Resources Law Network

Resources Sector Regulation
Productivity Commission
Locked Bag 2, Collins Street East
Melbourne VIC 8003

31 October 2019

Dear Sir / Madam

Resources Sector Regulation Issues Paper

[1] Thank you for the opportunity to make submissions on this Issues Paper.[1] The submissions are detailed below and, in summary:

(a) commend the Commission's inquiry into this area (see paragraphs [3] & [27] below), and we identify issues regarding best-practice arrangements: see [20];

(b) encourage the Commission to explicitly identify *how* non-financial aspects feature in its inquiry and analysis: [9], which should include the principles of ecologically sustainable development: [10]-[15];

(c) recommend broadening the scope of study – see (d)-(f) below – which would be within the Treasurer's terms of reference and, more importantly, align with the Commission's contribution to better 'policies in the long term interest of the Australian community': [5]-[7] and also government approaches of regulatory impact assessment: [16]-[17];

(d) urge the inclusion of renewable energy within the Commission's assessment of 'resources', given that renewables have some substitutability for coal and therefore make the Commission's focus on the latter, *if quarantined from the broader context*, a skewed analysis focussing on the status quo: [19];

(e) explain why the 'life cycle of a resources project', and government regulation of that, begins *prior* to exploration: [18]; and

(f) emphasise that public involvement should not be envisaged as community acceptance and involvement within a pre-determined resources project – instead, community engagement must be part of planning and decision-making *from the beginning*, as evident from contemporary practice by resources companies and also international standards: [21]-[26].

[1] Productivity Commission, *Resources Sector Regulation Issues Paper*, September 2019 (**Issues Paper**).

[2] The submissions are presented under these headings, corresponding to the Issues Paper. Full citations are included in the references section at the end of this letter.

Submissions

[3] The Commission's predecessor undertook a comprehensive review of Australia's *Mining and Minerals Processing* in 1991,[2] which provides useful background to the inquiry now underway. There have since been numerous inquiries around resources issues – by the Commission and other governmental and parliamentary bodies.[3] The significant international, social and technological developments since 1991 make it appropriate for the Commission to re-examine Australia's regulation of the resources sector.

[4] Various actions by regulators *have* inappropriately burdened or directed resources companies. Examples include the WA Government's proposed imposition of new or changed requirements after the Government had previously approved company actions (in mining royalty assessment, and in greenhouse gas emission management), and the fluctuating Commonwealth approaches regarding climate change, energy policy and resources taxation. These, and other examples, will presumably be examined by the Commission in its inquiry. The Issues Paper is replete with descriptions of regulation impeding business,[4] and these are quite properly an issue of examination to determine how regulation can be designed or implemented to assist business while still achieving the regulatory objectives. However there also exist examples where poor regulation of the resources sector benefitted some businesses, or has not been followed by business because of cost-cutting or other deficiencies. These result in unacceptable costs to broader society, leaving communities or government with social and environmental impacts to be addressed. Examples include the rehabilitation of abandoned mine-sites, subsidies provided to resources operators beyond that necessary to ensure the business investment, inadequate safety

[2] AUS Gov 1991.
[3] eg. just *some* of the inquiries and reviews involving the resources sector include: WA Plmnt 2015; AUS Gov 2013a; AUS Gov 2013b; AUS Gov 2011; AUS Gov 2010b; Garnaut 2010; WA Gov 2004; AUS Plmnt 2003; WA Gov 2002a; WA Gov 2002b; AUS Gov 2001.
[4] These are collated in Appendix 1 of this letter.

management, planning/prioritisation around extractives and conservation being ignored, and commercial pressure forcing unfair payment terms on suppliers.[5] Some of these problems have since been addressed but they remain important examples which should inform and remind the Commission's study that poor regulatory design or implementation can cut both ways. While there can be regulatory takings, there can also be regulatory givings.[6] There can be regulatory creep, just as there can be regulatory retreat. The opposite of regulatory burden (and of regulatory duplication) is regulatory absence or neglect.

[5] The Commission's own summary of its role is 'to help governments make better policies in the long term interest of the Australian community',[7] and 'provid[e] independent research and advice to Government on economic, social and environmental issues affecting the welfare of Australians'.[8] These perspectives and expertise will be important in the Commission's analysis of the resources sector, as it will not be an advocacy exercise of simply collecting examples of good or bad practice[9] to support a pre-determined objective. Instead, we expect the Commission will engage in a thorough, evidence-based, examination of the area in determining policies and approaches for the long-term interest of the Australian community.

[6] Australian States and Territories have, through their regulation of resources companies, overseen the development and operation of internationally renowned resources projects. This has produced significant benefits to the broader Australian community[10] as well as the companies involved. However, that has occurred in the context of a country with enormous space, plentiful resources, small population, and (in the 1960s and 1970s, when many of the large projects began) the absence of technological developments and contemporary understanding (and related standards) around environmental and social impact. This observation is not to diminish, or ignore, the significant work and achievements of the companies and regulators over many decades. Rather, it seeks to emphasise that Australia does not have some innate aptitude in resources regulation and development. What occurred previously could not occur now because of technological and social changes.[11] The *technological* changes have meant what used to be necessary development of local capacity (jobs, businesses, communities) has decreased or disappeared with the increased mechanisation and better transport enabling most goods or services being flown in. The *social* changes involve increased awareness and regulation of resources operations and their impacts – as compared to historically where there were fewer expectations or controls around

[5] These are collated in Appendix 2 of this letter.
[6] Bell & Parchomovsky 2001.
[7] Issues Paper, ii.
[8] https://www.pc.gov.au/ (accessed 16 October 2019).
[9] Such as those outlined in appendices 1 and 2 to this letter.
[10] eg. Maxwell 2013, 31-34.
[11] eg. UNCTAD 2007, 92-93; Crowson 2008.

environment, labour relations, workplace safety, international investment, or social impacts (to name just a few).

[7] This means that, if Australia's contemporary resource regulation is to best contribute to the long-term interest of the Australian community, then there must be close examination of the developments and guidance globally rather than simply continuing Australian regulatory forms and practices which originated in a different time and context. There have been many significant publications and reviews in recent years, which should inform the Commission's understanding and analysis of the resources sector and recommendations for Australia's future regulation. These include:

(a) reports providing objective, independent, economic and governance analysis on why and how resources can contribute to a country's sustainable development;[12]

(b) studies on the importance of parliamentary and community involvement in resources regulation,[13] and ways to increase local content in the resources sector;[14]

(c) materials around increased transparency and accountability of resources operations and their interaction with government, particularly in relation to revenues and contracts;[15] and

(d) attention to supply-chain issues, particularly around responsible sourcing.[16]

Scoping the study

[8] Informed by the above, there are several aspects in the Issues Paper which merit attention in the Commission's progress of its research and analysis in this inquiry.

