Hon Bill Johnston MLA
Minister for Mines and Petroleum; Energy; Industrial Relations;

Our Ref: 71-16080

Resources Sector Regulation Study
Ms Lisa Gropp
Productivity Commission
LB2, Collins Street East
MELBOURNE VIC 8003

Dear Ms Gropp

WESTERN AUSTRALIA'S ADVICE TO PRODUCTIVITY COMMISSION ON DRAFT REPORT ON RESOURCE SECTOR REGULATION

The Western Australian Government has noted the Productivity Commission's Draft Report on Resources Sector Regulation and provides the attached advice for your consideration.

In finalising this study, the Productivity Commission must ensure that it engages very broadly with all affected stakeholders. I emphasise this because I am disappointed by the draft report.

Quoting the Terms of Reference, the Productivity Commission was asked *to identify effective regulatory approaches to the resources sector and highlight examples of best-practice regulation* to support the development of a national benchmarking framework.

Unfortunately, the current draft report fails to deliver on the terms of reference, going much broader by presenting itself as a document for major reforms across a range of areas that affect the resource sector. This fails to recognise Australia is a world leader in resource development and regulation.

The report also provides an unsophisticated review of resource sector regulation which does not demonstrate an understanding of the need to balance commercial interests with broader societal interests. As a result, the draft report fails to contribute constructively to the ongoing improvement of resource sector regulation and instead, risks undermining it.

Consequently, the Western Australian Government does not support the Productivity Commission's study in its current form notwithstanding that we fully support ongoing improvement to resource sector regulation.

To ensure Western Australia remains on the frontier of best practice regulation, Western Australia will continue to enhance its regulation of the resources sector. This will be done in consultation with the sector and the community as well as the

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Australian Government where issues of coordination or duplication exist. We will do so for the benefit of the broader community and having regard to the net benefits of regulation as well as the efficiency of regulatory frameworks.

An example of this is the WA Recovery Plan, which provides for stimulus for exploration and an environment online portal, which aims to reduce joint State and Commonwealth approval processes by six months and new laws to simplify approvals for mining. However, regulatory reforms should not be rushed, but done carefully with proper community consultation, and consideration of broader societal impacts.

Yours sincerely

Hon Bill Johnston MLA
Minister for Mines and Petroleum; Energy; Industrial Relations

Att

2 SEP 2020

Advice to the Productivity Commission
Productivity Commission Draft Report, Resources Sector Regulation

GENERAL COMMENTS

The Productivity Commission's (PC) Draft Report on Resources Sector Regulation fails to deliver clearly on the terms of reference, while reporting on a range of issues that are out of scope. The consequence of this is that the draft report does not provide clear direction to governments and regulators how to make improvements that significantly impact business investment, while not undermining the effectiveness of regulation.[1]

In its current form, there is a risk that the PC report could undermine prudent regulatory reforms. Regulatory reform should be done carefully through better analysis and consultation. Otherwise, regulatory outcomes may be ineffective and have minimal impact on business investment.

Misinterpretation of the Terms of Reference

The PC has interpreted both the definition of regulation and the terms of reference very broadly. By doing so, the review considers any regulatory framework and government policy that affects the resources sector. In addition, the PC has gone beyond the terms of reference request to provide best practice examples, and made a number of detailed findings (not necessarily related to the Terms of Reference) and recommendations (which it was not asked to make).

The result of this is that the PC has spread itself too thinly. The PC appears to try to redo the work that Australian policy makers and regulators have achieved through incremental enhancements over many years. Notwithstanding that the PC itself recognises that those frameworks are world leading.

As a result, there is too much noise in the draft report (immaterial or out-of-scope matters), and therefore does not clearly deliver on the terms of reference.

Limited analysis

The PC adds limited analysis to assess what regulation has a material impact on business investment, while not undermining the effectiveness of regulation.[2] It largely appears to have asked regulated entities about what has material impact.

Unsurprisingly, regulated entities have suggested that they are over-regulated, as is in their commercial interest. However, this contributes little insight on how to improve efficiency without undermining environmental and social outcomes, or having a material impact on business investment.

Firstly, the PC has not applied an independent framework for assessing if regulatory issues are likely to have material effect on business investment, let alone would compromise effective regulation. That is, in addition to account for the impact on operational costs on regulated entities, also to account for the objectives of regulation and the interests of other stakeholders that these regulations seek to protect.

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1 Please refer to the Terms of Reference.

2 Please refer to the Terms of Reference.

As a starting point, the PC could have taken into account its own observation that there are good reasons for resources sector regulation and Australia is at the frontier of leading practice. Therefore, most regulatory practices are unlikely to have significant impact on business investment, without affecting the effectiveness of regulation.

Australian jurisdictions already have comprehensive system in place to assess the net impacts of regulation. The PC is not adding to the framework used by policy makers and regulators, but using COAG's own principles for best practice regulation for its assessment.

Secondly, the PC appears to have spent little time on accounting for and understanding why there are regulatory differences[3] or duplication across jurisdictions, and if so whether there is merit in changes and/or greater alignment.

Having had a more sophisticated analytical framework in place and having provided more guidance would have contributed to better targeting stakeholders' feedback on regulatory issues that have material impact on business investment without affecting the effectiveness of regulation.

Recommendations to the PC

The PC draft report would have been more helpful, if the PC had taken proper account of its own key observations about resources regulation in Australia:

- Resources are the property of the Crown, and the community should benefit from their extraction and be protected from the negative consequences of their extraction.
- The sector receives its "social licence" to operate by sharing the benefit of the Crown's resources with the community and by being soundly regulated.
- Resources sector regulation needs to strike the balance between adequately protecting the community from the inherent risks of resource extraction whether to personal safety, the environment, native heritage or other issues.
- Recognised Australia's (often) world leading regulatory environment is a result of Australian governments adopting the very same principles[4] that the PC adopts for its assessment.

As stipulated in the terms of reference, the PC should have identified:

- *What regulatory practices have material impact on business investment.*[5] The PC should have undertaken its own independent assessment, accounting for the effectiveness of achieving the regulatory objectives, as well as the existing system in place to ensure efficient regulation.
- *Effective regulatory approaches to the resources sector and highlight examples of best-practice regulation across the Australian resources sector and internationally, taking into account the unique regulatory challenges facing individual jurisdictions.*[6]

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[3] The terms of reference ask the PC to consider this.

[4] Australian Governments have adopted COAG's best practice principles for regulation and regulatory impact assessments for many years.

[5] Please refer to the Terms of Reference.

[6] Please refer to the Terms of Reference.

KEY ISSUES

Terms of Reference

The Terms of Reference asked the Productivity Commission to:

...focus on regulation with a material impact on business investment in the resources sector. The Commission is asked to identify effective regulatory approaches to the resources sector and highlight examples of best-practice regulation across the Australian resources sector and internationally, taking into account the unique regulatory challenges facing individual jurisdictions.

Note: Please refer to Attachment 1 for the terms of reference.

It appears that the PC has interpreted the terms of reference incorrectly. While there is some scope to interpret the terms of reference, the terms of reference clearly focus on best-practice resources regulation, balancing the role of regulation with the cost of regulation and presenting successful examples.

In addition, the PC has adopted a too broad definition of regulation that extends beyond what relates to regulation of the resources sector per se, and to issues that are not regulatory but a matter of Government policy.[7] Examples of this are royalties, gas reservation policies, native title issues (which relates to a property right) and local content policies.

In combination with the lack of guidance provided to consulted parties, the draft report largely reflects the long held views of regulated industries, which have a commercial interest in being subject to less regulation. This focuses solely on the cost of regulation without adequately demonstrating an understanding of the purpose of regulation and its benefits (notwithstanding that the report acknowledges this).

As a result of these issues, the draft report makes a number of detailed recommendations about issues that are often marginal (unlikely to have significant impact on business investment) or out of scope. This distracts from the identification of best practice examples in Australia or elsewhere.

