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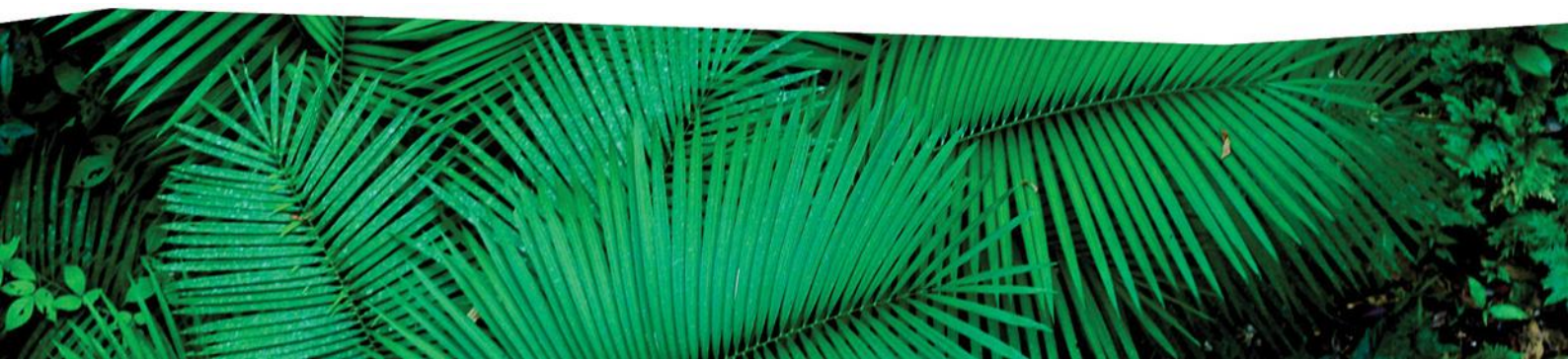
AUSTRALIAN CONSERVATION FOUNDATION

ACF Submission to the Productivity Commission Issues Paper on Resource Sector Regulation

7 November 2019



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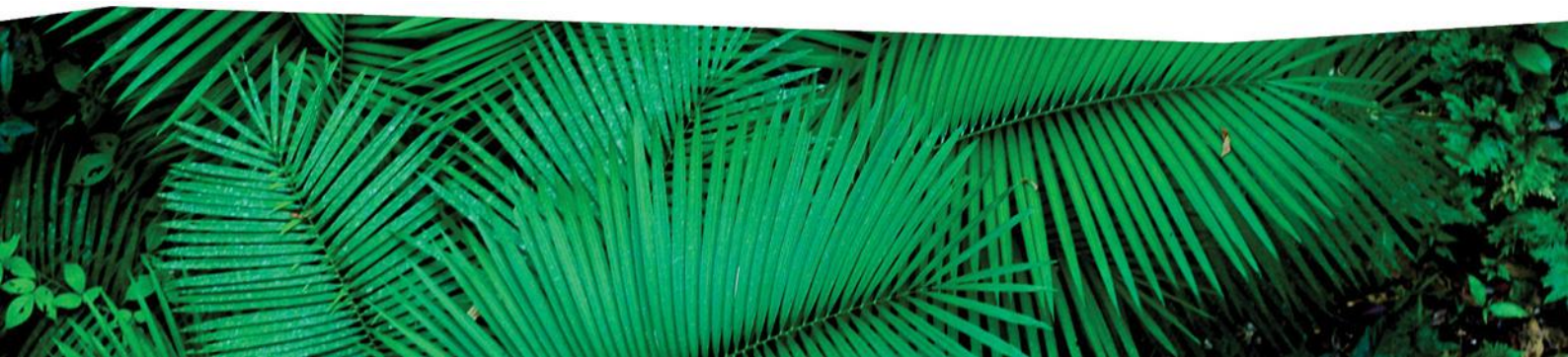

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Introduction

The Australian Conservation Foundation ("ACF") welcomes the opportunity to provide a submission to the Productivity Commission's inquiry into Resource Sector Regulation.

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

The Issues Paper covers a range of specific topics which we address in the main body of the submission. However, the Issues Paper and all the specific topics are framed by an assumption about the effectiveness of current regulation. For example, the Paper states under 'Background' that "regulation plays a critical role in ensuring that resource projects meet community and environmental management expectations." It is important that the Commission provide reasoning for this conclusion and/or how these expectations are defined as this statement reads as if community and environmental management expectations are currently being met. However, this is not the case. Australia's environment is deteriorating, carbon emissions continue to rise, and biodiversity is in decline. As outlined in the State of the Environment ("SoE") 2016 report:

> *"Although mining developments have contracted, there are still significant new mine site developments in areas of potential high impact and conflict with other land uses. The legacy of past mining is still large. There is considerable public concern about unconventional gas developments"*[1]

Further outlined in the report is that energy production and mining affect just under 17% of species listed as nationally threatened under the *Environment and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") and that there are 50,000 abandoned mines on public and private land with inadequate resources to rehabilitate them all.[2]

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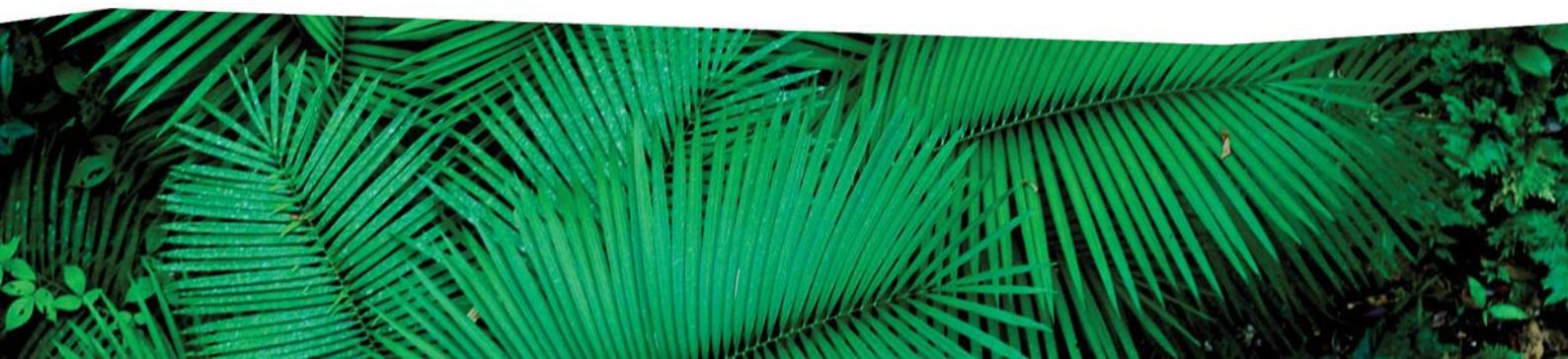
[1] Commonwealth of Australia, *Contemporary land-use pressures on the land environment* (2018) Australia State of the Environment 2016 <https://soe.environment.gov.au/assessment-summary-57-contemporary-land-use-pressures-land-environment>.

[2] Commonwealth of Australia, *Figure BIO2 Pressures affecting species listed as nationally threatened under the Environment Protection and Biodiversity Conservation Act 1999* (2018) Australia State of the Environment 2016 <https://soe.environment.gov.au/graph/biodiversity/2016/figure-bio2-pressures-affecting-species-listed-nationally-threatened-under>.



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Recommendations

1. The inquiry should have full regard to the objectives of environmental and other regulations affecting the resources sector and the degree to which these objectives are being met.
2. That a national review of offsets policies be undertaken to measure their efficacy and effectiveness as an environmental regulatory tool.
3. That more stringent limits to the use of biodiversity offsets be incorporated into national and sub-national policies, including setting limits to loss.
4. Introduction of clearer guidance, listing timeframes and strict protections for critical habitats and funding for species recovery
5. That the federal government prioritise the collation and transparent disclosure of offset data.
6. Establish an independent National Sustainability Commission to set national environmental standards and undertake strategic regional planning and report on national environmental performance. The commission would also develop enforceable national, regional, threat abatement and species level conservation plans.
7. Establish an independent National Environmental Protection Authority that operates at arm's-length from Government to conduct transparent environmental assessments and inquiries as well as undertake monitoring, compliance and enforcement actions.
8. The EPBC Act be amended to explicitly require the Environment Minister to consider the contribution of proposed projects to climate change, including scope one, two and three emissions.

Further recommendations relating to mine rehabilitation are found in ACF's submission to the Senate Standing Committee on Environment and Communications inquiry into the rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities.[3]

Scoping the study and defining key concepts

One of the primary objectives of resources sector regulation is protection of the environment. This is because the resources sector affects the environment more significantly than any other sector in the Australian economy. Resources projects present substantial risks to land, water, biodiversity, and people. While some of these risks are local, many are regional or global in scale – for example groundwater pollution and the contribution of greenhouse gas emissions to climate change.

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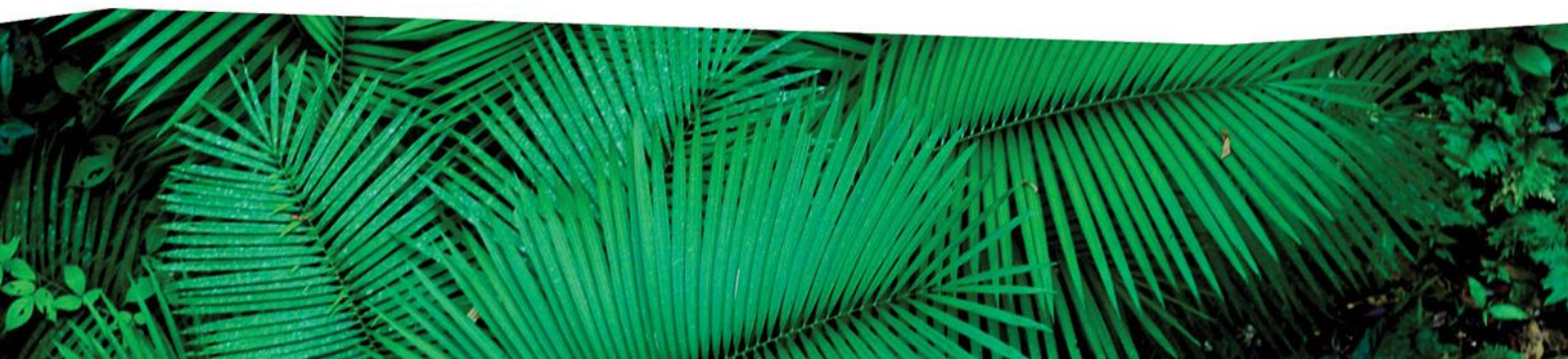
[3] Australian Conservation Foundation, *Submission to the inquiry into the rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities* (10 April 2017) <https://www.aph.gov.au/DocumentStore.ashx?id=4629a7fc-3231-4b4c-8f91-6b78bc3eaedd&subId=510416>.



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One of the most important laws governing resources projects is the EPBC Act. The objects of the Act include, inter alia:

- To provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance.
- To promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.
- To promote the conservation of biodiversity.
- To provide for the protection and conservation of heritage.

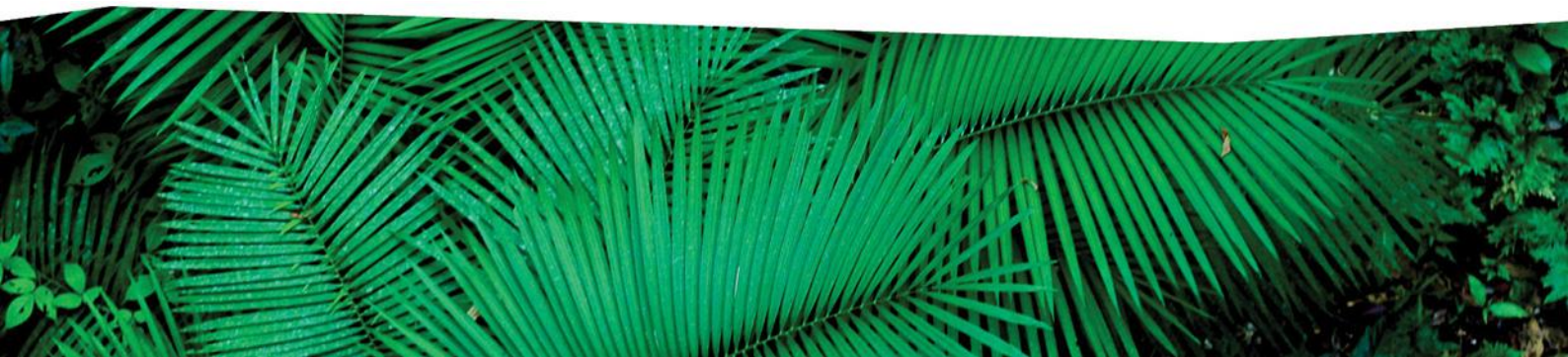
These public policy goals must be front of mind when assessing the appropriateness of resources sector regulation. The Issues Paper fails to outline these important objectives and takes a singular view to the role of regulation as an impediment to investment, rather than a service administered to protect and/or ensure the safety of the public, employees, investors and/or the environment. This inquiry should look at the effectiveness in delivering outcomes of regulation and this should be prioritised as a matter of urgency to ensure that the review fully contextualises the regulatory framework it is reviewing.

