MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE PRODUCTIVITY COMMISSION IN RESPONSE TO THE MINERAL AND ENERGY RESOURCE EXPLORATION DRAFT INQUIRY REPORT MAY 2013

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INTRODUCTION

The Minerals Council of Australia (MCA) is the peak national body representing Australia's exploration, mining and minerals processing industry. It represents the minerals industry both nationally and internationally in its contribution to sustainable economic and social development.

The minerals industry is Australia's principal export earner and most globalised industry. It has been a major driver of growth, investment and higher living standards in Australia over the last decade as rapid growth in emerging Asia has led to higher demand for mineral commodities.

The MCA welcomes the Draft Inquiry Report arising from the Productivity Commission's inquiry into non-financial barriers to mineral and energy resource exploration and strongly agrees with the direction of its recommendations, namely:

- there is considerable potential for reducing the volume, complexity and transparency of red-tape binding explorers without compromising environmental and heritage values to which the industry and the community are rightly committed;
- that regulation should be soundly evidence based;
- that regulation governing exploration should be appropriate to the level of risk posed by exploration, not extraction; and
- that land access decisions should take into account the benefits of exploration to the wider community.

As stated in our earlier submission to this inquiry, the MCA does not seek to diminish the importance of effective protection of the environment or communities in which the industry operates. The MCA's objective is to promote efficient and coordinated regulation that achieves better outcomes for all stakeholders while securing the industry's competitiveness and social license to operate.

Regulatory reform is critical to lifting the productivity of Australia's exploration effort in the face of challenges posed by increasingly competitive global capital markets, rising costs and declining discovery rates.

The MCA welcomes the Commission's endorsement of the business case for continued public investment in pre-competitive geoscience. World-leading exploration geoscience has been a key competitive advantage of Australia's exploration sector and is vital to securing the economic benefit of Australia's natural mineral endowment. It is an advantage that should not be impaired or surrendered.

A skilled workforce is also essential to advancing Australia's exploration effort. The minerals industry's demand for skilled labour remains high and notable skills gaps remain despite less buoyant industry conditions. As the Commission acknowledges, training and skilled migration each has a role in overcoming these capacity constraints. Unfortunately, the Draft Report is wrong in its assessment of provision of training within the minerals industry and fresh evidence is outlined in this submission to assist the Commission in its final report.

While financial barriers to minerals and resource exploration are not specifically included in the Commission's terms of reference a competitive financial and fiscal regime is a policy imperative for future minerals resource development. The MCA contends that Government should:

- introduce a form of flow-through-share scheme that addresses the tax asymmetry faced principally by junior explorers (such as the minerals industry's Exploration Tax Credit scheme); and
- maintain the existing taxation treatment for exploration expenditure for stability and certainty.

The MCA is pleased to provide further information to the Productivity Commission as requested in the Draft Report and to comment on the Commission's draft recommendations. This submission also includes an excerpt from the final report for the MCA by URS, *Update of National Audit of Regulations Influencing Mining Exploration and Project Approval Processes*.

1. RESPONSE TO CHAPTER 3: EXPLORATION LICENSING AND APPROVALS

The MCA welcomes the Commission's analysis in Chapter 3 of the Draft Report regarding the implications of the "sheer volume" (page 64) of legislation covering minerals exploration in Australia. The MCA particularly wishes to underline the Commission's conclusion that:

> *Frequent or unexpected regulatory change creates uncertainty for explorers. Given the intrinsically high risks of exploration and significant upfront capital investments, an uncertain regulatory environment can damage investor confidence and weaken exploration spending (page 85).*

The minerals industry values the Commission's acknowledgement that improving regulator performance has significant potential to reduce barriers to exploration. The MCA particularly supports recommendations to improve transparency and accountability and the call for legislators to be mindful of the cumulative impact of their decisions:

> *The Commission's view is that regulators should be mindful of the compliance burden that even minor changes can, in aggregate, impose on industry participants. All Governments should adhere to principles of best practice regulation, including consultation with key stakeholders at all stages of the regulatory process (page 86).*

The MCA has no further comment to make on the issues addressed in DRAFT RECOMMENDATIONS 3.1, 3.2, 3.3 or 3.4 but makes the following observations in regards to draft recommendation 3.5.

DRAFT RECOMMENDATION 3.5

> *Governments should ensure that their regulators publish target timeframes for approval processes, including exploration licensing and related approvals (for example environmental and heritage approvals). The lead agency for exploration should publish whole-of-government performance reports against these timeframes on their website.*

MCA response:

Certainty around timeframes is critical for investment across all phases of the minerals industry, including exploration. The cost of unnecessary delays to major exploration programs can be significant – both financially and in terms of opportunity costs.

Most exploration projects cause minimal disturbance and should therefore be straightforward to regulate and administer within statutory timeframes. The MCA considers that there is a need for transparency and accountability on adherence to these timeframes to provide certainty for project proponents.

In addition, many approval processes have in-built mechanisms which can 'stop the clock' on assessment processes. It is important there is clear guidance on how and when such mechanisms are applied.

The MCA supports the recommendation to publish target timeframes and government performance indicators to enhance transparency and accountability.

2. RESPONSE TO CHAPTER 4: LAND ACCESS ISSUES

The MCA has long contended that access to land is an issue of national significance, warranting a coordinated and strategic response from governments. Accordingly, the minerals industry welcomes and endorses the Commission's support for a strategic planning approach to land use assessment and planning.

DRAFT RECOMMENDATION 4.1

> *Drawing on the guiding principles of the Multiple Land Use Framework endorsed by the Standing Council on Energy and Resources, Governments should, when deciding to declare a new national park or conservation reserve in recognition of its environmental and heritage value, use evidence-based analyses of the economic and social costs and benefits of alternative or shared land use, including exploration.*
>
> *Governments should, where they allow for consideration of exploration activity, assess applications by explorers to access a national park or conservation reserve according to the risk and the potential impact of the specific proposed activity on the environmental and heritage values and on other users of that park or reserve.*

MCA response:

While the recommendation is generally supported, the MCA would urge the Commission to support the extension of this approach beyond the immediate issues of exploration tenure and recommend that the identification of minerals values be incorporated early in the process of defining a conservation area or in designating other land use.

