Productivity Commission Review of Resources Sector Regulation (draft report) August 2020

Comments on draft report – Corinne Unger

Preamble

While this PCRRSR seeks improved productivity by recommending changes in regulatory arrangements for the resources sector, the draft report understates the important role of communities and other external stakeholders in deciding what standards (at approval stage) they will accept or reject. Their voice(s) are growing stronger with concern around rehabilitation and closure of mines so the PCRRSR must be mindful that the prevalence of unmanaged mining legacies in Australia and government's lack of progress on remediating these mines will continue to fuel their opposition to notions of streamlining regulations for new resource approvals. Distrust of such processes will emerge if there is a perceived trade-off between simpler approval processes and the neglect of closure if such a trade-off externalises resource project liabilities onto the community, Indigenous landowners and the environment.

1 Independent review of the EPBC Act at the same time as the Productivity Commission Review of Resources Sector Regulation

I note that there is a review of the EPBC Act underway[1] concurrent with the Productivity Commission Review on Resources Sector Regulation (PCRRSR). My question is: *How is the productivity commission review addressing the findings of the EPBC Act review so far, specifically the proposed reform pathway?* Polarised views are evident in submissions referring to the EPBC Act within the PCRRSR draft report. Your report must do more than simply highlight problems of EPBC Act and its implementation. This review must work toward resolving these barriers and findings and 'draft leading practice' comments, so far, do not converge on a clear resolution.

Recommendation: The PCRRSR must address the intersection of these two processes if they are to advance understandings in a coordinated manner for improved processes in their recommendations. Include a section in the final report that addresses each of the stages of the

[1] https://epbcactreview.environment.gov.au/resources/interim-report

reform pathway for EPBC Act (and any other reviews underway that are relevant) to make transparent the links and relationships between this and other concurrent reviews.

2 Whose definition of best practice?

In the scope of the Terms of Reference: *"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."*

The definition of best and leading practices which has been applied is '*Best-practice regulatory approaches require governments and regulators to take the course of action that imposes the least burden on businesses, subject to achieving policy goals. The resulting regulatory framework is one that delivers the greatest possible net benefit for the community'* (p7 Issues paper). This sounds more like **optimisation** of regulation while continuing to meet societal expectations, than best practice. Later in the draft report (p34) it is not clear what is meant by '*Leading practice involves regulators taking a risk-based approach to due diligence when granting or renewing tenements'.* Then in **Box 1.1** the Commission has chosen terms like 'works best' (but for who?) then identifies leading practice that aligns with a 'sound approach to regulation' (which add further uncertainty to the definition).

From reading this draft report the intent of 'leading practice' appears to be seeking regulations that give Australia and the mining sector a short-term economic benefit, but not necessarily addressing longer term environmental and social legacies of resource activities. The ambiguous use of this term calls into question every instance where 'leading practice' is used in the PCRRSR draft report. Considering the dependence upon the term 'leading practice' in this report, and the lack of a well-defined and accepted term, its use invokes not 'leading practice' but BATNEEC best available technology not entailing excessive cost or CATNAP cheapest available technology narrowly avoiding prosecution (1993[2]). The PCRRSR's use of the term leading practice is ambiguous and by using it, the inquiry implies that it is seeking to apply robust regulations when instead it allows, even encourages, environmental and social impacts to be overlooked for the sake of the economy.

It is not clear why the PCRRSR does not use the definition of leading practice applied by the Australian Government when it produced its multiple series of best practice environmental

[2] https://www.newscientist.com/article/mg13818707-100-feedback/

management (1990s) and leading practice booklets in the 2000s (Australian Government, 2016a, 2016b; Unger, Everingham, & Bond, 2020).

A significant body of research literature is available on innovations in regulatory approvals yet it does not appear that PCRRSR has engaged appropriate academic researchers to identify relevant research findings. There are pilot studies of innovative regulatory approaches[3] and other research on sharing of pooled resources that show how industry can work together to bring about improved environmental outcomes (Bowen, Bansal, & Slawinski, 2018) thereby leading on self-regulation as a way of warding off more stringent and cumbersome regulations being imposed. The narrow remit of literature reviewed does not appear to include the failings of existing regulatory frameworks when mines enter liquidation (White, 2015; White, Doole, Pannell, & Florec, 2012) and other research on causes of failure to successfully close mines (Laurence, 2011; van Druten & Bekker, 2017). As a consequence of this omission, PCRRSR recommendations may not fully consider both the positive and negative implications of recommended changes.

