**Resources Sector Regulation**

**Productivity Commission**

**Locked Bag 2, Collins Street east, Melbourne. 8003.**

Thank you for the opportunity to provide comments in relation to the Commission Study into Resources Sector Regulation. This work is an essential component of maintaining an economically prosperous Australian economy and doing so sustainably across the economic, social, health and environmental dimensions.

Summary of key suggestions

1) **Life cycle approach:** The coverage of the proposed life cycle approach for the review should extend from mine to customer gate to encompass export regulations. The life cycle approach better builds a holistic government agency approach across minerals value chains.
2) **Concurrent reviews:** As regards "concurrent reviews", an evaluation of the consultation model presented in the recently reviewed ANZECC Water Quality Guidelines is suggested since it incorporates early and continuing stakeholder engagement alongside scientific assessment on water quality. This provides for consideration of stakeholder views over time alongside evaluation of new science related to health, safety and environmental impacts.
   Indigenous community input is essential.
3) **Agency expertise:** Government regulatory agencies should retain some in-house (on call) expertise across the science/ technical/engineering/life-cycle/legal disciplines in order to more transparently and efficiently address arising information requests compared to external "consultants" reports. This could be done through a single central "resource industry information hub" model, which would maintain agency independence. A "lead agency" model has more focus and would help reduce costs and improve efficiencies and effectiveness.
4) **Basis of regulations:** Regulations should be based on sound science since this offers objectivity on the measurement and management of impacts that is not offered elsewhere. Such a peer-reviewed, weight-of-evidence approach, with reproducible results is more likely to gain the confidence of government, industry and broader stakeholders. Effective science communication will be essential and has proven to be of worth in available case studies.
5) **"Lawfare":** One way to help reduce "lawfare" is to base risk assessments and decisions upon objective science. Science commissioners retained by and reporting to a land and environment court is likely an improved approach compared to "experts" retained by parties.
6) **Emerging issues – knowing the products:** Mineral products are coming under increasing health, safety and environment scrutiny in terms of "footprints" both nationally and internationally. Government, industry and broader stakeholders will need to work together so that responsibly-sourced products continue to be in demand.

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**Productivity Commission**

**Information Requests from Issues Paper September 2019**

## 2. Scoping the study and defining key concepts

***What resources are in scope?***

In addition to minerals ores, oil and gas, value-added products made in Australia from the smelting and concentration of metal-containing ores should to be included. Some of these products are used locally while others are exported.

*Suggestion: "Resources in scope" should be expanded to cover value-added minerals and metals products as well as extracted unprocessed minerals. Otherwise the work will be incomplete from the outset as these products form part of resource industry businesses.*

***What activities are in scope?***

The four stages of a minerals mining project described as a "life cycle" approach (Fig 2) do not adequately describe the minerals life cycle.

Missing is the crucial export transport phase from mine gate (or smelter or refinery) to customer gate. This is not marketing. Minerals and metals products do not automatically move to customer gate without satisfying very significant national and international shipping regulations and these must be addressed and complied with by Australia's exporting resource companies. Meeting export compliance regimes can be expensive and time-consuming and may involve research to fill data gaps e.g. the health, safety and environmental shipping characteristics of bulk cargoes.

Examples of export regulations include mineral/metal cargo potential for liquefaction, spontaneous combustion, oxygen-depletion and the natural-occurrence of impurities. Without such knowledge, permission to export may be declined by Australian agencies. Potential risks occur related to vessel stability with loss of crew, vessel and cargo due to possible cargo "liquefaction" and "combustion". In addition, health and environmental impacts may result from several cargo properties. Compiling such information and data through research comes with a very significant cost for resources companies which can influence investment decisions across the entire mine life cycle, including upstream and as far as the customer gate. Without exports flowing efficiently there may be no viable business.

*Suggestion: "Activities in scope" and Figure 2 should be expanded to include the shipping activities related to the export of Australia's resources.*

***What regulations are in scope?***

The broad definition of regulation described needs to be expanded in relation to the Australian Government to include international shipping regulations. This compliance is managed by agencies such as AMSA (Australian Maritime Safety Authority). These include for example, the IMSBC (International Solid Bulk Cargoes Code) and IMDG (International dangerous Goods Code) administered by the IMO (UN International Maritime Organisation). Australia, as a nation state at the IMO, adheres through its government agencies like AMSA, to the international regulations derived at the IMO.

Therefore, in Box 2 (Matters of national environmental significance), the Commonwealth has responsibilities potentially extending, beyond 3 nautical miles and marine parks, to the high seas depending on whether a cargo may be free-on-board-at-origin (cargo ownership changes at Australian

port) or free-on-board-at- destination (cargo ownership changes at destination). This aspect needs to be covered in the Commission study.