This could be achieved through integrated planning which includes participation or input from the relevant mines/geoscience agency in the jurisdiction in question. This will ensure that not only current, but future potential minerals industry growth is accounted for.

The MCA advocates the application of multiple and sequential land use principles in land use planning and management. In applying these principles, the MCA considers that:

- a precautionary approach should be adopted in making decision about tenure and reserve boundaries, so that options for future generations are not foreclosed;
- regulatory arrangements should not presume incompatibility between uses of land;
- decisions regarding access to land should be based on rigorous scientific assessment and genuine engagement with affected communities;
- the effects of development/environment interactions should be assessed on a case-by-case basis that focuses on the actual risk posed by proposed developments;
- transparent environmental impact assessment processes should be used to evaluate development proposals and to ensure maintenance of significant environmental values; and
- levels of management and controls should be appropriate for the environmental sensitivity of the area in question.

The MCA considers these principles fundamental to achieving, simultaneously, the nation's economic and conservation objectives.

Through the application of leading practice technological and management approaches, minerals exploration can be undertaken in ecologically sensitive areas without compromising biodiversity and heritage values.

The impact of any subsequent minerals development would depend on the mining and rehabilitation technologies to be employed and the environmental and heritage values in the area. It should be possible to protect significant environmental values whilst allowing development to proceed. Accordingly, the availability of cleaner and less intensive mining and

processing technologies (such as in-situ leaching) should also be included as factors in the assessment and related decision making for new reserve areas.

The MCA does not advocate access to existing National Parks, where such access is currently prohibited, but rather advocates the application of these principles during the planning of new protected areas. The need for a new approach is well demonstrated by the following case study.

Case Study: The Declaration of Limmen Park, Northern Territory

Limmen National Park was declared by the Northern Territory Government in July 2012. The MCA considers that the process leading to the park's declaration was deficient in terms of a lack of broad consultation with the minerals industry and a lack of consideration of other land use values, including an assessment of potential social and economic impacts.

As a result, at the time of declaration, some 48 exploration leases were affected by the new national park (eight existing exploration leases were excised from the park's boundaries). The declaration of the new national park without detailed consideration of the potential minerals prospectivity of the area creates significant barriers to future mining development and the realisation of social and economic benefits.

DRAFT RECOMMENDATION 4.2

> *State and territory governments should ensure that land holders are informed that reasonable legal costs incurred by them in negotiating a land access agreement are compensable by explorers.*

MCA response:

The MCA commends to the Commission *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*[i] which was developed by the minerals industry in 2002.

At the industry level, *Enduring Value* marked the critical shift from a simple compliance mentality to one of community engagement and continuous improvement in maximising the long-term benefits to society of the effective management of Australia's natural resources. At an operational level, *Enduring Value* targets site managers with practical guidance on how to implement policies and programs for environmental stewardship, community development, workplace health and safety, human rights and ethical business conduct. This includes the provision of relevant and timely information to stakeholders and open consultation.

A formal commitment to *Enduring Value* is compulsory for full MCA membership. As part of this commitment, companies undertake to implement effective and transparent engagement, communication and independently verified reporting arrangements with the industry's stakeholders.

Enduring Value has been recognised by the United Nations and has also been reflected in law in both South Australia and Victoria as part of mining approvals processes in those States. *Enduring Value* is currently undergoing formal review to ensure the Australian minerals industry remains at the fore of sustainable development best practice. The review will be completed in 2013 with implementation planned for 2014.

DRAFT RECOMMENDATION 4.3

> *Governments should ensure that the development of coal seam gas exploration regulation is evidence-based and is appropriate to the level of risk. The regulation should draw on the guiding principles of the Multiple Land Use Framework endorsed by the Standing Council on Energy and Resources to weigh the economic, social and environmental costs and benefits for those directly affected as well as for the whole community, and should evolve in step with the evidence.*

MCA response:

The Harmonised Framework for Natural Gas from Coal Seams (the Framework) was endorsed by SCER on 31 May 2013. The Framework correctly acknowledges the importance of decisions on granting licences based on rigorous scientific assessment and best practice environmental management rather than arbitrary decisions that are inconsistent with a merits-based decision making processes. Furthermore singling out a particular commodity, such as CSG, is not appropriate as risk management regulatory regimes are not dependent on a specific mineral and the principles of sustainable development apply to all exploration and minerals development.

The Guiding Principles of the Multiple Land Use Framework are mirrored in the Framework and are consistent with the minerals industry's shared commitment to multiple and sequential land use – a long held tenet of the MCA.

3. RESPONSE TO CHAPTER 5: HERITAGE PROTECTION

Heritage protection is important to ensure the recognition and management of Australia's unique or outstanding historical, cultural or environmental values. As stated above, MCA member companies are signatory to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development* which includes a commitment to "respect cultures, customs and values" of those affected by mining activities. In addition, the minerals industry has long recognised that engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australians' rights in law, interests and special connections to land and waters.

However, existing heritage processes are impeded by complexity, duplication and a lack of transparency. As the Draft Report notes, there is "substantial variation" between Australia's Federal, State, Territory and local governments on how Indigenous heritage is defined and protected. There have been a number of reviews into Indigenous heritage legislation but "the reviews remain inconsistent or proposed reforms have yet to be implemented" (page 145).

The MCA shares the concern cited in the Draft Report that "reform is taking too long" and agrees with the Commission that action is required to "achieve a balance which minimises costs and delays for explorers within the framework of efficient and effective Indigenous heritage legislation" (page 149).

To this end, the MCA makes the following comments on the Commission's draft recommendations.

