ACF Submission to Productivity Commission Resources Sector Regulation Draft Report

14 September 2020

Introduction

The Australian Conservation Foundation ("ACF") thanks the Productivity Commission for the opportunity to provide submissions on the Draft Report – Resources Sector Regulation released on 24 March 2020 (Draft Report).

ACF is Australia's national environment organisation. We represent a community of over 600,000 people who are committed to achieving a healthy environment for all Australians. For more than 50 years, ACF has been a strong advocate for Australia's forests, rivers, people and wildlife. ACF is proudly independent, non-partisan and funded by donations from our community.

On 7 November 2019, ACF made submissions on the Productivity Commission's Issues Paper on Resource Sector Regulation (Original Submissions), which addressed the terms of reference and scope of the Productivity Commission's Inquiry into Resources Sector Regulation (PC Inquiry) and made eight overarching recommendations.

ACF will respond to each draft finding, leading practice, recommendation and request for further information that is relevant to its position. Before doing so, ACF addresses a threshold issue below.

Scope of the PC Inquiry and Draft Report

As a threshold issue, ACF maintains its earlier position that the Terms of Reference for the PC Inquiry are framed by an erroneous assumption about the effectiveness of environmental regulation of the resources sector. This erroneous assumption appears to have caused the Terms of Reference for the PC Inquiry to focus on investment in the resources sector. In ACF's view, investment in the resources sector cannot be considered in isolation of issues such as climate change and biodiversity loss, which are both likely to affect the sector increasingly in coming months and years.

The failure of regulation in Australia's resources sector was demonstrated in June 2020 via Prof. Graeme Samuel's Independent Review of the EPBC Act – Interim Report[1] (Samuel Report).

The Samuel Interim Report was prepared as part of a statutory ten-yearly review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). It is fair to say that the Samuel Report condemns many aspects of Australia's national environmental law and its application and enforcement, as relevant to the resources sector -

[1] Samuel, G 2020, *Independent Review of the EPBC Act—Interim Report*, Department of Agriculture, Water and the Environment, Canberra, June. CC BY 4.0.

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> *The EPBC Act is ineffective. It does not enable the Commonwealth to play its role in protecting and conserving environmental matters that are important for the nation. It is not fit to address current or future environmental challenges.*
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> *…*
> *Fundamental reform of national environmental law is required, and new, legally enforceable National Environmental Standards should be the foundation. Standards should be granular and measurable, providing flexibility for development, without compromising environmental sustainability…*
> *…*
> *The operation of the EPBC Act is ineffective and inefficient. Reform is long overdue.*[2]
> *…*
> *The operation of the Act is dated and inefficient, and it is not fit to manage current or future environmental challenges, particularly in light of climate change* [3]
> [our emphasis]

Clearly, the EPBC Act is a central part of regulation in the resources sector. Given the Samuel Report and changing environmental law and policy in Australia that ACF suggests is likely to follow, the issues relevant to resources sector and the PC Inquiry itself are also bound to shift.

Therefore, as a threshold issue, given the likely finalisation of the Samuel Report in late 2020, ACF considers that the PC Inquiry ought to –

- await and carefully consider the recommendations in the final Samuel Report, when it is released, in terms of potential amendments to the EPBC Act that affect this PC Inquiry; and
- if necessary, then conduct further investigations and findings based on the final recommendations in the final Samuel Report; and
- consider recommending to the Treasurer that the Terms of Reference of the PC Inquiry be re-framed to provide a greater focus on the resource sector's response to changing environmental law and policy and the global issue of climate change, rather than its present focus on investment.

With this threshold issue in mind, ACF's responses to the most relevant issues arising from the Draft Report are outlined below.

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[2] Samuel Interim Report, p. 1 – 2.
[3] Samuel Report, p iii.

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1. MANAGING RESOURCES DEVELOPMENT IN THE INTERESTS OF THE COMMUNITY

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.**

ACF response

ACF agrees.

Thorough assessments of potential licence holders address the risk of non-compliance and that leading practice must involve regulators adopting a risk-based approach when granting or renewing tenements.

This must include considering previous non-compliances and environmental history of a proponent, including past criminal conduct, technical competency and past insolvency.

A proponent's environmental history is a relevant consideration for decisions under sections 136(4), 143(3), 144(3), and 145(3) of the EPBC Act. Decisions where consideration of a proponent's environmental history are relevant include approval of actions (Chapter 4), permit applications (Parts 13 and 13A).

However, while ACF supports the mandatory environmental history considerations set out in the EPBC Act (above), ACF considers that environmental history considerations are under-used and under-applied many Australian State jurisdictions.

ACF recommendation

ACF recommends that State mining and environmental legislation should adopt environmental history provisions similar to the EPBC Act when assessing environmental, planning and tenement applications at State level, where required.

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.

See also draft finding 4.4.

ACF response

While ACF agrees that governments must weigh the available scientific evidence of particular projects on the environment and other land uses and communities against the benefits, it does not necessarily agree that bans and moratoria, particularly on certain kinds of unconventional gas operations such as fracking ought to be ruled out entirely. This is particularly where the scientific risk of damage is clear, or even where there remains substantial uncertainty about the potential impacts of those operations, noting the precautionary principle.

