Australian Government
Productivity Commission

Resources Sector Regulation

Productivity Commission Draft Report

March 2020

This draft report has been prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Opportunity for further comment

You are invited to examine this draft report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by 5 June 2020. Further information on how to provide a submission is included on the inquiry website: https://www.pc.gov.au/inquiries/current/resources/make-submission.

The final report will be prepared after further submissions have been received and will be forwarded to the Australian Government by 7 August 2020.

Commissioners

For the purposes of this study and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Lisa Gropp Presiding Commissioner

Terms of reference

PRODUCTIVITY COMMISSION STUDY INTO RESOURCES SECTOR REGULATION

I, the Hon Josh Frydenberg MP, Treasurer, pursuant to Parts 2 and 4 of the Productivity Commission Act 1998 hereby request the Productivity Commission to examine regulation affecting the resources sector and highlight best practice.

Background

Commonwealth, state and territory governments are responsible for managing resources in their jurisdictions and are all involved in the regulation of the sector. For example, states and territories regulate health and safety, employment, community engagement and environmental management, while the Commonwealth has constitutional powers over many of these aspects of law, and in some instances overrides any legislative inconsistencies. Additionally, States negotiate contractual agreements with individual operators that are subsequently ratified by state parliaments.

Regulation plays a critical role in ensuring that resources projects across Australia meet community and environmental management expectations. However, regulations may pose unnecessary burdens or impediments on resources companies operating, or seeking to operate and invest, in Australia.

Scope

This study will focus on regulation with a material impact on business investment in the resources sector. The Commission is asked to identify effective regulatory approaches to the resources sector and highlight examples of best–practice regulation across the Australian resources sector and internationally, taking into account the unique regulatory challenges facing individual jurisdictions.

This will provide opportunities for individual jurisdictions to assess their own regulatory environments, and to draw on leading practice.

In undertaking this study, the Commission should:

1. Assess best–practice project approval processes across Australia and internationally and identify any broader impediments to the timing, nature and extent of business investment in the Australian resources sector.

2. Identify regulatory practices that have achieved evidence-based goals without imposing additional costs or regulatory burdens on industry, as well identifying jurisdictions' successful efforts to streamline or augment processes to reduce complexity and duplication and improve transparency for current and future investors.
3. Identify leading environmental management and compliance arrangements that have resulted in the removal of unnecessary costs for business while ensuring robust protections for the environment are maintained.
4. Identify best–practice examples of government involvement in the resources approvals process – taking into account the context of each development – to expedite project approvals without compromising community or environmental standards, based on sound risk-management approaches.
5. Examine regulatory and non-regulatory examples of effective community engagement and benefit–sharing practices, and establish best–practice examples of where mutually-agreeable relationships were successfully developed between the resources sector and the communities in which they operate, including with Indigenous communities.

Process

The Commission is to consult with key interest groups and affected parties, invite public submissions and release a draft report to the public.

The Commission is to consult with COAG Energy Council working groups on existing studies related to land access, community engagement and regulatory benchmarking.

The final report should be provided within 12 months of the receipt of these Terms of Reference.

The Hon Josh Frydenberg MP
Treasurer

[Received 6 August 2019]

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Abbreviations

ABS	Australian Bureau of Statistics
ADGSM	Australian Domestic Gas Security Mechanism
ADI	Accelerated Discovery Initiative
ALRA NSW	*Aboriginal Land Rights Act 1983* (NSW)
ALRA NT	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
ANSTO	Australia's Nuclear Science and Technology Organisation
ANZSIC	Australian and New Zealand Standard Industrial Classification
APPEA	Australian Petroleum Production and Exploration Association
ASX	Australian Stock Exchange
COAG	Council of Australian Governments
CCAA	Cement, Concrete and Aggregates Australia
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DAWE	Department of Agriculture, Water and the Environment
DoEE	Department of Environment and Energy
DIIS	Department of Industry, Innovation and Science
DISER	Department of Industry, Science, Energy and Resources
DMITRE	South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy
EDO	Environmental Defenders Office
EDR	Economic demonstrated resources
EFTF	Exploring for the Future
EIA	Environmental impact assessment
EPA	Environment Protection Authority
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
EVS	Economic Vehicle Status
FADA	Future act determination application
FBT	Fringe benefits tax

FDI	Foreign direct investment
FIFO	Fly in, fly out
FIRB	Foreign Investment Review Board
FPIC	Free, prior and informed consent
FTA	Free trade agreement
FVTOC	Federation of Victorian Traditional Owner Corporations
GA	Geoscience Australia
GDP	Gross domestic product
GGIC	Government Geoscience Information Committee
GHG	Greenhouse gas
GISERA	Gas Industry Social and Environmental Research Alliance
HFE	Horizontal fiscal equalisation
ICDC	Indigenous Community Development Corporation
ICMM	International Council of Mining and Metals
ILUA	Indigenous Land Use Agreement
LNG	Liquefied natural gas
LPG	Liquefied petroleum gas
LUAA	Land Use Activity Agreement
MCA	Minerals Council of Australia
METS	Mining equipment, technology and services
MLUF	Multiple Land Use Framework
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NSW IPC	New South Wales Independent Planning Commission
NSW PAC	New South Wales Planning Assessment Commission
NSW RR	New South Wales Resources Regulator
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NOPTA	National Offshore Petroleum Titles Administrator
NTA	*Native Title Act 1993* (Cth)
NTRB	Native title representative body
NTSP	Native title service provider

OECD	Organisation for Economic Co-operation and Development
OGIA	Office of Groundwater Impact Assessment
PBC	Prescribed body corporate
PBI	Public benevolent institution
PC	Productivity Commission
QAO	Queensland Audit Office
Qld DES	Queensland Department of Environment and Science
RNTBC	Registered Native Title Body Corporate
SA DEM	South Australian Department for Energy and Mining
TOSA	*Traditional Owner Settlement Act 2010* (Vic)
WA DMIRS	Western Australian Department of Mines, Industry Regulation and Safety

OVERVIEW

Key points

- There is no question that resources activities should meet reasonable requirements in relation to their impacts on the environment, heritage, worker safety, landowners and communities. Achieving them demands strict, often complex regulation, but if not done well this can create *unnecessary* costs for companies and diminish benefits for the broader community.
- This study focuses on whether regulatory processes can be improved to reduce unnecessary burdens without diluting environmental and other regulated outcomes. Indeed, reflecting growing community expectations and concerns, confidence in the robustness of regulatory regimes to achieve their objectives will be critical for ongoing support for investment in the resources sector.
- Notwithstanding many recent initiatives, there is evidence that regulatory processes remain unduly complex, duplicative, lengthy and uncertain and may be becoming more so.
- Many of the issues raised in this study have been raised in previous reviews. Successful reform will require greater attention to the pre-conditions for leading-practice regulatory systems — in particular clear regulatory objectives, effective governance, incentive and accountability frameworks for regulators, and adequately resourced institutions.
- No one regulatory system here or overseas stands out as leading practice in its entirety, but all have elements that merit this description. All jurisdictions could learn from each other.
- 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.
- Enhanced regulator accountability and transparency could significantly reduce unnecessary costs and improve regulated outcomes. Provision of clearer information about assessment requirements, agreed timelines and reporting against them, improved inter-regulator cooperation to reduce duplication, and publication of monitoring and compliance actions including for offsets commitments would assist proponents and build confidence in regulators' effectiveness. More comprehensive arrangements for mine rehabilitation would deliver community as well as reputational benefits.
- 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.
- Both governments and companies have responsibilities for addressing negative impacts of resources projects on local communities, but mandating requirements such as local content is not leading practice. Companies should consult and coordinate with local governments and community groups to promote local benefits from their community investments.
- Communities and landowners understandably want to know how a project may affect them and to comment on development proposals. Engagement should begin early in a project and continue throughout, and provide meaningful opportunities for the community to present their views. Trusted institutions can play an important role through building understanding of, and potentially allaying, stakeholders' concerns.
- Many resources projects are located on native title land. Benefits are shared with Aboriginal and Torres Strait Islander communities through native title agreements and targeted voluntary activities by companies. There is scope for reform to help ensure that management of native title agreement benefits promotes communities' objectives.

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 are in operation. Oil and gas wells add to the number of active sites; quarries number about 2200.

Resources are a significant economic contributor — accounting for about 9 per cent of Australia's GDP in 2018-19, directly employing about 250 000 people and contributing almost 60 per cent of the value of exports. Over 2017-18, the resources sector paid about $23 billion in wages and salaries, and the minerals sector paid about $19 billion in company taxes and $12 billion in royalties. The oil and gas sector contributed about $5 billion in taxes, royalties and other fees in 2016-17. Benefits also flow to the community via domestic shareholdings.

Industry, investors and some governments see significant growth potential for the sector, though the future mix of output and investment will reflect multiple (often competing) factors including global and domestic policies and new technologies. For example, emissions abatement policies will see rising demand for the many minerals required for renewable energy technologies and declining demand for coal and fossil fuels in some countries. 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.

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 entire community. Hence, governments have an interest in managing resource development to deliver a community dividend. Second, over their lifecycles 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.

Although essential, if not done well regulation can impose substantial unnecessary costs. Poorly designed or administered regulation can impose burdens on industry for negligible

community benefit, deterring companies from investing in projects that would have been worthwhile from a national perspective. Ineffective regulation can 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 to addressing 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.

A framework based on well-accepted and widely-applied regulatory principles is 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.

Each stage of the project life-cycle is examined. 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, are considered. Management of environmental and other regulated outcomes is also evaluated.

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 their 'social licence to operate' — the need to develop and maintain community acceptance of their activities.

Reflecting the importance of these issues, and as required by the terms of reference, 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. Distinct sets of issues relating to land access, community engagement and benefit sharing apply in this context.

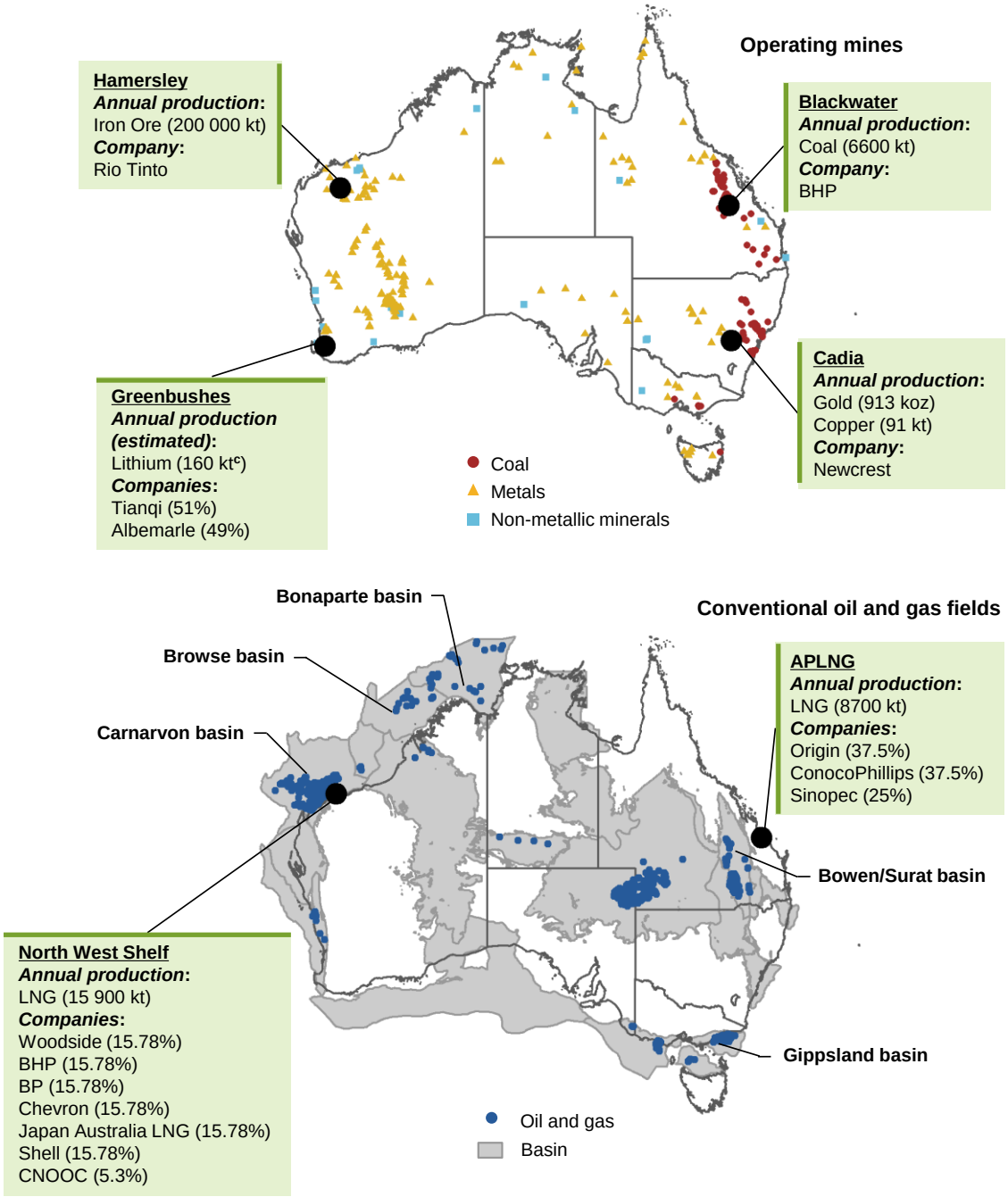
Australia's resources sector at a glance

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 on the north-west coast of Australia).

Figure 1 **Resources production occurs Australia wide**

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

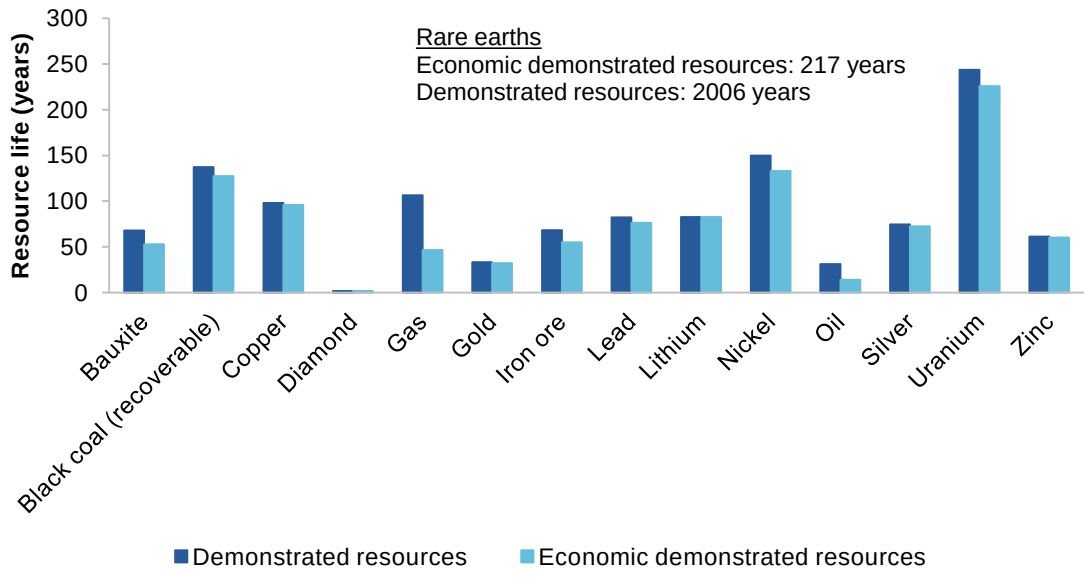


Australia possesses large quantities of resources that have not yet been extracted (figure 2). While some deposits have been identified with certainty and assessed as being economically viable, others are more speculative and may be difficult to extract.