There should be no doubt in the Commissioner's mind in relation to what is at stake when it comes to regulating the resources sector. Poorly regulated resource projects have left a devastating wake of death and destruction both here and abroad. The loss of life, property and environmental health should not be downplayed when discussing the regulation of resources sector. Nor the economic costs of emergency response and repair. For example, the BP New Horizon explosion and oil spill killed 11 people and resulted in catastrophic damage to marine and coastal ecosystems in the Gulf of Mexico. The Hazelwood mine fire, which burnt for 45 days contributed significantly to very poor air quality in the surrounding region and likely contributed to increased mortality in the La Trobe Valley.[4]

Recommendations

- The inquiry should have full regard to the objectives of environmental and other regulations affecting the resources sector and the degree to which these objectives are being met.

[4] Elise Kinsella, 'Hazelwood mine inquiry: Fire 'likely' contributed to an increase in deaths in Latrobe Valley', *ABC News* (online), 9 December 2015 <https://www.abc.net.au/news/2015-12-09/hazelwood-mine-fire-likely-caused-latrobe-deaths-inquiry-finds/7004546>.



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Identifying best-practice regulatory approaches

Regulatory context

A fundamental principle of best practice regulation is to define the problem that regulation is designed to solve.[5] This requires an understanding of the broader context and objectives of the regulation.

As noted above, best practice regulation must have regard to the outcome being sought through regulatory approaches. In addition to the objects of EPBC legislation, the Regulatory Framework 2017 specifies the objectives of the Department of the Environment and Energy ("DoEE") as it relates to its regulatory functions:

> *Through our regulation we support a thriving environment, community and economy now and into the future by protecting, conserving, and improving environment and heritage and ensuring energy is affordable, reliable and sustainable.*[6]

Again, this is important context for analysing the performance of regulation and the outcome sought. However, there is limited data available to measure the outcomes delivered by the EPBC Act alone (further discussion on data issues is included below). Key indicators through the SoE report highlight that the Australian Government's policy and legislative response to environmental pressures are inadequate - that is to say emissions are increasing, biodiversity is disappearing, and water resources are becoming more strained. Recent research shows that since the EPBC Act has been in operation, more than 7.7 million hectares of threatened species habitat has been destroyed, with the significant majority (>90%) unregulated.[7]

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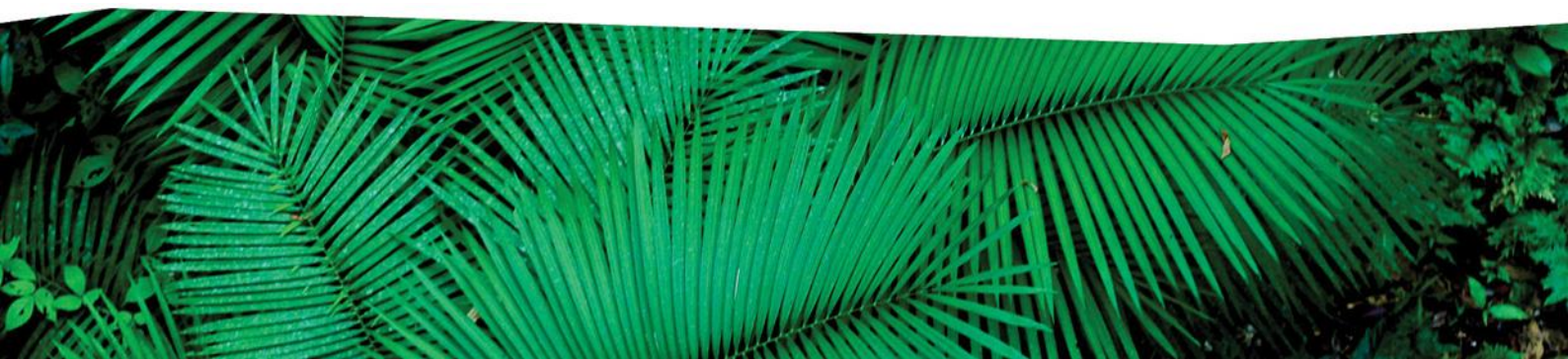
[5] Council of Australian Governments, *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies* (October 2007) <https://www.pmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf>.

[6] Department of Environment and Energy, 'Regulatory Framework' (Australian Government, October 2017) <https://www.environment.gov.au/system/files/resources/f992a66c-ff2f-4698-b816-c578f4511954/files/dept-environment-energy-regulatory-framework.pdf>.

[7] Michelle S Ward, Jeremy S Simmonds and April E Reside et al, 'Lots of loss with little scrutiny: The attrition of habitat critical for threatened species in Australia' (2019) 1(11) *Conservation Science and Practice* 117.



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Best-practice approaches

Tripartism

In regulatory theory tripartism is identified as an important response to regulatory capture and corruption. As noted by Ayres and Braithwaite:

> *...regulatory encounters that foster the evolution of cooperation also encourage the evolution of capture and corruption. Solutions to the problems of capture and corruption—limiting discretion, multiple-industry rather than single-industry agency jurisdiction, and rotating personnel—inhibit the evolution of cooperation. Tripartism—empowering public interest groups—is advanced as a way to solve this policy dilemma.*[8]

Empowering third-party actors to hold regulators to account on their decision making is an important component in preventing regulatory capture and corruption. This operates consistently under the *United States Clean Air Act 1963*, including provision for citizen suits that enable private citizens to hold government bodies to account for failing to perform a non-discretionary duty.

Regulatory capture presents significant risks to industry also. It drives societal discontent with the regulatory system, strips social license and can result in significant public opposition to approval decisions where these are perceived to not be made in the public interest. Safeguarding against regulatory capture is a critical element to any effective environmental regulatory regime.

Independent review bodies

Another safeguard against corrupting influences are to ensure regulatory decisions are made at arm's length from political interference. The administration of the EPBC Act is entirely housed within the DoEE. EPBC Act approval decisions may be delegated by the Minister for the Environment. Most state and territory jurisdictions in Australia have independent Environmental Protection Authorities. In NSW the Independent Planning Commission ("IPC") was established to improve the public standing of the regulator and address community concerns following numerous scandals involving planning decisions. One of the specific aims of the IPC is to provide community confidence in planning and approval decisions. Numerous studies have identified that independent review bodies, free from political interference, present optimal models for environmental regulation and reduce instances of regulatory capture.[9]

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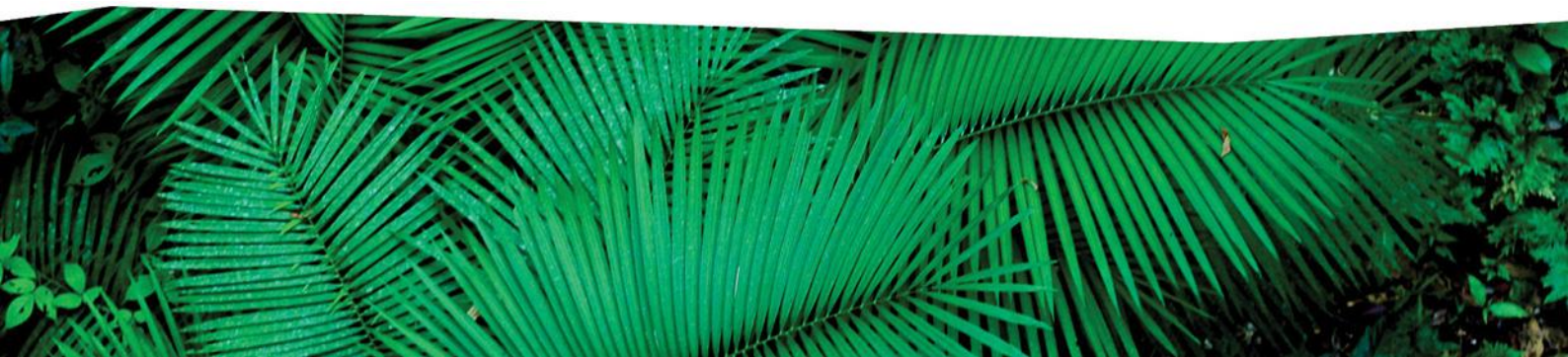
[8] Ian Ayres and John Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate* (Oxford University Press, 1st ed, 1992) 54.

[9] Australian Panel of Experts on Environmental Law, *Blueprint for the Next Generation of Australian Environmental Law* (Australian Panel of Experts on Environmental Law, 2017); Chris Joseph, Thomas Gunton and Murray



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Protection for critical habitat

The United States *Endangered Species Act* has been relatively successful in protecting and restoring population of threatened species since its inception in 1973. Key statistics highlighted by the US Centre for Biological Diversity include:

- From 1973 to 2013, the Act prevented extinction for 99 percent of species under its protection.[10]
- The Act has shown a 90 percent recovery rate in more than 100 species throughout the United States.
- The Act has allowed the designation of millions of acres of critical habitat, which is crucial to species' survival and recovery.[11]

Additionally, there can be no argument over the interaction between the US *Endangered Species Act* and the performance of the US economy. In fact, the improved trajectory of US threatened species under the *Endangered Species Act* regime is evidence that species recovery can be achieved and entirely decoupled from economic indicators. The success in the US *Endangered Species Act* identifies critical habitats and recovery actions within a specified timeframe from listing, providing industry with clear guidance as to where greater regulatory scrutiny and environmental protections will be in play. It is worth flagging that the Trump administration has begun weakening provisions in the US *Endangered Species Act*, and its effectiveness going forward should be measured cognisant of these amendments.

Mine-site rehabilitation

In terms of mine-site rehabilitation, the United States' *Surface Mining Control and Reclamation Act of 1977* (SMCRA) requires that surface coal mine operations "backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated".[12] The current approach in Australia does not see standardised requirements for backfilling of voids. This can lead to suboptimal landform, environmental and social outcomes. Final

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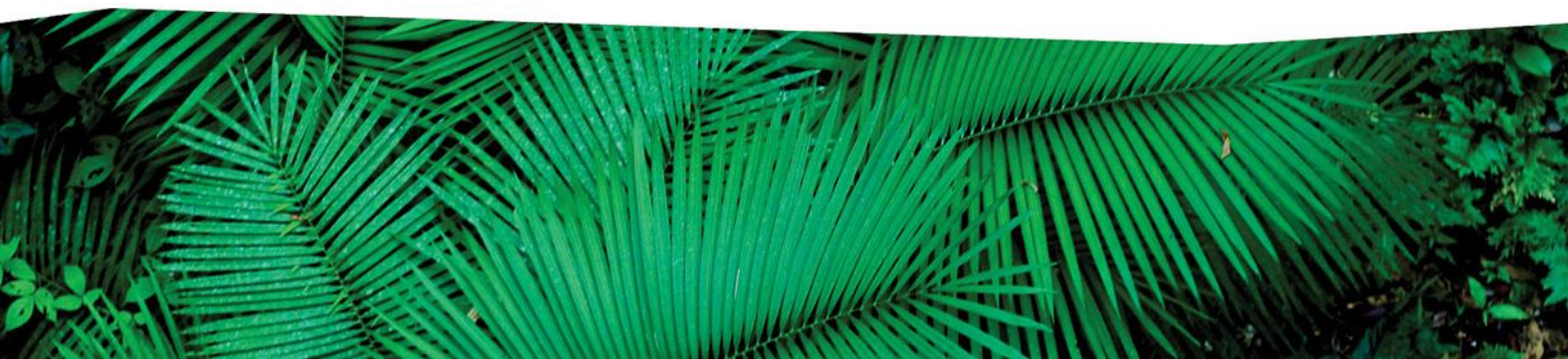
Rutherford, 'Good Practices for Environmental Assessment' (2015) 33(4) *Impact Assessment and Project Appraisal* 238.

[10] Kieran Suckling, Noah Greenwald and Tierra Curry, *On Time, On Target – How the Endangered Species Act is Saving America's Wildlife* (Centre for Biological Diversity, May 2012).

[11] Kieran Suckling, Loyal A Mehrhoff, Ryan Beam and Brett Hartl, *A Wild Success: A Systematic Review of Bird Recovery Under the Endangered Species Act* (Centre for Biological Diversity, June 2016).

[12] *Surface Mining Control and Reclamation Act of 1977*, 30 USC 25 § 1265(b)(3) (2012).



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voids present a significant hazard in terms of ongoing water quality management and community safety. National standards for mine-rehabilitation and final void management and backfilling are required.

To what extent are current regulatory processes consistent with best practice?

Administration of the EPBC Act

In 2017 the Australian Government undertook to improve its regulatory capability through the Regulatory Maturity Framework. The Department published the Regulatory Framework in 2017. The Framework outlines the way in which the department interacts with the regulated community, stakeholders, communities and NGOs amongst other sectors. Whilst a welcome development, the Department has not effectively implemented the framework in a number of key areas, including stakeholder engagement, systems improvement and information disclosure.

