MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO PRODUCTIVITY COMMISSION DRAFT REPORT - INQUIRY INTO THE REGULATION OF AGRICULTURE

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EXECUTIVE SUMMARY

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission on the Productivity Commission's draft report on regulation of Australian agriculture. This submission is supported by the New South Wales Minerals Council and the Queensland Resources Council.

The Productivity Commission's draft report on regulation of Australian agriculture contains a number of significant recommendations that are equally relevant to the Australian minerals industry. As with agriculture, Australia enjoys a comparative advantage in minerals exports, which must be continually defended by reducing costs, improving productivity and pursuing innovation.

A period of wide-ranging microeconomic reform beginning in the 1980s delivered significant improvements in Australia's policy and regulatory environment. Successive waves of financial, tariff, labour market and product market reform increased competitive pressures in the economy and provided firms with greater flexibility to respond to market incentives. Australian workers and households were the ultimate beneficiaries of these reforms, which encouraged jobs growth in internationally competitive industries and raised living standards.

The minerals industry is subject to more regulatory requirements than most other industries in Australia. Regulatory requirements cover all stages of industry activity – from grant of tenure, exploration, extraction, processing, transport and mine closure through to relinquishment of tenure. This stems in part from the nature and location of mining, and its potential social and environmental impacts. Yet it also reflects a vast accumulation of decisions by governments at all levels in Australia, often without regard to clear policy principles or good process. Duplication of process along with poor or inconsistent administering of regulation affects both mining and agriculture.

As the Productivity Commission points out, unnecessary regulatory burden – including overlapping or inconsistent regulations between jurisdictions – restrict management decisions and discourage investment.[1] To seize future opportunities, Australian mining must be more cost competitive, productive and flexible across the full length of the minerals supply chain – from exploration and initial project development through to final shipment. The Productivity Commission warns that: 'Without a lift in productivity to counteract the fall in the terms of trade, slower per capita GDP growth is likely to prevail in the years to come, relative to the growth that occurred in the period 2000–2010.'[2]

There has been a concerning increase in mining sector specific regulation in recent years which has created a divergence in the treatment of agriculture (and other land based activities) and mining. The 'water trigger' for coal seam gas and large coal developments under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* is a notable example of this. The trigger has created a situation where an action common to both industries (e.g. drilling a water bore) would be subject to additional regulation due only to its association with mining and not the risk posed to the environment. The Productivity Commission has previously determined the trigger was duplicative and the benefits 'not obvious'.[3]

The MCA endorses the Productivity Commission's views on the importance of foreign investment to Australia's economic development. Foreign investment is highly beneficial to both agriculture and mining. The Productivity Commission correctly highlights that 'net inflows of foreign capital increase investment in the Australian economy, and support higher future rates of economic growth and employment, as well as higher living standards'.[4]

The MCA supports the Productivity Commission's findings with respect to land access for resource exploration and extraction. Access to land is intrinsic to a state's ability to exercise its right to

[1] Productivity Commission, *Regulation of Australian Agriculture, Draft Report*, released on 21 July 2016, p iv-v.
[2] Productivity Commission, *PC Productivity Update 2016*, Canberra, released on 26 April 2016, p. 18.
[3] Productivity Commission, *Major project development assessment processes: final research report*, Canberra, released on 10 December 2013, p. 149.
[4] Productivity Commission, *Regulation of Australian Agriculture, Draft Report*, released on 21 July 2016, pp 440, 446.

minerals for the benefit of the community. Accordingly, any moves to give landholders a right of veto for access would effectively transfer state (community) ownership of minerals to the landholder and deter future investment in mineral exploration. It would also compromise the state's ability to put in place policy frameworks to optimise land use.

The Australian minerals industry strongly supports the development of diverse regional economies enabled through the coexistence of different land uses. Land access can be achieved through open and respectful engagement with landholders and fair compensation arrangements where necessary. State-based land access arrangements are operating effectively and access and compensation are by-and-large being negotiated successfully.