Moratoria on certain kinds of activities can at least provide clarity for investors, noting that the Draft Report expresses concern about abrupt policy changes, a lack of clarity and consistent long-term policy direction on issues affecting the sector.[4]

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2. DELAYS IN THE REGULATION OF RESOURCES SECTOR

DRAFT FINDING 6.1
Unnecessary delays in project commencements can be costly for proponents and the community, and typically dwarf other regulatory costs.

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.

ACF response

ACF agrees in part.

While ACF agrees that disproportionate and unfocused environmental impact assessments (EIAs) can drive up costs and can at times be of questionable value, ACF submits that –

- improved processes and information from regulators about the requirements for EIAs, improved resourcing of regulators and professional accreditation standards for those undertaking EIA reporting should be the drivers for efficiency in assessments; and

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[4] Draft Report, pp. 310.

- efficiencies in the EIA process must not however compromise the quality of the environmental assessments undertaken for resource projects.

The importance of proper funding and resourcing at State and Commonwealth level is under-recognised when considering delay in environmental decision-making. The Samuel Report found that the recent provision of additional resources at Commonwealth level to conduct EIAs has improved performance from 19% to 87% of key decisions made on time.[5]

Additional funding of regulators is also necessary State level, noting that in many cases, State accredited processes are also used to assess the environmental impacts of resources projects under the EPBC Act via bilateral agreements or other accredited processes in the EPBC Act.

Further, while ACF recognises that outcomes-driven objectives are appropriate in some circumstances, ACF submits that there is still a need for the purposes of EIAs to describe processes of how environmental outcomes will be achieved. These processes can be set out in legislation or consistent national policies or guidelines and can be simpler than the current legislation. For example, some processes such as Public Environment Reports (PERs) are effectively identical to Environmental Impact Assessments.

Specific process-driven objectives should ensure that:

- EIAs are prepared in line with national standards and plans using clearly defined and objective criteria;
- the EIA process is managed by independent accredited assessors and the results made public within a timely fashion.

The current lack of professional standards or accreditation processes for consultants who prepare EIAs for resources projects and assessors of EIA reports erodes trust in the decision-making process.[6] Further, it may also be a cause of disproportionate requests for information (from regulators) and unfocussed and therefore costly EIA reports and documentation (from consultants engaged by proponents).

ACF Recommendation

The causes of costly or disproportionate EIA processes ought to be further investigated and that further funding, proper policy or legislative guidelines about EIA processes and accreditation or professional standards should be considered as one way of improving this issue.

DRAFT FINDING 6.3
The referral process for the [EPBC Act] and the nuclear and water triggers are creating unnecessary regulatory burden:

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[5] Samuel Report, p. 65.

[6] Samuel Report, p. 64.

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- **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.**

ACF's response

ACF disagrees.

ACF particularly disagrees with the suggestion in draft finding 6.3 that the nuclear trigger and water triggers are creating an "unnecessary regulatory burden". On the contrary, ACF has experienced that the nuclear trigger and water triggers have provided an important check and balance on important environmental assessment aspects, particularly of large and potentially harmful resource projects.

ACF's response to specific points in draft finding 6.3 follow below.

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

While ACF does not dispute the accuracy of this finding, ACF submits that it is an inherent and necessary product of the environmental referral system, which is entirely appropriate to ensure that all proposed actions (that are in a 'grey area' as to whether or not they trigger the EPBC Act) are properly assessed as to whether they do trigger the EPBC Act.

- ***Projects ruled out as nuclear actions in the EPBC Act explanatory memorandum are being treated as nuclear actions requiring Commonwealth environmental approval.***

ACF does not contest that some projects not originally contemplated in the EPBC Act explanatory memorandum are captured as nuclear actions requiring EPBC Act approval. ACF suggests, however, that due to the critically important role that the nuclear trigger plays, the broad way in which the nuclear actions trigger is applied ought to continue. ACF elaborates below.

It is essential that uranium exploration and mining remain within the definition of 'nuclear actions' and that nuclear actions remain listed as a MNES and that full environmental assessments under the EPBC Act are retained. While this process still falls short of effectively regulating the industry and cannot ensure positive environmental outcomes, its removal would profoundly weaken an already deficient regulatory framework for the sector which has both high risks and high rates of incidents.

Australia's uranium sector is contested, flat-lining and characterised by under-performance and non-compliance – this is not the time for the Commonwealth to walk away from dedicated scrutiny or reducing environmental protections.

Notably, the Samuel Report does not recommend that the scope of the nuclear trigger be reduced.[7]

[7] Samuel Report, p. 52.

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Further, the bilateral agreements, which were designed to stop a perceived duplication of process, have not delivered good environmental assessment practice in relation to Australia's uranium sector However, the current referral and even the assessment bilateral processes provide a mechanism for the Commonwealth Government to apply conditions, to ensure consistency with the objects of the EPBC Act. The Commonwealth's ability to impose such conditions should not be compromised or reduced by changes to the nuclear trigger.

ACF recommendations: ACF submits that the nuclear trigger should –

- be maintained in the EPBC Act in its present form;
- continue to be applied broadly by regulators;
- be supplemented by a new National Environmental Standards for MNES for nuclear actions;[8]
- not be the subject of approval bilaterals, to allow the Commonwealth to continue to intervene including to impose conditions under referrals made to it under the nuclear trigger.[9]

- ***The evidence that the water trigger filled a significant regulatory gap is not compelling.***

ACF Response

ACF strongly disagrees.