Recommendation: PCRRSR apply a sustainable development definition to leading practice regulation in line with Australia's SD commitments and with peer reviewed literature based on research evidence. Leading practice usually means, more than just complying with the law, so for regulations it would mean more than the bare minimum, but if the Commission is seeking the bare minimum, then 'optimal' regulations might be a better term to use.

Recommendation: The PCRRSR broaden their understanding of the topic by including researchers and conducting regulatory research on resources followed by pilot studies. This review should also examine regulatory models that fail so that learning is gained from them. The absence of a critical review of failure in regulation as well as what is referred to as leading practice undermines the findings of the report.

3 A focus on the front end of projects neglects the longer term and back end of projects by both EPBC Act and this PCRRSR

Question for the PCRRSR: *How is this review addressing the long term impacts of inadequate regulatory requirements for planning and design for closure of mines and other forms of resource extraction?*

[3] https://www.law.upenn.edu/institutes/ppr/bestinclassregulator/

The EPBC Act is the Australian Government's key piece of environmental legislation, the object of the Act is reproduced below.

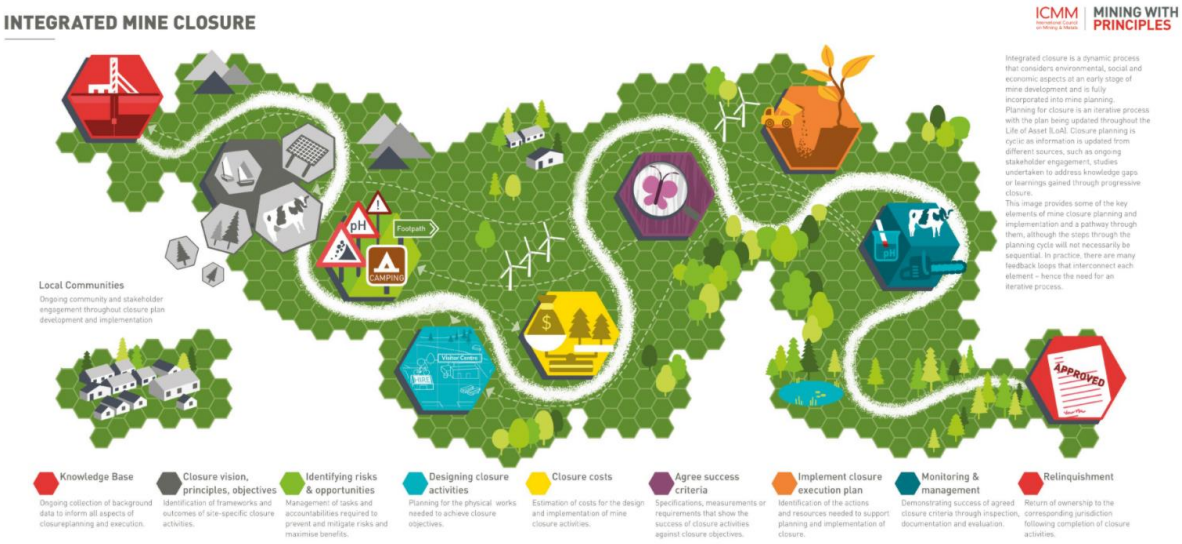
The objects of this Act are:

- *(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and*
- *(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and*
- *(c) to promote the conservation of biodiversity; and*
- *(ca) to provide for the protection and conservation of heritage; and*
- *(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and*
- *(e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and*
- *(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and*
- *(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.*

Neither the review of the EPBC Act nor the PCRRSR address the management of mining legacies (existing and new) in the context of this object. This review inadequately attends to the role of national legislation in setting standards for closure which promotes ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. The EPBC Act seeks to provide for the protection of the environment, while the PCRRSR seeks to streamline approvals, however, there does not appear to be attention on how these objectives are met at closure.

