



Australian Government  
Productivity Commission

# Resources Sector Regulation

## Productivity Commission Study Report *Overview*

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# OVERVIEW

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## Key points

- Resources activities demand strict, often complex regulation. But if regulation is not done well it can impose *unnecessary* costs, fail to meet objectives and diminish net community benefits.
- There is considerable scope to improve regulatory processes and reduce unnecessary burdens to encourage resources investment *without* diluting requirements to mitigate impacts on the environment, heritage, worker safety, landowners and communities.
- Indeed, confidence in regulatory regimes is critical for community support for resources investment and, in some areas, more rigour is warranted. Creating an environment conducive to sustained investment requires regulation that not only is administered efficiently but also delivers desired outcomes.
- Notwithstanding recent worthwhile initiatives, regulatory processes in the resources sector remain unduly complex, duplicative, lengthy and uncertain, and may be becoming more so.
- Sustained improvement requires greater attention to the pre-conditions for leading-practice regulation — clear regulatory objectives, effective governance, incentive and accountability frameworks for regulators, and adequately resourced institutions. A focus on these foundations would also help industry investment recover from the impacts of COVID-19.
- Leading regulatory practice supports an effective risk- and outcomes-based approach by regulators who: are accountable and transparent; follow clear and predictable processes; build fit-for-purpose technological and staff capabilities; collect, use and disseminate data effectively; and work to inform the community about their activities.
- Improved co-operation and coordination between regulators, both within jurisdictions and between the Commonwealth and States, would reduce delays, duplication and inconsistency.
- Enhanced regulator accountability and transparency — including around monitoring and compliance actions and performance meeting timelines — would reduce costs, improve regulated outcomes and build community trust. Clearer requirements for mine rehabilitation would also deliver community and industry reputational benefits.
- The destruction of Juukan Gorge has focussed attention on the inadequacy of Indigenous heritage protection regimes. Early engagement with traditional owners as part of the project assessment process is critical, centring them in decisions affecting their heritage.
- Capability gaps within regulators are a key cross-cutting issue. Governments should assess whether their regulators are appropriately funded, and the potential for greater cost recovery.
- Communities and landowners understandably want to know how projects affect them and comment on development proposals. Meaningful engagement should begin early in a project and continue throughout. Trusted institutions can play an important role through building community understanding of resources projects.
- Companies should consult and coordinate with local governments and community groups to promote local benefits from their community investments. Mandating requirements such as local content can be counterproductive.
- There are several factors limiting the benefits that traditional owners derive from agreements with resource companies, including resourcing constraints within Indigenous organisations. Clearer guidance on how funds in charitable trusts can be used is needed.

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# Overview

It is hard to overstate the role of the resources sector in modern life. Raw materials for the concrete, masonry, steel and glass used in infrastructure and dwelling construction; the steel and other metals used in cars, trucks, trains and planes and the fuels that run them; plastics and synthetic fabrics that are ubiquitous in packaging, clothing, communications and other technologies and construction materials; and the components of any technology including medical devices, computers, mobile phones, solar panels and batteries, for example, originally come from quarries, mines and wells.

Australia is a resource rich country, with global frontier expertise in exploration and extraction. The resources sector extracts a diverse range of minerals, and oil and gas. Over 300 mines and 2200 quarries are in operation. Oil and gas wells add to the number of active sites.

Resources are a significant economic contributor — accounting for about 9 per cent of Australia’s GDP in 2019-20, directly employing just over 240 000 people and comprising over 60 per cent of the value of exports. In 2018-19, the resources sector paid about \$25 billion in wages and salaries, and the minerals sector paid about \$40 billion in company taxes and royalties. The oil and gas sector contributed about \$6 billion in taxes, royalties and other fees in 2017-18. Benefits also flow to the community via domestic shareholdings.

Industry and some governments see significant growth potential for the sector, although the future mix of output and investment will reflect multiple (often competing) factors including global and domestic policies and new technologies. For example, net-zero emissions targets will likely see rising demand for the many minerals required for renewable energy technologies and declining demand for coal and other fossil fuels in some countries. However, global population growth and economic development will likely see continued demand for fossil fuels, particularly gas as countries transition to lower-emissions sources of energy. While the COVID-19 pandemic has put downward pressure on energy demand in the short term, medium-term outlooks remain strong.

## **The focus of this study is regulatory processes**

Two principal factors motivate strict regulation of the resources sector in Australia. First, resources (with a few exceptions) are owned by the Crown on behalf of the community. Hence, governments have a role in managing resources development to deliver a community dividend. Second, over their life cycles resources activities have the potential to cause harm to the environment, sites of cultural and heritage significance, workers, landowners and surrounding communities. Given the physical nature of resources activity, some level of harm is unavoidable, but regulations seek to mitigate this to maximise *net* benefits to the community.

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Although essential, if not done well regulation can impose substantial unnecessary costs. Poorly designed or administered regulation can impose burdens on industry (as well as governments) for negligible community benefit, deterring companies from investing in projects that would have been worthwhile from a national perspective. Ineffective regulation can also fail to adequately protect environmental, cultural and heritage assets, the safety of workers and the health of local communities.

This study evaluates regulation of the resources sector, identifying issues and leading-practice approaches that address them. The primary focus is on how regulation is designed, administered and enforced, and whether there is scope to reduce unnecessary burdens created by regulatory processes and practices without diluting environmental and other regulated outcomes. Indeed, by undermining community support for the sector, weakening regulatory regimes would ultimately be counterproductive.

Well-accepted and widely-applied regulatory principles are used to identify leading practices. Consistent with these principles, leading practices are those that seek to minimise burdens on businesses and regulators subject to achieving clear, evidence-based regulatory objectives. Examples are provided where possible. In some cases, the examples simply align with well-established norms for good regulatory practice. In other cases, the leading practices are more innovative.

The study examines each stage of the project life cycle. It considers potential impediments to investment from the regulation of resources management, land access and project assessment and approvals, along with issues stemming from broader regulatory settings. (Although many of these broader settings lie beyond the scope of this study, the study makes findings and recommendations where the issue has been considered by the Commission previously.) In addition, it evaluates management of environmental and other regulated outcomes, as well as the effectiveness of the Indigenous heritage assessment process.

The impacts of resources activities have always provoked some level of disquiet, particularly among nearby communities. In recent years, the potential for development of unconventional gas reserves, and concerns about environmental and social impacts more generally, have prompted pushback against a range of resources developments from affected landowners, communities and other groups. Resources companies are increasingly conscious of the need to develop and maintain community acceptance of their activities — their ‘social licence to operate’.

Reflecting the importance of these issues, the study has also examined ways in which resources companies engage with communities and share benefits, and identified leading practices.

A significant share of resources activity takes place on land that Aboriginal and Torres Strait Islander communities either own (under land rights legislation) or have native title interests in. This raises distinct sets of issues relating to land access, community engagement and benefit sharing.

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## 1 Australia's resources sector at a glance

Resources activity occurs in every State and Territory, and in Commonwealth waters (figure 1). Coal mines are located almost entirely in east-coast States, while metal ore mines are mostly situated in Western Australia. Conventional oil and gas fields are located both inland (concentrated in Queensland and South Australia) and offshore (primarily off the north-west coast of Australia).

Australia has large quantities of resources that have not yet been extracted (figure 2). While some deposits have been identified with certainty and assessed as being economically viable, others are more speculative and may be difficult to extract.

The resources market is global. Australia operates alongside major producers such as China, the United States, Russia, Saudi Arabia, Brazil and Canada. While resources are found in many countries, much of what others produce is consumed domestically. For example, China produces more resources than any country in the world — about four times the value of Australian production — but due to high domestic demand, it is also the largest global importer. In contrast, Australia is a small consumer of its own production and exports about 90 per cent (by value) of the top 10 commodities it produces.

From the mid-2000s, Australia experienced an unprecedented resources investment boom. Rapid industrialisation and urbanisation in emerging economies drove a spike in global prices for commodities used in steel and energy production, leading Australian producers to expand production capacity, particularly in coal, iron ore and liquefied natural gas.

Investment peaked in 2012-13 at \$103 billion, about ten times the level of the early 2000s (figure 3). Since then, it has wound down as new projects have transitioned into production. Exploration expenditure has also decreased — from a peak of \$8.4 billion in 2012-13 to \$4 billion in 2019-20. And as at October 2020, the pipeline of committed major projects — about \$39 billion worth — while still large, was about one seventh of the October 2012 level.

While there has been a recent recovery in investment since mid to late 2019, driven by increasing prices for some resources, some companies deferred investment decisions in the first half of 2020 due to the COVID-19 pandemic. The initial stages of the pandemic had a particularly negative impact on small explorers, who faced dwindling cash reserves. The Commonwealth and State governments implemented support measures to assist explorers over this period.

## Figure 1 Resources production occurs Australia wide

Operating mines and conventional oil and gas fields, selected major projects highlighted

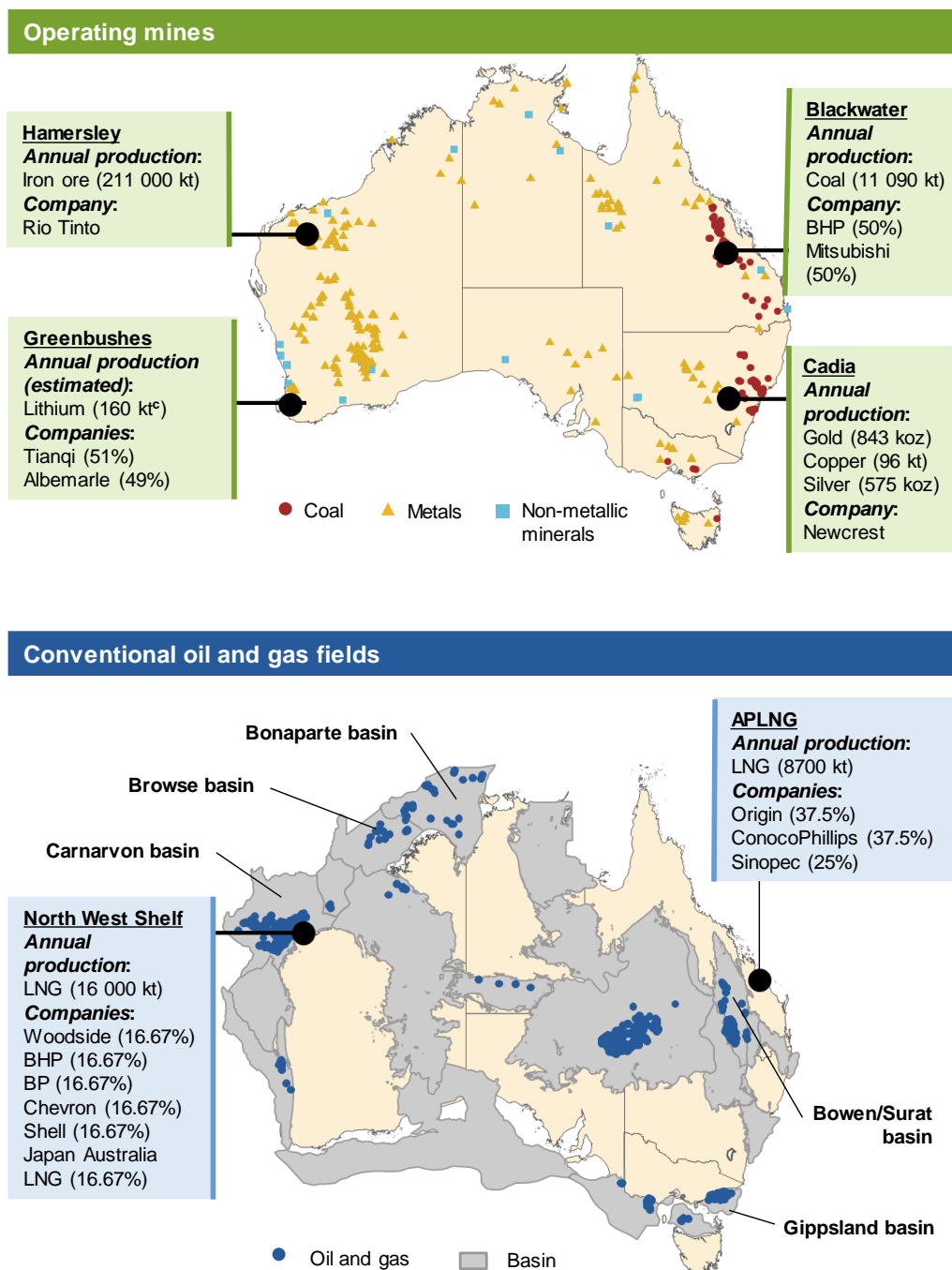


Figure 2

## Known reserves in Australia are large

Remaining years of resource life given known deposits of selected resources, 2018 (data for oil and gas are from 2014)