Australia is the driest inhabited continent on earth. Australia's water is precious. The current drought highlights how vulnerable our water resources are, and the impacts of poor management.

ACF submits that the current water trigger in the EPBC Act operates to protect important water resources from coal mining and coal seam gas developments. Further, the water trigger acts as a further important check-and-balance, to ensure that the cumulative impacts of water-affecting activities proposed by large resources projects are properly assessed.

As an example, ACF points to the example of the North Galilee Water Scheme Infrastructure (NGWS) associated with the Carmichael Coal proposed to be operated by Adani Infrastructure Pty Ltd. The NGWS will result in up to 12.5 gigalitres (GL) of water being taken from the Suttor River in central Queensland to the Adani coal mine, where it will be used for various purposes, primarily to wash coal, equipment and machinery and for dust suppression and similar uses. Although the Commonwealth Minister has decided not to apply the water trigger to the NGWS, ACF considers that the correct position at law is that the water trigger applies. Proceedings about that issue are underway in the Federal Court of Australia.

As a national environmental body, ACF's ordinary activities include to monitor the quality of regulator decision-making in relation to mining and other resource projects. ACF is of the view that State water licensing and assessment processes have often been insufficient in properly assessing the

[8] Samuel Report, p. 52.
[9] Samuel Report, p. 52.

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water resources impacts of large mining and other projects, including their cumulative impacts. On this issue, ACF points out that –

- the impacts of climate change including changing rainfall patterns and volumes have not, in ACF's experience, been properly considered during the assessment of many water-intensive projects such as the NGWS;
- The views of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Developments (IESC) are not a mandatory relevant consideration for State assessments of applications for water-affecting activities at State level, as is the case under the EPBC Act;[10]

In relation to the water trigger, the Samuel Report:

- does not find that the water trigger fails to fill a significant regulatory gap (as the PC's draft finding 6.3 proposes); and
- further, recommends that the water trigger be retained (in modified form) in the EPBC Act;[11] and
- finds that the IESC has improved decision-making and led to increased transparency and community confidence that cumulative impacts of proposals are assessed.[12]

It should be noted that the 2017 Independent Review also found:

- The water trigger is an appropriate measure to address the regulatory gaps regarding risks to water resources.
- The water trigger is an appropriate manner to seek to alleviate public concern about the impacts to water from coal seam gas and large coal mining developments.
- In practice, the scope of the legislation was in keeping with Parliament's intention.
- The characteristics of the legislation and the manner it has been implemented give confidence that it is capable of being effective.
- The legislation can deliver a net benefit to Australia.

While ACF acknowledges that the States and Territories have constitutional responsibility for managing their own water resources,[13] for at least the above reasons, ACF views the water trigger as an important further check and balance and to ensure that the cumulative impacts of larger resource projects on scarce water resources are properly assessed.

Having said this, there is inconsistency in the application of the water trigger. The water trigger does not apply to equally (or potentially more) damaging activities, such as shale gas fracturing, tight gas or underground coal gasification. More broadly there are other harmful activities, including the imposition of new regulatory structures (dams) on private and public lands that will impact the environment and downstream users.

[10] See for example, EPBC Act, s. 131AB.
[11] Samuel Report, p. 51.
[12] Samuel Report, p. 51.
[13] Samuel Report, p. 50.

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ACF recommendation

ACF recommends that draft finding 6.3 be reconsidered in light of the Samuel Report and that further investigations into the effectiveness of State assessments of water-affecting activities proposed by large mining and resource projects be undertaken, consistent with ACF's submissions above.

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.

ACF repeats its comments above that a lack of resourcing for regulators, lack of professional standards or accreditation for EIA assessors or those responsible for reporting (preparation of EIS, PERs, etc) may also be contributing to delays at the approval stage. ACF recommends that the PC Inquiry investigates this issue further to more accurately determine the need for accreditation or professional standards for EIA assessors and/or those preparing EIA reports.

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.

ACF Response

ACF agrees in part.

Comments

It is true that project approvals are often conditional on the preparation of management plans. However, management plans often form an important aspect of the environmental approval process for resources projects in appropriate circumstances.

In part due to under-resourcing, since 2012 ACF has observed that regulators increasingly adopt a practice of 'backloading', through which complex problems and decision making are deferred to post-approval provisions via conditions. This generally occurs via conditions requiring management plans.

One example of this backloading is the approval of the Adani coal mine (EPBC 2010/5736). This required a multitude of additional management plans to be approved following the actual approval decision. Many of these dealt with complex technical issues that should have been dealt with during the assessment process. Instead, these important issues were left to conditions requiring an "offsets plan" and a "groundwater management plan", which should have been addressed during the assessment of the project.

The Courts have regularly expressed concern about this practice of 'back-loading' via conditions:

> *The power to impose conditions is not provided to enable a planning authority to alter the nature of the proposal and hedge it about with conditions which are unworkable, unenforceable, and seek to confine the development in a kind of strait jacket which will constrain the development from being used in the ordinary way. Resort to the use of such conditions is tantamount to an acknowledgment that the proposed development is inappropriate.*[14]

ACF agrees with the above sentiments of the South Australian Supreme Court in relation to the use of conditions, which apply with equal force to other types of environmental authorisations, including EPBC Act approvals.