The Australian minerals industry has a strong interest in competitive and efficient coastal shipping. Bulk commodities such as iron ore, bauxite and alumina account for 70 per cent of Australia's coastal shipping trade. The MCA agrees with the Productivity Commission, the Australian Competition and Consumer Commission, the Competition Policy Review Panel and the Commission of Audit that cabotage licensing is unjustified industry assistance.

The MCA supports the following recommendations and findings of the Productivity Commission's draft report as conducive to investment, growth and employment in the Australian minerals industry:

- Draft finding 2.2 (1): Regulation and policies aimed at preserving agricultural land per se can prevent land being put to its highest value use.
- Draft finding 2.2 (2): A right of veto by agricultural landholders over resource development would arbitrarily transfer property rights from the community as a whole to individual landholders.
- Draft recommendation 8.5: The Australian Government should amend coastal shipping laws by 2018 to substantially reduce barriers of entry for foreign vessels, in order to improve competition in coastal shipping services.

1. LAND ACCESS FOR RESOURCE EXPLORATION AND EXTRACTION IS CRITICAL

1.1 Support for draft report findings

The MCA supports the Commission's draft findings (2.2) with respect to land access, specifically:

- Regulation and policies aimed at preserving agricultural land per se can prevent land being put to its highest value use.
- A right of veto by agricultural landholders over resource development would arbitrarily transfer property rights from the community as a whole to individual landholders.[5]

These findings highlight the importance of state rights and the ability to develop mineral resources for the benefit of the wider community. It also reinforces the necessity of land access processes that are respectful of landholder interests, fair and provide certainty for all parties.

1.2 Mining and agriculture as part of diverse regional economies

The Australian minerals industry strongly supports the development of diverse regional economies enabled through the coexistence of different land uses. Mining, agriculture and other land uses, including conservation, can be complementary as coexisting, neighbouring or sequential activities.

The two industries have a long history of successful co-existence. Non-operational land owned or managed by companies is often made available for alternative uses, including agricultural enterprises. For example, in the Upper Hunter Valley in New South Wales land managed by mining companies for viticulture, cattle grazing, horse studs and cropping is in excess of 60,000 hectares – three times the size of land under mining.

The Australian mining industry recognises the importance of landholder relationships. Industry coexistence is most effectively achieved through honest, open and respectful engagement with both the landholders directly affected by a proposed activity and the broader community.

1.3 Importance of land access

Australia's mining footprint constitutes less than 0.02 per cent of Australia's land mass, compared to almost 60 per cent for agriculture, (excluding forestry).[6] Accordingly, the intersection between the mining and agriculture is relatively small. Despite the mining industry's small operational footprint, access to land (including agricultural land) remains critical:

- **Exploration –** Land access is critical for mineral exploration. On-ground activity including exploratory drilling of prospective areas is essential to resource identification and provides the pipeline of future mining projects.
- **Mining** - Mining leases are typically much larger than the mining 'footprint'. While land is generally purchased where practical and appropriate, land that overlaps with the mining lease and is not directly affected by the mining operation may remain with the landholder, requiring ongoing land access arrangements to be in place.[7]

1.4 State and territory rights to minerals

Property of the Crown

Mineral resources are in most cases the property of the Crown (in right of the State). State access of minerals is an important right that enables each jurisdiction to realise the economic potential of its

[5] Productivity Commission, *Regulation of Australian Agriculture – Draft Report,* Canberra, July 2016, p. 82.
[6] Australian Bureau of Agricultural and Resource Economics and Sciences, *2010-11 summary statistics*, *National scale land use version 5*, Department of Agriculture and Water Resources, Canberra, 2016.
[7] SNL Metals & Mining (formerly Intierra RMG)- Mining and Minerals database, December 2012.

resource endowment for the benefit of the broader community. This is reflected in state mining legislation, where regard is given to landholder interests, but primacy given to the right of the state.

A veto would act to transfer mineral ownership to the landholder

The MCA agrees with the Commission that 'a right of veto is inconsistent with facilitating efficient land use'.[8] A right of veto for landholders, agricultural or otherwise would impact on the right of the state to access minerals and facilitate economic development which benefits the broader community.

