Environmental Defenders Office

Submission to the Productivity Commission in relation to the Draft Report on Resources Sector Regulation

9 June 2020

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Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Resources Sector Regulation study
Productivity Commission
LB2, Collins Street East
Melbourne Vic 8003

By email: resources@pc.gov.au

For further information on this submission, please contact:

Deborah Brennan
Senior Lawyer – Policy & Law Reform (Brisbane)

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Executive Summary

Thank you for the opportunity to provide comment on the draft report on the Productivity Commission's review of resource sector regulation (**draft report**).

Our input will take the form of some overarching themes about the approach taken in this review as well as some specific recommendations.

We note at the outset that we agree and support the Commission's draft recommendations in relation to ensuring that regulators are adequately funded and resourced, providing better public access to data, undertaking appropriate due diligence of the compliance record of potential resource operators[1] and providing publicly accessible information about environmental offsets. We also share the Commission's concerns about jurisdictions (including the Commonwealth's regulation of the offshore petroleum industry) that lack an adequate system of rehabilitation bonds or financial assurance to ensure that the costs of rehabilitating end-of-life resources sites is not transferred to the tax-payer.

Context for this review

We think that it is important to acknowledge the context for this review, and its suspension, in light of the current pandemic and the current review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act review**).

There is considerable overlap between the subject matter of the current review and the statutory review of the EPBC Act[2] which is currently underway, with a draft report expected shortly.[3] The terms of reference for that review[4] (which are not prescribed by the Act) include a requirement that the review be guided by principles including:

> *"making decisions simpler, including by reducing unnecessary regulatory burdens for Australians, businesses and governments"*

Other statements from the government reinforce the impression that the EPBC Act review has been given an explicit 'greentape reduction' mandate,[5] not dissimilar to the mandate suggested by the terms of reference for this review.

The rhetoric of the need for 'greentape reduction' does not appear to be supported by data,[6] and certainly doesn't have regard to the economic benefits of environmental protections can have in

[1] Productivity Commission 2020, Resources Sector Regulation, Draft Report, Canberra, Draft leading practice 4.2.

[2] https://epbcactreview.environment.gov.au/

[3] A draft report is due out in June 2020, with the final report scheduled for release in October 2020

[4] Found here: https://epbcactreview.environment.gov.au/resources/terms-reference

[5] See for example, Minister Ley's article in the financial review entitled 'Tis the Season to cut Greentape', found at: https://www.afr.com/companies/mining/tis-the-season-to-slash-green-tape-20191030-p535nf

[6] See, for example, Cary Coglianese, Adam M. Finkel, Christopher Carrigan, 2014, Does Regulation Kill Jobs?, University of Pennsylvania Press; Antoine Dechezleprêtre and Misato Sato, The Impacts of Environmental

such forms as health benefits, job creation and as a stimulant for innovation.[7] This appears to be consistent with the Commission's own findings in the draft report that:

> *"…….the regime has facilitated many billions of dollars in investment over several decades, suggesting that* ***the regulatory system has not acted as a significant brake****."*

In that regard, we have been disappointed to see some comments from government suggesting that changes to environmental protections may be made in advance of both the Commission's review and the EPBC Act review[8] (and in advance of the analysis of the outcomes being achieved by the regulation, which we think is missing from both processes). This appears to be based on the notion that removal of environmental protections will have a stimulatory effect, to assist in the economic recovery from the COVID crisis.

We believe that there is not only a lack of evidence to suggest that such loss of protections would have the desired stimulatory effect, but also a serious risk that long-term and unnecessary environmental degradation would result.

Overarching themes

No analysis of outcomes

The approach taken in the review has been to analyse inefficiencies that are perceived to exist in regulation of resource activities, including in the process for approving new resource extraction or exploration activities.

This is, as the report itself acknowledges (including in its definition of 'leading practice regulation'), only half the job of a regulatory review, which should also evaluate whether the relevant regulation is achieving its objectives without placing unnecessary burdens on the community, business or regulators.

Given that the report does not purport to assess the environmental (or other) outcomes being achieved by resources legislation, it should also contain a clear statement that all recommendations and statements of leading practice are subject to an assessment of the impact such as step would have on capacity to achieve the objectives of the legislation.

In the absence of such a statement, some readers may incorrectly assume that the recommendations and statements of leading practice are a product of a full evaluation and can be implemented without further analysis.

Regulation of Competitiveness, Review of Environmental Economics and Policy, Volume 11, Issue 2, 1 July 2017, Pages 183–206, https://doi.org/10.1093/reep/rex013

[7] See, for example, Hannah Li, 2016, Why Environmental Regulation is Good for the Economy, Wharton Public Policy Initiative, found at: https://publicpolicy.wharton.upenn.edu/live/news/1545-why-environmental-regulation-is-good-for-the, viewed on 5 June 2020

[8] https://www.theguardian.com/australia-news/2020/apr/23/coalition-is-aiming-to-change-australias-environment-laws-before-review-is-finished?CMP=share_btn_tw

Incompatibility of legislative and review objectives

The objective of the review is identified in the draft report as to assess regulation against the objective of 'improving the welfare of the community as a whole' (similar terms 'net national benefit' and 'net benefits to the community' are also used in defining leading practice regulation).

This concept appears to focus on short to medium term economic benefits (though this is not defined in the draft report).

By contrast, environmental laws must necessarily focus on the very long term because many environmental impacts are either very long term or irreversible. For that reason, environmental regulation typically uses concepts such as intergenerational equity to ensure that decision-makers are considering impacts at appropriate temporal scales and with regard to the fact that future generations may value ecological services in different ways.

Environmental legislation also typically focuses on protecting things which, while providing vital services such as the provision of clean water or atmospheric cycling, are not easily reduced to an economic value (or which may have their value misrepresented if reduced to exploitation value).

As a consequence, we recommend that the concept of 'welfare of the community as a whole' (and similar terms) be clearly defined in the report, once again to ensure that its recommendations are placed in an appropriate context.

Climate change

We welcome the Commission's findings that uncertainty about, and inconsistent, climate change and energy policies across jurisdictions risk impeding resources sector investment. This has also been true for the electricity sector and is likely to have been true for other sectors of the economy.

The reality is that this risk will remain until such time as the Federal and State/Territory governments put in place laws and policies that are consistent with meeting the goals of the Paris Agreement. Half measures and ineffective measures will simply lead to a continuation of this uncertain policy and investment environment.

In that regard, we are concerned that climate change considerations were not more fully integrated into the analysis contained in the draft report (for example, in the discussion of externalities of the industry and as part of the policy rationale for bans or moratoria on unconventional gas) and that the draft report does not recommend that all jurisdictions produce climate, energy and resource policies that are consistent with meeting the goals of the Paris Agreement.

Review Scope: Material impact on business investment

The terms of reference for the review asked the Commission to review "*regulation with a material impact on business investment in the resources sector."*

The Commission concluded in the draft report that Australia s regulatory regime for the resource sector is comparable to other developed countries, is ***at or near the frontier of leading practice globally*** and has ***not had an apparent impact on business investment.***

This must be contrasted with the poor and declining condition of many of the values our environmental laws seek to protect (as exemplified by the Great Barrier Reef undergoing its third mass bleaching event in five years and our very poor track record of extinctions) and our country's vulnerability to the effects of climate change (as demonstrated in last summer's unprecedented bushfire season).

While efficient regulation is desirable for both the community and business, ***it is clear that these findings can't justify any changes that would reduce protections for the environment - in fact, the reverse may be warranted.***

Role of elected representatives

We welcome the support contained in the draft report for merits review of environmental decision-making, as well as for the importance of judicial review. We are, however, concerned that the rationale and references contained in the draft report don't support the recommendations it makes to exclude decisions made by elected representatives from merits review.

We recommend that the relevant recommendations be revised to support merits review of all environmental decision-making, regardless of whether the decision-maker is an elected or unelected representative.

We also note that the draft report strongly supports clear, objective criteria for environmental decision-making. The report, however, appears to frame project-level decisions made by elected representatives in a different way - as balancing exercises. We would suggest that such balancing exercises should take place at the stage where the overall goals of the legislation are set (and not at the stage of deciding whether to approve individual projects). Project level decisions should be made on the basis of clear, objective and transparent criteria designed to achieve the overall goals (set by elected representatives) in the primary legislation. In this way there is certainty and transparency for the community and proponents about how decisions will be made.

Specific recommendations

Draft report reference	Recommendation	Submission page #
Approach to review (pp67 – 68)	• **The final report should specify clearly how it defines 'community welfare' and the temporal scale at which that concept is being discussed. If community welfare is defined in the report to be largely limited to the economic wellbeing of the current community, that is a limited perspective that it unlikely to be compatible with the scale at which environmental legislation needs to work.**	17

Definition of 'leading practice regulation' (p68)	• **We recommend that the concept of leading-practice regulation be reframed to state that "leading practice regulation is regulation that achieves its objectives without placing unnecessary burdens on the community, business or regulators."** • **We recommend that any conclusions in the final report (including in the form of both recommendations and statements of leading practice) be made subject to a proper evaluation of outcomes being created by relevant regulations and an assessment of whether the recommendation or leading practice will contribute to achieving the objectives of the legislation.**	18
Scope of review (page 8 and 63)	• **We recommend that the final report be expanded to include a thorough evaluation by appropriately qualified professionals of the environmental outcomes being delivered by environmental laws.**	21
Rational for government intervention (section 3.1)	• **We recommend that the discussion of externalities in box 3.1 include acknowledgment of greenhouse gas emissions as a significant externality of the resources industry; and** • **The conclusion on page 91 of the draft report that it is generally unlikely that community welfare would be maximised by stopping a resource activity is not explained. We recommend that this conclusion either be removed or be further justified and that the final report include discussion of the types of externalities to which this conclusion is intended to apply.**	22
Bans/moratoria (section 4.3)	• **We recommend that draft finding 4.4 and draft recommendation 4.1 be deleted and that the Commission reconsider this section having regard to the long-term impacts of unconventional gas developments, including climate change and the risks that rehabilitation may fail.**	26

Land access (section 5.1)	• **We recommend that draft leading practice 5.1 be amended to reflect that maximising economic benefit should not be the primary objective of strategic land use frameworks, that other considerations that are difficult or impossible to quantify in economic terms will also be relevant, and that such frameworks should be produced based on long term welfare of the community (including future generations) and the ecological services upon which it depends.**	27
Nuclear trigger (draft finding 6.3)	• **The assertions in the draft report that the nuclear trigger cannot include mineral sand or rare earth projects is incorrect at law and should be removed.** • **The parts of draft finding 6.3 that refer to the nuclear trigger are incorrect at law and should be deleted.**	30
Water trigger (draft finding 6.3)	• **We recommend that the draft report be amended to include a thorough evidence-based assessment of the policy need for the water trigger, including the outcomes it is achieving, or that the relevant parts of draft finding 6.3 be deleted.**	32
Referrals (draft finding 6.3)	• **We recommend that instead of the relevant part of finding 6.3, the draft report be amended to propose a project be undertaken by the Commonwealth Department to produce a new version of the significant impact guidelines that incorporates objective criteria based on the impacts of the action.**	33
Deeming provisions (draft leading practice 6.4)	• **We recommend that draft leading practice 6.4 be framed around the use of deemed refusal powers (not deemed approval powers), to enable a project proponent to move a decision along to an independent Court in the event the primary decision-maker is unreasonably delaying the decision.**	34
Bilateral approval agreements (draft	• **We recommend that draft recommendation 6.1, in relation to approval bilateral agreements be deleted.**	36

recommendation 6.1)		
Conditions (draft leading practice 6.7)	• **We recommend that draft leading practice 6.7 be amended to acknowledge that outcome-based conditions are appropriate only in some circumstances. That draft leading practice should also reflect that outcome-based conditions will typically need to be supported by a management plan (or similar) to inform the regulator of how the relevant outcome is being implemented and by monitoring and reporting.**	38
Post-approvals (draft leading practice 6.9 and 6.10)	• **We recommend that draft leading practice 6.9 and 6.10 either be deleted or that they expressly contemplate that the time required to process secondary consents is likely to vary depending upon the complexity and subject matter of the relevant management plan.**	40
Review mechanisms (draft leading practice 6.11)	• **We recommend that the relevant text on pages 178 and 179 of the draft report be amended to accurately reflect the content of the ARC reports (ie. that environmental decisions should be generally subject to merits review, including where they are made by the Minister) and that leading practice 6.11 be amended to recommend that all decisions (of both elected and unelected officials) be subject to merits review.** • **The Commission should recommend that the Queensland Government conduct a review of the interaction between the *State Development and Public Works Organisation Act 1971* and the *Environmental Protection Act 1994*, particularly in relation to Land Court review and the Coordinator-General's power to impose conditions.**	44
Review and appeal (draft finding 6.7)	• **We recommend that the Commission identify in the report challenges to environmental decision-making that have been made on purely procedural grounds without "any consequential benefits for biodiversity or conservation". We believe that such a review would reveal few, if any, such cases.**	46