The use of conditions to back-load approvals shifts the liability and responsibility for the assessment decision making to post-approval monitoring and compliance resources of regulators. Often, conditions requiring management plans result in those management plans not being properly assessed and difficult to enforce. Further, there are no mandatory community consultation requirements or public disclosure mechanisms for post-approval management plans or subordinate approvals required as conditions.

ACF recommendation
ACF considers that there is a place for management plans in all environmental assessments, provided that requirements for management plans are properly considered and preferably, submitted, assessed and approved during the primary assessment of a project (not back-loaded). ACF suggests that these practices should be enshrined where possible in legislation (or practice notes).

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.

ACF Response

ACF disagrees.

Comments

The draft report has a narrow view of the role and effectiveness of environmental regulation. Specifically, the recommendations made offer no meaningful protections or improvement for

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[14] *Kipa Freeholds Pty Ltd v Development Assessment Commission* [1999] SASC 53 at [38]-[39].

environmental matters protected under the EPBC Act. As noted by Dr Chris McGrath in relation to the One Stop Shop legislation:

> *Handing approval powers to State governments in approval bilaterals would severely undermine one of the key functions and benefits of the EPBC Act in practice – to provide an appropriate level of oversight on State government-sponsored projects. Commonwealth laws prior to the EPBC Act created a number of direct and indirect federal powers to oversee State government decisions regarding the environment and resource management.84 These laws were manifested in a variety of ways, such as the dispute in the mid-1970s over the Commonwealth's refusal to grant export licences for sand mined from Fraser Island even though the mines had been approved by the Queensland Government.*[15]

The contrast between this and the broad reforms recommended as part of the Samuel review are stark, especially in relation the assurance, governance, transparency, accountability measures and the clear and central role for robust, legislated environmental standards. The Samuel review Interim report contains a critical review of the exact approach recommended by the Productivity Commission in 6.1, specifically stating:

> *In 2014 the then Australian Government was unable to secure the necessary parliamentary support for the legislative changes required. There was considerable community and stakeholder concern that environmental outcomes were not clearly defined and the states and territories would not be able to uphold the national interest in protecting the environment. A lack of clear environmental (as opposed to process) standards fuelled political differences at the time.*
>
> *This community concern remains. Submissions to the Review highlighted ongoing concern about the adequacy of state and territory laws, their ability to manage conflicts of interest, and increased environmental risks if the Commonwealth steps away.*
>
> *In their submissions to the Review, jurisdictions expressed a range of views on this, including both an ongoing desire to pursue the devolution of approvals powers (for example, WA Government and SA Government) as well as continue to improve existing arrangements (for example, ACT Government, NSW Government and NT Government).*[16]

Recommendations 6.1 and 6.2 have fallen into the same pattern as warned against in the Samuel review. To be clear - these reforms lack social license and have been strongly resisted by the community, especially in the absence of the assurance and accountability architecture articulated by the Samuel review.

Moreover, recommendation 6.1 fails to account for the inherent complexity that is built into accrediting state and territory regulatory regimes on a case by case basis. Such reforms create a patchwork of approval approaches for matters of national environmental significance, especially in the context of mixed adoption by states and territories. If adopted these approaches will involve

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[15] McGrath, C 2010, *One stop shop for environmental approvals a messy backward step for Australia*, Environmental and Planning Law Journal 31 (3), 164-191.

[16] Samuel Report, p. 53.

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significant legal and reputational risks for the overall architecture and the individual projects approved. As noted by Mcgrath:

> *Another problem for the one stop shop policy is that it may well create greater uncertainty. As was noted earlier, in December 2012 the process for accrediting approval bilaterals under the EPBC Act was placed on hold by the Gillard Government due to concerns over potentially increasing uncertainty and creating a patchwork of different approval bilaterals in different States and Territories.*
>
> *The one stop shop policy faces a similar challenge of avoiding a patchwork system at several levels across Australia. Without a legislative change, the prohibition on entering approval bilaterals for the water trigger noted above complicates the policy considerably for mines and CSG projects. There is also the real possibility that not all of the States and Territories will agree to approval bilaterals for all decisions, particularly without the Commonwealth providing funding for any additional workload placed on the State and Territory concerned.*

A simpler and more efficient mechanism to deliver efficient project assessment is to work on super-charged assessment bilateral agreements, which would, in effect operate as a single touch assessment, where one set of environmental assessment information is developed and assessed, with the Commonwealth maintaining a final decision-making role. Such a mechanism, if implemented correctly, would enable the Commonwealth to make concurrent approvals decisions as the states and territories, eliminating any timing delays whilst maintaining Commonwealth oversight.

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3. DELIVERING SOUND ENVIRONMENTAL AND SAFETY OUTCOMES

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 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.

See also draft leading practice 7.3.

ACF Response

ACF agrees with draft finding 7.2 and draft leading practice 7.3. ACF offers the following information and comments in relation to information request 7.1.

Comments

In ACF's experience, monitoring, compliance, enforcement and assurance by regulators overseeing resources projects is weak, under-resourced and ineffective.

Further, the monitoring and enforcement approaches of those regulators has not typically represented good risk-based regulation.