DRAFT RECOMMENDATION 5.1

> *Until concerns with state and territory legislation have been fully addressed, the Commonwealth should retain the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act) and amend it to allow state and territory regimes to be accredited if Commonwealth standards are met. Once all jurisdictional regimes are operating satisfactorily to Commonwealth standards, the Commonwealth should repeal the ATSIHP Act.*

MCA response:

MCA supports the intent of reducing duplication but is not supportive of the proposed strategy. A move by the Commonwealth Government both to maintain its existing regulations while creating an accreditation of State Government legislation may be perceived by the States as duplicating their responsibilities (which is contrary to the intent of the recommendation). In addition, it will take some time for the envisaged process to be completed, creating an indefinite period of uncertainty which will not constructively address the stated productivity concerns around forum shopping.

DRAFT RECOMMENDATION 5.2

> *Governments should ensure that their 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*
> *• 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), on the basis of agreed protocols.*

MCA response:

The MCA firmly supports the principles underlying draft recommendation 5.2 and its recognition of the practical benefits and risks of maintaining a public register of Indigenous heritage sites. Accordingly, the MCA commends to the Commission the Northern Territory model which enjoys the support of industry and Indigenous groups for providing a workable balance between the certainty sought by explorers and the security and confidence required by traditional owners.

The Northern Territory's Heritage Register is established under the *Heritage Act 2011*, is accessible online and contains details about places and objects that have been nominated to the Register, as well as those which have been declared. However, the Act provides that "the register must not include information that under Aboriginal tradition must be kept secret."[ii]

In addition, the *Northern Territory Aboriginal Sacred Sites Act 1989* has strict secrecy provisions which allow public access to "anyone with a bone fide interest in specific areas of land or sea in the Northern Territory". Under the Act, the Aboriginal Areas Protection Authority (AAPA) is the body responsible for overseeing the protection of sacred sites across the Territory, and for taking action against individuals or organisations that damage sacred sites or otherwise breach the laws protecting sacred sites.[iii]

The Northern Territory model has been described as "the high water mark for Aboriginal heritage protection in Australia".[iv]

The MCA has no further comment to make on the issues addressed in DRAFT RECOMMENDATION 5.3.

OTHER MATTERS

The MCA also commends to the Commission the work being undertaken by the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) with Deloitte Access Economics reviewing the statutory roles and functions of native title representative bodies (NTRBs) and native title services providers (NTSPs).

Effective partnerships between Indigenous communities and the private sector require effective representative bodies; this is particularly the case in the negotiation and implementation of Indigenous Land Use Agreements.

Since the *Native Title Act 1993* was introduced twenty years ago, the focus of its application has moved away from assisting native holders to achieve recognition of their native title through the claims process and towards assisting them with the challenges of a post-determination context. This trend has caused concern about adequate resourcing for these increasing and changing responsibilities.

FaHCSIA's review will examine whether NTRBs and NTSPs continue to meet the evolving needs of the system, particularly the needs of native title holders after claims have been determined. Deloitte Access Economics have been contracted to undertake the review which will be conducted in 2013 with the final report to be completed by the end of the year. The MCA is pleased to serve on the reference group for this review.

4. RESPONSE TO CHAPTER 6: ENVIRONMENTAL MANAGEMENT

The Productivity Commission's Draft Report is an important contribution on the need to for regulatory reform to bring about an "appropriate balance" in the management of exploration and environmental protection.

The minerals industry shares the goals advanced in the Draft Report of reducing duplication, establishing bilateral agreements, and ensuring regulations are outcome-focused, commensurate with the likely level of impact, and based on objective assessments of evidence.

The MCA outlined the best practice principles advanced by the minerals industry in its earlier submission to the Commission. The MCA would offer the following additional comments on the Draft Report's specific recommendations.

INFORMATION REQUEST

> *The Commission seeks views from inquiry participants on the scope for — and costs and benefits of — clarifying the defined matter of 'the Commonwealth marine area' under the Environment Protection and Biodiversity Conservation Act 1999 to better target matters of national environmental significance.*

MCA response:

The MCA considers there could be significant benefit in clearly defining the values within protected Commonwealth marine areas. This would assist proponents in identifying potentially significant impacts arising from exploration activities and hence the need to refer specific actions. Where possible, the spatial definition of protected matters (such as reefs, sea grass areas etc.) would also be useful for both regulators and proponents in assessment and planning. These defined protected matters should be made available through a single web based interface.

DRAFT RECOMMENDATION 6.2

> *The Commonwealth should improve the efficiency of environmental assessment and approval processes under the Environment Protection and Biodiversity Conservation Act by strengthening bilateral arrangements with the states and territories for assessments and establishing bilateral agreements for the accreditation of approval processes where the state and territory processes meet appropriate standards. The necessary steps to implement this reform should be properly scoped, identified and reviewed by jurisdictions and a timetable for implementation should be agreed.*

MCA response:

The MCA supports this recommendation. The MCA considers that bilateral agreements for assessment, and in particular approval, are a significantly underutilised mechanism under the EPBC Act. Even with the existing bilateral agreements for assessment, only 24 per cent of matters considered 'controlled actions' proceed under an assessment approach set out in a bilateral agreement.[v] In 2011, the Productivity Commission surmised that the reason assessment bilaterals remain relatively underutilised is the divergent nature of Commonwealth and State/Territory legislation (differing triggers) and the absence of a structured process for businesses to directly seek assessment under a bilateral agreement.

Where accreditation of State/Territory processes under an approval bilateral occurs, Commonwealth and State processes could be automatically integrated (without the requirement for proponents to directly seek assessment under a specific bilateral arrangement). This would potentially increase the usage of bilateral arrangements and therefore enhance the adoption of Commonwealth harmonised standards.

Barriers to the development of approval bilaterals were clearly identified in the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* conducted by Dr Allan Hawke in 2009.[vi] These include concerns over the standards of environmental protection, assurance, and the lack of Commonwealth compliance and auditing powers. These issues can be remedied through the application of appropriate safeguards, such as those provided in the Draft Framework of Standards for Accreditation of Environmental Approvals,[vii] developed in support of the recent COAG commitments and

aligning with the Hawke review recommendations. These safeguards would encourage greater confidence and therefore usage of assessment and approval bilateral arrangements by State and Commonwealth Governments.