*Suggestion: "Regulations in scope" should cover export regulations for resource cargoes, including to the high seas.*

**What are community engagement and benefit sharing?**

It is essential to account for the direct and indirect socio-economic benefits of resources activities for communities in the consideration of regulations.

Such benefits should be placed in the context of approvals for responsible operators.

**Concurrent Reviews**

*Suggestion: The recently revised ANZECC Water Quality Guidelines provide one model for the integration of both sound science and stakeholder views in water quality assessments. Importantly, there is provision for the ongoing review of the guidelines as stakeholder views may change and new science becomes available. This is a cooperative best management approach.*

*See* https://www.waterquality.gov.au/guidelines/anz-fresh-marine

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*INFORMATION REQUEST*

*Is the Commission's proposed scope for this study appropriate? Is it too broad or too narrow? How should the proposed scope be adjusted?*

*Should the Commission's definitions of the concepts of broader impediments and community engagement and benefit sharing be refined? If so, how?*

*Are there other relevant reviews that the Commission should be aware of, including ones being conducted overseas?*

## 3 Identifying best-practice regulatory approaches

How to "do" stakeholder engagement has been found to be a complex barrier to the progression of new regulations. Vested stakeholder positions at both ends of the spectrum may be robustly held so that common ground from which to move forward may be hard to find.

Stakeholders are entitled to their views and these need to be considered in regulatory developments and reviews. However, the role played by science may be downplayed as "technical detail" when in reality it offers real-world measurement and management data to help independently measure the impacts and benefits of resources activity. Quality data is reproducible, peer-reviewed and weight-of-evidence and because of its objectivity, more readily gains the confidence of stakeholders (government, industry and communities), than expressed viewpoints.

The recent review of the ANZECC Water Quality Guidelines has provided a model for stakeholder/ community engagement alongside the scientific evaluation of water quality issues in its management framework.

*Suggestion: Examples of regulatory tools such as the new ANZECC Water Quality Guidelines should be evaluated for their applicability to regulations for the resources sector. Tools of value will likely be characterised by providing for both stakeholder and science input and importantly, with provisions for revised stakeholder views and new science.*

Table 1 **Assessment criteria for best-practice regulation**

| *Regulatory design* | *Regulator governance* | *Regulator conduct* |
|---|---|---|
| • Consultation during regulation-making is sufficient<br>• Objectives of regulation are clearly defined and consistent across different regulations<br>• Regulation is not overly complex or excessively prescriptive<br>• Regulation is regularly reviewed | • Roles, responsibilities and requirements of different regulatory agencies are clear and duplication is avoided<br>• Decision makers are accountable<br>• Regulators are independent<br>• Regulators are adequately resourced and have necessary capabilities | • Regulators' processes are clear, predictable, open and transparent<br>• Regulatory outcomes are consistent with objectives<br>• Administrative costs are no higher than necessary |

*Sources*: COAG (2007); OECD (2014); PC (2009, 2013a, 2013b).

*INFORMATION REQUEST*

*The Commission is seeking feedback on whether the criteria outlined in table 1 are appropriate for assessing whether regulation is best practice.*

**How should best-practice regulation be assessed?**

For Table 1

*Regulatory design:* Agency consultation with the resources industry during regulation making, as experienced, is not automatic. It would greatly assist if government agencies were co-ordinated and always consult the resources industry on relevant new and revised regulations. This might be done perhaps through a small in-house" resources Information unit or hub", where the resource industry could direct enquiries. This unit would not impinge on agency independence.

*Regulator Governance:* Industry experience has been that some agencies operate in isolation of each other which slows product value chains and causes cost blow-outs. For example, there have been occasions in the past where industry saw the need to engage not only with transport agencies (Maritime Safety Authority) but also DFAT in relation to mineral export flows. The former is concerned with maritime safety and environment protection while the latter has a trade emphasis. It should not be an industry task to bring together relevant government agencies for a "whole of government" approach. The adoption of a life cycle approach across product value chains would assist in identifying the relevant government agencies and this could be housed in the "information unit" suggested above.

Resources at regulatory authorities can be a problem where industry finds no in-house expertise able to answer technical enquiries. This expertise tends to be more and more outsourced to external

consultants so that another engagement loop is created. Agencies should retain at least a few core science/technical/engineering experts who can respond to industry enquiries first hand. These advisors could be cost-effectively retained in an "information unit" on an on-call basis and field day to day enquiries.