In line with Productivity Commission's findings, access to land is intrinsic to a state's ability to exercise its right to minerals. Given this fundamental connection, the ability to block access to mineral resources would effectively act to transfer the ownership from the state to the landholder. This would also provide the landholder with the ability to seek not only compensation, but significant rents from mining companies and deter investment in exploration. It may also have implications beyond minerals by affecting the state's ability to pursue economic development (e.g. through infrastructure and indirect employment).

The effective transfer of mineral ownership rights to the landholder afforded by a right of veto would compromise the state's ability to implement a balanced land use policy for efficient and optimal land use. While it is important that landholder rights are respected and concerns recognised, these should be addressed though land access agreements that are fair and reasonable for all parties.

1.5 State-based land access arrangements

Access to land is subject to a range of stable state-based legal and policy frameworks developed over many decades. These frameworks are operating effectively. For example, in Queensland and New South Wales there are around 3,500 coal and mineral licences which are linked to thousands more successfully negotiated land access agreements (several are normally required for a given exploration title).[9]

Respectful and meaningful engagement with landholders and fair compensation arrangements where necessary are key to successful mineral exploration and mining activities. Transparent processes and access to information are central to empower landholders in negotiations and avoid potential conflict.

State governments have developed guidance to improve company and landholders understanding of land access and compensation arrangements. Examples include:

- Queensland - land access code.[10]
- Western Australia – private land provisions.[11]
- South Australia – Guidelines: landowner rights and access arrangements in relation to mineral exploration and mining in South Australia.[12]

In addition to the above guidelines and codes of practice, the regulation of land access arrangements continues to evolve (see Box 1 below).

[8] Productivity Commission, *Regulation of Australian Agriculture – Draft Report,* Canberra, July 2016, p. 81.
[9] Department of Natural Resources and Mines, *Queensland Mining and Tenure Series*, QSpatial, Queensland Government viewed 15 December 2015 and Department of Industry, Resources and Energy, *Title status reports*, New South Wales Government, updated 5 November 2015.
[10] Queensland Government; *Land access code,* November 2010.
[11] Department of Mines and Petroleum, *Private land provisions, Government of Western Australia, September 2014.*
[12] Department for Manufacturing, Innovation, Trade, Resources and Energy, *Guidelines: landowner rights and access arrangements in relation to mineral exploration and mining in South Australia – Version 2.1*, Government of South Australia, February 2013.

Box 1: Examples of recent changes to regulation affecting land access

Queensland

In 2012, Queensland introduced land access laws which provided a process for landholders and mining companies to negotiate conduct and compensation matters and reach agreement. Furthermore, in the Darling Downs region a Gasfields Commission was established to provide facts to landholders regarding negotiating with mining and gas companies and the realistic impacts to their land. The process promotes coexistence by focussing on funded infrastructure to compensate for impacts as opposed to lump sum payments.

New South Wales

The *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015* (assented on 2 November 2015 but yet to commence) introduces payment of costs to the landholder by the explorer associated with negotiating an access arrangement (including costs for landholder time, legal and expert costs).[13]

Key aspects of this amendment to the *Mining Act 1992 (NSW)* include:

- Landholders and titleholders have a right to legal representation in mediation and arbitration.
- Exploration title holders will be required to pay costs to the landholder associated with negotiating an access arrangement (including costs for landholder time, legal costs and expert costs). Costs are capped by the Minister.
- Exploration title holders will be required to pay 'reasonable costs' for landholder participation in mediation or arbitration (capped by the Minister).
- Landholders must negotiate access arrangements in good faith. An arbitrator or the Land and Environment Court may reduce payments to landholders if the landholder is engaged in unreasonable conduct. Either party can seek review of a determination, with the titleholder paying 'reasonable' costs, as determined by the Court.
- A proposed minerals land access code which may contain both mandatory provisions and non-binding guidelines about how a titleholder can carry out activities on the land.