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.

Figure 2 **Known reserves are large**

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

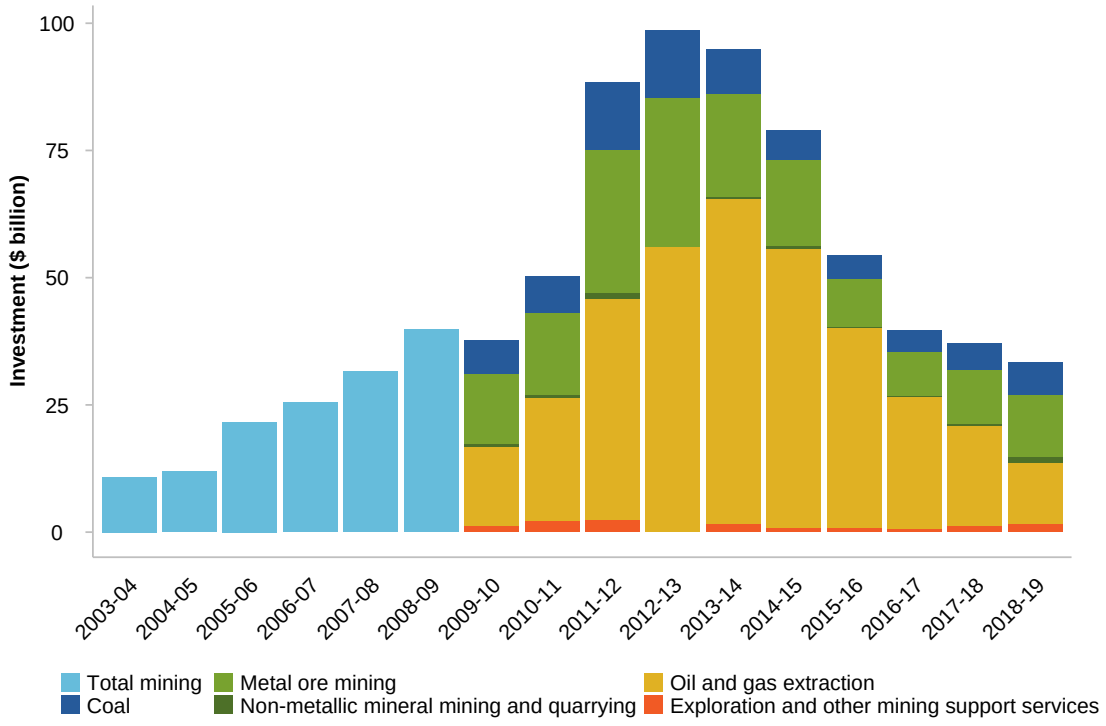


From the mid-2000s, Australia experienced an unprecedented resources investment boom. Rapid industrialisation and urbanisation in emerging economies drove a spike in global prices for commodities used in steel and energy production, leading Australian producers to expand production capacity, particularly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

Investment peaked in 2012-13 at $102 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 $3.6 billion in 2018-19. And at October 2019, the pipeline of committed major projects — about $30 billion worth — while still large, was about one-tenth of the October 2012 level.

Figure 3 **Investment has wound down from boom levels**

Resources sector investment by broad commodity, 2018-19 dollars



The regulatory landscape is complex

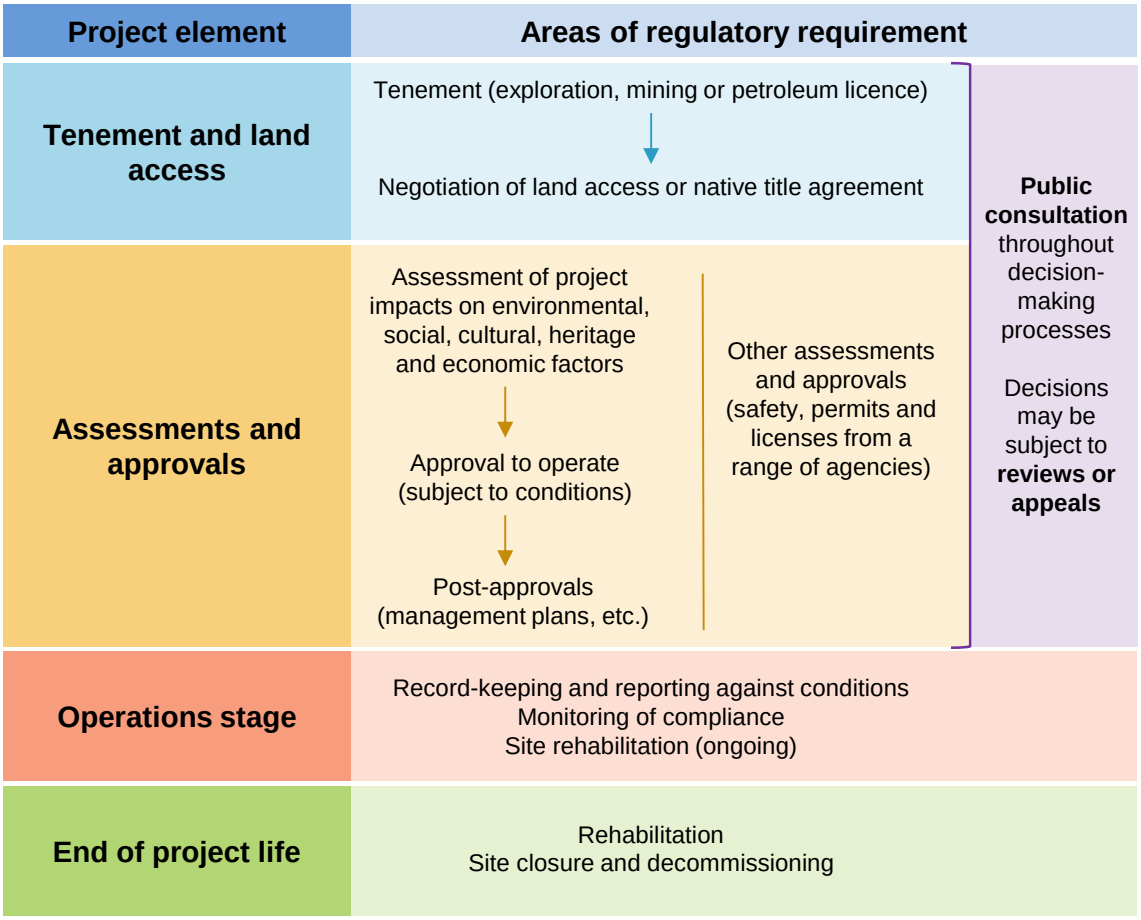
Project proponents and operators must navigate a large array of regulatory requirements across a project's lifecycle. Before exploration or extraction can begin, a proponent has to:

- 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).

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. Opportunities for regulatory outcomes that impose unnecessary costs on companies and fail to achieve regulatory objectives are manifold.

Figure 4 **Areas of regulatory requirement for resources projects**



Australian jurisdictions have been working to improve their regulatory systems

Australia is generally deemed to be a relatively desirable place to invest. Investors are attracted by Australia's political stability, protections for property rights, relatively predictable (if cumbersome) regulatory regime and good infrastructure. Environmental outcomes, as set out in national State of the Environment reports, are also considered to be relatively strong. And the regime has facilitated many billions of dollars in investment over several decades, suggesting that the regulatory system has not acted as a significant brake.

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 ringing 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).

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 has resulted in 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 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 2020 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. Mining environmental approvals are the first key area of reform.
- Tasmania has amended its *Mineral Resources Development Act 1995* and regulations to clarify the Act's intent, remove duplication and streamline processes.
- Reforms to the Northern Territory's environmental protection system will focus environmental assessment on projects' significant impacts and increase transparency.

Several reviews are underway in parallel with this study. At the Commonwealth level, for example, a review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) commenced in October 2019. In February 2020, the South Australian Productivity Commission commenced an inquiry into the effectiveness of regulation in the extractives supply chain. Western Australia is reviewing its *Aboriginal Heritage Act 1972* and New South Wales is reviewing its work health and safety regime for mining.

Considerable scope for improvement remains

Notwithstanding developments 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. This is often attributed to increased risk aversion from regulators manifesting as demands for more information on which to base decisions, possibly reflecting heightened community concerns. 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).

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)

… what is highly concerning – and discouraging to international investors – is the excessive number of project approval conditions, their highly prescriptive nature, the inconsistency and overlap between jurisdictions, and the fundamental uncertainty of process. (MCA, sub. 11, pp. 3–4)

Project approval conditions on minerals projects have become increasingly numerous and prescriptive. The number of prescriptive conditions imposed upon a project has been increasingly and wrongly used as a benchmark for sound regulatory process. This is of particular concern where such conditions are not risk-based, resulting in significant compliance effort for little environmental gain. (MCA, sub. 11, p. 13)

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)

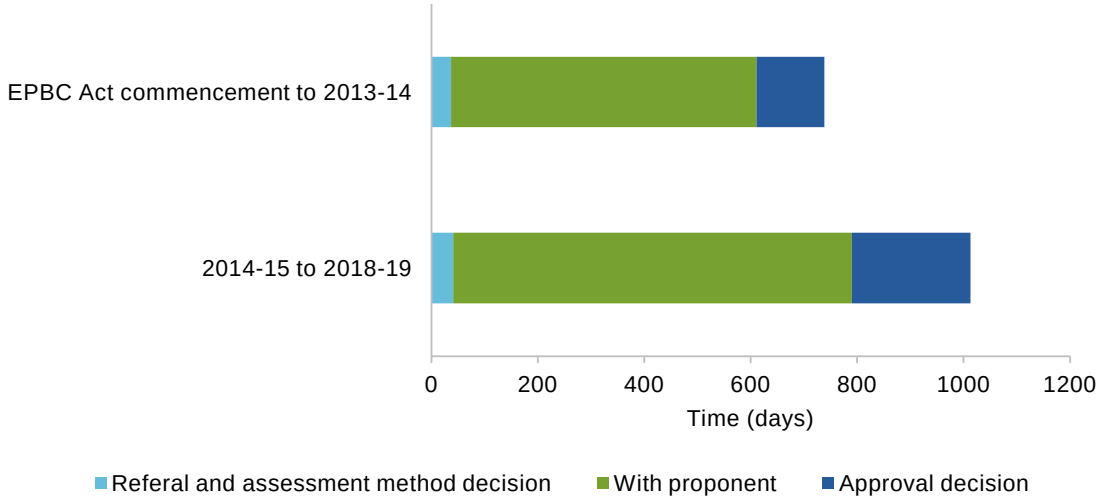
Getting hard data on assessment and approval timelines is challenging enough, let alone quantifying the extent to which these pose unnecessary burdens. However, the NSW Minerals Council noted an average assessment timeframe for five projects since 2016 of nearly 1000 days. How representative this is unknown. There is some evidence of an increase in the time required to obtain primary approval at the Commonwealth level (figure 5), although not all of the increase may reflect unnecessary delays. Where delays do occur, their costs can dwarf other regulatory costs (box 3).

But there is sufficient qualitative evidence of unnecessary costs to suggest room for significant improvement in regulation of the sector. This should be done with the dual aims of encouraging investment through reducing unnecessary regulatory burdens (particularly delays and procedural uncertainty) and building confidence and trust in the robustness of the regulatory regime across the wider community. Indeed, the Commission considers that these

two objectives are intertwined: going forward, trust in the efficacy of the regulatory system will be essential for ongoing community support for investment in the resources sector.

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

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



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

Project delays are costly because the delay of a net revenue stream in effect 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 often run into millions of dollars.

Overall, 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), but 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, the Commission sees merit in Ministers establishing a forum under the umbrella of the Council of Australian Governments 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 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

Study 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)
>
> … due to government's seeming inability to prioritise assessments … to those matters which [are] of the highest risk and therefore require the greatest studies and review, the community is often required to provide submission on enormous documents which make identifying the main issues of interest almost impossible. This not only means significant time and expense for companies for little environmental or social benefit, it has created a whole industry of professional reviewing middle men when the discussion should be with the directly affected stakeholders. (QRC, sub. 27, p. 20)
>
> There is a trend for more conditions to be imposed on all projects due to a one-size-fits approach, rather an impact-based analysis. (BCA, sub. 43, p. 5)
>
> Project approval conditions on minerals projects have become increasingly numerous and prescriptive. The number of prescriptive conditions imposed upon a project has been increasingly and wrongly used as a benchmark for sound regulatory process. This is of particular concern where such conditions are not risk-based, resulting in significant compliance effort for little environmental gain. (MCA, sub. 11, p. 13)
>
> 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)

Requests for broad-ranging environmental impact assessments are generating documentation that can run to thousands of pages. However, whether all the blame lies with regulators is unclear — for example, it has been noted that consultants face financial incentives to prepare lengthy reports. But the result is unduly high costs for companies, barriers to community engagement and unnecessary administrative loads on regulators who have to digest the material (contributing to delays).

Failure to tailor conditions to projects leaves proponents facing requirements that sometimes make little sense in their operational context and that can even be impossible for them to comply with. In addition, altering an approval in some jurisdictions can involve a time-consuming revisiting of the approvals process. Some companies are not adopting new technologies because the regulatory costs of seeking to change conditions are considered too high.

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.

Companies are often loath to push back on demands for fear of creating further delays. In the case of ill-fitting conditions, companies often accept what is suggested in order to receive approval, and then seek to negotiate more suitable conditions in the post-approvals stage.

The lack of a targeted risk-based approach appears to arise mainly from regulators' approaches to administering regulation rather than the regulations themselves. As noted earlier, a consistent theme from many participants was that regulators have become increasingly risk averse (in the sense of not wanting to make a call about what is important). 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 there has been a change in risk aversion, more thorough application of a risk- and outcomes-based approach to environmental impact assessment (box 5) would help streamline processes and deliver sounder environmental outcomes. Earlier scoping of key risks, including community consultation, would give regulators and proponents a clearer and shared understanding of what information is needed to support decision making.

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 regulators to 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. Regulators also need adequate resources in order 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.

There are several examples of relevant leading practice in operation.