It is recommended the PC more closely consider the terms of reference (for example, by reverting to the terms of reference for each chapter and seek to address those).

It should place greater emphasis on identifying regulations that have material impact on investment and highlight Australian best practice approaches and tools implemented (that is, revert to the original purpose of the review and feed into best practice benchmarking).[8] By doing this, it would also contribute to addressing industry concerns about inconsistent treatment of similar projects across jurisdictions.

Investment regime

Australia and Western Australia in particular (see the box below), are widely recognised as world leading investment destinations because of its resource reserves, policies and regulatory environment.

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[7] *"[A]ny laws, government policies and rules that are intended to control or influence specific aspects of resources activity. This encompasses a range of legal instruments including statutes, subordinate legislation (regulations) and ministerial orders, as well as less formal instruments that companies are expected to comply with, such as standards, guidelines and codes of conduct."* (p65-66)

[8] The Terms of Reference originated from COAG Energy Council Strategic Reform (now the National Federation Reform Council) Agenda Action 1 to develop a national framework for best-practice benchmarking.

Western Australia' investment regime

Western Australia's investment regime is consistently regarded as among the best in the world whether as measured by industry surveys such as the Fraser Institute, or by investment in mining and exploration, accounting for around 50 per cent of Australia's investment.

Notwithstanding the difficult circumstances times during the COVID pandemic, WA continues to attract investment with a significant pipeline of investments ($118 billion in March 2020), and WA will be leading this growth through investment in iron ore production sustaining projects...and this is supported by ABS March 2020 mining investment figures

In the context of COVID recovery, it is also worth emphasising that the resources sector has fared significantly better than the rest of the economy.

However, the PC does not focus on practices that contribute to this, why there are differences[9], or establish a case for changes that provide a net benefit to society. Instead, the draft report seeks to identify improvements across the whole regulatory regime and other government policies that affect the resources sector across all Australian jurisdictions, which is too broad an objective for the PC, and largely out of scope.

The Terms of Reference asks the PC to focus on regulation with a material impact on business investment in the resources sector. The PC does not present a framework for assessing effective and efficient regulation, including:

- How to balance outcomes of regulation in terms of evidence based outcomes (for example, safety and environment) and the impact on business. There is limited recognition that Australian jurisdictions already have frameworks in place that seek to ensure efficient regulation and net benefit of regulation.
- How to assess what issues would have a material impact on business investment, aside from noting that delay cost typically outweighs any direct cost of investment (p.11). The PC appears to rely on business stakeholders to identify issues that have a significant impact on investment (p. 221).
  - This establishes a review dynamic where stakeholders have an incentive to raise any issues with regulatory frameworks that reflect commercial interests, rather than identifying inefficient regulation (that unnecessarily affects business investment).
  - As a result, the draft report is superficial in its approach; suggesting minor changes to the regulatory frameworks; or major change or removal of sound regulation, neither of which are likely to have material impact on business investment or provide significant stimulus.

[9] Please refer terms of references about "unique regulatory challenges facing individual jurisdictions".

Role of regulation and regulatory reform

Regulation of the resources sector

The PC correctly observes that:

Two principal factors motivate strict regulation of the resources sector in Australia. First, resources (with a few exceptions) are owned by the Crown on behalf of the entire community. Hence, governments have an interest in managing resource development to deliver a community dividend. Second, over their lifecycles resources activities have the potential to cause harm to the environment, sites of cultural and heritage significance, workers, landowners and surrounding communities. Given the physical nature of resources activity, some level of harm is unavoidable, but regulations seek to mitigate this to maximise net benefits to the community. (p.3)

However, the PC fails to account for this in its assessment of the issues raised by regulated entities. As is often observed, regulators would probably not be doing their job well if regulated entities have no issues with regulation.

Australian context

The PC correctly observes that:

Australia is generally deemed to be a relatively desirable place to invest. Investors are attracted by Australia's political stability, protections for property rights, relatively predictable (if cumbersome) regulatory regime and good infrastructure. Environmental outcomes, as set out in national State of the Environment reports, are also considered to be relatively strong. And the regime has facilitated many billions of dollars in investment over several decades, suggesting that the regulatory system has not acted as a significant brake. (p.8)

Australian regulators appear to be generally at or near the frontier of leading-practice regulation globally. Accordingly, most examples of leading practice are sourced from Australian jurisdictions. (p. 63)

In addition to noting that Australia is a competitive investment destination with a world-class regulatory system near the frontier of regulatory practice, the PC also adopts COAG's best framework for regulatory practice to assess individual regulatory practices. [10]

Regulatory reform

In its draft report, the PC proposes regulatory reforms and policy changes based on the same policy principles that Australian governments and regulators have used over many years to implement and incrementally improve regulation of the resources sector. [11]

The PC does not make a case for why its relatively truncated process delivers a more considered outcome. The PC provides no additional analysis, no recommendations to improve regulatory principles or guidelines, or undertake careful cost-benefit analysis of its proposed changes, as policymakers are required to. Substantially, the PC contribution is to reflect the well-known views of regulated entities.

Australia has strong underlying regulatory principles and sound regulatory practices. The fact that Australia is consistently being regarded as a world leading investment destination, is not despite this but, in part, a result of this. As discussed in the previous section, both surveys and actual investments provide evidence of this.

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[10] COAG (Council of Australian Governments) 2007, guidelines for Best Practice Regulation by Commonwealth Office of Best Practice Regulation, as well jurisdiction guidelines for best practice regulation by Treasures etc.

[11] Such as the Western Australian review of the Native Titles Act, or initiatives such as Streamline WA

Unfortunately, the PC review has failed to consider regulatory approaches in this context. Instead, focusing on industry identified shortcomings, which potentially undermine good regulatory outcomes rather than contribute to them.

Regulatory reforms should be done carefully through better analysis and consultation. Otherwise, regulatory outcomes may be undermined, while the impact on business investments would be minimal. This would be detrimental to the Australian.

Gas Reservation Policies

The PC appears to identify gas reservation policies as inefficient regulations that materially impact business investment (see Attachment 2).

The Western Australian gas reservation policies are not a regulation and out of scope. Individual policy positions do not form part of the review.

Furthermore, the draft report's discussion of gas reservation polices is unbalanced. While reserving a small share of gas for domestic purposes may be contrary to the commercial interests of the affected companies, the application of reservation policies has not demonstratively impacted supply, prices and investments.

Gas reservation policies require a small share of gas be reserved for the domestic market, and:

- have operated effectively in Western Australia with bi-partisan approval since 2006 and have delivered bi-partisan policy goals, which are about benefit sharing and addressing a shortcoming of the market.[12] The Western Australian LNG industry is based on large-scale offshore gas developments in the state's remote north, with LNG processing and export facilities distant from centres of gas demand. There appear to be strong commercial drivers for LNG exporters to prioritise international markets over engagement with domestic consumers. Recent experience on the east coast bears this out;
- have ensured the domestic market is well supplied, and avoided the supply (and price)[13] issues that have plagued the eastern market for a number of years; and
- similar polices are being considered for the Eastern States. [14]

The application of such policies ties back to benefit sharing noted in the PC's report. The WA Domestic Gas Policy ensures LNG exporters make gas available for local consumers and economic development by requiring them to reserve gas, have domestic supply infrastructure in place and market gas in good faith to local consumers. Local gas supply has grown alongside the LNG industry, and ongoing exploration has led to substantial new finds in recent years. As a result of its successful operation, the policy enjoys bipartisan support in WA – support which also appears to be emerging nationally.

Royalties

Royalties are part of a broader fiscal regime for benefit sharing, and should not have been considered as a part of this study. Any review of royalties should be in the context of broader taxation issues.

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[12] Successive WA Governments have maintained a domestic gas policy ever since helping underwrite Australia's first LNG project, the North West Shelf.

[13] ACCC supports gas reservation.

