the mine subsidence system in NSW as a result of the MSC Act Review. No formal report has been published detailing outcomes of the MSC Act Review.

What consultation was undertaken with stakeholders and the broader community?

The Terms of Reference for the MSC Act Review provided that:

- The Review would be led by a Steering Committee chaired by the Department of Finance, Services and Innovation, with representation from DPE, Department of Department of Premier and Cabinet, Department of Industry and Treasury;
- Stakeholder engagement would be central to the review process and include industry stakeholders such as the Property Council of Australia, local developers and mining companies. The Review would invite submissions from all interested stakeholders including community groups and local councils; and
- Relevant departments such as the DPE and the Department of Industry would be consulted during the MSC Act Review for the purpose of ensuring that regulation across government is consistent.

The Q&A Note indicates that the MSC Act Review Steering Committee received submissions from a broad range of stakeholders, which has informed the proposed change the system. No formal report has been published analysing the submissions that were received.

Going forward, the Subsidence Advisory NSW website indicates that:

- Targeted consultation with industry and local government will occur over the following months;
- Community information sessions are being held across NSW in February 2017 to provide community members with the opportunity to meet with officers from Subsidence Advisory NSW and understand the proposals in detail; and
- Whilst Subsidence Advisory NSW is not asking for submissions on the proposed changes to the MSC Act, they welcome feedback which can be provided via Subsidence Advisory NSW's website.

What was done well?

The reforms to the MSC Act are ongoing, however to date there have been a few positive aspects of the MSC Review:

- The Terms of Reference required cross agency consultation to ensure a consistent regulatory approach from all of Government. Too often regulatory reform results in duplication of obligations as multiple agencies seek to regulate to same issues;
- A period of 5 weeks was provided for submissions in relation to the MSC Act Review. Given that the MSC Act is a relatively concise piece of legislation (when compared for example to the Mining Act or Biodiversity Conservation Bill), this period of time was sufficient; and
- The NSW Government has indicated that stakeholder engagement will occur over the coming months to inform the legislative drafting process.

What could have been done better?

The following improvements to the regulatory reform process have been identified as a result of the recent MSC Act Review:

- No formal report has been published detailing the outcomes of the MSC Act Review or summarising the submissions that were made. As a result the community is unable to scrutinise the stakeholder submissions that were received and to determine whether the proposed legislative reforms reflect the stakeholder feedback or simply a Government initiated change in policy. There has been a lack of transparency around the different options considered; the pros and cons of each option; and why the final proposal was

considered the best; and

- The Q&A Note announces the NSW Government's intention to introduce a number of significant changes to the mine subsidence compensation process. These proposed changes have been announced before draft legislation has been prepared for consultation and before any consultation was undertaken with industry and other stakeholders about the proposed reforms. Once the NSW Government announces a policy change of this nature, it is then extremely difficult to move away from this policy position (irrespective of submissions that may be made by stakeholders).
- Whilst the legislation has not been drafted Subsidence Advisory has begun to implement the changes in practice. Subsidence Advisory's submission on the Wallarah 2 project requested a condition be imposed that *"requires the Colliery to accept responsibility for any damage to existing surface improvements by mine subsidence and the associated cost to repair, due to its extractive works."* This submission was made before the outcomes of the review were even announced.

Case Study 4 - State Environmental Planning Policy (Mining, Petroleum Production and Extractive Activities) 2007

What was the purpose of the regulatory reform?

Clause 12AA of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Activities) 2007 (**Mining SEPP**) was introduced in September 2013 by the NSW Government to ensure that the significance of a mineral resource is given explicit and appropriate consideration in decision-making on mining-related Development Applications. The clause was introduced because the NSW Government believed that this needed to be explicitly considered to restore balance to the assessment process.

Less than two years after Clause 12AA was introduced into the Mining SEPP, the NSW Government repealed the provision through the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Significance of Resource) 2015 (**Mining SEPP Amendment**). The intention of the Mining SEPP Amendment, as stated on the DPE website, was to remove the provisions to ensure that "social, environmental and economic considerations would all have equal footing under the rules."

Separately, pursuant to clause 20A of the Mining SEPP the Minister for Planning was required to arrange for a review of the Mining SEPP (and a report of the review to be made public) before the end of September 2015 (**Mining SEPP Review**). In May 2015, the Minister announced that as part the Mining SEPP Review:

- There would be an overhaul of the way large mining and coal seam gas projects secure approval;
- The community would be given a greater chance to test the planning decisions;
- Society and the environment would get a more equal weighting with the economy in decision making; and
- There would be a focus on monitoring and compliance so that the consent doesn't sit on a shelf after it is granted.

What process was followed to introduce the reforms?

The following process was followed in relation to the Mining SEPP Amendment:

Date	Event
September 2013	Clause 12AA was introduced into the Mining SEPP.
May 2015	Planning Minister Rob Stokes announced that a review of the Mining SEPP would be undertaken in accordance with clause 20A of the SEPP.
7 July 2015	Submissions on the proposed repeal of clause 12AA could be made between 7 July 2015 and 21 July 2015.
28 July 2015	NSW Minerals Council met with the Planning Minister and representatives from DPE in relation to the proposed repeal of the Mining SEPP.
31 August 2015	Planning Minister Rob Stokes announced the State's mining policy would be changed to provide a more balanced framework for decision making. This announcement was in respect of the repeal of clause 12AA only.
2 September 2015	Clause 12AA was repealed from the Mining SEPP.

What consultation was undertaken with stakeholders and the broader community?