[9] The Issues Paper was unclear how the Commission will approach non-financial aspects in its analysis, and this should be clarified. The Paper indicated that non-financial aspects are relevant, through various adjectives and descriptions:

> '*[R]egulatory activity*…if not done well…*imposes burdens on industry* beyond those *necessary to maximise the net benefits accruing to the Australian community*'.[17]
>
> '[T]here is a risk that *some of the [regulatory] costs (including delays) imposed on resources companies are* higher than *necessary*'.[18]

[12] These include Addison & Roe 2018; Cameron & Stanley 2017; CCSI 2016; Gankhuyag & Gregoire 2018; IGF 2013; MAC 2019; NRGI 2014; Readhead 2018a.
[13] eg. Bryan & Hofmann 2008; Barton & Goldsmith 2016.
[14] eg. Cosbey & Ramdoo 2018.
[15] eg. De Schryver & Johnson 2011; Devlin 2018; Readhead 2018b; Pitman & o'rs 2018.
[16] eg. ICMM 2015; LME 2018.
[17] Issues Paper, 1 (emphasis added).
[18] Issues Paper, 7 (emphasis added), which references 'box 3' but box 3 gives no indication of what is 'necessary'.

> 'Poorly designed regulation in the resources sector can lead to uncertainty and impose unnecessary costs for … the community'.[19]

The Commission has been specifically tasked with identifying 'best–practice examples of government involvement in the resources approvals process ... without compromising community or environmental standards'.[20] However the Issues Paper had no clear indication of what role non-financial objectives have, how these are determined, and will then inform the Commission's analysis and recommendations.

[10] There are various matters which the Commission *must* consider, specified in the Commissions' Policy Guidelines in its governing statute.

> (1) In the performance of its functions, the Commission must have regard to the need:
>
> (b) to reduce regulation of industry (including regulation by the States, Territories and local government) where this is consistent with the social and economic goals of the Commonwealth Government;
>
> …
>
> (i) to ensure that industry develops in a way that is ecologically sustainable; and
>
> (j) for Australia to meet its international obligations and commitments.[21]

[11] The last of these Guidelines – Australia's international obligations and commitments – raise five areas relevant to the resources sector and its regulation in Australia.

(a) *International investment and trade*, which is an issue the Commission has previously examined.[22]

(b) *Human rights about land use and impacts*, and there is a useful 2015 collation of the relevant standards and jurisprudence prepared by the UN's Office of the High Commission for Human Rights.[23]

(c) *Encouraging responsible business conduct*, which includes the Australian Government undertaking to recommend that multinational enterprises operating in or from Australia observe the standards in the *OECD Guidelines for Multinational Enterprises*.[24] Particularly relevant here, therefore, is the OECD's further detail on what that involves in the extractives-sector

---

[19] Issues Paper, 9.
[20] Issues Paper, iv.
[21] *Productivity Commission Act 1998* (Cwth), s8.
[22] AUS Gov 2015, ch 7.
[23] UN 2015.
[24] Required by the *Declaration on International Investment and Multinational Enterprises*, 25 May 2011, art I, and the details of the Guidelines are contained in Annex 1 of that Declaration (see OECD 2011). For transparency, we note John Southalan has the role of Independent Examiner of the Australian National Contact Point (to manage complaints made about implementation of the Guidelines). This submission is not, however, written in that capacity.

engagement,[25] which should inform the Commission's analysis of regulation in this regard.

(d) *Sustainable development*, with many key aspects of this reflected in the principles of ecologically sustainable development, which are addressed in [12]-[15] below.

(e) *Climate change*, most recently involving the Australian Government's National Determined Contribution (to reduce emissions by at least 26% below 2005 by 2030) and other obligations under the *Paris Agreement* and earlier *UN Framework Convention on Climate Change*.

[12] The Commission's statutory Policy Guidelines also require it to have regard to the need for industry to 'develop... in a way that is ecologically sustainable'. The Commission confirmed how integral this is, in its most recent annual report:

> 'Reflecting its statutory guidelines, *ESD [ecologically sustainable development] principles are integral to the Commission's analytical frameworks*, their weighting depending on the particular inquiry or research topic. The Commission's five year assessment of the Murray Darling Basin Plan is a recent example of work undertaken requiring integration of complex economic, social and environmental considerations.'[26]

That integration is just as relevant to the Commission's examination of the resources sector, given the generational implications of resources regulation. That is: regulatory decisions and approvals regarding a resources development can frequently involve benefits and impacts enduring across many decades.

[13] There is no reference to 'ecologically sustainable' in the Issues Paper, the phrase is not defined in the Commission's statute, and the Commission's latest annual report does not explain what are the 'ecologically sustainable development principles' integral to its analytical frameworks. The Commonwealth's *National Strategy for Ecologically Sustainable Development* (as endorsed by the Council of Australian Governments) defines ecologically sustainable development as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.[27] This reinforces the centrality of the concept to the Commission's

---

[25] OECD 2017.

[26] AUS Gov 2019, 39 (emphasis added).

[27] AUS Gov 1992, Part 1. While that is a 1992 document, it remains current, eg see www.environment.gov.au/resource/guidelines-section-516a-reporting-environment-protection-and-biodiversity-conservation-act (accessed 17 October 2019). In 2018, the Australian Government confirmed: 'Australia is committed to the Sustainable Development Goals (SDGs) as a universal, global approach to reduce poverty, promote sustainable development and ensure the peace and prosperity of people across the world. The SDGs reflect things that Australians value highly and seek to protect, like a clean and safe environment, access to opportunity and services, human rights, strong and accessible institutions, inclusive economies, diverse and supportive communities and our Aboriginal and Torres Strait Islander cultures and heritage.': AUS Gov 2018, 6.

examination of the resources sector: a sector which is quintessentially concerned with the 'using, conserving and enhancing the community's resources'.

[14] The phrase 'ecologically sustainable' features in various Commonwealth statutes, with the most relevant guidance here perhaps from its general definition in the *Environmental Protection and Biodiversity Act 1992*.

> 'The following principles are principles of ecologically sustainable development:
>
> (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
>
> (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
>
> (c) the principle of inter-generational equity - that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
>
> (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
>
> (e) improved valuation, pricing and incentive mechanisms should be promoted'.[28]

[15] These five principles are presumably, therefore, integral to the Commission's analytical framework for this resources sector inquiry and will be considered and addressed in its recommendations and report.

[16] The concepts and approaches in regulatory impact assessment can help inform regulatory analysis such as the Commission's present inquiry. A fundamental aspect of regulatory impact assessment is 'problem identification and objectives'.[29] Thus, the 'regulatory objectives' regarding the resources sector, which the Commission has referred to in its Issues Paper, need to be explicitly determined and identified. Only after that is done, can any assessment be made as to the appropriateness of any impact on business. It is meaningless to attempt that analysis of only one side of that relationship: for instance, just considering impact on business or just considering whether a regulatory objective is met.

[17] The Productivity Commission has addressed this relationship between regulatory objectives and impact, in the Commission's own report on regulatory impact assessment.

> 'Costs and benefits should be assessed in a systematic and objective manner so as to enable identification of the option likely to be of the greatest net benefit to the community. Jurisdictions have generally adopted at least one of three alternative

[28] *Environment Protection and Biodiversity Conservation Act 1999* (Cwth), s3A.
[29] 'Sound problem identification is crucial in conditioning the analysis in the remainder of the RIS. As the COAG guidelines note': AUS Gov 2012, 152.