INFORMATION REQUEST

> *The Commission seeks views from inquiry participants on the benefits and costs of strategic assessments in relation to resource exploration proposals, as a tool to avoid unnecessary regulatory burden and to improve environmental outcomes.*

MCA response:

Strategic Assessments as a tool to avoid unnecessary regulatory burden

From a resource company perspective, the key advantage of strategic assessments is the potential for multiple projects to be assessed and approved in a single one-off process. This approval can provide certainty for projects that comply with the endorsed plan, as they will no longer be required to undergo a separate project-specific environmental assessment. In addition, other benefits include:

- the avoidance of potentially duplicative and separate environmental assessments by different levels of government (Commonwealth, state/territory or local);
- capacity to achieve better environmental outcomes and address cumulative impacts at the landscape level in a formal statutory process; and
- the ability to develop an accredited long-term approach to the delivery of offsets.

Conversely, strategic assessments, while appearing extremely attractive in terms of delivering approvals for multiple projects across the life of an asset or growth program, come with their own set of risks and limitations. To date many of the strategic assessments undertaken under the EPBC Act have been delayed in the assessment phase and in some cases have failed to be finalised at all. The full process from conception to finalisation can take from three to five years, or more in some cases. Commonly encountered limitations include that:

- the EPBC Act strategic assessment provisions do not contain statutory timeframes – instead an agreement is signed between government and proponent that include "soft" timelines;
- information needed to meet legal requirements and regulator expectation can be onerous, often at a similar level to that of an EIS but for multiple projects – a risk-based and adaptive management approach is required if the assessment is to be truly strategic; and
- strategic assessments can be difficult to line up with State-based approval processes.

In terms of optimal use, strategic assessments can be best applied in two key scenarios:

1. By an individual resource company with a long-term planned series of mining or infrastructure developments that are within a similar location or region.

   (Important in this scenario is having sufficient lead time to complete the strategic assessment, but also a clear mechanism in the agreement with the Commonwealth to carve out and expedite a particular project through a project-specific assessment should business needs or market forces change.)

2. In a multi-company partnership or collaboration where a series of mines or related infrastructure is planned in the same location over a period of time (5-20+ years). Obvious examples would be in greenfield mining areas or where there is a series of planned infrastructure upgrades or capital projects (port and rail).

DRAFT RECOMMENDATION 6.4

> *Governments should ensure that their environment-related regulatory requirements relating to exploration:*
>
> *• are the minimum necessary to meet their policy objectives*

• *proportionate to the impacts and risks associated with the nature, scale and location of the proposed exploration activity.*

MCA response:

The MCA supports this recommendation. Effective regulation is essential for achieving the objectives of a modern state. Regulation can be pro-competitive and advantageous to the community, promoting growth in productivity and living standards. Good regulation is also important to protect heritage, biodiversity and other environmental values.

Regulatory burden occurs where inefficient regulation increases the compliance costs to industry for no appreciable environmental gain. These costs represent a loss to the affected industry, the community and the economy as a whole.

Current environmental regulation takes a broad approach to approvals and requires that any impact on all environmental values be first understood, regardless of risk. This often leads to wasting both government and explorers' resources on assessing and understanding all possible impacts, including minor/low risk impacts. Accordingly, the MCA considers that environmental assessment should be risk-based and the resources and requirements applied should focus on, and be commensurate with, the level of risk to environmental values.

As previously indicated, exploration is most commonly a minimal disturbance activity. Given the low level of risk to the environment posed by the exploration activities, there is an opportunity to reduce the administrative burden on both the government and the explorer through the use of 'particular manner' decisions. As provided for in the EPBC Act, these provisions can remove the need for the approval of an action if that action is undertaken in a particular manner. Similar provisions could also be used at the State/Territory level to address potential impacts on environmental values outside the Commonwealth's jurisdiction.

DRAFT RECOMMENDATION 6.5

Governments should ensure that their environment-related regulation of exploration activities should be focused towards performance-based environmental outcome measures and away from prescriptive conditions, in order to better manage risk and achieve environmentally sound outcomes.

MCA response:

The MCA supports the concept of performance-based environmental regulation. Regulation which is focused on clear and measurable outcomes is preferable to highly prescriptive or process-driven regulatory approaches as it provides for adaptive management over time to achieve the environmental performance targets. As part of this regulatory approach, adaptive management and environmental management systems should be recognised.

DRAFT RECOMMENDATION 6.7

Governments should clearly set out in a single location on the internet environment-related guidance on the range of approvals that may be required.

MCA response:

The MCA supports a single point for environmental assessment and approval information or guidance. However, beyond information requirements, there is a need to better co-ordinate the existing multi-agency approvals required by project proponents. The MCA considers that an approvals process driven by a single or 'lead' agency would significantly improve the co-ordination of the various approvals required for development to proceed, avoid conflicting conditioning and simplify engagement between government and the proponent. These lead agencies should also hold responsibility for co-ordination with the Commonwealth where projects intersect with matters of National Environmental Significance.

There are existing examples of lead agency driven approval processes in Western Australia, South Australia and Queensland. While these approaches differ in implementation and structure, they have generally resulted in improved outcomes for the minerals industry.

DRAFT RECOMMENDATION 6.8

> *Governments should ensure that their authorities responsible for assessing environmental plans and environmental impact statements (and equivalent documents) should make archived industry data publicly available on the internet.*

MCA response:

While the MCA supports greater transparency and access to environmental assessment and approvals data, there is a need for careful consideration of the type of information that is presented. For example, some information may be unsuitable for public dissemination due to commercial-in-confidence matters. Other information which may fall into this category includes information on culturally sensitive areas. Appropriate secrecy provisions and penalties should be considered in this context.