Such expertise is available across the minerals resource life cycle – for exploration, development, operations, emissions/wastes, health/safety/environment, product characterisation, legal and life - cycle practice.

*Regulator conduct:* To make regulator processes "clear, predictable, open and transparent", the retention of some in-house science/technical/engineering expertise (on-call) in government agencies as contact points is important so that industry is supplied with information to better deliver "outcomes consistent with objectives".

*Suggestions:*

*Adopt a life cycle approach across resources value chains from mine to customer gate to assist in building a holistic government agency approach rather than a piece-meal agency-to-agency one.*

*Agencies should retain some in-house (on call) expertise across the science/ technical/engineering/life-cycle/legal disciplines in order to more transparently and efficiently address arising information requests and issues. This could be done through a single central "resource industry information hub" model.*

## 4 To what extent are current regulatory processes consistent with best practice?

*INFORMATION REQUEST*

*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 managed across different regulations*

*regulatory 'creep' occurs*

*regulation is overly complex or prescriptive*

*regulations are subject to rigorous assessment and effective review processes.*

*What are the consequences of identified instances of poor regulatory design for regulatory outcomes, investment in the sector and broader community outcomes?*

*How could identified shortcomings be remedied?*

**Issues with regulatory design**

Past consultations on resources regulations between government, industry and other stakeholders have generally been more productive in Australia than in some national jurisdictions. In part, this may be because while the resources industry seeks to produce and export, government seeks to ensure

export value chains continue efficiently, whilst ensuring regulatory controls are not unnecessarily burdensome. This positive relationship needs to continue but it does need refinements.

Consultation needs to be early, wide, ongoing, transparent and open to revision of outcomes when new research is obtained and stakeholder positions change. Regulations have often been very hard to "review" once in place so communication of revisions and their justification needs to be clear. Poorly-designed regulations lock industry into unnecessary inefficiencies and compliance costs.

In this consultation, objectives need to be agreed upfront under terms of reference. The life-cycle approach to coverage of minerals / metals value chains is recommended. Assessment of risks based on sound science is the approach most likely to build common ground amongst all stakeholders, including both industry and government.

A role of the suggested "information unit/hub" above would be to minimise complexity but not devalue findings. It would also act to collate the efforts of different agencies so that industry need not need to move through multiple approval processes.

*Suggestions:*

*Consultation on regulatory design needs to be early, wide, ongoing, transparent and open to revision of outcomes when new research is obtained and stakeholder positions change. Collation of agency efforts within an "information hub" with attached expertise, would aid efficiency and reduce costs.*

*Regulations built on sound science stand the best chance of being widely-accepted and enforceable but need to be open to revision as new science becomes available.*

**Efficiency, transparency and accountability of decision-making**

Finding common ground amongst diverse stakeholders is always difficult.

*Regulatory duplication*

Duplication, whether amongst Commonwealth agencies or between the Commonwealth and states/territories would be best countered by establishing a resources industry regulatory information hub, as suggested above.

In Box 4, the "coordination office" and "lead agency" models both offer a more consultative approach to DAA processes.

*Suggestion: In Box 4, while a one-stop shop has efficiency appeal as regards assessment and approvals, as described here it may not offer appropriate consultation opportunities. Can a blend of all three models be derived?*

*This might be an information unit providing guidance to industry/stakeholders which is situated within a lead agency which also coordinates its own responsibilities along with those of other agencies.*

*Regulatory accountability and independence*

While some jurisdictions may conduct reviews through independent agencies or else government departments, with decisions being made by regulators/ Minister, these may be open to legal challenge

in state Land and Environment courts. This presents a decision-making maze for industry/stakeholders.

*Suggestion: One way to help reduce "lawfare" is to base risk assessments and decisions upon objective science. This may entail making decisions based on existing data but also filling key data gaps through research. Effective science communication of findings should underpin regulatory reviews by agencies though these may still be subject to court challenge.*

*The differing approaches adopted by different state land and environment courts can delay project approvals. The NSW approach is to engage in-court "commissioners" to advise judges independently. Another approach in Queensland is for external experts retained by parties to potentially engage before presenting to court.*

*Consideration needs to be given to derivation of a "best-practice" model where approval decisions find their way to courts to reduce uncertainties and provide better clarity on decision-making.*

*Regulatory resourcing and capability*

*Some cost recovery from project proponents is appropriate as corporations profit, but as projects deliver wider socio-economic benefits to communities, costs should also be borne by the taxpayer.*

*INFORMATION REQUEST*

*The Commission is seeking feedback on approaches to regulator 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.*

*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 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).*