Institute for Energy Economics and Financial Analysis (IEEFA) has identified gas reservation as a driver to push prices down (not up).

[14] Other jurisdictions (than Western Australia and now Queensland) appear to show increasing support including the Australian Government through its Australian Domestic Gas Security Mechanism (ADGSM) and more recent proposal for a national reservation policy. (A final decision on the scheme is expected to be made by February 2021).

In addition, the broader Australian royalty regime does not appear to have material impact on investment into Australia's resources sector.

Native title and heritage

The PC has made a number of recommendations in relation to Native Title and Heritage (see Attachment 2). Native title and heritage issues are substantially about property rights and the protection of those. As such, they should not be considered as a part of this report process.

Native title rights and interests recognised under the *Commonwealth Native Title Act 1993* essentially relate to the right to access, use and control land, which may also be simultaneously subject to a range of legal tenures recognised under various State / Territory statutes. Aside from not relating to resource regulation, the legal framework is complex and expands over many policy areas. Therefore, these issues should also be considered in a broader policy context.

The PC makes a number of specific recommendations about native title and heritage issues. Some of these issues do not appear to affect the resources sector as they relate solely to the operation of the broader native title and heritage regime operation and its ability to deliver benefits to indigenous communities. For others, no case is made for how they have a material impact on business investment.

Mining Rehabilitation Fund

The PC makes a number of recommendations in relation to mining rehabilitation identifying best practice (Attachment 2, leading practices 7.7 to 7.9).

Mining rehabilitation is a complex issue because policy makers and regulators have to implement effective regulation that ensure rehabilitation, and efficient regulation that do not impose unnecessary cost on business, which could materially impact business investment. A large portfolio of abandoned mine sites and companies with different capacity to pay, different project portfolios, and different risk profiles adds to the complexity.

In Western Australia, the adoption of the Mining Rehabilitation Fund in conjunction with the option to impose company specific bonds on certain operations reflects this.[15]

It is unclear whether the PC has accounted for the specific regulatory challenges facing individual jurisdictions, or understands the practicalities of mining rehabilitation in Western Australia where:

- a large pool of historical abandoned mine sites, which has built up historically largely under a bond regime;
- a large rehabilitation event is likely to be addressed over multiple years, allowing for a drawdown of the fund, while it continues to build up and levy changes and other measures can be considered.

[15] Noting that a significant portfolio of abandoned mine sites built up historically under a regime, which used bonds.

While the Western Australian Government can consider other measures including bonds, a pooled arrangement:

- builds up sufficient funds over a short period, and as such insufficient funds are a temporal or transition period;
- avoids imposing prohibitive cost on industry and potentially affecting business investments;
- can lead to less administrative cost (less need to undertake complex risk assessment of individual companies projects potentially on an annual basis) for both regulators and regulated companies; and
- allows for adjustments over time to deal over the overall portfolio of risk including abandoned mine sites.

We note that the operation of fund is regularly reviewed including by independent consultants and the Department of Treasury's Better Regulation Unit reviews this assessment.

It is also worth noting that mining rehabilitation occurs in a complex legal environment. When problems occur this typically involves complex interactions with the *Corporations Act 2001 (*Cwlth*)*, which has the unintended consequence of removing mine rehabilitation from the issues that failing companies have to deal with.

As such, Governments need a broad portfolio of measures to deal with this, which minimise the impact on good corporate citizens' investment decisions, the taxpayer and protect the environment. Western Australia is happy to engage with the PC to clarify the Western Australian context.

CONSULTATION

It is important that the PC ensures that it consults widely with the broader community (not just resource sector companies) prior to finalising its study. This includes Western Australian regulators and community representatives including first nation representatives[16] and particularly on controversial matters raised in this document to the PC.

Western Australia is happy to engage with the PC informally on a number of issues raised in the draft report to assist the PC re-shape its report.

To ensure it remains on the frontier of best practice regulation, Western Australia will continue to improve its regulation of the resources sector for the benefit of the broader community and to grow employment and economic growth in the COVID recovery process.

This will be done in consultation with the sector, the community and the Australian Government where issues of duplication exist. We will do so having regard to the net benefits of regulation, and efficiency of regulatory frameworks.

An example of this is the WA Recovery Plan, which provides for stimulus for exploration and an environment online portal, which aims to reduce joint State and Commonwealth approval processes by six months and new laws to simplify approvals for mining. However, regulatory reforms should not be rushed, but done carefully with proper community consultation, and consideration of broader societal impacts.

OTHER ISSUES

Attachment 2 flags other issues identified in the draft report.

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[16] I note recent destruction aboriginal heritage sties reported in the media.

Attachment 1 Productivity Commissions Terms of Reference

BACKGROUND

Commonwealth, state and territory governments are responsible for managing resources in their jurisdictions and are all involved in the regulation of the sector. For example, states and territories regulate health and safety, employment, community engagement and environmental management, while the Commonwealth has constitutional powers over many of these aspects of law, and in some instances overrides any legislative inconsistencies. Additionally, States negotiate contractual agreements with individual operators that are subsequently ratified by state parliaments.

Regulation plays a critical role in ensuring that resources projects across Australia meet community and environmental management expectations. However, regulations may pose unnecessary burdens or impediments on resources companies operating, or seeking to operate and invest, in Australia.

SCOPE

This study will focus on regulation with a material impact on business investment in the resources sector. The Commission is asked to identify effective regulatory approaches to the resources sector and highlight examples of best-practice regulation across the Australian resources sector and internationally, taking into account the unique regulatory challenges facing individual jurisdictions.

WA comment: The PC appears to have paid limited attention to the above, which would appear to constrain the interpretation of the five points of focus area below.

This will provide opportunities for individual jurisdictions to assess their own regulatory environments, and to draw on leading practice.

In undertaking this study, the Commission should:

1. Assess best-practice project approval processes across Australia and internationally and identify any broader impediments to the timing, nature and extent of business investment in the Australian resources sector.
2. Identify regulatory practices that have achieved evidence-based goals without imposing additional costs or regulatory burdens on industry, as well identifying jurisdictions' successful efforts to streamline or augment processes to reduce complexity and duplication and improve transparency for current and future investors.
3. Identify leading environmental management and compliance arrangements that have resulted in the removal of unnecessary costs for business while ensuring robust protections for the environment are maintained.
4. Identify best-practice examples of government involvement in the resources approvals process – taking into account the context of each development – to expedite project approvals without compromising community or environmental standards, based on sound risk-management approaches.
5. Examine regulatory and non-regulatory examples of effective community engagement and benefit-sharing practices, and establish best-practice examples of where mutually-agreeable relationships were successfully developed between the resources sector and the communities in which they operate, including with Indigenous communities.

PROCESS

The Commission is to consult with key interest groups and affected parties, invite public submissions and release a draft report to the public.

The Commission is to consult with COAG Energy Council working groups on existing studies related to land access, community engagement and regulatory benchmarking.

The final report should be provided within 12 months of the receipt of these Terms of Reference.

The Hon Josh Frydenberg MP

Treasurer

[Received 6 August 2019]

Attachment 2- PC's Leading practices, findings and recommendations

Western Australian comments are in red, and are high-level.

DRAFT FINDING 2.1

Global and local factors including emissions policies, technological advances, economic development and population growth make it challenging to predict the future mix and level of resources investment in Australia. However, given Australia's diverse and significant resources deposits, the potential for investment will likely remain substantial.

Managing resources development in the interests of the community

DRAFT FINDING 4.1

There is no case for a major reform of the Australian pre-competitive geoscience arrangements given the quality of the information is generally highly regarded. However, the coverage of geoscience databases could be further improved, for instance, by all jurisdictions adopting sunset confidentiality periods for public release of private exploration and production reports prior to the end of the tenure of a project.

DRAFT LEADING PRACTICE 4.1

To promote data access, confidentiality periods before public release of private exploration and production reports generally should be shorter than the tenure of a project. New South Wales new regulations are one example of this practice. Many other jurisdictions have similar arrangements in place.