- Regulators can sit down with proponents at the outset of a project and work with them to identify key risks as now happens in South Australia, where impact assessments are then tailored to addressing those risks.

- 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.
- 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 cooperation, coordination and concurrence would reduce delays, duplication and inconsistency

Projects typically require approvals from multiple agencies, giving rise to concerns about 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 multiple agencies have jurisdiction over a project … a number of issues can occur. 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)

… 81 per cent of respondents whose actions were subject to conditions under the EPBC Act, as well as state and territory planning and environment permits, reported some or substantial overlap in the conditions. (APPEA, sub. 17 to PC (2013), p. 8)

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 appears to have improved over the last decade. The Commonwealth and most other jurisdictions have some variation of a lead agency model and all jurisdictions 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 be infeasible and probably inappropriate to bring *all* approvals required at a given level of government under the auspices of a single regulator, but significant benefits can flow

from improved coordination. Arrangements that enable regulatory processes to occur in parallel rather than in sequence can also reduce delay costs.

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
- 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 can be 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, which would allow State and Territory decision makers to approve or reject projects under the EPBC Act, acting as the authorised Commonwealth decision maker. Despite widespread support, including from the Commission in previous studies, these have proved a harder nut to crack. Although allowed in principle under the EPBC Act, none are in force. Draft agreements have been made, but their implementation requires changes to the EPBC Act which stalled in the Senate in 2014. Additional challenges lie in the likely complexity and limited coverage of agreements, but they remain worthy of pursuit and trial.

Delays, duplication and inconsistency could also be reduced by:

- rigorous application of risk- and outcomes-based approaches in State, Territory and Commonwealth jurisdictions (discussed above)
- improved cooperation 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)
- better communication by regulators to explain reasons for differences in the requirements from Commonwealth and State and Territory regulators, and to ensure regulators have worked to create as much alignment as possible in conditions

- reviewing the need for both the nuclear and water triggers under the EPBC Act.
  - A number of proposed rare earths and mineral sands operations have been classified as nuclear actions, triggering the EPBC Act, despite the explanatory memorandum for the EPBC Bill stating that the mining and milling of uranium ore (the focus of the trigger) does not include these types of activities. States already regulate the naturally occurring radioactive material in commodities like mineral sands under Australian Radiation Protection and Nuclear Safety Agency regulations. Additional scrutiny (and regulatory requirements) under the EPBC Act appears to deliver few, if any, benefits to the community, but adds significant costs.
  - Since 2013, coal seam gas projects and large coal mines expected to have a significant impact on a water resource have been classified as protected matters under the EPBC Act, and so require Commonwealth approval. There is not strong evidence that the water trigger has filled a significant regulatory gap, but it has imposed considerable duplicated effort.

Enhanced regulator capacity and capability are key to enduring reform

Adoption of risk- and outcomes-based approaches and greater inter-regulator cooperation requires sufficiently resourced, well-directed and capable regulators. Widespread concerns about regulators' capacity suggest these features are lacking in many agencies (box 7).

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 is one recognition of this issue.

On the capability front, agencies can lack adequate scientific and technical expertise and industry know-how. Staff may only be in their roles for 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, staff may not fully understand the technical details associated with an application, or not be up to date with technological advances that would allow a project proponent to achieve the same regulated outcomes in more efficient ways.

Box 7 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 clear guidance about their regulatory function.

Furthermore, staff turnover can affect continuity, frustrating proponents where case handovers are not smooth. This contributes to inconsistency and processing delays.

NOPSEMA is one outlier. As an independent statutory national regulator for offshore oil and gas, it is not tied to public sector wages and conditions, giving it greater freedom 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. Furthermore, full cost recovery, coupled with transparency about how revenue is spent, gives industry visibility of how its contributions are used, and contributes to cost consciousness and demand responsiveness on NOPSEMA's part. The offshore oil and gas industry is generally very positive about the regulator.

Because of its focus on one industry segment under Commonwealth jurisdiction, the NOPSEMA model would not translate in full to the broader, more diverse resources sector. But wider adoption of a number of its characteristics, including resourcing, would bring benefits.

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 and in NOPSEMA for all staff regarding regulatory practices)

- strategies to target particular skills gaps, including technical expertise (like a strategy adopted by the Environment Protection Authority (EPA) Victoria)
- site visits (as offered by the Victorian mining regulator).

The Commission also sees benefits in regulators consulting industry, including peak bodies, on a program of site visits in order to develop 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 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 Chief Risk Officer in the Commonwealth Department of Agriculture, Water and the Environment), 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).

Adequate resourcing is a basic pre-requisite for leading-practice regulation

Ultimately, governments are responsible for funding their regulatory agencies, setting performance expectations and monitoring against them.

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).

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

Inadequate accountability and transparency in some regulatory systems are creating uncertainty for proponents and hindering 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 guidance also impairs the quality of social impact assessments.

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

In some cases, approval requirements are being moved from the primary approval process into the so-called 'post-approvals' phase (box 8). 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 8 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. These types of conditions may be invalid, or, in some instances, may unintentionally invalidate the entire approval; and
- 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.

Better communication about outcomes would build trust

Environmental report cards generally find that Australia's system of resources regulation delivers good environmental and safety outcomes. But publication of information about resources monitoring and enforcement activity is limited. And few jurisdictions provide the public with meaningful information about whether resources activities, once operational, meet regulated requirements. 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.

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, for example, would generally not be able to find out one way or the other.

There are some examples of leading practice. Western Australia's detailed offsets register 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. This can lead to duplicated effort and unnecessary costs for proponents, and impede outcomes monitoring. There is a lack, for example, of consistent and comprehensive data on Indigenous heritage, despite the collection of considerable information by companies as part of the assessment process. Digital technologies could support the relatively low-cost collection and management of data and information.

Data and information collected by resources companies have value beyond the sector — for example, in water resource management — and 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 provision by trusted institutions can also play an important role in informing communities. Where there is tension in communities about resources activities, information provision can contribute to allaying fears and developing 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 with 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. South Australia now requires publication of all inputs.
- The pending development by the Commonwealth and Western Australia of a database of biodiversity studies is a long overdue initiative.

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. Key to addressing them, is putting in place the appropriate pre-conditions 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 ensure regulation remains fit-for-purpose and regulator performance 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.

Statements of expectations (used for the Victorian mining regulator and NOPSEMA) can clarify a government's expectations of a regulator. Such statements are important for aligning regulator incentives with policy objectives, and reducing 'grey' areas and ambiguity that create scope for inconsistent decision making and excessive risk aversion in particular. In essence, clear statements of expectations both empower and authorise regulators to make decisions and make them more accountable.

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. And the Independent Review of the NSW Regulatory Policy Framework highlighted a 'lifecycle' and 'whole-of-system' approach for developing and managing regulation, as is used in Canada and New Zealand, to ensure that frameworks remain fit-for-purpose.

Political factors will necessarily shape regulatory systems. Decision makers have to balance the trade-offs between resources developments and other land uses. They clearly have to be attuned to community expectations. But investor confidence can be destabilised by sudden policy changes that occur without consultation and analysis, such as abrupt changes to royalty settings. 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. Study participants raised a number of concerns with policy decisions and processes (box 9).

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.

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
- weighing the environmental, social, amenity and economic impacts of any proposed development against the benefits on a project by project or regional basis, rather than for example, pre-emptively banning an activity such as gas exploration.

Box 9 **Unclear policy and regulatory 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)
>
> At both state and federal levels, there is an acknowledgement that the scope three emissions of proposed projects are relevant to their assessment. However, there is not a consistent approach as to how the contribution of GHG [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). (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)

Other issues merit attention

Surety arrangements for rehabilitation are improving but should go further

Rehabilitation of sites has been a focus for governments in recent years. There are few examples of successful rehabilitation and governments have sometimes been left with a large clean-up bill, including from 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 could be adjusted to reflect and

encourage progressive rehabilitation. Jurisdictions are heading in this direction, but a leading-practice jurisdiction has not been identified.

Pooled arrangements used by some State and Territory Governments need to ensure that levies reflect the risk of the company passing their liabilities to the government. Larger companies should be covered using alternative surety arrangements. Queensland's rehabilitation pool is a good example of a model that treats larger companies differently.

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).

Legal standing arrangements are appropriate but there may be scope to reduce appeals on inconsequential procedural matters

'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 citizens 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. There would be merit in the EPBC Act review examining options for reducing opportunities for inconsequential technical breaches of procedures that lead to court action.

Other matters affecting investment

The terms of reference ask the Commission to identify any other factors that may be impeding investment.

Several study participants submitted that the tax burden on the resources sector in Australia is high by international standards and suggested measures that would lower the effective company tax rate on resources companies. A number expressed concerns about the impact of uncertain and inconsistent emissions and energy policies across jurisdictions. Australia's foreign direct investment screening regime remains a source of uncertainty for some investors. Workforce issues, including the availability of a skilled workforce and the duration of enterprise agreements for greenfield sites were identified as areas with potential for improved policy settings.

While the Commission acknowledges and notes these concerns, comprehensive examination of these issues lies beyond the scope of this study. However, findings and recommendations

have been made where the Commission has previously been asked to consider the issue and has relevant conclusions from which to draw.

Effective community engagement and benefit sharing can build confidence

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 on local communities are typically amplified by the relatively large size of projects, 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 (box 10). 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 outstanding leading practice set of guidelines.

Engagement is normally a requirement of licensing and approval processes, and governments generally require an assessment of the economic and social impacts of a 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 11).

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 impediments to supply responses can be addressed to moderate price disruption (for example, via land release).

Box 10 Why effective community engagement is important

Study participants emphasised the importance of community engagement to their operations.

> Effective community engagement underpins the acceptance of the mining industry across regional and remote Australia. Industry engagement with regional communities has evolved over past decades, in line with improved understanding and the development of innovative approaches. (MCA, sub. 11, p. 29)
>
> Community engagement is a two-way process and INPEX is grateful for the feedback the community has provided which enhances decision-making processes on issues that may affect local people's wellbeing and/or interests. (INPEX, sub. 34, p. 18)
>
> Today, more than ever, interactions between company and community that aim to increase understanding on all sides, build trust, and strengthen relationships are vital to the success of resource operations. (QRC, sub. 23, p. 19)

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 can include financial payments to local governments and community groups, investment in key 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 11 Who should do and pay for what?

Companies should be required to address negative externalities from their operations, such as noise and dust. 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.

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 resource companies. There are better ways of building local capability. For example, providing businesses in local communities with the support they need to engage with resources companies, such as through BHP's Local Buying Program, 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. Some jurisdictions have implemented royalties for regions programs that hypothecate mining royalties for use across all regions, not just those near mining projects. And, to some extent, these programs may simply substitute for other government spending. But, to the extent this is not the case, their hypothecated nature risks money being spent on projects with lower community pay-offs 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. While landowners should be fairly and fully compensated for impacts of resources activity on their land, a veto right or right to royalties, regardless of the level of impact, would deliver potentially large gains to some landholders, but gains would not necessarily spread to all landholders or to local communities.

Indigenous community engagement and benefit sharing

Engagement and benefit sharing with Aboriginal and Torres Strait Islander communities can be voluntary or required by regulation, and can involve Aboriginal and Torres Strait Islander people as members of the broader community, or as the intended beneficiaries of the activity.

Regulated community engagement and benefit sharing includes agreements made under legislation that recognises the importance of land to Aboriginal and Torres Strait Islander cultures, spirituality and identities, such as the *Native Title Act 1993* (Cth) (NTA) and land rights legislation. It is understood that financial payments under agreements can run to the millions of dollars, but there is scant information available about the actual extent and nature of benefits, as agreements are private contracts. This makes it difficult to evaluate their effectiveness and to identify leading practice. The Commission has therefore relied on participants' views and insights, particularly Aboriginal and Torres Strait Islander representatives.

The ability of agreements to benefit broad sections of Aboriginal and Torres Strait Islander communities is necessarily limited by who can be parties to agreements. This, in turn, depends on who holds the relevant rights, according to legislation. Voluntary benefit sharing, by contrast, can potentially benefit broader groups, such as Aboriginal and Torres Strait Islander people who reside in communities close to resources projects but do not have a cultural connection to that land.

Leading-practice community engagement involves the free, prior and informed consent (FPIC) of Aboriginal and Torres Strait Islander people to developments affecting their traditional lands. FPIC is not a right of veto, but requires proponents and governments to genuinely engage with communities and strive to obtain consent. Ultimately, FPIC creates an environment in which governments, resources proponents and Aboriginal and Torres Strait Islander communities can reach an agreement acceptable to all parties.

Capacity limitations in some prescribed bodies corporate (PBCs) inhibit their ability to give free, prior and informed consent, and act as a barrier to effective benefit sharing. A number of government programs provide funding to PBCs. However, the adequacy of funding levels and the extent to which existing government programs meet their objectives is unclear.

The most common benefit-sharing arrangements are formal agreements made under the NTA. Two issues have the potential to impair benefit sharing in communities via this avenue:

- A lack of clarity regarding 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, exposes these funds to misuse by applicants.
- Private agents can misuse 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 NTA would not fully resolve these issues. The Government should examine the question of who is the rightful owner of funds from native title agreements. And the Commission is seeking feedback on whether private agents should have statutory obligations towards those who hold or may hold native title.

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 — potentially limiting 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. Guidance from the Australian Charities and Not-for-profits Commission would help provide clarity.