The Department's regulatory performance framework highlights that across the broad remit of its regulatory functions, the bulk of stakeholder perceptions are that its performance considered poor to very poor (21%) or fair (41%). Only 35% of stakeholders thought the departments regulatory approach was excellent to good.[13] Concerningly the Department survey has some glaring methodological issues, including poor participation rates and a very strong focus on regulated entities as opposed to broad stakeholder groups including impacted communities. The majority fair - poor performance of DoEE as a regulator is also reflected in its assessment against timeframes.

As noted in the table below, despite a trend of declining number of decisions overall, the Department's capacity to make EPBC Act assessment decision consistent with timeframes is worsening year on year. This is correlated with declining resourcing for regulatory functions of the Department, particularly when viewed against performance in the 13/14 and 14/15 financial years.

[13] Department of the Environment and Energy, 'Regulator Performance Self-Assessment Report 2017-18' (Australian Government, 2019) <https://www.environment.gov.au/system/files/resources/dcea27cc-041e-4d1d-bebd-072be3eaf689/files/regulator-performance-self-assessment-2017-18.pdf>.

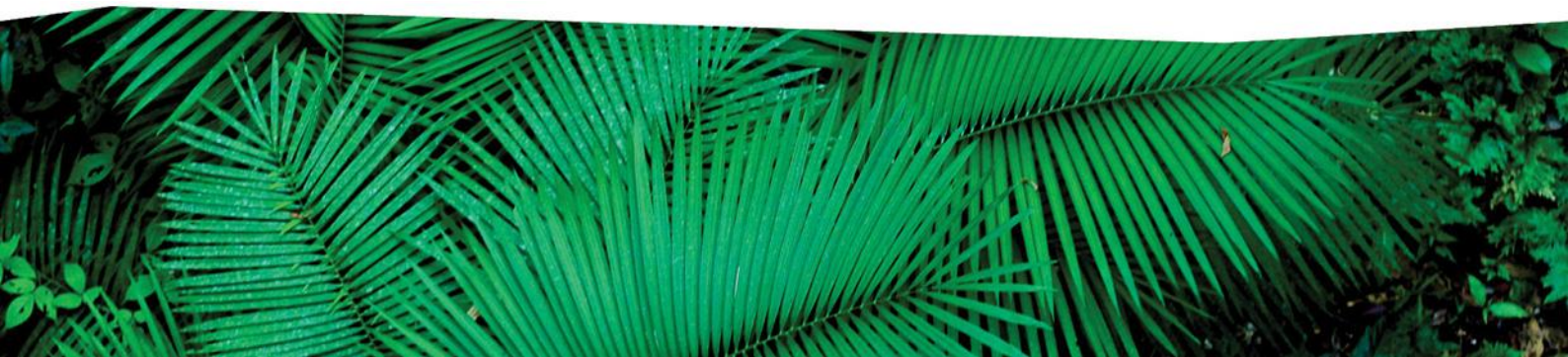

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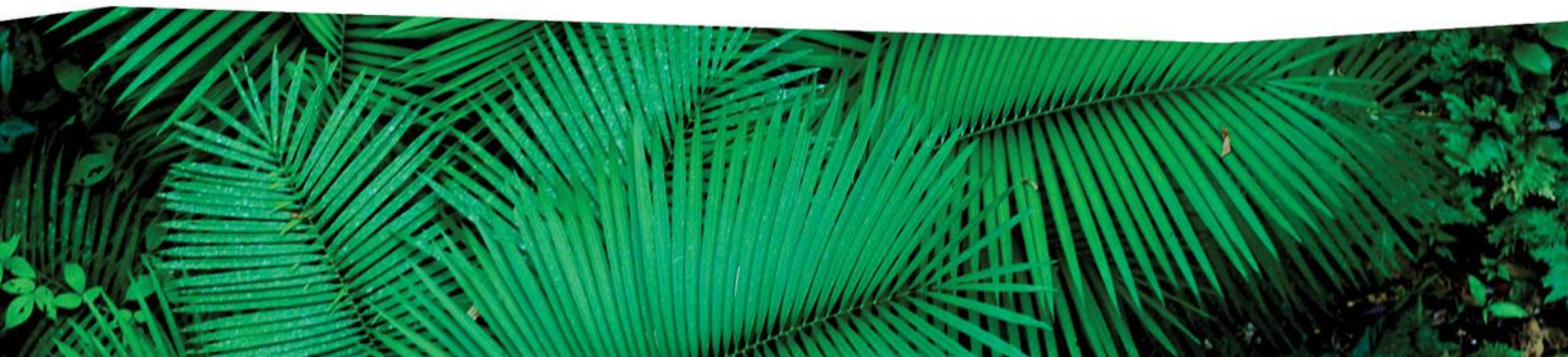
Table 1. Data on regulatory performance from DoEE Annual Reports 2011/12-2018/19

FINANCIAL YEAR	NUMBER OF REFERRALS UNDER EPBC ACT	RESOURCES REFERRALS (ENERGY GEN + SUPPLY NON-RENEWABLE, EXPLORATION AND MINING)	REGULATORY DECISION-MAKING PERFORMANCE#	OUTCOME 1.5 (EPBC REGULATION) BUDGET ACTUAL EXPENSES
2018/19	220	47	60%	$56m
2017/18	240	51	62%	$55m
2016/17	239	43	64%	$55m
2015/16	209	42	74%	$57m
2014/15	225	64	75%	$63m
2013/14	304	76	76%	$71m*
2012/13	439	150	63%	$58m*
2011/12	412	137	63%	$59m*

*Program 5.2; # Some data is inconsistent across annual reporting years - most recent annual report data relied on.

In relation to the administration of the EPBC Act, the DoEE have made some moves to improve non-regulated stakeholder engagement in their regulatory processes, including adopting a co-design approach to the regulatory framework. However, more broadly, ACF's experience is that DoEE adopts a more hostile approach to engaging with environmental stakeholders as it relates to EPBC Approvals. For example, there have been numerous requests to the department that range across data, information and statutory requests (including under s135(A) of the EPBC Act) that have been ignored or not acted upon.



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Poor data management and inadequate community consultation provisions

The EPBC Act is one of the few pieces of legislation where recommendation or assessment reports that inform key decisions on approvals are not made public. Section 135(A) of the report provides for members of the public to request recommendation reports from the Secretary. There is also provision for the Minister (or their delegate) to publish these reports as a matter of course. However, this has seldom happened.

Rather the key criteria and reasoning for approval decisions under the EPBC Act are not publicly disclosed. Ironically, the most effective means for the public and interested stakeholders to get such information is to then request a formal Statement of Reasons from the regulator, which are voluminous legal documents that draw significant resources from the regulator.

The EPBC Act system also fails to provide open access information and data. DoEE have poor data systems and, for example, cannot provide systematic maps of where biodiversity offsets are located nor identify the amount of habitat that has been lost for threatened species. When the EPBC Biodiversity Offsets Policy was released in 2012 it committed to both a review of the policy and the establishment of a public register. In the 2015/16 Portfolio Budget Statement for the department a specific performance criteria was the amount of habitat protected by offsets, yet the annual report for that year highlighted that data was not available:

Figure 1. Extract 2015/16 DoEE Annual Report

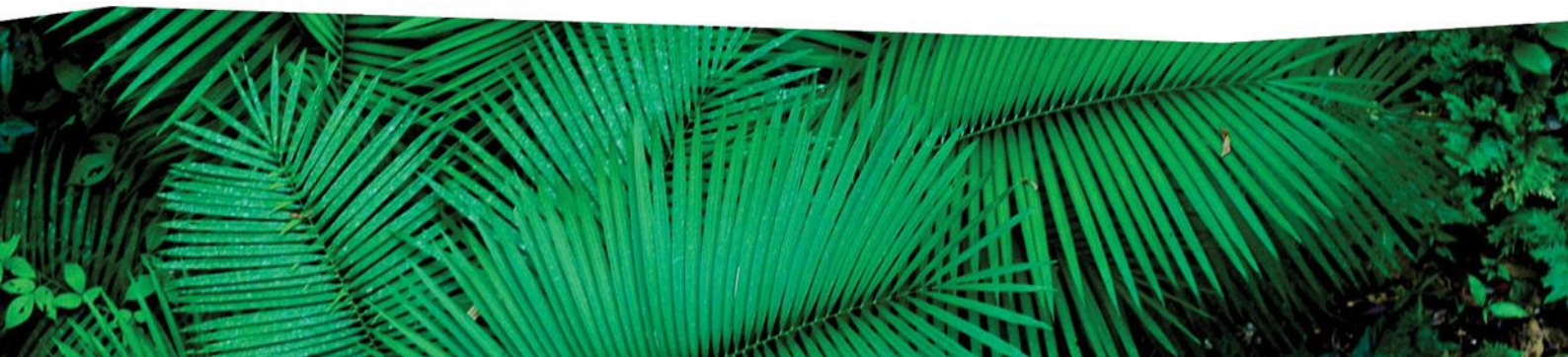
Objective: Ensure sustainable development outcomes by regulating impacts on matters of national environmental significance

Criterion	The number of hectares of habitat protected by offsets[6] compared with the area impacted[7] for approved projects[8]
Result	**Data/information not available or incomplete**

In short, the EPBC Act is a regulatory system that is fundamentally out-of-date in terms of modern transparency and disclosure and data management.

Biodiversity offsets

Biodiversity offsets are a mechanism to compensate for the loss of habitat or other protected matter values as a result of development. Theoretically, they are an option of last resort after all avoidance and mitigation measures to reduce impacts have been pursued. They seldom operate this way - and often form a key focus of regulatory decision making.



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Policies across Australia have varying objectives, 'net-gain' (Victoria), 'no-net loss' (NSW) or 'improve and maintain' (Federal). Research has highlighted that all of the policies are set against a backdrop of assumed declines in baseline biodiversity. That is to say, they only deliver environment benefits when you assume the environment is declining at a much more rapid rate than it is. As noted in the study:

> *"crediting baselines in Australian offset schemes risk exacerbating biodiversity loss. The near-ubiquitous use of declining crediting baselines risks 'locking in' biodiversity decline across impact and offset sites, with implications for biodiversity conservation more broadly"*[14]

As noted above, there are systemic issues with how biodiversity offsets are tracked and disclosed under the EPBC Act. This lack of data capture and transparency creates issues with offset delivery and compliance with offset obligations. Whilst this is challenging for business, it presents a serious risk to environmental outcomes (see Ulan Mine case study).

Additionally, there has been a noted absence of additional policy guidance on the application of the EPBC Act offsets assessment guide, which relies on the interpretation of a number of technical elements to be inputted into a calculator. This lack of guidance and criteria have meant that the guide itself can be easily gamed to produce less than scientifically robust offset scenarios.

Generally, offsets are over-used in the regulatory toolkit. And whilst there are offsets policies across jurisdictions, these are often focused on different environmental values, depending on the legislative context (for example the EPBC Act generally focuses on threatened species whereas the NSW Government approach focuses on native vegetation).

Biodiversity offsets can send an important price signal and drive the internalisation of environmental harms/costs, however decision-making criteria under EPBC are not robust enough to ensure price signals are heeded consistently. It is often more attractive for proponents to negotiate with the regulator to lower offset liability, rather than accept the full costs that reflect the negative environmental cost and externalities of their activity.[15]

There is also a significant absence of evidence that demonstrates, at a policy level, that biodiversity offsets are fulfilling their stated objectives of no-net loss and/or improvement and maintenance of the populations of threatened species. Given offsets have been implemented in Australia for almost two

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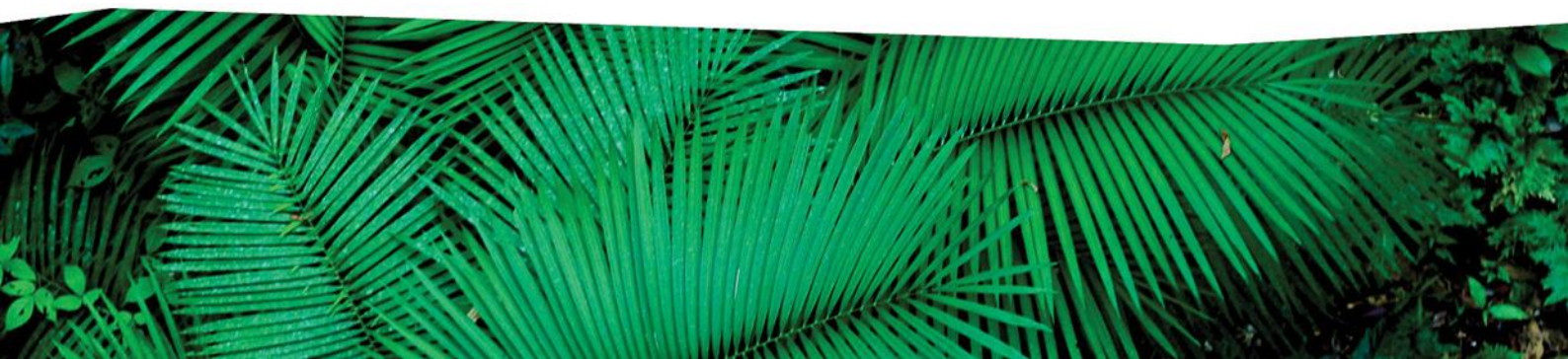
[14] Martine Maron, Joseph W Bull, Megan C Evans and Ascelin Gordon, 'Locking in loss: Baselines of decline in Australian biodiversity offset policies' (2015) 192 *Biological Conservation* 504.