Consultation was undertaken by DPE in relation to the Mining SEPP Amendment (i.e. the repeal of clause 12AA). This consultation including an opportunity for public submissions to be made, together with further engagement with the following peak stakeholder groups:

- NSW Farmers Association;
- NSW Minerals Council;
- Australian Petroleum Production & Exploration Association;
- Cements Concretes and Aggregates Australia;
- Nature Conservation Council;
- Total Environment Centre;
- Lock the Gate;
- Environment Defenders Office.

With regards to consultation, the Mining SEPP Review Report states that *'in conducting its review, DPE has taken into consideration a number of issues raised by stakeholders. These views were gathered through submissions and consultation with key representative bodies for industry, community and environmental interests. The discussion held with peak bodies were broad and focused on the policy aims and operation of the SEPP.'*

However, the consultation undertaken by DPE only related to the Mining SEPP Amendment and did not extend to issues that would be relevant to the broader Mining SEPP Review.

What was done well?

With respect to the complete repeal of clause 12AA from the Mining SEPP, it was positive to see that all public and government agency submissions made in relation to the repeal of clause 12AA are publicly available on the DPE website. The publication of submissions is important for promoting an open and transparent planning system.

What could have been done better?

The following deficiencies arose with respect to the Mining SEPP Review as required pursuant to clause 20A of the Mining SEPP:

- Despite the statutory requirement for the formal Mining SEPP Review by the end of September 2015, no proper review or consultation was conducted by DPE in relation to the whole SEPP. Instead, the only consultation and ultimate change that was made to the Mining SEPP as a result of the Mining SEPP Review was the repeal of clause 12AA. DPE's reason for not making further changes to the SEPP at this time was that 'feedback from the community in relation to the Mining SEPP has called for broader reform of mining policy and regulation that goes beyond the scope of the SEPP'; and
- The Mining SEPP Review Report was issued supposedly as a result of the review of the whole Mining SEPP. However, this report does not reflect any consultation or review that was conducted by DPE in relation to the broader Mining SEPP. In fact, the report was released after the amendments to the clause 12AA of the Mining SEPP had already been made.

With respect to the complete repeal of clause 12AA from the Mining SEPP, the following deficiencies have been identified:

- A half page document was published on the DPE website to explain the intended effect of the proposed repeal of clause 12AA, together with a brief Q&A document. However, these documents did no more than restate the purpose of the clause and provided no real context for the proposed amendment;
- No transitional arrangements were provided which meant that the changes would effectively apply retrospectively to projects that were already under assessment.

Case Study 5 - Change in policy relating to non-road diesel emissions

What was the purpose of the regulatory reform?

Non-road diesel equipment at NSW coal mines are a source of particulate emissions in the NSW Greater Metropolitan and Hunter regions.

In recent years, the NSW Environment Protection Authority (**EPA**) has assessed practices used at EPA-licensed coal mines and considered the costs and benefits of options available to reduce non-road diesel emissions.

A report titled *'NSW Coal Mining Benchmarking Study – Best Practice Measures for reducing Non-Road Diesel Exhaust Emissions'* (**Non-Road Diesel Exhaust Emission Report**) was published by the EPA in August 2015, which among other matters:

- identifies cost-effective options to reduce non-road diesel emissions
- recommends that existing and proposed NSW coal mines conduct a best management practice (BMP) determination to identify the most practicable options for achieving exhaust emission performance standards for in-service, new and replacement non-road diesels (from <8 kW to ≥560 kW):
    - for existing EPA-licensed coal mines BMP should be implemented through a pollution-reduction program (PRP), which is enforced through environment protection licence conditions
    - for proposed NSW coal mine developments BMP should form part of the environmental assessment (EA), which is directly linked to the air quality impact assessment
- details the performance standards, implementation timeframes, certification and verification requirements for in-service, new and replacement non-road diesels.

The EPA has indicated that it will be further engaging with stakeholders and seeking feedback on the proposed pollution reduction program for non-road diesels at EPA-licensed coal mines.

What process was followed to introduce the reforms?

The process was initiated several years ago with an industry survey to obtain data on non-road diesel equipment and use. The EPA then prepared a cost-benefit analysis assessing various options to reduce non-road diesel emissions using information about diesel equipment used at NSW coal mines obtained from the industry survey. The EPA held a workshop with industry and suppliers in June 2016 to discuss the proposals.

No final regulatory proposals have been presented to the industry at this stage so there continues to be uncertainty about what impact the proposals will have on the industry.

What consultation was undertaken with stakeholders and the broader community?

The EPA released the cost benefit analysis for public consultation; has held two workshops; and has responded to multiple submissions made by the industry on the proposals.

What was done well?

- The EPA gathered detailed information about the non-road diesel fleet at NSW coal mines, which enabled much more accurate estimations of the impact of non-road diesel emissions on air quality and gave a more accurate picture of the natural adoption of

better performing non-road diesel equipment by the industry.

What could have been done better?