While large resources projects often require State and Commonwealth approvals, the EPBC Act is a primary regulatory tool that applies to all (particularly larger) resources projects that involve one or more "controlled actions". Enforcement and compliance activities under the EPBC Act is performed by officers of the Commonwealth Department of Agriculture, Water and the Environment (as it is now known). ACF will refer to this Department and its predecessors collectively as **"the Department".**

In relation to the enforcement of the EPBC Act, the Samuel Report recently found that –

> *…[t]here has been limited activity to enforce the [EPBC Act] over the period of 20-years it has been in effect, and the transparency of what has been done is limited.*
>
> *The culture of monitoring, compliance, enforcement and assurance is not forceful. This erodes public trust in the ability of the law to deliver environmental outcomes.*
> *…*
> *The monitoring, compliance, enforcement and assurance powers in the EPBC Act are outdated. Powers are restrictive and can only be applied in a piecemeal way across different parts of the Act due to the way it is constructed.*
>
> *Monitoring, compliance, enforcement and assurance activities are significantly under-resourced.*[17]

ACF agrees with the above findings in the Samuel Report. ACF is concerned that often the current compliance regimes, under both the EPBC Act and at State level makes it cheaper and more attractive for resources and mining operators to risk of non-compliance.

In ACF's experience, at times flagrant breaches of environmental laws in Australia by mining and resources operators go unpunished. Further, where breaches are punished or become the subject of enforcement proceedings, often the penalties and punishments are less burdensome than the approval process itself.

The Department currently administers a cost recovery scheme for referrals, the assessments of those referrals and changes made post-approval. This means that the cost of regulation is borne by the community who are willing and able to comply. Conversely, historical compliance practices have

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[17] Samuel Report, p. 95.

resulted in non-compliance effectively being rewarded in many cases, through more expedient and less costly development.

Some recent examples of failures or unsatisfactory results from compliance and enforcement matters at Commonwealth level of which ACF is aware include:

- Meadowbank Station - Mt Garnet, Queensland - the landholders unlawfully cleared a substantial amount of native vegetation in a protection area. However, the Department's compliance response resulted in a variation of the landholder's previous approval being varied, at no cost to the offenders. Although the landholders were required to increase the protection area by 7 hectares, this came at no material cost and very minimal opportunity cost, as the landowner's total cleared area was still reduced by 0.5 per cent.[18]

- Sand mining project – Parkfield, Binningup WA - the proponent of a large sand mining project (Hovey Property Group) at Binningup, Western Australia failed to secure an offset within the time required by an original EPBC Act approval. However, the proponent extended the deadline to provide the required offset and because it was a compliance response, the variation for an extension to their deadline occurred at no charge to the proponent.[19]

ACF considers that the primary issues affecting compliance and enforcement of the resources sector that warrant further investigation by the PC include –

- Proper funding and resourcing;
- An independent environmental enforcement agency (EPA);
- Amendments to the EPBC Act, including greater compliance tools and increased penalties.

ACF elaborates on these issues below.

- Funding and resourcing issues

In ACF's experience, compliance and enforcement officers are substantially under-resourced at all levels of both Commonwealth, State and local government. ACF's own experience has been that the Department's compliance and enforcement staff are substantially deficient in numbers to properly handle the compliance and enforcement issues that arise under the EPBC Act.

ACF Recommendation

The PC should investigate the funding arrangements for environmental compliance and enforcement at all levels of government, but particularly at Commonwealth level to determine whether sufficient funding is allocated to enforcement and compliance staff under the EPBC Act.

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[18] EPBC 2016/7838 Variation (link here).
[19] EPBC 2016/7838 Variation (link here).

- Need for an independent environmental enforcement agency

In ACF's experience, there is too often a lack of true independence from regulators when determining whether to take compliance or enforcement action. When decisions are made to enforce breaches, this is often not done to the extent that the circumstances of the breach warrant.

ACF has observed a lack of political willingness on the part of regulators within Commonwealth departments to prosecute or pursue compliance actions against politically sensitive proponents or issues (like broadscale land clearing in Queensland by mining companies). Too often, local political issues affect what should be environmentally-based decisions to prosecute or enforce breaches of environmental legislation in the resources sector. The same occurs with other environmental decision making on mining and resources projects, amongst other projects.

The above issues highlight a need for an independent compliance and enforcement body at Commonwealth level. ACF considers that these responsibilities could be invested in an independent, national Environment Protection Authority (EPA).

A independent regulator has also been recommended by the Samuel Report:

> *An independent monitoring, compliance, enforcement and assurance regulator that is not subject to actual or implied direction from the Environment Minister should be established. This is important to address significant community concern about perceived conflict of interest, which is undermining their trust in the EPBC Act.*
>
> *An independent, strong cop on the beat will provide confidence that once conditions are set, they will be enforced to deliver the intended outcomes.*
>
> *The regulator should have improved transparency, publishing all actions taken in a timely manner. It should publish on its website the directions, prohibition notices and improvement notices it makes and provide follow up when they have been met. The regulator should also publish a clear set of compliance priorities and should report against an annual compliance plan.*[20]
>
> [our emphasis]

ACF agrees with the above recommendations in the Samuels Report and repeats its submissions on that issue at page 7 of its Original Submissions on the need for an independent national EPA.