	• **We recommend that draft finding 6.7 be amended to remove references to 'process-driven legislation'.**	
Strategic assessment (draft finding 6.9)	• **We recommend that the Commission consider other options for proactively planning for environmental protections (such as bioregional planning) and the benefits they could create in terms of better outcomes for the environment, greater community confidence in environmental regulation and greater certainty for project proponents.**	47
Managing environmental and safety outcomes (draft finding 7.1)	• **Given that the draft report (as stated in the introductory text) does not seek to undertake any analysis of the outcomes being achieved by the legislation applying to the resources industry, and that such conclusions cannot be drawn based on the references reviewed by the Commission, all recommendations, statements of leading practice and findings should be made subject to detailed analysis of the outcomes being achieved by any relevant legislation.** • **Draft finding 7.1 should be deleted as it is not supported by the evidence reviewed by the Commission.**	49
Offsets (draft report section 7.2)	• **The final report should recognise that not all impacts can be offset and that financial offsets will not be appropriate in all cases. It should also recommend that state offset funds and proponent-driven offsets be audited to ensure that they are delivering the intended outcomes at an appropriate time and that monies paid into the fund are adequate to offset the specified impacts.**	51
Rehabilitation (draft finding 7.3, 7.4, 7.5; draft leading practice 7.8 and 7.11)	• **We recommend that draft finding 7.3 be amended to avoid the suggestion (which is not supported by evidence cited in the report) that regulatory focus is a primary cause of failure to rehabilitate mine sites.** • **We recommend that draft finding 7.4 be amended to recognise that states and territories should have (or maintain) capacity to decline to approve the**	52

	transfer of end of life mine sites if the buyer is considered too high risk or lacking the financial and technical capacity and experience to manage the rehabilitation of a mine (particularly large and complicated sites). • **The draft report should be updated to include an express recommendation that all jurisdictions (including the Commonwealth) immediately ensure that resource activities are covered by a rehabilitation scheme which prevents the cost of rehabilitation being transferred to the taxpayer.** • **The draft report should also recommend a review of interaction between the insolvency provisions of the *Corporations Act 2001 (Cth)* and financial assurance or pooled fund rehabilitation arrangements at both the state and federal level.** • **The Commission should recommend that pooled fund arrangements be stress tested for their capacity to withstand disruptive changes to resource markets, such as climate change regulation in export markets and changes in technology or price which may displace coal.** • **We recommend that draft leading practice 7.11 be amended to reflect that re-opening of legacy mine sites should have the objective of removing rehabilitation liability from the government's balance sheet and removing any harm currently being caused by the abandoned site. Such projects should also be limited to metallurgical mining (and exclude fossil fuels).**	
Uncertain climate and energy policy (draft finding 8.2)	• **We recommend that the draft report be amended to include a recommendation that the Federal, State and Territory governments introduce coherent climate change, energy and resource laws and policies – including in relation to mining and petroleum production - that are consistent with the goals of the Paris Agreement.**	58
Inconsistent regulatory treatment –	• **We recommend that box 8.5 be amended to disclose the economic modelling or analysis it**	60

greenhouse gas emissions (draft finding 8.3 and 8.4 and draft leading practice 8.1)	**relies upon and to include a broader review of economic analyses of this issue.** • **We recommend that draft finding 8.4 be amended to clarify that it is not intended to suggest that project-level assessments should not include the whole of the environmental impacts of a project and that it is intended to mean that more effective, whole of economy or whole of sector, approaches are also needed to address climate change.** • **We recommend that the second part of draft leading practice 8.1 be amended to provide as follows: *Environmental decision-making should be based on objective criteria that have been designed to achieve the overall objectives of the legislation under which the decision is being made. This may involve governments taking a more proactive role in planning and data collection to ensure that the impacts of a project can be assessed in the context of the cumulative impacts of existing projects and other threats and pressures.***	
Free, prior and informed consent (draft finding 10.2)	• **We recommend that the section of the draft report on Free, Prior and Informed Consent be re-written, in consultation with Traditional Owners, drawing on peer reviewed publications from law journals, decisions of relevant Courts or publications of the relevant international agencies as sources.** • **We recommend that the last sentence of draft finding 10.2 be deleted as it is wrong at law.**	65
Review and evaluation (Draft leading practice 11.2)	• **We recommend that draft leading practice 11.2 be amended to reflect the need for evaluation of regulatory frameworks to be undertaken by appropriately qualified experts, against the objectives of the legislation and using measurable trends (rather than subjective opinion).**	67
Institutional separation of regulatory agencies	• **We recommend at the Commonwealth level that the administration of environmental laws be separated across an Environmental Protection Agency (responsible for assessing and deciding applications and undertaking compliance and**	67

(information request 11.1)	**enforcement activities) and an Environment Commission (responsible for setting standards and objectives and other policy work).**	
Site visits (draft recommendation 11.2)	• **We recommend that draft recommendation 11.2 be deleted and replaced with a recommendation that programs of continuing professional development be available to assessment and compliance officers within regulatory agencies, coordinated through institutions independent of the industry.**	68
Data (draft leading practice 11.7)	• **We recommend that draft leading practice 11.7 be expanded to address the need for expanded environmental monitoring programs and for systems to be put in place to ensure that data created for project assessment, compliance and reporting purposes can be integrated with other public data sets.**	68

Approach to the review

The Commission has stated (at pp67 – 68) that its approach to the review has been:

- To assess resource regulation against the objective of improving the **welfare of the community as a whole**; and
- That the focus of the study was **not on the objectives of the regulation** *per se* but rather the process followed in forming regulatory objectives and more specific goals in line with them, and the regulatory approach taken to achieving these.

Community welfare

In order to provide readers with a clear understanding of the scope of the review, we **recommend** that the report clearly identify the criteria that has been used to define 'welfare' and 'community', including the temporal aspects of those terms.

If 'welfare' is defined largely (or solely) in terms of economic wellbeing it is likely to either exclude many of the factors communities may consider as important to their wellbeing (such as the natural environment, clean and reliable sources of water and other ecosystem services) or may attempt to price parts of the environment based on their exploitation value only, without considering other values they may have that are difficult or impossible to place a dollar value on.

If the concept of community' used in the report s analysis is limited to the current community, then that concept is more limited than the approaches that generally (and necessarily) inform the development of environmental laws (which are a significant focus of the report). Many elements of the environment, once lost or degraded, cannot be restored or replaced (eg. extinctions are forever). For that reason, among others, most environmental laws are informed by the principle of intergenerational equity. Intergenerational equity is defined in the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**)[9] as:

> *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"*

Some state environmental laws[10] also use this concept, which has been drawn from developments in the international level.[11]

Resource activities, due to their nature and scale, have the potential to create impacts that will persist long past the end of the production phase (eg. permanent alienation of land that could be used indefinitely for agriculture, permanent removal of habitat for threatened species, interference

[9] EPBC Act, s3A(c).

[10] See, for example, the 'standard criteria' defined in Schedule 4 of the *Environmental Protection Act 1994 (Qld)* and *Environment Protection Act 1970 (Vic)*, s1D, *Protection of the Environment Administration Act 1991 (NSW)*, s6(2)(d).

[11] The concept most notably emerged in an environmental context in World Commission on Environment and Development, 1987, Our Common Future (known as the *Brundtland report*) and the Rio Declaration on Environment and Development (1992). Intergenerational equity was also a principle of environmental policy stated in the *Intergovernmental Agreement on the Environment 1992*, which was a foundational agreement about federal/state regulation of the environment.

with aquifers that could provide an ongoing source of water for communities and ecosystems and disruption of global climate systems through the release of greenhouse gases). It is very difficult to know how future generations will use or value different aspects of the environment and almost impossible to reduce that value to purely dollar terms. In that regard, if the report defines 'community welfare' purely on the basis of the economic wellbeing of the current community, it is applying very different goal-posts from those of much of the legislation it is reviewing.

The final report should specify how it defines 'community welfare' and the temporal scale at which the concept is being discussed. This provides the reader with important information about whether the analysis is being undertaken at a scale compatible with the objectives of the legislation it discusses.

Recommendation:

- **The final report should specify clearly how it defines 'community welfare' and the temporal scale at which that concept is being discussed. If community welfare is defined in the report to be largely limited to the economic wellbeing of the current community, that is a limited perspective that it unlikely to be compatible with the scale at which environmental legislation needs to work.**

No analysis of whether legislation achieving its objectives

We agree that efficient regulatory processes are important, for a number of reasons. However, the outcomes being achieved by legislation, and whether they further the objectives of the legislation, are a critical part of any regulatory review. To be blunt, efficient environmental approvals processes are of little value if they are not protecting and preserving the environment.

The draft report (at p68) uses the following concept to describe leading-practice regulation:

- A leading practice approach to regulation is one that imposes the least burden on businesses and regulators, subject to achieving clear and evidence-based objectives that serve to promote net national benefits (at page 68).

- Leading practice requires that regulations maximise net benefits to the community, with the cost to governments of administering regulations, and to firms of complying with them, being the minimum necessary to achieve policy objectives (at page 92).[12]

Once again, the concepts of net national benefit and net benefit to the community could benefit from further explanation, including the temporal scale at which the terms are being used and whether the benefits being considered go beyond purely economic benefits.

These formulations, while making the critical point that leading-practice regulation must be achieving its objectives, seem to de-emphasise this primary goal by implying that minimising costs is a higher order goal.

[12] Similar formulations are found in other parts of the draft report, including on page 96.

Recommendation:

- **We recommend that the concept of leading-practice regulation be reframed to state that "leading practice regulation is regulation that achieves its objectives without placing unnecessary burdens on the community, business or regulators."**

The more confounding issue with the report, however, is that it only undertakes part of this analysis in that it is expressly limited to evaluating the efficiency of the legislation (ie. the "burden" it imposes on industry and government) without any evaluation of the outcomes being achieved by legislation.

While we acknowledge that environmental law can be difficult to evaluate because such outcomes are often in the nature of avoided harm (ie. things that didn't happen), that doesn't mean that the exercise is not feasible or necessary.

While certain aspects of Australia s natural environment, environmental health and ecosystem services can be improved as a result of strong environmental law (eg. protections leading to reduced rates of clearing of vegetation – which is essential for multiple environmental services, including carbon drawdown and water cycling, as well as to provide habitat for other species), it must be acknowledged that our environmental laws are failing against many of their objectives, for example:

- The Great Barrier Reef has suffered significant impacts, including through the three mass coral bleaching events that have occurred in the last 5 years[13] and through catchment runoff,[14] that are damaging its outstanding universal values (and its tourism value);
- Our biodiversity is under increased threat, and was continuing to decline,[15] even before last summer's unprecedented bushfire season;[16]
- Some of our vital water resources, such as parts of the Murray-Darling Basin, continue to be over-allocated and poorly managed.

While the resource industry is by no means solely responsible for this degradation, it certainly contributes to biodiversity loss both through direct habitat destruction, poor water management (through direct use, dewatering and contamination) and through its contribution to global climate change.

Recommendation:

- **We recommend that any conclusions in the final report (including in the form of both recommendations and statements of leading practice) be made subject to a proper**

[13] https://theconversation.com/we-just-spent-two-weeks-surveying-the-great-barrier-reef-what-we-saw-was-an-utter-tragedy-135197.
[14] Great Barrier Reef Marine Park Authority 2019, Great Barrier Reef Outlook Report 2019, GBRMPA, Townsville
[15] Cresswell ID, Murphy H (2016). Biodiversity: Biodiversity. In: Australia state of the environment 2016, Australian Government Department of the Environment and Energy, Canberra, https://soe.environment.gov.au/theme/biodiversity, DOI 10.4226/94/58b65ac828812.
[16] See, for example, Communiques of the Wildlife and Threatened Species Bushfire Recovery Expert Panel, found here: http://www.environment.gov.au/biodiversity/bushfire-recovery/expert-panel.

evaluation of outcomes being created by relevant regulations and an assessment of whether the recommendation or leading practice will contribute to achieving the objectives of the legislation.

Scope of the review

The terms of reference for this review asked the Commissioner to focus on *regulation with a material impact on business investment in the resources sector."*

The findings on page 8 of the draft report include that:

- "Australia is generally deemed to be a relatively desirable place to invest"
- "[Australia's regulatory regime] has facilitated many billions of dollars in investment over several decades, suggesting that the regulatory system has not acted as a significant brake"
- "evidence suggests that the regulatory regimes in other major developed resources-producing countries, including Canada and the United States, are similarly complex and time consuming"

The findings on page 63 of the draft report go on to conclude that *Australian regulators appear to be generally at or near the frontier of leading practice regulation globally."*

Given the conclusion that Australia s regulatory regime for the resource sector is comparable to other developed countries, is at or near the frontier of leading practice globally and has not had an apparent impact on business investment, it is difficult to see what problem the balance of the report is attempting to solve.

The draft report, however, goes on to state that:

> *there is a widely held view within the sector that regulatory processes are becoming more complex to navigate, more protracted and more uncertain, for* ***little if any improvement in regulated outcomes"***

The draft report then acknowledges that there is no data to support these assertions and goes on to state (on page 10) that there is *sufficient qualitative evidence of unnecessary costs to suggest room for significant improvement in regulation of the sector."* The evidence relied upon to make this statement appears to be opinion evidence from the regulated community (as listed in Box 2 of the draft report).

Reliance on this type of evidence base, without analysis of data to ensure that subjective opinions have a foundation in fact, does not appear to be good evaluation practice.

The balance of the report proceeds on the assumption that (presumably) recent changes to environmental regulation are not improving environmental outcomes. This assertion should not be accepted uncritically and certainly should not be accepted without data. Analysis of the outcomes being achieved by the environmental regulation governing the resource sector should first proceed from an explicit identification of the outcomes' being evaluated (which should be based on the objectives of the relevant legislation). This should be followed by the collection and evaluation of data to provide a clear indication of whether, and to what extent, the identified outcomes are being achieved. While we acknowledge that such an exercise would involve expertise in engineering,

ecology and similar disciplines that are not represented on the Productivity Commission, that is certainly work that could have been commissioned in support of the draft report to provide appropriate evidence to draw conclusions about the outcomes being achieved by resources regulation.