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

Issue	*Draft recommendations and selected leading practices*[a]
Managing resources development in the interests of the community	
Not all companies meet their obligations as tenement holders	Thorough assessment of potential licence holders using a risk-based approach, and taking into account applicants' past regulatory compliance, insolvency and criminal conduct, and their technical competency, can address the risks of repeated non-compliance. (DLP 4.2)
Community concerns about mixed land use contribute to calls for greater regulation	For project proposals of significant public concern, accessible information provided by independent institutions can help inform debate. (DLP 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 to the environment, other land users and communities against the benefits on a project-by-project (or regional) basis. (DR 4.1)
Managing resources activities on private lands	
Land access can be a contentious issue	Effective strategic land use frameworks seek to balance the trade-offs between resources development and other land uses to maximise benefits for the community. (DLP 5.1) Early personal engagement between resources companies and landholders (DLP 5.2) and low-cost dispute resolution mechanisms (DLP 5.4) can reduce tensions.
Landholders often lack capacity and knowledge 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. (DLP 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. (DR 5.1)
Addressing unnecessary regulatory burdens	
Environmental impact assessments (EIAs) are often unduly broad in scope	Adopting a risk-based approach leads to the level and focus of investigations being proportionate to the size and likelihood of environmental risks. (DLP 6.1)
Delays at the approval stage are unpredictable and lengthy; conditions can be inappropriate	Clarity provided by timelines for regulatory processes supports proponents' planning. Public reporting of regulator performance against timelines is a valuable accountability measure. (DLP 6.2) Limiting use of stop the clock provisions to situations where issues emerge that could not have been reasonably anticipated would promote certainty. (DLP 6.3) 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. (DLP 6.4) Clear guidance on regulators' expectations about the content and quality of EIAs can reduce the need for additional information requests. (DLP 6.5) Outcomes-based approval conditions enable companies to choose least-cost ways of achieving defined environmental outcomes. (DLP 6.7)

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Table 1 (continued)

Issue	*Draft recommendations and selected leading practices*[a]
Projects requiring both Commonwealth and State or Territory approval face delays and potentially inconsistent approval conditions	Greater cooperation between the Commonwealth and other jurisdictions would improve environmental approval processes. (DLP 6.6) When bilateral assessment agreements are renegotiated, State and Territory Governments should consider making additional commitments to address inconsistencies and overlap in approval conditions. (DR 6.2) The EPBC Act should be amended to enable negotiation of bilateral approval agreements (DR 6.1).
Processes and timelines for securing post-approvals are often unpredictable	Timelines for regulator decisions and public reporting against them are needed in the post-approval stage. (DLP 6.9) Clear guidance from regulators on post-approval documentation requirements can make the process more efficient. (DLP 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. (DLP 6.12)
Delivering sound environmental outcomes	
Inappropriate or inadequate approval conditions impede regulator effectiveness	A 'feedback loop' between compliance monitoring and condition-setting processes can convey useful information about the efficacy of approval conditions in protecting the environment. (DLP 7.1)
Regulators' compliance and enforcement activity lacks transparency	Regular public provision of information about compliance activities, contraventions detected, enforcement action taken and lessons learned helps to improve public confidence in the sector's regulation. (DLP 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. (DLP 7.4) Schemes that allow companies to pay their offset obligations into a fund can reduce costs and deliver better environmental outcomes. (DLP 7.5) Science-based implementation strategies for the use of offset funds are key to achieving their intended purpose. (DLP 7.6)
Site rehabilitation has been limited; the historical legacy of abandoned mines is large	Notification to regulators when resources sites are placed into care and maintenance helps manage the additional risks these sites pose. (DLP 7.7) Financial assurance arrangements can provide incentives for companies to undertake rehabilitation and minimise the risk that governments will be left responsible for rehabilitation. (DLP 7.8) Progressive rehabilitation can lead to better understanding of rehabilitation requirements, ensure that funds are available, reduce the total costs of rehabilitation, improve health and safety outcomes and provide community confidence in the operator's commitment to rehabilitate. (DLP 7.10) There is merit in governments seeking opportunities to facilitate reopening and rehabilitating legacy mines. (DLP 7.11)
Surety arrangements for rehabilitation generally have been inadequate	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. (DLP 7.9)
Investment is also affected by abrupt policy changes, policy inconsistency and uncertainty	
Investment can be undermined by abrupt policy changes, and 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. (DLP 8.1)

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Table 1 (continued)

Issue	*Draft recommendations and selected leading practices*[a]
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. (DR 8.1)
Community engagement and benefit sharing can help mitigate impacts on local communities	
Some mechanisms for addressing community impacts from resources projects are more effective than others	Supporting companies to engage with resources companies, rather than mandating local procurement and employment requirements, is likely to create long-term and more enduring benefits for companies. (DLP 9.2) Coordination with local governments and communities can improve the effectiveness of companies' voluntary benefit-sharing activities. (DLP 9.3)
Specific community engagement and benefit sharing arrangements apply for Aboriginal and Torres Strait Islander communities	
Ownership of funds arising from native title agreements that precede a native title determination is unclear	The Australian Government should review the question of whether native title claim groups or holders are the beneficial owners of funds arising from native title agreements made before a native title determination, and, if native title holders are considered to be the beneficial owners of funds, whether applicants and/or claim groups have any duties towards them in receiving and managing funds for their benefit. (DR 10.1)
Scope of permissible uses of funds held in charitable trusts is unclear	The Australian Charities and Not-for-profits Commission should publish plain English guidelines on activities that are likely to be consistent with a charity's charitable purposes and for the public benefit, and those which are likely to be outside this scope. (DR 10.2)
Effective governance, conduct, capability and culture are crucial for leading-practice regulation	
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. (DR 11.1) Statements of Expectations from Ministers to regulators are one effective way for Governments to clearly set out their objectives for the regulatory system. (DLP 11.1) Regular independent review and evaluation of regulatory frameworks and objectives drives continuous improvement and ensures they remain fit for purpose. (DLP 11.2)
Capability challenges constrain regulator performance	Staff capability and technical expertise can be improved through secondments, training programs and site visits. (DLP 11.3) Regulators in each jurisdiction should consult with industry, including peak bodies (such as the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association), on developing a program of site visits in order to enhance technical expertise. (DR 11.2) Strategies for managing information and data help promote routine use of data in regulator decision making. (DLP 11.5) Digital technology and data management systems have the potential to significantly improve regulatory processes. (DLP 11.6) Ministers, through the Council of Australian Governments, should establish a forum for regulators to share leading-practice initiatives. (DR 11.3)
Information provision and community engagement by regulators can be improved	Provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector. (DLP 11.7) Engaging with local communities on the regulatory process throughout the lifecycle 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. (DR 11.8)

[a] DLP (Draft Leading Practice); DR (Draft Recommendation).

Leading practices, findings and recommendations

DRAFT FINDING 2.1

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

Managing resources development in the interests of the community

DRAFT 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 generally 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.

DRAFT LEADING PRACTICE 4.1

To promote data access, 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.

DRAFT 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'.

DRAFT 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 or renewing 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.

INFORMATION REQUEST 4.1

The Commission is seeking information on whether there are aspects of mining and petroleum licensing systems that pose a material impediment to investment.

DRAFT FINDING 4.3

Domestic gas reservation schemes can 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.

DRAFT FINDING 4.4

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

DRAFT RECOMMENDATION 4.1

Rather than imposing bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the scientific evidence 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.

DRAFT 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.

Managing resources activities on private lands

DRAFT 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 for the resources under it.

DRAFT LEADING PRACTICE 5.1

Community concerns about mixed land use are best resolved through strategic land use frameworks rather than prohibitions on resources activity on agricultural land. Leading-practice frameworks seek to balance the trade-offs between resources development and other land uses to maximise economic benefits for the community. These framework 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.

DRAFT 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.

DRAFT FINDING 5.2

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

DRAFT LEADING PRACTICE 5.3

A standard template for land access agreements can reduce information asymmetry and 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.

DRAFT 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

DRAFT 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.

DRAFT 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.

DRAFT 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.

DRAFT RECOMMENDATION 5.1

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

DRAFT FINDING 5.6

Very few projects are going ahead on land protected by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The requirements that agreements must cover both exploration and extraction, and that refusal of consent for one project in an area means that a moratorium is imposed on any other development while the original proponents retain a right to renegotiate, appear to be unnecessarily restrictive.

INFORMATION REQUEST 5.1

The Commission is seeking further information on whether reforms to the following elements of the Aboriginal Land Rights (Northern Territory) Act 1976 *(Cth) would help to enable resources sector investment while still achieving the aims of the Act:*

- *conduct of resources companies and traditional owners during negotiations (including the way that moratorium rights are exercised)*
- *the conjunctive link between exploration and extraction approvals*
- *the potential costs and benefits of allowing other resources companies to apply to develop land rights land that is subject to a moratorium for another resources company.*

DRAFT FINDING 5.7

South Australia, Victoria and the Northern Territory have implemented alternative regimes to that prescribed under the *Native Title Act 1993* (Cth) for negotiating agreements between resources companies and traditional owners. These approaches have both advantages and disadvantages; a leading-practice approach has not been identified.

DRAFT 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.

DRAFT 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.

Addressing unnecessary regulatory burdens

DRAFT FINDING 6.1

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

DRAFT 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.

DRAFT FINDING 6.2

Environmental impact assessments are often unduly broad in scope and do not 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.

DRAFT FINDING 6.6

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

DRAFT 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 filled a significant regulatory gap is not compelling.

DRAFT 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.

DRAFT LEADING PRACTICE 6.1

Leading-practice environmental impact assessment 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. In practice this means:

- allocating different projects to different assessment tracks depending on their level of risk, which occurs throughout Australia
- thorough scoping, including community consultation, to identify which matters need to be investigated more or less thoroughly. The ongoing EIA improvement project in New South Wales shows movement in this direction
- terms of reference that focus on projects' biggest and most likely risks
- regulators that are empowered to focus on what matters most, for example through Statements of Expectations as occurs at NOPSEMA.

DRAFT LEADING PRACTICE 6.2

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.

DRAFT LEADING PRACTICE 6.3

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.

DRAFT LEADING PRACTICE 6.4

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

DRAFT LEADING PRACTICE 6.5

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

DRAFT LEADING PRACTICE 6.7

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

DRAFT 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.

DRAFT LEADING PRACTICE 6.10

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

DRAFT LEADING PRACTICE 6.9

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

DRAFT 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 cooperation, and intra-state coordination, would deliver substantial benefits

DRAFT FINDING 6.4

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

DRAFT RECOMMENDATION 6.1

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should be amended, in line with the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* (Cth), to enable negotiation of bilateral approval agreements.

DRAFT 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.*

DRAFT LEADING PRACTICE 6.6

Cooperation 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.

DRAFT 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
- cooperative 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

DRAFT FINDING 6.7

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

DRAFT LEADING PRACTICE 6.11

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

Further information on heritage approvals would be appreciated

INFORMATION REQUEST 6.1

The topic of Indigenous heritage has not been raised by many participants to this study and it is not clear which jurisdictions, if any, could be described as leading practice. Could interactions between Indigenous heritage and the resources sector be improved? Which jurisdictions manage these interactions well already? How do they do it?

Delivering sound environmental and safety outcomes

DRAFT FINDING 7.1

Environmental report cards indicate that Australia's resources regulation has been effective in delivering relatively good environmental outcomes. But there have been several incidents and resources activities are one source of pressure on Australia's biodiversity.

INFORMATION REQUEST 7.1

Is there evidence of any systematic deficiencies in the compliance monitoring and enforcement effort of regulators overseeing resources projects? In particular:

- *Are regulators adequately resourced to carry out effective monitoring and enforcement programs?*
- *Do the monitoring and enforcement approaches of regulators represent good risk-based regulation?*

DRAFT LEADING PRACTICE 7.3

Regular public-facing statements describing regulators' compliance activities and lessons learned from them, such as the New South Wales Resource Regulator's *Compliance Priorities Outcomes* reports, or NOPSEMA's *The Regulator* magazine, help to improve community confidence in the sector's regulation.

Regulators should also inform the community of any contraventions that may have put the environment or community at significant risk, and any actions they have taken in response. The New South Wales Resource Regulator's investigation information reports, and its publication of enforceable undertakings, are good examples.

DRAFT LEADING PRACTICE 7.4

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

DRAFT LEADING PRACTICE 7.5

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

While the principles behind the use of such funds, including on what basis prospective offsets 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 Biodiversity Conservation Trust in New South Wales.

DRAFT LEADING PRACTICE 7.6

Science-based implementation strategies for the use of offset funds are key to achieving their intended purpose. These should have regard to any existing recovery plans for relevant species, and be publicly available. Queensland's Brigalow Belt offsets tender project is a leading practice example.

DRAFT 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.

DRAFT 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 respective examples of these practices.

DRAFT FINDING 7.2

Limited transparency in most jurisdictions means that evidence about the effectiveness of compliance monitoring and enforcement activity is limited. This situation risks damaging public confidence in the regulation of projects.

DRAFT FINDING 7.3

There are few examples of large resource extraction sites being rehabilitated or decommissioned in Australia — in part because rehabilitation and decommissioning only became a policy focus for governments in the latter half of the 20th century. As a result, there is a large number of legacy abandoned mines.

DRAFT LEADING PRACTICE 7.8

Having financial assurance arrangements in place to cover rehabilitation, based on the risk the project poses to the taxpayer, provides incentives for companies to undertake rehabilitation and minimises the risk that governments will be left responsible. These arrangements are present in most (but not all) jurisdictions.

DRAFT FINDING 7.4

Concerns about resources sites being sold to smaller firms that may not have the resources to rehabilitate them are best addressed through effective rehabilitation bonds (draft leading practice 7.9).

DRAFT LEADING PRACTICE 7.9

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.

DRAFT FINDING 7.5

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

State and Territory Governments that use pooled arrangements for rehabilitation surety should ensure that levies reflect the risk of the company passing their liabilities to the government. Larger companies should be separate to the pool, and covered using rehabilitation bonds. Queensland's rehabilitation pool is a good example of this model.

DRAFT LEADING PRACTICE 7.7

Resources sites that are placed into care and maintenance can pose risks to the environment, and the operator may be at greater risk of default. These risks can be managed by a requirement to notify the regulator where a site is placed into care and maintenance, and the preparation of care and maintenance plans that identify these additional risks, such as those required in Western Australia.

DRAFT LEADING PRACTICE 7.10

Progressive rehabilitation can lead to 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 financial surety requirements being reduced commensurate with ongoing rehabilitation work. Victoria's rehabilitation policy for Latrobe Valley mines represents a good example.

DRAFT LEADING PRACTICE 7.11

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

INFORMATION REQUEST 7.2

To what extent are post-relinquishment obligations on resources companies a barrier to investment? What are leading-practice ways of managing the residual risk to the Government following the relinquishment of a mining tenement?

Further information about the effectiveness of health and safety legislation would be appreciated

DRAFT FINDING 7.5

The major resources states are in the process of reviewing or reforming their workplace health and safety frameworks for resources extraction, making identifying a leading practice in this area difficult. Recent safety incidents raise concerns about the effectiveness of existing frameworks.

INFORMATION REQUEST 7.3

The Commission is seeking further information about the effectiveness of resources health and safety legislation across Australian jurisdictions, including:

- *whether there would be benefits in greater consistency across jurisdictions*
- *approaches that represent leading practice health and safety legislation for resources*
- *how health and safety approaches in each jurisdiction could be improved.*

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

DRAFT FINDING 8.1

Government policies necessarily evolve in response to changing economic conditions, technology development and shifts in broader societal values and priorities. However, abrupt policy changes with inadequate consultation can undermine investor confidence and discourage investment.

DRAFT FINDING 8.2

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

DRAFT FINDING 8.3

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

DRAFT FINDING 8.4

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

DRAFT LEADING PRACTICE 8.1

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

Clear policy objectives aid consistent and predictable regulatory decision making. 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.

Changing the duration of greenfields agreements would support investment

DRAFT FINDING 8.5

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

DRAFT RECOMMENDATION 8.1

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 can help mitigate impacts on local communities

DRAFT FINDING 9.1

The effects of resources extraction, both positive and negative, are amplified for local communities. Resources extraction can stimulate economic activity in the community, but also lead to effects such as house price fluctuations and strains on local infrastructure.

It is appropriate that resources companies are required to address significant negative externalities associated with resources extraction, such as noise and dust, and provide or pay for infrastructure that they directly use. However, effects such as fluctuating house prices signal the need for market adjustments and should not be supressed. Approaches such as appropriate planning can moderate price spikes.