> methods for assessing costs and benefits in a RIS — cost-benefit analysis (CBA), cost-effectiveness analysis (CEA) and multi-criteria analysis (MCA)'.[30]

These methodologies may be useful here, to assist the Commission's analysis of non-financial aspects, in its inquiry of resources-sector regulation.

[18] The Issues Paper characterises the life cycle of a minerals project as only commencing at exploration.[31] Regulation of the resources sector involves decisions and conduct *before* exploration, which the Commission should include within its scope of inquiry. This accords with the important public interest in the government's ownership of mineral resources and regulation of where, when, and how those resources may be extracted. These fundamental aspects of the resources sector are reflected in the approaches to resources regulation in Australian analysis[32] and also contemporary international practice.[33] It would be illogical for the Commission to endeavour to understand regulatory objectives in the resources sector if the scope of inquiry only begins at exploration.

[19] The Commission proposed that its assessment of the resources sector will ignore renewable resources.[34] We urge the Commission to reassess this scoping, given the Commission's explicit inclusion of fossil fuels, because these are *to some extent* alternatives to each other.[35] The analysis of coal in the Australian resources sector will, presumably, examine emissions as well as issues of workforce and related communities. It is unrealistic to consider that coal mining and use ought immediately cease, as there are complexities in transition,[36] which we assume the Commission will examine. These issues must, logically, be examined *in conjunction with* understanding renewables and their existing and potential workforces, businesses and related communities.

Identifying best-practice regulatory approaches

[20] The Commission's analysis of best-practice regulatory approaches in the resources area should include the following.

(a) **Mineral rights allocation, and whether 'first come, first served' remains appropriate**. In 1991, the Industry Commission observed that:

> 'In order for the community to reap maximum benefit from publicly owned mineral resources, it is of fundamental importance that mineral rights be

[30] AUS Gov 2012, 168.
[31] Issues Paper, 3-4.
[32] eg. AUS Gov 1991, vol 1, 14
[33] eg. NRGI 2014, 7-11; Cameron & Stanley 2017, ch 4.
[34] Issues Paper, 2.
[35] We recognise there is no exact substitutability.
[36] See, for example Stanley & o'rs 2018; Makhijani & Doukas 2015; Addison & Roe 2018, 26-29.

> allocated in such manner and subject to such conditions as permit those with the best information and expertise to acquire and exercise those rights'.[37]

The Industry Commission noted this issue involves the interaction of the *type of right* (ie. what entitlements and responsibilities that involves) and the *method of allocation* (how parties can acquire such a right from government). In 1991, the Industry Commission recommended *against* retaining the 'first come, first served' system because of economic inefficiency. Since that time, there has been increasing attention to whether historical practices (which were used to encourage expansion and economic development) are no longer appropriate in contemporary understandings of sustainable development and resource use.[38]

(b) **Examine the utility and application of integrated land use planning, particularly regarding mineral rights allocation and management.** One development of interest will be the recent initiative and framework in South Australia of multiple land use planning,[39] which the Government explains as follows.

> The Multiple Land Use Framework 'encourages the consideration of multiple land use where appropriate, and ... recognises the importance of land ownership and the need for timely engagement with land-owners, communities and organisations. ... The Framework seeks to increase transparency and consistency in decision making to encourage consideration of multiple and sequential land use[40] and enable more effective targeted engagement with communities on land use change. The Framework can be used by anyone who is involved in multiple land use projects and assists regulators, decision makers and individuals by providing clear direction on the importance of considering multiple land uses at the early stage of a project tools and general policy direction to assist regulators, decision makers and individuals to improve stakeholder engagement'.[41]

(c) **Increased significance of environmental considerations in future decisions to mine.** The RMIT Engineer, Dr Gavin Mudd, published an extensive study on Australia's mining history and projected future.[42] His analysis indicates future extraction will be limited not by the availability of minerals but rather the resources involved in their extraction. Now that easily accessible deposits have gone, to produce the same amount of mineral has involved more energy and water, and produces more waste. These dynamics

---

[37] AUS Gov 1991, pXXIII, with the analysis in Section 3.4 of that volume.

[38] eg. CSMI 2010, Southalan 2012, 48-50. Another recent study examines a correlation between human development indicia and forms of mineral ownership (centralised -v- decentralised): Flomenhoft 2018.

[39] SA Gov 2017.

[40] The distinction here being land used for different purposes simultaneously and sustainably (seeking to retain options for current and future use) as opposed to land being used for different purposes which may include a return to a former use or the development of an alternative land use.

[41] www.minerals.statedevelopment.sa.gov.au/land_access/multiple_land_use_policy_framework

[42] Mudd 2009.

must be examined and included in regulation of the resources sector. This reinforces that analysis cannot be focussed solely on whether a business is able to achieve a financial return from extracting minerals.

(d) **Examine mining regulation based on 'shared value' paradigm, in light of changes from automation.** The last few decades have seen mining, and its regulation, develop on the assumption of 'shared value'. That is: the extraction by private industry gives business reward, government revenue, and impacted communities get jobs and related benefits. The last of those three is now under increasing doubt as remote control and automation removes the need (or possibility) for local jobs. Thus, what the Commission identified as 'social licence to operate' is much less assured than it used to be. A 2016 paper cautioned that technological advances will reduce the 'traditional' mining benefits to society through jobs, multipliers and associated industries, and envisages this as a particular vulnerability in advanced mining economies like Australia and Canada.[43] There have been repeated recent calls for detailed examination of this dynamic and how nations should adjust their regulatory approaches and objectives accordingly.[44]

(e) **Increased use of resource revenue funds.** This issue was summarised in a recent article on Australian resources policies.

> 'Revenue management is an area where Australia has been considerably out-of-step with good practice. The royalties and income created by Australian extractives operations essentially go to the consolidated revenue of the government of the day to spend as it likes and can politically endure. This motivates short-term thinking and spending, and is neither good nor recommended practice.
>
> The 2018 UN sourcebook *Managing Mining for Sustainable Development* has relevant guidance including: "Managing the volatility of resource revenues by using tools such as structural budget rules developed by the International Monetary Fund, and designing and instituting natural resource funds". Resource funds, to ensure resource revenues also provide future benefits, are a common feature in other countries and commentary'.[45]

(f) **Consider risk management methodologies not just for industry *but also for resources regulators*.** The WA Auditor General issued a report in 2004 on how the Government has regulated large resources projects through agreements.[46] One of the key criticisms in this report was the inadequacy of the government's risk analysis and accounting, outlined below.

---

[43] Cosbey & o'rs 2016.
[44] eg. Cosbey & o'rs 2016; Cosbey & Ramdoo 2018, 82-83.
[45] Southalan 2019, 4.3.
[46] WA Gov 2004.