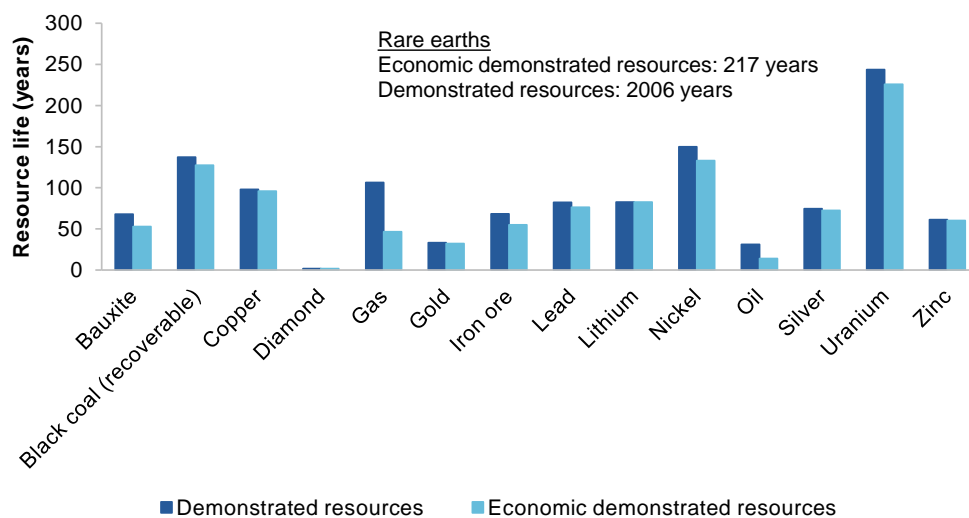
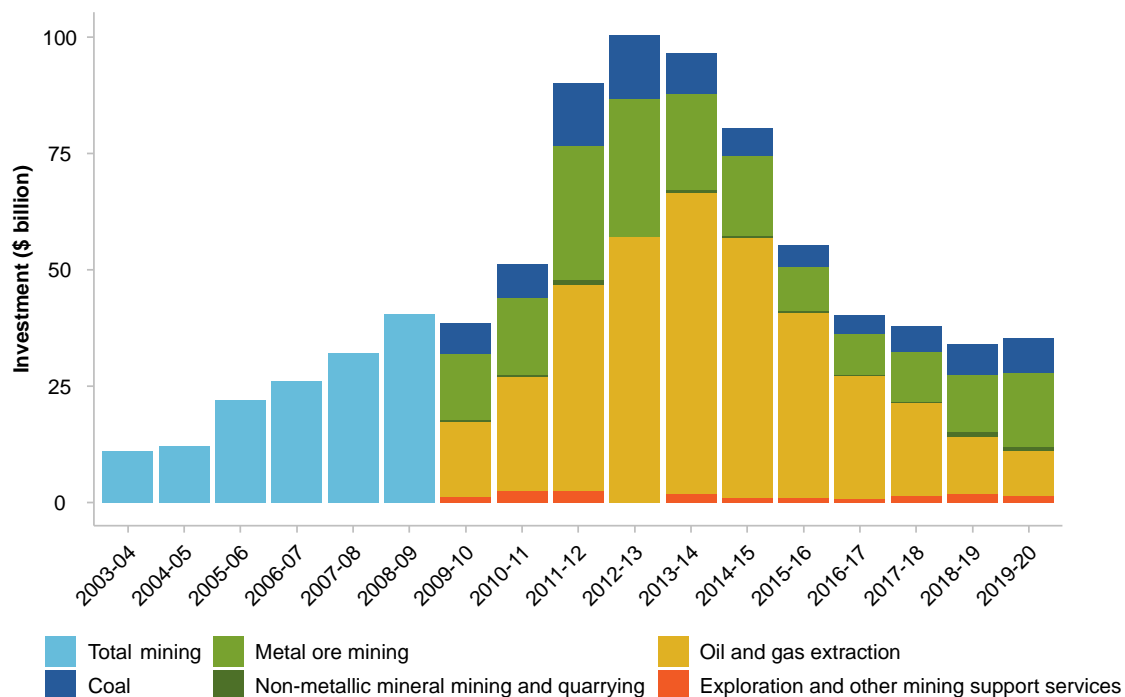


Figure 3

## Investment has wound down from boom levels

Resources sector investment by broad commodity, 2019-20 dollars



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## **2 The regulatory landscape is complex**

Project proponents and operators must navigate a large array of regulatory requirements across a project's life cycle. Before exploration or extraction can begin, a proponent has to:

- get a licence or permit
- assess the potential impacts of planned activity
- obtain any required environmental and other approvals.

Once operational, activity has to be monitored and when a site ceases operation, it has to be rehabilitated as agreed (unless this has happened progressively over the life of the project).

All levels of government, with multiple agencies in each jurisdiction, play a role in creating, administering and enforcing regulations. It is a complex regulatory landscape and comprehensive depictions challenge regulators themselves. Figure 4 provides a stylised mapping of the system that inevitably masks the regulatory complexity. Opportunities for regulatory outcomes that create unnecessary costs for companies and fail to achieve regulatory objectives are manifold.

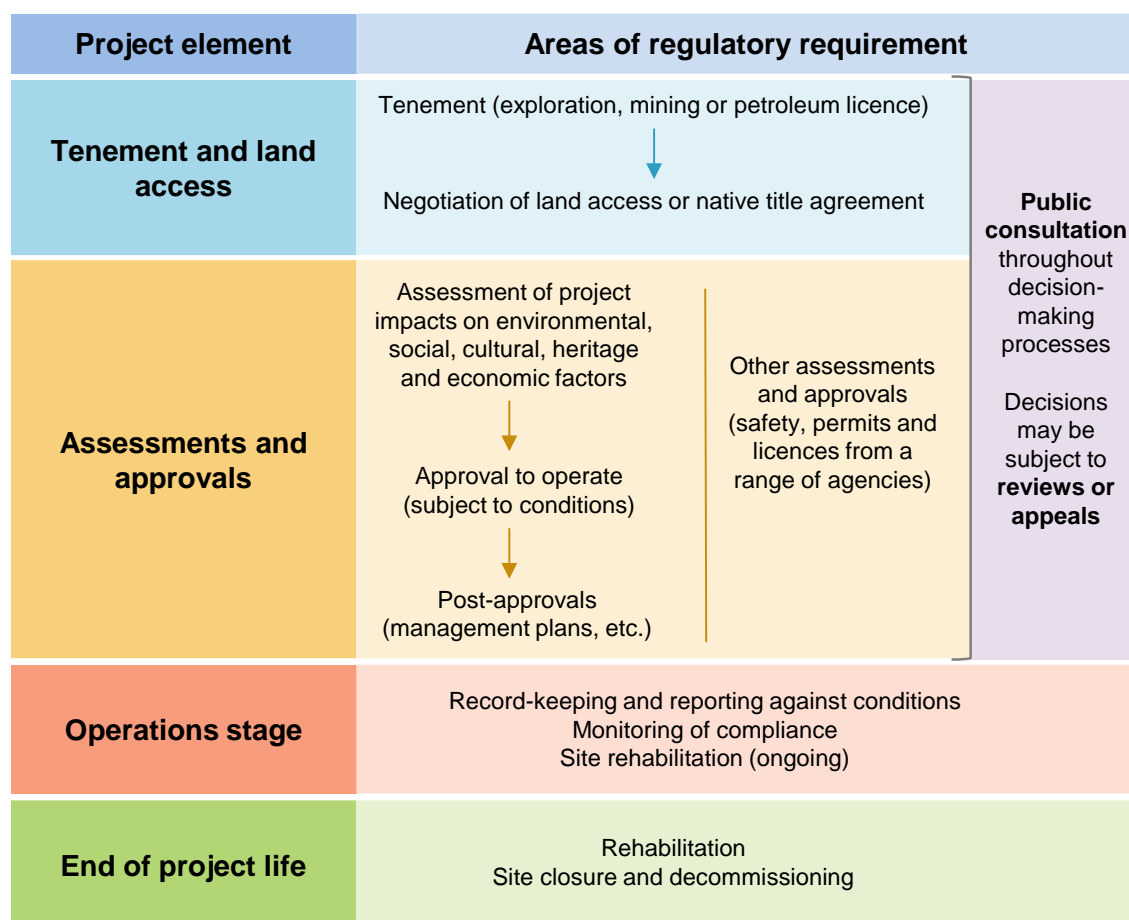
## **3 Australian jurisdictions have been working to improve their regulatory systems**

Australia is generally considered a desirable place to invest. Australian jurisdictions perform favourably in international indices of investment attractiveness due to their political stability, strong legal systems and relatively predictable (if cumbersome) regulatory regimes. And given the many billions of dollars in investment over several decades, the regulatory system does not appear to have acted as a significant brake.

Indeed, the vast majority of applications for new resources projects are approved (eventually). And while the number of potential investors choosing to allocate their capital elsewhere rather than navigate the regulatory maze in Australia is unknown, evidence suggests that the regulatory regimes in other major developed resources-producing countries, including Canada and the United States, are similarly complex and time consuming.

But that is not a wholesale endorsement of the Australian regime. Many reviews over recent years (several by the Commission) have identified significant shortcomings and recommended numerous improvements, and reforms of one type or another have recently been introduced or are being progressed in every jurisdiction (box 1).

Figure 4 Areas of regulatory requirement for resources projects



Several reviews are underway in parallel with this study. At the Commonwealth level, a review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) was completed in October 2020. In August 2020, the South Australian Productivity Commission completed an inquiry into the effectiveness of regulation in the extractives supply chain. Western Australia has reviewed its *Aboriginal Heritage Act 1972* and New South Wales is reviewing its work health and safety regime for mining.

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## Box 1      **Resources regulation has been an active reform area**

Jurisdictions have recently introduced or are progressing reforms in many areas of regulatory effort. Selected examples include:

- Amendments to the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth) to improve consultation and transparency requirements for offshore petroleum activities. And the Australian Government's Deregulation Taskforce led to a partnership with Western Australia to develop an online portal that will enable project proponents to apply for WA and Commonwealth environmental approvals via a single application, and track its progress. A database of biodiversity studies will also be established.
- New South Wales has developed a Minerals Strategy with initiatives including a new titles management system to increase efficiency, transparency and accountability. Other reforms include a more flexible approach to environmental offsets and improved compliance and reporting requirements for rehabilitation.
- Victoria has amended its *Mineral Resources (Sustainable Development) Act 1990* to support a transition to risk-based work plans and establish a Mine Land Rehabilitation Authority. And the *Environment Protection Amendment Act 2018* is due to take effect from 1 July 2021 with a focus on risk-based regulatory oversight and strengthened compliance and enforcement powers.
- Queensland has introduced reforms to improve site rehabilitation and financial assurance outcomes, as well as operational policies and guidance to provide greater detail on legislative requirements. A risk-based approach to environmental regulation is being implemented.
- South Australia's updated *Mining Act 1971* includes, among other changes, a commitment to increased transparency — all inputs to government decision making will now be made public. And a regular review and amendment process will test whether regulation remains fit-for-purpose.
- Western Australia has a commitment to monitoring, reporting and improving the performance of the resources regulator and reforms to regulation are being driven through a Streamline WA program. Resources-related environmental approvals are the first key area of reform.
- Tasmania has amended its *Mineral Resources Development Act 1995* with the aim of clarifying the Act's intent, removing duplication and streamlining processes.
- Reforms to the Northern Territory's environmental protection system focus environmental assessment on projects' significant impacts and increase transparency.

Some jurisdictions are also intending to fast track regulatory reforms applicable to the resources sector as part of the COVID-19 economic recovery. For example, Western Australia will amend mining regulations to reduce timeframes for assessing exploration applications.

## 4      **Considerable scope for improvement remains**

Notwithstanding initiatives in recent years, there is a widely held view within the sector that regulatory processes are becoming more complex to navigate, more protracted and more uncertain, for little, if any, improvement in regulated outcomes. The industry considers that Australia's global ranking as a place to invest is slipping as a result, and study participants have identified a range of regulatory issues (box 2).

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## Box 2      **Participants consider there is room for improvement**

[There are] significant opportunities to reduce regulatory duplication and streamline interactions between state and national legislation, to increase investor confidence and support timely project assessment processes. (SA Government, sub. 25, p. 5)

There has been a trend over the past decade or so for approval timeframes to lengthen beyond what is necessary to deliver a thorough assessment of the merits of the project and afford natural justice to all relevant parties with an interest in the project approval decisions. (QLS, sub. 41, p. 3)

Undefined and protracted delays mean that critical market windows that come and go with fluctuating ore prices are lost, and companies cannot proceed with their development. (TMEC, sub. 46, p. 3)

Inconsistent, overly prescriptive and non-risk-based conditions make it difficult for companies to implement project approvals. (CMEWA, sub. DR74, p. 4)

Rather than regulations being 'overly complex' or 'prescriptive' in Australia, attention needs to be placed on the chronic ambiguity and discretion that is provided under resource laws throughout all jurisdictions in Australia. Vague regulation can hinder investment in Australia through affecting the certainty as to how it will be interpreted for each project and what is expected of a proponent. (EDO, sub. 40, p. 29)

The direct financial costs to proponents of preparing assessments can be in the millions of dollars. The greater cost to proponents, and the community, however, comes from the length of time it takes to navigate the environmental approval process (box 3). But getting hard data on assessment and approval timelines is challenging, let alone quantifying the extent to which these pose unnecessary burdens. The NSW Minerals Council noted an average assessment timeframe for seven projects since 2016 of nearly 1000 days, although whether this is representative is unknown. There is some evidence of an increase in the time required to obtain primary approval at the Commonwealth level (figure 5).

There are a number of likely causes of delays. Proponents blame increasingly risk-averse regulators for unclear and ever-growing information demands and their failure to meet statutory timelines, while the regulators counter that they often need to stop the clock and request more information from proponents who provide inadequate documentation. But the two are not unrelated — increased demands for information are likely to result in more documentation gaps. The difficulty in getting performance data itself is indicative of systemic problems within many regulatory regimes.

Overall, the Commission has found that there are many facets of current regulatory arrangements warranting improvement, not only to reduce unnecessary costs but also to bolster regulated outcomes. Going forward, trust in the efficacy of the regulatory system will be essential for ongoing community support for investment in the resources sector. In short, regulation that is both effective and efficiently administered is required to create an environment conducive to sustained investment over time.

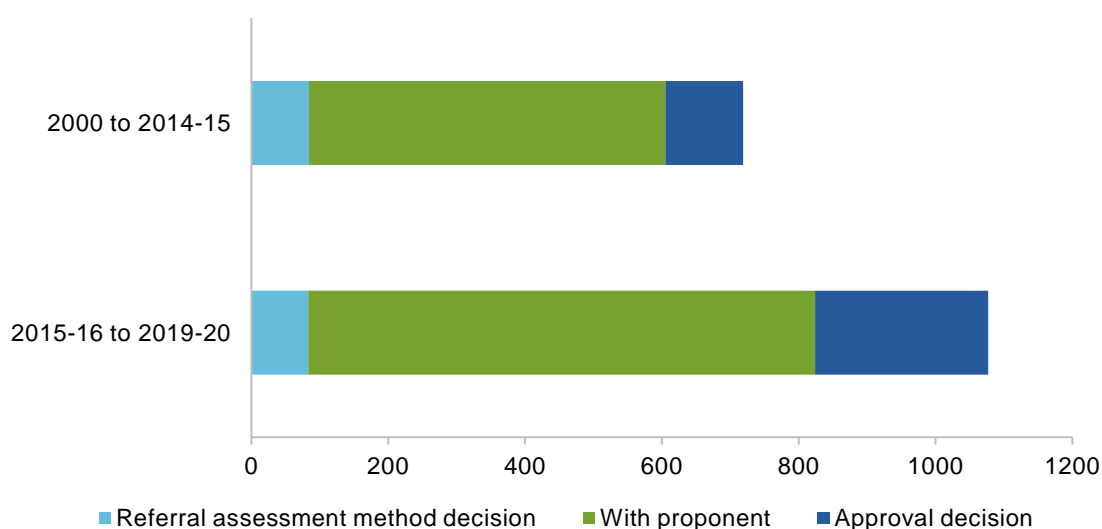
### Box 3 The cost of delays can dwarf other regulatory costs

Project delays are costly because the delay of a net revenue stream leads to net revenue forgone. The Commission has previously estimated that a one-year delay for a gas project could cost in the order of 10 per cent of its net present value, acknowledging that such estimates are highly sensitive to assumptions, particularly the cost of capital (discount rate), and projected revenue flows including future commodity prices.