[15] Peter McCutcheon, 'Koala habitat cleared for housing development against Environment Department's offset policy', *ABC News* (online), 13 August 2019 <https://www.abc.net.au/news/2019-08-13/koala-habitat-cleared-against-department-of-environment-rules/11392454>.



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decades, and there remains a lack of evidence to their performance, an in-depth review is required which collects sufficient data to evaluate their efficacy and effectiveness as an environmental policy mechanism. There must also be clear limits to the use of offsets, especially for impacts on species or ecosystems that are highly threatened, irreplaceable, or for which there is scientific uncertainty as to the key mechanisms for their recovery.

CASE STUDY: OFFSET ISSUES WITH ULAN COAL MINE - GLENCORE

Glencore had the expansion of their Ulan Coal Mine approved in 2010. The approval is current until 2031. Nine years later, nearly halfway into the life of the approval, the associated environmental offsets are still in the process of being secured in perpetuity. The original approval required the offsets to be secured by 2012.

The NSW and Federal Government have approved multiple variations of the approval conditions over the years, with the Department of the Environment and Energy implying to Glencore they were losing patience in 2015 and 2016. In the last 18 months legal issues have arisen in relation to tenure, native title and projects not involving Glencore—these issues could have been identified a decade earlier. Before the legal issues emerged, Glencore's main reason for the delays was issues negotiating with the NSW Government.

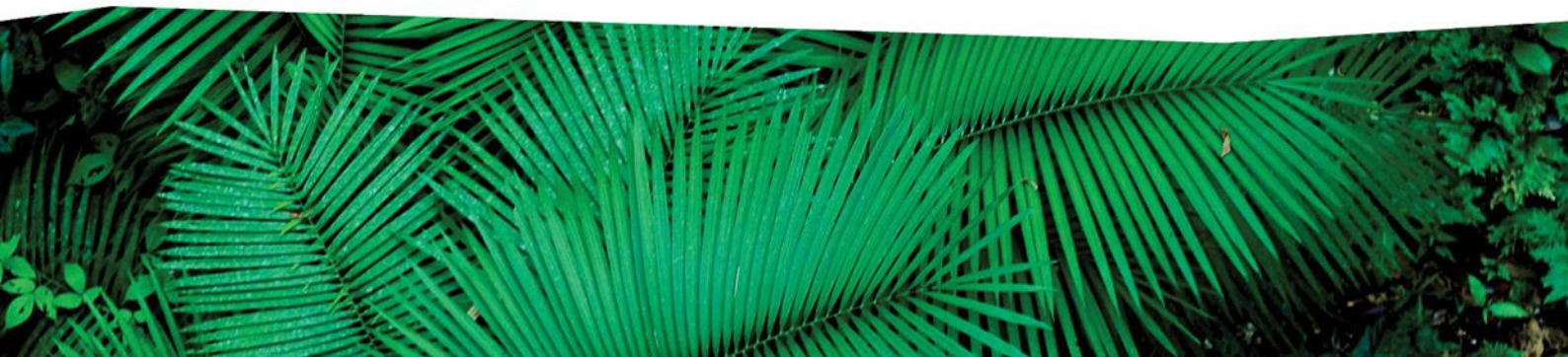
The NSW Government stated consistently from 2012 until 2015 that their preference for the security of the offsets was BioBanking while Glencore preferred a Conservation Agreement. Ultimately, in 2016, the NSW Government commenced negotiations with Glencore on the basis that a Conservation Agreement would be sufficient. BioBanking was replaced by a new scheme in August 2017.

Further, it appears that as part of the approved expansion Glencore is mining coal seams underneath the offset areas they proposed. It is unclear how subsidence is being dealt with and how that affects the value and quality of the offsets.

This is an inadequate outcome for the environment, for the use of the regulator's resources and for Glencore.

Recommendations:

- That a national review of offsets policies be undertaken to measure their efficacy and effectiveness as an environmental regulatory tool.
- That more stringent limits to the use of biodiversity offsets be incorporated into national and sub-national policies, including setting limits to loss.
- That the federal government prioritise the collation and transparent disclosure of offset data
- The Australian government introduce clearer guidance, listing timeframes and strict protections for critical habitats and funding for species recovery



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Lack of independence in decision making under EPBC Act

The administration of the EPBC Act is housed solely within the DoEE. Senior Executive Service officers, who operate under the direction for the Secretary and the Minister, as also those charged with overseeing the assessment and approval of projects under the EPBC Act. This creates the potential for conflicts of interest in relation to the independent assessment of projects and avenues of direct political interference in regulatory decisions.

Recent examples of highly questionable approval decision making process within the context of significant political pressure include the approval of the groundwater management plan (GWMP) for the Adani coal mine and the approval of Yeelirrie Uranium mine just prior to the 2019 election. Both approvals were heavily politicised and did not follow the usual process for approval under the EPBC Act. The approval of the GWMP was particularly dubious, noting political threats made against the environment ministers, the proximity of the decision to the writs being issued for the federal election and the approval of the plan following a brief phone link up between senior executives in DoEE, CSIRO and Geoscience Australia.[16]

Australia must have new national environmental institutions that:

- Have independent governance.
- Provide independent and transparent advice to decision makers.
- Provide clear criteria for how decisions are made.
- Ensure publicly available, timely and robust reporting on decision processes and outcomes.
- Ensure the collection and reporting of accurate environmental data.
- Are based on twenty-first century principles of smart regulation in order to deliver streamlined, strategic and effective outcomes for the environment, for government, business and our communities.

Recommendations

- Establish an independent National Sustainability Commission to set national environmental standards and undertake strategic regional planning and report on national environmental performance. The commission would also develop enforceable national, regional, threat abatement and species level conservation plans.

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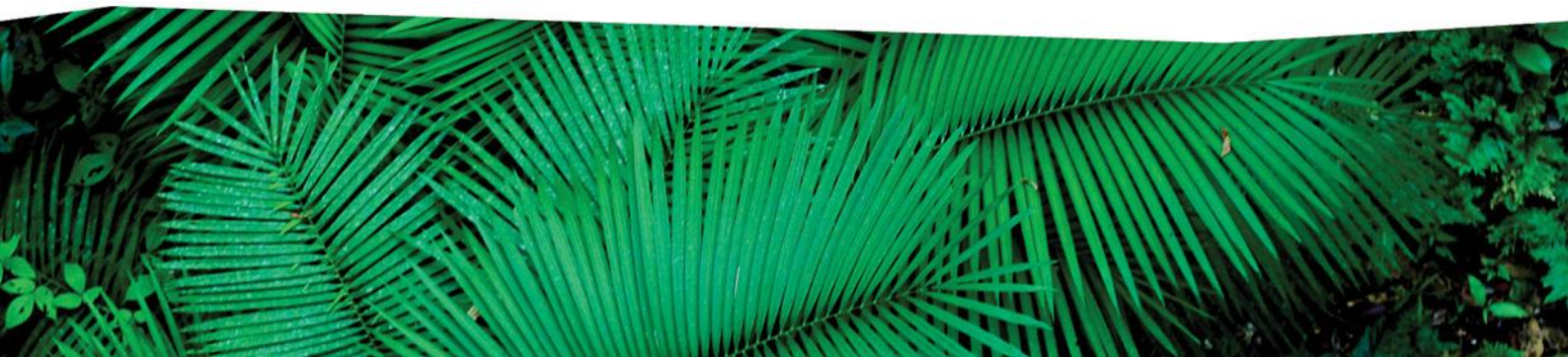
[16] Michael Slezak, 'Adani water plan ticked off within hours despite lack of detail, internal CSIRO emails reveal', *ABC News* (online) 14 May 2019 <https://www.abc.net.au/news/2019-05-14/adani-csiro-emails-foi-melissa-price/11107276>.



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- Establish an independent National Environmental Protection Authority that operates at arm's-length from Government to conduct transparent environmental assessments and inquiries as well as undertake monitoring, compliance and enforcement actions.

CASE STUDY: YEELIRRIE URANIUM MINE APPROVAL

In May 2019 the former federal Environment Minister Melissa Price approved a uranium mine in Western Australia, the day before the federal election was called. In so doing she chose to set weak environmental conditions for the project despite knowing that decision could result in subterranean species going extinct.

The Statement of Reasons for this approval shows her Department recommended two possible conditions for the mine and Minister Price chose conditions that do not require the proponent to ensure it will avoid the extinction of species.

Minister Price noted there was a risk this choice would result in the extinction of stygofauna – subterranean animals that have evolved to live in a very specific groundwater habitat.

The Statement of Reasons also concedes that the Yeelirrie mine would result in the 'complete loss' of the entire western population of a rare saltbush – one of only two that exists – wiping out a third of the species' extent and occurrence.

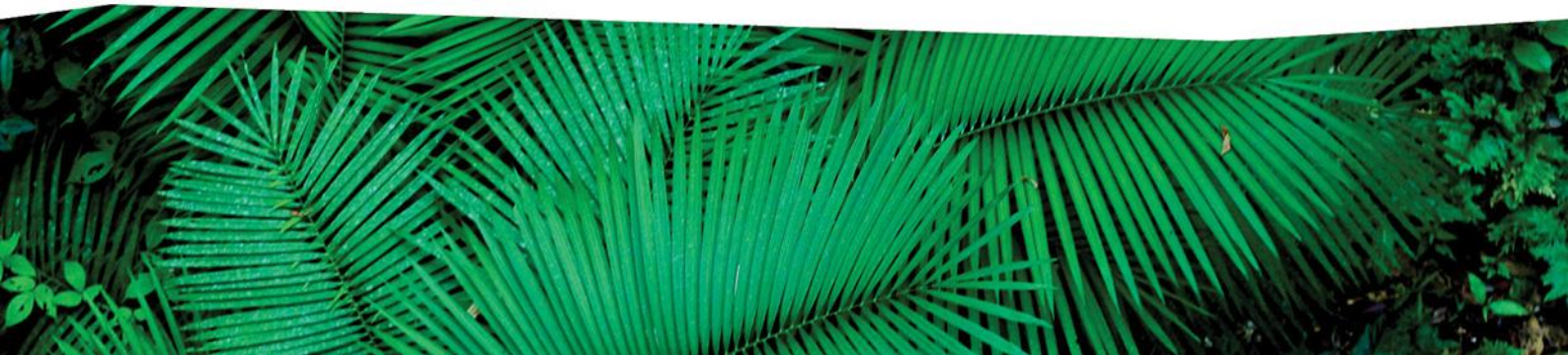
Before Minister Price's approval the WA Environmental Protection Authority had recommended the mine not be approved because of the extinction risk to the stygofauna and the harm it would do to other wildlife like the Malleefowl, Princess parrot and Greater bilby.

At the time Minister Price approved the Yeelirrie mine, which is in her electorate of Durack, the project was subject to legal appeal by senior Tjiwarl native title holders and conservationists. Ms Price had previously said she would not make a decision on Yeelirrie until the Supreme Court had ruled on the challenge.

Since the federal election the current federal Environment Minister Sussan Ley told The West Australian newspaper on 29/7/19 that she would not be reviewing the decision by her predecessor to approve the Yeelirrie uranium mine 500km north of Kalgoorlie a day before the May 18 Federal election.

"I don't propose to review decisions that were already made before I became minister," Ms Ley said, despite advice the mine could lead to the extinction of up to 12 native species.

From an environmental perspective the lessons from the Yeelirrie eleventh hour approval is clear. Australia needs new and stronger national environment laws that protect nature and take politics and undue influence out of approval decisions for major industrial projects.



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Mine-site rehabilitation

There are clear long term environmental and social impacts that arise from mining activity. These pose major challenges and pressures on governments, regulators and companies to ensure that landscapes are repaired and that ecosystems, water resources and agricultural lands are healthy and functional and meet community expectations. Unfortunately, short term policy making, poor economic management and lax regulatory standards have meant that inadequate safeguards currently exist to address the serious negative social and environmental harm that arise from unrehabilitated mines.

Impacts from mining remain in the landscape long after operations cease. As such, mining is not a temporary land use. These impacts include open pits and final voids, subsidence, contaminated lands, acid mine water and water pollution, leeching, altered hydrology, air pollution, residual tailings dams and loss of biodiversity, community amenity and cultural heritage.