- Amendments to the EPBC Act – compliance tools

Firstly, ACF considers that there should be an appropriate range of tools available to authorised officers in investigating and responding to alleged non-compliances for resources operations in Australia. To standardise the regulatory powers available at Commonwealth level, ACF suggests that

[20] Page 95.

the EPBC Act could be amended to trigger the Regulatory Powers (Standard Provisions) Act 2014 (Cth) as was recommended in the Samuel Report.[21]

Secondly, ACF notes that many State environment, development and planning regulators have a generally broader and more effective set of compliance tools than those available under the EPBC Act, including the power to:

- require enforceable undertakings from proponents;[22]
- make adverse publicity orders; [23]
- issue warning, enforcement, infringement, prohibition and improvement notices;[24]
- issue environmental protection orders.[25]

ACF is aware, for example, that many of the above powers already exist in South Australian and New South Wales environment protection legislation. Similar and more expansive powers are soon to be given to the Victorian EPA under the Environment Protection (Amendment) Act 2018 (Vic) which will commence by 1 July 2021. That legislation will also create new enforcement notices including improvement notices, clean up notices and new civil enforcement remedies. There will also be substantial additional penalties for non-compliance, typically double the current penalties for many offences under the current Environment Protection Act 1970 (Vic).

By contrast, currently, if an offence is occurring under the EPBC Act, the Department must apply to the Federal Court for an injunction to require the person to cease the action that constitutes the breach. This is an expensive and time-consuming process which is infrequently used and is not immediate enough to prevent environmental or other harm. The Department also lacks "first step" powers that exist in similar State legislation, such as appropriate warning notices or infringement notices.

ACF recommendations

ACF submits that the PC Inquiry ought to conduct further investigations into enforcement and compliance issues associated with resources sector, particularly at Commonwealth level, including:

- Establish a Special Account for the collection of payments from environmental infringement notices;
- Substantially increase the penalty units attached to a breach of approval conditions to provide adequate disincentive for non-compliance;
- Trigger the Regulatory Powers (Standard Provisions) Act 2014 with exceptions made for environmentally-specific coercive and enforcement actions;
- Include provision for warning and infringement notices for offences under the EPBC Act;
- Include strong enforcement and penalty provisions for Part 10 (strategic assessment) approvals that encourage approval

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[21] Page 95.

[22] *Environment Protection (Amendment) Act 2018* (Vic), s. 300.

[23] *Environment Protection (Amendment) Act 2018* (Vic), s. 330.

[24] *Environment Protection (Amendment) Act 2018* (Vic), ss. 271, 272, 273, 274, 275, 278.

[25] *Environment Protection Act 1993* (SA), Part 10, Division 2.

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4. MINE REHABILITATION AND REHABILITATION BONDS

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.

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).

Also see draft finding 7.5, draft leading practice 7.7, 7.9, 7.10, 7.11.

ACF agrees with draft finding 7.3 and 7.4 and 7.5 and the associated leading practice indicators.

The Commonwealth, through the EPBC Act, has a central role in the regulation of mining impacts on the environment and the performance and security of mining rehabilitation.

ACF understands that as of early 2016, there were 129 projects for which the Australian Government had placed specific conditions of approval under the EPBC Act that related to the rehabilitation of a mine site (this is out of approximately 420 operating mines nationally).[26] These figures have undoubtedly increased since.

However, the current legal frameworks do not adequately reflect community expectation when it comes to mine-site rehabilitation, especially when it comes to environmental outcomes, community wellbeing,
human health and who pays for rehabilitation. ACF agrees with draft finding 7.4 to the extent that it is aware of corporations seeking to avoid rehabilitation liabilities, including by offloading mines with rehabilitation liabilities to smaller operators, or putting operations into liquidation.

Requirements for adequate rehabilitation bonds to ensure appropriate mine rehabilitation occurs are therefore critical. Failure to do so is one of the clearest examples of environmental cost-shifting to the public. Substantial evidence exists of failures of the current system of financial assurances and rehabilitation bonds. For example -

- Hazelwood Coal Mine and power station, Vic – The Hazelwood Mine Fire Inquiry identified a shortfall in the rehabilitation bond, and required it increase from $15 million to $73.4 million, meanwhile post closure, its owners estimated that the cost of rehabilitation would likely be more than $740 million.[27]

[26] *Standing Committee on Environment and Communications*, Question 62 – Additional Estimates 24 February 2016 (link here).
[27] "Hazelwood rehabilitation estimated to cost $743 million but may rise, Engie says" (ABC News, 20 Jan 2017) (link here).

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- McArthur River Mine, NT – Media reports have stated the amount held by the Northern Territory Government to be around $140 million, though the Government has refused to release the final bond amount. Public estimates are that the rehabilitation liability for the mine (discussed further below) is between $550 million and $1 billion.[28]
- Ellendale Diamond Mine, WA – Ellendale went into liquidation, after cashing in a $2 billion performance bond. The company, once folded, passed a potential $28 - $40 million liability to the Western Australian Government under its Mine Rehabilitation Fund, even though the company only had contributed $818,000 to the fund.[29]
- Texas Silver Mine, Qld – In 2016 it was reported the abandoned mine risks spilling heavily polluted water into Murray Darling Basin. Queensland Government holds only approximately $2 million in financial assurance for the mine, despite the estimated clean up being more than $10 million.[30]

As mentioned, although mine rehabilitation is being required of proponents by conditions under the EPBC Act, often the rehabilitation requirements are insufficient or unclear. ACF considers that there is substantial variability and general uncertainty as to the nature and extent of mine rehabilitation required for individual projects across Australia.