Given the size of most resources projects, delay costs can dwarf the direct costs of regulatory obligations such as assessment documentation and studies, even though these can run into millions of dollars.

### Figure 5 Environmental approvals can take years to secure

Average time taken for environmental approval decisions for resources projects under the EPBC Act



The Commission has also found that regulatory regimes in all jurisdictions have elements of leading practice (some are noted below, selected practices are summarised in table 1 at the end of the overview, and many more are identified throughout the report), although no one jurisdiction has a leading-practice *system*. This means that there is ample scope for jurisdictions to learn from each other. To this end, Ministers should establish a forum to foster such interaction.

### Risk- and outcomes-based regulatory approaches would help focus on the things that matter

Claims of increasing regulator demands for information, leading to increased costs for proponents with little beneficial impact on outcomes, were a strong theme among study participants (box 4). This view was not confined to industry participants. The NSW

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Department of Planning and Environment has observed that ‘[environmental impact assessment] documents are getting longer and more complex without necessarily improving public understanding or decision making’.

**Box 4            More requirements can raise costs for little apparent benefit**

Industry participants pointed to increases in assessment requirements and approval conditions.

[Environmental impact assessment (EIA)] requirements have proliferated over recent decades as governments (state and federal) are taking an increasingly risk-averse approach to EIA. Increasing ... requirements are resulting in wide-ranging assessments of all impacts, regardless of materiality/level of risk. (MCA, sub. 11, p. 12)

Failure to adequately scope an EIA can lead to a situation where excessive resources are expended on minor impacts, leading to voluminous environmental impacts statements that cover an unnecessarily wide range of impacts in far too much depth. (Woodside, sub. DR82, p. 2)

There is a trend for more conditions to be imposed on all projects due to a one-size-fits approach, rather than an impact-based analysis. (BCA, sub. 43, p. 5)

A cycle of increasing regulatory compliance (scope creep) can occur when business has a vested interest in receiving an important approval from the regulator, so there is no incentive to push back on additional information and reporting requests made from these bodies, in the interests of time (as often the associated financial cost associated with any further delay in receipt of approval outweighs the benefit). (Roy Hill, sub. 7, p. 5)

Environmental impact assessments are indeed lengthy — the documents can run to thousands of pages. Of itself, this is not necessarily a problem — expansive assessments may deliver benefits to the community where they are well targeted at the risks imposed by the project. However, the weight of submissions and other evidence suggest that requests for information are generally not risk based, which can result in unduly high costs for companies (particularly protracted delays), barriers to community engagement and unnecessary administrative loads on regulators who have to digest the material.

The lack of a targeted risk-based approach appears to arise mainly from regulators’ approaches to administering regulation rather than the regulations themselves — potentially a reflection of regulators’ increasing risk aversion. It is impossible to gauge the extent of this, but any increase in risk aversion might reflect a lack of support, clear guidance and expectations from governments at a time of heightened community concerns about some resources activities. It might also reflect gaps in regulator capacity and capability (discussed below).

Irrespective of whether risk aversion has increased, more thorough application of a risk-based approach to environmental impact assessment (box 5) would help streamline processes and deliver sounder environmental outcomes. Earlier scoping of key risks, including through community consultation, would give regulators and proponents a clearer and shared understanding of what information is needed to support decision making.

In addition to the issues at the assessment stage, several participants raised concerns about inappropriate approval conditions and a reliance on prescriptive conditions. Failure to tailor conditions to projects leaves proponents facing requirements that sometimes make little

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sense in their operational context and that can even be impossible for them to comply with. Unclear or under-specified conditions can also limit regulators' ability to enforce them once projects are operational. In addition, altering an approval in some jurisdictions can involve a time-consuming revisiting of the approvals process. The high cost of seeking changes to approval conditions may deter companies from adopting new technologies, and companies are often loath to push back on demands for fear of creating more delays.

A rigid one-size-fits-all approach is also increasingly out of step with a shift towards new 'critical minerals' (such as lithium, boron and rare earth elements), reworking old mine sites and a tendency for newly identified deposits to be deeper and more challenging to extract. In contrast, greater use of outcomes-based approval conditions would foster innovation — as these conditions do not dictate how companies should achieve certain outcomes (box 5).

#### **Box 5      What is risk- and outcomes-based regulation?**

A risk-based approach to regulation bases regulatory decisions and priorities on the likely risks posed by an activity, taking into account both the potential seriousness of a risky outcome and the likelihood of it occurring. Appropriate and proportionate levels of control are then adopted.

Risk-based regulation requires that regulators begin by identifying the risks that they need to manage, not the rules they have to enforce. This requires that they have accurate information and data about the operation of regulated industries, and adequate resources to target their efforts to the areas presenting the greatest risks. In an ideal setting, a risk-based approach can facilitate the efficient and effective use of regulatory resources.

Outcomes-based regulations set out the outcomes or standards that regulated entities must achieve, without specifying what steps must be taken to comply. This contrasts with prescriptive regulation, which sets out in specific detail how regulated entities should behave.

Outcomes-based rules are generally preferable, as they are flexible enough to accommodate different or changing circumstances, including material changes to how an industry operates, and they enable businesses and individuals to choose the most cost-effective ways of complying. However, prescription does have its place in the regulatory framework, and there are instances where it is necessary — for example, where there is a high degree of uncertainty regarding the nature or severity of project impacts.

There are several examples where principles of risk-based or outcome-based regulation have been introduced.

- In New South Wales, draft guidelines on scoping environmental impact statements indicate that matters to be addressed would be categorised as either a 'key issue' (requiring detailed assessment) or 'other issue' (where approaches are understood and specialist studies are not required).
- Measurable outcomes can be identified and pursued through proponent design of risk-management strategies best suited to their project (as now happens in the offshore oil and gas industry under the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and in Norway), rather than through prescriptive operating conditions.

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- A risk-based approach to due diligence when granting tenements to identify likely non-compliant operators would bring community as well as reputational benefits to other operators. Explorers could be required to notify landholders of low-impact low-risk activity in person (as required by the Queensland Land Access Code) rather than via formal negotiation.

## **Greater co-operation, coordination and concurrence would reduce delays, duplication and inconsistency**

Projects typically require approvals from multiple agencies, which can lead to protracted (sometimes sequential) approval timeframes, duplicated effort and inconsistent requirements (box 6).

### **Box 6      Involvement of multiple agencies can create confusion**

Minerals developments are subject to multiple state/territory level approvals requiring interactions and oversight by a range of different agencies, including but not limited to those responsible for planning, environment, water and mining. Managing the myriad approvals and licencing processes can and does lead to additional confusion, costs and delays. (MCA, sub. 11, p. 17)

... the Company has spent an enormous amount of time constantly following up with the different NSW Government departments for progress updates and simple clarifications. (AMEC, sub. 31, p. 15)

Where dual-processes are required, additional and unnecessary work is created, and where multiple parallel approvals are required across jurisdictions and agencies, there is no central coordinating agency or office, and a lack of coordination and prioritisation can lead to project delays. (Woodside, sub. 18, p. 4)

The imposition of approval conditions under the EPBC Act also increases compliance costs across Australia, particularly when those such approval conditions duplicate or impose additional requirements that are similar to State or Territory requirements. (NSW Minerals Council, sub. 28, p. 37)

Regulatory coordination within jurisdictions has improved over the last decade. The Commonwealth and most other jurisdictions have some variation of a lead agency model and all jurisdictions other than the ACT offer major project facilitation. But navigating the regulatory landscape remains challenging for some proponents. And regulation by multiple agencies risks regulators overstepping their remit, resulting in duplication and inconsistency.

It would probably be infeasible and inappropriate to bring *all* approvals required at a given level of government under the auspices of a single regulator, but significant benefits would flow from improved coordination. Arrangements that enable regulatory processes to occur in parallel rather than in sequence also reduce delays.

Leading practices include:

- Western Australia's use of memorandums of understanding and officer working groups, which regularly bring together case management officers from different agencies to resolve issues surrounding approvals

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- the South Australian mining regulator's use of funds from costs recovered from companies to pay the salaries of staff in other regulatory agencies (supporting more efficient approvals processing and better inter-agency communication), and use of multi-agency taskforces that are assembled for complex projects.

### Reducing Commonwealth–State duplication would deliver substantial benefits

Delays and duplication are major issues for projects that trigger the EPBC Act and require environmental approval at both the Commonwealth and State or Territory level.

Bilateral assessment agreements are leading-practice arrangements that reduce duplication by allowing proponents to prepare a single set of assessment documentation for both Commonwealth and State or Territory decision makers. Participants have indicated that they are of demonstrable benefit but that duplication in approval conditions, and in monitoring and reporting requirements, remains problematic.

Participants continue to advocate for bilateral approval agreements. These would allow State and Territory decision makers to approve or reject projects under the EPBC Act, acting as the authorised Commonwealth decision maker. The most recent independent review of the EPBC Act recommended that the Australian Government introduce a set of National Environmental Standards (box 7), which would be used to accredit State and Territory systems to assess and approve projects. While the Australian Government supported this recommendation, the process is in its infancy. The ability of the Commonwealth to develop effective national standards that are supported by State and Territory Governments will be crucial. Notwithstanding the challenges, bilateral approval agreements remain worthy of pursuit.

Delays, duplication and inconsistency would also be reduced by:

- rigorous application of risk- and outcomes-based approaches in State, Territory and Commonwealth jurisdictions (discussed above)
- improved co-operation and coordination between the Commonwealth and State and Territory regulators, including through out-posting of Commonwealth officers to jurisdictions with high application throughput, and training of State and Territory officers in EPBC Act requirements (which would help ensure that information provided in bilateral assessments meets Commonwealth requirements)
- greater commitment from Commonwealth and State and Territory regulators to avoid inconsistencies and overlaps in approval requirements, such as by State and Territory Governments ensuring that their conditions address the likely impacts on matters of national significance
- tighter application of the nuclear and water triggers under the EPBC Act.

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**Box 7****Proposed National Environment Standards**

The interim report of the second independent review of the EPBC Act recommended the Australian Government create a set of legally enforceable National Environmental Standards to underpin the EPBC Act. The intent of the Standards would be to focus decision makers on environmental outcomes being achieved under the EPBC Act, and clearly define the fundamental processes for sound decision making. The review recommended the Standards be set by the Commonwealth Environment Minister, and that they should be granular and measurable (with targets that specify intended outcomes) without being overly prescriptive. The review recommended Interim Standards be introduced as a first step, to facilitate rapid reform and streamlining, which should evolve as soon as practicable into more specific, definitive and data-based Standards as information improves.

## **Enhanced regulator capacity and capability are key to enduring reform**

Adoption of risk- and outcomes-based approaches and greater inter-regulator co-operation requires sufficiently resourced, well-directed and capable regulators. Widespread concerns about regulators' capacity indicate these features are lacking in many agencies (box 8).

Inadequate funding appears common — a product of limited cost recovery combined with budget cuts and efficiency dividends in a number of jurisdictions. Additional funding of \$25 million for the Commonwealth environment regulator announced in the Mid-Year Economic and Fiscal Outlook 2019-20 to address the backlog in environmental approvals, and a further \$21.2 million allocated in the 2020-21 Budget to continue to improve assessment timeliness, is one recognition of this issue.

On the capability front, agencies can lack adequate scientific and technical expertise and industry know-how. Staff turnover means some are in their roles for only a short period of time. Lack of permanent, deep expertise means that staff may be unable to assess project proposals in a risk-based manner — for example, because they do not fully understand the technical details associated with an application, or are not up to date with technological advances that would allow a project proponent to achieve the same regulated outcomes in more efficient ways.

Furthermore, staff turnover also affects continuity, frustrating proponents where case handovers are not smooth and creating inconsistency and processing delays.

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## Box 8      **Capability is seen as a key factor in delays and uncertainty**

Regulator capability and resourcing were a focus for many study participants. For example:

Industry has observed some significant differences in the capability and consequent resourcing of agencies and regulators as they relate to the petroleum industry ... These differences in capabilities is typically expressed as disparities in timeliness of approvals, which has resulted in project approval delays and timing uncertainty for industry. (APPEA, sub. 44, p. 13)

We recognise this [regulator capability and under-resourcing] to be a major challenge – especially the attraction and retention of high-end, industry-relevant technical skills in an environment which appears, from the outside, to prefer to move staff around rather than retain and grow sector specific expertise. It also struggles with a mechanism to compete with industry salaries. (Garnett, sub. 24, p. 5)

Delays in regulators fulfilling their obligations can appear, at times, to be driven by resourcing constraints within agencies. The matter of adequate resourcing is not just about personnel numbers but equally applies to the availability of suitable technical expertise and live industry experience within the regulator. (Woodside Energy sub. 18, p. 4)

Officers of [the NSW] Resources Regulator [are] lacking in experience and understanding of the exploration sector ... the expertise of the regulator is often not relevant to the present project or the issue being dealt with ... (NSW Minerals Council, sub. 28, p. 36)

Decision-making approaches for similar issues often vary between officers, reflecting different capabilities and, potentially, gaps in training and a lack of clear guidance about their regulatory function.