The concept of closure (Australian Government, 2016a) is a holistic process starting from the beginning of mining to design stable new mine landforms that are rehabilitated (Australian Government, 2016b) but importantly includes many other facets of sustainable development than simply clean-up work at the end of mining. Closure must return sustainable uses of land after extraction while also transitioning communities from resource-dependent to independent for socio-economic benefit. Regulations that address transitioning workforces during closure (van Druten & Bekker, 2017) are omitted from this study encouraging a short sighted view of mine approval without considering the regulatory scaffolding required for transitions to closure.

The concept of land rehabilitation predominates in regulatory frameworks (often as a proxy for ‘closure’) in Australia but legislation that focusses only on land rehabilitation may neglect the water-related impacts of mined land: large open cut pits with and without water of variable quality and value (Energy & Resource Insights, 2016), underground voids, subsidence and other ground instability, land use, water quality (surface and ground) and water demand and use. Leading practice closure must also reinstate indigenous cultural heritage values that were once lost or otherwise disrupted (Bond & Kelly, 2020). Social transitioning and evaluation of alternative beneficial land uses is also part of designing and preparing for closure, showing that ‘closure’ is more than ‘rehabilitation’. Further to this discussion of rehabilitation and closure, your Figure 4 shows an outdated concept of rehabilitation and closure as something that is deferred until the end. Whereas, closure and post-closure use should be designed from the outset and refined throughout with the industry understanding of this process conceptualised in the figure below[4] (ICMM, 2019) so the PCRRSR’s review of government regulatory processes needs also to be aligned to the full life cycle and not just resource project approvals.



The review also highlights the concept of regulators becoming more risk adverse, however does not investigate the source or nature of the risk and the aversion. Further investigation by the PCRRSR may identify a link between this lack of clarity in the closure process and regulators apparent risk aversion.

[4] https://www.icmm.com/en-gb/environment/mine-closure/integrated-mining-closure

Despite listing various regulatory initiatives (p22 of draft report) the Commission does not yet compare whole of government approaches with single agencies working in isolation to regulate mines. Increasing complexity may require new insights and different regulatory approaches. A forty year review of rehabilitation and closure shows the shifts in focus not only of industry and governments but also of professionals and civil society that demands new ways of regulating in the present and the future (Unger et al., 2020). This indicates that simplification of regulatory approvals will not sustain societal expectations without a more integrated and novel way of regulating. Clearly old ways of regulating are not keeping pace with this complexity and governments need to know how to apply whole of government approaches to mine approvals, rehabilitation and closure, rather than having separate agencies imposing conditions that leave gaps, not realised until mine closure (Hazelwood Mine Fire Inquiry, 2016). Research is critical to revealing innovation in regulation.

Recommendation: the PCRRSR could recommend the Australian government update its now very old Strategic Framework for mine closure (Australian and New Zealand Minerals and Energy Council and Minerals Council of Australia, 2000) to ensure it reflects the contemporary expectations of industry, governments, communities and other stakeholders in civil society setting clear minimum requirements.

Recommendation: the PCRRSR should engage researchers with specialist expertise in analysing regulatory frameworks for resource projects so that a more thorough literature review is undertaken, than is currently presented. From such a review, greater insights on contemporary and emergent innovative regulatory frameworks could be included in the PCRRSR in its final report that guides regulatory processes for approvals as well as the full life cycle of a resource project through to relinquishment and post-closure.

4 Australian government reinforces the status quo of neglect of mining legacies

While the report acknowledges potential residual resource value in abandoned mines (p74-75) and notes the large number of legacy abandoned mines (p45) the draft report goes on to only mention economic value from reprocessing. This focus does not fully consider the implications of the environment impacts that must be navigated nor the impact of these cumulative liabilities on the Australian economy (p 190). The draft finding that follows, overlooks this observation of Australia having so many legacy mines (draft Finding 7.1). On p208 (Draft finding 7.3) observations on poor closure are given but no insights or solutions, nor reference to leading practice learnings on this front yet there are many that the Australian

government has access to through COAG's SCER (Land access for resources working group on mining legacies (Noetic Solutions Pty Limited, 2015, 2016), and abandoned mine working group). This PCRRSR does little to shift Australia from the status quo of neglect of mining legacies.