> 'As well as providing significant opportunities, mining can be a high risk activity for both the private sector and the State. The State faces a wide range of risks including: economic development risk, environmental risk, revenue risk, resource risk, regulatory risk and political risk. While [State] Agreements[47] may mitigate against many risks, overall Agreements can involve a transfer of risk from the company to the State. Particularly as Agreements have very distant or no end dates, with regulatory clauses that cannot be varied without the consent of the company.
> ...
> Most Agreements were established long before risk management principles and practices, developed initially within the insurance industry, were adopted by the wider private sector and then the public sector. Standards Australia issued a generic risk management standard, designed to be applicable to any industry or economic sector, in 1995 (revised and updated in 1999). ...
>
> The importance and value of the natural resource sector to the State warrants a more rigorous approach to Agreement risk management. It is almost certain that the company, and its financiers, carry out ongoing rigorous risk assessments. The negotiating position of the State is weakened if the company has completed a rigorous assessment of its risk profile but the State has not done the same'.[48]

Best-practice community engagement

[21] The Issues Paper essentially envisages community engagement as something to be considered and framed to accommodate a pre-determined resources project. This is apparent from the following statements.

> *What are community engagement and benefit sharing?* Community engagement and benefit sharing can describe a range of interactions and arrangements that involve and deliver benefits to communities affected by resources activities.[49]
>
> ...[R]egulation seeks to ensure that resources sector activities reflect the potential for social and environmental impacts ... 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.[50]

[22] A more contemporary approach – evident in both industry and international guidance – is that community engagement is essential from the beginning of any contemplation of a resources project. Sometimes that means a proposed resources project not

[47] A State Agreement in WA is a parliamentary-approved regulatory scheme specifically designed for a resources project. There are benefits in some jurisdictions regulating large projects in this manner, see Southalan & o'rs 2015, [1]-[3].
[48] WA Gov 2004, p23-25.
[49] Issues Paper,
[50] Issues Paper, 7.

proceeding – a position understood by industry.[51] The 2002 report *Breaking New Ground* (following the two-year international review of mining and sustainable development), observed as follows.

> 'The decision of whether or not to explore and mine in a certain area must be based on an integrated assessment of ecological, environmental, economic, and social impacts and thus be governed by a land use strategy that incorporates the principles of sustainable development. *Decision-making processes must be open to the decision not to mine in circumstances where cultural, environmental, or other factors override access to minerals or where mining would impose unacceptable loss in the view of those it is being imposed on'*.[52]

[23] That approach has been reflected in many procedures and developments since 2002. Contemporary guidance about the role of community was summarised in the 2019 article on Australian resources policies.

> 'The 2018 UN sourcebook urges nations to "Incorporat[e] … or strengthen … the principles of consultation with local communities and free, prior and informed consent in domestic laws and regulations; and establishing or strengthening state remedy mechanisms for people affected by mining".
>
> That is reflected in industry guidance, with the International Council of Mining and Metals explaining that standards for "consent apply to new projects and changes to existing projects that are likely to have significant impacts on indigenous communities".
>
> Consent also features in the 2015 Chinese Due Diligence Guidelines, which indicate that Chinese companies in the minerals supply chain will be discouraged from sourcing minerals extracted without the "free, prior and informed consent of local communities … including those for which the extractor holds a legal title, lease, concession or licence".
>
> This attention to supply chains is found in recent OECD guidance on resources extraction and use ... A recent article mused that "sustainable mining and resource management [is] transitioning from the life cycle of the mine to the life cycle of the mineral". This focus on the supply chain reinforces that questions and consideration of the arrangements for resources extraction are no longer the exclusive province of company and government. Attention regarding – and decisions affecting – a project's feasibility or duration often now involve financiers, customers, and others. Thus, resources regulation which does not involve community consent can be expected to attract international scrutiny and wariness'.[53]

[24] The principle of *free, prior and informed consent* (**FPIC**), and the question of community consent to mining more generally, does not appear in the Issues Paper. This absence contrasts with what is happening in other jurisdictions – notably Canada, which is

[51] eg. IFC 2012; IPIECA 2012; ICMM 2013; BHP 2019.
[52] MMSD 2002, 25 (emphasis added).
[53] Southalan 2019, 4.4

(now) a 'full supporter' of FPIC.[54] Where Indigenous interests are concerned, best practice approaches to community engagement involve FPIC.[55] This requires in particular that for consent to be given freely, there must also be a viable option for it to be withheld.

[25] The Commission seeks feedback on whether 'approaches to consultation are amenable to best-practice community engagement'. We attach a recent article addressing native title law and international standards,[56] which informs our submission below. While we are happy for our submission to be made publicly available, please note there are publisher's restrictions on the dissemination of the article, so we suggest you do not make that available on your website without first confirming arrangements with the publisher. Our article notes the following.

> '[T]he international legal concept of FPIC has grown from earlier human rights standards around effective participation and informed consent (to decisions affecting minority rights and interests) as a protection of cultural rights and non-discriminatory treatment of property and related rights. These standards were based in international treaties from the 1960s dealing with racial discrimination and more general human rights, and are thus binding on those countries that have joined those treaties. The International Labour Organization's *Convention 169* also includes aspects of FPIC and, again, has binding force on the countries party to that treaty. FPIC arrangements have also arisen under the treaty on biological diversity. Notions of FPIC have been referenced in regional human rights structures and intergovernmental arrangements. As a consequence, various developments have been adjudged invalid for having occurred without the FPIC of the affected communities.
>
> There are various publications about implementing FPIC but the most comprehensive international standard regarding FPIC and land use is the 2007 United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) which covers many aspects and has several provisions about FPIC. As UNDRIP is a declaration and not a treaty, it is not formally binding of itself, but it is being increasingly referenced by other human rights bodies in their explication of obligations required under treaties. UNDRIP's provisions have also been picked up by the *UN Guiding Principles on Business and Human Rights* and are thus part of the international human rights that any business must respect. There are increasingly numerous mechanisms. and structures by which the UN Guiding Principles are implemented, monitored and enforced, including the *OECD Guiding Principles on Multinational Enterprises*, IFC's Performance Standards, international financiers' and development banks' standards, and various sector and company initiatives'.[57]

[26] The Commission also seeks examples of effective benefit-sharing practices, including with Indigenous communities, in Australia and internationally, and examples that are

[54] CAN Gov 2016.
[55] eg. see fn51 above.
[56] Southalan & Fardin 2019.
[57] Southalan & Fardin 2019.

problematic. A recent publication of the Centre for Mining, Energy and Natural Resources Law (at the University of Western Australia)[58] examines benefit-sharing practices in Australia in detail as well as some international analogues. This study focussed on the structures that receive payments from land use agreements and that hold and distribute assets for Indigenous peoples and groups (known as benefits management structures or 'BMSs'). It reviews general research on the structure and operation of Indigenous organisations, identifies key issues raised in practice by BMSs, offers design considerations that can guide the design or review of a BMS, and offers a range of general best practice approaches in BMS design. The document also identifies a range of challenges for BMSs identified through interviews and focus groups. We attach a 'Summary Overview' of this document and refer the Commission in particular to the:

- findings on key issues raised in practice for BMSs (p 6);
- 12 proposed BMSs design considerations (p 7-8); and
- best practice BMS examples identified (p 14-17).