The scope of the review contained in the Minister s terms of reference includes:

> 2. Identify regulatory practices that **have achieved evidence-based goals** without imposing additional costs or regulatory burdens on industry, as well identifying jurisdictions' successful efforts to streamline or augment processes to reduce complexity and duplication and improve transparency for current and future investors.
> 3. Identify leading environmental management and compliance arrangements that have resulted in the removal of unnecessary costs for business **while ensuring robust protections for the environment are maintained**.
> 4. Identify best–practice examples of government involvement in the resources approvals process – taking into account the context of each development – to expedite project approvals **without compromising community or environmental standards**, based on sound risk-management approaches.

It would seem to us, based on the highlighted parts of the text above, that the scope of work the Minister has asked the Commission to undertake includes an evaluation of the outcomes being achieved by the environmental and other legislation considered in the review. Given that the draft report expressly states that it has not assessed the outcomes being achieved by the legislation it has considered, we would question whether the draft report fully delivers on the terms of reference.

See below for further discussion of the 'environmental report cards' referenced later in the draft report.

Recommendation:

- **We recommend that the final report be expanded to include a thorough evaluation by appropriately qualified professionals of the environmental outcomes being delivered by environmental laws.**

Rationale for government intervention – market failure

Section 3.1 of the draft report includes a discussion of market failure as a rational for regulation of the resources sector.

The discussion in box 3.1 (at page 91 of the draft report) includes the following in relation to 'externalities' of resource projects:

> ***"spillover effects or 'externalities'*** *occur when the costs and benefits of undertaking an activity do not fully reflect its effects on others. Examples of negative spillovers associated with resource activity may include air or noise pollution, damage to heritage sites or a reduction in public amenity for local residents"*

Given that a significant externality of the resources industry is greenhouse gas emissions, it is surprising that this example is omitted from the discussion in box 3.1 of the draft report.

The impacts of climate change are relevant externalities of the industry under consideration in this report and should not be overlooked.[17]

We also note the following conclusion in relation to how far regulation should go to address market failure (at page 91 of the draft report) (our emphasis):

> *"Almost invariably there will be a tipping point where further efforts to reduce risk* [to environment, heritage, health and safety] *through regulation will come at an additional cost greater than any additional expected benefits. In other words, it is* ***generally unlikely to be the case that net community welfare will be maximised by stopping an activity altogether (though there will be exceptions)****."*

This conclusion appears to suggest that the Commission's view is that there is almost no level of environmental harm or nuisance that would justify refusing to grant an authorisation allowing a resources project to proceed (ie. that the economic benefits of a resource project will, almost inevitably, justify approval notwithstanding the environmental impacts of a project). We find this a surprising conclusion, particularly as there is almost no discussion in the draft report about how this conclusion was reached.

We do not believe that such a conclusion should be made with so little justification. We further believe that the final report should clarify which types of externalities this statement is intended to apply to (for example, should the draft report be read as suggesting that the impacts of global climate change do not justify a refusal or that removing or significantly degrading a community's water source wouldn't justify a refusal?).

Recommendation:

- **We recommend that the discussion of externalities in box 3.1 include acknowledgment of greenhouse gas emissions as a significant externality of the resources industry; and**

[17] The economic implications of climate change have been analysed most notably in the The Garnaut Climate Review, 2008 (https://webarchive.nla.gov.au/awa/20190509030954/http://www.garnautreview.org.au/2008-review.html) and the subsequent update of that report in 2011 (https://webarchive.nla.gov.au/awa/20190509033723/http://www.garnautreview.org.au/update-2011/garnaut-review-2011/summary-garnaut-review-2011.html).

- **The conclusion on page 91 of the draft report that it is generally unlikely that community welfare would be maximised by stopping a resource activity is not explained. We recommend that this conclusion either be removed or be further justified and that the final report include discussion of the types of externalities (such as climate change) to which this conclusion is intended to apply.**

Bans/Moratoria on coal seam gas

Relevant excerpts from draft report:

- **Draft finding 4.4: "Bans and moratoria are a response to uncertainty about impacts of unconventional gas operations. However, the weight of evidence available, and the experience of jurisdictions where unconventional gas development takes place, suggests that risks can be managed effectively."**

- **Draft recommendation 4.1: "Rather than imposing bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the scientific evidence of 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."**

- **"Some risks [of unconventional gas projects] are immediate, some may arise over the course of a project, and some may not arise until extraction is completed. And some of the impacts are uncertain — they may not arise in every project, or the scientific evidence to assess their likelihood may still be developing. This uncertainty has underpinned a precautionary approach by some governments. However, strict application of the precautionary principle brings its own risks: in particular, that no effort is made to assess the potential upsides of the banned activity (Peterson 2006, p. 16), including the benefits of increased gas supplies (PC 2019c, p. 6) and additional royalty and tax revenues." (from page 118)**

We believe the Commission s concerns (at page 118) that an application of the precautionary principle may lead to a failure to consider the 'potential upside' of unconventional gas projects (such as increased gas supply,[18] royalties, taxes and employment) are misplaced. We believe that governments and the community are well aware of the purported benefits that can flow from new resource developments.

We would also note that the above quote in relation to the precautionary principle is the only response the draft report makes to the fact that the impacts of unconventional gas projects may be uncertain or unknown. We do not believe that this is an adequate answer to that risk, particularly given that such uncertainty is often in relation to the impacts on groundwater systems.

We are also concerned that the Commission s conclusion that the risks of unconventional gas can be managed effectively are based on a simplification of the recommendations made by the various inquiries referred to and on the basis of the very short history of such large scale developments both internationally and in Australia. There is even less experience either domestically or internationally of the effectiveness of rehabilitation (with the result that there is very little experience to draw on to understand the extent to which the plug and abandonment rehabilitation procedures will last over the long term). As a consequence, both impacts that may take longer to emerge and impacts that may result from ineffective rehabilitation remain uncertain or unknown.

[18] This does, of course, assume that new gasfields result in increased domestic supply rather than increased exports, which recent history suggests may not be a reliable assumption.

For example, the Inquiry undertaken by the NSW Chief Scientist[19] expressly acknowledged that uncertainties about environmental impacts remained, including in relation to rehabilitation:

> *There is a need to understand better the nature of risk of pollution or other potential short- or long-term environmental damage from CSG and related operations, and the capacity and cost of mitigation and/or remediation and whether there are adequate financial mechanisms in place to deal with these issues."*

Both the Chief Scientist's report itself and the background paper on abandoned wells[20] acknowledge that there is a lack of information, beyond the scale of decades, about the effectiveness of rehabilitation (the failure of which can have significant implications including pollution or depressurisation of aquifers).

We are also particularly concerned that the following statement, from page 118 of the draft report, does not take into account the risks of the post-abandonment phase of coal seam gas wells (at which point the tenure would typically have been surrendered, financial assurances refunded and the risk will sit with government):

> *With effective regulation, resources companies face the full costs of the adverse results of resource extraction and have greater incentive to manage those risks."*

As outlined above, we do not believe that there is an adequate evidence base to make this finding and we **recommend** that it be deleted.

The uncertainty about the risks of an immature form of resource extraction – particularly one with such significant potential impacts on aquifers in a country as dry as Australia – would certainly seem to be sufficient grounds for a government to make a policy decision to apply the precautionary principle in relation to such technology.

Recommendation 4.1 also appears to place resource companies undertaking exploration in a needlessly high-risk position. If the risks of a technology are such that a government has a general policy of not allowing it to proceed, why would it encourage resource companies to expend time and money on exploration and approvals?

We also note that this section of the report does not address the climate change impacts of coal seam gas extraction. Given that climate change is the biggest single environmental risk facing Australia at present, it might be seen as misleading to assert that the risks of activity can be appropriately managed without considering the risks of climate change.

It would seem to us that there is a logical basis for a government to discourage or ban unconventional gas, given the uncertainty of the impacts of coal seam gas development (particularly

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[19] NSW Chief Scientist & Engineer, Final Report of the Independent Review of Coal Seam Gas Activities in NSW, September 2014, found at: https://www.chiefscientist.nsw.gov.au/__data/assets/pdf_file/0005/56912/140930-CSG-Final-Report.pdf.

[20] NSW Chief Scientist and Engineer, Independent Review of Coal Seam Gas Activities in NSW, Information paper: Abandoned Wells, September 2014, found at: https://www.chiefscientist.nsw.gov.au/__data/assets/pdf_file/0009/56925/141002-Final-Abandoned-Well-report.pdf.

in relation to such critical resources as groundwater), combined with the uncertain future of the industry having regard to climate change regulation in export markets and the significant adverse impacts of the greenhouse gas emissions of the industry.

Recommendations:

- **We recommend that draft finding 4.4 and draft recommendation 4.1 be deleted and that the Commission reconsider this section having regard to the long-term impacts of unconventional gas developments, including climate change and the risks that rehabilitation may fail.**

Land access and competing land use

Relevant excerpt from chapter 5 of the draft report:

- **Draft leading practice 5.1: Community concerns about mixed land use are best resolved through strategic land use frameworks rather than prohibitions on resources activity on agricultural land. Leading practice frameworks seek to balance the tradeoffs between resources development and other land uses to maximise economic benefits for the community. These frameworks should thoroughly consider the costs and benefits of allowing resources development, and have approval processes proportionate to the risks of resources development on the relevant land. The Council of Australian Governments' Multiple Land Use Framework provides a leading practice example.**

We agree that strategic planning would be an appropriate way to manage decisions about conflicting land uses, in place of the assumption (which is often built into legislative frameworks) that resource extraction should occur regardless of surrounding or alternative land uses.

However, we disagree with the criteria upon which this draft leading practice suggests that such decisions should be made. Maximising economic benefit for the community' should not be the sole aim of land use planning decisions, as there are multiple other relevant social and environmental criteria that should go into such decisions. As discussed above, this formulation also implies that the short-term economic benefits of resource extraction activities should be the paramount consideration, which once again approaches such decisions at the wrong temporal scale and without regard to other values that are important to the community.

We would also caution that, in our experience, strategic planning processes have often failed to effectively resolve land use conflicts, particularly in relation to the use of land for resource extraction.

Recommend:

- **We recommend that draft leading practice 5.1 be amended to reflect that maximising economic benefit should not be the primary objective of strategic land use frameworks, that other considerations that are difficult or impossible to quantify in economic terms will also be relevant, and that such frameworks should be produced based on long term welfare of the community (including future generations) and the ecological services upon which it depends.**

Nuclear trigger

Related excerpt from draft report:

- **Draft finding 6.3: Projects ruled out as nuclear actions in the EPBC Act explanatory memorandum are being treated as nuclear actions requiring Commonwealth environmental approval.**

The draft report appears to have two complaints about the nuclear trigger contained in the EPBC Act:

- firstly, that it is not being interpreted correctly; and
- secondly, that it may be unnecessary on the basis of 'other regulatory arrangements' administered by the Australian Radiation Protection and Nuclear Safety Agency.

We believe that both concerns are unfounded.

Interpretation of the nuclear trigger

On page 16, and again on page 160, the draft report asserts that rare earth and mineral sands operations should not fall within the scope of the nuclear trigger' contained in the EPBC Act on the basis that the explanatory memorandum to the original EPBC Bill stated that the mining and milling of uranium ore does not include such activities.

This assertion is founded on a misunderstanding of the scope of the nuclear trigger, as well as on a misreading of, and legally incorrect understanding of the legal effect of, the explanatory memorandum.

We examine below both the legal basis and the factual basis for the assertion in the draft report that the nuclear trigger is being used beyond its lawful scope.

Legal basis

The 'nuclear trigger' is contained in ss21 – 22A of the EPBC Act. The relevant prohibition is on taking a 'nuclear action' that may, or is likely to, have a significant impact on the environment without approval under the Act.

'Nuclear action' is defined as:

a) establishing or significantly modifying a nuclear installation;[21]
b) transporting spent nuclear fuel or radioactive waste products arising from reprocessing;
c) establishing or significantly modifying a facility for storing radioactive waste products arising from reprocessing;
d) **mining or milling uranium ore**;

[21] Note that 'nuclear installation' is further defined in this section to mean a nuclear reactor, plant for preparing or storing fuel for a nuclear reactor, a nuclear waste storage or disposal facility or a facility for production of radioisotopes with an activity that is greater than the activity level **prescribed by regulations** made for the purposes of this section.

e) establishing or significantly modifying a largescale disposal facility for radioactive waste;
f) decommissioning or rehabilitating any facility or area in which an activity described in paragraph (a), (b), (c), (d) or (e) has been undertaken;
g) any other action prescribed by the regulations.[22]

It is relevant to note that the mining or milling of uranium ore is only one limb of the definition of 'nuclear action' (ie. the nuclear trigger), which includes a broader range of activities than the draft report suggests including such activities as disposing of, or storing, radioactive waste.

One set[23] of explanatory memorandum for the *Environment Protection and Biodiversity Conservation Bill 1999 (Cth)*,[24] contains the following text (with our emphasis):

Clause 22 – What is a nuclear action?