In 2016 ACF provided a grant to the Minerals Policy Institute to complete research on a national perspective on mine-site rehabilitation. The final report highlighted:

> *Most mine closures are unplanned and a result of economic and market factors. A failure to reform the regulation of mine closures will result in long term pollution affecting communities, water, air and wildlife. While companies' exposure to risk is usually protected by subsidiary entities and limited liability, governments and the community have limited protection against the social environmental and financial risks when a project or company fails.*[17]

The report noted the efforts by industry and government to rectify rehabilitation practice and reporting, particularly in the mid 2000's, including the Commonwealth's development of the Mine Closure and Completion Handbook. However, the case studies contained within the report highlight that successful mine rehabilitation continues to be an aspiration for industry and major issue for regulators and the community, both in terms of ongoing environmental harm and exposure of governments and taxpayers to unacceptable future liabilities.

Further recommendations relating to mine rehabilitation are found in ACF's submission to the Senate Standing Committee on Environment and Communications inquiry into the rehabilitation of mining

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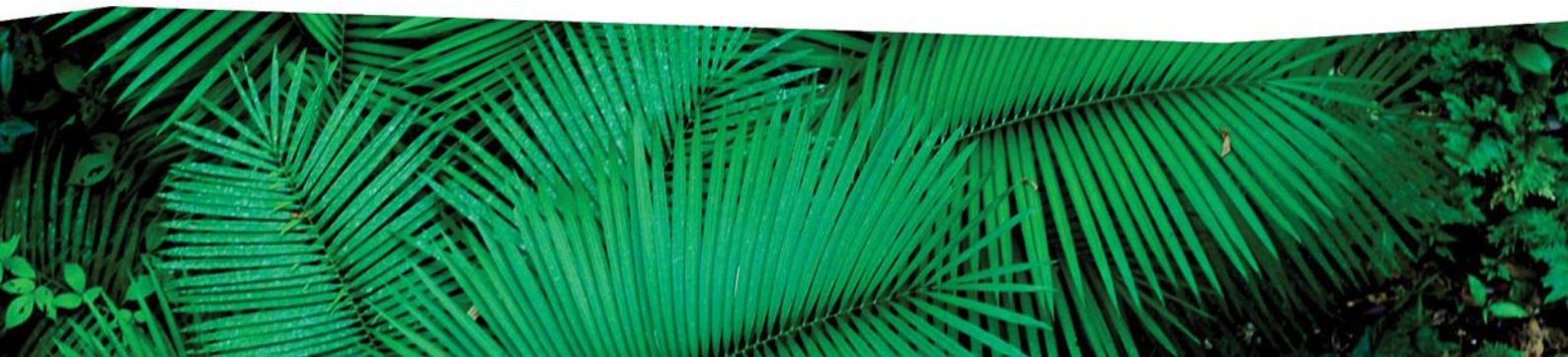
[17] Charles Roche and Simon Judd, *Ground Truths: Taking Responsibility for Australia's Mining Legacies* (2016) Mineral Policy Institute <https://www.aph.gov.au/DocumentStore.ashx?id=987efbab-3d84-4e85-a1da-69c8ae07c5f7&subId=510416>.



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and resources projects as it relates to Commonwealth responsibilities.[18] Also relevant is an ACF publication outlining four local examples of the impact of mining on communities.[19]

Regulatory design and scope three emissions

There is a clear need for regulatory intervention at the federal level to strengthen the assessment of fossil fuel projects, specifically regarding the contribution of those projects to climate change.

Federal assessment of GHG emissions

At a federal level, assessment of proposed projects under the EPBC Act does not explicitly require scope three greenhouse gas (GHG) emissions[20] to be considered. This is because environmental assessment under the EPBC Act is limited to evaluating a proposal's impact on Matters of National Environmental Significance (MNES).[21] However, the GHG emissions of a project may still be indirectly relevant to assessment under the Act because GHG emissions are the leading cause of climate change, which is seriously impacting many MNES.

The clearest example of the connection between GHG emissions and MNES is the potentially catastrophic impact of climate change on the Great Barrier Reef Marine Park. A global analysis of 100 coral reefs has shown that climate change has created a fivefold increase in the frequency of severe coral bleaching events over the past 40 years.[22] And last year, the Intergovernmental Panel on Climate

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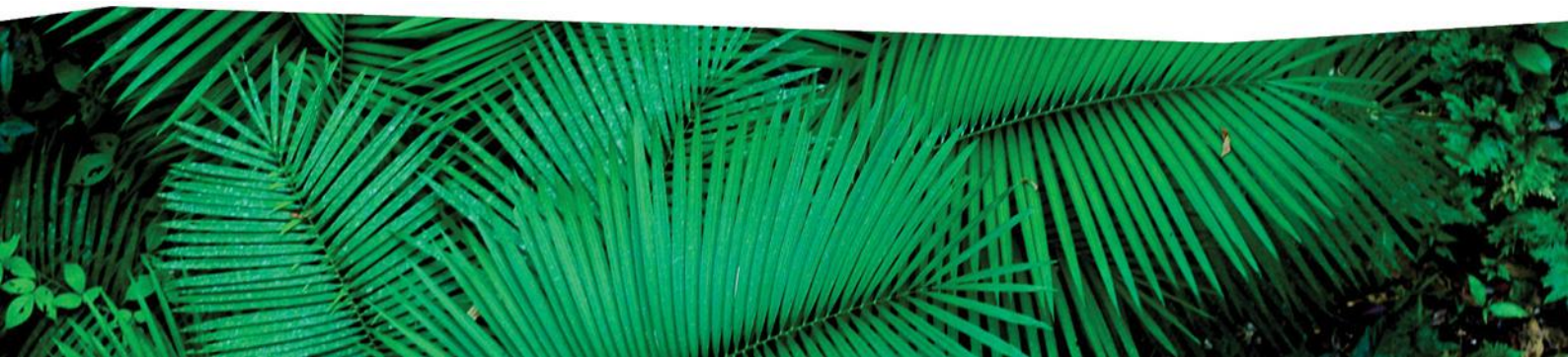
[18] Australian Conservation Foundation, *Submission to the inquiry into the rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities* (10 April 2017) <https://www.aph.gov.au/DocumentStore.ashx?id=4629a7fc-3231-4b4c-8f91-6b78bc3eaedd&subId=510416>.

[19] Australian Conservation Foundation, *Undermining the future* (10 April 2017) <https://d3n8a8pro7vhmx.cloudfront.net/auscon/pages/815/attachments/original/1465627931/Undermining_the_future_four_stories.pdf?1465627931>.

[20] For clarity, scope three emissions are all indirect emissions that occur downstream of a proposed project. In the case of a coal mine, this includes, for example, all emissions produced as a result of the coal being used for generating electricity or steelmaking, even if the coal is consumed and emissions generated outside Australia.

[21] The nine matters of national environmental significance protected under the EPBC Act are: (1) world heritage properties; (2) national heritage places; (3) wetlands of international importance (listed under the Ramsar Convention); (4) listed threatened species and ecological communities; (5) migratory species protected under international agreements; (6) Commonwealth marine areas; (7) the Great Barrier Reef Marine Park; (8) nuclear actions (including uranium mines); (9) a water resource, in relation to coal seam gas development and large coal mining development.

[22] Terry P Hughes, Kristen D Anderson and Sean R Connolly et al, 'Spatial and temporal patterns of mass bleaching of corals in the Anthropocene' (2018) 359(6371) *Science* 80.



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Change (IPCC) warned that coral reefs are predicted to decline by a further 70-90% at 1.5°C or >99% at 2°C.[23]

Climate change impacts on the Great Barrier Reef were a central feature of the Federal Court case concerning the Environment Minister's approval of the Carmichael coal mine.[24] Relevantly, the Minister decided that although the mine would generate a combined 4,729,988.241 tCO2-e, the overseas component of these emissions (i.e. the 'scope three' emissions) was not a 'direct consequence' of the project. The Minister reasoned that the actual net increase in global emissions (and therefore impacts attributable to the mine) depended on a range of variables, including:

- Whether the coal replaces coal currently provided by other suppliers;
- Whether the coal is used as a substitute for other energy sources, and;
- The efficiency of the coal burning power plants.

While the Federal Court held in favour of the Minister, it explicitly did not reject the relevance of scope three emissions, as the Issues Paper suggests. Rather, the Court considered that the Minister was entitled to consider whether the mine would contribute to a net increase in GHG emissions. Since he concluded that this was "speculative", it was not unlawful for the Minister to conclude the mine would not have a direct impact on the Great Barrier Reef. Relevantly the Court highlighted that its role was not to adjudicate on the merits of the Minister's reasoning, but rather, whether it was lawful under the EPBC Act:

> *On a judicial review application, the Court cannot step into the shoes of the Minister and decide for itself whether Adani's action should be approved and, if so, what conditions should apply. The Parliament has conferred that task and responsibility on the Minister and the Minister alone. This Court's function on a judicial review is significantly more limited, confined as it is to a review of the legality, and not the merits, of the Minister's decision. Ultimately, it is the Minister who must accept responsibility and be accountable for the merits of his decision.*[25]

It is not the case that the Federal Court has adopted a position that is inconsistent with the NSW Land and Environment Court. In fact, the Federal Court's decision in the Carmichael coal mine case demonstrates that the scope three emissions from projects <u>are</u> a relevant factor that must be

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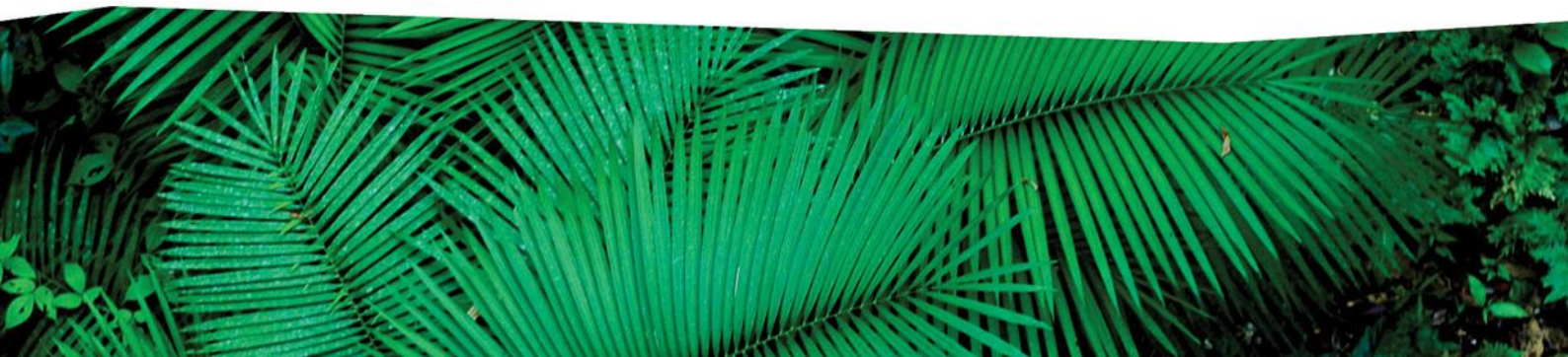
[23] Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C – Summary for Policymakers* (Intergovernmental Panel on Climate Change, 2018) 10.

[24] *ACF Inc v Minister for the Environment* [2016] FCA 1042.

[25] Ibid [4].



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considered by the Minister. However, at a federal level, the Environment Minister is responsible for assessing the merits of a proposed project, not the Federal Court. Therefore, it is the Minister who has the discretion to decide whether a proposed project is likely to contribute to climate change.

In comparison, the NSW Land and Environment Court is empowered to consider the impacts of proposed projects and weigh the public interest in the project proceeding. The approach taken by the NSW planning courts demonstrates a much more sophisticated treatment of potential climate change impacts than the approach adopted by the Environment Minister.

State assessment of GHG emissions

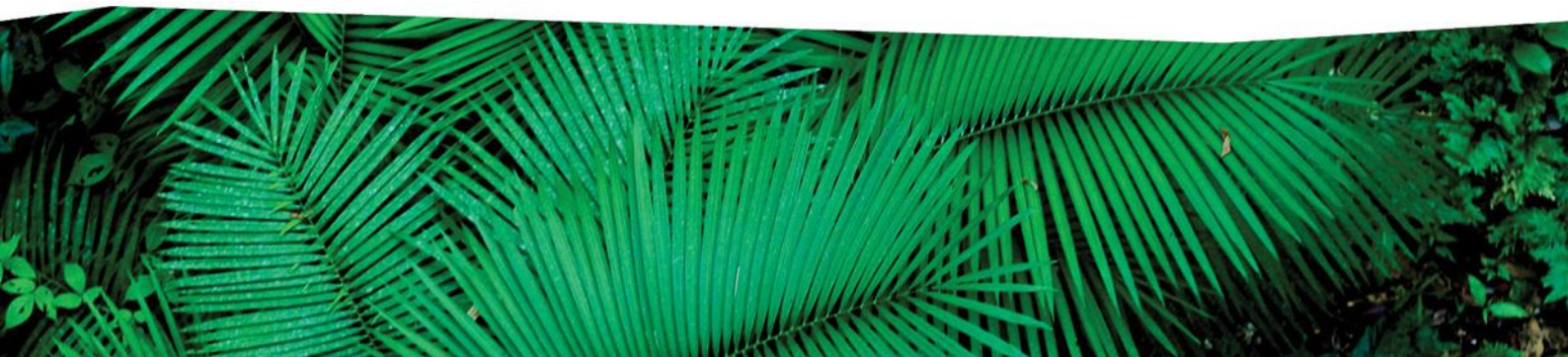
In NSW, three recent decisions have demonstrated that the GHG emissions from proposed projects can be a reason for rejecting the proposal entirely, or imposing conditions designed to manage the contribution of coal mining to global GHG emissions.