NOPSEMA is an outlier. As an independent statutory national environmental and safety regulator for offshore oil and gas, it has greater capacity to employ staff who are technically competent with the experience, backgrounds and capabilities needed to assess environmental plans. NOPSEMA also entirely cost recovers its services through levies and fees. When workflow increases, revenue increases and the agency can take on additional staff. Cost recovery demands transparency and accountability so that stakeholders can be confident that collected funds are being used effectively — for example, NOPSEMA publishes annual statements on the cost effectiveness of its operations. The offshore oil and gas industry is generally positive about the regulator's capabilities.

The full NOPSEMA model would not translate easily to the broader, more diverse resources sector (as noted earlier, bringing all approvals required at a given level of government under a single regulator would probably be infeasible, and project approvals processes also apply to non-resources projects), but there is little doubt that wider adoption of a number of its characteristics, including resourcing, would bring benefits.

Governments in each jurisdiction should assess whether their resources-related regulators are appropriately funded, enabling employment of the appropriate number and calibre of staff for implementing a risk-based regulatory system. They should also investigate opportunities for enhancing regulators' cost recovery processes (like those adopted by the SA mining regulator and NOPSEMA).

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Other leading-practice approaches that build capability include:

- secondments (such as the officer exchange program between the NT and WA environmental regulators)
- training programs (offered in Tasmania for senior management regarding leadership and in NOPSEMA for all staff regarding regulatory practices)
- strategies to target particular skills gaps, including technical expertise (such as a strategy adopted by the Environment Protection Authority (EPA) Victoria)
- developing cultural understanding through direct engagement with Indigenous organisations and communities (a leading-practice example has not been identified)
- site visits (as have been undertaken by regulators in both Victoria and New South Wales).

Regulators should also consult industry, including peak bodies, on a program of site visits to enhance technical expertise. Such programs could form part of induction training provided to new staff.

Regulators could also make better use of technology to undertake routine tasks, freeing up staff to concentrate on more complex tasks and improving the interface with proponents and the community. The Commonwealth–WA Government partnership to build a portal that will enable proponents to track applications is a promising initiative.

### A supporting culture that develops capability

Effective implementation of leading regulatory practices requires a supportive culture, with strong leadership from senior management.

Leading practices include appointment of a regulatory champion (like the Principal Regulatory Officer at the then Commonwealth Department of Agriculture), recognising and incentivising good staff performance (as per the Queensland mining regulator), creation of working groups to assess and promote cultural change (a NOPSEMA approach) and reporting on performance (for example, the WA mining regulator reports its target timeframes and its performance against them).

## **Improved accountability and transparency would enhance certainty and confidence in the regulatory system**

Inadequate accountability and transparency in some regulatory systems creates uncertainty for proponents and hinder community confidence in the sector.

Regulators do not always provide clear information to proponents about assessment requirements. Proponents claim they deliver what they think is needed, then face requests for more input — extending timelines to approval and adding costs to the process. Lack of clear guidance also impairs the quality of social impact assessments.

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Not all jurisdictions publish information on target assessment and approval timeframes. In some instances, timeframes stretch out without clear reason, and many agencies do not report on whether target timeframes are achieved. Regulators tend to blame proponents for not supplying adequate information; proponents tend to blame regulator capacity and capability for delays. Greater transparency would shed some light on where the problem lies.

In some cases, approval requirements have been moved from the primary approval process into the so-called ‘post-approvals’ phase (box 9). In part, this is a function of regulators struggling to meet statutory timeframes (where these exist); in part, it reflects the preferences of some proponents to do the minimum required to obtain primary approval as early as possible so they can then seek investment financing. But there is little accountability or transparency in the post-approvals process. For example, there are no statutory timeframes and reporting requirements are unclear, making for greater uncertainty and delay.

#### **Box 9                      Post-approval processes add to uncertainty and delays**

It has become increasingly common ... for approvals to be granted subject to conditions requiring later lodgement and acceptance of various types of plans or reports, which are required before operations (or construction) can commence. However, for many of these ‘nested’ approvals, there are two significant risks:

- The matter that has been deferred for future consideration may be fundamental both to the approval and to the proponent’s investment decision, in which case, it is a matter that should have been decided upfront ...
- There is no assessment framework for the plan or report, such as regulatory timeframes, criteria or appeal against refusal. There may be multiple information requests, with no way of closing out the process, preventing the operation (or construction) from starting. (QRC, sub. 27, p. 13)

The process for navigating post approval requirements for mining projects is becoming increasingly uncertain ... This is becoming increasingly difficult and time consuming, with limited accountability or transparency ... Under the NSW assessment process there has been a noticeable increase in post approval requirements necessitating further approval or consultation with various Agencies ... satisfaction of these conditions often takes months ... (NSW Minerals Council, sub. 28, pp. 15, 26, 34)

In addition to the increased time and resources required to resolve post determination issues, the increased reliance on post approval requirements is causing significant uncertainty for operations, particularly where ‘incremental approvals’ are required for projects to continue operating. (Peabody Australia Coal Pty Ltd, sub. 33, p. 5)

The timing of [Offset Management Plan] approvals are becoming one of the biggest risks of delays to the commencement of mining projects. (Anglo American, sub. 42, p. 10)

There are examples of better practice:

- Western Australia provides guidance to proponents on environmental assessment requirements and New South Wales likewise provides guidance on social impact assessment requirements.
- Western Australia is also working to speed up information flows and is publishing average approval times, including the time that applications spend with proponents.
- NOPSEMA has found that publishing applications and seeking public comment has lifted the quality of information provided.

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- New South Wales intends to report on performance against timelines for post-approvals.

### Limited transparency makes assessing environmental outcomes difficult

There is limited evidence on the effectiveness and efficiency of resources monitoring and enforcement activity. While regulators in all jurisdictions provide reports summarising their monitoring and compliance activities, the format and content is not always accessible for a lay audience. It can be difficult for the public to get a picture of a regulator's most consequential activities and to assess the overall state of play with compliance.

Audits of regulators' monitoring and enforcement activities provide a detailed view of their processes and capabilities, but these are not done regularly. Those that have been completed have raised concerns — for example, several jurisdictions do not have integrated information systems, making it difficult for regulators to target compliance activities. And the review of the EPBC Act found limited evidence of proactive compliance monitoring.

Environmental offsets can enable economically valuable projects to go ahead without compromising overall environmental quality. But again, there is little available evidence about whether they are achieving their objectives. A community member seeking insight into whether offsets have been delivered would generally not be able to find out one way or the other.

There are some examples of leading practice. Western Australia's provision of summary information from operators' annual environmental reports is one. And comprehensive reports published by the New South Wales Resources Regulator on its activities, including enforceable undertakings, incident investigations and compliance priority programs is another.

### **Harnessing information and data would support better regulation and community engagement**

Resources projects generate rich data and information about geological formations and the quality of resources, heritage sites, threatened species, groundwater assets and more. While much is collected, relatively little is made publicly available. In some cases, there are good arguments to limit access. For example, incentives to explore would be weakened by requirements to release private geoscience data early in the life of projects and the location and nature of Indigenous heritage sites are often highly sensitive. But more generally, the release of collected data would reduce duplicated effort and unnecessary costs for proponents, and promote outcomes monitoring. Digital technologies would support the relatively low-cost collection and management of data and information.

Data and information collected by resources companies also hold significant potential value for the broader community. They can enhance understanding of resources activities, increase confidence in the regulatory system, help with communicating regulatory objectives and provide evidence of whether those objectives are being met. Research and information

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provision by trusted institutions can also play an important role in informing communities. Where there is tension in communities about resources activities, information provision would help allay fears and develop acceptance.

Examples of leading practice exist:

- The Queensland GasFields Commission, an independent statutory body, aims to manage and improve coexistence among rural landholders, regional communities and the onshore gas industry. Publication of accurate data and information contributes to achieving this end. Also in Queensland, the Office of Groundwater Impact Assessment has built significant expertise in large-scale, groundwater impact modelling. Its research helps allay concerns about the potential impacts of groundwater extraction from resource operations. Independence helps create trust in the work done by these bodies.
- The Gas Industry Social and Environmental Research Alliance — a collaboration between the Commonwealth Scientific and Industrial Research Organisation (CSIRO), Commonwealth, State and NT Governments and industry — undertakes publicly reported independent research.
- The WA EPA has formed a working group, which includes the NT EPA and NOPSEMA, to investigate ways in which digital technologies could streamline the capture, supply and interpretation of data in the environmental impact assessment process.
- The Commonwealth and Western Australian Governments are developing a database of biodiversity studies, which will store and share information provided by proponents.

## **Governments are responsible for the foundations of leading-practice systems**

As already noted, many of the regulatory challenges facing the sector have been raised in previous reviews, by the Commission and others. The key to addressing them is to put in place the appropriate foundations for delivering efficient and robust regulatory processes. These include:

- an institutional and governance architecture that:
  - assigns clear roles and accountabilities
  - sets clear expectations of regulators and decision makers
  - is reviewed regularly to assist in maintaining fit-for-purpose regulation, and enables regulator performance that is consistent with expectations
- provision of, or arrangements for, adequate funding and resourcing of regulators (discussed above)
- evidence-based and consultative policy-making processes that translate to clear and consistent regulatory objectives.

Governments are ultimately responsible for ensuring that these pre-conditions are in place.

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Getting the foundations of the regulatory system right is particularly relevant in the current climate, as many jurisdictions seek to boost their economic activity as part of the COVID-19 recovery. Setting clear expectations of regulators and improving their accountability and capability can be put in place reasonably quickly and would yield immediate benefits, including by supporting risk-based regulation.

Statements of Expectations (used for the Victorian mining regulator and NOPSEMA (box 10)) clarify a government's expectations of a regulator, and how performance against these expectations will be measured. Such statements are important to align regulator incentives with policy objectives, and reduce 'grey' areas and ambiguity that creates scope for inconsistent decision making and excessive risk aversion. In essence, clear Statements of Expectations empower and authorise regulators to make decisions and make them more accountable.

#### **Box 10      Examples of Statements of Expectations**

In Victoria, the Minister for Resources issued a Statement of Expectations for Earth Resources Regulation over the period 2018–20. The Statement sets out 14 specific expectations across several areas where there are opportunities for Earth Resources Regulation to improve regulatory practice: streamlining approvals pathways; developing guidance, processes and procedures; staff training; and ICT systems. Expectations have been assigned target completion dates to improve accountability, and the Minister also specified that progress against performance targets must be published in standard annual reporting.

The Commonwealth Minister's Statement of Expectations for the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), released in October 2019, sets out how the agency is expected to exercise its legislated functions by regulating petroleum activities in a manner that reflects international leading practice. In addition to a set of guiding principles, the Statement includes specific expectations on NOPSEMA's regulatory activities in relation to providing effective and efficient regulation; regulatory change; stakeholder engagement, consultation and transparency; reducing regulatory burden; decommissioning; meeting future industry challenges; and operational matters.

A range of institutions are well placed to (and do) conduct reviews. For example, several jurisdictions have established offices akin to the Commonwealth Office of Best Practice Regulation and formed State-specific Productivity Commissions (in New South Wales in 2018, Queensland in 2015 and South Australia in 2018). The Victorian Government has appointed a Better Regulation and Red Tape Commissioner. And jurisdictions have drawn upon Auditor-General reporting to inform change. Further, jurisdictions have undertaken a range of broader initiatives to assess the prevalence of redundant and duplicative regulation, including through the Australian Government's Deregulation Taskforce, the Streamline WA initiative and numerous Productivity Commission reviews. The Independent Review of the NSW Regulatory Policy Framework highlighted a 'life cycle' and 'whole-of-system' approach for developing and managing regulation, as is used in Canada and New Zealand, to assist in maintaining fit-for-purpose regulatory frameworks.

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Political factors will necessarily shape regulatory systems. Decision makers have to balance the trade-offs between resources developments and other land uses. They have to be attuned to community expectations. But investor confidence can be destabilised by sudden policy changes that occur without consultation and analysis (box 11). Policy positions not based on sound evidence, such as blanket bans on gas exploration, undermine investment and community welfare. And the absence or vagueness of policy can translate to inconsistent regulatory objectives and decision making. Recent regulator decisions in relation to scope 3 emissions, for example, have created uncertainty for investors, in particular with respect to the weight that might be given to these emissions in future regulatory decisions. Moreover, targeting scope 3 emissions on a project-by-project basis is likely to be an ineffective mechanism for reducing global emissions.

**Box 11      Unclear objectives, inconsistency and sudden policy changes increase uncertainty for potential investors**

Study participants raised concerns about the regulatory design process, for example:

In the complex legal landscape affecting the resources sector, adequate consultation time is essential to allow stakeholders to identify unintended consequences of proposed changes, which can be many and varied, and may include significant impacts on the legitimate expectations of stakeholders. (QLS, sub. 41, p. 2)

... there is not a consistent approach as to how the contribution of GHG [greenhouse gas] emissions to global climate change should be assessed and how this should be factored into the public interest of a project proceeding. (ACF, sub. 32, p. 19)

The oil and gas sector is inherently marked by high levels of (resource and price) risk and uncertainty in advance of major investment decision making. Stability and gradual change in the regulatory settings are important. For example, a recent 'overnight' announcement of royalty increases in Queensland is destabilising because it is not congruent with the stated aims of government to put downward pressures on gas prices and increase supply (in fact it does the opposite). (Andrew Garnett, sub. 24, p. 3)

The regulatory outcomes sought by the [water] trigger – to improve environmental outcomes and enhance community confidence – were poorly defined, being broad and difficult to measure. As regulatory objectives are not clearly defined from the outset, regulators and independent panels are left to interpret requirements inconsistently and potentially change scope and expectations for the regulated entity. (MCA, sub. 11, p. 11)

Undue political influence on the operation of a regulatory regime, or lack of support for it, can risk undermining confidence in integrity of the system itself. Institutional independence for policy and regulatory functions can reduce perceptions of undue political influence — although independence alone is no guarantee that a regulator will be effective, and other strong governance arrangements remain essential.

Leading practice involves governments:

- clearly communicating their regulatory objectives
- adopting consultative and evidence-based processes when developing or changing policies and regulations
- being transparent about the reasoning behind decisions

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- supporting regulatory processes to weigh the environmental, social, amenity and economic impacts of proposed developments against the benefits, rather than for example, pre-emptively banning an activity such as gas exploration.