DRAFT FINDING 4.2

No evidence has been presented to this study indicating that differences between jurisdictions' approaches to licensing have created impediments to investment, or that any particular regime for the allocation of tenements is 'leading practice'.

DRAFT LEADING PRACTICE 4.2

Thorough assessments of potential licence holders address the risk of repeated non-compliance. Leading practice involves regulators taking a risk-based approach to due diligence when granting or renewing tenements and considering:

- whether the applicant has previously failed to comply with licence conditions or health, safety and environment legislation (whether in the same jurisdiction, or in other domestic and international jurisdictions)
- past criminal conduct, technical competency and past insolvency.

While all jurisdictions undertake some due diligence, none fully follows leading practice.

INFORMATION REQUEST 4.1

The Commission is seeking information on whether there are aspects of mining and petroleum licensing systems that pose a material impediment to investment.

DRAFT FINDING 4.3

Domestic gas reservation schemes can reduce returns to investors and discourage investment in gas exploration and extraction, leading to higher prices in the longer run and imposing net costs on the community.

Comment – This is addressed in the body of the submission

DRAFT FINDING 4.4

Bans and moratoria are a response to uncertainty about impacts of unconventional gas operations. However, the weight of evidence available, and the experience of jurisdictions where unconventional gas development takes place, suggests that risks can be managed effectively.

DRAFT RECOMMENDATION 4.1

Rather than imposing bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the scientific evidence on the costs of a particular project on the environment, other land users and communities against the benefits on a project-by-project (or regional) basis.

Comment – bans or moratoria form an appropriate part of Governments' portfolio of policy tools and are put in place to either allow for better scientific information to become available in response to a risk assessment or reflect Governments assessment of as suggested by the PC. As such, the wording of the current draft recommendation does not make sense and is not supported.

DRAFT LEADING PRACTICE 4.3

Where resources project proposals are contentious and generate intense public concern, establishing institutions, independent of resources companies and regulators, to provide accessible information to landholders and the broader community can help inform debate. The GasFields Commission, the Office of Groundwater Impact Assessment in Queensland and the Commonwealth's Gas Industry Social and Environmental Research Alliance provide examples in relation to coal seam gas developments.

Managing resources activities on private lands

DRAFT FINDING 5.1

Landholders frequently express concern about resources projects, and some have called for a right of veto over resources activity on their land. This would be inconsistent with Crown ownership of resources and would affect the distribution of the benefits of resources significantly. Landholders have a right to full and fair compensation for access to their land, but not for the resources under it.

DRAFT LEADING PRACTICE 5.1

Community concerns about mixed land use are best resolved through strategic land use frameworks rather than prohibitions on resources activity on agricultural land. Leading-practice frameworks seek to balance the trade-offs between resources development and other land uses to maximise economic benefits for the community. These framework should thoroughly consider the costs and benefits of allowing resources development, and have approval processes proportionate to the risks of resources development on the relevant land. The Council of Australian Governments' Multiple Land Use Framework provides a leading-practice example.

DRAFT LEADING PRACTICE 5.2

Where planned activity will be low impact, requiring early personal engagement between resources companies and landholders can ease potential tensions and be less costly than a negotiated agreement. The Queensland Land Access Code's notification requirements provide a leading-practice example of this approach.

DRAFT FINDING 5.2

Many landholders enter land access negotiations with resources companies with little prior experience or knowledge. This information asymmetry provides a basis for government intervention.

DRAFT LEADING PRACTICE 5.3

A standard template for land access agreements can reduce information asymmetry and help to set expectations for landholders and resources companies, and improve confidence in the regulatory system. The Queensland Land Access Code, providing a combination of mandatory conditions as well as guidelines, provides a leading-practice model.

DRAFT LEADING PRACTICE 5.4

Low-cost dispute resolution methods that take an investigative approach to resolving problems between parties can reduce tensions between landholders and resources companies. The recently established Queensland Land Access Ombudsman provides an example.

Special access requirements apply to resources activity on traditional lands covered by native title or land rights legislation

DRAFT FINDING 5.3

The *McGlade* decision of the Federal Court in 2017 created concerns in the resources industry about the validity of native title agreements that had only been signed by the majority of the individual members of the applicant. Amendments proposed in the Native Title Legislation Amendment Bill 2019 (Cth) should address these concerns.

DRAFT FINDING 5.4

The level of compensation paid for resources developments on native title land has typically been a matter for proponents and native title groups. However, the Timber Creek decision of the High Court in 2019 went to the value of native title rights and interests and could affect agreement-making with native title groups. Any uncertainty will likely be resolved as access negotiations occur over time.

DRAFT FINDING 5.5

Exploration activities have differing impacts on native title land. Consequently, a case-by-case approach by States and Territories to assessing whether the expedited procedure under the *Native Title Act 1993* (Cth) applies is necessary to give effect to the intention of the Act.

DRAFT RECOMMENDATION 5.1

The National Native Title Tribunal should publish guidance about the circumstances in which the expedited procedure will apply.

DRAFT FINDING 5.6

Very few projects are going ahead on land protected by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The requirements that agreements must cover both exploration and extraction, and that refusal of consent for one project in an area means that a moratorium is imposed on any other development while the original proponents retain a right to renegotiate, appear to be unnecessarily restrictive.

INFORMATION REQUEST 5.1

The Commission is seeking further information on whether reforms to the following elements of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) would help to enable resources sector investment while still achieving the aims of the Act:

- *conduct of resources companies and traditional owners during negotiations (including the way that moratorium rights are exercised)*
- *the conjunctive link between exploration and extraction approvals*
- *the potential costs and benefits of allowing other resources companies to apply to develop land rights land that is subject to a moratorium for another resources company.*

DRAFT FINDING 5.7

South Australia, Victoria and the Northern Territory have implemented alternative regimes to that prescribed under the *Native Title Act 1993* (Cth) for negotiating agreements between resources companies and traditional owners. These approaches have both advantages and disadvantages; a leading-practice approach has not been identified.

DRAFT LEADING PRACTICE 5.5

Conjunctive agreements that provide a standard set of terms for resources developments in a particular area can reduce impediments to investment on native title land. South Australia's ILUAs for gas and mineral exploration are a leading-practice example.

DRAFT LEADING PRACTICE 5.6

High-quality guidance on native title facilitates investment in the resources sector. The Australian Government's Working *with Indigenous Communities* handbook is a leading-practice example.

Addressing unnecessary regulatory burdens

DRAFT FINDING 6.1

Unnecessary delays in project commencements can be costly for proponents and the community, and typically dwarf other regulatory costs.

Comment – Unnecessary delays should clearly be avoided. Unnecessary delays can be caused by both regulators and project proponents. In terms of material impact on business investment this is the only 'type of regulatory impact' that the PC establishes a case for having a material impact on companies although whether it affects overall business investment in Australia is unclear.

DRAFT FINDING 6.5

Unpredictable and lengthy delays at the approval stage are a key frustration for project proponents. That frustration is compounded where delays are seen as unnecessary or their cause is unclear.

Comment – while unpredictable delays should be avoided these can be caused by both proponents and regulators.

DRAFT FINDING 6.2

Environmental impact assessments are often unduly broad in scope and do not focus on the issues that matter most. This comes with costs — the direct costs of undertaking studies and preparing documentation and the more significant cost of delay to project commencement. Disproportionate and unfocused environmental impact assessments are also of questionable value to decision makers and the community.

Comment – it is unclear how the PC reaches this conclusion. The PC should engage closely with environmental regulators and form its own independent assessment rather than simply issues raised by regulated entities.

DRAFT FINDING 6.6

Project approvals are often conditional on the preparation of management plans that also need to be approved by regulators ('post-approvals'). The process and timelines for securing post-approvals are often unpredictable, and over-reliance on management plans is not a first-best approach to achieving environmental outcomes.