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.

This draft report confirms that not all states have effective programs to manage abandoned mines and the Australian government allows this to continue while trying to concurrently streamline legislation for resources approvals. Both aspects require attention. Further **Box 7.3** restates the Australian governments 'hands off' approach to mining legacies. The Australian government distances itself, in this PCRRSR from all mining legacy responsibility while at the same time seeks regulatory reforms that could worsen the problem, but has not included this consideration in its analysis. Yet there are excellent overseas initiatives led by national governments that enable the national and state government to retain their separate responsibilities, while promoting robust programs that remediate existing orphaned and abandoned mines. For example the National Orphaned and Abandoned Mine Initiative of Canada (Unger, 2009, 2017a, 2017b). This leading practice example role of governments does not appear to have been considered as an as an example of leading programs for state based management of mining legacies (Crown Contaminated Sites Program, 2016; Government of British Columbia, 2018).

Legacy impacts from mining are not directly felt or accounted for by the Australian government with the exception of the Captains Flat mine creating pollution that impacted Canberra's Lake Burley Griffin (Australian Government, 1975), the ongoing environmental impacts from the Rum Jungle Uranium Mine (Northern Territory Department of Mines and Energy, 2013) and Christmas Island phosphate mining (Australian Government, 2016c). Even though the states are responsible for most of the mining legacies in Australia, state governments find ways to avoid activity addressing these issues by devolving responsibility to private landholders (Chapter 13) (Queensland Floods Commission of Inquiry, 2012). In other examples some governments simply do not set up programs to manage abandoned mines or set up programs with inadequate funding so they are ineffective (as noted in the

Commission's draft report). While some jurisdictions sustain funded programs, others do not. Omission of recommendations for the Australian government and states from this PCRRSR is implicit support for maintaining the status quo of neglect (by both the Australian and state governments) of mining legacies.

Recommendation: the PCRRSR recognise that with increasing community and NGO involvement in regulatory frameworks that there is a demand for cross-functional integration when regulating mines not only at the front end for approvals but also for rehabilitation and closure. Such innovations could be included in the review.

Recommendation: the PCRRSR could recommend Australian government develop a leading practice booklet that focuses solely on governance of the resources sector that includes global case studies and principles of good mine approvals processes (that also address closure governance).

Recommendations: the PCRRSR noted only one successful example of a legacy site with a legal agreement for re-mining, so it could recommend the Australian government funds research that reviews this aspect more widely. This research would inform regulatory frameworks that facilitate re-mining at abandoned mines together with environmental remediation. By studying common obstacles and solutions, a valuable resource would be provided for all jurisdictions when seeking economic value from re-mining mining legacies.

Recommendation: the PCRRSR instigate a review of Australian and overseas resources regulatory pitfalls and inadequacies in preventing long term legacy impacts. In this way the Commission can ensure that in the process of making recommendations on streamlined regulations for approval, they are not repeating these failings, or encouraging externalisation of mining impacts onto the environment, community and future generations.

Recommendation: the PCRRSR could recommend that the Australian government initiate leadership in jurisdictional regulation of mining by funding research that reviews peer reviewed literature on resources sector regulatory integration and innovation overseas. Using this research as a guide, the Australian government can then provide tools and guidance to jurisdictions on how to reform regulations in an effective way that not only addresses short term streamlining needs but also addresses future needs.

5 Stop-start nature of Australian govt involvement on mining legacies

At both state and national levels attention to managing mining legacies has been stop start or absent. A Churchill Fellowship[5] and many other sources over the last few decades have highlighted the value of a Canadian NOAMI-style initiative for Australia. Australian government (under COAG) initiatives such as the strategic framework for managing abandoned mines (Ministerial Council on Mineral and Petroleum Resources and Minerals Council of Australia, 2010). This working group and process was then abandoned while multiple land use frameworks omitted closure (Standing Council on Energy and Resources, 2013). The land access for resources working group had mining legacies on the agenda (Noetic Solutions Pty Limited, 2015, 2016) then this was abandoned . The University of Queensland, Centre for Mined Land, hosted a forum to provide an alternative model and independent coordination hub for knowledge sharing on abandoned mine management, but there was no funding to sustain such an initiative. There has been no continuity of effort at an Australian government level.