The MCA has no further comment to make on the issues addressed in DRAFT RECOMMENDATIONS 6.1, 6.3 or 6.6.

5. RESPONSE TO CHAPTER 7: PRE-COMPETITIVE GEOSCIENCE INFORMATION

As stated in its earlier submission, the MCA is strongly of the view that world-leading exploration geoscience has been a key competitive advantage of Australia's exploration sector and critical to securing the economic benefit of Australia's natural mineral endowment.

It has been acknowledged by successive governments at both the Federal and state levels that publicly funded pre-competitive geoscience is an investment from which governments themselves are the foremost beneficiary.

The Commonwealth Department of Finance's 2011 Strategic Review of Geoscience Australia stated in Chapter 3:

> *Typically, the first application for pre-competitive information is in informing decisions on which specific areas within a region or basin are viable for release for private exploration… At this stage the Government itself is the main beneficiary of the information in terms of identifying the specific acreage that has potential to be attractive to industry… A closely associated second stage in use of pre-competitive information is in promoting the exploration potential of Australian territory either in general terms or for specific areas being offered for exploration permits with a view to attracting investment from private explorers. The two stages described above represent the primary application of pre-competitive data and have strong analogies to the costs and processes involved in developing a prospectus for the sale of an asset. While the process involves providing information to potential investors, the underlying objective is not to benefit those investors but to elicit a positive investment response. The Government's interest in gaining the most favourable return for the community is served by ensuring the efficient provision of available information on that opportunity to potential investors. This holds regardless of how the Government seeks to capture a return for allocation of exploration rights.*
>
> *The 'prospectus' analogy represents a departure from the public good argument that is typically used to justify government provision of pre-competitive information. While public good attributes certainly apply to pre-competitive information, under this model it is the Government's desire to maximise its private interests, as sovereign owner of resources and recipient of secondary tax revenues from resource development that forms the core business case for the Government to generate and provide pre-competitive information.*[viii]

The MCA notes that this analysis strongly refutes the claim that public investment in pre-competitive geoscience is a subsidy to the minerals industry.

DRAFT RECOMMENDATION 7.1

> *Governments should monitor the outcomes of the cost recovery funding approach to the provision of pre-competitive geoscience information being adopted by the New South Wales Government, with a view to its possible broader application in those jurisdictions.*

MCA response:

The MCA notes that it has been common for industry to pay for the delivery [not the collection] of pre-competitive data and analysis but that developments in technology (including data transfer) have significantly reduced these costs.

INFORMATION REQUEST

> *The Commission is seeking information on the current proportion of funding for Australia's geological agencies that is sourced from ongoing block appropriation. The Commission is also seeking views from stakeholders as to whether the current funding arrangements of Australia's geological surveys represent the optimal way to finance the collection and provision of pre-competitive geoscience information.*

MCA response:

The MCA supports the conclusion of the Department of Finance's Strategic Review as noted in Chapter 5 that the temporary funding approach to the acquisition and analysis of pre-competitive data "compromises the cost-effectiveness of the

supported activities and capabilities over the long term and represents a value-for-money trade for the Government to the value of maintaining budget flexibility".[ix]

Further the Review explicitly recommended against cost recovery for pre-competitive data (Chapter 5). After consideration of the advantages and disadvantages of both the principle and practicalities of implementing such a model, the Review found:

> *… from a resource development perspective the principal client for pre-competitive information is the Government itself. Under current arrangements for release of exploration acreage, pre-competitive information serves important, arguably critical, roles in enabling the Government to identify areas that have conditions sufficiently favourable for exploration to be considered viable for commercial investment and in promoting and validating those areas to potential investors. This indicates that no more than partial cost recovery or industry funding would be appropriate.*
>
> *The analysis in Chapter 3 of this report strongly suggests that the production and distribution of pre-competitive information in this context was akin to the costs of developing and distributing a prospectus when marketing other investment opportunities. This does not discount the existence of private benefits from making available new investment opportunities (indeed it would be hard to motivate investors without prospects of returns), but it does recognise that the most common approach in public offerings is to focus on maximising the return for the investment opportunity or asset being marketed. For Australian governments, the dominant part of this return is realised in the form of secondary taxes (such as royalties, resource rent taxes and other charges) specific to resource extraction.*[x]

6. RESPONSE TO CHAPTER 8: WORKFORCE ISSUES

As earlier submitted, the minerals industry's demand for skilled labour remains high and notable skills gaps remain despite less buoyant industry conditions.

The Draft Report rightly addresses both short and long term approaches to addressing the supply of skilled workers to the exploration sector. The MCA would like to submit further information on two of the measures cited by the Commission:

- trade apprenticeships; and
- temporary skilled migration.

TRADE APPRENTICESHIPS

The Draft Report states on page 225 that "…exploration businesses do not in aggregate train a sufficient number of trade apprentices to meet industry requirements" citing the 2010 report by the National Resources Sector Employment Taskforce (NRSET) that says "the resources sector as whole does not train enough apprentices"[xi]. The Draft Report then concludes on page 232 that:

> *In the Commission's view, lack of appropriate apprenticeship opportunities for drillers, fitters and machinists is likely to be an important explanation for why exploration companies are experiencing difficulty in recruiting these occupations.*

The MCA submits that the NRSET assessment is now dated and does not reflect the acceleration in the hiring of apprentices and trainees since 2010. Analysis undertaken for the MCA by the National Centre for Vocational Education Research (NCVER) and released in 2013 found that the industry employs about 11,000 apprentices and trainees across Australia (approximately 5 per cent of the mining workforce) and spent $1.147 billion on training in 2011-12. Hence, one in every twenty employees in the sector is an apprentice or trainee.[xii] The NCVER's other findings include that:

- The mining industry spends 5.5 per cent of total payroll on training expenditure, five times relevant government training benchmarks for the employment of 457 visa holders and the defunct 1 per cent national Training Guarantee Levy.
- Around 20 per cent of all apprentices and trainees are reported as being mature-aged (more than 21 years old).
- Female apprentices and trainees comprise around 15 per cent of all apprentices and trainees, with the iron ore sector employing around 20 per cent female apprentices and trainees.
- About 13 per cent of apprentices and trainees are indigenous Australians.
- Apprentices and trainees are paid an average of $39,395 per annum.
- About 75 per cent of mining operators offer at least one form of national recognised training to their employees.
- Nationally, about 80 per cent of total mining employees participated in structured training.