88 This clause defines nuclear actions.

89 Nuclear actions include mining or milling uranium ore. To avoid any doubt, this does not include operations for the recovery of mineral sands or rare earths.

90 ……"

This appears to be the excerpt relied upon in the draft report.

The two key points that must be noted about this excerpt from the explanatory memorandum are that:

- The text in relation to mineral sands and rare earths is expressed as a clarification of the scope of only one limb of the definition of 'nuclear action' being the 'mining or milling or uranium ore' in subparagraph (d). It does not purport to refer to, limit or clarify the meaning of the other seven limbs of the definition, which also relevantly include the power to expand the scope of term by regulation;

- Section 15AB of the *Acts Interpretation Act 1901 (Cth)* allows extrinsic material, such as explanatory memoranda, to be used to interpret legislation only in quite limited circumstances. Those circumstances do not include changing the otherwise plain meaning of the language used in the Act.

[22] *Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)*, s2.01 provides that a nuclear action includes establishing, significantly modifying, decommissioning or rehabilitating a facility where radioactive materials at or above the activity level mentioned in regulation 2.02 are, were, or are proposed to be used or stored.

[23] Note that the relevant text is not found in the version of the explanatory notes that can be found on the Commonwealth Parliament website.

[24] http://classic.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/bill_em/epabcb1999598/memo_0.html?stem=0&synonyms=0&query=environment%20protection%20and%20biodiversity%20conservation%20bill%201999.

Even if it was lawful to use the explanatory memorandum to limit the meaning of this provision (and it is not), the explanatory memorandum refers only to one small part of the relevant definition and could not be used to limit the other limbs of the definition of nuclear action .

Recommendation:

- **The assertions in the draft report that the nuclear trigger cannot include mineral sand or rare earth projects is incorrect at law and should be removed.**

Factual basis

The draft report, at page 160, cites the Nolans Project in the Northern Territory' as an example of a rare earths or mineral sands project that should not, based in the draft report s interpretation of the effect of the explanatory memorandum, have been determined to be a nuclear action .

The relevant project (EPBC Number 2015/7436) stated in its referral[25] that the project included 'rare earth intermediate processing' to remove uranium and thorium from the ore mined at the site to create a saleable product. The **uranium and thorium waste was proposed to be stored on the Nolans site, with 150 tonnes of uranium and 2,000 tonnes of thorium to be added to the on-site storage facility each year** (see pages 19 and 20 of the referral). The EIS[26] for the project proposed that such radioactive waste would remain on site and be covered with inert waste rock upon closure of the mine. The on-site storage of radioactive waste referred to in the referral would therefore seem to amount to **permanent on-site disposal of radioactive waste**.

While the decision[27] to identify sections 21 and 22A (ie. the nuclear trigger) as controlling provisions for the Nolans project doesn't specify which limb/s of the definition of nuclear action' were determined to be relevant, it seems to us that limbs (a), (d), (e), (f) or (g) were all potentially available (depending, for limbs (a), (e) and (g), on the activity level of the disposal site).

As a consequence, even if the above excerpt from the explanatory memorandum is taken at face value, it does not relate to the parts of the nuclear trigger that are relevant to the Nolans project.

Other regulatory arrangements

The reference in the report to "other regulatory arrangements" appears to be a reference to the *Australian Radiation Protection and Nuclear Safety Act 1998 (Cth)* (**ARPNSA**). That Act was in effect prior to the EPBC Act and prior to the *COAG Heads of Agreement on Commonwealth and State roles and responsibilities for the environment* (1997), in which it was agreed that the Commonwealth had

[25] Found here: http://epbcnotices.environment.gov.au/_entity/annotation/8f4eb403-d868-e511-b93f-005056ba00a7/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1586924337057.
[26] Which can be access through the Northern Territory EPA website, here: https://ntepa.nt.gov.au/environmental-assessments/register/nolans-project.
[27] http://epbcnotices.environment.gov.au/_entity/annotation/8acc1516-3668-e511-9099-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1586926239238.

responsibility for protecting the health and safety of the people of Australia, and the environment, from possible harmful effects associated with nuclear activities.

Rather than a case of regulatory overlap, it appears to us that the EPBC Act and the ARPNSA have been designed to operate as a statutory scheme.[28] We would recommend against any steps to remove (or recommend the removal) of the nuclear trigger without a thorough evaluation of how those Acts are functioning as a scheme and whether they are achieving appropriate outcomes that accord with community expectations, the objectives of the legislation and sound environmental management.

Further, given that environmental assessments are intended to assess the whole of the impacts that a project will, or may, have on the environment, we find it quite peculiar to suggest that such a significant source of impacts should be left to a separate statutory regime which would not allow for an appropriate holistic assessment.

We further note that it could be somewhat misleading to cite (on page 160) an excerpt from a submission to the Hawke Review of the EPBC Act without also noting that the Hawke review concluded that, while some clarification of the scope of uranium mining' should be considered, the other controls on nuclear activities remained suitable at that time.

Recommendation:

- **The parts of draft finding 6.3 that refer to the nuclear trigger are incorrect at law and should be deleted.**

[28] For example, the Acts appear to intentionally use the same definition of 'nuclear installation' and the EPBC regulations prescribed activity levels for the purposes of the definition of nuclear activity by reference to the regulations in effect under the ARPNSA.

Water trigger

Related findings and recommendations:

- **Draft finding 6.3: The evidence that the water trigger filled a significant regulatory gap is not compelling.**

Environmental regulation must remain contemporary and must be able to address threats that emerge from changes in technology and changes in industry practice. In that regard, it was appropriate for the then government to consider whether the EPBC Act was able to effectively achieve its objectives, with the existing level of protections, when unconventional gas entered Australia at a large scale and in response to changes in mining practices.

These changes in technology and industry practice also highlighted the limited capacity of the EPBC Act to address cumulative impacts, when three large coal seam gas projects were being assessed almost simultaneously in Queensland, with overlapping impacts on groundwater.

The states' poor history[29] when it comes to managing shared or connected water resources and the threat that coal seam gas extraction and large-scale coal mining pose to such shared water resources as the Great Artesian Basin makes a compelling case for Commonwealth involvement in large projects with impacts on groundwater at the very least.[30]

The Independent Review of the Water Trigger Legislation[31] found that it was an appropriate public policy response to the risks associated with such developments and that it was operating effectively.

The Commission s conclusion that *evidence that the water trigger filled a significant regulatory gap is not compelling"* appears (from the text of the draft report) to have been based solely on disagreements with the Independent Reviewer about three particular case studies. A broader evidence base, perhaps including an analysis of the outcomes being created by the water trigger in the years since the Independent Review, would be a more adequate basis for forming conclusions about its utility.

Recommendation:

- **We recommend that the draft report be amended to include a thorough evidence-based assessment of the policy need for the water trigger, including the outcomes it is achieving, or that the relevant parts of draft finding 6.3 be deleted.**

[29] See, for example, the long history of mismanagement of the Murray-Darling Basin, which includes parts of Queensland, NSW, Act, Victoria and South Australia, and resulted in the need for the Commonwealth to intervene with the *Water Act 2007 (Cth).*

[30] We have recommended that the water trigger be expanded in our recent submission to the EPBC Act ten year review (at page 39). The submission can be found here: https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf.

[31] Hunter S, 2017, The Independent Review of the Water Trigger Legislation, Commonwealth of Australia 2017, found at: http://www.environment.gov.au/system/files/resources/905b3199-4586-4f65-9c03-8182492f0641/files/water-trigger-review-final.pdf.

"Triggering the EPBC Act"

Related findings and recommendations:

- **Draft finding 6.3: Over half of all projects referred under the EPBC Act do not ultimately require Commonwealth approval.**
- **"Provision of better guidance to assist proponents when they are considering whether to refer their project may go some way towards addressing this inefficiency….. Another way of addressing this problem, adopted in some jurisdictions, would be to require assessment and approval based on the nature and extent of proposed activities rather than their potential impacts." (from page 182)**

The purpose of the referral process contained in the EPBC Act is to allow project proponents to obtain certainty about whether their project requires approval under the EPBC Act. A referral is only mandatory if the project proponent thinks that their project is, or may be, a controlled action.[32] In that regard, a significant proportion of referrals being determined not to be controlled actions is an expected outcome of the referral process, and one that allows proponents (and the states/territories) to proceed with certainty that the EPBC Act has not been engaged for the project.

We certainly agree that clearer Significant Impact Guidelines[33] (based on objective criteria) would be of benefit to both the environment and project proponents, however, we believe that for existing matters of national environmental significance[34] such guidelines should remain based on the degree of impact (and not on the type of activity proposed).

Recommendation:

- **We recommend that instead of the relevant part of finding 6.3, the draft report be amended to propose a project be undertaken by the Commonwealth Department to produce a new version of the significant impact guidelines that incorporates objective criteria based on the impacts of the action.**

[32] EPBC Act, s68.

[33] The current significant impact guidelines can be found here: https://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guidelines_1.pdf.

[34] Thresholds based on scale may be appropriate in other circumstances, such as the new matters of national environmental significance we have proposed for vegetation clearing and greenhouse gas emissions at pages 34 – 39 of our submission to the EPBC Act review, found at: https://www.edo.org.au/publication/submission-10-year-review-epbc-act/.

Use of deeming provisions

Relevant excerpt from draft report:

- **Draft leading practice 6.4: The use of deemed decisions, whereby the assessment agency's recommendation to the final decision maker becomes the approval instrument if a decision is not made within statutory timeframes, is a leading-practice approach to reducing delays. At the same time, deemed decisions should be subject to limited merits review. No jurisdiction ticks both boxes — the *Environment Protection Act 2019* (NT) introduced deemed decisions but does not allow them to be subjected to merits review.**

We would recommend against the use of a deemed approval approach for higher risk environmental decisions, particularly at the Commonwealth level. There is a high risk that such a deemed approval could be triggered through inadvertent miscalculation of statutory timeframes or be used by decision-makers who would prefer not to make politically sensitive decisions themselves. A deemed refusal' approach, allowing the proponent to move a decision along to an independent court in the event the decision-maker is unreasonably delaying, would be a more appropriate approach.

We also note the Commission s comment as follows:

> *Commission maintains the view that primary approval decisions involving tradeoffs between competing environmental, social and economic values (2013a, p. 207) are best made by elected representatives"*

We would question whether it is appropriate for elected representatives to make such trade-off decisions' at the project level. While such a role may be appropriate for the legislature in setting the overall objectives to be achieved by the legislation, we do not believe that this logic flows down to the project scale, at which stage the public s confidence in the system may be undermined by the perception that decision-making is not undertaken on the basis of objective criteria.

We have in the past recommended,[35] and continue to recommend[36] the creation of independent agencies to implement the objectives set by Parliament in the EPBC Act (or any successor legislation) and the implementation of objective criteria and standards for decision-making to be developed on the basis of sound science to foster public confidence in environmental decision-making.

Recommendation:

- **We recommend that draft leading practice 6.4 be framed around the use of deemed refusal powers (not deemed approval powers), to enable a project proponent to move a**

[35] Humane Society International and Environmental Defenders Office, 2018, Next General Biodiversity Laws: Best Practice Elements for a new Commonwealth Environment Act, found at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/5788/attachments/original/1533002626/HSI_EDO_Next_Generation_Report_SEARCHABLE.PDF?1533002626.

[36] See our recent submission to the review of the EPBC Act, found here: https://www.edo.org.au/publication/submission-10-year-review-epbc-act/.

decision along to an independent Court in the event the primary decision-maker is unreasonably delaying the decision.

Bilateral approval agreements

Related excerpt from draft report:

- **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.**

Given that the Commission has not found that the current system is an impediment to investment, and that the values the EPBC Act aims to protect are in need of enhanced (not reduced) protections, we can see no justification for this recommendation.

We note that it is still government policy to create a "one stop shop" for environmental approvals to improve efficiency.[37] This involves devolving federal approval responsibilities to states and territories through the use of 'approval bilateral agreements'. This approach is problematic and unlikely to achieve the desired efficiency due the difficulties of creating eight "one stop shops" and attempting to accredit state regimes that do not satisfy national standards.

Environmental assessments and approvals, 'green tape', 'red tape', 'streamlining' and 'one stop shop' ideas have been examined by a number of parliamentary inquiries (both Senate and House of Representatives), and by independent bodies including the Productivity Commission (in previous reports) and the Australian Law Reform Commission. EDO has presented extensive evidence to these various inquiry processes for almost a decade. For the purpose of this submission, we note that while most environmental decision-making happens at the state level, there are five crucial reasons why the Australian Government must retain a leadership and approval role in environmental assessments and approvals of matters of national environmental significance. These reasons are:

- only the Australian Government can provide national leadership on national environmental issues, strategic priorities and increased consistency;
- the Australian Government is responsible for our international obligations, which the EPBC Act implements;
- State and Territory environmental laws and enforcement processes are not always up to standard, and do not consider cross-border, cumulative impacts of decisions;
- States and Territories are not mandated to act (and do not act) in the national interest; and
- State and Territory governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess.

Recommendation:

- **We recommend that draft recommendation 6.1, in relation to approval bilateral agreements be deleted.**

[37] See: https://www.environment.gov.au/epbc/one-stop-shop.