DRAFT FINDING 6.3

The referral process for the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) *(EPBC Act)* and the nuclear and water triggers are creating unnecessary regulatory burden:

- Over half of all projects referred under the EPBC Act do not ultimately require Commonwealth approval.

- Projects ruled out as nuclear actions in the EPBC Act explanatory memorandum are being treated as nuclear actions requiring Commonwealth environmental approval.
- The evidence that the water trigger filled a significant regulatory gap is not compelling.

DRAFT FINDING 6.8

Resources projects typically require a range of assessments and approvals by multiple regulators within a jurisdiction. While regulatory coordination has improved over the past decade, proponents still report difficulties navigating the regulatory landscape. Lack of coordination can cause costly delays and liaising with multiple agencies can also give rise to significant compliance costs.

DRAFT LEADING PRACTICE 6.1

Leading-practice environmental impact assessment involves application of a risk-based approach, where the level and focus of investigations is aligned with the size and likelihood of environmental risks that projects create. In practice this means:

- allocating different projects to different assessment tracks depending on their level of risk, which occurs throughout Australia
- thorough scoping, including community consultation, to identify which matters need to be investigated more or less thoroughly. The ongoing EIA improvement project in New South Wales shows movement in this direction
- terms of reference that focus on projects' biggest and most likely risks
- regulators that are empowered to focus on what matters most, for example through Statements of Expectations as occurs at NOPSEMA.

DRAFT LEADING PRACTICE 6.2

Timelines, statutory or otherwise, provide proponents with information about how long regulatory processes ought to take, which supports project planning. They also focus regulators' attention, and public reporting of regulator performance in meeting those timelines is a means of keeping them accountable. For example, both Western Australia and South Australia report on the share of mining proposals and other approvals finalised within target timelines.

DRAFT LEADING PRACTICE 6.3

Leading-practice use of stop the clock provisions means placing limits on when they can be used — when matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated — and transparency about why the clock is stopped. No examples of leading practice have been identified.

DRAFT LEADING PRACTICE 6.4

The use of deemed decisions, whereby the assessment agency's recommendation to the final decision maker becomes the approval instrument if a decision is not made within statutory timeframes, is a leading-practice approach to reducing delays. At the same time, deemed decisions should be subject to limited merits review. No jurisdiction ticks both boxes — *the Environment Protection Act 2019 (NT)* introduced deemed decisions but does not allow them to be subjected to merits review.

Comment – This is a complex issues which relates to striking an appropriate balance between the objectives of regulation and the impact on regulated entities. It is unclear how the PC reaches this conclusion without clearly outlining a framework for assessing the merit. It is possible that a deemed decision would not deliver a net benefit to society, may not positively affect the level of business investment (while impacting operational cost), and establish a regime where companies can game the process. Deemed decisions should also be considered in the context of funding issues.

DRAFT LEADING PRACTICE 6.5

Clear guidance on regulators' expectations about the content and quality of environmental impact assessments reduces the need for additional information requests. Western Australia and Queensland are examples of leading practice in this area.

DRAFT LEADING PRACTICE 6.7

Outcomes-based approval conditions enable companies to choose least-cost ways of achieving defined environmental outcomes. The Commonwealth's *Outcomes-based conditions policy* outlines a leading-practice approach to outcomes-based condition setting.

DRAFT LEADING PRACTICE 6.8

The use of standard conditions for standard risks can deliver efficiencies to approval processes. Queensland's *Model Mining Conditions* are leading practice.

DRAFT LEADING PRACTICE 6.10

Clear guidance from regulators on the type and quality of information that post-approval documentation needs to include can help make the process more efficient. An example of such guidance is the Instructions on how to prepare *Environmental Protection Act 1986* Part IV Environmental Management Plans produced by the Western Australian Environmental Protection Authority.

DRAFT LEADING PRACTICE 6.9

Regulator decisions in the post-approval stage should be subject to timelines — statutory or otherwise — and regulator performance against those timelines should be publicly reported. The New South Wales Department of Planning, Industry and Environment has recently announced its intention to report on performance against timelines for post-approvals.

DRAFT FINDING 6.9

Strategic assessments are costly but may reduce regulatory burden in the long run where they reduce the cost or number of future project approvals.

Greater Commonwealth-State cooperation, and intra-state coordination, would deliver substantial benefits

DRAFT FINDING 6.4

Bilateral assessment agreements significantly reduce regulatory burden for projects that require Commonwealth and State or Territory environmental assessment.

DRAFT RECOMMENDATION 6.1

The ***Environment Protection and Biodiversity Conservation Act 1999* (Cth)** should be amended, in line with the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth), to enable negotiation of bilateral approval agreements.

DRAFT RECOMMENDATION 6.2

When bilateral assessment agreements are renegotiated, State and Territory governments should consider making additional commitments to address inconsistencies and overlap in project approval conditions. These commitments could be modelled on those described in the *EPBC Act 1999 Assessment Bilateral Agreement Draft Conditions Policy.*

DRAFT LEADING PRACTICE 6.6

Cooperation between the Commonwealth and the States and Territories in environmental assessment and approval processes can be supported by:

- the Commonwealth out-posting staff with State and Territory regulators, prioritising jurisdictions where more projects require approval by both levels of government;
- State and Territory regulators taking up opportunities to have their staff trained in the application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

New South Wales is an example of leading practice with respect to both initiatives.

DRAFT LEADING PRACTICE 6.12

Effective coordination among agencies within a jurisdiction reduces uncertainty, facilitates timely processing and minimises overlaps and inconsistencies. This can occur through:

- a lead agency or major project coordination office that provides guidance to proponents and coordinates processes across agencies (without overriding the decision-making capacity of other regulators). The coordination models in Western Australia and South Australia, and the case management system in Northern Territory have been highlighted as leading practice by study participants
- cooperative arrangements between agencies. These include the use of memorandums of understanding, inter-agency working groups or taskforces such as those in Western Australia. South Australia's approach of using costs recovered from resources companies to pay staff in multiple regulatory agencies also supports faster approvals and better inter-agency communication.

Avenues for review of decisions bring accountability to the approvals process

DRAFT FINDING 6.7

Court cases brought by third-party opponents to resources projects may cause delay, but this does not imply that third parties should be excluded from seeking judicial review. Process-driven legislation creates opportunities for regulators to make invalid administrative decisions that open the door for judicial review.

Comment – the PC seems to be implying that current legal rights to third parties should be removed. This is a complex issue and should be carefully considered with broad and specific consultation on this issue.

DRAFT LEADING PRACTICE 6.11

Where approval decisions are made by unelected officials it is a leading-practice accountability measure that they can be subjected to merits review that allows for conditions and approval decisions to change to reflect substantive new information. The *Environment Protection Act 2019* (NT) puts this principle into practice.

Comment – this is a complex issue and it would be preferable if the PC elaborates on how it reaches this conclusion including accounting its legal consideration in terms of all review options available to proponents.

Further information on heritage approvals would be appreciated

INFORMATION REQUEST 6.1

The topic of Indigenous heritage has not been raised by many participants to this study and it is not clear which jurisdictions, if any, could be described as leading practice. Could interactions between Indigenous heritage and the resources sector be improved? Which jurisdictions manage these interactions well already? How do they do it?

Comment: As noted in the body of our submission this should not form part of the review. If the PC chooses to proceed with this in needs to engage with the relevant regulators in all jurisdictions and carefully consider the property rights, heritage and benefit issues that underlie this subject area.

Delivering sound environmental and safety outcomes

DRAFT FINDING 7.1

Environmental report cards indicate that Australia's resources regulation has been effective in delivering relatively good environmental outcomes. But there have been several incidents and resources activities are one source of pressure on Australia's biodiversity.