## **Centring traditional owners in Indigenous heritage protection**

Given the high cultural significance of many sites around Australia to traditional Aboriginal and Torres Strait Islander owners, governments have established regulatory processes to manage and conserve Indigenous heritage, while allowing development to take place. Regulation of Indigenous heritage is primarily a state and territory responsibility, and each jurisdiction takes a different approach. Broadly speaking, these approaches can be placed into one of two categories — agreement making with traditional owners, or ministerial approval for developments that may affect heritage sites. (Traditional owners are those with cultural and spiritual affiliations with land, which may give rise to statutory rights.)

In May 2020, Rio Tinto destroyed several rock shelters in Juukan Gorge, Western Australia, which had significant cultural and heritage value. This has brought to the fore longstanding and widespread concerns about a lack of consultation with Indigenous communities and inadequate monitoring of heritage compliance. There is a perception that the views of traditional owners are seen as an afterthought, rather than influencing decisions about the operation of a site.

Given the nature of Indigenous heritage, understanding of heritage sites cannot be properly achieved without genuine and direct engagement between traditional owners and companies. Centring traditional owners in decisions about the protection of their heritage is therefore a critical element of leading practice regimes, which should:

- promote engagement with Indigenous communities early in the process to allow heritage sites to be identified early and managed effectively
- integrate consultation with regulatory assessment processes
- give traditional owners a strong voice in the heritage approval process.

While all state and territory regimes are under review or are being reformed, there are some examples of leading practice.

- Victoria requires proponents to negotiate a cultural heritage management plan with registered Aboriginal parties before planning approval for a project can be given. Decisions cannot be overturned by the Minister, but can be reviewed by the Victorian Civil and Administrative Tribunal, which considers whether the activity can proceed in a way that minimises harm to Indigenous heritage.
- In Queensland, the ‘cultural heritage duty of care’ requires consultation where there is a high risk of activity damaging Indigenous heritage; compliance can be demonstrated through an agreement covering heritage issues. The process allows for mediation by the Land Court if the project proponent and traditional owners cannot reach agreement.

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Ultimately, if the parties cannot agree, the Land Court makes a recommendation for an appropriate decision to the Minister who has the final call.

Concerns have also been raised about the role of the Australian Government in heritage protection. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) provides a last-resort power to intervene when state and territory laws provide inadequate protection to heritage sites. The current Act appears to have been largely ineffective at playing this backstop role.

There are different views about the appropriate role of the Commonwealth in this area. Some participants want the Australian Government to play a much larger role in heritage protection, while there are also arguments for heritage protection to remain the primary responsibility of the State and Territory Governments, embedding engagement and decision making within their assessment processes. Given the concerns about the effectiveness of the ATSIHP Act, its future role, and that of national heritage protection more broadly, a comprehensive review is warranted. This review would need to undertake extensive national consultation on heritage issues (including those beyond the resources sector). It would need to consider the findings of, and responses to, ongoing inquiries, including the Parliamentary Inquiry into Juukan Gorge, and the push for National Environmental Standards and devolution of approvals to state and territory regulators coming out of the EPBC Act review.

## **Other issues merit attention**

### **Surety arrangements for rehabilitation are improving but should go further**

Rehabilitation of sites has become an increasingly important focus for governments. There are few examples of successful rehabilitation — although some have emerged more recently. Governments have sometimes been left with a large clean-up bill, including from the many legacy sites around the country that predate requirements to rehabilitate sites.

Surety arrangements for rehabilitation generally have been inadequate, but are being strengthened. Bonds that cover the full cost of providing rehabilitation offer the highest level of financial assurance for governments, and provide companies with full incentives to complete rehabilitation in a timely way. Surety requirements should be adjusted to reflect and encourage progressive rehabilitation. Jurisdictions are heading in this direction, but a leading-practice jurisdiction has not been identified.

Some State and Territory Governments have moved towards pooled arrangements for rehabilitation surety. These pools are akin to insurance pools, and offer many of the same benefits — notably lowering the potential costs for industry. But they also carry many of the same risks, including reduced incentives to undertake rehabilitation, and the benefits of the pool will be reduced if higher-risk companies or companies with large rehabilitation liabilities dominate the risks covered by the fund. If used, State and Territory Governments need to ensure that levies reflect the risk of the company passing their liabilities to the government, and that the pool is complemented by effective compliance and enforcement arrangements.

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Larger liabilities should be covered using alternative surety arrangements. Queensland's rehabilitation pool is a good example of a model that treats larger liabilities differently.

Following the surrender of the mine site, some risks will likely remain. These residual risks are an emerging issue — participants stated that mining companies can be responsible for a mining lease many years after it has ceased to be in force. Residual risk payments, such as those in Queensland, provide protection for governments while allowing companies to surrender their liabilities.

There is also merit in governments facilitating the reopening and rehabilitation of abandoned mines, such as through streamlined approval processes (without compromising the intent of regulation) and indemnities against past damages (where they are clearly not the responsibility of the new operator).

### Addressing 'lawfare' at its source

'Lawfare' (or attempts by environmental advocates to derail projects via court action) was raised as a concern by some participants. Delays associated with review of environmental approval decisions in the court system are potentially costly but there is good reason to allow certain third parties standing to seek judicial review of environmental approvals.

In reality, there have not been many environmental citizen suits. That said, cases that have made it to court, at least in relation to Commonwealth environmental approvals under the EPBC Act, are often based on technical breaches that have no substantive impact on environmental outcomes. Addressing excessive procedural requirements, improving public confidence in the EPBC Act and improving transparency would reduce the drivers for unnecessary legal challenge, while not frustrating those that address substantive failings in approvals.

## **5 Effective community engagement and benefit sharing can build trust**

Resources projects generally bring net benefits to the economy and community as a whole, as well as the local communities in which they operate. But both positive and negative impacts are typically amplified for local communities, often creating community apprehension and tensions.

Effective community engagement allows communities to have a say in projects that may affect them, and can be a valuable tool in creating support. Early engagement can help to identify issues and any impediments to the projects proceeding. Guidance to companies on how to engage is plentiful. Most frameworks cover similar themes, and there is no one set of guidelines that is better than the others.

Engagement is normally a requirement of licensing and approval processes, and governments generally require an assessment of the economic and social impacts of a

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project. Companies, rightly, are required to identify the effects of their projects on communities. The issue then is who is best placed to deal with these impacts and who should pay for doing so (box 12).

Some project impacts such as volatile house prices are an inevitable market response to increased demand outstripping supply. They signal a need for adjustment and should not be suppressed, but pursuing strategies such as appropriate planning and targeted investments can manage changes in demand and moderate price spikes.

While communities often benefit from the normal economic activities of resources companies (for example, through new jobs and higher wages), the contributions to communities by many companies go beyond these impacts. Additional ‘benefit-sharing’ activities include financial payments to local governments and community groups, investment in infrastructure, programs to increase local employment and business capability, and approaches to mitigate the negative social effects of resources projects.

In part, companies go above and beyond in benefit sharing to build a ‘social licence to operate’. A lack of community support can lead to delays, additional financial costs and, in extreme cases, failure to obtain an operating licence. Benefit-sharing activities can also improve the liveability of a region, making it easier to attract and retain workers.

#### **Box 12      Who should do and pay for what?**

Companies should be required to address negative externalities from their operations, such as noise and dust as required by regulation. And they should also generally be expected to provide or pay for infrastructure that is built solely for their operations.

Governments are better placed to address impediments to market adjustment — for example, in the housing market through planning policy, including land release. Alternatively, allowing use of external (fly-in, fly-out) workforces can moderate pressures on housing demand and price increases (but possibly reduce local employment and activity benefits).

Where infrastructure is shared, governments are likely to be better placed to coordinate its provision, partly funded from direct contributions, or from royalty or rate revenue from the project. Governments are also better placed to plan for, provide and manage economic and social infrastructure associated with local population growth. Funding for generally available services should be in line with normal taxing and charging arrangements.

Left to themselves, companies may not target investment to areas of greatest benefit for the community — particularly where multiple companies are making investments simultaneously. Leading practice involves companies consulting with local governments or community groups about how they might leverage and align their investments to promote local benefits (and not shift hidden costs such as upkeep and maintenance). This can occur through formal partnerships, such as that between Rio Tinto and the City of Karratha, or informal consultative arrangements, such as the committee established by Hillgrove Resources in Kanmantoo and Callington.

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Some participants have argued that local communities located near resources projects should receive benefits from resources companies over and beyond those flowing from increased economic activity and voluntary benefit sharing. These include mandated local jobs, local content and hypothecated royalties.

But approaches that mandate resources companies to use local content — either workers or services — can be costly, reducing both opportunities to source services and employment from other parts of Australia and the profitability of resources companies (which affects the taxes and royalties they pay and the benefits to the Australian community). There are better ways of building local capability — for example, governments and businesses can provide businesses in local communities with the support they need to engage with resources companies, such as through BHP’s Local Buying Program, which is likely to develop more enduring capability than mandating use of local content.

Nor is there a case for hypothecating royalty payments to communities near resources activities. Government revenues should be spent wherever community net benefits are greatest. Programs that hypothecate royalty payments to mining regions may simply substitute for other government spending, and they risk money being spent on projects with lower benefits than might be achieved elsewhere.

It has also been suggested that consideration of community benefit sharing should encompass private landowners being given a right of veto over resources activity on their land or a right to a royalty stream. Landowners have a right to fair and full compensation for access to their land, but not payment for the resources under it. And while a veto right or right to royalties would deliver potentially large gains to some landholders, it would not necessarily spread benefits to all local landholders or communities.

## **6 Indigenous community engagement and benefit sharing**

Resources companies interact with Aboriginal and Torres Strait Islander people as part of environmental impact assessment and heritage processes, but most interaction occurs through agreement making with traditional owners. Many companies also have voluntary programs aimed at benefitting Aboriginal and Torres Strait Islander people even if they are not traditional owners. While agreements often benefit those in the community who are not traditional owners, traditional owners remain the primary beneficiaries of agreements (as they are intended to be).

Financial payments under agreements can run to the millions of dollars, but the confidentiality of agreements has made it difficult for the Commission to gain a broad view of their content, evaluate their effectiveness and identify leading practice. In undertaking its analysis, the Commission has necessarily relied heavily on participants’ views and insights, particularly Aboriginal and Torres Strait Islander representatives, and academics and

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practitioners who have experience working with traditional owners to negotiate agreements and manage benefits.

The principle of free, prior and informed consent (FPIC) is used to guide engagement with traditional owners regarding the use of their traditional lands. In Australia, traditional owners generally do not have a right of veto. Some resources companies choose not to proceed with development unless traditional owners give their consent, but most apply FPIC by building respectful relationships, and negotiating with traditional owners with the aim of obtaining consent. Where consent cannot be obtained, companies may pursue dispute resolution processes set out in legislation — for example, in the Native Title Act, the National Native Title Tribunal can make determinations about whether a future act can be done (and under what conditions).

Resource limitations in some prescribed bodies corporate (PBCs) inhibit their ability to engage effectively with the resources sector and maximise benefits to Indigenous communities. The Australian Government provides some funding to PBCs, and the effectiveness of capacity-building funding is expected to be reviewed this financial year. But there is also a role for resources companies to provide support, particularly where costs arise from resources companies' need to engage with native title organisations — the Native Title Act allows PBCs to charge resource companies fees associated with negotiating agreements.

Participants have also raised concerns about constraints on how Aboriginal and Torres Strait Islander groups can use funds from native title agreements. These funds are commonly held and managed through charitable trusts — which can limit their use to support economic development. The Commission understands that charities can run profit-making activities and retain registration provided the ultimate use of funds raised is consistent with their charitable purposes and for the public benefit. The range of economic development activities that may be undertaken by Indigenous charities, therefore, may be wider than is currently perceived to be the case, but there is ambiguity surrounding the types of activities that would be acceptable.

Giving the Australian Charities and Not-for-profits Commission the power and capacity to make private rulings on whether activities are considered charitable would provide greater clarity. This change would clarify the scope of permissible economic development activities that charities could undertake, but it would not change the underlying requirement for charities to conduct or support only activities that have a charitable purpose and are for the public benefit. Native title groups may need to look to other vehicles if they wish to undertake non-charitable activities.

Ultimately, traditional owners must be at the centre of decision making about how benefits are used, managed and held. Resources companies can work with and support traditional owners to articulate their goals and realise them.

Two additional legal issues require clarification to ensure that native title benefits flow to their rightful recipients. These are:

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- the duties of the applicants who act on behalf of groups claiming native title, and, relatedly, whether claim groups or the groups ultimately determined to hold native title are the rightful owners of funds negotiated through agreements
  - the duties of private agents who represent native title interests. Some private agents have reportedly misused native title funds, either of their own volition or on native title applicants' instructions. A contributing factor is that private agents do not have the same obligations as native title representative bodies to consider the broader native title group's interests, even though they provide similar services.

Proposed amendments to the Native Title Act would not fully resolve these issues. The Australian Government should examine the question of who is the rightful owner of funds from native title agreements, and impose statutory obligations on private agents that are equivalent to those imposed on native title representative bodies and service providers.