Outcome-based approval conditions

Relevant excerpt from draft report:

- **Draft leading practice 6.7: Outcomes-based approval conditions enable companies to choose least-cost ways of achieving defined environmental outcomes. The Commonwealth's *Outcomes-based conditions policy* outlines a leading-practice approach to outcomes-based condition setting.**

We recommend that this leading practice be qualified in the ways discussed in our initial submission,[38] which reflects the findings of a research report issued by the Productivity Commission in 2013.[39]

We also recommend that the Commission review other sources of evidence to identify whether inappropriately prescriptive conditions are, in fact being imposed, or whether prescriptive conditions are being imposed in relation to appropriate subject matter or for good reasons (eg. to reflect commitments made by a project proponent in its EIS or application documents).

We also recommend that draft leading practice 6.7 be amended to acknowledge that:

- outcome-based conditions, while having their place, will not be appropriate in all circumstances; and
- it is important, for both transparency and enforceability, that both the regulator and the community know how the project proponent or site operator is implementing an outcome-based condition on a progressive basis.

While outcome-based conditions can be appropriate in some situations, there will certainly be many situations in which prescriptive conditions are necessary. For example, the Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia[40] (which the Commission has relied upon in other parts of the draft report), made explicit findings and recommendations that prescriptive regulation was necessary to appropriately regulated hydraulic fracturing.[41]

It is also critically important, to ensure that compliance can be monitored and that enforcement action can be taken, to ensure that that the regulator has information about how any outcome-based conditions are being complied with. Outcome-based conditions may also warrant the imposition of monitoring and reporting obligations – to ensure that the efficacy of the proponent s approach to achieving the relevant outcome is being appropriately monitored and that appropriate interventions are made before serious or irreversible harm occurs. Community confidence in the

[38] See our earlier submission to this process, from page 14, found at: https://www.pc.gov.au/__data/assets/pdf_file/0003/247476/sub040-resources.pdf.
[39] Productivity Commission, Major Project Development Assessment Processes (Research Report, November 2013) 223.
[40] Commander et al, 2018, Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia: Final report to the West Australian Government, found at: https://frackinginquiry.wa.gov.au/sites/default/files/final_report.pdf.
[41] See page 50 and discussion from page 470, including finding 72 and 74 and recommendation 32.

environmental regulation of resource activities is also improved if there is transparency about how compliance is being achieved including through access to monitoring and reporting data.

Recommendation:

- **We recommend that draft leading practice 6.7 be amended to acknowledge that outcome-based conditions are appropriate only in some circumstances. The draft leading practice should also reflect that outcome-based conditions will typically need to be supported by a management plan (or similar) to inform the regulator of how the relevant outcome is being implemented and by monitoring and reporting.**

We also note the following excerpt found on page 172 of the draft report:

> "The use of overly prescriptive rather than outcome based conditions means that new, more efficient, ways of achieving environmental outcomes may need to be eschewed in the name of compliance. And a review of interactions between the agriculture sector and the EPBC Act found that **the environment minister's ability to vary approval conditions 'is largely restricted to changes that expand protection of [matters of national environmental significance], rather than pragmatic changes that seek to maintain current levels of protection by alternate means'** (Craik 2018, p. 56)."

The Minister s power to amend EPBC Act approval conditions at the request of the proponent is contained in s143(1)(c) of the EPBC Act:

> (c) the holder of the approval agrees to the proposed revocation, variation or addition, or the Minister has extended the period for which the approval has effect under section 145D, and the Minister is satisfied that any conditions attached to the approval after the proposed revocation, variation or addition are necessary or convenient for:
>
> (i) protecting a matter protected by any provision of Part 3 for which the approval has effect; or
>
> (ii) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).

The requirements contained in s143(1)(c)(i) and (ii) in relation to varied condition are in the same terms as the requirements that apply to the original decision to impose conditions on the approval under s134(1). In that regard, we find it peculiar that the draft report suggests that the power to vary conditions is so limited.

State environmental Acts also typically contain powers allowing conditions to be amended.

In that regard, we find it surprising that the draft report suggests that an ability to amend conditions is a barrier to business. We do not believe that the report is intending to suggest that changes to conditions intended to protect the environment should be able to proceed without an appropriate level of assessment by the regulator.

Post approvals

Related excerpts from draft report:

- **Draft finding 6.6: Project approvals are often conditional on the preparation of management plans that also need to be approved by regulators ('post-approvals'). The process and timelines for securing post-approvals are often unpredictable, and over-reliance on management plans is not a first-best approach to achieving environmental outcomes.**

- **Draft leading practice 6.9: Regulator decisions in the post-approval stage should be subject to timelines — statutory or otherwise — and regulator performance against those timelines should be publicly reported. The New South Wales Department of Planning, Industry and Environment has recently announced its intention to report on performance against timelines for post approvals.**

- **Draft leading practice 6.10: Clear guidance from regulators on the type and quality of information that post-approval documentation needs to include can help make the process more efficient. An example of such guidance is the *Instructions on how to prepare* Environmental Protection Act 1986 *Part IV Environmental Management Plans* produced by the Western Australian Environmental Protection Authority.**

There may be a number of reasons why conditions of approval may require the preparation of a management plan, including:

- Detailed design is typically not undertaken at the EIS stage, with the result that information about whether (or how) environmental outcomes are achievable for the final project may not be available at the EIS stage;

- There may be uncertainty about the impacts of a project or how those impacts can be managed, with the consequence that the proponent has nominated that it will take an adaptive management approach addressing the impact;[42] or

- As outlined above, to ensure that outcome-based conditions are being complied with appropriately and are enforceable.

As a consequence, post-approval management plans will range from relatively straightforward plans to plans that are scientifically or logistically complex and/or (particularly in the case of plans designed to address uncertain impacts through adaptive management) designed to deal with novel situations.

The time and technical expertise required to adequately review such plans is, consequently, likely to vary significantly. It should go without saying that approval should not be granted for any such plans that don't comply with the relevant condition or which are likely to be ineffective. Ensuring that

[42] Note that such an approach may be consistent with precautionary principle in some cases, but that such uncertainty may warrant refusal in other cases.

regulators are adequately resourced, and can secure external technical assistance if necessary, may go some way towards assessing such plans in a timely manner.

However, an unstated assumption made in this section of the report appears to be that assessment times are solely driven by the regulator. We do not believe that this is correct, as delays may well be driven by proponents submitting inadequate plans or finding that matters put off for secondary approvals at the EIS stage are not so easily dealt with.

Putting time pressure on regulators in the way proposed by draft leading practice 6.9 may result in regulators either compromising environmental outcomes by approving plans that should not be approved or issuing refusals because there has been inadequate time to undertake a proper assessment.

One alternative, of course, would be to require that proponents undertake detailed design at the EIS stage.

Recommendation:

- **We recommend that draft leading practice 6.9 and 6.10 either be deleted or that they expressly contemplate that the time required to process secondary consents is likely to vary depending upon the complexity and subject matter of the relevant management plan.**

Review mechanisms

Relevant excerpt from draft report:

- **Draft leading practice 6.11: Where approval decisions are made by unelected officials it is a leading-practice accountability measure that they can be subjected to merits review that allows for conditions and approval decisions to change to reflect substantive new information. The *Environment Protection Act 2019* (NT) puts this principle into practice.**
- **Page 177: "Review mechanisms are an important check on the legality and quality of regulator decision making"**
- **Page 178: "Not all decisions are suitable for merits review. In particular, there are risks associated with offering merits review for decisions made by a Minister, decisions of a high political content, and decisions allocating a finite resource between competing users (ARC 1999).**
- **"Reviews can, however, delay projects and discourage investment."**

We agree with the draft report that merits review of environmental (and other) decision-making both leads to better decision-making and improves public confidence that decisions are being made in a way that is both correct and preferable.

However, we would not agree that merits review should be limited to unelected officials, particularly given that the following rationale for this limitation, made at page 178, does not accurately reflect the source cited for it:

> *Not all decisions are suitable for merits review. In particular, there are risks associated with offering merits review for decisions made by a Minister, decisions of a high political content, and decisions allocating a finite resource between competing users (ARC 1999)."*

The Administrative Review Council s publication[43] (cited in the draft report as ARC 1999) starts from the following basic principle:

> "2.1. As a matter of **principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review**. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test."

Environmental decision-making in relation to resource activities is generally likely to affect the interests of a variety of people including the project proponent, any landholder of the land containing the resource, traditional owners, adjacent holders of interests in land and water, surrounding communities affected by the off-site impacts of the activity, the broader community

[43] Which can be found here: https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/practice-guides/what-decisions-should-be-subject-to-merit-review-1999.aspx.

which has an interest in ecological processes being maintained and even the global community, to the extent that it is affected by the climate change impacts of resource activities.

While the ARC publication does identify some factors that **may** make a decision unsuitable for merits review, those factors **do not** include whether the decision-maker is an elected or unelected official.

The factors listed in the ARC publication as potentially justifying excluding merits review include policy decision of high political content' which are limited to those issues of the highest consequence for Government (the examples given for economic decisions were determining interest rates; floating the dollar; and, setting foreign exchange rates).[44] In any event, the ARC publication does not contemplate that such factors would justify a blanket exemption and instead proposes that a process (such as through certificates for individual decisions tabled in Parliament) could be created to exempt specified decisions.

Further, the ARC publication does not suggest that decisions made by Ministers should be generally exempt from merits review – it, in fact, makes the following statement about factors (including the status of the decision-maker) that **should not** exclude merits review:

> "5.20. The status of the primary decision-maker is not a factor that, alone, will make decisions of that person inappropriate for merits review.
>
> 5.21. For example, **the fact that the decision-maker is a Minister or the Governor-General, is not, of itself, relevant to the question of review**. Rather, it is the character of the decision-making power, in particular its capacity to affect the interests of individuals, that is relevant.
>
> 5.22. That said, **policy decisions that involve consideration of matters of the highest consequence to government or major political issues may be regarded as inappropriate for merits review**: this exception is discussed in Chapter 4, above.
>
> 5.23. The high political content exception **focuses upon the nature of the decision, not the identity of the decision-maker**, although it will usually only apply if the decision is made personally by a Minister."

The ARC publication expressly rejects the proposition that decisions should be exempt from merits review on the basis that the decision-maker is an elected official.

We would further suggest that environmental decision-making is not of a character that would fall within the scope of decisions that the ARC considers could be exempted from merits review on the basis being a policy decision of high political content'. Decisions will not fall within that category

[44] Ibid at paragraph 4.22.

merely because they have a political flavour or degree of controversy and the ARC certainly did not recommend a general exemption for all decisions of a type merely because some of those decisions might have high political content .

We note that this part of the draft report also cites an earlier report of the Commission in relation to the assessment of major projects, which makes the following statement:

> *The Administrative Review Council (ARC) (1994, 1999) considered that, as a general rule, policy decisions of a high political content made by a Minister, including environmental decisions that involve major political controversies, should not be merits reviewable."*[45]

This excerpt appears to be based on the same misreading of the 1999 ARC report as outlined above but also cites an earlier report published by the ARC in 1994[46] which primarily related to decisions made under the (now repealed) *Environmental Protection (Impact of Proposals) Act 1974 (Cth)*. The 1999 report makes no explicit mention of either environmental decisions or major political controversies , while the 1994 report makes a recommendation to allow specified decisions involving 'major political controversies' to be exempted from a general right to merits review on a case-by-case basis through a certificate tabled in Parliament. The 1994 report certainly doesn't suggest that there should be a general exemption from merits review for decisions made by a Minister.

The draft report finally appears to assume that political accountability' is a substitute for merits review. We disagree, including because such accountability will not alleviate the impacts of a poorly made decision, including impacts on communities that could last for decades and decisions allowing irreversible environmental harm to occur. To address this, we refer you to recommendations in our report on *Next Generation Biodiversity Laws*[47] which considers the appropriate division of functions between the Environment Minister and independent agencies and recommends that project-level decisions be made by an independent Environmental Protection Agency, with appeal on the merits available from such decisions.

To summarise, we believe that the reports relied upon to justify excluding the decisions of elected officials from merits review in fact make the case for precisely the opposite outcome (unless the Minister in question is given the statutory power to exempt decisions on a case-by-case basis).

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[45] Page 261 of Productivity Commission, 2013, Major Project Development Assessment Processes, found at: https://www.pc.gov.au/inquiries/completed/major-projects/report/major-projects.pdf.

[46] Administrative Review Council, 1994, Report No 36, Report to the Minister for Justice: Environmental Decisions and the Administrative Appeals Tribunal, found at: https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/publications/report-36.pdf.

[47] Humane Society International and Environmental Defenders Office, 2018, Next General Biodiversity Laws: Best Practice Elements for a new Commonwealth Environment Act, found at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/5788/attachments/original/1533002626/HSI_EDO_Next_Generation_Report_SEARCHABLE.PDF?1533002626.

Recommendation:

- **We recommend that the relevant text on pages 178 and 179 of the draft report be amended to accurately reflect the content of the ARC reports (ie. that environmental decisions should be generally subject to merits review, including where they are made by the Minister) and that leading practice 6.11 be amended to recommend that all decisions (of both elected and unelected officials) be subject to merits review.**

We agree with the Commission s analysis in relation to the interaction of decisions of the Queensland Coordinator-General[48] with the Land Court s review functions in relation to certain mining activities. We do, however, believe that the interaction between the Coordinator-General s powers and environmental legislation warrants further scrutiny (particularly in relation to whether conditions imposed by the Coordinator-General are constraining effective environmental regulation later in the life of a mine).