Conclusions

[27] The summary of our submissions is contained in paragraph [1] above. We recognise regulation of the resources sector is complex, and that 'recommendations are easily made at the international or academic level because those authors do not have to actually implement that regulatory regime, nor manage competing interests. Nevertheless, international guidance and standards do provide a useful measure and ideas for improvements in domestic mining regulation'.[59] The Commission is ideally placed – with its expertise and procedures – to provide important, independent research and advice to government on economic, social and environmental issues affecting the welfare of Australians. We look forward to seeing the Commission's progress and draft report.

About Resources Law Network

[28] Resources Law Network is network of practicing lawyers, barristers and academics[60] who recognise that the development and use of resources (minerals, petroleum, renewables) is a vitally important activity for any society. The Network members also believe that good regulation maximises the benefits and minimises the negative impacts of resource extraction, and recognise the rule of law in achieving that balance.

[58] Murray & o'rs 2019.
[59] Southalan 2018, 165.
[60] Further information available at https://resourceslawnetwork.com/about/

This submission has been written by, and is the sole responsibility of, John Southalan and Joe Fardin whose experience and contact details are summarised below.

(a) John Southalan is an adjunct academic who writes and teaches on various aspects of resources regulation, and is also a barrister in resources law disputes.

(b) Joe Fardin is Associate Director at the Centre for Mining, Energy and Natural Resources Law at the University of Western Australia, and consults internationally on sectoral reform in mining regulation.

For transparency, we intend to make this submission available on the website of the Resources Law Network. If you have any concerns regarding that, please let us know by 18 November 2019.

[29] We would be happy to expand on any issues covered in this letter. If you have any questions regarding this submission, please contact John Southalan in the first instance.

Yours faithfully

JL Southalan
(ABN 58 778 632 415)
Barrister (WA Bar Association)
Adjunct Academic (Dundee, UWA, Murdoch, Curtin)
C6, 118 Railway Street, West Perth
PO Box 3248, East Perth WA 6892

Joe Fardin
Associate Director
Centre for Mining, Energy
and Natural Resources Law
M253, 35 Stirling Highway
Crawley WA 6009

Appendix 1 - Issues Paper extracts

The Issues Paper has many examples and descriptions of where regulation or regulatory approaches impede business, including these.

> '[S]ome of the costs (including delays) imposed on resources companies are higher than necessary (box 3)': 7
>
> 'Poorly designed regulation in the resources sector can lead to uncertainty and impose unnecessary costs for businesses and the community.': 9
>
> '[P]roject proponents must contend with overly complex or excessively prescriptive regulation. This can add to costs without necessarily effectively addressing the negative externalities associated with resources sector activities': 10
>
> 'Increasing complexity, along with regulatory 'creep' (that is, gradual increases in the scope of regulated activities), run the risk of creating uncertainty and sovereign risk for companies': 10
>
> 'In particular, the Commission is interested in whether: … regulatory 'creep' occurs [and] regulation is overly complex or prescriptive': 11
>
> 'The resources sector has previously raised a number of issues … including the use of review mechanisms by those opposed to a project in order to delay its approval, rather than to resolve a legal issue (sometimes referred to as 'lawfare')': 12
>
> '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?': 14
>
> 'While the complex nature of many resources projects may mean that significant time is required to undertake the necessary assessments, unwarranted delays can substantially reduce net benefits, both to companies and the broader community.': 15
>
> '[R]oyalties based on revenues rather than profits can discourage investment in financially riskier projects (Henry et al. 2010). As with unstable regulatory policy, uncertainty over future changes to the tax regime can also deter investment.': 17
>
> 'Complex and protracted negotiating processes may also act as an impediment to resources sector investment.': 20

Appendix 2 - Examples of regulatory failure

The following are examples of where business has benefitted from regulatory failure, or has failed to accord with regulation or expected conduct.

[30] The Senate Standing Committees on Environment and Communications, held a multi-year inquiry into Rehabilitation of mining and resources projects, and reported in 2019 that:

> 'It is clear that there are issues of significant environmental and social concern arising from legacy mining sites in Australia, ... It is also clear that there are improvements that can be made to current industry practice and the regulatory framework underpinning mine rehabilitation in this country': AUS Plmnt 2019, 147 (see also Young 2019).

[31] The WA Auditor General has reported on the financial inequities enjoyed by *some* resources operations over many years, where state agreement operations had royalty concessions not available to other operators: WA Gov 2004, 31-34. The Productivity Commission and its predecessors are familiar with the distorting effects of industry rebates, tax concessions and such like.

[32] A WA Parliamentary report noted how the government provided significant assistance for a mine and was 'left with a considerable burden following the mine's demise': WA Plmnt 2004, xiii.

[33] An inquiry about a gas explosion in 2008 on Veranus Island noted 'Apache's strategy to operate with low manning levels...leads to vulnerability in the event of abnormal operations': WA Gov 2009, xvi-xvii. The Minister for Mines and Petroleum, in tabling the report to Parliament, stated:

> '[F]or two years, Apache initiated litigation which hindered every effort by the state, as well as the joint state and federal government effort, to publicly release the findings of the Bills–Agostini report. ... In summary, I can inform the house that the report is highly critical of Apache, particularly regarding the company's technical and operational failings as the operator. The report concluded that Apache Northwest had the ultimate responsibility for maintaining the Varanus site in good condition and repair. The investigators were also critical of regulators at the time, highlighting that there was significant confusion between the then Department of Industry and Resources, the National Offshore Petroleum Safety Authority, and industry in regard to regulatory boundaries within, and between, these agencies': Moore 2012, 3143-3144.

[34] A 2010 Commonwealth inquiry described the 'Montara Wellhead ....Blowout ...[as] the worst of its kind in Australia's offshore petroleum industry history', which caused significant pollution and costs. The report noted:

> 'PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEPAA) did not observe sensible oilfield practices at the Montara Oilfield. Major shortcomings in the company's procedures were widespread and systemic, directly leading to the Blowout. [And that] the Northern Territory Department of Resources (the NT DoR) ... was not a sufficiently diligent regulator: it should not have approved the Phase 1B Drilling Program for the Montara Oilfield in July 2009 as it did not reflect sensible oilfield practice; it also adopted a minimalist approach to its regulatory responsibilities': AUS Gov 2010a, 6.

[35] In WA, a 2007 governmental strategic review of the Mid-West identified some areas for mining and others for environmental conservation: WA Gov 2007, 8-9. However subsequent mining applications were recommended for grant in the conservation areas with the Warden's decision that 'these are matters best left to the Minister for Mines': *Polaris Metals -v- Wilderness Society* 2017, [90].

[36] Several of the larger resources companies have forced suppliers to accept very long payment terms and other unfavourable conditions, to the financial benefit the larger companies: see AUS Plmnt 2018, ch 4 and Masige 2016.