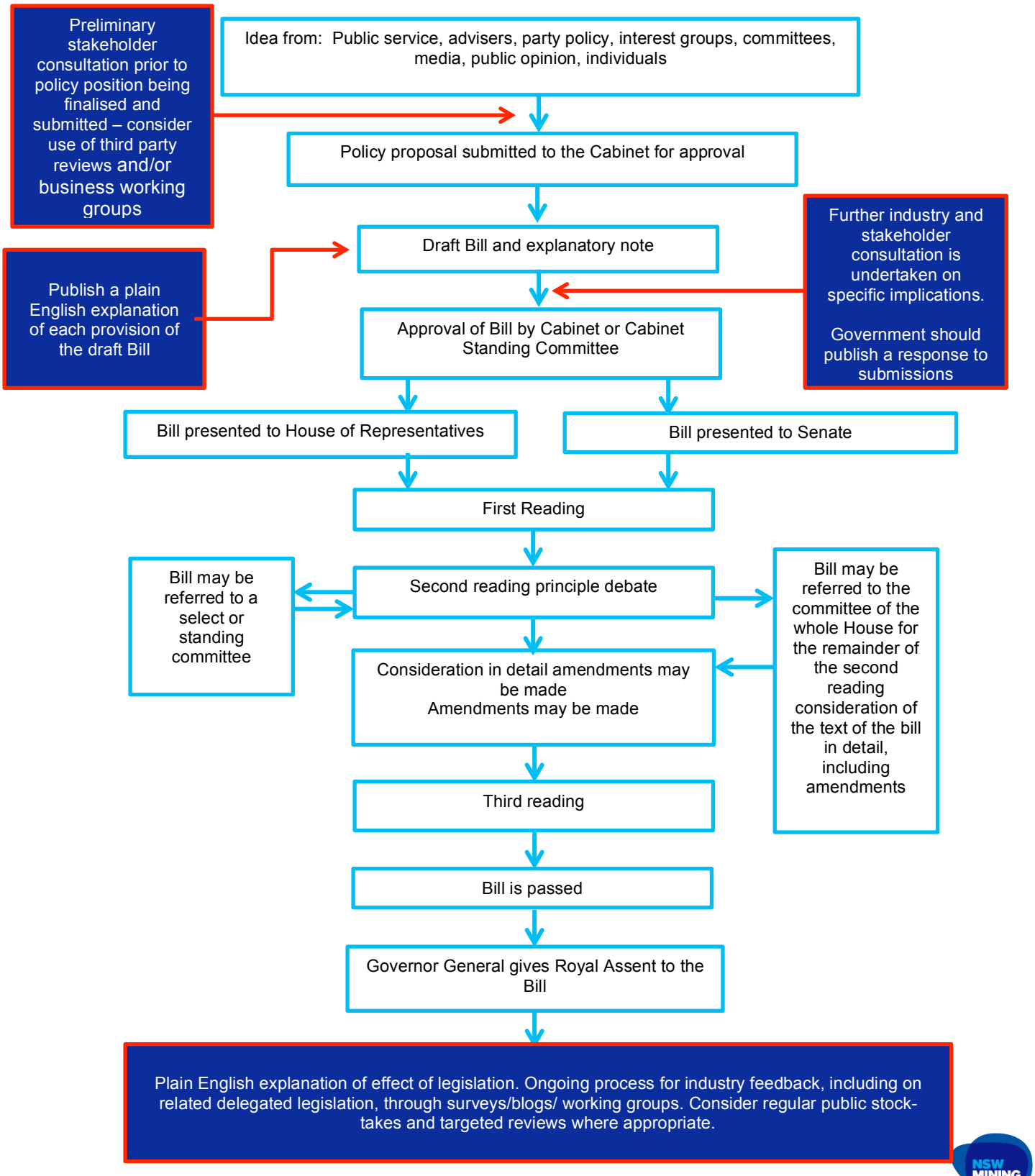
- Working much closer with the mine sites from the beginning of the process, including the selection of options for consideration in the cost benefit analysis and the assumptions used in the cost benefit analysis.

- The industry's reviews (including a report commissioned from an expert) identified several deficiencies in the EPA's cost benefit analysis, raising questions about the justification for the proposals. However, no significant changes were made a result of this input. Requiring an independent review of the cost benefit analysis that was prepared by the EPA could strengthen the analysis and improve stakeholder confidence in the results.