Recommendation:

- **The Commission should recommend that the Queensland Government conduct a review of the interaction between the *State Development and Public Works Organisation Act 1971* and the *Environmental Protection Act 1994*, particularly in relation to Land Court review and the Coordinator-General's power to impose conditions.**

[48] under the *State Development and Public Works Organisation Act 1971 (Qld).*

Review and appeal: 'lawfare'

Relevant excerpts from the draft report:

- **Draft finding 6.7: Court cases brought by third-party opponents to resources projects may cause delay, but this does not imply that third parties should be excluded from seeking judicial review. Process-driven legislation creates opportunities for regulators to make invalid administrative decisions that open the door for judicial review.**

- **From page 180: An overly prescriptive Act, with many *procedural* requirements rather than a focus on *outcomes*, creates opportunities to make objections that delay projects, without any consequential benefit for biodiversity or conservation.**

We note and agree with the draft report's conclusion that challenges to environmental approvals are relatively infrequent and that there are good reasons to allow third parties standing to seek judicial review. We would also refer the Commission to the discussion from page 90 of our submission to the EPBC Act review[49] in which we provide further information and analysis to debunk the 'lawfare' myth.

We would, however, query the distinction being made between process and outcomes. Procedural requirements are often in place to ensure that the legislation creates good outcomes by, for example, ensuring that the decision-maker has regard to all relevant factors (and does not base a decision on an irrelevant consideration) and providing procedural fairness for both the proponent and the community.

We would refer the Commission, in this respect, to the submission made by the Law Council of Australia[50] to the current EPBC Act review, which contained the following analysis:

> *"When the only protection provided by the EPBC Act is procedural, it makes no sense to criticise a legal challenge on the basis that it is procedural in nature. It also makes no sense when the purposes of the procedural rules are to achieve substantively better decisions concerning development and the environment……. Access to the courts is a foundation of Australian democracy and guaranteed by the Constitution."*

Efficient processes are desirable but not at the expense of procedural fairness or good decision-making.

Further, the text excerpted above from the draft report and the draft finding appear to suggest that there have been a high number of cases challenging environmental decision-making on purely procedural grounds. We do not believe this to be the case. We recommend that the Commission provide examples of cases run on such procedural grounds to both support this finding and to allow public discussion of the basis for this finding.

We also note that Courts hearing judicial review matters have a variety of powers available to them to ensure that matters are dealt with expeditiously and to avoid unnecessary delays (eg. the power

[49] Found at: https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf.
[50] Found at: https://epbcactreview.environment.gov.au/submissions/anon-k57v-xqbu-d.

to stay - or not stay - the relevant decision, make procedural orders and the power to grant costs orders).

If the intent of this recommendation is that rights to seek judicial review should be removed in cases of 'purely procedural grounds', we would note that attempts to create such a privative clause tend to be of limited effect.[51]

Recommendations:

- **We recommend that the Commission identify in the report challenges to environmental decision-making that have been made on purely procedural grounds without "any consequential benefits for biodiversity or conservation". We believe that such a review would reveal few, if any, such cases.**
- **We recommend that draft finding 6.7 be amended to remove references to 'process-driven legislation'**

[51] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

Strategic Assessments

Relevant finding:

- **Draft finding 6.9: Strategic assessments are costly but may reduce regulatory burden in the long run where they reduce the cost or number of future project approvals.**

While we support the better use of strategic assessments, we think that there are other opportunities to create better outcomes for the environment while also providing project proponents with greater certainty about the standards to be achieved and better data upon which to base project-level assessments.

In that regard, we refer the Commission to the discussion of the use of bioregional planning (as well as strategic assessment) in our report on *Next General Biodiversity Laws*.[52]

We believe that, by focusing efforts on the planning stage and creating better data and objective standards to inform environmental decision-making, project-level decision-making will both create better outcomes for the environment and become faster, more certain and less costly for project proponents.

Recommendation:

- **We recommend that the Commission consider other options for proactively planning for environmental protections (such as bioregional planning) and the benefits they could create in terms of better outcomes for the environment, greater community confidence in environmental regulation and greater certainty for project proponents.**

[52] See Part E from page 62.

Managing environmental and safety outcomes

Relevant excerpts from the draft report:

- **"On the whole, Australia's resources regulation delivers relatively good environmental outcomes, but there are certain weak points."**
- **"On the whole, Australia's resources regulation delivers relatively good environmental outcomes. The 2016 State of the Environment Report noted that Australia's resources regulation was effective (Metcalfe and Bui 2017, p. 124), and the 2018 Environmental Performance Index produced by Yale and Columbia Universities ranked Australia's environmental performance at 21st out of 180 countries (Wendling et al. 2018, p. vii)."**
- **Draft finding 7.1: "Environmental report cards indicate that Australia's resources regulation has been effective in delivering relatively good environmental outcomes. But there have been several incidents and resources activities are one source of pressure on Australia's biodiversity."**

We are concerned that the draft report s assertion that resource regulation is delivering good environmental outcomes is not supported by strong evidence. The draft report cites two sources in support of this conclusion, neither of which provides an adequate evidence base to draw a conclusion of this type.

The source cited as Metcalf and Bui (2017)"[53] is the 'Land' section of the 2016 *State of the Environment Report* prepared under the EPBC Act.[54] That section comments on environmental outcomes in relation to impacts on land only, and has nothing to say about impacts on water (either surface or groundwater), biodiversity or air/atmospheric emissions. We do not believe that this reference can be used to support the broad assertion made in the draft report, particularly having regard to conclusions from other parts of the 2016 State of the Environment Report, for example:

- The report concludes that *"the main pressures facing the Australian environment in 2016 are the same as those reported in SoE 2011: climate change, land-use change, habitat fragmentation and degradation, and invasive species."* The resource sector is far from the only sector creating these pressures but it is certainly a driver of climate change, land use change, habitat fragmentation (which the unconventional gas sector can create at a very large scale) and habitat degradation;
- *"This report demonstrates that Australia's biodiversity is under increased threat and has, overall, continued to decline……The outlook for Australian biodiversity is generally poor, given the current overall poor status, deteriorating trends and increasing pressures."*

[53] Metcalfe, D.J. and Bui, E.N. 2017, Australia State of the Environment 2016: Land, Independent report to the Australian Government Minister for the Environment and Energy, Australian Government Department of the Environment and Energy, Canberra.

[54] See s516B.

The source cited as Wendeling et al (2018)"[55] is the Environmental Performance Index (**EPI**) issued by the Yale Centre for Environmental Law and Policy. This report provides an overall indication of countries' performance in relation to certain aspects of the environment (eg. air quality, water resources, air pollution, heavy metals, biodiversity). It does not make any specific comment about the effectiveness of the regulatory regime that applies to the mining or resources sector. We do not believe it is possible to draw the conclusion stated in the draft report from the information contained in the EPI.

Recommendation:

- **Given that the draft report (as stated in the introductory text) does not seek to undertake any analysis of the outcomes being achieved by the legislation applying to the resources industry, and that such conclusions cannot be drawn based on the references reviewed by the Commission, all recommendations, statements of leading practice and findings should be made subject to detailed analysis of the outcomes being achieved by any relevant legislation.**
- **Draft finding 7.1 should be deleted as it is not supported by the evidence reviewed by the Commission.**

[55] Wendling, Z.A., Emerson, J.W., Esty, D.C., Levy, M.A. and de Sherbinin, A. 2018, 2018 Environmental Performance Index, Yale Center for Environmental Law & Policy, https://epi.envirocenter.yale.edu/downloads/epi2018reportv06191901.pdf.

Offsets

Relevant excerpt from section 7.2 of the draft report:

- **Draft leading practice 7.4: Public registers of activities with offset obligations and the projects developed to fulfil them provide valuable transparency about the application of offset policies. Information on offset projects should include their biodiversity values, location, date of approval, completion status, and follow up evaluations of benefits. Where companies fulfil their offset obligations by paying into a fund, the register should include the size of the payment. Western Australia s offset register is a leading practice example.**

- **Draft leading practice 7.5: Schemes that allow companies to meet their offset obligations by paying into a fund can reduce costs for both companies and governments, and can create opportunities for better environmental outcomes. New South Wales, Queensland, South Australia, and Western Australia s Pilbara Fund, all offer examples of this.**

We do not necessarily disagree with all of draft leading practice 7.4, however, it is incomplete.

While there is certainly a place for payments into offset funds (particularly in the case where payments for smaller impacts can be aggregated to better effect), such payments will not be appropriate in all cases. Particularly in the case of larger impacts, having the proponent take responsibility for delivering the offset ensures that the offset occurs and that the full costs of the impact are internalised into the project.

Some of the other issues which should be acknowledged in the report are that:

- Not all impacts can be offset. Offsets should be available only for those impacts where there is good evidence that the impact can be effectively offset;
- Offsets should be permissible only within a framework that requires proponents and regulators to ensure that impacts are first avoided, and if that is not possible, then minimised and finally that any residual impact is offset;
- The timing of the provision of the offset is likely to be critical in many cases. As a consequence, there should be a general rule that offsets are provided in advance of the impact;
- Where offset funds are used, the agency responsible for the fund must ensure that the funds are deployed, and that offsets are provided, in a timely manner;[56]
- Where an offset fund is used, care must be taken to ensure that contributions are calculated on the basis of the true cost of providing the offset; and

[56] For example, a significant percentage of the financial settlement offsets received under the Environmental Offsets Act 2014 (Qld) remained unspent – and the relevant offsets unprovided – in 2019. See: A Review of Queensland's Environmental Offsets Framework: A discussion paper, February 2019, found at: https://www.qld.gov.au/__data/assets/pdf_file/0018/94131/qld-enviro-offsets-framework-discuss-paper.pdf

- There must be mechanisms in place to ensure that offset areas are securely and permanently protected.

Recommendation:

- **The final report should recognise that not all impacts can be offset and that financial offsets will not be appropriate in all cases. It should also recommend that state offset funds and proponent-driven offsets be audited to ensure that they are delivering the intended outcomes at an appropriate time and that monies paid into the fund are adequate to offset the specified impacts.**

Rehabilitation
Drivers of poor rehabilitation

Relevant excerpts from section 7.3 of the draft report:

- **"Surety arrangements for rehabilitation generally have been inadequate in practice but are improving. Where they are used, rehabilitation bonds should cover the full cost of the potential rehabilitation liability — both to minimise the risk to governments and to provide companies with incentives to rehabilitate. Pooled approaches need to manage the risk of moral hazard, and to minimise the possibility of the fund being insufficient to cover a company's rehabilitation liabilities."**

- **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.**

We agree that there are few examples of large resource sites that have been rehabilitated (in Queensland, for example, there are 120 medium to very large abandoned mines and only one mine that has been fully rehabilitated[57]). However, the drafting of this finding suggests that regulatory focus is a key driver of this poor outcome, which is likely to lead to other drivers being overlooked (for example, insolvency laws that allow mine sites to be disclaimed).

We recommend that the report either undertake an analysis of the circumstances that have led to resource sites being abandoned in an unremediated state or that it remain silent in relation to the drivers of this problem.

Recommendation:

- **We recommend that draft finding 7.3 be amended to avoid the suggestion (which is not supported by evidence cited in the report) that regulatory focus is a primary cause of failure to rehabilitate mine sites.**

End of life sale of mine sites

Relevant excerpt from report:

- **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).**

We would make two comments about this:

1. Rehabilitation bonds must be based on *estimates* of the costs of rehabilitation. As the draft report correctly observes, there is limited experience across Australia of what effective rehabilitation looks like, how long it takes and how much it costs in an Australian

[57] https://s3.treasury.qld.gov.au/files/8243_Abandoned-Mines-Discussion-Paper_v61.pdf.

environment. In that regard, there is always a risk that the amount of the rehabilitation bond will be inadequate to cover full rehabilitation costs in the event the state/territory needs to step in to take responsibility for the rehabilitation of the site;

2. The Commission should examine the financial incentive smaller companies have for entering into the purchase of a mine near the end of its life and the way in which such transactions are structured. For example, if the buyer receives the full cost of the rehabilitation bond from the seller in exchange for taking on rehabilitation liability, the buyer's business model (and a significant way in which the buyer may make a profit from the deal) is likely to involve delivering rehabilitation at a lower cost. This gives the buyer a strong incentive to deliver lower quality rehabilitation and to cut corners where possible.

Recommendation:

- **We recommend that draft finding 7.4 be amended to recognise that states and territories should have (or maintain) capacity to decline to approve transfers of end of life mine sites if the buyer is considered too high risk or lacking the financial and technical capacity and experience to manage the rehabilitation of a mine (particularly large and complicated sites).**

Jurisdictions without rehabilitation bonds

Relevant excerpt from draft report:

- **Page 211 – 212: "the regulatory framework for Australia's offshore oil and gas resources does not include an explicit requirement for financial surety for decommissioning. Titleholders are required to maintain financial surety that will allow them to meet the costs of complying with requirements under the Offshore Petroleum and Greenhouse Gas Storage Act, however, there is no provision that allows governments to access these funds if necessary (DIIS 2018, p. 40)."**
- **"Western Australian oil and gas projects are not covered by the Mining Rehabilitation fund, nor are mining projects covered by State agreements."**
- **Draft leading practice 7.8: Having financial assurance arrangements in place to cover rehabilitation, based on the risk the project poses to the taxpayer, provides incentives for companies to undertake rehabilitation and minimises the risk that governments will be left responsible. These arrangements are present in most (but not all) jurisdictions.**

We are troubled by the Commission s failure to include an explicit recommendation that the relevant jurisdictions (including the Commonwealth) immediately rectify this failure, which risks rehabilitation liability being transferred to the taxpayer.