Appendix 3 - References

Addison, T & Roe, A, 2018. 'Extractive Industries: The Management of Resources as a Driver of Sustainable Development', *UNU-WIDER Studies in Development Economics*. Oxford (GBR): Oxford University Press. Available <https://www.wider.unu.edu/publication/extractive-industries> 1 Oct 2018.

AUS Gov, 1991. Industry Commission, *Mining and Minerals Processing in Australia: Vol 1 Report*, Report No. 7, 25 February 1991. Melbourne (AUS): Australian Government. Available <www.pc.gov.au/__data/assets/pdf_file/0020/6068/07miningv1.pdf > 21 Jun 2008.

------, 1992. Council of Australian Governments, *National Strategy for Ecologically Sustainable Development*, December 1992. Canberra: Australian Government. Available <www.environment.gov.au/about/esd/publications/strategy/index.html> 3 Aug 2010.

------, 2001. National Competition Council, *Mining*, Ch 15, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms*, June 2001. Canberra: Australian Government. Available <http://ncp.ncc.gov.au/docs/AST3As-017.pdf> 19 Jan 2013.

------, 2010a. Borthwick, D, *Report of the Montara Commission of Inquiry*, 17 June 2010. Canberra: Australian Government. Available <https://www.industry.gov.au/data-and-publications/montara-commission-of-inquiry> 30 Oct 2019.

------, 2010b. National Water Commission, *Water issues in jurisdictional planning for mining: an overview of current practice*, Waterlines Report Series No 29, Report by Sinclair Knight Merz, May 2010. Canberra: Australian Government. Available <www.nwc.gov.au/resources/documents/Waterlines_Water_issues_in_jurisdictional_planning_for_mining_final.pdf> 10 Jun 2010.

------, 2011. Department of Resources Energy and Tourism, *Leading Practice Sustainable Development Program for The Mining Industry*, July 2011. Canberra: Australian Government. Available <www.ret.gov.au/resources/Documents/LPSDP/guideLPSD.pdf> 18 Sep 2011.

------, 2012. Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Research report, 13 December 2012. Melbourne (AUS): Australian Government. Available <www.pc.gov.au/__data/assets/pdf_file/0003/120675/ria-benchmarking.pdf> 21 Jan 2013.

------, 2013a. Productivity Commission, *Major Project Development Assessment Processes*, Research Report, 10 December 2013. Melbourne (AUS): Australian Government. Available <www.pc.gov.au/projects/study/major-projects/report> 8 April 2014.

------, 2013b. Productivity Commission, *Mineral and Energy Resource Exploration*, Inquiry report No 65, 27 September 2013. Melbourne (AUS): Australian Government. Available <http://www.pc.gov.au/inquiries/completed/resource-exploration/report> 16 Feb 2018.

------, 2015. Productivity Commission, *Trade and Assistance Review 2013-14*, Annual Report Series, 24 June 2015. Melbourne (AUS): Australian Government. Available <https://www.pc.gov.au/research/ongoing/trade-assistance/2013-14> 30 Oct 2019.

------, 2018. Department of Foreign Affairs and Trade, *Report on the Implementation of the Sustainable Development Goals*, United Nations High–Level Political Forum on Sustainable Development 2018. Canberra: Australian Government. Available <https://dfat.gov.au/aid/topics/development-issues/2030-agenda/Documents/sdg-voluntary-national-review.pdf> 30 Oct 2019.

------, 2019. Productivity Commission, *Annual Report 2018-19*, (tabled in Parliament on 14 October 2019). Melbourne (AUS): Australian Government. Available <https://www.pc.gov.au/about/governance/annual-reports/2018-19> 30 Oct 2019.

AUS Plmnt, 2003. House of Representatives Committee on Industry & Resources, *Exploring: Australia's Future - impediments to increasing investment in minerals and petroleum exploration in Australia*, 21 August 2003. Canberra: Australian Government. Available <www.aph.gov.au/house/committee/isr/resexp/reportscript.pdf> 18 Jan 2008.

------, 2018. House of Representatives Standing Committee on Industry Innovation Science and Resources, *Keep it in the regions*, Report of Inquiry into how the mining sector can support businesses in regional economies, November 2018. Parliament of Australia. Available <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Industry_Innovation_Science_and_Resources/MiningSector/Report> 30 Oct 2019.

------, 2019. Senate Standing Committees on Environment and Communications, *Rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities*, 20 March 2019. Canberra: Commonwealth of Australia. Available <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/MiningandResources/Report> 30 Oct 2019.

Barton, B & Goldsmith, M, 2016. 'Community and Sharing', in Barrera Hernández, L & o'rs (eds.) *Sharing the Costs and Benefits of Energy and Resource Activity*, pp25-40. Oxford (GBR): Oxford University Press.

Bell, A & Parchomovsky, G, 2001. 'Givings' 111(3) *Yale L Journal* 547-618. Available <http://ssrn.com/paper=268954> 4 Aug 2011.

BHP, 2019. *BHP Indigenous Peoples Policy Statement*. Melbourne (AUS). Available <https://www.bhp.com/our-approach/operating-with-integrity/indigenous-peoples/bhp-indigenous-peoples-policy-statement> 30 Oct 2019.

Bryan, S & Hofmann, B (eds.), 2008. *Transparency and Accountability In Africa's Extractive Industries: The Role of the Legislature*. Washington: National Democratic Institute for International Affairs. Available <http://ndi.org/files/2191_extractive_080807.pdf> 22 Jan 2009.

Cameron, P & Stanley, M (eds.), 2017. *Oil, Gas, and Mining*. Washington DC: World Bank. Available <https://openknowledge.worldbank.org/handle/10986/26130> 18 Jul 2017.

CAN Gov, 2016. Indigenous and Northern Affairs Minister, *Speaking Notes for the Honourable Carolyn Bennett*, Speech to 15th session of UN Permanent Forum on Indigenous Issues, 10 May 2016. New York: Northern Public Affairs. Available <http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/> 13 Feb 2018.

CCSI, 2016. Columbia Center on Sustainable Investment, *Mapping Mining to the Sustainable Development Goals: An Atlas*, White Paper, July 2016. Paris: UN Sustainable Development Solutions Network, UNDP, World Economic Forum. Available <http://unsdsn.org/wp-content/uploads/2016/11/Mapping_Mining_SDGs_An_Atlas.pdf> 13 Apr 2019.

Cosbey, A & o'rs, 2016. Columbia Center on Sustainable Development, *Mining a Mirage?*, Reassessing the shared-value paradigm in light of the technological advances in the mining sector, October 2016. Winnipeg (CAN): International Institute for Sustainable Development. Available <https://www.iisd.org/library/mining-mirage-reassessing-shared-value-paradigm-light-technological-advances-mining-sector> 14 Sep 2018.

Cosbey, A & Ramdoo, I, 2018. Intergovernmental Forum on Mining Minerals Metals and Sustainable Development, *Local Content Policies*, Guidance for Governments. Winnipeg (CAN): International Institute for Sustainable Development. Available <http://igfmining.org/guidance-documents/local-content-guidance/> 24 Jul 2018.