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

DRAFT FINDING 9.3

Companies have an incentive to engage and share benefits voluntarily with communities, to obtain 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.

DRAFT FINDING 9.2

Resources are owned by the Crown on behalf of all Australians. Although negative externalities of resource projects on local communities should be efficiently addressed, these communities should not benefit over and above other regional communities from resources royalties as a matter of right.

DRAFT FINDING 9.6

It is reasonable that governments provide funding and support for services in regional areas. However, there is no case for hypothecating royalty payments to communities near resource projects — this can weaken governance and encourage money to be spent on projects without fully considering their pay offs. Royalty revenues should be spent wherever community net benefits would be greatest.

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

DRAFT LEADING PRACTICE 9.3

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.

DRAFT FINDING 9.4

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 there is no one leading practice set of guidelines.

DRAFT LEADING PRACTICE 9.1

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 suggests that social impact assessments should provide a framework for companies and governments to work together to address these effects, in line with the principles outlined in draft finding 9.1. The Commission has not identified a leading practice jurisdiction in this area.

Adjustment can be supported by a range of other activities

DRAFT FINDING 9.5

Fly-in, fly-out workforces provide flexibility for companies, and distribute the benefits of resources development around Australia. The use of fly-in fly-out 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.

DRAFT LEADING PRACTICE 9.2

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.

INFORMATION REQUEST 9.1

Is there scope for greater sharing of resources company infrastructure with communities? Are there any examples of where this has been done effectively?

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

DRAFT FINDING 10.1

Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people, particularly under native title legislation, can mean that only small groups of Indigenous people benefit from resources activity. Voluntary activities offer the potential for larger groups of Aboriginal and Torres Strait Islander people to benefit, including those who reside in the local community but are not native title holders.

DRAFT FINDING 10.2

Effective engagement with Aboriginal and Torres Strait Islander communities regarding the use of their traditional lands for resources development incorporates the principle of free, prior and informed consent (FPIC). FPIC is not a right of veto, but creates a process of genuine engagement where governments, resources proponents and communities aim to come to an agreement that all parties can accept.

DRAFT FINDING 10.3

The capacity of Prescribed Bodies Corporate to engage meaningfully with resources companies is critical to Aboriginal and Torres Strait Islander people being able to give their free, prior and informed consent to resources development on their traditional lands, and to negotiating effective agreements. However, many Prescribed Bodies Corporate lack this capacity.

INFORMATION REQUEST 10.1

The Commission is seeking more information on government programs that fund Indigenous prescribed bodies corporate, native title representative bodies and native title service providers. In particular:

- *Have the current funding programs met their objectives? Can you provide examples where funding has made a tangible difference to the native title agreement-making process, or where it has reduced reliance on government funding?*
- *Are there alternative approaches that could improve the capacity of Indigenous organisations, such as training programs?*

DRAFT FINDING 10.4

Proposed amendments to the *Native Title Act 1993* (Cth) (NTA) will allow applicants to enter into future act agreements as a majority by default. This could increase the risk of a majority of the applicant entering into a future act agreement that is not consistent with the wishes of the claim group. However, other proposed amendments to the NTA protect claim groups against this risk. They include allowing claim groups to impose limits on the authority of applicants, and clarifying that applicants owe fiduciary duties towards the claim group.

DRAFT FINDING 10.5

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 ultimate native title holding group, and whether applicants and/or claim groups have any duties towards native title holders.

DRAFT RECOMMENDATION 10.1

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

INFORMATION REQUEST 10.2

In principle, it appears appropriate for private agents to have obligations towards all those who hold or may hold native title (as native title representative bodies do). Should the Native Title Act 1993 (Cth) be amended to impose statutory obligations on private agents that are equivalent to those imposed on native title representative bodies? Why or why not?

Clarity around permissible uses of funds held in charitable trusts is needed

DRAFT FINDING 10.6

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. This may be an overly narrow interpretation of the law, but there is legal ambiguity regarding the scope of permissible activities.

DRAFT RECOMMENDATION 10.2

The Australian Charities and Not-for-profit Commission should publish plain English guidelines on activities that are likely to be consistent with a charity's charitable purposes and for the public benefit, and those which are likely to be outside this scope. This would reduce the risks associated with any for-profit long-term development or commercial activities that Indigenous charities may wish to undertake.

INFORMATION REQUEST 10.3

- *What are some potential reasons to allow native title funds to be removed from charitable trusts?*
- *What are some mechanisms through which funds may be removed from charitable trusts, and what might the tax implications be? How would these proposals affect non-Indigenous charitable trusts?*

INFORMATION REQUEST 10.4

The Commission is seeking more information on whether there are barriers, unrelated to tax and charity law, to maximising benefits to communities from native title funds, including in relation to benefit management structures and the investment of native title funds. What are potential solutions to these issues?

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

DRAFT FINDING 11.1

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

DRAFT FINDING 11.2

The ability for regulators to operate effectively and efficiently is constrained by capability challenges, including limited technical expertise and inadequate use of data and technology. In addition, a lack of clarity and regulator transparency inhibits accountability, 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.

Good ‘regulatory housekeeping’ can underpin leading-practice systems

DRAFT LEADING PRACTICE 11.1

Statements of Expectations from Ministers to regulators are one effective way for Governments to clearly set out their objectives for the regulatory system. Examples include the Statements to Earth Resources Regulation in Victoria and to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) at the Commonwealth level.

DRAFT LEADING PRACTICE 11.2

Regular independent review and evaluation of regulatory frameworks and objectives drives continuous improvement and ensures they remain fit for purpose. 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 ‘lifecycle’ approach for managing regulation over time ensures that frameworks remain fit for purpose.

INFORMATION REQUEST 11.1

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

DRAFT RECOMMENDATION 11.1

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.

A range of actions can lift capability and regulator performance

DRAFT LEADING PRACTICE 11.3

Approaches to improving staff capability and technical expertise include:

- secondments — as have been established in the officer exchange program between the Northern Territory Environment Protection Agency 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
- development of strategies to target particular skills gaps, including technical expertise — as has been the case in the Victorian Environment Protection Authority
- 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
- site visits — as offered by the Victorian Earth Resources Regulator.

DRAFT RECOMMENDATION 11.2

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

DRAFT LEADING PRACTICE 11.4

Senior management have a key role in fostering a culture that supports ongoing capability development and adoption of modern regulatory practices. 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 Natural Resources, Mines and Energy
- 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.

DRAFT LEADING PRACTICE 11.5

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.

DRAFT LEADING PRACTICE 11.6

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.

DRAFT RECOMMENDATION 11.3

Ministers, through the Council of Australian Governments, 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

DRAFT LEADING PRACTICE 11.7

The provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector. There are a number of instructive examples, including 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.

DRAFT LEADING PRACTICE 11.8

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

- engaging with local communities on the regulatory process throughout the lifecycle 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.

INFORMATION REQUEST 11.2

The Commission is seeking feedback on leading practices that it has overlooked. Information on how these practices have contributed to improved regulatory outcomes would also be appreciated.

1 About the study

1.1 What has the Commission has been asked to do?

The context for the study

The resources sector is a significant part of Australia's economy. It accounted for nearly 8 per cent of Australia's GDP in 2018-19, employing just over 250 000 people (ABS 2019b, 2019e) and contributing nearly 60 per cent of the value of Australia's merchandise exports (ABS 2020). The 'mining boom' saw the sector expand markedly from the mid-2000s, with investment in the 15 years to 2018-19 totalling almost $710 billion (ABS 2019f).

Many resource activities involve complex works of engineering, often below ground or sea. By nature, these activities significantly affect their immediate surrounds and, sometimes, neighbouring areas. The environment, sites of cultural and heritage significance, project workers, landowners and surrounding communities can suffer detrimental impacts. For this reason, resource activities are strictly regulated to ensure net benefits flow to the Australian community as a whole.

All levels of government in Australia have responsibilities for regulating the sector, with multiple agencies in each jurisdiction playing a role in administering and enforcing regulations.

Though essential, regulation can impose substantial unnecessary costs if not done well. Poorly designed or administered regulation can impose additional burdens on industry for negligible extra community benefit, deterring companies from investing in projects that would have been worthwhile from a national perspective. On the other hand, ineffective regulation can fail to adequately protect environmental, cultural and heritage assets, the safety of workers, or the health of local communities.

The Australian Government's National Resources Statement (DIIS 2019a), released in February 2019, had among its goals that Australia is the most globally attractive destination for investment in resource projects, and that local communities — including Indigenous communities — benefit from the sector's activities. However, recent reports have raised concerns that Australia's regulatory environment for resources is stifling investment. The Resources 2030 Taskforce Report, for example, stated that:

> In its consultations, the taskforce heard general concerns regarding the efficiency of Australia's regulatory frameworks, including from an investment attractiveness perspective. … while stakeholders feel that frameworks are generally effective, they are often inefficient, duplicative and difficult to navigate. This poses financial and time burdens for companies. (Cripps 2018, p. 31)

Reported experiences of some recent project proposals have also put Australia's approach to regulating mining under a spotlight. For example, the approval process for Adani's Carmichael coal mine took eight years (and became a hotly contested issue at the 2019 federal election).

This study reflects a commitment by Council of Australian Governments' Resources Ministers in December 2018 (COAG Energy Council 2018a), linked to recommendations by the Resources 2030 Taskforce, to:

- highlight best-practice regulation of resources projects
- evaluate community engagement and benefit-sharing practices by industry.

The study is occurring in a landscape of several active reviews and reforms. All State and Territory Governments are (or have recently been) assessing and amending their resources regulation systems — for example:

- the Streamline WA initiative aims to reduce red tape in Western Australia, including in the resources sector
- South Australia has made a number of changes to its land access and environmental protection rules, and in February 2020 the South Australian Productivity Commission commenced an inquiry into the effectiveness of regulation in the extractives supply chain
- the Northern Territory has reworked its environmental impact assessment process.

A host of related reviews by federal agencies are also underway or have recently been completed, including the:

- review of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act) (due for completion in October 2020) (Samuel 2019)
- Deregulation Taskforce (The Treasury 2019)
- Australian National Audit Office's audit of referrals, assessments and approvals of actions under the EPBC Act (due to report in May 2020) (ANAO 2019b)
- Chief Scientist's audit of the National Offshore Petroleum Safety and Environmental Management Authority's consideration of exploration in the Great Australian Bight (reported in September 2019) (Finkel 2019)
- review of the offshore oil and gas decommissioning framework (options paper expected in early 2020) (DISER 2018)
- Senate Economics Reference Committee inquiry into Australia's oil and gas reserves (expected to report in September 2020) (Australian Parliament House 2019).

The Commission's task

The Australian Government asked the Commission to identify effective regulatory approaches to the resources sector, highlighting examples of best practice both in Australia and

internationally, and focusing on regulation with a potentially material impact on investment. The Commission has approached this by listing a number of identified 'leading practices' alongside its findings and recommendations in this report (box 1.1).

More specifically, the Commission has examined:

- ways in which governments can reduce regulatory costs for business without compromising environmental standards or community expectations. Areas for examination include:
  - project approval processes and government involvement to expedite them
  - environmental management and compliance arrangements
  - regulatory processes more generally
- any broader impediments to business investment.

The Commission was also been asked to examine resources companies' engagement and sharing of benefits with local communities, including Indigenous communities.

Box 1.1 Best or leading practice?

The Commission's terms of reference ask it to:

> … highlight examples of best–practice regulation across the Australian resources sector and internationally, taking into account the unique regulatory challenges facing individual jurisdictions.

In approaching this task, the Commission has taken the following approach.

- As Garnett (sub 24, p. 4) noted, 'the regulatory practice which "works best" is probably contingent on the physical, legal and market environment' — and these vary across time and place. Best practice, therefore, is not a static or universal concept. The notion also implies that the identified practice is as good as it gets. But practices can and should evolve.
- Rather than best practice, therefore, the Commission has identified many examples of regulatory practice that align closely with a sound approach to regulation. These are identified as 'leading practices' throughout the report, and are presented alongside the Commission's findings and recommendations.

The Commission has consulted with governments and industry bodies in other jurisdictions, namely Canada, Norway and Germany. Australian regulators appear to be generally at or near the frontier of leading-practice regulation globally. Accordingly, most examples of leading practice are sourced from Australian jurisdictions.

1.2 The scope of the study

What *resources* are in scope?

The terms of reference do not specify which resources are within this study's scope. The resources sector is often defined to include minerals, oil and gas extraction — aligning with

the definition of the mining industry in the Australian and New Zealand Standard Industrial Classification (box 1.2). This classification covers iron ore, oil and gas (conventional and unconventional), thermal and metallurgical coal, other metal ores including gold, bauxite, copper, uranium, mineral sands, rare earths and other critical minerals and construction material mining. The Commission has adopted this definition of resources for the study.

Box 1.2 Activities classified as 'mining' in ANZSIC

The Australian and New Zealand Standard Industrial Classification (ANZSIC) is a system used to classify activity between industries, and aid in subsequent statistical and economic analysis of that activity. Division B — 'Mining' — of ANZSIC includes businesses involved in the exploration and extraction of naturally occurring minerals and other resources (namely, oil and gas). Activities undertaken to prepare ore for smelting, such as crushing, screening, washing and flotation, as well as other preparation work usually performed at the mine site or as a part of mining activity, are also included. The classification excludes:

- businesses that mainly produce products that require complex processing, such as refining or smelting minerals or ores (except the preliminary smelting of gold)
- businesses that manufacture products of mineral origin, such as coke or cement
- businesses mainly engaged on a contract or fee basis in geological and geophysical surveying, laboratory-type services and mine site preparation
- incidental services such as transport.

Source: ABS (2013).