1.6 Mining, agriculture and government working together

Farming, mining and government have been working together to develop agreed protocols/codes for land access and to improve relationships between the two sectors. Examples of which include:

- New South Wales – the New South Wales Minerals Council, New South Wales Farmers and the state government have developed a land access agreement template for mineral exploration.[14]
- Queensland – Over the past four years, Agforce and the Queensland Resources Council have partnered with the state government to foster better relationships between resource companies and landholders and provide information on land access and how to work with companies to offset and improve the productivity of the farm. The program includes information and support to for landholders and communities to negotiate mutually beneficial conduct and compensation agreements with resource companies.

[13] New South Wales Parliament, *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015 (NSW)*, assent 2 November 2015.
[14] Department of Trade, *Land access arrangements for mineral resources*, New South Wales Government.

1.7 Specific protections for landholders already in place

There are a range of mechanisms already in place which afford specific protections to the landholder:[15]

- Cooperation/access agreements with the landholder must be entered into before land can be accessed for exploration. Under the *Mineral Resources Act 1989* (Qld) a person cannot enter 'private land' unless a Conduct and Compensation Agreement (CCA) is in place. In New South Wales, under the *Mining Act 1992* (NSW), 'the holder of a prospecting title must not carry out prospecting operations on any particular area of land except in accordance with an access arrangement or arrangements applying to that area of land'. In Western Australia, no surface mining can commence before compensation is agreed with the owner and occupier.[16]
- Landholders can refuse consent to access land where sensitive or restricted land uses may be impacted by mining activities. These include dwellings, dams, stockyards, orchards, cultivated land, water wells and other land improvements. Furthermore, in both New South Wales and Queensland an access and compensation agreement must be entered into before the Mining Lease (ML) holder is able to exercise rights under the ML. In South Australia and Western Australia, the owner and occupier must consent to the access of improved land, including stockyards, cultivated areas, infrastructure and small land parcels.[17]
- Compensation is payable to the landholder prior to the exercise of rights under a ML. Landholders can seek recourse to mediation then arbitration/specialist Court if they are not satisfied and agreement is not reached.

1.8 Other regulation

Mining activities need to meet a range of other legislative requirements before they can proceed, these include state-based authorisations and in many cases Commonwealth approval.[18] These existing legislative requirements provide landholders and the broader community with opportunities to provide input and raise concerns. Some jurisdictions also have specific protections for 'prime' agricultural land (for example, the *Regional Planning Interest Act 2014* (Qld) and the New South Wales Strategic Regional Land Use and Mining - State Environment Planning policies. [19]

1.9 Optimal land use

The MCA considers the 2013 Multiple Land Use Framework, developed under the COAG Standing Council on Energy and Resources, provides a national framework of guiding principles to promote the best use of Australia's land resources under existing state and territory regimes.[20] This will ensure the right balance between landholders' interests and the state's obligation to realise the economic potential of its resource endowment for the benefit of the broader community. Relevant principles include:

- **Best use of resources** – Maximise the social, economic, environmental and heritage values of land use for current and future generations
- **Coexistence** – The rights of all land users are recognised and their intentions acknowledged and respected. Ensure land use decision making does not exclude other potential uses without considering the benefits and consequences for other land users and the wider Australian community.

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[15] *Queensland Mineral Resources Act 1989 (Qld) and New South Wales Mining Act 1992 (NSW).*
[16] Department of Mines and Petroleum, *Private land provisions,* Government of Western Australia, September 2014, p.5.
[17] Department of Mines and Petroleum, *Private land provisions,* Government of Western Australia, September 2014, p.4 and Department for Manufacturing, Innovation, Trade, Resources and Energy, *Guidelines: landowner rights and access arrangements in relation to mineral exploration and mining in South Australia – Version 2.1*, Government of South Australia, February 2013, p.9.
[18] For example, the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*
[19] New South Wales Government, *Strategic land use policy*, NSW, September 2012.
[20] Council of Australian Governments, Standing Council on Energy and Resources, *Multiple Land Use Framework*, SCER, endorsed 13 December 2013.

- **Decision making and accountability** – Risk-based approach in the assessment of land use capability, including the benefits and consequences.
- **Strategic planning** – Inter-governmental planning to recognise community expectations and capacity to adapt to land change. Effective planning gives greater certainty to industry.