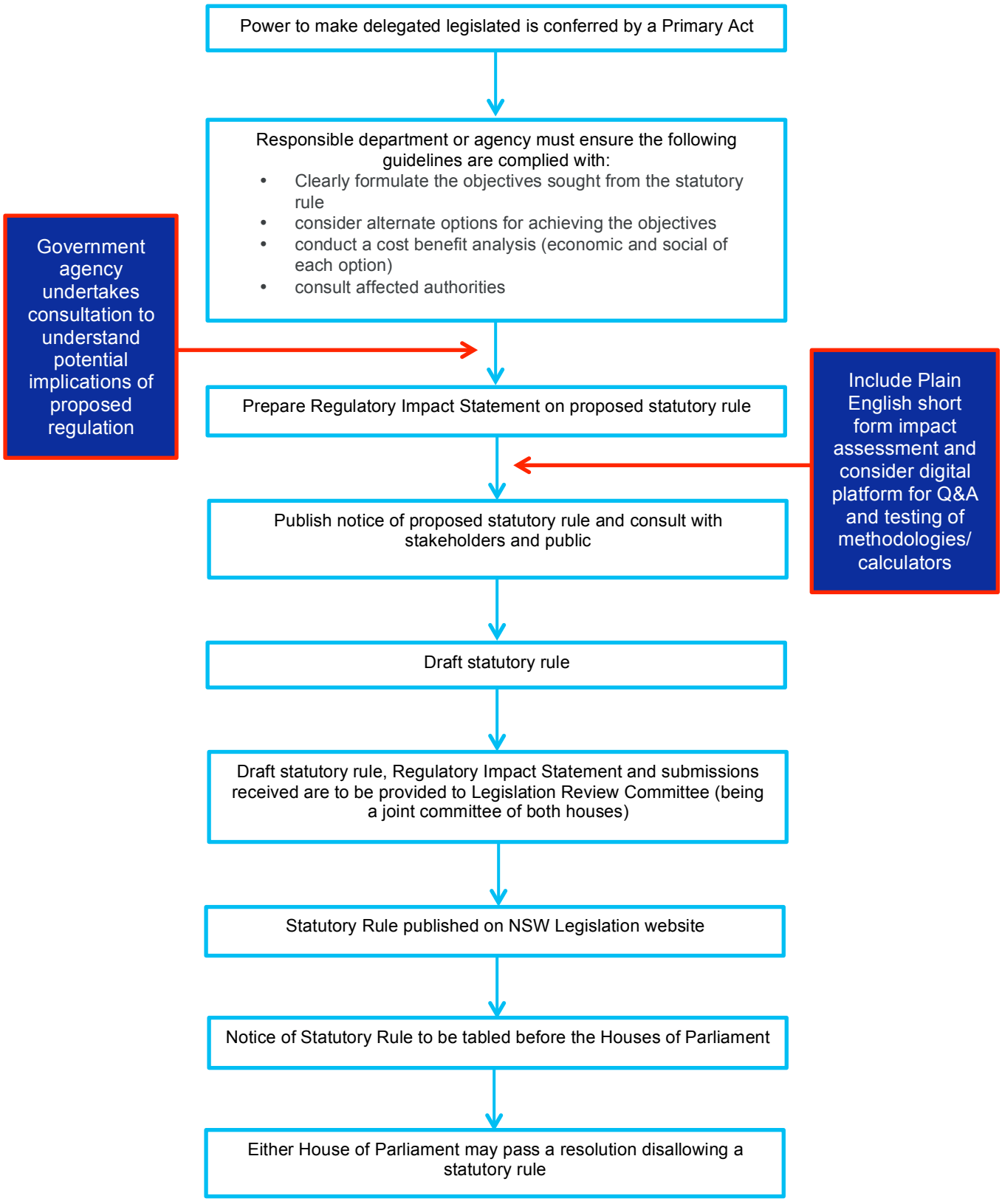
Flowcharts

The NSW Minerals Council has prepared a number of simplified flowcharts which show the current regulatory reform processes in NSW (blue boxes) as well as opportunities that have been identified for improvement in this process in terms of stakeholder consultation (red boxes).

Flowchart: legislation making process



Flowchart: delegated legislation process



Appendix B - Commonwealth Government Productivity Commission review into Major Project Development Assessment Processes (April 2013)

MAJOR PROJECT DEVELOPMENT ASSESSMENT PROCESS

NSW MINERALS COUNCIL SUBMISSION

MARCH 2013

NEW SOUTH WALES
MINERALS COUNCIL LTD

1 Introduction

The NSW Minerals Council (NSWMC) welcomes the opportunity to contribute to the Productivity Commission's study of Australia's major development assessment processes on behalf of the minerals industry of NSW. NSWMC also supports the submission of the national peak body for mining, the Minerals Council of Australia.

An efficient major projects approval process is vital to the continued economic growth of Australian industries including mining. Each state and territory in Australia has its own development assessment process. The Federal Government through the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) requires a separate Australian Government approval for many major projects. The inefficiencies of this process are obvious; frequent duplication between state and Australian Government approvals; and inconsistencies of process for developers operating in more than one jurisdiction. Added to this are considerable inefficiencies in the NSW planning system in both the strategic planning and assessment processes.

The consequences of inefficiencies in the major project development processes are extremely significant including a loss of productivity for industry and increased sovereign risk of investing in Australia. Indicators, including international surveys of investment intentions indicate that the inefficient development assessment process is affecting Australia's attractiveness as a location for investment.

The NSW minerals industry is supportive of changes to the planning system and regulation of the mining industry. The current processes have become unwieldy, duplicative and costly. The NSW minerals industry believes that changes should not be made at the risk to loss of protection for the community or the environment. However there is considerable scope for streamlining and merging of processes, as well as reduction of administrative burden, that can be achieved without any loss of protection for the community or the environment.

1.1 About the NSW Minerals Council

The NSW Minerals Council (NSWMC) is a not for profit, peak industry association representing the State's $20 billion minerals industry. NSWMC provides a single, united voice on behalf of our 100 member companies: 40 full members (producers and explorers), 25 associate members (junior explorers) and 35 associate members (service providers) and works closely with government, industry groups, stakeholders and the community to foster a dynamic, efficient and sustainable minerals industry in NSW.

NSWMC is a major stakeholder in many of the environmental, social, regulatory and economic issues critical to the sustainable development of NSW.

2 Development Assessment in NSW

For the last two years the NSW planning system has been in a state of uncertainty. This was initially caused by the repeal of the major projects provisions of the planning legislation in 2011; and subsequently by the Planning System Review, which will overhaul completely the system of strategic planning and development assessment in NSW and replace the current planning legislation.

The NSW Government has commenced the NSW Planning System Review. The Review should have been completed and new planning legislation introduced by December 2012. The Review has been delayed and the public release of the White Paper and draft legislation is said to be imminent.

Since the change of government in NSW in 2011, considerable changes have been made to the major projects development assessment process:

- The dedicated major project provisions of the *Environmental Planning and Assessment Act 1975* (EP&A Act) have been replaced by State Significant Development.

- The Minister for Planning and Infrastructure has delegated his decision making powers on State Significant Development to the Planning Assessment Commission, and senior officers of the Department of Planning and Infrastructure.

In addition to the Planning System Review the NSW Government has introduced a Strategic Regional Land Use Policy and Aquifer Interference Policy. As a result of these policies, mining projects which have potential to impact strategic agricultural land will be required to pass through a pre-development assessment Gateway Process. The Gateway Process will add considerable time, and cost to the development process. It will increase the regulatory burden on mining proponents in NSW. It is not clear how the already exhaustive assessment process will be enhanced sufficiently by the Gateway to warrant the delay and costs that it will result from this additional process.