Crowson, P, 2008. *Mining Unearthed*. London: Mining Journal.

CSMI, 2010. Centre for Sustainability in Mining and Industry, *Granting Mineral Rights; A Good Practice Note*, Final Report for Extractive Industries Resource Book Program, December 2010. Witwatersrand (ZAF): University of the Witwatersrand. Available <www.eisourcebook.org/cms/files/uow_granting_mineral_rights;_a_good_practice_note.pdf> 31 Jan 2012.

De Schryver, A & Johnson, J, 2011. Extractive Industries Transparency Institute, *EITI Guide for Legislators*, How to Support and Strengthen Resource Transparency, February 2009. Oslo: National Democratic Institute. Available <https://www.ndi.org/files/EITI_Guide_for_Legislators_2009Feb.pdf> 23 Feb 2015.

Devlin, D, 2018. Intergovernmental Forum on Mining Minerals Metals and Sustainable Development & OECD Centre for Tax Policy and Administration Secretariat, *Limiting the impact of excessive interest deductions on mining revenue*, IGF-OECD Program to address BEPS in Mining, 19 October 2018. Winnipeg (CAN): International Institute for Sustainable Development. Available <http://www.oecd.org/tax/beps/limiting-the-impact-of-excessive-interest-deductions-on-mining-revenue-oecd-igf.pdf> 20 Dec 2018.

Flomenhoft, G, 2018. 'Historical and Empirical Basis for Communal Title in Minerals at the National Level: Does Ownership Matter for Human Development?' 10(6) *Sustainability* 1958.

Gankhuyag, U & Gregoire, F, 2018. UN Environment, *Managing mining for sustainable development: A sourcebook*, UNDP Bangkok Regional Hub and Poverty-Environment Initiative Asia-Pacific of UNDP and UN Environment, 20 March 2018. Bangkok: United Nations Development

Programme. Available <http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/Managing-Mining-for-SD.html> 24 May 2018.

Garnaut, R, 2010. Australian Government, *The Garnaut Review 2011*, Australia in the Global Response to Climate Change, Nov 2010. Melbourne (AUS): Cambridge University Press. Available <www.garnautreview.org.au/update-2011/garnaut-review-2011/garnaut-review-2011.pdf> 30 Dec 2012.

ICMM, 2013. International Council on Mining and Metals, *Position Statement on Indigenous Peoples and Mining*, 16 May 2013. London. Available <www.icmm.com/document/5433> 12 June 2013.

------, 2015. International Council on Mining and Metals, *Demonstrating value*, A guide to responsible sourcing, 3 December 2015. London. Available <www.icmm.com/document/9674> 4 Dec 2015.

IFC, 2012. International Finance Corporation, *Guidance Note 7: Indigenous Peoples*, 1 January 2012. Washington DC. Available <www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012%20pdf?MOD=AJPERES> 19 Feb 2017.

IGF, 2013. Intergovernmental Forum on Mining Minerals Metals and Sustainable Development, *Mining and Sustainable Development: managing one to advance the other*, Mining Policy Framework (revised), Oct 2013. Ottawa: Intergovernmental Forum Secretariat (Foreign Affairs, Trade and Development Canada). Available <www.globaldialogue.info/MPFOct2013.pdf> 8 Mar 2014.

IPIECA, 2012. *Indigenous Peoples and the oil and gas industry: context, issues and emerging good practice*, 2nd ed, March 2012. London: International Petroleum Industry Environmental Conservation Association. Available <http://www.ipieca.org/resources/good-practice/indigenous-peoples-and-the-oil-and-gas-industry-context-issues-and-emerging-good-practice/> 30 Oct 2019.

LME, 2018. London Metals Exchange, *Responsible Sourcing: LME position paper*, Setting the Global Standard, 5 October 2018. London. Available <https://www.lme.com/-/media/Files/Trading/New-initiatives/Responsible-Sourcing/Responsible-Sourcing-LME-position-paper.pdf?la=en-GB> 19 Sep 2019.

MAC, 2019. *Towards Sustainable Mining 101: A Primer*, 18 July 2019. Toronto: Mining Association of Canada. Available <https://mining.ca/towards-sustainable-mining/> 23 Sep 2019.

Makhijani, S & Doukas, A, 2015. *G20 subsidies to oil, gas and coal production: Australia*, November 2015. Oil Change International. Available <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9992.pdf> 27 Nov 2015.

Masige, S, 2016. *Tackling longer payment terms*, 2 May 2016. Australian Mining. Available <https://www.australianmining.com.au/features/tackling-longer-payment-terms/> 30 Oct 2019.

Maxwell, P, 2013. 'Minerals and Development', in Maxwell, P & Guj, P (eds.) *Mineral Economics: Australian and global perspectives*, pp21-37. Melbourne (AUS): Australasian Institute of Mining and Metallurgy.

MMSD, 2002. Mining Minerals and Sustainable Development, *Breaking new ground: mining, minerals, and sustainable development: the report of the MMSD Project*, International Institute for Environment and Development (IIED) and World Business Council for Sustainable Development (WBSCD). London: Earthscan. Available <www.iied.org/pubs/display.php?o=9084IIED> 2 Jul 2009.

Moore, N, 2012. Minister for Mines and Petroleum, *Statement on Varanus Island Gas Explosion —Independent Review —Bills–Agostini Re-port*, Hansard, 24 May 2012. Perth (AUS): Parliament of Western Australia. Available <https://www.parliament.wa.gov.au/hansard/hansard.nsf/0/347CF6D1463C132548257A0C001D45A1/$File/C38%20S1%2020120524%20All.pdf> 30 Oct 2019.

Mudd, G, 2009. *The Sustainability of Mining in Australia - Key Production Trends and Their Environmental Implications for the Future*, orig Oct 2007, rev April 2009. Melbourne: Monash University and Mineral Policy Institute. Available <http://civil.eng.monash.edu.au/about/staff/muddpersonal/SustMining-Aust-aReport-Master.pdf> 16 Jul 2009.

Murray, I; Fardin, J & O'Hara, J, 2019. Centre for Mining Energy and Natural Resources Law, *Co-designing Benefits Management Structures: A Summary Overview*. Perth (AUS): University of Western Australia. Available <http://www.law.uwa.edu.au/__data/assets/pdf_file/0007/3417226/159434_BMS20Exec20summary20v3.pdf> 28 Oct 2019.

NRGI, 2014. Natural Resource Governance Institute, *Natural Resource Charter*, 2nd edition, 12 June 2014. London: Natural Resource Governance Institute. Available <https://resourcegovernance.org/analysis-tools/publications/natural-resource-charter-2nd-ed> 10 Dec 2017.

OECD, 2011. Adhering Governments, *OECD Guidelines for Multinational Enterprises*, 25 May 2011. Paris: Organisation for Economic Co-operation & Development. Available <http://dx.doi.org/10.1787/9789264115415-en> 22 Oct 2012.

------, 2017. OECD Secretariat, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, 2 February 2017. Paris: Organisation for Economic Co-Operation and Development. Available <http://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm> 18 Jul 2017.