While the MCA supports the COAG framework and the need for state discretion in implementation, there is a need to stocktake progress in applying the principles across jurisdictions. This would encourage ongoing efforts to align processes with the framework principles.

2. COASTAL SHIPPING LAWS ARE COUNTER-PRODUCTIVE AND COSTLY

The MCA supports the Productivity Commission's draft recommendation 8.5: The Australian Government should amend coastal shipping laws by 2018 to substantially reduce barriers of entry for foreign vessels, in order to improve competition in coastal shipping services.[21]

Coastal shipping (or cabotage) refers to the transportation of goods or passengers between ports in Australia. The Australian minerals industry has a strong interest in competitive and efficient coastal shipping. Bulk commodities such as iron ore, bauxite and alumina account for 70 per cent of Australia's coastal shipping trade.[22]

The participation of foreign ships is a longstanding feature of Australia's coastal shipping trade and is essential to the efficient and timely movement of freight. Australia has always had an undersupply of ships providing domestic services. From the commencement of the *Navigation Act 1912,* Australia relied upon British ships (and later other foreign vessels) to supplement its coastal shipping fleet.[23]

The gradual liberalisation of Australia's coastal shipping trade was reversed by the *Coastal Trading (Revitalising Australian Shipping) Act 2012.* This Act made retrograde changes to competition rules by replacing single and continuous voyage permits with a tiered licensing system that discriminates against foreign ships. While Australian-flagged ships enjoy unrestricted access to coastal trade under a five-year general license, foreign-flagged vessels only have access to a 12-month temporary license or, in exceptional circumstances, a 30-day emergency license. In addition, the Coastal Trading Act gives Australian ships the power to contest voyages proposed by foreign ships.[24]

The Productivity Commission correctly notes that: 'Cabotage restrictions are a significant impost for Australian businesses that rely on coastal shipping, and they deter businesses from using coastal shipping'.[25] The experience of the Australian minerals industry is that the Coastal Trading Act has increased domestic transport and administration costs and made it more difficult to source coastal shipping services when they are needed. In particular:

- For some dry bulk commodity producers, the cost of shipping final product around Australia is now about the same as shipping from Asia to Australia
- For one company, tonnage rates on a key route have increased 63 per cent
- Another company saw freight changes increase by over $3,000 a day up and down the east coast of Australia.

The deadweight loss of the existing regulatory regime to the national economy is expected to be between $242 and $466 million to 2025.[26] The Productivity Commission has argued that Tasmania is disproportionately harmed, because it depends on coastal shipping for 99 per cent of freight moved in and out of the state, and because it has smaller freight volumes and more marginal ports.[27]

Further, there is no evidence that current settings are revitalising Australia's domestic maritime fleet. The fleet of major licensed Australian ships has been declining for decades, falling from 30 to 15 between 2006-07 and 2013-14. Since the Coastal Trading Act was introduced, the carrying capacity of the Australian coastal fleet has decreased by 63 per cent. In addition, Australia's coastal fleet is older and more costly to operate by international standards, attracting higher insurance premiums.[28]

The regulatory impact statement on the Shipping Legislation Amendment Bill 2015 concluded that:

[21] Productivity Commission, *Regulation of Australian Agriculture, Draft Report,* released on 21 July 2016, p. 334.
[22] Commonwealth of Australia, *Explanatory Memorandum to the Shipping Legislation Amendment Bill,* p. 48.
[23] ibid., p. 46.
[24] ibid., pp. 52, 90f.
[25] Productivity Commission, *Regulation of Australian Agriculture, Draft Report,* released on 21 July 2016, p. 331.
[26] Commonwealth of Australia, *Explanatory Memorandum to the Shipping Legislation Amendment Bill,* p. 52
[27] Productivity Commission, *Final Report on Tasmanian Shipping and Freight,* released on 24 June 2014, Canberra, p. 149ff; *Regulation of Australian Agriculture, Draft Report,* released on 21 July 2016, p. 332.
[28] Commonwealth of Australia, *Explanatory Memorandum to the Shipping Legislation Amendment Bill,* p. 50ff.