The backdrop to this uncertainty about planning in NSW is increasingly worsening sentiment about investing in the state. The Fraser Institute's Survey of Mining Companies ranks the attractiveness of global mining jurisdictions to investors. The 2012-13 Fraser Institute survey found that the overall attractiveness of investing in Australia had declined. While some jurisdictions ranked higher than in the previous 12 months (including Western Australia), NSW dropped from 32 of 93 jurisdictions in 2011/12, to 44 of 96 jurisdictions in 2013/13.[1]

3 Duplication of State and Australian Government process

The first three months of 2013 has seen a number of backwards steps taken in streamlining state and Australian Government assessment processes.

In 2012 there was anticipation that the NSW and Australian governments were moving closer to accreditation of the NSW assessment process for matters of national environmental significance under the EPBC Act. However that reform appears to be stalled, and the current process of undertaking separate assessments continues. This process causes significant delays and increased cost of assessment. Frequently the duplicative processes result in increased costs of offsetting the impacts of projects, without achieving commensurate gains for the environment.

More recently the Australian Government has introduced a 'water trigger' under the EPBC Act, which will require separate assessment of impacts on water of mining and gas projects, which will duplicate the NSW assessment process. The introduction of the water trigger will mean that water will be assessed by up to three different bodies on some mining projects in NSW: the independent gateway panel; the Planning Assessment Commission; and the Australian Government. This process is not efficient, will result in increased delays and costs for projects, and is unlikely to achieve commensurate gains for the environment.

4 Recommendations

NSWMC recommends that the Productivity Commission Study should consider the following approaches to reforming major project assessment processes:

- **Streamlining of state and Australian government approvals**. This is an area of growing duplication. Accreditation of state government approval processes would provide a very significant gain in productivity. This can be done without posing additional risks to the environment or community.

- **Streamlining and introducing statutory time frames for state based approval processes**. The NSW State Significant Development process contains very few statutory timeframes. This process can take between two to three years. While the Department of Planning and Infrastructure is the lead agency, other state agencies are required to provide input into the assessment and this frequently leads to delays. Introducing realistic statutory timeframes would drive a more efficient process and allow for assessment of performance.

[1] Fraser Institute, *Survey of Mining Companies 2012-13,* http://www.fraserinstitute.org/

- **Streamlining independent review, determination and appeals processes**. In NSW it will be possible for a mining project to be assessed by up to three separate independent bodies (the Gateway Panel, a Planning Assessment Commission review panel and a Planning Assessment Commission determination panel) and still be subject to merit appeal to the Land and Environment Court by third parties.

  Third party merit appeals add delay, cost and risk to the development assessment process, and have rarely been successful against mining projects in NSW. The transparency provided by independent review should be an important part of the assessment process. However, as the introduction of new independent assessments/ reviews are designed to ensure better, more transparent decisions are made, this should lead to a reduction of appeal rights for third parties.

- **Streamline additional approvals.** An efficient major development process should include all subsequent approvals. Allowing any approvals to sit outside the exhaustive major development processes, is inefficient and risks the delay/ failure of a project that has been approved.

- **Ensuring that independent determination panels are fit for purpose**. In NSW the Planning Assessment Commission undertakes determination of State Significant Development projects. Traditionally the role of this panel was to review projects, and accordingly it is comprised of experts. This, along with the delegation at the end of the project has led to concerns that the panel is reopening, and duplicating the assessment process. Independent determination panels should be comprised of members who have a background in making balanced planning decisions, and should refer concerns about assessment to the lead assessment for review.

- **Providing clear and transparent assessment policies to guide proponents**. In NSW a lack of clear and transparent assessment policy has been a concern for industry, and has led to unprecedented decisions by both the Planning and Assessment Commission and the Land and Environment Court.

  Major project proponents should be able to rely on compliance with clear policy on impacts, mitigation measures and other matters, to assess the viability of the project and determine whether to proceed, alter the project or abandon the project as unviable. Given the long assessment process, the costs and capital at risk, the conditions on which a project will be approved should be clear before the project reaches the determination phase of assessment. This level of certainty benefits the community, government and proponents.

- **Providing assessment processes proportionate with the significance of a project**. Mining is unlike other development. It is a temporary land use and a dynamic form of development subject to changes as knowledge and technology improves. As a dynamic form of development it is important that mining has access to an efficient process for modifying development consents.

Appendix C - Regulatory or policy changes that affected the NSW mining industry 2011-2017