- In the Rocky Hill case, the NSW Land and Environment Court rejected a new coking coal mine because it was in the "wrong place" at the "wrong time". The wrong place because the mine would have unacceptable local impacts (e.g. amenity, visual and social impacts). The wrong time, because the GHG emissions from the mine would increase global GHG emissions at a time when there is an urgent need for rapid and deep decreases in emissions.
- In the Bylong case, the NSW Independent Planning Commission rejected the proposed Bylong Valley coal mine, adopting substantially the same reasoning as the Rocky Hill case with respect to assessing GHG emissions.
- In the United Wambo case, the Independent Planning Commission approved a significant expansion of a thermal coal mine in the Hunter Valley, on the condition that the coal is only exported to countries that are signatories to the Paris Agreement, or to countries that have similar policies in place to reduce GHG emissions.

The response to these cases has been a high-profile campaign by the mining industry to remove the power of the NSW courts to consider the scope three emissions of proposed projects. This appears to have been successful, with the NSW Planning Minister introducing a Bill on 24 October 2019 that would prevent the regulation of scope three GHG emissions by removing the requirement for proponents to assess the quantity or impact of scope three emissions.

Discussion

At both state and federal levels, there is an acknowledgement that the scope three emissions of proposed projects are relevant to their assessment. However, there is not a consistent approach as to how the contribution of GHG emissions to global climate change should be assessed and how this should be factored into the public interest of a project proceeding.



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The approach of the Environment Minister in the Carmichael coal mine case study is a crude example of how this assessment should occur, where the Minister's decision that the variables governing the net increase in global GHG emissions made it impossible to calculate the actual contribution of the mine to climate change. The Rocky Hill case study highlights a much more sophisticated and preferable analysis. There, the NSW Land and Environment Court found that the 'market substitution argument' (i.e. the notion that if a proposed project in Australia is rejected the emissions will be generated elsewhere) – adopted by the Minister in approving the Carmichael coal mine – was flawed. The Court held there was no certainty that there would be market substitution by new coal mines and developed and developing countries are increasingly acting to reduce GHG emissions, as evidenced by the Paris Agreement. More abstractly, but relevantly, the Court found that the potential for hypothetical, but uncertain, projects elsewhere is not a reason to approve the proposed project:

> *There is also a logical flaw in the market substitution assumption. If a development will cause an environmental impact that is found to be unacceptable, the environmental impact does not become acceptable because a hypothetical and uncertain alternative development might also cause the same unacceptable environmental impact. The environmental impact remains unacceptable regardless of where it is caused. The potential for a hypothetical but uncertain alternative development to cause the same unacceptable environmental impact is not a reason to approve a definite development that will certainly cause the unacceptable environmental impacts.*[26]

The approach of the NSW government – introducing legislation to remove the consideration of scope three emissions – is an irrational and unsatisfactory approach. By directly contributing to global climate change, the scope three emissions of proposed projects create significant local and global environmental impacts. Removing the assessment of scope three emissions would mean that a crucial environmental impact of resources projects goes unexamined.

Climate change now poses an existential threat to human society. The international community has recognised, through the Paris Agreement, that reducing GHG emissions is a pressing responsibility of governments across the world. The scale and urgency of this problem highlights the need for both supply and demand-side interventions in fossil fuel markets. In the absence of a domestic or international carbon pricing framework, the federal government must consider the EPBC Act as a key tool to regulate the contribution of Australian fossil fuels to climate change.

Recommendations

- The EPBC Act be amended to explicitly require the Environment Minister to consider the contribution of proposed projects to climate change, including scope one, two and three emissions.

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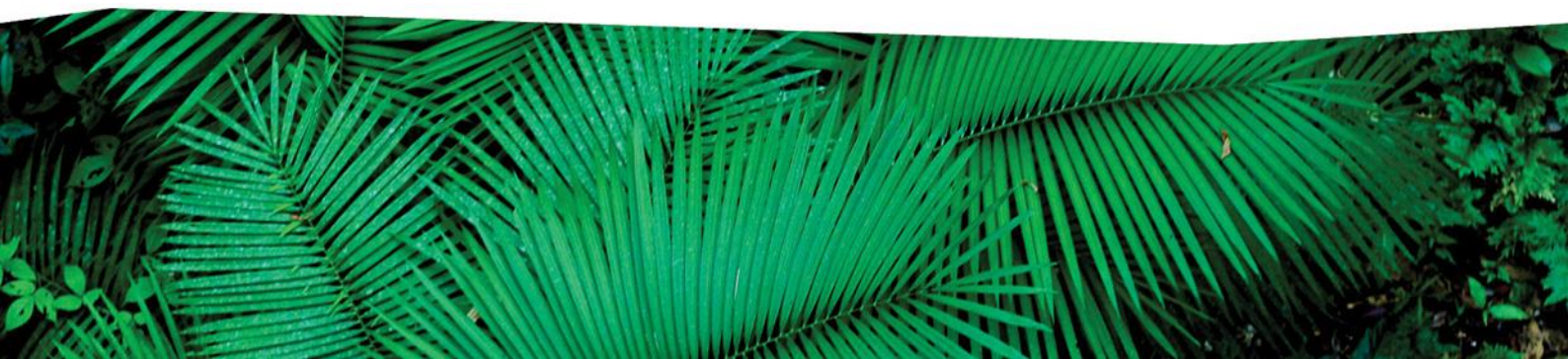
[26] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [545].



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Regulatory accountability and independence

Legal challenges to the Carmichael coal mine

The Issues Paper frames legal challenges to the Carmichael coal mine as an example of 'lawfare' – i.e. the use of legal challenges to obstruct and delay regulatory approvals. However, this argument is not substantiated by this case study. Rather, the Carmichael coal mine legal challenges reveal the value of allowing public participation in approval processes.

- The first federal approval of the Carmichael coal mine under the EPBC Act was set aside by consent, after a challenge to the approval was launched by the Mackay Conservation Group.[27] Although no judgment was delivered, the Federal Court issued a statement explaining that the parties had agreed the Environment Minister had failed to consider approved conservation advice for two listed threatened species, the Yakka Skink and the Ornamental Snake, contrary to the requirements of s 139(2) of the EPBC Act.
- The second approval of the Carmichael coal mine under the EPBC Act was challenged by the ACF on the basis that the Minister had failed to consider the impact of the mine on the Great Barrier Reef, through its contribution to climate change. Although the Federal Court held that the Minister had acted lawfully, the Court made a rare and significant departure from the usual 'costs follow the event' rule. The Court ordered ACF to pay 70% of the Minister's costs and 40% of Adani's costs. In making this decision the Court noted the "considerable public interest and public concern" in the case.[28]
- The latest legal challenge was to the Environment Minister's decision not to apply the 'water trigger' to the North Galilee Water Scheme - Adani's planned pipeline to supply river water for use at the Carmichael coal mine. The Minister conceded the case in June 2019 on the basis that her delegate had not properly considered public comments, as required by s X of the EPBC Act.

As these examples demonstrate, public participation in approval processes has revealed failures by the federal government to lawfully administer the EPBC Act. Far from being examples of 'lawfare' these cases have held the government to account and ensured that Australia's environmental laws are applied as required by law. Even where this litigation was unsuccessful - for example the ACF's challenge to the second approval of the Carmichael coal mine - the courts have recognised the clear public interest in this litigation.

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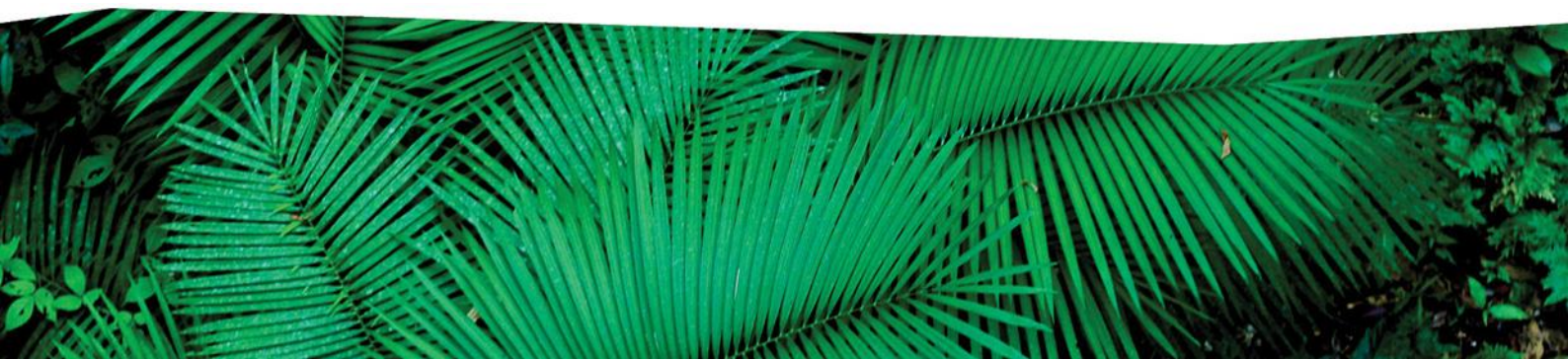
[27] *Mackay Conservation Group Inc v Commonwealth of Australia NSD33/2015* [2015] FCA <https://www.comcourts.gov.au/file/Federal/P/NSD33/2015/3715277/event/28181487/document/607760>.

[28] *ACF Inc v Minister for the Environment* [2016] FCA 1042 [13].



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What are broader impediments materially affecting investment?

Assistance to the resources sector

The Issues Paper does not identify the ways that current government activity encourages and/or subsidises resource sector activity. While the terms of reference refer to a 'focus on regulation with a material impact on business investment in the resources sector" it is important that this is placed in the appropriate context. The issues paper also doesn't consider the changing international market for certain resources due to the Paris Agreement on climate change, the effect this is having on policies of individual countries and the implications this has for global investment.

The mining and resources sector is subsidised by both state and federal governments. Mining companies are the major beneficiaries of the diesel fuel tax credit scheme receiving just over 44% of the total $6.8 billion subsidy[29]. In a May 2019 working paper, the International Monetary Fund calculated that Australia provides energy subsidies of US$29 billion (AU$42 billion), or US$1,198 (AU$1,735) per capita.[30] In a joint report[31] in April 2019 the International Energy Agency and the OECD outlined that for Australia:

> *Energy taxation notably comprises comparatively low tax rates on transport fuels in international comparison. Fossil fuels are untaxed in industrial use and in electricity generation. This also applies to coal, which is used heavily in electricity generation.*

While these subsidies do not all directly flow to the resources sector, it is a major beneficiary. Other work that estimated direct subsidies to the mining and energy sectors has concluded that the mining industry receives about $4 billion a year from the federal government.[32] Estimates on subsidy from

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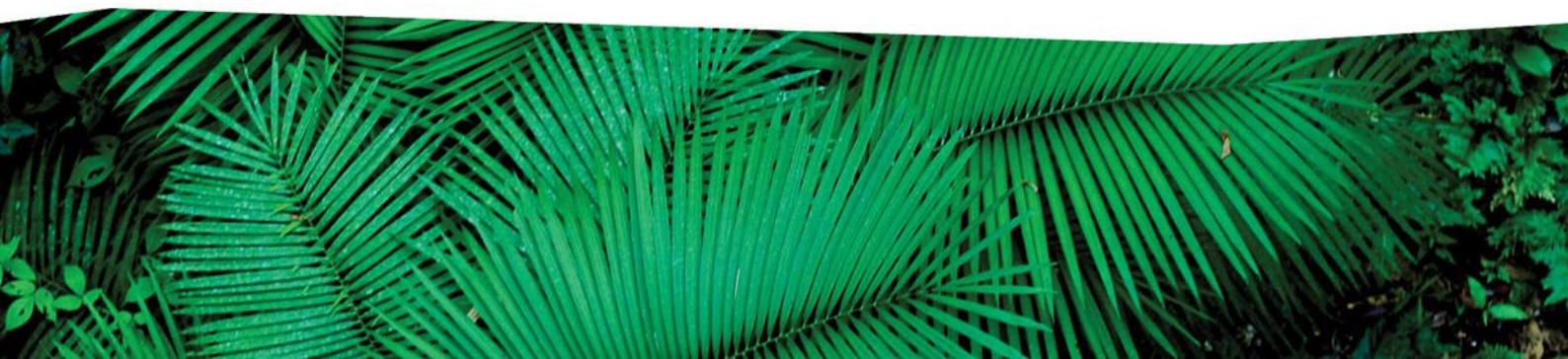
[29] Australian Taxation Office, *Taxation Statistics 2016-17 / Excise – Table 4* (2018) <https://data.gov.au/data/dataset/taxation-statistics-2016-17/resource/198f209f-9591-4e02-9bfb-78ee76be0e59>.