The regime created by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)* (**OPGGSA**) appears to represent particularly poor practice that creates a significant risk to the public purse.

The obligation under s571 of the OPGGSA is to maintain capacity to meet the costs and liabilities arising out of carrying out the activity, including complying (or failing to comply) with requirements

under the Act. The National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) generally takes the approach that the amount necessary to comply with this obligation should be calculated on the basis of the costs associated with a major oil spill[58] (which may be an appropriate benchmark if the calculator used to calculate such costs arrives at a reasonable estimate). However:

- The regulator only assesses capacity to comply with s571 when it is making a decision on whether to accept an Environment Plan under *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulation 2009 (Cth)* (see regulation 5G) or where there is a transfer of title. This would appear to us to be inadequate, given that the financial position of a company may change significantly over the life of an environment plan. It also appears to fail to capture other events (such as changes in control or ownership of the title holder or other corporate structures) that may affect financial capacity;

- The trigger to consider financial assurance under regulation 5G of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulation 2009 (Cth)* does not apply to certain tenures (such as pipeline licenses) when an environment plan is first approved,[59] with the result that such activities may be approved without the regulator satisfying itself that financial assurance is in place;

- The form of financial capacity required to meet s571 may be 'self insurance' (which appears to simply mean that the petroleum title holder ensures that the company has adequate financial resources). This not only appears to fall well short of the standards for financial assurance set by other jurisdictions (Queensland, for example, typically requires financial assurance to be in the form of an unconditional, irrevocable and on-demand bank guarantee), but raises the question of whether such funds would even be available in the event of an insolvency event (due to the priority of creditors or the capacity to disclaim onerous assets);

- As noted in the draft report, there is no statutory mechanism allowing the regulator to step in and claim the funds necessary to undertake decommissioning or clean-up in the event the title holder fails in its obligations. This creates a high risk that such costs will be transferred to the public.

We note that Commonwealth Department of Industry, Science, Energy and Resources is currently undertaking a review of the framework for decommissioning offshore oil and gas infrastructure.[60]

Recommendation:

- **The draft report should be updated to include an express recommendation that all jurisdictions (including the Commonwealth) immediately ensure that resource activities**

[58] NOPSEMA Guideline N-04730-GL1381: Financial assurance for petroleum titles, rev 7, June 2019, found at: https://www.nopsema.gov.au/assets/Guidelines/A342339.pdf.
[59] See regulation 5G(1)(a)(ii).
[60] https://consult.industry.gov.au/offshore-resources-branch/decommissioning-discussion-paper/.

are covered by a rehabilitation scheme which prevents the cost of rehabilitation being transferred to the taxpayer.

- **The draft report should also recommend a review of interaction between the insolvency provisions of the *Corporations Act 2001 (Cth)* and financial assurance or pooled fund rehabilitation arrangements at both the state and federal level.**

Risks of pooled funds

Relevant excerpts from draft report:

- **Draft finding 7.5: Rehabilitation pools can reduce incentives for companies to rehabilitate their sites and there are risks that the pool will be insufficient to cover the cost of rehabilitation if a large company does not fulfil their rehabilitation requirements. These pools should be used with caution, and must be paired with effective compliance and enforcement arrangements. State and Territory Governments that use pooled arrangements for rehabilitation surety should ensure that levies reflect the risk of the company passing their liabilities to the government. Larger companies should be separate to the pool, and covered using rehabilitation bonds. Queensland's rehabilitation pool is a good example of this model.**

We would also recommend that the Commission consider that length of time that the fund has been operating (which in Queensland is quite short) will be a determinative factor in how prepared the state is to take on rehabilitation liability for an abandoned mine or other resource site.

If there is an abrupt change to our export markets (such as a decline in demand for coal due to climate change regulations being put in place, the rapidly falling cost of renewable energy generation[61] and/or new technologies that will displace demand for coal[62]), that may result in a large number of mines becoming insolvent at a similar time and, consequently, the state taking on rehabilitation liability in excess of the capacity of the pooled fund.

We recommend that:

- **The Commission should recommend that pooled fund arrangements be stress tested for their capacity to withstand disruptive changes to resource markets, such as climate change regulation in export markets and changes in technology or price which may displace coal.**

[61] Wind and solar, even firmed by battery storage, are the cheapest form of new electricity generation. See, for example, the recent CSIRO/AEMO GenCost Report: Graham, P., Hayward, J., Foster, J. and Havas, L. 2019, GenCost 2019-20: preliminary results for stakeholder review CSIRO, Australia, found at: https://www.aemo.com.au/-/media/Files/Electricity/NEM/Planning_and_Forecasting/Inputs-Assumptions-Methodologies/2019/CSIRO-GenCost2019-20_DraftforReview.pdf.

[62] See, for example, the emergence of technology to enable renewable hydrogen to displace coking coal: https://reneweconomy.com.au/another-nail-in-coals-coffin-german-steel-furnace-runs-on-renewable-hydrogen-in-world-first-55906/ and https://www.miningmonthly.com/partners/partner-content/1383437/hydrogen-could-hybrit-really-halt-coal-use-in-steel-making.

Re-opening mines

Relevant excerpt from draft report:

- **Draft leading practice 7.11: There is merit in governments working with industry to reopen and rehabilitate legacy abandoned mines, such as through streamlined approval processes (without compromising the intent of regulation) and indemnities against past damages. The Savage River Rehabilitation Project in Tasmania is an example of a successful government–industry partnership.**

If legacy abandoned mines are to be re-opened, the government should be clear about the policy reasons for doing so. We would suggest that those policy reasons should include:

- supporting resource extraction with a long-term future in a carbon-constrained economy; and

- achieving rehabilitation of abandoned mine sites at no cost to the public.

The government should also be very clear about the risks involved in such an approach (such as legacy environmental and human health hazards, out of date mining practices and investing public resources into mine sites – such as coal – with limited futures).

While there may be some merit in streamlined processes given that abandoned mine sites are not greenfield sites and are less likely to have high biodiversity values, any streamlining of process should not result in inattention to risks flowing from the legacy nature of the site or risks that could worsen its off-site impacts. Streamlining would be inappropriate if the proposed re-opening of a mine involved expansion into greenfield areas.

We would also note that providing indemnities against past damage will rarely be a straightforward process, particularly given that past harm (such as poorly constructed tailings dams which continue to leach) or poor practices will often continue to cause ongoing harm (making it very difficult to define the bounds of an indemnity).

Any approvals to re-open legacy sites or to indemnify past damage should ensure that they reduce the environmental risk of the site and result in its ultimate rehabilitation.

Recommendation:

- **We recommend that draft leading practice 7.11 be amended to reflect that re-opening of legacy mine sites should have the objective of removing rehabilitation liability from the government's balance sheet and removing any harm currently being caused by the abandoned site. Such projects should also be limited to metallurgical mining (and exclude fossil fuels).**

Uncertain climate and energy policy

Relevant excerpt from draft report:

- **Draft finding 8.2: Uncertainty about and inconsistent climate change and energy policies across jurisdictions risk impeding resources sector investment.**

The reality is that this uncertainty will remain until Australia adopts coherent climate, energy and resource policies that are **consistent** with meeting the goals contained in the Paris Agreement.

Laws and policies that are not consistent with this goal (or which will not meet the goal in full) will only leave business and the community with continued uncertainty about further changes in approach (as well as the significant risks of climate change itself, such as the threat of extreme weather and rising sea levels to infrastructure).

We recommend that the draft report be updated to recommend that Federal and State governments put in place laws and policies that are consistent with Australia doing its fair share to meet Paris Agreement goals, including by transforming our resources industry to remove the focus from fossil fuels. We do not believe that such laws and policies could be categorised as unexpected or that business will be unprepared for them.

While we believe that certainty about the form and timing of such policy would assist industry by providing certainty to inform investment decisions, we also believe that rational resource companies will have been preparing for such a transition for some time given that:

- the Intergovernmental Panel on Climate Change has been issuing reports since 1990[63] showing increasing confidence that human-induced climate change is occurring[64] and that a significant driver of that process is the burning of fossil fuels;[65]
- the United Nations Framework Convention on Climate Change (**UNFCC**) entered into force in 1994;
- the Garnaut Review on the economic implications of climate change was issued in 2008 (and updated in 2011);
- Australia ratified the Kyoto Protocol in 2007 and the Paris Agreement in 2016.[66]

[63] https://www.ipcc.ch/about/history/

[64] From the Fifth Assessment report: *"Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems."*

[65] From the Fifth Assessment report: *"Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years. Their effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are extremely likely to have been the dominant cause of the observed warming since the mid-20th century"* and *"Emissions of CO2 from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010 (high confidence)"*

[66] https://unfccc.int/node/28580

Given the long history of both our understanding of climate change and Australia s international commitments to combat its effects, surely businesses that are behaving rationally and as responsible investors of shareholder funds, have been undertaking business planning on the basis that the Australian Government will act on evidence of a threat and meet its international commitments.

Recommendation:

- **We recommend that the draft report be amended to include a recommendation that the Federal, state and territory governments introduce coherent climate change, energy and resource laws and policies – including in relation to mining and petroleum production - that are consistent with the goals of the Paris Agreement.**

Inconsistent regulatory treatment of similar projects – example of scope 3 greenhouse gas emissions

Relevant excerpts from draft report:

- **Draft finding 8.3: Lack of clarity in policy objectives can lead to inconsistent and unpredictable application of regulations across resources projects, creating investor uncertainty (such as in relation to approval decisions and conditions on the basis of scope 3 emissions).**

- **Draft finding 8.4: Not approving proposed resources projects or curtailing their exports on the basis of potential greenhouse emissions in destination markets is an ineffective way of reducing global emissions.**

- **Draft leading practice 8.1: Early public consultation on new policy proposals, accompanied by clear evidence based articulation of why a proposed change is the best way of addressing an issue (for example, through regulatory impact assessments), can avoid policy surprises. Clear policy objectives aid consistent and predictable regulatory decision making. Policymakers can achieve this by avoiding the use of vague language in policy documents and providing clearly articulated guidance on the intention and interpretation of policies and legislation.**

Greenhouse gas emissions

The propositions set out in box 8.5 of the draft report appear to be intended as the reasoning to support draft finding 8.4. However, the propositions in box 8.5 are not supported by any citations which identify the economic analysis upon which they are based. The economic evidence presented in such cases as *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 would certainly seem to suggest, at the very least, that such propositions are not beyond argument.

Further, the propositions in box 8.5 appear to be based on the unstated assumption that the supply of fossil fuels from other exporting countries will be unchanged by action on climate change. We do not believe that this is a reasonable assumption to make.

In that regard, we strongly **recommend** that the Commission disclose the economic modelling relied upon to make these assertions and that it also review the range of economic analysis available on the subject.

We think the Commission would agree that proper environmental assessment involves a holistic assessment of all of the impacts of a project and that draft findings 8.3 and 8.4 are not intended to suggest that climate change impacts be excluded from such assessments. In that regard, we further **recommend** that draft finding 8.4 be amended to clarify that it is not intended to suggest that project level assessment exclude any of the environmental impacts of the project – merely that more effective means of addressing climate change are also required.

Please see further our discussion in section 2.1(e) (on page 38) of our submission to the EPBC Act review,[67] in which we discuss that best practice environmental impact assessment should include consideration of scopes 1, 2 and 3 emissions.

Better environmental decision-making

Draft leading practice 8.1 addresses two issues: first, good policy processes that are both evidence-based and include proper consultation and second, good administrative decision-making which should ideally be based on clear objective criteria, that have been developed to achieve the overall goals of the legislation.

We think that the second part of this draft leading practice could better reflect the Commission s intent by being expressed in the following way:

> *Environmental decision-making should be based on objective criteria that have been designed to achieve the overall objectives of the legislation under which the decision is being made. This may involve governments taking a more proactive role in planning and data collection to ensure that the impacts of a project can be assessed in the context of the cumulative impacts of existing projects and other threats and pressures.*

We discuss ways of achieving this at the Federal level in our report on *Next Generation Biodiversity Laws* and our submission to the EPBC Act review.[68]

Recommendations:

- **We recommend that box 8.5 be amended to disclose the economic modelling or analysis it relies upon and to include a broader review of economic analyses of the impacts of domestic approvals for mines on scope 3 emissions.**
- **We recommend that draft finding 8.4 be amended to clarify that it is not intending to suggest that project-level assessments should not include the whole of the environmental impacts of a project and that it is intended to mean that more effective, whole of economy or whole of sector, approaches are needed to address climate change.**
- **We recommend that the second part of draft leading practice 8.1 be amended to provide as follows: *Environmental decision-making should be based on objective criteria that have been designed to achieve the overall objectives of the legislation under which the decision is being made. This may involve governments taking a more proactive role in planning and data collection to ensure that the impacts of a project can be assessed in the context of the cumulative impacts of existing projects and other threats and pressures.***

[67] Found here: https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf

[68] See discussion in the section on 'Clear Decision-making criteria and Accountability' from page 58, found here: https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf

Free prior and informed consent

Relevant excerpts from draft report:

- **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.**

Free prior and informed consent is an international legal commitment which Australia has accepted

Free, Prior and Informed Consent (**FPIC**) is more than best practice. FPIC is an international human rights standard for engaging with traditional owners that has been accepted by Australia via its adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and as a signatory to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

While UNDRIP clarifies the rights of indigenous peoples (and, thus, the international obligations imposed on Australia), its status as a declaration of the United Nations General Assembly rather than an international treaty should not be misunderstood as carrying political and moral weight only. UNDRIP is underpinned by the legal commitments to which Australia is bound as a signatory to ICCPR, ICESCR and ICERD. As ex-Special Rapporteur on the rights of indigenous peoples James Anaya has explained:

> *"Even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the United Nations Charter, other treaty commitments and to customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely-ratified human rights treaties, as evident in the work of United Nations treaty bodies…The significance of Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."*[69]

FPIC is a minimum standard; not the highest standard

Article 43 of UNDRIP provides as follows:

[69] J. Anaya, Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples to the Expert Mechanisms on the Rights of Indigenous Peoples, July 15, 2010, http://unsr.jamesanaya.org/statements/statement-on-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-to-the-emrip. Emphasis added.