INFORMATION REQUEST 7.1

Is there evidence of any systematic deficiencies in the compliance monitoring and enforcement effort of regulators overseeing resources projects? In particular:

- *Are regulators adequately resourced to carry out effective monitoring and enforcement programs?*
- *Do the monitoring and enforcement approaches of regulators represent good risk-based regulation?*

DRAFT LEADING PRACTICE 7.3

Regular public-facing statements describing regulators' compliance activities and lessons learned from them, such as the New South Wales Resource Regulator's Compliance Priorities Outcomes reports, or NOPSEMA's The Regulator magazine, help to improve community confidence in the sector's regulation.

Regulators should also inform the community of any contraventions that may have put the environment or community at significant risk, and any actions they have taken in response. The New South Wales Resource Regulator's investigation information reports, and its publication of enforceable undertakings, are good examples.

DRAFT LEADING PRACTICE 7.4

Public registers of activities with offset obligations and the projects developed to fulfil them provide valuable transparency about the application of offset policies. Information on offset projects should include their biodiversity values, location, date of approval, completion status, and follow-up evaluations of benefits. Where companies fulfil their offset obligations by paying into a fund, the register should include the size of the payment. Western Australia's offset register is a leading-practice example.

DRAFT LEADING PRACTICE 7.5

Schemes that allow companies to meet their offset obligations by paying into a fund can reduce costs for both companies and governments, and can create opportunities for better environmental outcomes. New South Wales, Queensland, South Australia, and Western Australia's Pilbara Fund all offer examples of this.

While the principles behind the use of such funds, including on what basis prospective offsets projects should be evaluated, should be set subject to ministerial oversight, the fund's administration and selection of offset projects is best left to a separate body, like the Biodiversity Conservation Trust in New South Wales.

DRAFT LEADING PRACTICE 7.6

Science-based implementation strategies for the use of offset funds are key to achieving their intended purpose. These should have regard to any existing recovery plans for relevant species, and be publicly available. Queensland's Brigalow Belt offsets tender project is a leading practice example.

DRAFT LEADING PRACTICE 7.1

Regulators' experiences of monitoring compliance with approval conditions provide useful information about the efficacy of approval conditions in protecting the environment. Leading practice involves regulators employing a 'feedback loop' between the compliance monitoring and condition-setting processes, where any findings of redundant or ineffective approval conditions are communicated to the bodies responsible for setting those conditions. An example has not been identified.

DRAFT LEADING PRACTICE 7.2

Effective regulators continually look for ways to improve their methods, and for actions they could take beyond their routine monitoring and enforcement activities that could address specific problems. The New South Wales Environment Protection Authority's involvement with a study examining emissions from coal trains, and the New South Wales Resources Regulator's targeted programs described in its Compliance Priorities documents, provide respective examples of these practices.

DRAFT FINDING 7.2

Limited transparency in most jurisdictions means that evidence about the effectiveness of compliance monitoring and enforcement activity is limited. This situation risks damaging public confidence in the regulation of projects.

DRAFT FINDING 7.3

There are few examples of large resource extraction sites being rehabilitated or decommissioned in Australia — in part because rehabilitation and decommissioning only became a policy focus for governments in the latter half of the 20th century. As a result, there is a large number of legacy abandoned mines.

Comment: However, there is a large body of work relating in parts to a historical legacy of abandoned mine sites, which in Western Australia in parts occurred under a bonds regime.

DRAFT LEADING PRACTICE 7.8

Having financial assurance arrangements in place to cover rehabilitation, based on the risk the project poses to the taxpayer, provides incentives for companies to undertake rehabilitation and minimises the risk that governments will be left responsible. These arrangements are present in most (but not all) jurisdictions.

Comment: Any financial assurance arrangement needs to account for risk, the impact on business investment, and the administrative cost of the financial assurance arrangement.

DRAFT FINDING 7.4

Concerns about resources sites being sold to smaller firms that may not have the resources to rehabilitate them are best addressed through effective rehabilitation bonds (draft leading practice 7.9).

Comment: It is not clear how the PC reaches this conclusion. Governments can use a portfolio of tools to address this issue depending on risk profiles, the ability to pay, the impact on business investment and other issues like historical abandoned mine sites.

Bonds are more likely to have a material impact on business investment by interfering with market particularly affected smaller operators. Bonds do not provide funding for legacy sites and impose a higher cost on individual project, and should require a detailed regular risk assessment of individual projects.

DRAFT LEADING PRACTICE 7.9

Rehabilitation bonds that cover the full cost of providing rehabilitation offer the highest level of financial assurance for governments, and provide companies with full incentives to complete rehabilitation in a timely way. Jurisdictions are heading in this direction, but a leading practice example has not been identified.

Comment: This is discussed in our submission. Governments can use a portfolio of tools to address this issues depending on risk profiles and the ability to pay. It is not clear how the PC reaches this conclusion particularly in regards to the requirements in its terms of reference to also have regard to "a material impact on business investment".

DRAFT FINDING 7.5

Rehabilitation pools can reduce incentives for companies to rehabilitate their sites and there are risks that the pool will be insufficient to cover the cost of rehabilitation if a large company does not fulfil their rehabilitation requirements. These pools should be used with caution, and must be paired with effective compliance and enforcement arrangements.

State and Territory Governments that use pooled arrangements for rehabilitation surety should ensure that levies reflect the risk of the company passing their liabilities to the government. Larger companies should be separate to the pool, and covered using rehabilitation bonds. Queensland's rehabilitation pool is a good example of this model.

Comment: The magnitude of the pool is a temporal problem during the initial years, after which Pools build up to a significant amount over a fairly short period, while clean-up cost are likely to be spread over a number of years allowing for the pool to be replenished over that period. Levies can be varied. In addition, pools are likely to have a lesser impact on overall business investment particularly on smaller companies.

DRAFT LEADING PRACTICE 7.7

Resources sites that are placed into care and maintenance can pose risks to the environment, and the operator may be at greater risk of default. These risks can be managed by a requirement to notify the regulator where a site is placed into care and maintenance, and the preparation of care and maintenance plans that identify these additional risks, such as those required in Western Australia.

DRAFT LEADING PRACTICE 7.10

Progressive rehabilitation can lead to better understanding of rehabilitation requirements, ensure that funds are made available, reduce the total costs of rehabilitation, improve health and safety outcomes and provide community confidence in the operator's commitment to rehabilitate.

Progressive rehabilitation can be encouraged by financial surety requirements being reduced commensurate with ongoing rehabilitation work. Victoria's rehabilitation policy for Latrobe Valley mines represents a good example.

DRAFT LEADING PRACTICE 7.11

There is merit in governments working with industry to reopen and rehabilitate legacy abandoned mines, such as through streamlined approval processes (without compromising the intent of regulation) and indemnities against past damages. The Savage River Rehabilitation Project in Tasmania is an example of a successful government-industry partnership.

INFORMATION REQUEST 7.2

To what extent are post-relinquishment obligations on resources companies a barrier to investment? What are leading-practice ways of managing the residual risk to the Government following the relinquishment of a mining tenement?

Further information about the effectiveness of health and safety legislation would be appreciated

DRAFT FINDING 7.5

The major resources states are in the process of reviewing or reforming their workplace health and safety frameworks for resources extraction, making identifying a leading practice in this area difficult. Recent safety incidents raise concerns about the effectiveness of existing frameworks.

INFORMATION REQUEST 7.3

The Commission is seeking further information about the effectiveness of resources health and safety legislation across Australian jurisdictions, including:

- whether there would be benefits in greater consistency across jurisdictions
- approaches that represent leading practice health and safety legislation for resources
- how health and safety approaches in each jurisdiction could be improved.

Investment is also affected by abrupt policy changes, policy inconsistency and uncertainty

DRAFT FINDING 8.1

Government policies necessarily evolve in response to changing economic conditions, technology development and shifts in broader societal values and priorities. However, abrupt policy changes with inadequate consultation can undermine investor confidence and discourage investment.

DRAFT FINDING 8.2

Uncertainty about and inconsistent climate change and energy policies across jurisdictions risk impeding resources sector investment.