[30] David Coady, Ian Parry, Nghia-Piotr Le and Baoping Shang, *Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates* (2 May 2019) International Monetary Fund <https://www.imf.org/en/Publications/WP/Issues/2019/05/02/Global-Fossil-Fuel-Subsidies-Remain-Large-An-Update-Based-on-Country-Level-Estimates-46509>.

[31] International Energy Agency and Organisation for Economic Cooperation and Development, *Update on Recent Progress in Reform of Inefficient Fossil-Fuel Subsidies that Encourage Wasteful Consumption* (19 April 2019) <http://www.oecd.org/fossil-fuels/publication/OECD-IEA-G20-Fossil-Fuel-Subsidies-Reform-Update-2019.pdf>.

[32] Matt Grudnoff, *Pouring more fuel on the fire – the nature and extent of federal government subsidies to the mining industry* (June 2013) The Australia Institute <https://www.tai.org.au/sites/default/files/PB%2052%20Pouring%20more%20fuel%20on%20the%20fire.pdf>.



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state governments concluded that in Australia state governments spent $17.6 billion over six years in assistance to the mineral and fossil fuel industries.[33]

The Commission has highlighted the Carmichael thermal coal mine as a case study in its Issues Paper. The Carmichael mine proponent is Adani Australia which is being supported by subsidies by the Australian and Queensland governments of over $4.4 billion over the 30-year project life.[34]

The terms of reference of this inquiry imply that regulation is holding back resource investment, without acknowledging the factors that are helping to accelerate resource investment, including the role of government assistance and subsidies. A more balanced discussion on resource regulation would include information on the way governments already provide substantial support to the resources industry.

Changing international markets

The international market for Australia's fossil fuel resources is undergoing a fundamental transformation. The main driver is the commitment by governments around the world to reduce GHG emissions and address the urgent threat of climate change.

The Paris Agreement articulates the shared goal of 195 signatory countries to "keep the increase in global average temperature to well below 2°C above pre-industrial levels; and to pursue efforts to limit the increase to 1.5°C".[35] According to the Intergovernmental Panel on Climate Change (IPCC), the safest pathway[36] for limiting global warming to 1.5°C requires dramatic and urgent changes to global fossil fuel resource consumption (Table 2). A paper published recently by over 11,000 scientists from 153 countries in the journal *Bioscience* recommends quickly implementing massive energy

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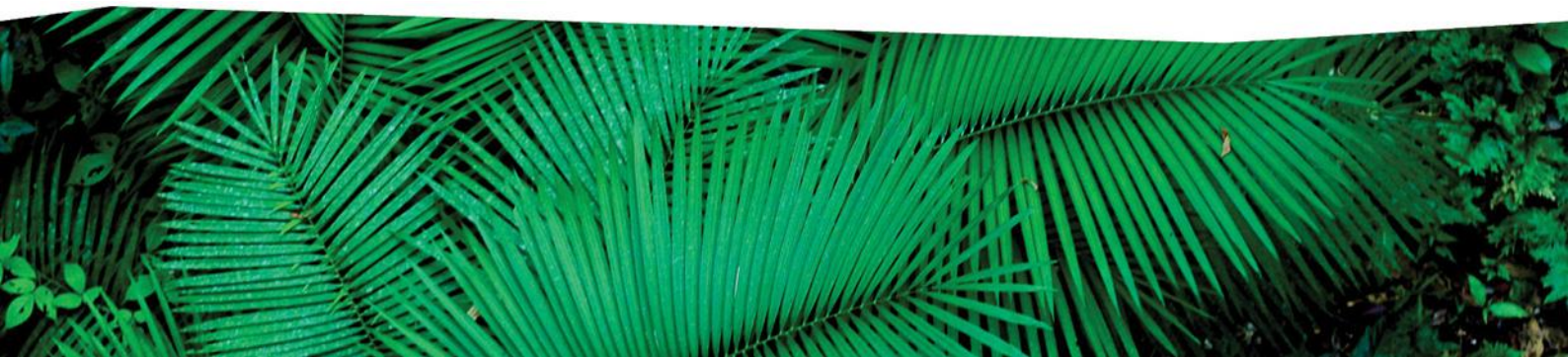
[33] Mick Peel, Roderick Campbell and Richard Denniss, *Mining the age of entitlement – State government assistance to the minerals and fossil fuel sector* (June 2014) The Australia Institute <https://www.tai.org.au/sites/default/files/Mining%20the%20age%20of%20entitlement.pdf>.

[34] Tim Buckley, *Billionaire Adani Being Subsidised for Carmichael Thermal Coal Mine* (29 August 2019) Institute for Energy Economics and Financial Analysis <http://ieefa.org/wp-content/uploads/2019/08/IEEFA-Note_Billionaire-Adani-Being-Subsidised-for-Carmichael-Thermal-Coal-Mine_29-August-2019.pdf>.

[35] *Paris Agreement*, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016) art 2(1)(a).

[36] The IPCC report models four possible pathways to achieve 1.5°C. The 'safest' pathway is P1, as unlike the other three pathways it does not rely on the use of unproven Carbon Capture and Storage (CCS) or Bioenergy with Carbon Capture and Storage (BECCS) technologies. Under this scenario afforestation is the only carbon dioxide removal option considered.



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efficiency and conservation practices, adopting renewable energy and leaving all remaining reserves of fossil fuels in the ground.[37] As one of the world's largest exporters of coal and gas, Australia's fossil fuel resources sector is uniquely exposed to these urgently required changes.

Table 2. Safest pathway to achieve 1.5 with no or limited overshoot as modelled by the IPCC.[38]

GLOBAL PRIMARY ENERGY FROM:	MINIMUM CHANGE REQUIRED BY 2030 (% RELATIVE TO 2010)	MINIMUM CHANGE REQUIRED BY 2050 (% RELATIVE TO 2010)
Coal	-78%	-97%
Oil	-37%	-87%
Gas	-25%	-74%

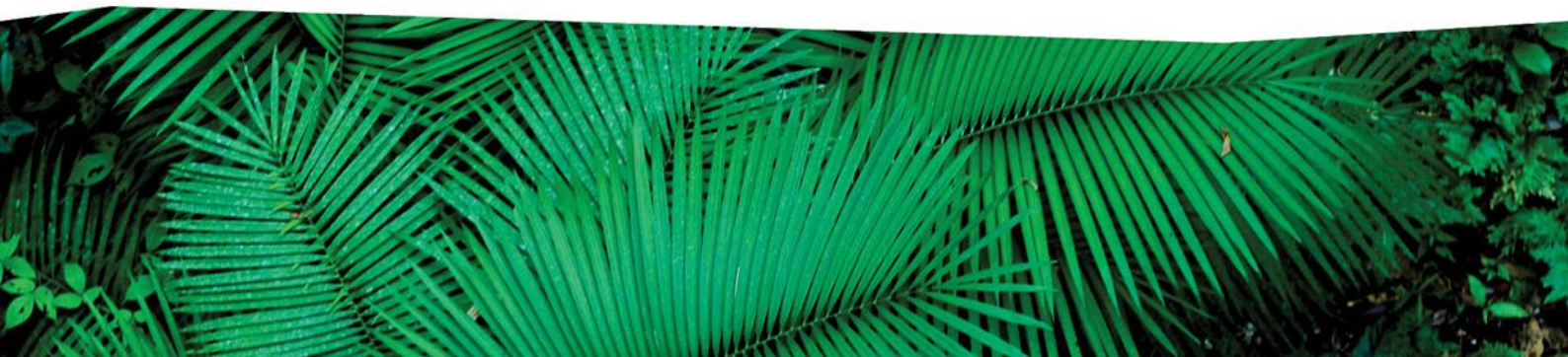
Evidence shows that the global economy is already transitioning - albeit more slowly than is required - towards clean energy and away from fossil fuels. In Australia, solar and wind technologies are now the lowest-cost form of new electricity generation, outstripping coal and gas-fired power plants.[39] The price of renewable energy is predicted to continue its rapid decline through increased investment and research.

These trends are also mirrored globally. The United Nations Environment Programme (UNEP) identifies that investment in renewables capacity in 2018 was about three times the global investment in coal and gas-fired generation capacity and that solar and wind are cheaper options for new

[37] William J Ripple, Christopher Wolf and Thomas M Newsome et al, 'World Scientist' Warning of a Climate Emergency' (2019) 88 *BioScience* 1.

[38] Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C – Summary for Policymakers* (Intergovernmental Panel on Climate Change, 2018) 19.

[39] CSIRO, 'Annual update finds renewables are cheapest new-build power' (News Release, 21 December 2018) <https://www.csiro.au/en/News/News-releases/2018/Annual-update-finds-renewables-are-cheapest-new-build-power>.



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generating capacity than fossil fuel sources in an increasing number of countries.[40] Similarly, a report by financial advisory firm Lazard concluded that renewable energy costs have dropped rapidly and new unsubsidised coal and wind generation is now even cheaper than some existing coal-fired power generation.[41]

Demand from many major Australian thermal coal export destinations has peaked and is now in decline. Japan, Australia's biggest thermal coal export market, is predicted to begin phasing-out coal-fired power generation in the next five years:

> *Japan's coal-fired power capacity will go into decline from 2023, with plant closures accelerating in the 2030s and early 2040s.*[42]

India, a major thermal coal importer, also has ambitious renewable energy plans. The country has a goal of 500 GW of installed renewable energy capacity by 2028, up from 79 GW in 2019.[43]

Elsewhere, the global fossil fuel divestment movement is driving investment away from coal, gas and oil. Over 1,110 institutions with more than USD $11 trillion in assets have committed to divest from fossil fuels.[44] In June 2019, Norway's sovereign wealth fund, which manages $1 trillion in assets, committed to drop more than $13 billion in fossil fuel investments.[45] In Australia, dozens of banks

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[40] United Nations Environment Programme, *Global Trends in Renewable Energy Investment 2019* (2019) Frankfurt School-UNEP Collaborating Centre <https://wedocs.unep.org/bitstream/handle/20.500.11822/29752/GTR2019.pdf?sequence=1&isAllowed=y> 11.

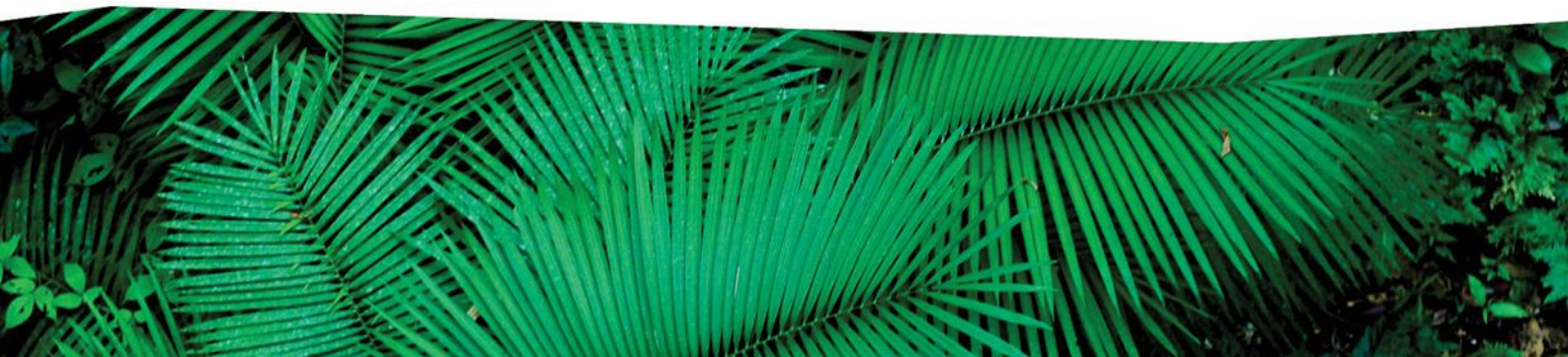
[41] Lazard, *Lazard's Levelised Cost of Energy Analysis – Version 12.0* (November 2018) Lazard <https://www.lazard.com/media/450784/lazards-levelized-cost-of-energy-version-120-vfinal.pdf>.

[42] Simon Nicholas and Tim Buckley, *Japanese Thermal Coal Consumption Approaching Long Term Decline* (July 2019) Institute for Energy Economics and Financial Analysis <http://ieefa.org/wp-content/uploads/2019/07/Japan_Coal_July-2019.pdf>.

[43] Sudarshan Varadhan, 'India plans to add 500 GW renewable energy by 2030: government', *Reuters* (online) 25 June 2019 <https://www.reuters.com/article/us-india-renewables-idUSKCN1TQ1R9>.