**Table 1 Summary of issues and avenues for improvement**

<i>Issue</i>	<i>Recommendations and selected leading practices</i>
<b>Managing resources development in the interests of the community</b>	
Not all companies meet their obligations as tenement holders	Thorough assessments of potential licence holders using a risk-based approach, and considering applicants' past regulatory compliance, insolvency and criminal conduct, and their technical competency, address the risks of repeated non-compliance. (LP 4.2)
Community concerns about mixed land use contribute to calls for greater regulation	For project proposals of intense public concern, accessible information provided by independent institutions can help inform debate. (LP 4.3)
Extraction bans and moratoria can prohibit activity of potential value to the community	Rather than imposing bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the evidence on the costs of a particular project to the environment, other land users and communities against the benefits on a project-by-project (or regional) basis. (R 4.1)
<b>Managing access to land for resources projects</b>	
Land access can be a contentious issue	Where resources projects proposals affect multiple landholders in a region, it may be appropriate for governments to develop effective strategic land use frameworks to assess the trade-offs between resources development and other land uses on a regional basis. (LP 5.1) Early personal engagement between resources companies and landholders (LP 5.2) and low-cost dispute resolution mechanisms (LP 5.4) can ease tensions.
Landholders often lack capacity to negotiate with resources companies	A standard template for land access agreements can help to set expectations for landholders and resources companies and improve confidence in the regulatory system. (LP 5.3)
Over-use of the NTA expedited procedure can cause unnecessary delays	The National Native Title Tribunal should publish guidance about the circumstances in which the expedited procedure will apply. (R 5.1)
<b>Addressing unnecessary regulatory burdens</b>	
Environmental impact assessments (EIAs) are often unduly broad in scope	Adopting a risk-based approach, including through the use of thorough scoping, leads to the level and focus of investigations being proportionate to the size and likelihood of environmental risks. (LP 6.1)
Delays at the approval stage are unpredictable and lengthy; conditions can be inappropriate	Clear guidance on regulators' expectations about the content and quality of EIAs reduces the need for additional information requests. (LP 6.2) Clarity provided by timelines for regulatory processes supports proponents' planning. Public reporting of regulator performance against timelines is a means of keeping them accountable. (LP 6.3) Limiting use of stop-the-clock provisions to situations where issues emerge that could not have been reasonably anticipated would promote certainty. (LP 6.4) Deemed decisions, whereby the assessment agency's recommendation to the final decision maker becomes the approval instrument if a decision is not made within statutory timeframes, can reduce delays. (LP 6.5) Outcomes-based approval conditions enable companies to choose least-cost ways of achieving defined environmental outcomes. (LP 6.7)
Projects requiring both Commonwealth and State or Territory approval face delays and potentially inconsistent approval conditions	The EPBC Act should be amended to enable negotiation of bilateral approval agreements (R 6.1). When bilateral assessment agreements are renegotiated, State and Territory Governments should consider making additional commitments to address inconsistencies and overlap in approval conditions. (R 6.2)

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**Table 1** (continued)

<i>Issue</i>	<i>Recommendations and selected leading practices</i>
Processes and timelines for securing post-approvals are often unpredictable	Timelines for regulator decisions and public reporting against them would reduce delays and uncertainty in the post-approval stage. (LP 6.9) Clear guidance from regulators on post-approval documentation requirements can make the process more efficient. (LP 6.10)
Coordination between regulators can be insufficient	Effective coordination among agencies within a jurisdiction, such as through a lead agency or major project coordination office, facilitates timely processing and minimises overlaps and inconsistencies. (LP 6.12)
<b>Delivering sound environmental outcomes</b>	
Inappropriate or inadequate approval conditions impede regulator effectiveness	A 'feedback loop' between compliance monitoring and condition-setting processes provides useful information about the efficacy of approval conditions in protecting the environment. (LP 7.1)
Regulators' compliance and enforcement activity lacks transparency	Public communication from regulators about compliance and enforcement activities, and access to information about regulated sites can help to improve public confidence in the sector's regulation. (LP 7.3)
The effectiveness of offset obligations and schemes is unclear	Comprehensive public registers of offset obligations and the projects developed to meet them are a valuable transparency measure. (LP 7.4) Schemes that allow companies to pay their offset obligations into a fund can create opportunities for better environmental outcomes and reduce costs for companies (LP 7.5). The payment should cover the full expected cost of attaining the outcome through the fund. (LP 7.7) Science-based implementation strategies for the use of offsets funds are key to achieving their intended purpose. (LP 7.6)
Surety arrangements for rehabilitation generally have been inadequate	Financial assurance arrangements that cover the full cost of providing rehabilitation provide incentives for companies to undertake rehabilitation and minimise the risk that governments will be left responsible for rehabilitation. (LP 7.9; LP 7.10)
Site rehabilitation has been limited; the historical legacy of abandoned mines is large	Progressive rehabilitation can be encouraged by including requirements in approvals plans, and by financial surety arrangements being reduced commensurate with ongoing rehabilitation work. (LP 7.11) There is merit in governments working with industry to reopen and rehabilitate legacy abandoned mines. (LP 7.14)
Companies can be liable for resources sites for many years after surrender	Residual risk payments allow governments to be compensated for the risks that remain following surrender of a mine site, while allowing companies to surrender their liabilities to the site. (LP 7.13)
<b>Indigenous heritage regulations are in need of reform</b>	
Consultation with traditional owners is often inadequate, and heritage can be seen as an afterthought	Leading-practice heritage regimes embed heritage engagement in the project assessment process, put traditional owners at the centre of decision making on heritage, and provide a process for both traditional owners and proponents to seek dispute resolution or appeal. (LP 8.1)
<b>Investment is also affected by abrupt policy changes, policy inconsistency and uncertainty</b>	
Investment can be undermined by abrupt policy changes, policy inconsistency and uncertainty	Early public consultation on new policy proposals, accompanied by clear articulation of the policy rationale, can avoid policy surprises. Clear policy objectives aid consistent and predictable regulatory decision making. (LP 9.1)
Bargaining arrangements for greenfields agreements can pose risks for projects	The Fair Work Act should be amended to allow an enterprise agreement for greenfields projects to specify a nominal expiry date that matches the life of the project. (R 9.1)

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**Table 1** (continued)

<i>Issue</i>	<i>Recommendations and selected leading practices</i>
<b>Community engagement and benefit sharing can help mitigate impacts on local communities</b>	
Some mechanisms for addressing community impacts from resources projects are more effective than others	Supporting local businesses to supply goods and services to resources companies, rather than mandating local procurement and employment requirements, is likely to create more enduring benefits for communities. (LP 10.2) Coordination with local governments and communities can improve the effectiveness of companies' benefit-sharing activities. (LP 10.3)
<b>Specific community engagement and benefit sharing arrangements apply for Aboriginal and Torres Strait Islander communities</b>	
Scope of permissible uses of funds held in charitable trusts is unclear	The Australian Charities and Not-for-profits Commission should have the power and capacity to make private rulings on whether particular activities that a charity wishes to undertake are charitable, and to publish de-identified summaries of private rulings. (R 11.1)
Ownership of funds arising from native title agreements that precede a native title determination is unclear	Whether native title claim groups or common law holders are entitled to funds arising from native title agreements made before a native title determination should be reviewed, and also whether applicants and/or claim groups have any duties towards common law holders in receiving and managing funds. (R 11.2)
Private agents may not act in the best interest of the native title group	The Native Title Act should be amended to impose statutory obligations on private agents representing native title parties equivalent to those imposed on native title representative bodies and service providers. (R 11.3)
<b>Effective governance, conduct, capability and culture are crucial for leading-practice regulation</b>	
Pre-conditions needed for leading-practice systems are sometimes inadequate	Governments should assess whether regulators are appropriately funded, and consider opportunities for enhanced cost recovery. (R 12.1) Statements of Expectations from Ministers to regulators are an effective way for governments to set out clearly their objectives for the regulatory system. (LP 12.1) Regular independent review and evaluation of regulatory frameworks, objectives and performance drive continuous improvement and assist in maintaining fit-for-purpose systems. (LP 12.2)
Capability challenges constrain regulator performance	Staff capability and technical expertise can be improved through secondments, training programs and site visits. (LP 12.3) Regulators in each jurisdiction should consult with industry, including peak bodies, on developing programs of site visits to enhance technical expertise. (R 12.2) Digital technology and data management systems have the potential to significantly improve regulatory processes. (LP 12.6) Ministers should establish a forum to share leading-practice initiatives. (R 12.3)
Information sharing and community engagement by regulators can be improved	The provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector. (LP 12.7) Engaging with local communities on the regulatory process throughout the life cycle of a resources project and conducting broader consultation on an ongoing basis to understand community expectations can improve the public's understanding of regulatory objectives and processes. (LP 12.8)

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# Leading practices, findings and recommendations

## FINDING 2.1

Global factors including emissions policies, technological advances, and economic and population growth that drive demand as well as local factors affecting production costs make it challenging to predict the future mix and level of resources investment in Australia. However, given Australia's diverse and significant resources deposits and likely growth in global demand, the potential for investment will likely remain substantial.

## Managing resources development in the interests of the community

### FINDING 4.1

There is no case for a major reform of the Australian pre-competitive geoscience arrangements given the quality of the information is highly regarded. However, the coverage of geoscience databases could be further improved, for instance, by all jurisdictions adopting sunset confidentiality periods for public release of private exploration and production reports prior to the end of the tenure of a project. The public benefits of open access to exploration information must be balanced against the private incentives to explore.

### LEADING PRACTICE 4.1

To promote data access while balancing private incentives to explore, confidentiality periods before public release of private exploration and production reports generally should be shorter than the tenure of a project. New South Wales' new regulations are one example of this practice. Many other jurisdictions have similar arrangements in place.

### FINDING 4.2

No evidence has been presented to this study indicating that differences between jurisdictions' approaches to licensing have created impediments to investment, or that any particular regime for the allocation of tenements is 'leading practice' in all circumstances. However, exemptions from normal licensing requirements aimed at attracting investment have questionable merit.

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#### LEADING PRACTICE 4.2

Thorough assessments of potential licence holders address the risk of repeated non-compliance. Leading practice involves regulators taking a risk-based approach to due diligence when granting, renewing or transferring tenements and considering:

- whether the applicant has previously failed to comply with licence conditions or health, safety and environment legislation (whether in the same jurisdiction, or in other domestic and international jurisdictions)
- past criminal conduct, technical competency and past insolvency.

While all jurisdictions undertake some due diligence, none fully follows leading practice.

#### FINDING 4.3

Domestic gas reservation schemes that remove the link between domestic and export prices reduce returns to investors and discourage investment in gas exploration and extraction, leading to higher prices in the longer run and imposing net costs on the community.

#### FINDING 4.4

Bans and moratoria are a response to uncertainty about impacts of unconventional gas operations. However, proper application of risk-based regulation would allow projects to proceed where it could be demonstrated that they would not generate undue environmental or other harm. The weight of evidence available, and the experience of jurisdictions where unconventional gas development takes place, suggests that risks can be managed effectively.

#### RECOMMENDATION 4.1

Rather than maintaining bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the scientific evidence on the costs of a particular project on the environment, other land users and communities against the benefits on a project-by-project (or regional) basis.

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#### LEADING PRACTICE 4.3

Where resources project proposals are contentious and generate intense public concern, establishing institutions, independent of resources companies and regulators, to provide accessible information to landholders and the broader community can help inform debate. The GasFields Commission, the Office of Groundwater Impact Assessment in Queensland and the Commonwealth's Gas Industry Social and Environmental Research Alliance provide examples in relation to coal seam gas developments.

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## Managing resources activities on private lands

#### FINDING 5.1

Landholders frequently express concern about resources projects, and some have called for a right of veto over resources activity on their land. This would be inconsistent with Crown ownership of resources and would affect the distribution of the benefits of resources significantly. Landholders have a right to full and fair compensation for access to their land, but not payment for the resources under it.

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#### LEADING PRACTICE 5.1

Where resources project proposals affect multiple landholders in a region, it may be appropriate for governments to develop strategic land use frameworks to assess the trade-offs between resources development and other land uses on a regional, rather than case-by-case basis. However, the aim of these frameworks should be to maximise economic benefits for the community, rather than prohibit activity on certain types of land. These frameworks should thoroughly consider the costs and benefits of allowing resources development, and have approval processes proportionate to the risks of resources development on the relevant land. The Council of Australian Governments' Multiple Land Use Framework provides a leading-practice example.

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#### LEADING PRACTICE 5.2

Where planned activity will be low impact, requiring early personal engagement between resources companies and landholders can ease potential tensions and be less costly than a negotiated agreement. The Queensland Land Access Code's notification requirements provide a leading-practice example of this approach.

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#### FINDING 5.2

Many landholders enter land access negotiations with resources companies with little prior experience or relevant knowledge. This information asymmetry provides a basis for government intervention.

#### LEADING PRACTICE 5.3

A standard template for land access agreements can reduce information asymmetry, help to set expectations for landholders and resources companies, and improve confidence in the regulatory system. The Queensland Land Access Code, providing a combination of mandatory conditions as well as guidelines, provides a leading-practice model.

#### LEADING PRACTICE 5.4

Low-cost dispute resolution methods that take an investigative approach to resolving problems between parties can reduce tensions between landholders and resources companies. The recently established Queensland Land Access Ombudsman provides an example.

Special access requirements apply to resources activity on traditional lands covered by native title or land rights legislation

#### FINDING 5.3

The *McGlade* decision of the Federal Court in 2017 created concerns in the resources industry about the validity of native title agreements that had only been signed by the majority of the individual members of the applicant. Amendments proposed in the Native Title Legislation Amendment Bill 2019 (Cth) should address these concerns.

#### FINDING 5.4

The level of compensation paid for resources developments on native title land has typically been a matter for proponents and native title groups. However, the Timber Creek decision of the High Court in 2019 went to the value of native title rights and interests and could affect agreement making with native title groups. Any uncertainty will likely be resolved as access negotiations occur over time.

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#### FINDING 5.5

Exploration activities have differing impacts on native title land. Consequently, a case-by-case approach by States and Territories to assessing whether the expedited procedure under the *Native Title Act 1993* (Cth) applies is necessary to give effect to the intention of the Act.

#### RECOMMENDATION 5.1

The National Native Title Tribunal should publish guidance about the circumstances in which the expedited procedure will apply.

#### FINDING 5.6

South Australia has implemented an alternative regime for negotiation of resources projects on native title land, while Victoria and the Northern Territory have different approaches to that set out under the *Native Title Act 1993* (Cth) for negotiating agreements between resources companies and traditional owners. Each of these unique approaches have both advantages and disadvantages; a leading-practice approach has not been identified.

#### LEADING PRACTICE 5.5

Conjunctive agreements that provide a standard set of terms for resources developments in a particular area can reduce impediments to investment on native title land. South Australia's ILUAs for gas and mineral exploration are a leading-practice example.

#### LEADING PRACTICE 5.6

High-quality guidance on native title facilitates investment in the resources sector. The Australian Government's *Working with Indigenous Communities* handbook is a leading-practice example.

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## Addressing unnecessary regulatory burdens

### FINDING 6.1

Unnecessary delays in project commencements can be costly for proponents and the community, and typically dwarf other regulatory costs.

### FINDING 6.5

Unpredictable and lengthy delays at the approval stage are a key frustration for project proponents. That frustration is compounded where delays are seen as unnecessary or their cause is unclear.