ACF considers that there should be a clearer, national set of guidelines that regulate mine rehabilitation. This includes guidance similar to other jurisdictions internationally about the standards of rehabilitation.

For example, the United States' Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires that surface coal mine operations "backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated".[31] However, the current approach in Australia does not see standardised requirements for backfilling of voids. National standards for mine-rehabilitation and final void management and backfilling are required and should be pursued at the earliest potential opportunity, particularly in relation to impacts on water resources.

ACF Recommendations:

- Ensure all environmental and financial regulatory mechanisms that authorise and govern mining activity are based on a polluter pays principle;

- A specific legal duty of care for proponents to restore the environment where they cause harm ought to be enshrined in the EPBC Act via the present EPBC Act review;

- Establish a clear national set of mine rehabilitation guidelines that include standards on void management and back-filling, similar to the model in the United States.

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[28] "Calls to halt McArthur River mine operations over safety and remediation concerns" (The Guardian) (link here).
[29] "New Minister warns mine 'rogues'" (The West Australian, 31 March 2017) (link here).
[30] "Pump crews work at abandoned silver mine to keep toxic spill out of Murray-Darling Basin" (ABC) (link here).
[31] U.S. Code (1977) *Surface Mining Control and Reclamation Act of 1977*, U.S. Code (Title 30, Chapter 25).

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- Implement a national legal obligation for closure liability accounting and reporting on a site-by-site basis, to be included in annual financial statements and as a separate line item in company balance sheets.

- Require mining proposals to clearly identify and be assessed on closure costs and post mine management requirements over the life of the site (including perpetual management) and identify a secure funding mechanism relevant to management timeframes.

- Define and regulate care and maintenance to prevent companies from holding sites in care and maintenance indefinitely

- Increase powers to assess the capacity and capabilities of companies to meet environmental requirement and mine closure requirements. These powers should be increased where there is a change in the controlling interest of the company in the latter stages of a project's operation.

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?

Respectfully, ACF considers that information request 7.2 is leading and erroneously implies that proponents with insufficient financial capability for rehabilitation are appropriate proponents for such activities.

ACF's position is that companies that cannot demonstrate the financial capability to rehabilitate their mining activities should not conduct the operation. ACF's submits that mine rehabilitation and other post-relinquishment obligations on resource companies are as much a part of a proponent's capability to take on a project as a mining operation itself.

ACF respectfully suggests that the PC reconsider information request 7.2 to consider ACF's position above in relation to draft finding 7.5, 7.7., 7.9, 7.10 and 7.11.

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5. CLIMATE CHANGE POLICY - CHANGES, INCONSISTENCY AND UNCERTAINTY

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).

ACF Response

ACF generally agrees with draft findings 8.2 and 8.3 to the extent that uncertain and inconsistent policy can create investor uncertainty. However, ACF says that climate change policy can and should be far stronger and more certain in Australia, including in how it deals with Australia's international climate change obligations, such as the Paris Agreement.[32]

It is beyond argument that climate change now poses an existential threat to human society. The international community has recognised, through the Paris Agreement, that reducing greenhouse gas (GHG) emissions is a pressing responsibility of governments across the world. It should not be controversial that the scale and urgency of the climate change problem highlights the need for strong and certain legislative and policy intervention.

In the absence of a domestic or international carbon pricing framework, the federal government must consider national environmental law as a key tool to regulate the contribution of Australian fossil fuels resources to climate change. The present EPBC Act review being undertaken by Prof. Graeme Samuel presents an opportune time to do so. It is fair to suggest that the Samuel Report is scathing about the present operation of the EPBC Act on regulating matters affecting climate change:

> *The operation of the Act is dated and inefficient, and <u>it is not fit to manage current or future environmental challenges, particularly in light of climate change</u>.*[33]

The Samuel Report also found that the EPBC Act should require that development proposals explicitly consider the effectiveness of their actions to avoid or mitigate impacts on nationally protected matters under specified climate change scenarios.[34]

Following the repeal of the carbon price there has been no effective mechanisms to drive down GHG emissions nationally. The Government's climate solutions fund, in which taxpayers purchase abatements does little to drive down emissions. Analysis has highlighted the systemic flaws in the CSF and the lack of adequate enforcement of baselines.

However, Courts in other nations are increasingly accepting that the Paris Agreement forms part of domestic government policy, which decision-makers are bound to take into account when making planning and environmental decisions.

ACF refers in particular to the decision of the United Kingdom's Court of Appeal on 27 February 2020,[35] which found that <u>the Paris Agreement forms part of UK government policy</u>, under s. 5(8) of its Planning Act 2008 (UK), which provides:

> *[In making a national policy statement] the reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.*

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[32] United Nations, dated 12 December 2015, entered into force on 5 October 2016.
[33] Samuel Report, p. iii.
[34] Samuel Report, p 4.
[35] *R (on application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214.

The result of the Court of Appeal's decision was that a planned third runway at Heathrow Airport was remitted back to the Secretary of State for re-consideration, as the Secretary failed to consider the climate change targets in the Paris Agreement when making its original decision to approve the third runway.