[44] Yossi Cadan, Ahmed Mokgopo and Clara Vondrich, *$11 Trillion and Counting* (8 September 2019) 350.org <https://631nj1ki9k11gbkhx39b3qpz-wpengine.netdna-ssl.com/divestment/wp-content/uploads/sites/52/2019/09/FF_11Trillion-WEB.pdf>.

[45] Jillian Ambrose, 'World's biggest sovereign wealth fund to ditch fossil fuels', *The Guardian* (online) 13 June 2019 <https://www.theguardian.com/business/2019/jun/12/worlds-biggest-sovereign-wealth-fund-to-ditch-fossil-fuels>.



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and credit unions have ruled out financing fossil fuel projects.[46] Significantly, the Westpac Group has committed to limit investment for new thermal coal projects to existing coal basins and where the energy content of the coal meets certain benchmarks.[47] While this does not reflect the scale of ambition that is required to avert catastrophic climate change, it demonstrates an increased willingness by major Australian financial institutions to phase-out funding for fossil fuel projects.

While the shift away from fossil fuels will fundamentally alter the profile of Australia's resources sector, it also presents an enormous opportunity. Demand for the minerals and materials required for clean energy technologies such as solar, wind and batteries will rise sharply. Metals which are likely to expand in demand include aluminium (including bauxite), cobalt, copper, iron ore, lead, lithium, nickel, manganese, the platinum group of metals, rare earth metals including cadmium, molybdenum, neodymium, and indium—silver, steel, titanium and zinc.[48] As a major producer and source of many of these metals, Australia is poised to reap significant benefits from the transition to clean energy. Of course, the development of these resources must be achieved without repeating the mistakes of the fossil fuel resources sector. Future minerals development must be environmentally sensitive, respect the sovereignty of First Nations people and the wealth that is generated must be fairly distributed to all Australians.

The changing nature of international resources markets, particularly for fossil fuels but also for the metals required for the clean energy transition, is a fundamental driver of material investment in Australia's resources sector. Understanding the shift away from fossil fuels and towards renewable energy is critical to contextualise the current Australian experience. Deregulation at the expense of environmental and social safeguards should not be proposed as a counterbalance to the accelerating investment trend away from fossil fuel resources.

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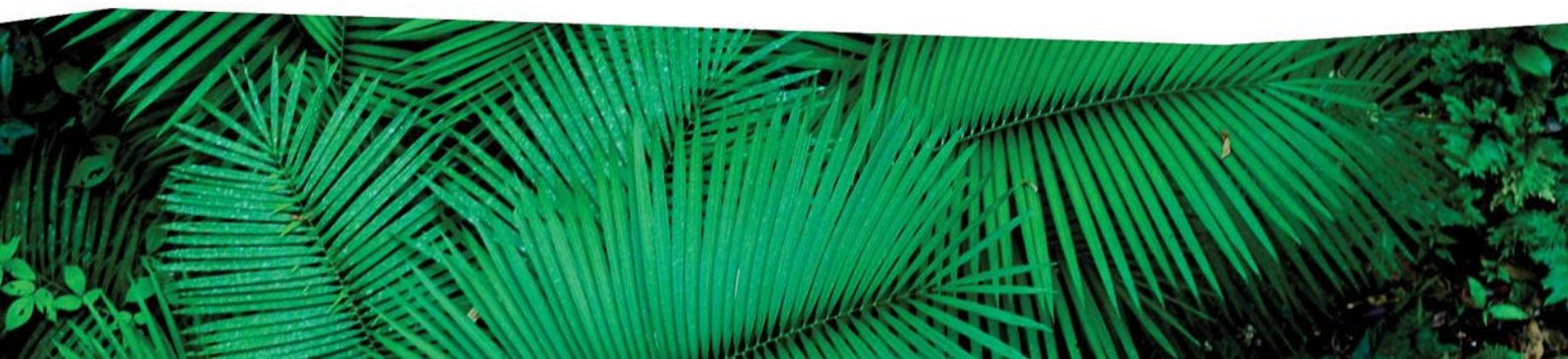
[46] Market Forces, *Fossil fuels – where does your bank stand?* (2019) Market Forces <https://www.marketforces.org.au/info/compare-bank-table/>.

[47] Westpac Group, *Climate Change Position Statement and 2020 Action Plan* (28 April 2017) Westpac Group <https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/sustainability/WestpacCCEActionPlan.pdf>.

[48] World Bank Group, *The Growing Role of Minerals and Metals for a Low Carbon Future* (June 2017) World Bank Group <http://documents.worldbank.org/curated/en/207371500386458722/pdf/117581-WP-P159838-PUBLIC-ClimateSmartMiningJuly.pdf>.



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Best practice community engagement and benefit sharing

Systemic Aboriginal disadvantage has not been addressed by mining operations and most mining agreements have failed to deliver lasting benefits to Indigenous communities. This continuing failure deserves dedicated attention and redress.

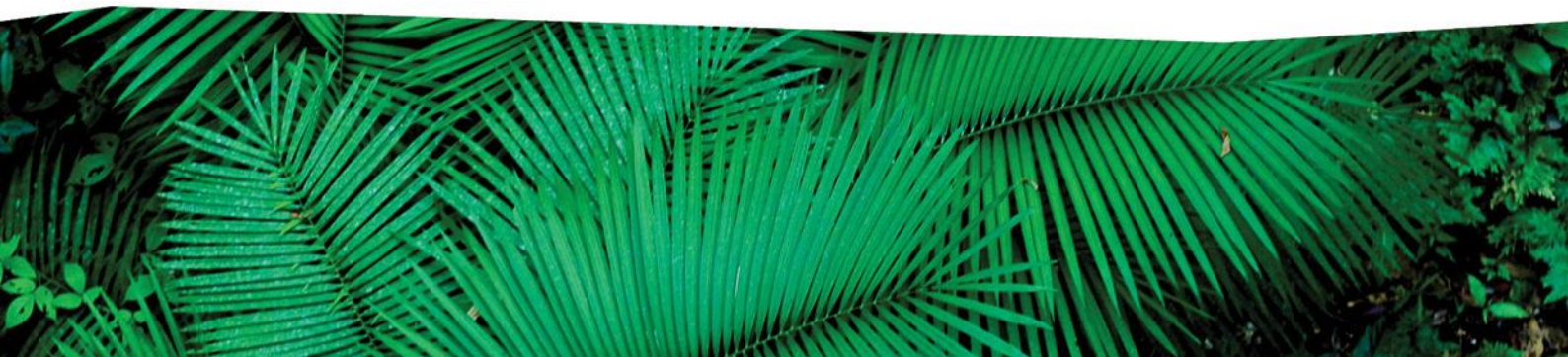
Indigenous people's ability to exercise full, free, prior and informed consent and effective input into the activities of mining operations on their traditional lands is compromised by severe capacity and procedural constraints. The legal and approvals framework should be changed to address this power imbalance.

Mining agreements with Indigenous groups have been justifiably criticised for not operating on a level-playing field. Problems relating to financial and administrative resources, confidential and complex agreements, and inadequate representation show that the "Australian Government is unlikely ever to make *adequate* provision for the proper, professionally-supported preparation and execution of all significant future act negotiations."[49]

ACF maintains that the cards are heavily stacked against Aboriginal people who are concerned about and would prefer to see no mining on their country. The inequity found in the relationship between mining companies and Indigenous communities is further compounded by the limited rights afforded to Aboriginal people in relation to developments on their traditional lands and estate. According to prominent Aboriginal lawyer Noel Pearson:

> *The legal framework that applies to mining and native title legal framework that applies to mining and native title severely disadvantages indigenous landowners. Section 38 of the Native Title Act explicitly says that in arbitrating an application for mining, the National Native Title Tribunal "must not determine a condition ... that has the effect that native title parties are to be entitled to payments worked out by reference to:*
>
> *(a) the amount of profits made; or*
>
> *(b) any income derived; or*
>
> *(c) any things produced."*

[49] Ciaran O'Faircheallaigh, *Financial Models for Agreements Between Indigenous Peoples and Mining Companies* (Research Paper No 12, Centre for Australian Public Sector Management, 2003).



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> *You might as well make clear in the law that the tribunal can only determine beads and mirrors as acceptable outcomes from arbitration, because that is in effect what it has been doing.*

The mining lobby has been quiet on land rights for the past decade. Having secured an advantageous legal framework through the bitter conflicts over the Native Title Act in the '90s, they have learned that ideological opposition to land rights is unproductive for its members. As long as member companies are winning hands-down through the so-called agreement-making process, they have had no interest in conflict.[50]

The *Aboriginal Land Rights (Northern Territory) Act 1976* provides NT Traditional Owners with some ability to veto mining proposals on their lands, however this is unnecessarily complicated and compromised by the conjunctive linkage between exploration approval and mining approval. It would be far better if exploration and mining approvals were discrete and separate processes. Such an approach would appear beneficial for all parties by providing increased clarity and certainty for Aboriginal Traditional Owners (that saying yes to exploration did not preclude any ability to say no to future mining), for industry (as Traditional Owner's would be arguably less likely to oppose exploration applications if they knew this would not constrain their options on future mining approvals) and for other stakeholders like ACF who would have more confidence that the process facilitated and reflected full and informed consent.

Aboriginal communities on native title land have extremely limited ability to say no to mining developments on their country. In ACF's experience, many Aboriginal communities are put in a position where they must choose between (i) non co-operation and non-consent with a mining or development proposal, an option that most clearly reflects opposition to the proposed development but is not of itself sufficient to halt the project and also precludes a place at the table should the project go ahead and (ii) forming an Agreement with the developer. This is invariably promoted by the project proponent as proof of community 'consent' and used to confine debate and any continuing concerns over the operation to in house forums. Often unreasonable pressures and expectations are placed on Aboriginal communities in order to fast track mining agreement and approvals.

Aboriginal communities facing resource developments on their traditional estate need a way to ensure that their key concerns and questions receive meaningful attention, and that they retain a critical and empowered voice, both within and parallel to any Agreement process.

Resource sector advocates claim that the expansion of the industry will foster benefits for remote Indigenous communities, citing the industry as a vehicle to address Indigenous disadvantage in providing direct employment, secondary industry opportunities and additional revenue through royalty payments. Such claims are not an accurate representation of past practices and current

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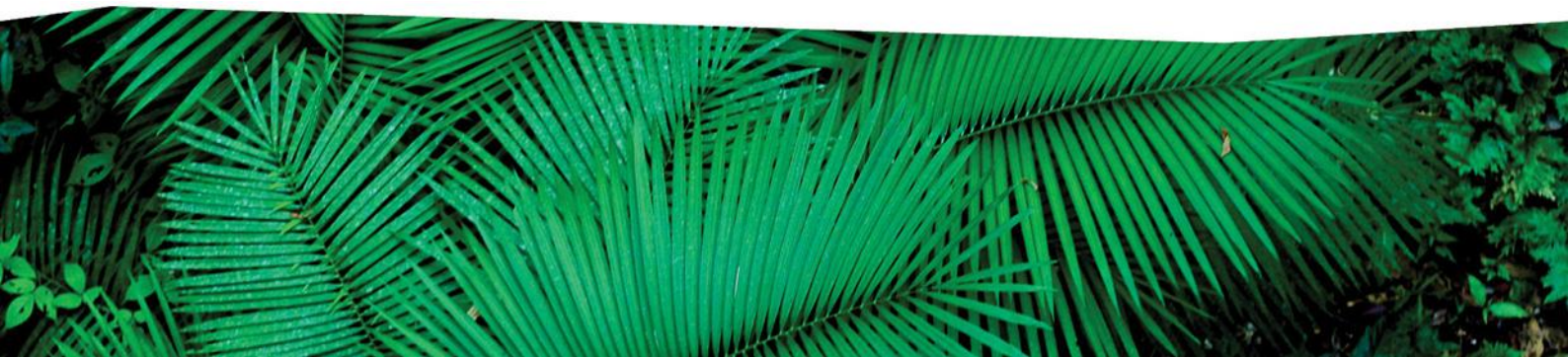
[50] Noel Pearson, 'Boom or dust lifestyle', *The Australian* (Australia) 16 December 2008.



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operational realities as many Aboriginal people have not benefitted substantially from mining and increased mining will not change this trend. Most mining agreements have – and continue – to fail to deliver benefits to Aboriginal landowners. Over a decade ago the Native Title Working Group Report identified obstacles that get in the way of successful agreements for Indigenous communities with mining companies – little has changed:

"There are *only a limited number of good agreements* to provide models…The reasons for the absence of more agreements containing substantial financial and other benefits for traditional owners after almost 15 years of the operation of the *Native Title Act 1993* (NTA) is, in itself, deserving of inquiry."[51]

[51] Department of Families, Housing, Community Services and Indigenous Affairs, *Native Title Payments Working Group Report* (Department of Families, Housing, Community Services and Indigenous Affairs, December 2008) <https://treasury.gov.au/publication/taxation-of-native-title-and-traditional-owner-benefits-and-governance-working-group/attachment-a-terms-of-reference>.