TEMPORARY SKILLED MIGRATION

The MCA would also like to submit additional comments in relation to temporary skilled migration.

The minerals industry uses temporary skilled migration only as a last resort after exhausting workforce sources locally and nationally. The industry is an employer of Australians first and foremost and employs only 2.6 per cent of its workforce through temporary skilled migration.

Visa subclass 457 is nonetheless a vital component of realising the skills required by the sector. This visa is an effective tool for filling areas of identified skill shortages, especially in the professional cohort. As at December 2012, the total number of primary 457 visa holders across all industries was 83,840 (representing 0.72 per cent of the national workforce). The mining

workforce on 457 visa represents 7.6 per cent of temporary skilled workers and 2.4 per cent of the total industry workforce. Of the 6,380 temporary skilled migrants in the mining industry, 3,670 are located in Western Australia and 1,680 are located in Queensland.[xiii]

457 visas are critical in enabling the Australian minerals sector to meet the challenges of the global demand for minerals commodities. Without temporary skilled migration, the Australian minerals industry would not have been able to respond to the significant investment demand in mining experienced over the past decade. Hence the minerals sector is strongly of the view that Australia needs an effective temporary skilled migration program that has the capacity to respond to economic demand within a framework that ensures integrity and efficiency.

The MCA is therefore concerned at the largely unsubstantiated claims of 'rorting' being made in the national political debate. The MCA considers that the process for granting and monitoring of such visas is transparent and rigorous in its current form (through the SkillSelect program effective 1 July 2012). The obligations to sponsor a temporary skilled migrant under a 457 visa are already comprehensive and include clear sanctions should their obligations not be met.

New legislation rushed through the federal Parliament will increase the burden on the industry. The Act provides for more labour market testing by sponsors and increased record-keeping to account for new guidelines. The previous training benchmarks of 1 to 2 per cent of payroll for training purposes now become mandatory for every year of the visa sponsorship. While some exemptions remain for many professional and managerial skilled professions as defined in Schedule 1 of the Skilled Occupations List (the largest proportion of 457 visas for the minerals industry), the Government has arbitrarily decided certain types of occupations in this Schedule will not be exempt, including engineers.

The first preference of MCA members is to recruit locally and use the 457 Temporary Migration Scheme as a last resort, but the new reporting rules require increased and ill-defined proof that employers have made genuine attempts have been made to open job opportunities up to Australian citizens and have a genuine need for skilled workers from overseas.

These changes follow unexpected and unwelcome measures announced in the Federal Budget 2013-14 to more than double the fees charged to foreign workers applying for 457 visas (from $400 to $900). The Government stated that this will raise an additional $200 million over four years. This is a direct cost to business.

The Budget also formalised the March 2013 announcement that the Fair Work Ombudsman's budget will be increased by $3.4 million to enforce employer compliance with 457 visa conditions.

The minerals industry welcomes an effective temporary skilled migration program that has the capacity to respond to economic demand within a framework that ensures integrity and efficiency. It is too early to determine what impact the Government's recent increases to fees, charges and bureaucracy will have on the minerals sector, but it is important to note that the tenor of the debate will also have an effect.

With hundreds of billions of dollars of proposed resource projects in the investment pipeline yet to reach the final investment decision stage, misinformed debate around skilled immigration will not be conducive to positive investment decision-making. The MCA is concerned at the potential for a successful scheme to continue to be used as a political football.

The consequences of such an outcome can be seen in Enterprise Migration Agreements (EMAs) which have not been allowed to work effectively since their introduction.

The Commonwealth introduced EMAs in 2011 in response to the final report of NRSET. EMAs are a custom-designed, project-wide migration arrangement for large scale resource projects, designed to help ensure peak workforce needs are met, to ease capacity constraints and to ensure economic and employment benefits are realised.

Despite strong safeguards including the need for employers to provide a training plan, labour market analysis and workforce plan, the announcement of an EMA covering Hancock Prospecting's Roy Hill Project in May 2012, aroused a concerted campaign from sections of the labour movement. The campaign led the Gillard Government to announce it was "strengthening oversight"[xiv] of EMAs and establishing a 'Jobs Board' which companies seeking EMAs would be required to use to "demonstrate that suitably qualified Australians are given the first opportunity to apply for available jobs"[xv].

Subsequently, Hancock Prospecting announced on 18 February 2013 that it would no longer require the foreign workers as negotiated under its EMA and there have been no other EMAs approved. The MCA notes that the guidelines for EMAs have been removed from the Department of Immigration and Citizenship's website. The reason provided is that the guidelines are under review. It is the MCA's view that any further tightening of the EMA guidelines would render the initiative unworkable.

7. OTHER MATTERS – FINANCIAL BARRIERS

While financial barriers to exploration are not specifically included in the Productivity Commission's terms of reference for this inquiry, a competitive financial and fiscal regime is a policy imperative for future minerals resource development.

As argued in the MCA's initial submission, difficulties attracting funding for early stage exploration and for more marginal projects are greater now than at any time since the depths of the Global Financial Crisis. Policy responses designed to address taxation disadvantage faced by exploration companies are an essential component of the policy framework.

Australia's suboptimal level of exploration expenditure relates directly to the tax asymmetry problem faced by many explorers, particularly junior ones, unable to utilise immediate deductions for exploration expenditure due to their lack of taxable income. This effectively increases the costs for junior and mid-size explorers of carrying out exploration. As a result, small exploration companies exploring in Australia are less attractive as investment options compared with other industries and exploration companies in competing jurisdictions with pro-exploration policies.