ACF is aware that international governments are increasingly legislating and policy-making to better account for climate change. ACF agrees that climate change law and policy must be strong and decisive and says that this should now also be reflected in the EPBC Act given the timely review of that legislation that is presently occurring. Markets and legislatures in both Australia and internationally are now inevitably shifting to become more climate-conscious. Investment decisions must inevitably follow that trend. Clearer legislative reform on climate change will assist the resources industry to understand that market in Australia.

ACF Recommendation

ACF considers that given the opportunity presented by the current Samuels Review, the EPBC Act ought to be amended consistent with ACF's submissions to the EPBC Act review and in its Original Submissions, which together recommended the following legislative reforms of the EPBC Act on climate change:

- New national legislation (the EPBC Act) should include a GHG emission trigger that ensures any development that produces over 100,000 tonnes of CO_2 equivalent per year (including downstream emissions) as a matter of national environmental significance;
- There should also be provision for a designated development list to trigger assessment under a new GHG trigger.[36]
- The EPBC Act ought to be amended to expressly require the Minister for Environment to consider the contribution of proposed projects to climate change, including Scope 1, Scope 2 and Scope 3 emissions.[37]

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

ACF Response

ACF strongly disagrees.

Finding 8.4 is in effect a finding about the relevance of Scope 3 emissions. That finding is in ACF's view unjustified and inconsistent with the manner that Australian and International Courts have recently approached the relevance of Scope 3 emissions in the context of individual projects.

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[36] ACF "Submission to the Independent Review of the EPBC Act", April 2020.
[37] ACF IP Submissions, p 20.

ACF outlined the approach of Australian Courts at length in its Original Submissions. It refers to and repeats those submissions in response to the PC's draft finding 8.4.

It is somewhat disingenuous to suggest that because "environmental approval processes in Australia are not set up to manage cumulative impacts [of GHG emissions, including Scope 3]"[38] that this is a reason why they should not do so.

ACF considers that the PC Inquiry and Draft Report has made value judgments in draft finding 8.4 (and Box 8.5 of the Draft Report) which do not appear to be based on robust research or facts about the ways in which global emissions are or may be reduced.

ACF Recommendation

Having regard to ACF's position at pages 17 – 20 of its Original Submissions, the approval of an individual resources project plainly has a cumulative impact on global GHG emissions. Policy decisions and government decision-making about individual resources projects can and should be taken into account as part of that exercise, consistent with the approach of Australian Courts.

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6. COMMUNITY ENGAGEMENT AND BENEFIT SHARING

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 liveability 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.

ACF Response

ACF agrees in part but says that government can do more to ensure that benefits from resource operations are shared voluntarily with communities and that mining agreements are negotiated on a level playing-field.

Comments

ACF refers to and repeats its Original Submissions at pages 27 – 29 in relation to this issue, which reflect ACF's position as to benefit-sharing.

Further, as the Draft Report makes clear, benefit-sharing with Aboriginal and Torres Strait Islander communities can be voluntary or required by regulation and can involve Aboriginal and Torres Strait Islander people as members of the broader community, or as the intended beneficiaries of the activity.[39]

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[38] Draft Report, p. 229.

[39] Draft Report, p 27.

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While ACF acknowledges the current constraints as to who can be a party to agreements made under the Native Title Act 1993 (Cth) (NTA), ACF believes that there is scope to amend the NTA to provide for greater flexibility as to who can be a party to those agreements and to create a more even playing field in those negotiations.

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.

Also see draft finding 9.1, 9.4, 9.5, 9.6, draft leading practice 9.3, information request 9.1

ACF Response

ACF generally agrees with finding 9.2.

However, ACF believes that proponents of mining and resource operations should be required to assess and consider whether there are particular social and/or economic needs or disadvantages in communities situated close to a proposed activity and that a greater proportion of benefits should be assigned in such cases to that community.

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7. COMMUNITY ENGAGEMENT AND BENEFIT SHARING WITH ABORIGINAL AND TORRES STRAIT ISLANDERS

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.

ACF agrees and repeats its Original Submissions at pages 27 – 29 on this issue.

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.

ACF agrees in part and repeats its Original Submissions at pages 27 – 29 on this issue.

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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.

See also draft finding 10.4, 10.5, 10.6, draft recommendation 10.1 and 10.2, information request 10.2.

ACF agrees and repeats its Original Submissions at pages 27 – 29 on this issue.

Further, ACF recommends that the reasons for Prescribed Bodies Corporate not having the proper capacity to engage meaningfully with resources companies should be further investigated by the PC Inquiry and recommendations made about what steps government can and should take to address this issue.

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8. EFFECTIVE GOVERNANCE, CONDUCT, CAPABILITY AND CULTURE

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.**

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 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.

See also draft findings 11.1, 11.2, draft leading practice 11.1, 11.2, 11.3, 11.4, 11.5, 11.6, 11.7, 11.8.

ACF agrees with draft recommendations 11.1, 11.2 and 11.3 and notes the associated drafting leading practices.

ACF refers to and repeats its comments in relation to draft findings 6.1 and 6.2 in relation to the funding of regulators in the resources sector.

Further, ACF agrees that achieving timely and high-quality environmental outcomes for both investors, operators and the wider Australian community requires sufficiently resourced, well-directed and capable regulators.

For more information:
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