Such an initiative is not about the Australian government taking responsibility for the states/NT abandoned mines, but instead taking responsibility for facilitating implementation of improved programs at a jurisdictional scale (Unger et al 2015). These must have measurable goals and show improvements in the number and nature of rehabilitated and remediated mines and transformed mines (for other purposes and to create value). Values overlooked for water include: how many mining legacies are impacting river systems and how much water is unusable because of this? Scattered reports from academia and NGOs provide insights on whole jurisdiction impacted water systems (Miller, Northey, & Yellishetty, 2017) but there are few if any studies on cumulative human health impacts from farmers growing food crops and grazing animals downstream of a polluting metalliferous mine where the water is contaminated and the floodplains are laden with historic deposits of heavy metals (that can be remobilised during natural fluvial processes). There despite research that points to these problems at local and regional scales (Lawrence & Davies, 2014).

It has been noted in audits in some Australian jurisdictions that governments are not placing mining legacies on contaminated land registers even though they are contaminating (New

[5] http://hazelwoodinquiry.vic.gov.au/wp-content/uploads/2016/01/Winston-Churchill-Memorial-Trust-of-Australia-Report-by-Corinne-Unger.pdf

South Wales Audit Office, 2012, 2014). Therefore, financial accounting of mining legacy liabilities is not being carried out. It appears that Australian accounting standards do not require mining legacy liabilities to be accounted for, unlike the Canadian Public Sector Accounting Board Standard Section 3260 Liability for Contaminated Sites (PS 3260) (Crown Contaminated Sites Program, 2016; Government of British Columbia, 2018). More details on this standard can be found in a recent Senate Inquiry submission and attachment (Unger, 2017b).

Recommendation: PCRRSR could make recommendations for the Australian government to more actively and continually engage the states in addressing its existing mining legacies. This would seek to overcome the ad hoc, stop start or absent approaches of the states as well as the Australian government itself.

Recommendation: the PCRRSR could recommend that the Australian government establish, fund and resource over at least 10 years, an Australian NOAMI-like initiative (National Orphaned/Abandoned Mine Initiative https://www.abandoned-mines.org/en/) to establish and maintain a dialogue with the states /NT and key stakeholder groups to ensure all jurisdictions have an effective program to managing its mining legacies. Through this process share knowledge and resources and coordinate targeted research. This entity could be based in Geosciences Australia where there is the ability to draw upon the appropriate technical skills and background.

Recommendation: the PCRRSR could recommend that the Australian National Audit Office update its accounting standards to require all jurisdictions to financially account for their mining legacy liabilities.

Recommendation: the PCRRSR could recommend that the Australian government require states to record all contaminating mining legacy sites on contaminated land registers.

6 Conclusion

In the process of seeking to simplify mine approvals, the PCRRSR must engage with parallel processes like the review of the EPBC Act to transparently demonstrate that environmental and cultural protection standards are not being lowered in the process. Further, communities, local governments and NGOs seek a change from the status quo of neglect of existing mining legacies. Not all Australian jurisdictions have mining legacy programs, and only two are adequately resourced with a funding stream that assure ongoing progress on remediation of

mining legacies. The Australian Government must require effective state legacy, abandoned, derelict and/or former mine remediation programs, characterised by progress on reducing liabilities supported by appropriate resources. The Australian government through an entity in Geosciences Australia, could support states by setting accounting standards for reporting on mining legacy liability, and engaging the states in knowledge sharing and implementation of mining legacy management. The final recommendations of the PCRRSR must ensure that equal attention is given to regulatory reforms for streamlined approvals, and scaffolding for project closure to assure the public that negative environmental and social impacts of resource projects will not be externalised onto communities and the environment.

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