Regulatory Policy Reform Initiative		Agency	Change/ongoing
Independent Review of Rail Coal Dust Emissions Management Practices in the NSW Coal Chain - NSW Chief Scientist	2015-2016	NSW Chief Scientist	Ongoing
Proposed changes to Order 41 including considering more frequent testing, enhanced lung function testing and introducing fit testing.	2016-2017	Coal Services	Ongoing
Mine Subsidence Compensation Act reform	2016-2017	DFSI	Ongoing
Mine Subsidence Districts Review	2016-2017	DFSI	Change
Removal of Part 3A for the Environmental Planning and Assessment Act (1979)	2011	DPE	Change
Introduction of State Significant Development	2011	DPE	Change
Guideline for Agricultural Impact Statements	2012	DPE	Change
Voluntary Land Acquisition and Mitigation Policy	2014	DPE	Change
Mining SEPP (Resources Significance) Amendment	2014	DPE	Change
IMP Water Regulation and Policy Framework	2015	DPE	Change
IMP Post-approval Guidelines	2015	DPE	Change
IMP Planning Agreement Guidelines	2015	DPE	Change
IMP Independent Audits, Annual Review and Web based reporting Framework	2015	DPE	Change
IMP Mine Application Guideline	2015	DPE	Change
IMP Secretary's Environmental Assessment Guideline	2015	DPE	Change
IMP Resources Significance Advice Policy	2015	DPE	Change
IMP Standard Conditions	2015	DPE	Change
IMP Mine Design Guideline	2015	DPE	Change
Mining SEPP Review	2015	DPE	Change
Draft Hunter Regional Plan	2016	DPE	Change
Review of the Community Consultatative Committee Guidelines	2016	DPE	Change
Draft New England North West Regional Plan	2017	DPE	Ongoing
Strategic Regional Land Use Policy and Plans	2011-2012	DPE	Change
Guidelines for the Economic Assessment of Coal and Coal Seam Gas Proposals	2014-2017	DPE	Change
Planning System Review and the Environmental Planning and Assessment Act (1979) Amendments 2016-17	2011-2017	DPE	Ongoing
Post Approval Guidelines for SSD Projects	2016-2017	DPE	Ongoing
Environmental Impact Assessment (EIA) Improvement Project	2016-2017	DPE	Ongoing
Social Impact Assessment Guidelines	2016-2017	DPE	Ongoing
Review of the Blasting Guidelines for Mining in NSW	2011	DPE	Change
Draft Strategic Agricultural Land Impact Assessment Policy	2016	DPI	No change
Water Sharing Plan for the North Coast Fractured and Porous Roack Groundwater Sources	2016	DPI	Change
Aquifer Interference Policy	2011-2012	DPI	Change
Merger of the Coal Mine Health and Safety Regulation and the Mine Health and Safety Regulation	2012	DRE	Change
Draft ESG2: Guideline for Preparing Review of Environmental Factors	2012	DRE	Change
Protection of the Environment Operations (General) Amendment (Upper Hunter Quality Monitoring Network) Regulation 2012	2012	DRE	Change
Work Health and Safety Bill - Employee Representation	2012	DRE	Change
Draft Mining Operations Plan Guideline	2012	DRE	Change
Mining Petroleum Legislation Amendment (Public Interest) Bill 2013	2013	DRE	Change
Mine Design Guideline 2007 (Implementation of collision management systems)	2013	DRE	Change
Proposed Exploration Drill Hole Template	2013	DRE	Change
Mine Subsidence Compensation Act 2014	2014	DRE	Change
Mining and Petroleum Legislation Amendment Bill 2014	2014	DRE	Change

Walker Inquiry into Land Access Arbitration	2014	DRE	Change
Interim Guidelines for the Allocation of Coal Resources	2014	DRE	Change
Draft Mining Regulation amendments 2015 (Operational Allocation Regulation and Harmonisation and Arbitration Regulation)	2015	DRE	Change
Practice Note of Conflicts of Interest and Bias (Arbitrators)	2015	DRE	Change
Guideline for Agricultural Impact Statements for Exploration	2015	DRE	Change
Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016	2016	DRE	Change
Incident Prevention Strategy	2016	DRE	Change
Review of the Rehabilitation Cost Estimates Guideline and Tool	2016	DRE	Change
Mining Act Authorities - Financial Capability and Environmental Performance Guideline	2016	DRE	Change
Land Access for Exploration - Templates for Agreement	2016	DRE	Change
ESG4 Environmental and Rehabilitation Compliance Report for Exploration	2016	DRE	Change
DRE Consultation Paper - Publication of Work Summaries (Exploration)	2016	DRE	Change
Draft Native Title Protocol and Guideline	2016	DRE	Change
Maintenence Competence Scheme for Practicing Certificates	2017	DRE	Change
Ancillary Mining Activities - Changes the Mining Act 1992	2016-2017	DRE	Ongoing
Review of the Mine Safety (Cost Recovery) Act 2005	2011-2012	DRE	Change
Review of the Mine Safety Levy	2011-2017	DRE	Change/Ongoing
Work Health and Safety (Mines) Act 2013 and Work Health and Safety (Mines) Regulation 2014	2012-2015	DRE	Change
Mining Act Amendment - Harmonisation Bill	2015-2016	DRE	Change
Mining Act Amendment - Land Access Arbitration Bill	2015-2016	DRE	Change
Mining Act Amendment - Strategic Release Bill	2015-2016	DRE	Change
IMER Exploration Code of Practice - Environmental Management	2015-2017	DRE	Change
IMER Exploration Code of Practice - Rehabilitation	2015-2017	DRE	Change
IMER Exploration Code of Practice - Community Consultation	2015-2017	DRE	Change
IMER - Standard Licence Conditions	2015-2016	DRE	Change
IMER - New and updated forms (e.g financial capability)	2015-2016	DRE	Change
IMER - Updated Guidelines (for work programs, annual activity reporting, assessment for exploration activities, REF etc.)	2015-2017	DRE	Ongoing
IMER - Industry Guide for Mineral Explorers	2015-2017	DRE	Ongoing
IMER review project	2016-2017	DRE	Ongoing
Strategic Release Framework for Coal and Petroleum Exploration	2015-2017	DRE	Change
Proposed amendments to the Work Health and Safety (Mines and Petroleum Sites) Regulation 2014	2016-17	DRE	Ongoing
Statutory review of the Work Health and Safety Act 2011 (NSW)	2016-2017	DRE	Ongoing
Coal Mine Particulate Matter Best Management Practice Pollution Reduction Program	2011-2012	EPA	Change
Protection of the Environment Amendment Legislation 2011 - notification, monitoring and Pollution Incident Response Management Plans	2012	EPA	Change
Radiation Control Regulation 2013	2013	EPA	Change
Wheel Generated Dust Pollution Reduction Program	2013-14	EPA	Change
Disturbing and Handling Overburden under Adverse Weather Conditions Pollution Reduction Program	2013-14	EPA	Change
Trial of Best Practice Measures for Disturbing and Handling Overburden Pollution Reduction Program	2013-14	EPA	Change
EPA Exposed Land Pollution Reduction Program	2014	EPA	Change
EPA Risk Based Liscensing Framework	2014	EPA	Change
Approved Methods for the Modelling and Assessment of Air Pollutants in New South Wales (2016)	2017	EPA	