*What have been the consequences of identified instances of poor regulatory governance, including unnecessary duplication, for regulatory efficacy and efficiency and for investment in the sector?*

*How could identified shortcomings be remedied?*

*The Commission is also interested in the different approaches agencies have taken to recover costs. Should 'user pays' be applied more broadly?*

*Suggestion*

*There exists a lack of clarity on the coverage and responsibilities of different agencies across the resource industry regulatory spectrum. The suggested approach above by deploying an "information hub" across the minerals life cycle to customer gate is recommended.*

*In terms of accountability of decision-making, new and revised regulations need to be based on sound science.*

## Issues with Regulator Conduct

### *A recent case study provided very useful insights into effective management of a regulatory development applicable to the resources industry*

*An international case study* example of an "effective and best-practice approach" is the recent industry consultation process for bulk minerals export (iron ore, bauxites, coal and metals concentrates) with the Australian Maritime Safety Authority.

Over a period of around 7 years, AMSA and the minerals industry consulted many times as new scientific research on cargo characteristic and shipping conditions was developed, peer-reviewed and eventually implemented. The implementation was into international shipping regulations at the International Maritime Organisation in London.

Sound science was the common platform for the AMSA/industry collaboration and industry experts were invited as members of the Australia delegation. This was found to be an excellent consultation model which became a collaborative model because of the common acceptance by the industry participants and the agency of sound, peer-reviewed science as a joint platform for progress. Importantly, the agency retained its independence but sound science was the common ground. Further, other stakeholders such as NGOs, industry associations and other nation states were found be more accepting of regulatory developments based on science. As a result of this work, global exports of these cargoes are now subject to new internationally-accepted and legally-binding shipping requirements by IMO member states.

Suggestions:

Lessons from this case study included the value of

- early and ongoing consultation between agency and industry where trust was built on a sound science platform
- industry willingness to support research to fill key data gaps on cargo characterisation
- effective and coordinated consultation and communication by government and industry including at an international regulatory forum (IMO)
- further strengthening links between agency and industry from one case study (iron ore and bauxite "liquefaction") to following issues (self-heating and oxygen-depleting cargoes)
- a life-cycle appreciation of "knowing products" up to customer gates
- the need for a multi-agency appreciation of the risks and benefits associated with minerals value chains (maritime safety and environment protection, socio-economic and trade).

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*INFORMATION REQUEST*

*The Commission is seeking examples of government activity beyond resources sector-specific regulation that influences investment, particularly where that activity represents a major impediment. How important for investment are these impediments?*

*How could the impact of these impediments be reduced?*

Expectations are that industry and communities alike will increasingly look towards Government activity or inactivity in response to climate change.

For example, carbon foot-printing of all products (whether mineral commodities or otherwise) is gaining increasing attention whether at the production(operations) or transport phases (sea miles to markets).

*Suggestion: Adopting a life cycle approach covering mine to customer gate will reduce the likelihood unexpected carbon-foot printing challenges to Australia's resources exports.*

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*INFORMATION REQUEST*

*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?*

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*Suggestion*

*Consultation, in keeping with risk assessment and management standards, needs to as wide as needed to include all relevant stakeholders and should be early and continue to completion of a new regulation. Provision also needs to be made for revisions when stakeholder views change and new science becomes available. Stakeholder ownership of the process is key.*

*The links of indigenous communities to country are an essential component of such consultations.*

**5. What are broader impediments materially affecting investment?**

*Product regulatory risk:*

Mineral products are coming under increasing international scrutiny in relation to their health, safety and environment credentials compared to competitor products. There will be a growing need for Australian producers to "know their products" in increasing detail.

Examples include

- naturally-occurring product impurities which may impact downstream processing efficiency and possibly present downstream health and environment concerns
- climate related product characterisations e.g. carbon and water foot printing covering both the production and transport (sea miles) phases.
- climate change risk to production and export infrastructure and transport

These examples will present new challenges to product value chains and the effective communication of product technical characteristics will be required both nationally and internationally, where downstream regulatory barriers to market access are known to exist**.**

The value of product knowledge is lost where is does not reach relevant government and judicial decision-makers (national and international).

## 6. Best practice community engagement and benefit sharing

There is a glaring need for a coordinated approach to community engagement and benefit sharing. This is clearly illustrated by the diversity of legal and regulatory frameworks described in the Issues Paper.

There can be only one model where diverse community ownership of consultation outcomes can be built.

It must be based on trust developed and confirmed through early, ongoing, respectful and transparent consultations. This will require the careful balancing of health, safety, environment, socio-economic, business and legal considerations to support licence to operate.

It will require ongoing input from diverse and mutually-respectful expertise.