Pitman, R; Shafaie, A; Hayman, G & Kluttz, C, 2018. Open Contracting Partnership, *Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice*, 26 June 2018. New York (USA): Natural Resource Governance Institute. Available <https://resourcegovernance.org/analysis-tools/publications/open-contracting-oil-gas-and-mineral-rights> 17 Jul 2018.

Polaris Metals -v- Wilderness Society (2017). Decision of Mining Warden (AUS), *Polaris Metals Pty Ltd v The Wilderness Society WA, Helena and Aurora Range Advocate Inc. & Wildflower Society of Western Australia Inc.* [2017] WAMW 21 (20 October 2017). Available <http://www.dmp.wa.gov.au/Documents/Wardens-Court/2017WAMW21.pdf> 14 Jan 2019.

Readhead, A, 2018a. Intergovernmental Forum on Mining Minerals Metals and Sustainable Development & OECD Centre for Tax Policy and Administration Secretariat, *Monitoring the Value of Mineral Exports: Policy Options for Governments*, IGF-OECD Program to address BEPS in Mining, 19 October 2018. Winnipeg (CAN): International Institute for Sustainable Development,. Available <http://www.oecd.org/tax/beps/monitoring-the-value-of-mineral-exports-oecd-igf.pdf> 21 Dec 2018.

------, 2018b. Intergovernmental Forum on Mining Minerals Metals and Sustainable Development & OECD Centre for Tax Policy and Administration Secretariat, *Tax Incentives in Mining: Minimising Risks to Revenue*, IGF-OECD Program to address BEPS in Mining, 19 October 2018. Winnipeg (CAN): International Institute for Sustainable Development. Available <http://www.oecd.org/tax/beps/tax-incentives-in-mining-minimising-risks-to-revenue-oecd-igf.pdf> 21 Dec 2018.

SA Gov, 2017. Premier, *South Australian Multiple Land Use Framework*, 15 June 2017. Adelaide (AUS): South Australian Government. Available <http://assets.yoursay.sa.gov.au.s3.amazonaws.com/production/2017/02/14/02/04/54/0b18f662-4c27-42fc-9b35-37500e09a5f7/South%20Australian%20Multiple%20Land%20Use%20Framework.pdf> 25 Aug 2017.

Southalan, J, 2012. *Mining law and policy: international perspectives*. Sydney (AUS): Federation Press.

------, 2018. 'Mining the International Guidance on Mining' 59 *Advances in Economics, Business and Management Research* 165-176. Available <https://www.atlantis-press.com/proceedings/iceml-18/25902920> 27 Oct 2018.

------, 2019. 'WA and National Policy Guidance on Extractives Regulation' 38(1) *Australian Resources & Energy LJ*.

Southalan, J & o'rs, 2015. University of Western Australia - Faculty of Law, *Parliaments and Mining Agreements: Reviving the Numbed Arm of Government*, IM4DC Action Research Report, 13 April 2015. Perth (AUS): International Mining for Development Centre. Available <http://im4dc.org/wp-content/uploads/2015/04/Parliamentary-Agreements-Complete-Report.pdf> 14 April 2015.

Southalan, J & Fardin, J, 2019. 'Free, prior and informed consent: how and from whom? An Australian analogue' 37(4) *Journal Energy & Natural Resources Law* 365-388. Available <https://www.tandfonline.com/doi/full/10.1080/02646811.2018.1524436> 23 Oct 2018.

Stanley, M & o'rs, 2018. Energy and Extractives Global Practice, *Managing Coal Mine Closure: Achieving a Just Transition for All*, Issues Paper Report Number 130659, 12 December 2018. Washington DC: World Bank Group. Available <http://documents.worldbank.org/curated/en/484541544643269894/Managing-Coal-Mine-Closure-Achieving-a-Just-Transition-for-All> 18 Dec 2018.

UN, 2015. Office of the High Commissioner of Human Rights, *Land and Human Rights: Standards and Applications*, UN doc HR/PUB/15/5/Add.1. Geneva (CHE): United Nations. Available <https://www.ohchr.org/Documents/Publications/Land_HR-StandardsApplications.pdf> 1 Dec 2018.

UNCTAD, 2007. UN Conference on Trade and Development, *Transnational Corporations, Extractive Industries and Development*, World Investment Report 2007. Geneva: UN Conference on Trade and Development. Available <www.unctad.org/en/docs/wir2007_en.pdf> 8 Jan 2008.

WA Plmnt, 2004. Legislative Assembly, *Vanadium Resources at Windimurra*, Economics and Industry Committee, Report No. 10 11 Nov 2004. Perth: Western Australian Parliament. Available <www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/3E17C78E8C8E860148256F490007F524/$file/Vanadium+Resources+at+Windimurra.pdf> 16 Mar 2010.

------, 2015. Legislative Council, *Implications for Western Australia of Hydraulic Fracturing for Unconventional Gas*, Environment and Public Affairs Committee Report 42, 17 November 2015. Perth: WA Parliament. Available <www.parliament.wa.gov.au/Parliament/commit.nsf/(ReportsAndEvidence)/74E61E739E39E57748257EF9002150FE?opendocument> 23 Sep 2016.

WA Gov, 2002a. *Ministerial Inquiry into Greenfields Exploration in Western Australia*, Nov 2002. Perth: Government of Western Australia. Available <www.doir.wa.gov.au/documents/aboutus/Bowler_Report.pdf> 20 Jan 2008.

------, 2002b. Independent Review Committee, *Review of the Project Development Approvals System - Final Report*, Apr 2002. Perth (AUS): Government of Western Australia. Available <www.dmp.wa.gov.au/documents/Keating_Review.pdf> 15 Apr 2010.

------, 2004. Auditor General for Western Australia, *Developing the State: The Management of State Agreement Acts*, Report No 5 of 2004, Jun 2004. Perth (AUS): Government of Western Australia. Available <www.audit.wa.gov.au/reports/pdfreports/report2004_05.pdf> 6 Jun 2008.

------, 2007. Department of Environment and Conservation & Department of Industry and Resources, *Strategic review of the conservation and resource values of the Banded Iron Formation of the Yilgarn Craton*. Perth (AUS): Western Australian Government. Available <https://library.dbca.wa.gov.au/static/FullTextFiles/024311.pdf> 28 Oct 2019.

------, 2009. Bills, K & Agostini, D, *Offshore Petroleum Safety Regulation: Varanus Island Incident Investigation*, Report to the Minister for Mines and Petroleum, June 2009. Perth (AUS): Western Australian Government. Available <https://www.slp.wa.gov.au/salesinfo/varanusinquiry.pdf> 30 Oct 2019.

Young, E, 2019. *Ten thousand abandoned mines in WA and no fix in sight: Inquiry*, 26 Mar 2019. Perth (AUS): WA Today. Available <https://www.watoday.com.au/national/western-australia/ten-thousand-abandoned-mines-in-wa-and-no-fix-in-sight-inquiry-20190325-p517fd.html> 30 Oct 2019