The Australian Bureau of Agricultural and Resource Economics (the forerunner to the Bureau of Resources and Energy Economics) has estimated that this asymmetry increases the exploration costs of small exploration companies by around 7-8 per cent. This is a significant structural barrier to an activity already characterised by high risk, escalating costs, extensive regulatory requirements and pressures for new restrictions (for example, new land access provisions in States such as Queensland and additional monitoring and compliance requirements in NSW).

By distorting the allocation of finance to the junior sector, and hence penalising risky projects, this feature of the tax system can result in a degree of financial market incompleteness. Revising those features of the tax system, or attempting to offset them through other measures, is likely to yield important net welfare gains.

To address this problem, the minerals industry considers the Australian Government should adopt an Exploration Tax Credit scheme, a variation on the Canadian Flow-Through-Shares scheme tailored for Australia's unique policy context. An ETC would enable the transfer of specified deductions of select exploration companies operating in Australia to individual Australian resident investors at the company income tax rate. Rather than being accumulated as tax losses which are only realisable if and when the company earns a taxable income, the tax credit for exploration expenditure is leveraged in the capital markets so as to attract external investors. By targeting only those exploration companies with unutilised tax deductions, the ETC will necessarily target juniors and, by default, greenfields exploration.

The industry's aim is to promote a simple and workable mechanism which:

- encourages eligible junior exploration companies to undertake exploration for mineral deposits in Australia;
- minimises administrative costs for companies, regulators and investors;
- minimises distortions between shareholders;
- minimises tax compliance costs;
- minimises risk for investors and regulator; and
- minimises distortions for investment decisions by companies.

In addition, the MCA has argued strongly against measures to limit the immediate deductibility of legitimate exploration expenditure under income tax laws. Any such proposals would impose an effective tax increase on explorers. The immediate deductibility of exploration expenditure acknowledges that:

- such expenditure is an ongoing, necessary and an ordinary business expense analogous with other normal operating expenses that are immediately deductible, such as those geared towards market research or marketing;
- general exploration expenditure cannot be viewed as capital expenditure creating a long-term asset because most exploration expenditure does not result in discovery;

- similarly, exploration cannot be deducted over life of mine (LOM) because – by definition – it occurs before there is a mine and in most instances a mine never eventuates; and
- there is a need to encourage discovery of new deposits to support the growth of a sector in which Australia has a demonstrable comparative advantage.

Both the Industry Commission (the forerunner to the Productivity Commission) and the 1999 Ralph Review into business taxation concluded that the immediate deductibility of exploration expenditure provides the least distorting and most practical way to treat exploration expenses.

Executive Summary (Excerpt)

Findings

1 Mining Regulation is extensive and may impede industry competitiveness

Mining, through all phases, from exploration to closure, is subject to more regulatory requirements than most, if not all, other economic activities. The cost of meeting regulatory requirements are a business cost and mining companies have a commercial incentive to make these as low as possible in securing desired regulatory outcomes in order to remain profitable and internationally competitive. Any unnecessary costs incurred in obtaining the required approvals, and/or in pursuing regulatory outcomes that are not justified, constitute a cost burden that undermines the commercial performance of individual companies, as well as the attractiveness of Australia and New Zealand as a place to invest in a global sense. Regulatory efficiency is therefore critical to the minerals industry if it is to be both globally competitive and competitive nationally relative to other sectors.

2 The extent of regulatory "churn" is destabilising for business

The past seven years has been a period of persistent regulatory "churn" in Australia. A large number of changes have been made by all Australian jurisdictions, including the key mining states of Queensland and Western Australia, to the regulatory arrangements governing mining exploration and project approval processes. The changes relate to all aspects of the regulatory spectrum including primary legislation, subordinate legislation, and ministerial directions and guidelines. Many of these changes were made as a result of the large number of reviews of the regulatory arrangements over this period.

With reference to primary legislation, and to illustrate the extent of regulatory change for Australian jurisdictions since January 2006 (to March 2013), the changes that are likely to have a significant impact on the two approval processes include:

- the enactment of six new pieces of legislation;
- the enactment of six replacement Acts;
- the enactment (in addition to new and replacement legislation) of more than sixty major sets of amendments, spread across all jurisdictions (refer to **Table 1**), to the major primary legislation governing the two approval processes; and
- many more minor amendments.

Several more changes are in the "pipeline", including a number of Bills (some may now be Acts) before various Parliaments. For New Zealand, the regulatory arrangements have been more stable, but this could change with a number of regulatory reform initiatives currently being progressed by the New Zealand Government.

Further to the changes to primary legislation, there have been a plethora of consequential changes to subordinate legislation, Ministerial Directions and Guidelines, as well as to official government guidelines and policy strategies. In turn, these changes have given rise to a plethora of technical and administrative changes which seek to make minor adjustments to the approval processes, including fees and charges.

The extent of regulatory "churn" is highly destabilising for business. Further, the audit update also revealed that while there is a strong commitment to red/green tape reduction by governments, this has resulted in a plethora of review processes rather than efficiency reforms.

The underlying "market failure" reasons why government needs to intervene to regulate minerals exploration and mining projects do not change quickly over time, therefore the extent of review activity and regulatory change since January 2006 is difficult to explain. A general conclusion is that the approval processes have become more politicised and with a shorter-term focus since the 2006 Audit, and that this has increased uncertainty and compliance costs for industry, as well as the costs incurred by government agencies in administering the processes.