Hunter River Salinity Trading Scheme Review and Amendment of Regulation	2013-2016	EPA	Change
Best Practice Measures for Reducing Non-Road Diesel Emissions and NSW Coal Mines	2014-2017	EPA	Ongoing
Draft Industrial Noise Guideline	2015-2017	EPA	Ongoing
Clean Air for NSW Consultation	2016-2017	EPA	Ongoing
Load Based Licensing Scheme Review	2016-2017	EPA	Ongoing
Review of the Local Government Rating System	2016-2017	IPART	Ongoing
Draft Dust Assessment Handbook for Upper Hunter Open Cut Mines	2011	OEH	Change
Review of the BioBanking Scheme	2012	OEH	Change
Rail Infrastructure Noise Guideline	2012	OEH	Change
Aboriginal Cultural Heritage - Consultation on model	2013	OEH	No change
Major Projects Offset Policy	2014	OEH	Change
Framework for Biodiversity Assessment	2014	OEH	Change
Biodiversity Conservation Act 2016	2016	OEH	Change
NSW Draft Koala Strategy	2017	OEH	Ongoing
Upper Hunter Strategic Assessment	2011-2017	OEH	Ongoing
Biodiversity Legislation Review	2014-15	OEH	Change
Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species	2015-2016	OEH	Change
Biodiversity Assessment Method	2016-2017	OEH	Change
Biodiversity Conservation Regulations and supporting products	2016-2017	OEH	Change
Biodiversity Conservation Fund Calculator	2016-2017	OEH	Change
Aboriginal Cultural Heritage - Legislation	2016-2017	OEH	Ongoing
NSW Climate Change Policy Framework	2016-2017	OEH	Ongoing
Worker Representation and Participation for Coal Mines Guide	2017	Resources Regulator	Ongoing
Causal Investigation Policy	2017	Resources Regulator	Change
Harmonisation of the Work Health and Safety Laws	2012-	Safe Work Australia	Ongoing
Explosives Regulation 2013	2013	WorkCover NSW	Change

Appendix D – Additional case studies

Case Study: Safe Work Australia review of Workplace Exposure Standards

What is the purpose of the regulatory reform?

The limits to which workers can be exposed to hazardous airborne chemicals are published in the *Workplace exposure standards for airborne contaminants*.

Safe Work Australia is evaluating the Workplace exposure standards (WES) for airborne contaminants to ensure they are based on the highest quality, contemporary evidence and supported by a rigorous scientific approach.

Safe Work Australia reviewed the workplace exposure standards framework and the effectiveness of the current workplace exposure standards in modern workplaces. The review found that many of the WES values require updating and highlighted that toxicological knowledge and recommendations of airborne hazardous chemicals have advanced significantly since the workplace exposure standards were first adopted in 1995.

What process is being followed to introduce the reforms?

The following is an overview of the process being undertaken:

Date	Event
June 2018	Methodology published. Recommendations for workplace exposure standards will be made by following a consistent process of decision-making, and evaluating the information from the primary data sources (with supporting information from secondary sources where appropriate). Recommendations will also be made for values and notations for carcinogenicity, sensitisation of the skin or respiratory tract, and a skin notation where there is a risk of the chemical being absorbed through the skin. This process may result in a recommendation to: • keep the existing WES value or notation • amend the WES value or notation, or • to withdraw the existing values or notations. In some cases, there may not be enough data available for a recommendation or there may be uncertainty about the data. In these cases, an interim WES value may be recommended, accompanied with either: • a recommendation for a further assessment of the data for the chemical, or • a recommendation for a priority evaluation of the data for the chemical in the next scheduled review of the workplace exposure standards. Each evaluation will be peer reviewed by an independent expert. Once the evaluations and peer review is complete, individual chemical evaluation reports will be made available.
July - August 2018	Open tender for evaluation of workplace exposure standards.
November 2018 – January 2020	Commencement of evaluations and peer review.

February 2019 – February 2020	Public comment.
March 2020	Final, revised workplace exposure standards for airborne contaminants.

What consultation is being undertaken with stakeholders and the broader community?

There will be approximately 700 WES recommendations released for public comment through 16 different releases from February 2019 to February 2020. There are approximately 50 chemicals in each release and each release will be open for comments for 4 weeks.

The draft evaluation reports and recommendations for the WES will include:

- a recommended WES value
- information about the basis of the recommendation, and
- a summary of the data relied upon to make the recommendation.

The recommended WES values are health-based recommendations made by expert consultants.

SWA seeks feedback on the recommendations, in particular, comments of a technical nature regarding:

- the toxicological information and data that the value is based upon, and
- the measurement and analysis information provided.

What was done well?

There has been a clear process and timetable set out for SWA's review of Workplace Exposure Standards, with stakeholders being kept informed regularly. Other positive aspects of the review include:

- Safe Work Australia has maintained and regularly updated a website which provides specific information and documents in relation to the WES review and how the community can get involved in the process.
- SWA personnel have been easily contactable and willing to provide updates at industry meetings.
- Collaboration and input from across the whole of Australia and many different industries.
- Flexibility in allowing submissions to be made after the closing date for a Release to ensure that all feedback is captured.

What could have been done better?