"The rights recognised herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world"

In that regard, the Commission's final report should emphasise that FPIC should not be regarded as 'best practice' but should instead be treated as a necessary minimum standard.

FPIC involves a determinative right of indigenous peoples to say no to destructive extractive industries

We do not agree with the Commission's conclusion that FPIC is not a right to veto. This position portrays a fundamental misunderstanding of the operation of FPIC and international law. We also question the Commission's selection of references in coming to its conclusion in the next section, but in this section we address the inconsistency of the Commission's view with international law.

In circumstances, where an extractive industry will severely and permanently threaten indigenous land and waters and, thus, substantially harm the traditional owner's right to culture, FPIC crystalises into a mandatory requirement to obtain the consent of the traditional owners.

Former Special Rapporteur Anaya puts it this way:

> *"where the rights implicated [by extractive industries] are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations. It is generally understood that indigenous people's rights over land and resources in accordance with customary tenure are necessary to their survival. Accordingly, indigenous consent is presumably a requirement for those aspects of any extractive operation and takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival."*[70]

The Australian Human Rights Commission has accepted this view and has explained that:

> *"there appears to be a range of circumstances where States have an obligation to obtain the free prior and informed consent of those affected. These circumstances range from cases in which States seem to have a simple duty to consult with indigenous peoples, to cases where consent is required with respect to development projects or projects concerning the extraction of natural resources to their lands, to contemplating a more general duty to require consent before taking any decisions directly relating to their rights and interests…**[W]ith respect to cultural rights, when the essence of [an indigenous peoples']***

[70] J.Anaya, Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples, Report to the Human Rights Council, 24th Session, A/HRC/24/41, July 1, 2013, para 28.

> ***cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory.***"[71]

Further, while we agree that it is true that there is a balancing act between different rights and interests, Australia's economic interests (and as owner of mineral rights) must be balanced against the right of traditional owners to their culture. When that right to culture is substantially at risk and traditional owners have not consented, Australia will have violated the right to culture. The Human Rights Commission explained this in *Angela Poma Poma v Peru* when discussing the right to culture under the ICCPR:

> *"[A] State may legitimately take steps to promote its economic development. Nevertheless,…economic development may not undermine the rights [to culture] protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27…[M]easures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27."*[72]

Former Special Rapporteur James Anaya has noted that most extractive industries are so destructive that the "general rule" is that *"extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent"*. The limited exception to this general rule is where "it can be conclusively established that the activities will not substantially affect indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories". However, because of the invasive nature of extractive activities this is *"mostly a theoretical possibility"*.[73]

To recap: under international law, which Australia has accepted, where extractive industries threaten substantial harm to traditional owners' right to culture, which includes use and spiritual significance, FPIC is affirmatively required and is mandatory. This is inconsistent with the Commission's statement that FPIC is not a veto right.

Selective references

While we would agree with the draft report that Free, Prior and Informed Consent (**FPIC**) is a necessary part of engaging with traditional owners, we believe that the references used to interpret the concept in the report are, at best, selective.

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[71] Australian Human Rights Commission, The Declaration Dialogue Series: Paper No.3 – We have a right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith, Jul.2013, 10-11. (Emphasis added)

[72] Human Rights Committee, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April, 2009, para.7.4.

[73] J.Anaya, Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples, Report to the Human Rights Council, 24th Session, A/HRC/24/41, July 1, 2013, para 31.

The analysis in box 10.3 of the draft report attempts to discuss the elements of FPIC by drawing on a publication by the UNHRC.[74] That analysis, however, omits any discussion of the meaning of 'consent' (despite setting out the meaning of the other elements of the concept). This is what the same UNHRC publication had to say about the meaning of 'consent' (our emphasis):

> *"Indigenous peoples may withhold their consent in a number of situations and for various purposes or reasons:*
>
> *(a) They may withhold consent following an assessment and conclusion that the proposal is not in their best interests. Withholding consent is expected to convince the other party not to take the risk of proceeding with the proposal. Arguments of whether indigenous peoples have a "veto" in this regard appear to largely detract from and undermine the legitimacy of the free, prior and informed consent concept;*
>
> *(b) Indigenous peoples may withhold consent temporarily because of deficiencies in the process. Such deficiencies often consist of non-compliance with the required standards for the consent to be free, prior and informed. Indigenous peoples may seek adjustment or amendment to the proposal, including by suggesting an alternative proposal;*
>
> *(c) Withholding consent can also communicate legitimate distrust in the consultation process or national initiative. This is generally the situation in countries where there is insufficient recognition of indigenous peoples or protection of their rights to lands, resources and territories. Cases of indigenous peoples being harassed, arrested and even being killed for resisting "trap-like" consultation offers are numerous."*

The United Nations Food and Agriculture Organisation has published a manual[75] about how FPIC should be implemented, which has the following to say about consent :

> *the FPIC process does not guarantee consent as a result. The result of an FPIC process can be any of the following outcomes: consent from the Indigenous Peoples community on the proposed activity; consent after negotiation and change of the conditions under which the project will be planned, implemented, monitored and evaluated; or the withholding of consent. It is also important to bear in mind that consent, once given, can also be withdrawn at any stage."*

The draft report asserts (inconsistently with the above references and, as outlined above, with international law) that FPIC is not a right of veto" and that:

> "Despite good faith engagement, however, Aboriginal and Torres Islander communities may still withhold their consent. In this instance, resources companies may still be considered to have

[74] UNHRC (United Nations Human Rights Council) 2018, Free, Prior and Informed Consent: A Human Rights-Based Approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/ PDF/G1824594.pdf?OpenElement

[75] Food and Agricultural Organisation of the United Nations, Free Prior and Informed Consent: An indigenous peoples' right and good practice for local communities – Manual for Project Practitioners

adhered to FPIC if they have made a genuine attempt to reach an agreement with the Indigenous community. The Mcdonald Laurier Institute explained that:

> … FPIC does not require consent for a project to proceed, but instead only requires good faith effort to obtain consent. (Newman 2017, p. 1)"

We do not believe this analysis is accurate and would suggest that:

- Sources of information on the meaning of FPIC should be drawn from decisions of international courts, peer reviewed law journals or publications of the UN agencies that administer the relevant international agreements. It would also be preferable to avoid the use of publications issued by overseas Think Tanks such as the McDonald-Laurier Institute, given that many Australians will be unfamiliar with any agenda or source of funding that may be relevant to considering the validity of the arguments being made. Further, presenting a line from such as publication as a reflection of settled law, rather than an argument being made which is inconsistent with more authoritative sources of interpretation, could be seen as misleading; and

- The line quoted in the draft report is from the executive summary of the Newman article, which somewhat overstates the argument made in the body of the text, where the following, much more qualified, assertion is made: *"The drafting history of the UNDRIP actually shows the development of wording that <u>may not</u> require that states obtain consent";* and

- The excerpt included in the draft report is, at the very least, not a universally held interpretation of the meaning of FPIC and should not be represented in the draft report as a definitive statement of its meaning. We recommend that the Commission instead rely on the more authoritative sources we discuss above.

Recommendation:

- **We recommend that the section of the draft report on Free, Prior and Informed Consent be re-written in consultation with Traditional Owners drawing on peer reviewed publications from law journals, decisions of relevant Courts or publications of the relevant international agencies as sources.**

- **We recommend that the last sentence of draft finding 10.2 be deleted as it is wrong at law.**

Regulator governance

Resourcing for regulators

Relevant excerpts from draft report:

- **"Enduring improvement requires the preconditions for a robust regulatory system to be in place, and these preconditions are the ultimate responsibility of elected governments. They include clear policy and regulatory objectives, adequately resourced institutions and effective governance and accountability arrangements." (page 308)**
- **"Participants have also raised concerns that many regulators face resource constraints, limiting the resources they can allocate to the various aspects of the regulatory process. Inadequate funding is a consequence of budget cuts and efficiency dividends introduced by governments over a number of years." (page 311**
- **Draft finding 11.1: Many of the regulatory issues presented to the Commission through the course of this study have been examined previously. Implementing enduring improvement requires that governments ensure the preconditions for leading practice regulatory systems are in place, particularly clear regulatory objectives, adequately resourced institutions and effective governance and accountability arrangements.**
- **Draft recommendation 11.1: Governments in each jurisdiction should assess: (1) whether regulators of resources sector activity are appropriately funded to enable timely processing of applications and effective adoption of a risk based regulatory system; and (2) opportunities for enhancing regulators' cost recovery processes.**

We agree that appropriately resourcing environmental regulators is an important prerequisite for an effective and efficient regulatory system and one that is often missing. Better resourcing would not only provide sufficient assessment staff to assess applications competently and efficiently but would also create capacity for better data collection and proactive planning to further facilitate better decision-making.

Review and evaluation

Relevant excerpts from draft report:

- **Draft leading practice 11.2: Regular independent review and evaluation of regulatory frameworks and objectives drives continuous improvement and ensures they remain fit for purpose.**

While we agree that regular review and evaluation of regulatory frameworks is important, such evaluation should be undertaken by appropriately qualified independent experts and should focus on whether the regulation is achieving the outcomes it is intended to achieve (as well as whether those outcomes could be achieved more efficiently). Such reviews should also be based, to the extent possible, on data and measurable outcomes (and not solely or substantially on opinion evidence from the regulated community).

Legislation designed to protect biodiversity should, for example, be evaluated by a team including appropriately qualified and experienced ecologists, should be evaluated against the goals of the

legislation and should be judged based on trends in environmental outcomes (not on the basis of short-term economic outcomes).

Recommendation:

- **We recommend that draft leading practice 11.2 be amended to reflect the need for evaluation of regulatory frameworks to be undertaken by appropriately qualified experts, against the objectives of the legislation and using measurable trends (rather than opinion evidence).**

Institutional separation of regulatory and policy functions

Relevant excerpt from draft report:

- **Information request 11.1: The Commission is seeking views on the advantages and disadvantages of institutionally separating regulatory and policy functions in jurisdictions where separation does not already exist, and the effectiveness of other approaches to ensuring regulator accountability.**

We refer the Commission to our report on Next Generation Biodiversity Laws, section 4.1 of our submission to the EPBC Act review and to the work of the Australian Panel of Experts on Environmental Law.[76]

Recommendation:

- **We recommend at the Commonwealth level that the administration of environmental laws be separated across an Environmental Protection Agency (responsible for assessing and deciding applications and undertaking compliance and enforcement activities) and an Environment Commission (responsible for setting standards and objectives and other policy work).**

Site visits

Relevant excerpts from draft report:

- **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."**

While we agree that assessment officers in all relevant government departments should be given opportunities to increase their skills and knowledge of the industries and technologies they are regulating, we strongly disagree with this recommendation.

Peak bodies for the resources sector lobby on behalf of their industry. There is nothing unusual about lobbying. However, there is something very unusual in suggesting that lobbyists for the regulated community should take on a role in educating the regulator. Such an approach would significantly increase the risk that there would be, or be perceived to be, regulatory capture.

[76] http://apeel.org.au/

Regulators should strive to be, and be seen to be, independent (including culturally independent) of the industry they regulate to ensure that decisions are made (and are perceived to be made) in the long-term interests of the community as a whole (and not in the interests of the regulated community).

There are other organisations capable to developing programs of continuing professional development, including site visits, for the relevant government departments (eg. the Sustainable Minerals Institute at the University of Queensland).

Recommendation:

- **We recommend that draft recommendation 11.2 be deleted and replaced with a recommendation that programs of continuing professional development be available to assessment and compliance officers within regulatory agencies, coordinated through institutions independent of the industry.**

Data

Relevant excerpt from the draft report:

- **Draft leading practice 11.7: "The provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector."**

We agree that publicly accessible information and data is a critically important component of environmental (and other) regulation.

However, the issue goes beyond the need to make data publicly accessible. There is also a need to ensure:

- that regulatory agencies have adequate environmental monitoring programs in place to create the data to support good decision-making (including to inform assessments undertaken by project proponents);
- that regulators aren't hampered by claims that monitoring data from proponents or site operators is commercial-in-confidence or otherwise exempt from disclosure; and
- that data provided by project proponents and site operators is in a consistent and useable format.

This will require not only public investment in better monitoring programs but clear and consistent open data policies to ensure that project proponents and site operators are providing data that can be integrated into public data sets.

Recommendation:

- **We recommend that draft leading practice 11.7 be expanded to address the need for expanded environmental monitoring programs and for systems to be put in place to ensure that data created for project assessment, compliance and reporting purposes can be integrated with other public data sets.**