Table 1 Major sets of legislative amendments by Jurisdiction: Mineral exploration and mining project approval processes

Legislation	NSW	Vic	Qld	WA	SA	Tas	NT	Cth	NZ
Mining Industry	2	2	2	3	1	-	1	-	-
Environment	1	1	2	4	1	2	1	3	5
Planning	1	1	-	4	-	1	-	-	-
Land Rights	-	1	-	-	-	-	1	4	-
Aboriginal Heritage	1	1	-	-	-	1	2	-	2
Native Vegetation	1	-	-	1	-	-	-	-	-
Water	2	1	1	3	2	2	-	4	-
Combined	8	7	5	15	4	6	5	11	7

3 Limited Application of COAG Principles of Best Practice of Regulation

Without involvement in the regulatory change decisions processes, it was not possible to assess the application of the COAG principles of best practice regulation. However, some general observations can be made about the application of some of the principles:

With respect to Principle 1, "establishing a case for action before addressing a problem", many situations were observed where regulatory change had been made without clearly specifying the "problem" and/or the "case" that the proposed change represented the best approach.

Most of the regulatory changes made were of a technical/housekeeping nature. Whilst most of these changes may not have justified the explicit application of the COAG Principles, they do increase the cost for all parties involved of meeting regulatory requirements directly or indirectly because of the constant changing requirements, and associated uncertainty, arising from the regulatory "churn".

With respect to consultation (COAG Principle 7), while consultation efforts by governments were genuine and undertaken in "good faith", tight timeframes and the large number of reviews undertaken meant the mining industry (including associations) had limited capacity to respond meaningfully in a number of cases.

In summary, COAG best practice principles are found to be necessary, but not sufficient for achieving effective and efficient regulation.

4 Limited engagement of Offices of Best Practice Regulation

The review found that Offices of Best Practice Regulation tend to become engaged too late to have a significant influence on the development of policy initiatives and associated regulatory measures. Their involvement in facilitating the ongoing cost-effective management of regulatory systems, from the perspective of all affected parties, also appears limited. Further, while many amendments have been incremental and of themselves minor, their cumulative impact on regulatory efficiency is significant and not adequately assessed under current processes.

The approach of the New Zealand Treasury is not to apply a set of principles as a "tick-the-box" exercise, but rather to emphasise the importance to policy makers and regulators of assessing the consequences of their decisions and of the need to take responsibility for the decisions that they make. This has the effect of placing emphasis on the development of sound policy, rather than the application of a set of principles per se.

5 Independent Expert Panels are duplicative and may undermine confidence

The recent emphasis on establishing "independent expert panels" has the potential to cause a number of adverse impacts. These include the potential to duplicate the normal assessment processes of government agencies and to undermine the confidence that can be placed in those processes.

The establishment of such panels is also likely to be inconsistent with the COAG Principles in that a "problem" with normal government assessment and approval processes had not been determined before doing so. Even if determined, the establishment of such panels would appear to have been pursued in the absence of an assessment under the COAG Principles that such panels represented the most cost-effective way of addressing the "problem".

6 Capacity, capability, and competency in government agencies

There has been a significant reduction in the capacity, capability and competency of government agencies. This loss impacts adversely on the ability to make the right regulatory decision in a timely manner and to monitor the impact of that decision in achieving the desired outcomes sought through the regulatory provisions.

More specifically, the loss of competency within government is reflected in the reluctance, or lack of ability, to:

- specify desired outcomes and the relative importance of the various outcomes being pursued;
- determine the issues that must be addressed in order to secure those outcomes and, hence, included in the assessment of whether to grant regulatory approvals;
- determine and specify the conditions that must be met by proponents in undertaking the activities for which approval has been granted;
- determine the data required, hence associated monitoring activities, to assess if the desired outcomes were being achieved and/or needed to be adjusted or no longer pursued; and
- adopt a consistent approach to the undertaking of assessments and the granting of regulatory approvals within a given agency, and between government agencies.

7 Influence of "paradigm" used for assessments and approvals

The review found that the underlying culture and approach of the agencies determines the general approach taken in assessment and for approvals. This has a significant influence over the cost-effectiveness of those processes. Planning agencies tended to be procedure and rules based and, as such, this constrained the ability to assess proposals on their merits as determined by the specifics of any given proposal. By contrast, economic and industry agencies tended to adopt a more outcomes focussed approach and willingness to be more flexible in how those outcomes were achieved. They also tended to be more willing, and better able to address the environmental, economic and social dimensions of a proposal in an integrated and balanced way as informed by the merits of the proposal from a whole-of-government perspective.

8 Duplication of regulatory effort

Duplication primarily occurs in the implementation, rather than the design of the regulation. In particular, where there is a lack of integration and coordination in the administration of the processes under the various acts.

Differences can arise between government agencies in determining data requirements and the subsequent actions required by proponents to address perceived adverse consequences. In addition, a lack of alignment in terms of regulatory time sequence, changes resulting from staff, the experience and knowledge of the replacement staff, and the overall commitment of government agencies to completing the regulatory approvals process within the originally set timeframes negatively impact on regulatory processes.

The lack of alignment of approach and commitment between jurisdictions justifies further consideration by COAG so that the mining sector, and indeed all sectors of the Australian economy are not unnecessarily constrained in reaching their full potential.

9 Governance is the critical factor

A critical issue with respect to the performance of the various regulatory processes was not with the underlying “black-letter” law but the lack of capacity, capability and competence within government to effectively implement those processes. These aspects were central to a range of concerns expressed about the lack of clarity and consistency in undertaking assessments, as well as time delays in the granting of approvals.

Accordingly, the identification of the significance of governance is the most important outcome in updating the 2006 Audit. To address these concerns, there is a need for greater integration of the separate assessments and approvals of different agencies into one whole-of-government regulatory approval decision process.

Integrated, whole-of-government approaches to the granting of approvals for mineral exploration and mining projects have been implemented by some jurisdictions. Driving the introduction of these arrangements has been the need to integrate the assessment of a range of technical issues into one overall approval process and to select central co-ordinating and lead assessment agencies.

Cabinets play a critical role in the successful implementation of the regulatory arrangements for granting minerals exploration and mining projects approvals. The nature of the authority and the way in which it is imposed combine to determine the culture within which approval assessments and decisions are made. They also combine to establish the behaviour expected of all parties so that the assessments and decisions are made with procedural fairness in good faith.

URS Australia Pty Ltd
31 May 2013

ENDNOTES

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