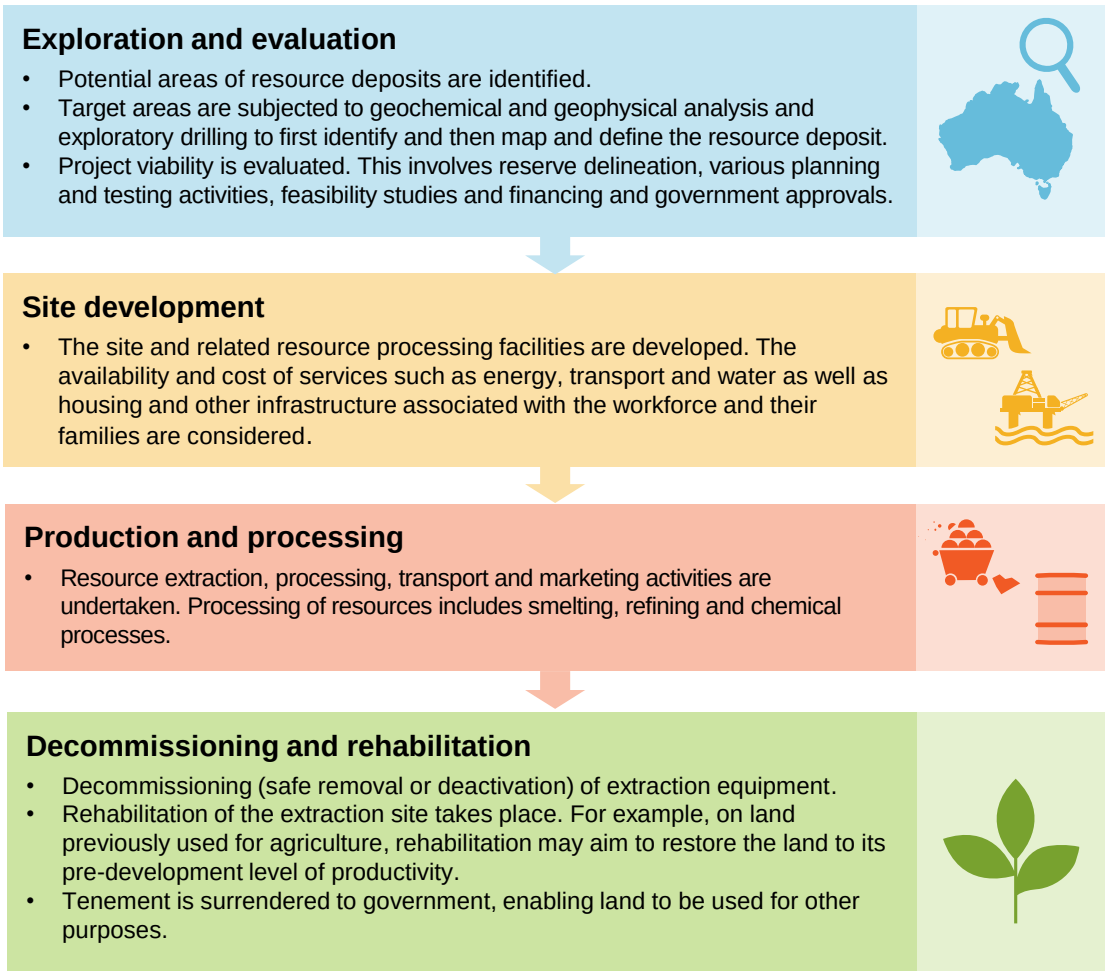
This definition focuses on the activity of exploration and extraction, but leaves some significant parts of the resources and energy supply chain out of scope. Some participants argued for the inclusion of:

- large-scale renewables, such as wind and solar farms or hydrogen power plants (for example, the Resources Law Network, sub. 22, p. 8 and Isaac Regional Council, sub. 48, p. 2). On the other hand, others thought the scope proposed in the issues paper was generally appropriate (for example, Origin, sub. 8, p. 2). Although renewables are subject to some of the same regulation as resources activities, regulation of the latter (particularly licensing), is sufficiently different that the Commission has limited its scope to non-renewable resources
- supporting services and infrastructure, including the processing of resources (beyond preparation work at the mine site) such as smelting and refining (for example, Peter Glazebrook, sub. 17, p. 2); energy infrastructure (for example, SACOME, sub 37, p. 5; Origin, sub. 8, p. 2); and transport (for example, shipping activity — Peter Glazebrook, sub. 17, p. 2). The Commission does not consider that these services fall within the definition of resources. However, they fall within scope where they may impose a material barrier to resources investment (considered in chapter 8 on other factors affecting investment, discussed below).

What *activities* are in scope?

Broadly speaking, the Commission has focused on regulation relevant to the four stages in the life cycle of a resources project: exploration and evaluation, development, production and processing, and site decommissioning and rehabilitation (figure 1.1). The specific activities undertaken at each stage depend on the resource in question and the characteristics of the particular project. For example, iron ore extraction is likely to involve digging, crushing and screening, while petroleum extraction involves drilling wells.

Figure 1.1 **The life cycle of a resources project**[a]



[a] Certain activities in the life cycle are not in scope, such as marketing.

Sources: Hogan et al. (2002); NSW Minerals Council (nd).

What *regulation* is within scope?

The Commission has adopted a broad definition of regulation, including any laws, government policies and rules that are intended to control or influence specific aspects of

resources activity. This encompasses a range of legal instruments including statutes, subordinate legislation (regulations) and ministerial orders, as well as less formal instruments that companies are expected to comply with, such as standards, guidelines and codes of conduct.

The Commission has considered regulatory activities at all levels of government. This includes (but is not limited to) activities related to the EPBC Act, native title legislation and offshore petroleum regulations administered by the Commonwealth Government, the broad frameworks for resources extraction administered by State and Territory Governments, and planning and development legislation implemented by local governments.

Regulation at all stages of the project life cycle is in the scope of this study — including requirements relating to access to resources, project assessment and approval, compliance with operating conditions and site rehabilitation.

Other factors affecting investment

Beyond resources-specific regulation, there is a range of factors that can affect business investment in the resources sector. These include a number of other policy areas (including energy and foreign investment policy), workforce issues, taxes and royalties, safety regulations, infrastructure and pre-competitive data. Many of these factors were raised by participants to this study.

Given the broad scope of this study, the Commission has focused on the issues that have the most potential to impose material and unnecessary impediments to investment. Findings and recommendations have only been made where the Commission has previously considered an issue and has relevant conclusions to draw on.

What does community engagement and benefit sharing cover?

The terms of reference require the Commission to examine best-practice community engagement and benefit sharing. These activities can describe a range of interactions and arrangements that involve and deliver benefits to communities affected by resources activities. This includes landholders and local communities directly affected by resource projects, but can extend to the broader Australian or even global community, which may have an interest in the impacts of resource projects.

Community engagement refers to activities that are undertaken by resources companies to consult with the local community (it does not refer to interactions between the government and the community, or resources companies and governments). Community engagement is often voluntary in nature — and includes activities such as community forums and engaging with local landowners. But it can also be regulated: resources companies may be required to consult with the community during assessment and approval processes. Both types of community engagement are within the study's scope.

Likewise, benefit sharing can be voluntary or regulated. While acknowledging the broader benefits that flow to the Australian community from resources activity, this study focuses on those activities that a resources company undertakes to share the benefits of resources (or mitigate the negative social effects of resources extraction) beyond its normal commercial activities. This means that, for example, the benefits of jobs created by the resources industry do not fall within the definition of community benefit sharing. However, efforts to employ a greater proportion of local people would be considered benefit sharing.

Benefit sharing can also include:

- financial payments beyond compensation payments for land access, such as contributions to local councils and payments to Aboriginal and Torres Strait Islander communities through native title and other agreements
- investment in key infrastructure, such as roads and water networks; facilities such as arts centres and gyms; and community services such as health and education programs
- approaches that seek to compensate communities for the negative social or other effects that mining can have — such as conducting social impact assessments, and plans to manage the impacts, at the outset of the project.

1.3 The Commission's approach

The conduct of this study

The Commission received the terms of reference for this study on 6 August 2019, and released an issues paper on 17 September 2019. The issues paper outlined a range of areas on which the Commission was seeking feedback from participants. 53 submissions were received in response to this paper.

The Commission also consulted widely in preparing this draft report. Meetings were held with regulators in all capital cities in Australia, and in regional areas including Karratha and Townsville. The Commission also consulted with overseas experts in Germany, Norway and Canada.

The Commission thanks all participants for their contribution to this draft report. Submissions on this draft report are sought by 5 June 2020.

Assessing leading-practice regulation

As required by its Act, the Commission has assessed resources regulation against the objective of improving the welfare of the community as a whole.

The main focus of this study is not on the objectives of regulations per se. Rather, the focus is on the process followed in forming regulatory objectives and more specific goals in line with them, and the regulatory approach taken to achieving these.

A leading-practice approach to regulation is one that imposes the least burden on businesses and regulators, subject to achieving clear and evidence-based objectives that serve to promote net national benefits. Chapter 2 provides an overview of the sector, and chapter 3 introduces the Commission's framework for assessing leading-practice regulation.

This is not a benchmarking exercise. The Commission has not sought to assess or rank the regulatory practices of every Australian jurisdiction exhaustively. Rather, it has identified regulatory processes in Australia that accord with the Commission's criteria for leading practice, as well as any problem areas, with examples provided where possible. In some cases, the leading practices identified simply align with well-established norms for good regulatory practice. In other cases, the leading practices are more innovative. International examples have also been drawn upon where useful for demonstrating leading-practice approaches.

Some exercises do attempt to benchmark jurisdictions' regulatory performance — for example, the Fraser Institute's Global Survey of Mining Companies (Fraser Institute 2020). The Australian Government has referenced this study in calling for reforms to the resources sector (Canavan 2018) and the Commission understands that resources companies consider its findings of some relevance. However, while providing useful insights, particularly relating to perceptions about the comparative performance of international regulatory regimes, such studies should be interpreted carefully (box 1.3).

Chapters 4–8 of this report contain the Commission's assessment of resources regulation. Chapter 4 considers resource management regulation and policy, and chapter 5 considers land access regulation. Chapters 6 and 7 consider projects' assessment and approval processes and the management of outcomes. Chapter 8 considers a mixture of regulatory and non-regulatory issues that have been identified as other factors affecting investment in the resources sector.

Assessing leading-practice community engagement and benefit sharing

The Commission's approach to community engagement and benefit sharing has two key components:

- assessing whether there is a role for governments to require community engagement and forms of benefit sharing and, if so, whether the regulation is as effective as it could be
- identifying examples of leading practice voluntary community engagement and benefit sharing, and whether there is a role for governments to improve the benefits delivered through voluntary benefit sharing, such as through playing a coordinating role.

Chapter 9 considers leading practice community engagement and benefit sharing in general, while chapter 10 assesses specific community engagement and benefit sharing issues applicable to Indigenous communities.

Box 1.3 The Fraser Institute's Annual Survey of Mining Companies

The Fraser Institute is a Canadian think tank founded in 1974. Its work is generally targeted at reducing government intervention in markets: the former Canadian Prime Minister Stephen Harper described the Institute as 'a compelling advocate for the benefits of competition, open markets and economic freedom'. Although most of its work is focused in Canada, the Fraser Institute publishes a number of indices ranking jurisdictions on their competitiveness in various industries.

The Annual Survey of Mining Companies is conducted by the Institute. It 'attempt[s] to assess how mineral endowments and public policy factors such as taxation and regulatory uncertainty affect exploration investment'. Two indices are produced: one to assess the overall investment attractiveness of each jurisdiction (in both mineral endowment and resources sector regulation), as well as a separate policy perceptions index.

Australian States and Territories (which are separately identified) tend to perform favourably in both indices. Western Australia was ranked in the most recent survey (taken in 2019) as the most attractive jurisdiction in the world for investment, and as having the 5th-best policy environment based on exploration company perceptions (out of 76 jurisdictions). The lowest-ranked Australian jurisdiction in both indices was New South Wales (47th and 46th on investment attractiveness and policy perceptions respectively). This puts the overall spread of Australian jurisdictions at roughly similar ranks to the United States, Canada and Europe, and ahead of most jurisdictions in Africa.

Australian jurisdictions have moved up and down the rankings over the past five years. The lowest rank of any Australian jurisdiction was Victoria in 2017, ranked 71st of 91 jurisdictions (in 2018, it ranked 43rd out of 76 jurisdictions on the investment attractiveness index). This could be attributed to the introduction of a ban on unconventional gas development in the State (chapter 4). However, because the sample of jurisdictions included in the survey varies between years, this volatility cannot be interpreted as solely attributable to policy changes between years of the survey.

The survey also suffers from small response rates (in 2019, out of 2400 potential respondents, only 224 full responses were received worldwide) and a small sample size of developed countries (which are more representative of Australia's competitors for resources investment than developing countries, which are likely to have less stable property rights and greater risks for investors generally).

Source: Fraser Institute (2009, p. 3, 2020).

Some cross-cutting issues emerge throughout the report

While some issues considered in the study are specific to certain regulatory areas, governments' role in providing the foundations of the regulatory system, and the conduct and activities of regulators themselves, cut across them. Chapter 11 considers these cross-cutting governance and conduct issues that will contribute to improved regulator governance, conduct and performance.

2 Resources activity in Australia

Key points

- Australia is a resource-rich country. Resources activity (including quarrying) occurs in every State and Territory and offshore — with most concentrated in Western Australia and Queensland.
- The resources sector accounts for about 8 per cent of Australia's gross domestic product, 2 per cent of employment and 59 per cent of exports.
- Australia is a major exporter of resources, with China, Japan and South Korea the top destinations.
- Coal, iron ore and natural gas are Australia's top three commodities by value of both production and exports. Key competitors in production include China, the United States and Brazil.
- From the mid-2000s, Australia experienced an unprecedented resources investment boom, which peaked in 2012-13. Investment has wound down since, but there has been a modest recovery recently which is expected to continue over the next few years. Major projects in the pipeline total about $30 billion.
- Future demand for Australia's resources will be driven by a range of factors including global population growth, the rate of economic development, technological progress and climate change policies in Australia and overseas. The overall effect of these factors on the demand for Australia's resources is difficult to ascertain, but the potential for investment will likely remain substantial.
- Foreign companies hold about a third of Australia's resources assets. The resources sector also accounts for 38 per cent of the total stock of foreign direct investment, a larger share than any other sector reflecting its capital intensity.