Considerations that would aid in improving the process include:

- The review makes health based recommendations and does not factor in economic or technical feasibility. From a practical perspective, economic and technical elements are relevant to determining how a workplace exposure standard will operate in the real world. While these elements can be raised by stakeholders during the public consultation, the release into the public of health based recommendations has an impact on expectations, such that once released it is difficult to change the standard to a more feasible level and there may be pressure for the WES to remain at the health based recommendation. A preferable approach would be for the initial recommendation to adopt a more wholistic approach.
- With approximately 50 chemicals being released in each Release and the frequency of releases every few weeks, it is difficult to envisage that there will be sufficient time to thoroughly prepare and review all the WES recommendations. This includes the initial evaluations, peer reviews and stakeholder input.
- In respect to respirable coal dust and respirable crystalline silica, the coal mining industry has a wealth of Australia specific data residing with Coal Services around the incidence rates

at the present WES. It would be useful if this Australia specific data could be taken into account in the review.

- Following the consultation periods, industry groups, including the NSW Minerals Council, were not provided with information as to how their concerns and recommendations provided in their respective submissions have been addressed by SWA and taken into account to help form the final recommendation.

Case Study: Environmental Impact Assessment Improvement Project

What was the purpose of the regulatory reform?

The Department of Planning and Environment (DPE) is reviewing Environmental Impact Assessment (EIA) for State significant projects in NSW to identify areas for improvement. In October 2016, the DPE invited feedback from the community and other stakeholders on a discussion paper which outlined proposed improvements.

DPE considered the way NSW approaches EIA and the approaches of other jurisdictions, both within Australia and internationally.

New guidelines are intended to be implemented which will:

- create a consistent framework for setting the scope of the EIS.
- ensure earlier and better engagement with the community and other stakeholders.
- improve the quality of EIA documents.
- provide a standard framework for setting conditions for the construction and operation of projects.
- provide greater clarity on the approved project to improve post-approval compliance.
- increase accountability for the practice of EIA professionals.

Additional improvements, not included in the draft guidelines, are also being developed. These will give further guidance on an approach to cumulative impact assessment and professional practice requirements for those undertaking EIA.

DPE are also proposing changes to the *Environmental Planning and Assessment Regulation 2000* to give effect to the guidelines.

What process was followed to introduce the reforms?

Date	Event
October 2016	Discussion paper released describing potential improvements to the EIA process, including the post approval phase of State significant projects.

June 2017	The release of nine guidelines in a Draft Environmental Impact Assessment Guidance Series which were open for comment until 1 September 2017: • Guideline 1 - Overview of the EIA Improvement Project • Guideline 2 - Community Guide to EIA • Guideline 3 - Scoping an Environmental Impact Statement • Guideline 4 - Preparing an Environmental Impact Statement • Guideline 5 - Responding to External Submissions • Guideline 6 - Community and Stakeholder Engagement • Guideline 7 - Approach to Setting Conditions • Guideline 8 - Modifying an Approved Project • Guideline 9 - Peer Review
July 2017 – August 2017	Community information sessions were held across NSW.
August 2019	The release of seven guidelines and a Community Guide to EIA in a Guidance for State Significant Projects series as part of targeted consultation with a range of stakeholders, including the mining industry: • Guideline 1 - Preparing a Scoping Report • Guideline 2 – Preparing an Environmental Impact Statement • Guideline 3 – Preparing a Peer Review Report • Guideline 4 - Preparing a Submissions Report • Guideline 5 - Preparing an Amendment Report • Guideline 6 – Preparing a Modification Report • Guideline 7 – Engagement in EIA

What consultation was undertaken with stakeholders and the broader community?

DPE prepared a Discussion Paper that explained the scope of the EIA Improvement Project, presented the key issues identified to date and explained the proposed initiatives to address the key issues. Submission were open from 17 October to 27 November 2016. DPE received responses from 149 participants to the online survey and 52 written submissions with commentary on the proposed initiatives.

Further consultation was undertaken to allow DPE to develop the draft guidelines and this occurred in November 2016 – January 2017. A total of 15 workshops were held – two with Councils, six with agencies and seven with key stakeholders. Following this the nine guidelines in a Draft Environmental Impact Assessment Guidance Series were released and open for comment until 1 September 2017.

From July to August 2017, 10 community information sessions were held at Parramatta, Ballina, Sydney (x3), Queanbeyan, Muswellbrook, Newcastle, Wollongong and Dubbo.

DPE undertook a targeted consultation with a range of stakeholders, including the mining industry on a revised seven guidelines and a Community Guide to EIA in a Guidance for State Significant Projects series. Feedback was due back 6 September 2019.

What was done well?

- The NSW Government has maintained a website which provides specific information and documents in relation to the EIA Improvement Project and how the community can get involved in the process;
- DPE met with key stakeholders and industry and community groups to give those groups an opportunity to discuss their specific views and concerns in detail, as well as provide a better understanding around the detail of the updated Guidelines and clarify aspects of the reforms.

- Significant improvement to the Guidelines between the 2017 and 2019 versions which reflects evident consideration of the feedback received from stakeholders.

What could have been done better?

- The EIA Improvement Project has been in progress for over 3 years, which is an extensive length of time.
- Following the consultation periods, industry groups, including the NSW Minerals Council, were not provided with information as to how their concerns and recommendations provided in their respective submissions had been addressed by DPE in the Guidelines.
- The Guidelines include an increased emphasis for proponents and the Government to engage with the community and stakeholders throughout the life of a project, particularly earlier during the inception and scoping phase of projects. The intent of the Guidelines is generally supported given most proponents for mining projects undertake extensive community and stakeholder engagement throughout the life of a project. However, there are a number of statements within the draft Guidelines which are likely to raise community expectations unrealistically around its role in defining and reviewing a project.