DRAFT FINDING 8.3

Lack of clarity in policy objectives can lead to inconsistent and unpredictable application of regulations across resources projects, creating investor uncertainty (such as in relation to approval decisions and conditions on the basis of scope 3 emissions).

DRAFT FINDING 8.4

Not approving proposed resources projects or curtailing their exports on the basis of potential greenhouse emissions in destination markets is an ineffective way of reducing global emissions.

DRAFT LEADING PRACTICE 8.1

Early public consultation on new policy proposals, accompanied by clear evidence-based articulation of why a proposed change is the best way of addressing an issue (for example, through regulatory impact assessments), can avoid policy surprises.

Clear policy objectives aid consistent and predictable regulatory decision making. Policy-makers can achieve this by avoiding the use of vague language in policy documents and providing clearly articulated guidance on the intention and interpretation of policies and legislation.

Changing the duration of greenfields agreements would support investment

DRAFT FINDING 8.5

Allowing parties to negotiate greenfields enterprise agreements with durations that match the life of a greenfields project would improve investor certainty.

Comment: This is out of scope and should be removed from the report. Any consideration of enterprise agreements should only be entertained in a broader policy context (taking account for the intention of enterprise agreements), and this is not under consideration or supported.

DRAFT RECOMMENDATION 8.1

The Australian Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that matches the life of a greenfields project. The resulting enterprise agreement could exceed four years, but where it does so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

Comment: This is out of scope and should be removed. Any consideration of industrial relations should be done in a broader context, and this is not under consideration or supported.

Community engagement and benefit sharing can help mitigate impacts on local communities

DRAFT FINDING 9.1

The effects of resources extraction, both positive and negative, are amplified for local communities. Resources extraction can stimulate economic activity in the community, but also lead to effects such as house price fluctuations and strains on local infrastructure.

It is appropriate that resources companies are required to address significant negative externalities associated with resources extraction, such as noise and dust, and provide or pay for infrastructure that they directly use. However, effects such as fluctuating house prices signal the need for market adjustments and should not be suppressed. Approaches such as appropriate planning can moderate price spikes.

Companies should not be required to fund or construct infrastructure that is not associated with their project (although they may do this voluntarily).

DRAFT FINDING 9.3

Companies have an incentive to engage and share benefits voluntarily with communities, to obtain a social licence to operate and improve the livability of local communities for their workers. The appropriate role for government in this area is limited to coordinating resources companies' community-focused investments, providing guidance to companies and efficiently regulating negative externalities borne by communities due to resources extraction.

Comment – while companies may have some incentive to do so, it is not clear that this incentive is always strong enough to support the PC's argument that Governments have a limited role. The PC should consider its arguments more carefully.

DRAFT FINDING 9.2

Resources are owned by the Crown on behalf of all Australians. Although negative externalities of resource projects on local communities should be efficiently addressed, these communities should not benefit over and above other regional communities from resources royalties as a matter of right.

DRAFT FINDING 9.6

It is reasonable that governments provide funding and support for services in regional areas. However, there is no case for hypothecating royalty payments to communities near resource projects — this can weaken governance and encourage money to be spent on projects without fully considering their pay offs. Royalty revenues should be spent wherever community net benefits would be greatest.

Coordination and guidance can help ensure that company activities deliver benefits to communities

DRAFT LEADING PRACTICE 9.3

Coordination between local communities and resources companies can improve the effectiveness of benefit sharing activities. Coordination can involve formal partnerships, such as that between Rio Tinto and the City of Karratha, or community consultation, such as that established by Hillgrove Resources in Kanmantoo and Callington.

DRAFT FINDING 9.4

There is sufficient guidance available to companies from a range of institutions on how to engage with communities and other stakeholders. Most cover similar themes, and there is no one leading practice set of guidelines.

DRAFT LEADING PRACTICE 9.1

Guidance on the social impacts that should be considered in the approvals process, and how they should be considered, helps improve the quality of social impact assessments. For example, the New South Wales Government has issued guidance that outlines:

- what social impacts should be considered in the assessment
- how to engage with the community on social impacts
- how to scope the social impacts and prepare the assessment.

The effects identified in social impact assessments should not always be the domain of companies to address. Rather, leading practice suggests that social impact assessments should provide a framework for companies and governments to work together to address these effects, in line with the principles outlined in draft finding 9.1. The Commission has not identified a leading practice jurisdiction in this area.

Adjustment can be supported by a range of other activities

DRAFT FINDING 9.5

Fly-in, fly-out workforces provide flexibility for companies, and distribute the benefits of resources development around Australia. The use of fly-in fly-out workforces can also moderate some of the effects of resources extraction on local communities such as higher housing demand and prices, particularly during the construction phase.

DRAFT LEADING PRACTICE 9.2

Local procurement requirements can be a relatively high cost way of meeting development objectives. In contrast, resources companies and governments providing businesses in local communities with the support needed to engage with resources companies, such as BHP's Local Buying Program, is likely to create more enduring benefits for communities.

Comment: It is not clear how the PC reaches this conclusion. Buy local policies is a form of benefit sharing that may affect cost, but may also facilitate a greater return of projects to local economies, while having no impact on the level of business investment (although profits may be marginally reduced).

INFORMATION REQUEST 9.1

Is there scope for greater sharing of resources company infrastructure with communities? Are there any examples of where this has been done effectively?

Specific community engagement and benefit sharing arrangements apply for Aboriginal and Torres Strait Islander communities

DRAFT FINDING 10.1

Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people, particularly under native title legislation, can mean that only small groups of Indigenous people benefit from resources activity. Voluntary activities offer the potential for larger groups of Aboriginal and Torres Strait Islander people to benefit, including those who reside in the local community but are not native title holders.

DRAFT FINDING 10.2

Effective engagement with Aboriginal and Torres Strait Islander communities regarding the use of their traditional lands for resources development incorporates the principle of free, prior and informed consent (FPIC). FPIC is not a right of veto, but creates a process of genuine engagement where governments, resources proponents and communities aim to come to an agreement that all parties can accept.

Comment: This is a complex issue relating to a broader legal framework for ownership rights. As stated in the body of the submission it is a regulatory issue and should be removed from the report.

DRAFT FINDING 10.3

The capacity of Prescribed Bodies Corporate to engage meaningfully with resources companies is critical to Aboriginal and Torres Strait Islander people being able to give their free, prior and informed consent to resources development on their traditional lands, and to negotiating effective agreements. However, many Prescribed Bodies Corporate lack this capacity.

Comment: While such bodies should be funded to undertake their role appropriately, as stated in the body of the submission it is a regulatory issue and should be removed from the report.

INFORMATION REQUEST 10.1

The Commission is seeking more information on government programs that fund Indigenous prescribed bodies corporate, native title representative bodies and native title service providers. In particular:

- *Have the current funding programs met their objectives? Can you provide examples where funding has made a tangible difference to the native title agreement-making process, or where it has reduced reliance on government funding?*
- *Are there alternative approaches that could improve the capacity of Indigenous organisations, such as training programs?*

Comment: While such bodies should be funded to undertake their role appropriately, as stated in the body of the submission it is a regulatory issue and should be removed from the report. Governments, companies and first nations should use a broad portfolio of tools to best achieve the desired objectives.

DRAFT FINDING 10.4

Proposed amendments to the *Native Title Act 1993* (Cth) *(NTA)* will allow applicants to enter into future act agreements as a majority by default. This could increase the risk of a majority of the applicant entering into a future act agreement that is not consistent with the wishes of the claim group. However, other proposed amendments to the NTA protect claim groups against this risk. They include allowing claim groups to impose limits on the authority of applicants, and clarifying that applicants owe fiduciary duties towards the claim group.

DRAFT FINDING 10.5

Proposed amendments to the *Native Title Act 1993* (Cth) make it clear that native title applicants owe fiduciary duties to their claim group when entering into native title agreements. However, they do not address questions of whether funds arising from native title agreements entered into before a native title determination belong to the claim group or ultimate native title holding group, and whether applicants and/or claim groups have any duties towards native title holders.