### FINDING 6.2

Environmental impact assessments are often unduly broad in scope and do not necessarily focus on the issues that matter most. This comes with costs — the direct costs of undertaking studies and preparing documentation and the more significant cost of delay to project commencement. Disproportionate and unfocused environmental impact assessments are also of questionable value to decision makers and the community.

### FINDING 6.6

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

### FINDING 6.3

The referral process for the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and the nuclear and water triggers are creating unnecessary regulatory burden.

- Over half of all projects referred under the EPBC Act do not ultimately require Commonwealth approval.
- Projects ruled out as nuclear actions in the EPBC Act explanatory memorandum are being treated as nuclear actions requiring Commonwealth environmental approval.
- The evidence that the water trigger has filled a significant regulatory gap is not compelling. The recommendation of the interim report of the second review of the EPBC Act to limit application of the water trigger should help reduce duplication.

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#### FINDING 6.8

Resources projects typically require a range of assessments and approvals by multiple regulators within a jurisdiction. While regulatory coordination has improved over the past decade, proponents still report difficulties navigating the regulatory landscape. Lack of coordination can cause costly delays and liaising with multiple agencies can also give rise to significant compliance costs.

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#### LEADING PRACTICE 6.1

Leading-practice environmental impact assessment (EIA) involves application of a risk-based approach, where the level and focus of investigations is aligned with the size and likelihood of environmental risks that projects create. Early identification of risks through thorough scoping, including community consultation, is critical for developing EIA terms of reference that focus on the projects biggest and most likely impacts and therefore which matters need to be investigated more or less thoroughly. The ongoing EIA improvement project in New South Wales shows movement in this direction.

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#### LEADING PRACTICE 6.2

Clear guidance on regulators' expectations about the content and quality of environmental impact assessments reduces the need for additional information requests and the scope for misunderstanding by proponents. Western Australia and Queensland are examples of leading practice in this area.

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#### LEADING PRACTICE 6.3

Timelines, statutory or otherwise, provide proponents with information about how long regulatory processes ought to take, which supports project planning. They also focus regulators' attention, and public reporting of regulator performance in meeting those timelines is a means of keeping them accountable. For example, both Western Australia and South Australia report on the share of mining proposals and other approvals finalised within target timelines.

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#### LEADING PRACTICE 6.4

Leading-practice use of stop the clock provisions means placing limits on when they can be used — when matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated — and transparency about why the clock is stopped. No examples of leading practice have been identified.

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#### LEADING PRACTICE 6.5

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

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#### LEADING PRACTICE 6.7

Outcomes-based approval conditions enable companies to choose least-cost ways of achieving defined environmental outcomes. The National Offshore Petroleum Safety and Environmental Management Authority has a leading-practice approach to outcomes-based condition setting.

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#### LEADING PRACTICE 6.8

The use of standard conditions for standard risks can deliver efficiencies to approval processes. Queensland's *Model Mining Conditions* are leading practice.

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#### LEADING PRACTICE 6.10

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

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#### LEADING PRACTICE 6.9

Regulator decisions in the post-approval stage should be subject to timelines — statutory or otherwise — and regulator performance against those timelines should be publicly reported. The New South Wales Department of Planning, Industry and Environment intends to report on performance against timelines for post-approvals.

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FINDING 6.9

Strategic assessments are costly but may reduce regulatory burden in the long run where they reduce the cost or number of future project approvals.

Greater Commonwealth-State co-operation, and intra-state coordination, would deliver substantial benefits

FINDING 6.4

Bilateral assessment agreements significantly reduce regulatory burden for projects that require Commonwealth and State or Territory environmental assessment.

RECOMMENDATION 6.1

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should be amended in line with the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* (Cth), to enable negotiation of bilateral approval agreements.

RECOMMENDATION 6.2

When bilateral assessment agreements are renegotiated, State and Territory governments should consider making additional commitments to address inconsistencies and overlap in project approval conditions. These commitments could be modelled on those described in the *EPBC Act 1999 Assessment Bilateral Agreement Draft Conditions Policy*.

LEADING PRACTICE 6.6

Co-operation between the Commonwealth and the States and Territories in environmental assessment and approval processes can be supported by:

- the Commonwealth out-posting staff with State and Territory regulators, prioritising jurisdictions where more projects require approval by both levels of government
- State and Territory regulators taking up opportunities to have their staff trained in the application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

New South Wales is an example of leading practice with respect to both initiatives.

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#### LEADING PRACTICE 6.12

Effective coordination among agencies within a jurisdiction reduces uncertainty, facilitates timely processing and minimises overlaps and inconsistencies. This can occur through:

- a lead agency or major project coordination office that provides guidance to proponents and coordinates processes across agencies (without overriding the decision-making capacity of other regulators). The coordination models in Western Australia and South Australia, and the case management system in Northern Territory have been highlighted as leading practice by study participants
- co-operative arrangements between agencies. These include the use of memorandums of understanding, inter-agency working groups or taskforces such as those in Western Australia. South Australia's approach of using costs recovered from resources companies to pay staff in multiple regulatory agencies also supports faster approvals and better inter-agency communication.

#### Avenues for review of decisions bring accountability to the approvals process

#### FINDING 6.7

Court cases brought by third-party opponents to resources projects may cause delay, but this does not imply that third parties should be excluded from seeking judicial review. Process-driven legislation creates opportunities for regulators to make invalid administrative decisions that open the door for judicial review even where a project meets appropriate regulatory standards.

#### LEADING PRACTICE 6.11

Where approval decisions are made by unelected officials it is a leading-practice accountability measure that they can be subjected to merits review that allows for conditions and approval decisions to change to reflect substantive new information. The *Environment Protection Act 2019* (NT) puts this principle into practice.

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## Delivering sound environmental and safety outcomes

### FINDING 7.1

The average environmental footprint of resources activities has reduced over time, but publicly available information about environmental outcomes and how regulations have influenced them, is limited.

### LEADING PRACTICE 7.1

Regulators' experiences of monitoring compliance with approval conditions provide useful information about the efficacy of approval conditions in protecting the environment. Leading practice involves regulators employing a 'feedback loop' between the compliance monitoring and condition-setting processes, where any findings of redundant or ineffective approval conditions are communicated to the bodies responsible for setting those conditions. An example has not been identified.

### LEADING PRACTICE 7.2

Effective regulators continually look for ways to improve their methods, and for actions they could take beyond their routine monitoring and enforcement activities that could address specific problems. The New South Wales Environment Protection Authority's involvement with a study examining emissions from coal trains, and the New South Wales Resources Regulator's targeted programs described in its *Compliance Priorities* documents, provide examples of these practices.

### FINDING 7.2

In most jurisdictions public reporting about the effectiveness of compliance monitoring and enforcement activity is limited, putting public confidence in the regulation of projects at risk.

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#### LEADING PRACTICE 7.3

Public communication from regulators on their compliance and enforcement activities, dialogue with community groups on local issues and access to information about regulated sites can help to improve community confidence in the sector's regulation. Leading practice examples include:

- the NSW Resources Regulator's updates on rehabilitation progress and summaries of the outcomes of its compliance priority programs, and the National Offshore Petroleum Safety and Environmental Management Authority's *The Regulator* magazine
- the NSW Resources Regulator's publishing of its enforceable undertakings and documenting of prosecutions
- the NSW Environment Protection Authority's consultations with regional air quality committees.
- the Western Australian Department of Mines, Industry Regulation and Safety's posting of information from operators' annual environmental reports.

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#### LEADING PRACTICE 7.4

Public registers of activities with offset obligations and the projects developed to fulfil them provide valuable transparency about the application of offsets policies. Information on offset projects should include their biodiversity values, location, date of approval, completion status, and follow-up evaluations of benefits. Where companies fulfil their offset obligations by paying into a fund, the register should include the size of the payment. Western Australia's offsets register includes some, but not all, of these elements.

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#### LEADING PRACTICE 7.5

Schemes that allow companies to meet their offset obligations by paying into a fund can create opportunities for better environmental outcomes and reduce costs for companies. New South Wales, Queensland, South Australia and Western Australia all offer examples of this.

While the principles behind the use of such funds, including on what basis prospective offset projects should be evaluated, should be set subject to ministerial oversight, the fund's administration and selection of offset projects is best left to a separate body, like the NSW Biodiversity Conservation Trust.

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#### LEADING PRACTICE 7.6

Science-based implementation strategies for the use of offsets funds are key to achieving their intended purpose. These should complement other government activities or strategies aimed at improving the same types of outcomes, and be publicly available. An example has not been identified.

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#### LEADING PRACTICE 7.7

When a resources company elects to fulfil its offset obligations by paying into a fund, the fund payment should cover the full expected cost of attaining the required environmental outcome through the fund, including an amount that contributes proportionately to the fund's establishment and administration costs. The NSW Biodiversity Conservation Trust's fund incorporates this principle.

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### Rehabilitation requirements should be strengthened

#### FINDING 7.3

There are few examples of large resource extraction sites being rehabilitated or decommissioned in Australia — in part because rehabilitation and decommissioning only became a policy focus for governments in recent decades. As a result, there are many legacy abandoned mines. Some examples of positive end uses and good rehabilitation outcomes have emerged over recent years.

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#### LEADING PRACTICE 7.8

Resources sites that are placed into care and maintenance can create particular risks for the environment, and the operator may be at greater risk of default. These risks can be managed by a requirement to notify the regulator when a site is placed into care and maintenance, which can lead to further conditions. The preparation of care and maintenance plans that identify and address how environmental risks will be managed (such as those required in Western Australia) and the option to modify a site's financial assurance requirements (as available to the regulator in Queensland) are leading practice examples.

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#### LEADING PRACTICE 7.9

Having financial assurance arrangements in place to cover rehabilitation or decommissioning, based on the risk the project poses to the taxpayer, provides incentives for companies to undertake those processes and minimises the risk that responsibility will be shifted to governments. These arrangements are present for most (but not all) types of site.

#### LEADING PRACTICE 7.10

Rehabilitation bonds that cover the full cost of providing rehabilitation offer the highest level of financial assurance for governments, and provide companies with full incentives to complete rehabilitation in a timely way. Jurisdictions are heading in this direction, but a leading-practice example has not been identified.

#### FINDING 7.4

Rehabilitation pools can weaken incentives for companies to rehabilitate their sites and there are risks that the pool will be insufficient to cover the cost of rehabilitation if a company with a large liability does not fulfil its rehabilitation requirements. Pools must be paired with effective compliance and enforcement arrangements.

State and Territory Governments that use pooled arrangements for rehabilitation surety should ensure that levies reflect the risk of the company passing their liabilities to the government. The pool's exposure to larger liabilities or higher-risk companies should be limited. Queensland's rehabilitation pool is a good example of this model.

#### LEADING PRACTICE 7.11

Progressive rehabilitation can lead to a better understanding of rehabilitation requirements, ensure that funds are made available, reduce the total costs of rehabilitation, improve health and safety outcomes and provide community confidence in the operator's commitment to rehabilitate.

Progressive rehabilitation can be encouraged by including requirements in approval plans, and by financial surety requirements being reduced commensurate with ongoing rehabilitation work. Victoria's rehabilitation policy for Latrobe Valley mines represents a good example of the latter mechanism.

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#### LEADING PRACTICE 7.12

Smaller companies that acquire a resource extraction site that is nearing the end of its life may struggle to meet their rehabilitation obligations. Leading practice suggests that governments account for this risk in financial assurance frameworks. Governments can also consider the financial strength of companies in tenement licensing approvals, as has been implemented in Queensland's recent reforms.

#### LEADING PRACTICE 7.13

Residual risk payments allow governments to be compensated for foreseeable residual risks after the surrender of a mine site, while allowing companies to surrender their liability for the site. These payments should be proportionate to the remaining level of risk and determined at the point of surrender. Risks should be assessed, and payments calculated, through a formalised process. As a focus on residual risk issues is relatively new, no jurisdiction has been identified as having a leading-practice approach, although recent reforms in Queensland look to be moving in this direction.

#### LEADING PRACTICE 7.14

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

Worker health and safety legislation has recently been reformed, but is only one determinant of safety outcomes

#### FINDING 7.5

Reforms to mining workplace health and safety frameworks in the major resources states have led to more consistent and outcomes-based approaches. Company culture is a key determinant of safety performance, but good outcomes also require ongoing regulator monitoring of safety processes and practices. In some instances, improved regulator capability may be needed to enforce safety regulations effectively.

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## Strengthening the protection of Indigenous heritage

### LEADING PRACTICE 8.1

Heritage registers help to share information and avoid wasted time and cost in surveying areas repeatedly. Under a leading-practice approach, heritage authorities:

- require that resource explorers or other parties lodge all heritage surveys with that authority
- maintain registers which map and list all known Indigenous heritage sites
- adopt measures to ensure that sensitive information collected by a survey is only provided to approved parties (and only as necessary for the purposes of their activities).

The Commission has not identified an example of leading practice.

### LEADING PRACTICE 8.2

Leading-practice heritage regimes:

- embed heritage engagement in the project assessment process, so that heritage is considered in the earliest stages of, and throughout the life of, a project, rather than being a 'final box to check' when other approvals have been obtained
- centre traditional owners in decision making about their heritage. This means, in the first instance, that project proponents seek agreement from traditional owners on how heritage impacts will be managed
- provide a process where both traditional owners and project proponents can seek dispute resolution or appeal a heritage decision.

Leading-practice examples include:

- the Victorian *Aboriginal Heritage Act 2006*, under which a cultural heritage management plan must be approved by the Registered Aboriginal Party before planning approval can be given
- the Queensland *Aboriginal Cultural Heritage Act 2003* which requires a negotiated agreement on heritage issues before a project can go ahead.

### FINDING 8.1

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was initially implemented to operate where State and Territory regimes proved ineffective. This role remains important, but the Act does not fit well with the regulatory systems operated by the States and Territories. A comprehensive review of the role of the Commonwealth in heritage regulation and its effectiveness is required.

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## Investment is also affected by abrupt policy changes, policy inconsistency and uncertainty

### FINDING 9.1

Government policies necessarily must evolve in response to changing economic conditions, technology development and shifts in broader societal values and priorities. However, abrupt policy changes without adequate consultation can undermine investor confidence and discourage investment.