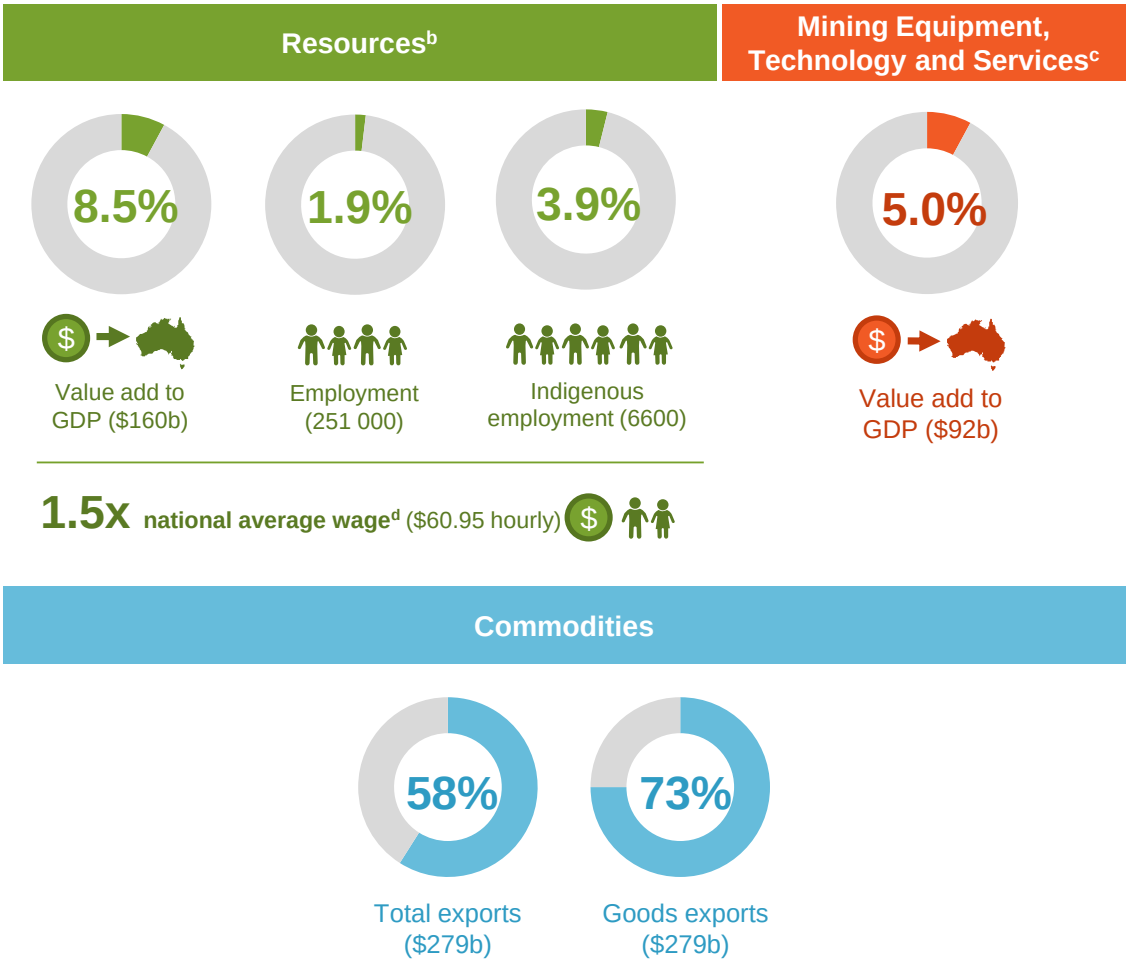
Australia is a resource-rich country, with global frontier expertise in exploration and extraction (DIIS 2019a, p. 36). Industrial mining has occurred in Australia since the late 18th century, when coal was discovered in New South Wales near Newcastle (ABS 2001; Geoscience Australia 2015). Today, the resources industry extracts a diverse range of minerals and petroleum (oil and gas) (GA 2019; Geoscience Australia 2020, p. 10). This chapter provides an overview of Australia's resources sector (section 2.1), and investment therein (section 2.2).

2.1 Australia's resources sector — an overview

Resources are an important contributor to economic activity in Australia. They dominate exports, and through that avenue make a significant contribution to GDP and employment (figure 2.1).

Figure 2.1 **Resources — an important contributor to economic activity[a]**

Contribution of the resources and mining equipment, technology and services (METS) sectors to GDP, employment, wages and exports



[a] Data for resources value-add to GDP and commodities exports are from 2018-19, total employment data are from November 2019, Indigenous employment data are from 2016, resources wages data are from May 2018, and METS data are from 2017-18. [b] Defined as Australian and New Zealand Standard Industrial Classification (ANZSIC) Division B – Mining, which includes exploration and other mining support services that are integral to the resources production process, such as drilling, draining and pumping services. [c] Includes services that specifically support resources activities such as mine construction, geological survey services, and the manufacturing of mine-specific equipment. It also includes other goods and services used in the resources supply chain, such as financial services, travel and accommodation. [d] Adult rate for non-managerial employees.

Sources: ABS (*Australian National Accounts: National Income, Expenditure and Product*, Cat. no. 5206.0; Employee Earnings and Hours, Australia, Cat. no. 6306.0), DIIS (2019a, p. 9, 2019b, pp. 6, 14), METS Ignited (2019, p. 6).

Value added from Australia's resources flows through to the community via wages and salaries, taxes, royalties and domestic shareholdings. Over 2017-18, the resources sector paid about $23 billion in wages and salaries (ABS 2019a). The minerals sector (a subset of the resources sector) paid an estimated $18.6 billion in company taxes and $12 billion in royalties in 2017-18 (DAE 2019, p. 3). The oil and gas sector paid about $4.6 billion in taxes, royalties and other fees in 2016-17 (APPEA 2019).

Domestic shareholders receive returns through dividends, capital gains and share buybacks. BHP and Rio Tinto, the two largest resources companies in Australia, both had annual dividend yields of 6.6 per cent as at March 2020 (ASX 2019a, 2019b).

Australia's energy and metal mining firms are ahead of the curve in adopting new technologies (compared with firms in other sectors) and also have better managerial practices (Quinn 2019).

Resources are diverse, and typically geographically concentrated

Resources produced in Australia fall into four broad categories — coal, oil and gas, metal ores and non-metallic minerals (box 2.1). Metal ore mining accounts for nearly half of the value of resources production (figure 2.2).

Resources activity, which includes quarrying (box 2.2), occurs in all States and Territories and offshore (figure 2.3). However, production tends to be concentrated in particular areas, mirroring naturally-occurring resources clustered in particular geographic regions. 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). In 2018, there were over 300 mines in operation (Geoscience Australia 2020, p. 3). Quarries and oil and gas wells, add to the number of active sites.

Box 2.1 Resources in Australia

Australia produces a diverse range of resources.

- **Coal**, including black and brown coal. Black coal includes thermal and metallurgical coal, and is mainly used for electricity generation and steel production respectively. Brown coal is used almost exclusively for domestic electricity generation in Victoria.
- **Oil and gas**
  - Oil extracted from conventional sources includes crude oil, condensate and liquefied petroleum gas (LPG). Australia also has prospective oil resources from unconventional sources, including oil shale, shale oil and tight oil, although these are not extracted. Oil and its by-products are used for fuel and for manufacturing products such as plastics and lubricants.
  - Gas is also extracted from conventional and unconventional sources (chapter 4). Gas is used as fuel and in the production of various industrial products, and can be cooled to become 'liquefied natural gas' (LNG) for shipping and storage purposes.
- **Metal ores**, including iron ore, bauxite, gold ore, uranium ore, mineral sands and rare earths. Iron ore and bauxite are mainly used for steel and aluminium production, while uranium is mainly used to fuel nuclear power plants and for medical applications. Mineral sands are used for various industrial purposes such as the manufacture of paints and paper. Rare earths are used for electronics, magnets, motors, batteries and a range of other purposes.
- **Non-metallic minerals**, including gemstones, lithium, salt and construction materials such as gravel, sand and limestone.

Technological change has driven global demand for a new group of minerals that are considered vital to the economy, yet whose supply may be disrupted due to geological scarcity, geopolitical issues, trade policy or other factors. These are collectively known as 'critical minerals', and include lithium, rare earth elements, and various precious and base metals. Uses include the manufacture of mobile phones, flat screen monitors, wind turbines, electric cars, solar panels, and many other high-tech applications. While many of the world's major industrial economies are heavily reliant on the imports of these minerals, Australia's domestic demand for most of these minerals is relatively small and is far outstripped by domestic production.

Sources: ABS (2013); Constable (2018); WA DMIRS (nd); Geoscience Australia (2017, p. 1, 2019; 2013, 2017, p. 1, 2019, p. 1, nd).

Untapped resources represent a rich endowment

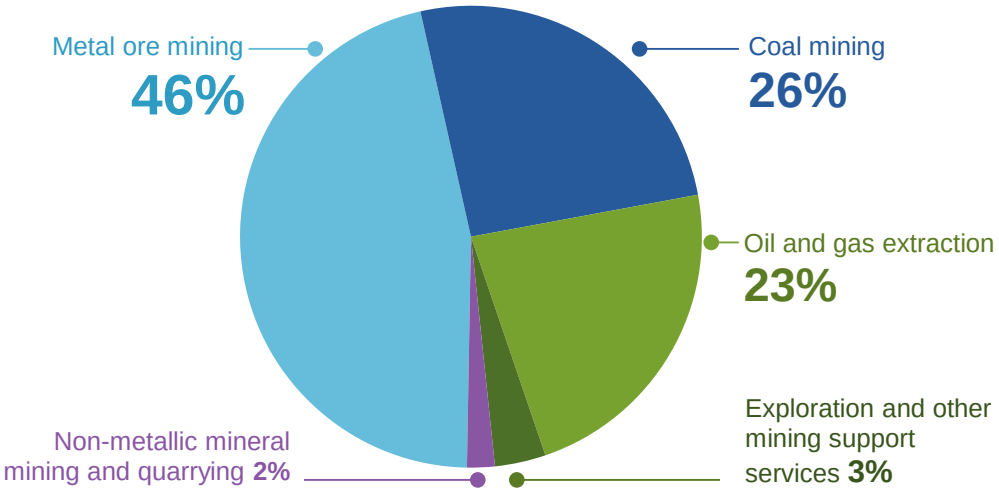
Australia possesses large quantities of resources that have not yet been mined (figures 2.4 and 2.5). While some of these resources have been identified with certainty and assessed as being economically viable, others are more speculative and may be difficult to extract. As at 2018, Australia had the world's largest Economic Demonstrated Resources (EDR) of eight commodities, including gold, iron ore and zircon (Geoscience Australia 2020, p. iv).[1] Due to the development of new techniques, producers are also recovering further

[1] Economic Demonstrated Resources (EDR) are defined under Australia's national resources classification system as resources that have been identified with a reasonable level of confidence and deemed profitable to extract or produce.

resources from inactive or abandoned mines by reworking waste material such as tailings (Parbhakar-Fox 2016).

Figure 2.2 **Metal ores make up almost half of Australia's production[a]**

Resources production, shares by resource type by value, 2017-18



a Defined as ANZSIC Division B – Mining, which includes exploration and other mining support services that are integral to the resources production process, such as drilling, draining and pumping services. The mining equipment, technology and services sector is broader than these services.

Source: ABS (*Australian Industry*, Cat. no. 8155.0).

Box 2.2 Quarries

Quarries are open-pit mines that produce construction aggregates such as crushed rock, sand and gravel. These materials, used in the building of new houses, roads and other infrastructure, are a key input to Australia's $200 billion building and construction industries.

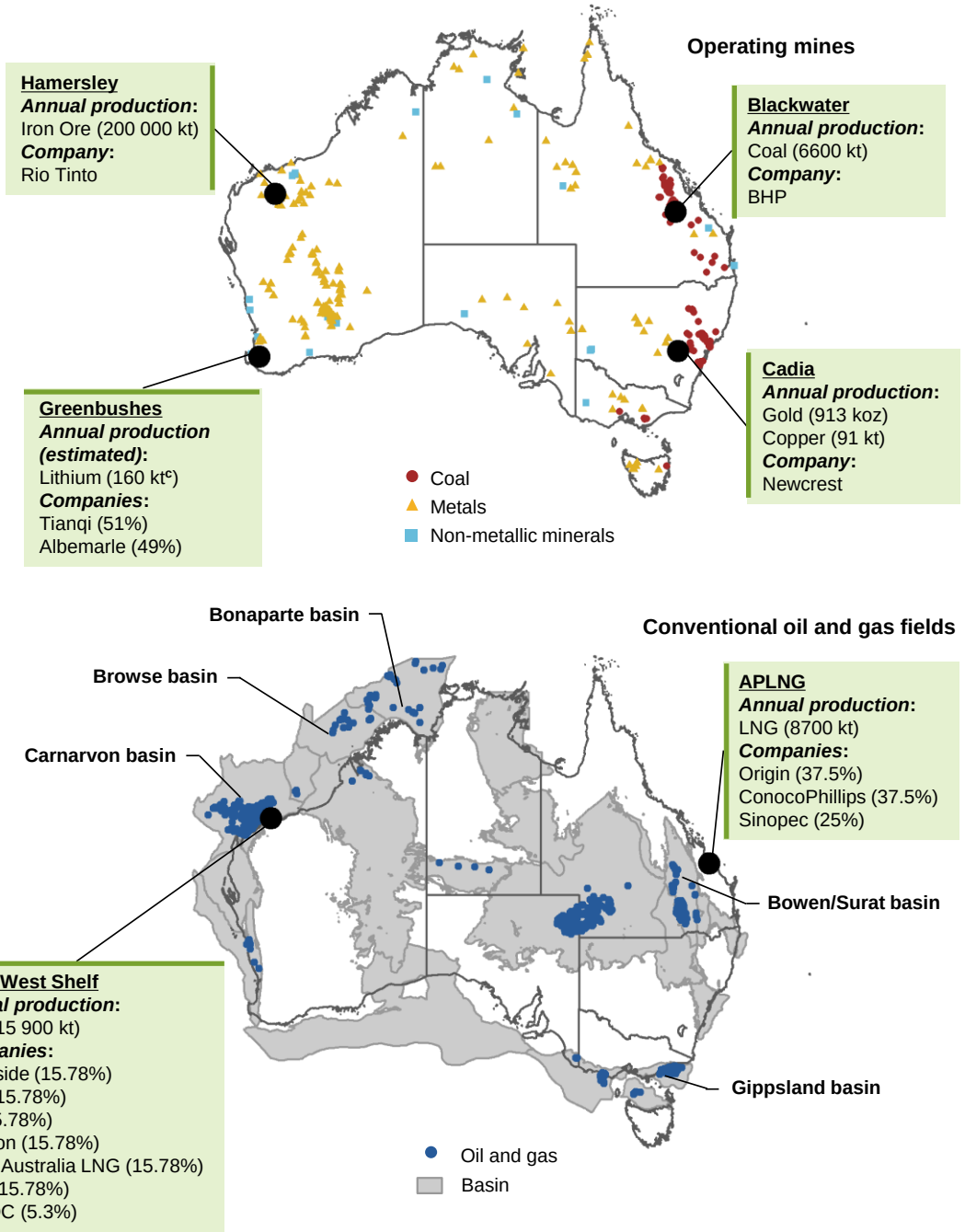
There are about 2200 quarries across Australia, where more than 200 million tonnes of rock, limestone, gravel and sand are collectively extracted each year. The sector generates about $15 billion in annual revenue and employs about 30 000 Australians directly (and a further 80 000 indirectly).

As quarries produce high-volume, low-value materials, proximity to markets and transport infrastructure is important to minimise transport costs and allow producers to supply at competitive prices. As such quarries are often located in or close to residential areas.

Sources: CCAA (nd); CCAA, sub. 36, p. 1; The Institute of Quarrying (nd).