> [T]he current situation is such that foreign participation in the Australian domestic maritime industry is essential for the foreseeable future … The declining tonnage of trading ships on the Australian registry has led to a shortage in Australian capacity on domestic routes and has brought about an increased reliance on foreign ships to provide these services … Domestic coastal trade suffers from either high freight charges or loss of business to the road and rail freight sectors.[29]

The high opportunity cost of the Coastal Trading Act – and its failure to revitalise domestic shipping – puts paid to any claim that liberalising coastal trade would result in a net loss of jobs (Box 2).

Box 2: The Coastal Trading Act temporarily protects some jobs at the expense of many more

Protectionist measures – like those enshrined in the Coastal Trading Act – might preserve some jobs for some time in one industry, but they place many more jobs in other industries at risk by reducing their competitiveness. The Productivity Commission argues strongly that the while the Coastal Trading Act cannot sustainably protect jobs from international competition, it does increase costs for the users of coastal shipping and the broader Australian community:

> Parliament did not pass the [Shipping Legislation Amendment] bill due to concerns over the potential loss of Australian jobs (Albanese 2016). Such concerns are unjustified – the restrictions protect some jobs at the expense of job growth in other industries (PC 2014g). Protecting an industry from competition not only harms consumers (in this case farmers), but also reduces the incentives of the protected industry to improve its efficiency and competitiveness. Over time, the protected industry falls further behind foreign competitors, requiring ever more protection and increasing the cost to consumers and the community in general.[30]

Some opponents of the Shipping Legislation Amendment Bill asserted that it would induce the loss of 1,000 jobs. But these opponents ignore the hundreds of thousands of jobs in other industries – including minerals extraction and processing, petroleum, cement, steel and agriculture – that rely on the efficient transportation of freight by sea.

Rio Tinto alone employs 6,000 workers in bauxite mines, alumina refineries and aluminium smelters across Australia, namely:

- Amrun bauxite mining extension project in Cape York Peninsula, Far-North Queensland
- Bell Bay Aluminium smelter near George Town, Tasmania
- Boyne Smelters Limited, located approximately 20 kilometres south of Gladstone at Boyne Island, Central Queensland
- Gove Operations Bauxite Mine Alumina Refinery in North-East Arnhem Land
- Queensland Alumina Limited in Gladstone
- Tomago Aluminium, located 13 kilometres north-west of Newcastle
- Weipa bauxite mine in Cape York Peninsula
- Yarwun alumina refinery situated 10 kilometres north-west of Gladstone.[31]

The MCA agrees with the Productivity Commission, the Australian Competition and Consumer Commission, the Competition Policy Review Panel and the Commission of Audit that cabotage licensing is unjustified industry assistance.[32] The regulatory impact statement on the Shipping Legislation Amendment Bill 2015 estimated that a controlled deregulation of coastal shipping would bestow a net benefit of $786.2 million to the Australian economy and an annual deregulatory saving to business of $27.9 million.[33]

[29] Commonwealth of Australia, *Explanatory Memorandum to the Shipping Legislation Amendment Bill*, p. 49f.
[30] Productivity Commission, *Regulation of Australian Agriculture, Draft Report*, released on 21 July 2016, p. 333.
[31] See Rio Tinto, *Our business: Aluminium*, viewed on 18 August 2016.
[32] Productivity Commission, *Final Report on Tasmanian Shipping and Freight*, released on 24 June 2014, Canberra, p. 152f; Competition Policy Review Panel, *Final Report*, 31 March 2015, p. 210; Australian Competition and Consumer Commission, *Submission to the Government's Options Paper: Approaches to regulating coastal shipping in Australia*, May 2014; Commission of Audit, *Towards Responsible Government, Phase 2 Report*, March 2014, p. 29.
[33] Commonwealth of Australia, *Explanatory Memorandum to the Shipping Legislation Amendment Bill*, pp. 68, 70.

3. FURTHER INFORMATION

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