### FINDING 9.2

Uncertainty about and inconsistent climate change and energy policies across jurisdictions risk impeding resources sector investment.

### FINDING 9.3

Unclear policy objectives can lead to inconsistent and unpredictable application of regulations across resources projects, creating investor uncertainty (such as in relation to approval decisions and conditions on the basis of scope 3 emissions).

### FINDING 9.4

Not approving proposed resources projects or curtailing their exports due to potential greenhouse gas emissions in destination markets is an ineffective way of reducing global emissions.

### LEADING PRACTICE 9.1

Early public consultation on new policy proposals, accompanied by clear evidence-based articulation of why a proposed change is the best way of addressing an issue (for example, through regulatory impact assessments), can avoid policy surprises.

Clear policy objectives aid consistent and predictable regulatory decision making. Policy makers can achieve this by avoiding the use of vague language in policy documents and providing clearly articulated guidance on the intention and interpretation of policies and legislation.

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## Changing the duration of greenfields agreements would support investment

### FINDING 9.5

Allowing parties to negotiate greenfields enterprise agreements with durations that match the life of a greenfields project would improve investor certainty.

### RECOMMENDATION 9.1

The Australian Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that matches the life of a greenfields project. The resulting enterprise agreement could exceed four years, but where it does so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

## Community engagement and benefit sharing help mitigate impacts on local communities and build trust

### FINDING 10.1

The effects of resources extraction, both positive and negative, are amplified for local communities. By stimulating economic activity in the community, resources extraction can contribute to effects such as house and rental price increases and strains on local infrastructure.

It is appropriate that resources companies are required to address significant negative externalities directly associated with resources extraction, such as noise and dust, and provide or pay for infrastructure that they directly use. However, indirect effects, such as fluctuating house prices, signal the need for market adjustments and thus suppressing them would have costs. Governments are better placed to assess and address related social impacts. Approaches such as appropriate planning and targeted investments can moderate the community impacts of price spikes.

Companies should not be required to fund or construct infrastructure that is not directly associated with their project (although they may do this voluntarily).

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#### FINDING 10.2

Although negative externalities of resources projects on local communities should be efficiently addressed, these communities should not benefit over and above other regional or remote communities from resources royalties because of their *proximity* to resources activities. Instead, funding should be allocated wherever it generates the largest net social benefits.

#### FINDING 10.3

Companies have an incentive to engage and share benefits voluntarily with communities, to maintain a social licence to operate and improve the liveability of local communities for their workers. The appropriate role for government in this area is limited to coordinating resources companies' community-focused investments, providing guidance to companies and efficiently regulating negative externalities borne by communities due to resources extraction.

#### FINDING 10.6

Governments have a responsibility for funding and supporting services in regional areas. However, the case for hypothecating royalty payments to communities near resources projects is not compelling. There is evidence that such programs weaken governance and encourage projects that do not deliver community benefits. Royalty revenues should be spent where community net benefits are greatest, which may or may not be in communities close to resources.

Coordination and guidance can help ensure that company activities deliver benefits to communities

#### LEADING PRACTICE 10.4

Coordination between local communities and resources companies can improve the effectiveness of benefit-sharing activities. Coordination can involve formal partnerships, such as that between Rio Tinto and the City of Karratha, or community consultation, such as that established by Hillgrove Resources in Kanmantoo and Callington.

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#### FINDING 10.4

There is sufficient guidance available to companies from a range of institutions on how to engage with communities and other stakeholders. Most cover similar themes, and no one set of guidelines has been identified as better than the others.

#### LEADING PRACTICE 10.1

Guidance on the social impacts that should be considered in the approvals process, and how they should be considered, helps improve the quality of social impact assessments. For example, the New South Wales Government has issued guidance that outlines:

- what social impacts should be considered in the assessment
- how to engage with the community on social impacts
- how to scope the social impacts and prepare the assessment.

The effects identified in social impact assessments should not always be the domain of companies to address. Rather, leading practice requires that social impact assessments provide a framework for companies and governments to work together to address these effects, in line with the principles outlined in finding 10.1. The Commission has not identified a leading-practice jurisdiction in this area.

Adjustment can be supported by a range of other activities

#### LEADING PRACTICE 10.2

Local procurement requirements can be a relatively high-cost way of meeting development objectives. In contrast, resources companies and governments providing businesses in local communities with the support needed to engage with resources companies, such as BHP's Local Buying Program, is likely to create more enduring benefits for communities.

#### FINDING 10.5

Fly-in, fly-out (FIFO) (and drive-in, drive-out) workforces provide flexibility for companies, and distribute the employment benefits of resources development around Australia. The use of these workforces can also moderate some of the effects of resources extraction on local communities such as higher housing demand and prices, particularly during the construction phase.

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#### LEADING PRACTICE 10.3

Early identification of fly-in, fly-out requirements and their potential social effects, together with effective community and local government engagement, can ease resistance and lead to better integration of workers into communities.

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### **Specific community engagement and benefit sharing arrangements apply for Aboriginal and Torres Strait Islander communities**

#### FINDING 11.1

Agreements between resources companies and Aboriginal and Torres Strait Islander people primarily benefit traditional owners who have cultural and spiritual connections to land, as they are intended to do. However, agreements can also benefit other Aboriginal and Torres Strait Islander people who live in the community, who are sometimes voluntarily included as beneficiaries of agreements.

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#### FINDING 11.2

Effective engagement with traditional owners about the use of their traditional lands for resources development is guided by the principle of free, prior and informed consent (FPIC). In Australia, traditional owners generally do not have a right of veto, but agreement-making processes are provided for through legislation. Some resources companies choose not to proceed with development unless traditional owners give their consent, but most apply FPIC by building relationships and working with traditional owners to obtain consent.

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#### FINDING 11.3

The confidentiality of many agreements between resources companies and Aboriginal and Torres Strait Islander people makes it difficult to assess whether legislative frameworks and other arrangements that affect agreement making are fit for purpose and whether changes are required. It also limits the capacity for parties to agreements to share insights on leading-practice agreement making to improve the overall quality of agreements. While there would be advantages in making agreements more transparent, decisions to do so should be driven by traditional owners in collaboration with resources companies.

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#### FINDING 11.4

Prescribed bodies corporate (PBCs) are central to the ability of native title holders to represent their interests when making agreements with resources companies. However, resourcing and capacity constraints mean that many PBCs are unable to carry out this function effectively. Both government and resources companies have a role in resourcing and building the capacity of PBCs.

#### FINDING 11.5

There is legal ambiguity about the scope of permissible economic activities that charities can undertake. Some Indigenous organisations interpret the requirement for charities to operate for a charitable purpose and for the public benefit as limiting their ability to invest money for long-term economic development.

#### RECOMMENDATION 11.1

The Australian Government should amend the *Australian Charities and Not-for-profits Commission Act 2012* to give the Australian Charities and Not-for-profits Commission (ACNC) the power and capacity to make private rulings about whether particular activities that a charity wishes to undertake are considered charitable, and to publish de-identified summaries of private rulings.

#### FINDING 11.6

Proposed amendments to the *Native Title Act 1993* (Cth) make it clear that native title applicants owe fiduciary duties to their claim group when entering into native title agreements. However, they do not address questions of whether funds arising from native title agreements entered into before a native title determination belong to the claim group or common law native title holders, and whether applicants and/or claim groups have any duties towards this group.

#### RECOMMENDATION 11.2

The Australian Government should review whether native title claim groups or common law holders are entitled to funds arising from native title agreements made before a native title determination, and, if common law holders are considered to be entitled to these funds, whether applicants and/or claim groups have any duties towards them in receiving and managing funds for their benefit.

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#### RECOMMENDATION 11.3

The Australian Government should amend the *Native Title Act 1993* (Cth) to impose statutory obligations on private agents representing native title parties that are equivalent to those imposed on native title representative bodies and native title service providers. In particular, private agents should be required to have regard to the interests of the broader native title group affected by their actions, rather than just the native title applicant or claim group engaging their services.

### **Effective governance, conduct, capability and culture are crucial for leading practice regulation**

#### FINDING 12.1

Many of the regulatory issues presented to the Commission through the course of this study have been examined previously. Implementing enduring improvement requires that governments ensure the pre-conditions for leading-practice regulatory systems are in place; in particular, clear regulatory objectives, adequately resourced institutions and effective governance and accountability arrangements.

#### FINDING 12.3

The pre-conditions for leading-practice regulatory systems are particularly relevant in the current climate, as jurisdictions seek to boost their economic activity as part of the COVID-19 recovery. Clear Statements of Expectations of regulators and improved accountability and capacity would help expedite industry activity.

#### FINDING 12.4

The ability for regulators to operate effectively and efficiently is often constrained by capability challenges, including limited technical expertise and inadequate use of data and technology. In addition, a lack of regulator transparency inhibits accountability for their performance in achieving regulatory objectives, leads to unnecessary costs for industry and risks a loss of public confidence in the regulatory system. Not least, regulators collect a wealth of data but relatively little is made available to the public.

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## Good ‘regulatory housekeeping’ can underpin leading-practice systems

### LEADING PRACTICE 12.1

Statements of Expectations from Ministers to regulators are an effective way for governments to clearly set out their objectives for the regulatory system. Examples include the Statements to Earth Resources Regulation in Victoria, the National Offshore Petroleum Safety and Environmental Management Authority at the Commonwealth level, and the Independent Planning Commission in New South Wales.

### LEADING PRACTICE 12.2

Regular independent review and evaluation of regulatory frameworks, objectives and performance drive continuous improvement. Victoria, for example, following an inquiry into its Environmental Protection Authority, is clarifying the Authority’s objectives, principles and functions and developing a legislative framework that embeds a risk-based regulatory approach. The Independent Review of the New South Wales Regulatory Policy Framework has highlighted that a ‘life cycle’ approach for managing regulation over time assists in maintaining fit-for-purpose regulatory frameworks.

### RECOMMENDATION 12.1

Governments in each jurisdiction should assess:

- whether regulators of resources-sector activity are appropriately funded to enable timely processing of applications and effective adoption of a risk-based regulatory system
- opportunities for enhancing regulators’ cost recovery processes, in consultation with industry stakeholders about potential cost recovery models and their impacts on regulatory outcomes, and with the appropriate accountability measures in place.

### FINDING 12.2

Governments are responsible for establishing governance and institutional arrangements that minimise the risks of interference in regulatory decisions and promote regulator accountability, to build public trust in the system. Institutional independence for regulatory and policy functions can be one mechanism for promoting this. Strong governance arrangements such as clearly defined objectives, roles and responsibilities, as well as transparent and accountable decision-making processes, are also essential.

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## A range of actions can lift capability and regulator performance

### LEADING PRACTICE 12.3

Approaches to improving staff capability and technical expertise include:

- secondments — such as the officer exchange program between the Northern Territory Environment Protection Authority and Western Australia’s Department of Water and Environmental Regulation
- training programs — akin to those offered in Tasmania for senior management and in the National Offshore Petroleum Safety and Environmental Management Authority for all staff regarding regulatory practices
- developing strategies to target skills gaps, including technical expertise — as used by the Environment Protection Authority Victoria
- communities of practice — as in the case of the Australasian Environmental Law Enforcement and Regulators Network’s Better Regulation Working Group, which enables members to share experiences and ideas related to regulatory practice
- building cultural understanding through engaging with Indigenous organisations and visiting Aboriginal and Torres Strait Islander communities (an example of leading practice has not been identified)
- industry site visits — as have been undertaken in both Victoria and New South Wales.

### RECOMMENDATION 12.2

Regulators in each jurisdiction should consult with industry, including peak bodies (such as the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association), on developing programs of site visits to enhance technical expertise. These programs should be ongoing and part of induction training provided to new staff.

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#### LEADING PRACTICE 12.4

Senior management has a key role in fostering a culture that supports ongoing capability development and adoption of modern regulatory practices. Leading-practice approaches to promoting this type of culture include:

- appointment of a regulatory champion, akin to that established at the then Australian Department of Agriculture
- recognising and incentivising good staff performance, as occurs in Queensland's Department of Resources
- working groups to assess and promote cultural change, both internally as occurs at the National Offshore Petroleum Safety and Environmental Management Authority, and externally as with the Australasian Environmental Law Enforcement and Regulators Network's Better Regulation Working Group
- reporting on successes and learnings from failures, as occurs in South Australia's Department for Energy and Mining and Western Australia's Department of Mines, Industry Regulation and Safety.

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#### LEADING PRACTICE 12.5

Strategies for managing information and data help promote routine use of data in regulator decision making. Examples include strategies recently developed by the (then) Australian Department of Environment and Energy, the Department of Environment and Science in Queensland and the Department of Mines, Industry Regulation and Safety in Western Australia.

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#### LEADING PRACTICE 12.6

Digital technology and data management systems have the potential to improve the efficiency and effectiveness of regulatory processes significantly, while also leading to increased transparency and providing the foundations for more informed consultation. Leading-practice approaches include:

- developing a working group to investigate options for technologies to improve the use of data, as has occurred in the Environmental Protection Authority of Western Australia
- developing a strategy for improving the capabilities required to deploy information and technology, as has occurred at the Australian Department of Agriculture, Water and the Environment
- improving the interface between regulators and resources companies through online portals and databases, as will occur in a Commonwealth pilot with Western Australia
- developing modelling capabilities to support analysis and decision making, as has occurred at the Queensland Office of Groundwater Impact Assessment.

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#### RECOMMENDATION 12.3

Resources Ministers should establish a forum for regulators to share leading-practice initiatives from their jurisdictions, including those implemented to develop the capabilities and expertise of their agencies.

### Regulators can play a key role in building community confidence

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#### LEADING PRACTICE 12.7

The provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector. Examples include the National Offshore Petroleum Safety and Environmental Management Authority's website and Western Australia's offsets register. Regulators can be supported by the data and information published by other independent bodies, such as Queensland's GasFields Commission and the Gas Industry Social and Environmental Research Alliance.

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#### LEADING PRACTICE 12.8

Regulators can improve the public's understanding of regulatory objectives and processes by:

- engaging with local communities on the regulatory process throughout the life cycle of a resources project, including in the initial scoping stage, as occurs in Canada
- conducting broader consultation on an ongoing basis to understand community expectations and provide this feedback to policy makers and the government, as occurs in New South Wales.