DRAFT RECOMMENDATION 10.1

The Australian Government should review the question of whether native title claim groups or holders are the beneficial owners of funds arising from native title agreements made before a native title determination, and, if native title holders are considered to be the beneficial owners of funds, whether applicants and/or claim groups have any duties towards them in receiving and managing funds for their benefit.

INFORMATION REQUEST 10.2

In principle, it appears appropriate for private agents to have obligations towards all those who hold or may hold native title (as native title representative bodies do). Should the Native Title Act 1993 (Cth) be amended to impose statutory obligations on private agents that are equivalent to those imposed on native title representative bodies? Why or why not?

Clarity around permissible uses of funds held in charitable trusts is needed

DRAFT FINDING 10.6

Some Indigenous organisations interpret the requirement for charities to operate for a charitable purpose and for the public benefit as limiting their ability to invest money for long-term economic development. This may be an overly narrow interpretation of the law, but there is legal ambiguity regarding the scope of permissible activities.

DRAFT RECOMMENDATION 10.2

The Australian Charities and Not-for-profit Commission should publish plain English guidelines on activities that are likely to be consistent with a charity's charitable purposes and for the public benefit, and those which are likely to be outside this scope. This would reduce the risks associated with any for-profit long-term development or commercial activities that Indigenous charities may wish to undertake.

INFORMATION REQUEST 10.3

- *What are some potential reasons to allow native title funds to be removed from charitable trusts?*
- *What are some mechanisms through which funds may be removed from charitable trusts, and what might the tax implications be? How would these proposals affect non-Indigenous charitable trusts?*

INFORMATION REQUEST 10.4

The Commission is seeking more information on whether there are barriers, unrelated to tax and charity law, to maximising benefits to communities from native title funds, including in relation to benefit management structures and the investment of native title funds. What are potential solutions to these issues?

Effective governance, conduct, capability and culture are crucial for leading practice regulation

DRAFT FINDING 11.1

Many of the regulatory issues presented to the Commission through the course of this study have been examined previously. Implementing enduring improvement requires that governments ensure the pre-conditions for leading-practice regulatory systems are in place, particularly clear regulatory objectives, adequately resourced institutions and effective governance and accountability arrangements.

DRAFT FINDING 11.2

The ability for regulators to operate effectively and efficiently is constrained by capability challenges, including limited technical expertise and inadequate use of data and technology. In addition, a lack of clarity and regulator transparency inhibits accountability, leads to unnecessary costs for industry and risks a loss of public confidence in the regulatory system. Not least, regulators collect a wealth of data but relatively little is made available to the public.

Good 'regulatory housekeeping' can underpin leading-practice systems

DRAFT LEADING PRACTICE 11.1

Statements of Expectations from Ministers to regulators are one effective way for Governments to clearly set out their objectives for the regulatory system. Examples include the Statements to Earth Resources Regulation in Victoria and to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) at the Commonwealth level.

DRAFT LEADING PRACTICE 11.2

Regular independent review and evaluation of regulatory frameworks and objectives drives continuous improvement and ensures they remain fit for purpose. Victoria, for example, following an inquiry into its Environmental Protection Authority, is clarifying the Authority's objectives, principles and functions and developing a legislative framework that embeds a risk-based regulatory approach. The Independent Review of the New South Wales Regulatory Policy Framework has highlighted that a 'lifecycle' approach for managing regulation over time ensures that frameworks remain fit for purpose.

INFORMATION REQUEST 11.1

The Commission is seeking views on the advantages and disadvantages of institutionally separating regulatory and policy functions in jurisdictions where separation does not already exist, and the effectiveness of other approaches to ensuring regulator accountability.

DRAFT RECOMMENDATION 11.1

Governments in each jurisdiction should assess:

- whether regulators of resources-sector activity are appropriately funded to enable timely processing of applications and effective adoption of a risk-based regulatory system
- opportunities for enhancing regulators' cost recovery processes.

A range of actions can lift capability and regulator performance

DRAFT LEADING PRACTICE 11.3

Approaches to improving staff capability and technical expertise include:

- secondments — as have been established in the officer exchange program between the Northern Territory Environment Protection Agency and Western Australia's Department of Water and Environmental Regulation
- training programs — akin to those offered in Tasmania for senior management and in the National Offshore Petroleum Safety and Environmental Management Authority for all staff regarding regulatory practices
- development of strategies to target particular skills gaps, including technical expertise — as has been the case in the Victorian Environment Protection Authority
- communities of practice — as in the case of the Australasian Environmental Law Enforcement and Regulators Network's Better Regulation Working Group, which enables members to share experiences and ideas related to regulatory practice
- site visits — as offered by the Victorian Earth Resources Regulator.

DRAFT RECOMMENDATION 11.2

Regulators in each jurisdiction should consult with industry, including peak bodies (such as the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association), on developing a program of site visits in order to enhance technical expertise. The program should be ongoing and part of induction training provided to new staff.

DRAFT LEADING PRACTICE 11.4

Senior management have a key role in fostering a culture that supports ongoing capability development and adoption of modern regulatory practices. Approaches to promoting this type of culture include:

- appointment of a regulatory champion, akin to that established at the then Australian Department of Agriculture
- recognising and incentivising good staff performance, as occurs in Queensland's Department of Natural Resources, Mines and Energy

- working groups to assess and promote cultural change, both internally as occurs at the National Offshore Petroleum Safety and Environmental Management Authority, and externally as with the Australasian Environmental Law Enforcement and Regulators Network's Better Regulation Working Group
- reporting on successes and learnings from failures, as occurs in South Australia's Department for Energy and Mining and Western Australia's Department of Mines, Industry Regulation and Safety.

DRAFT LEADING PRACTICE 11.5

Strategies for managing information and data help promote routine use of data in regulator decision making. Examples include strategies recently developed by the (then) Australian Department of Environment and Energy, the Department of Environment and Science in Queensland and the Department of Mines, Industry Regulation and Safety in Western Australia.

DRAFT LEADING PRACTICE 11.6

Digital technology and data management systems have the potential to improve the efficiency and effectiveness of regulatory processes significantly, while also leading to increased transparency and providing the foundations for more informed consultation. Leading-practice approaches include:

- developing a working group to investigate options for technologies to improve the use of data, as has occurred in the Environmental Protection Authority of Western Australia
- developing a strategy for improving the capabilities required to deploy information and technology, as has occurred at the Australian Department of Agriculture, Water and the Environment
- improving the interface between regulators and resources companies through online portals and databases, as will occur in a Commonwealth pilot with Western Australia
- developing modelling capabilities to support analysis and decision making, as has occurred at the Queensland Office of Groundwater Impact Assessment.

DRAFT RECOMMENDATION 11.3

Ministers, through the Council of Australian Governments, should establish a forum for regulators to share leading-practice initiatives from their jurisdictions, including those implemented to develop the capabilities and expertise of their agencies.

Regulators can play a key role in building community confidence

DRAFT LEADING PRACTICE 11.7

The provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector. There are a number of instructive examples, including the National Offshore Petroleum Safety and Environmental Management Authority's website and Western Australia's offsets register. Regulators can be supported by the data and information published by other independent bodies, such as Queensland's GasFields Commission and the Gas Industry Social and Environmental Research Alliance.

DRAFT LEADING PRACTICE 11.8

Regulators can improve the public's understanding of regulatory objectives and processes by:

- engaging with local communities on the regulatory process throughout the lifecycle of a resources project, including in the initial scoping stage, as occurs in Canada
- conducting broader consultation on an ongoing basis to understand community expectations and provide this feedback to policy makers and the government, as occurs in New South Wales.

INFORMATION REQUEST 11.2

The Commission is seeking feedback on leading practices that it has overlooked. Information on how these practices have contributed to improved regulatory outcomes would also be appreciated.