Figure 2.3 **Resources production occurs across Australia**

Operating mines and conventional oil and gas fields, with selected major projects highlighted[a,b]

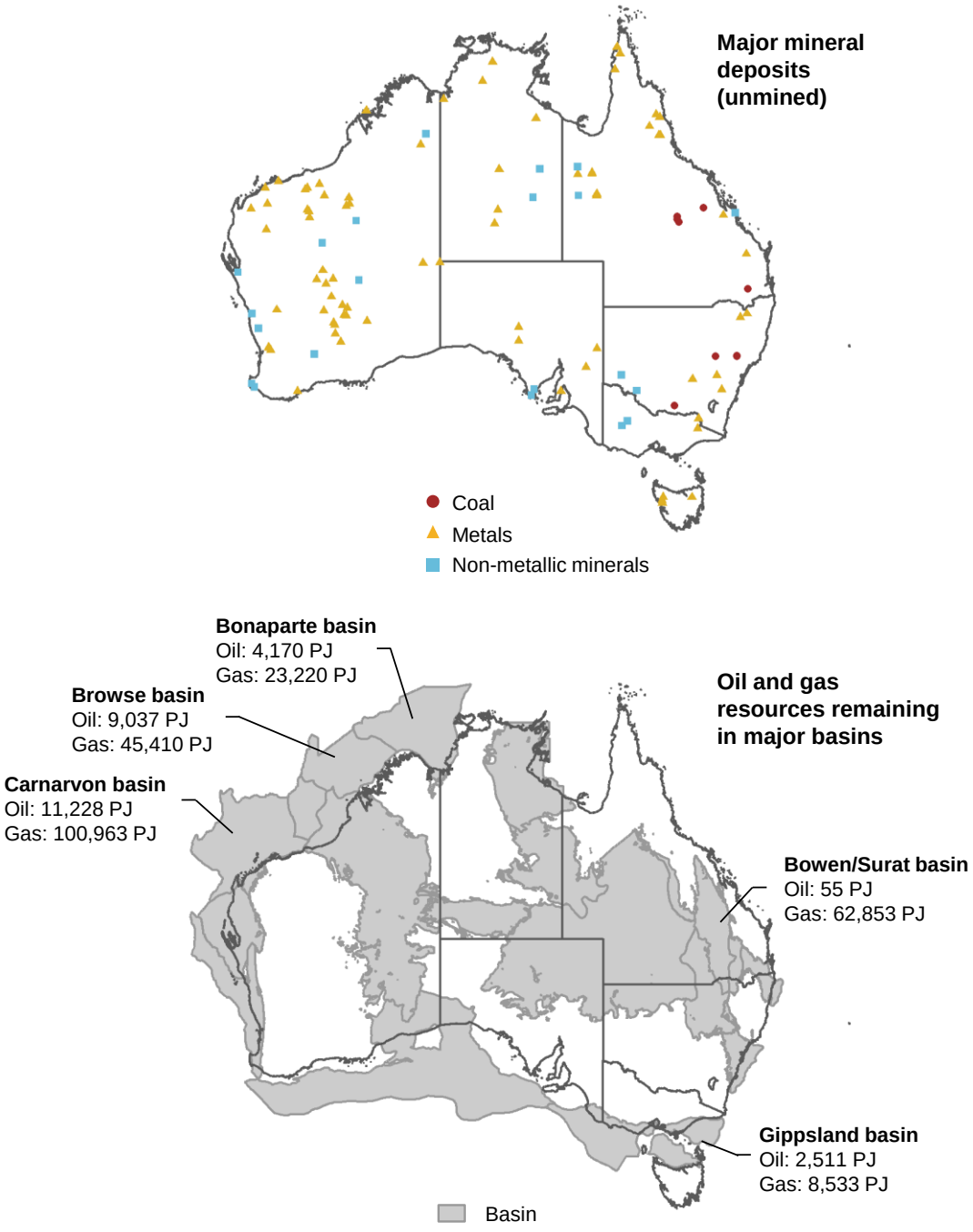


[a] Maps show operating mines and conventional oil and gas fields as at 2017. [b] Annual production data for Hamersley, North West Shelf and APLNG are from 2019. Data for Blackwater and Cadia are from 2018-19. Data for Greenbushes are estimated annual production. [c] Weight as lithium carbonate equivalent.

Sources: Albemarle (nd); BHP (2019b, p. 19); Newcrest (nd); unpublished data from DISER and Geoscience Australia.

Figure 2.4 **Australia is richly endowed with a range of commodities**

Major mineral deposits and oil and gas resources remaining at major basins[a,b,c,d]

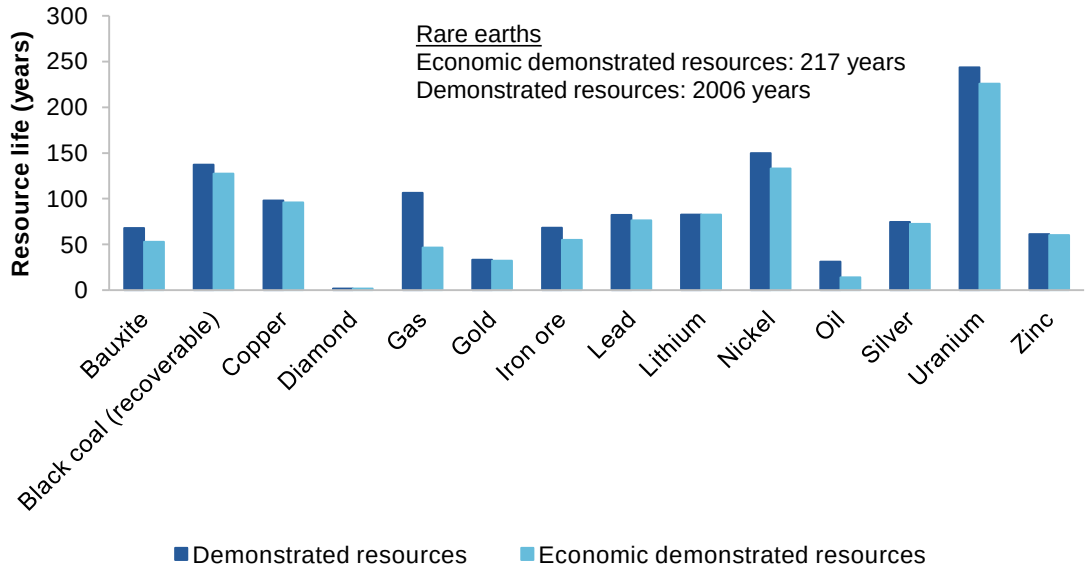


[a] Major deposits as classified by Geoscience Australia. [b] Gas resources excluding shale and tight gas. [c] Major mineral deposits as at 2017 and oil and gas resources as at 2014. [d] Basins with over 4000 PJ of oil resources or over 8000 PJ of gas resources (excluding shale and tight gas) remaining at the end of 2014.

Source: Unpublished data from Geoscience Australia.

Figure 2.5 **Large volumes of discovered resources have not yet been mined**

Remaining years of resource life, selected resources, 2018[a,b,c]



[a] Demonstrated resources defined under Australia's national resources classification system are those that have been identified with a reasonable level of confidence. Economic Demonstrated Resources (EDR) are demonstrated resources deemed profitable to extract or produce. [b] Resource life is calculated as ratios of resources over production. Estimates assume that new resources are not found and production rates do not change. Estimates for EDR life also assume that uneconomic deposits do not become economic. [c] Data for oil and gas are from 2014.

Sources: Geoscience Australia (2019; 2020, p. 10).

Rates of discovery are relatively low

Australia has seen declining discovery rates of major new mineral resources over the past decade, even during periods with high expenditure on exploration (Geoscience Australia nd; Schodde 2018, p. 16). One key impediment to discovery is the 'cover' of sediments and weathered rock that conceals about 80 per cent of Australia's prospective resources (Geoscience Australia 2014).

Difficulties in identifying new resources have driven a number of government-funded initiatives, particularly those that provide pre-competitive information, such as Exploring for the Future (chapter 4). The UNCOVER initiative also seeks to provide the knowledge base and technology to support the exploration of resources concealed below the surface, and involves collaboration between government, academia and industry (Uncover Australia nd).

Many resources businesses operate in Australia

About 3400 employing resources businesses were operating in Australia in June 2019, the vast majority of which are small (ABS 2019c) (figure 2.6). As at July 2017, over 650 companies were listed on the Australian Stock Exchange (ASX) in the metals and mining sector. Within the sector, the top five companies (by market capitalisation) accounted for 80 per cent of market capitalisation occupied by the top 100 (ASX 2017, pp. 1–3). Overall, resources companies represent about 20 per cent of the ASX (by market capitalisation) (Mathews 2019).

Larger resources companies tend to be multinationals, with operations around the world and in a range of commodities. They are often engaged in the full life cycle of the resources extraction process, from exploration to development, production and rehabilitation (figure 1.1). They are often also engaged in other activities such as downstream processing (including refining and smelting), marketing and operating power stations (BHP 2019a, pp. 17, 254; Rio Tinto 2019a, p. 46). Smaller resources businesses are typically engaged in exploration (28 per cent), other mining support services (27 per cent) and non-metallic mineral mining and quarrying (26 per cent).[2] Very few junior miners engage in resources production as they tend to sell discoveries to large operators for development (ABS 2019c).

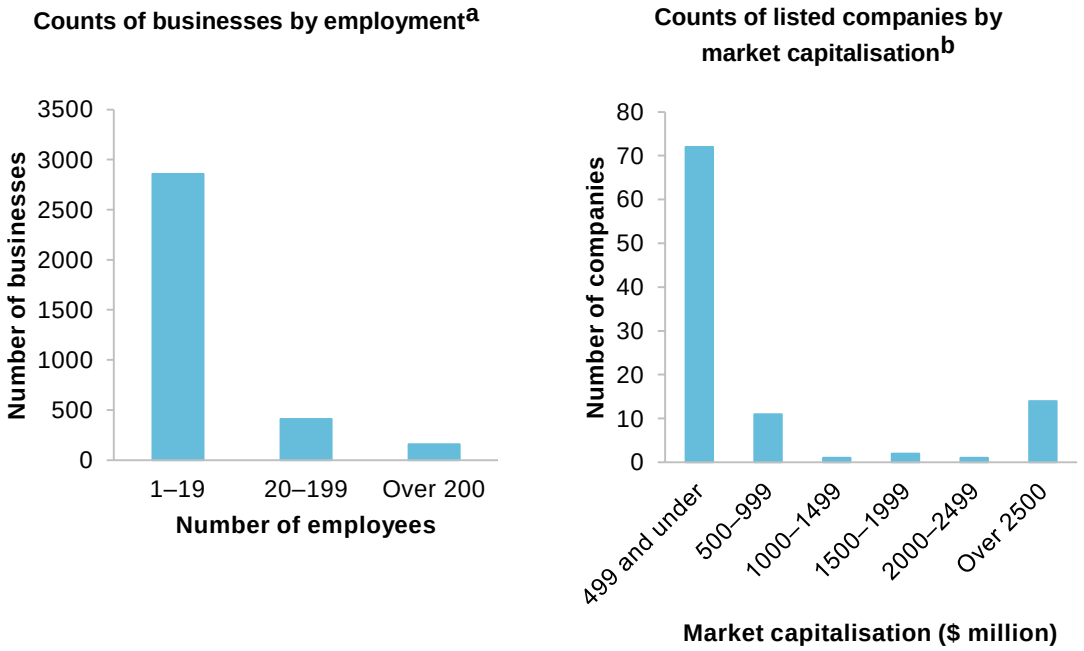
Joint ventures between companies are common for resources projects, and form and dissolve regularly (ACE 2015, p. 1). For example, Rio Tinto and China Baowu Group have an iron ore joint venture in Western Australia, of which they own 54 and 46 per cent respectively (Rio Tinto 2019b).

In 2014-15, foreign businesses (defined as those with foreign ownership greater than 50 per cent) held about 36 per cent of all resources assets in Australia, or $325 billion in assets. The United States and China held the largest stakes, accounting for about 38 per cent and 10 per cent, respectively (DFAT 2018, p. 19). In 2018, the resources sector had a greater stock of foreign direct investment[3] (FDI) than any other sector, at about $370 billion or 38 per cent of the total FDI stock (DFAT 2019a). This reflects its capital intensity (Jenner et al. 2018, p. 3). FDI inflows to resources businesses were about $16.9 billion (21 per cent of total FDI inflows) (ABS 2019d).

2 Among resources businesses with one to 19 employees.

3 Foreign direct investment refers to investment in an enterprise or asset where the foreign investor has control or a significant degree of influence over management. Generally, investment is considered to be ‘direct’ when an investor has 10 per cent or more of the voting power in the company, so is often associated with an equity stake (such as through shares), rather than debt securities.

Figure 2.6 **There are many small resources businesses**



[a] Employing businesses as at June 2019. [b] Top 100 ASX-listed stocks in the Metals & Mining sector, as at 13 July 2017.

Sources: ABS (*Counts of Australian Businesses, Including Entries and Exits*, Cat. no. 8165.0); ASX (2017, pp. 2–3).

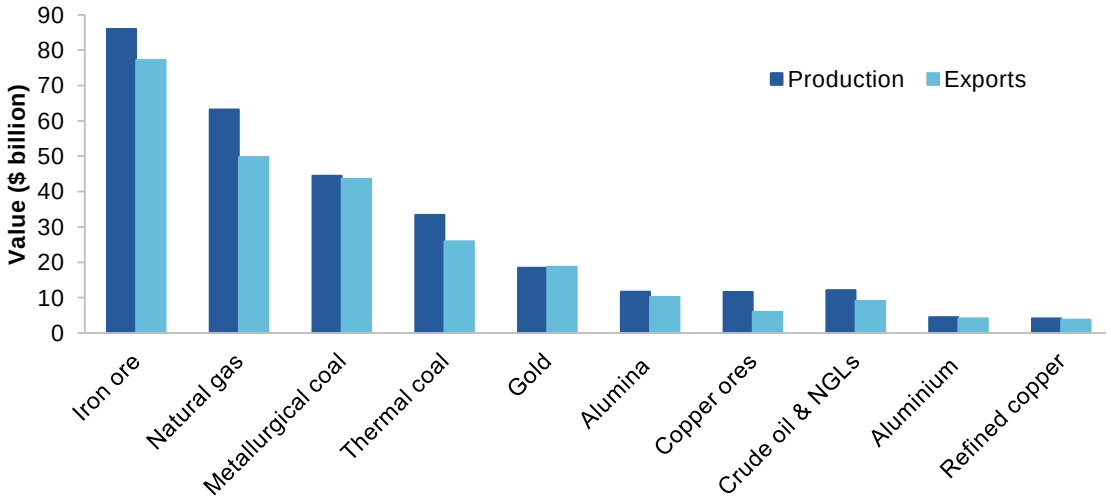
Australia operates in a global market as a major exporter

Australia operates in a global market, 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 they produce is often consumed domestically. For example, in 2017, China produced more resources than any country in the world — about four times that of Australia (by value) (BMNT 2019, p. 42). However, due to high domestic demand, it was also the largest global importer of resources (World Bank nd).

In contrast, Australia is a major exporter, exporting about 90 per cent (by value) of the top 10 commodities it produces (unpublished data from DISER). Australia's top three resources by value of both production and exports are iron ore, natural gas and metallurgical coal (figure 2.7) — commodities usually used for energy and steel production. Australia's major commodities face competition from China, the United States and Brazil, among other countries (figure 2.8).

Figure 2.7 **Iron ore, natural gas and coal make up the bulk of Australia's production and exports**

Production and exports of major commodities by value[a], 2018-19

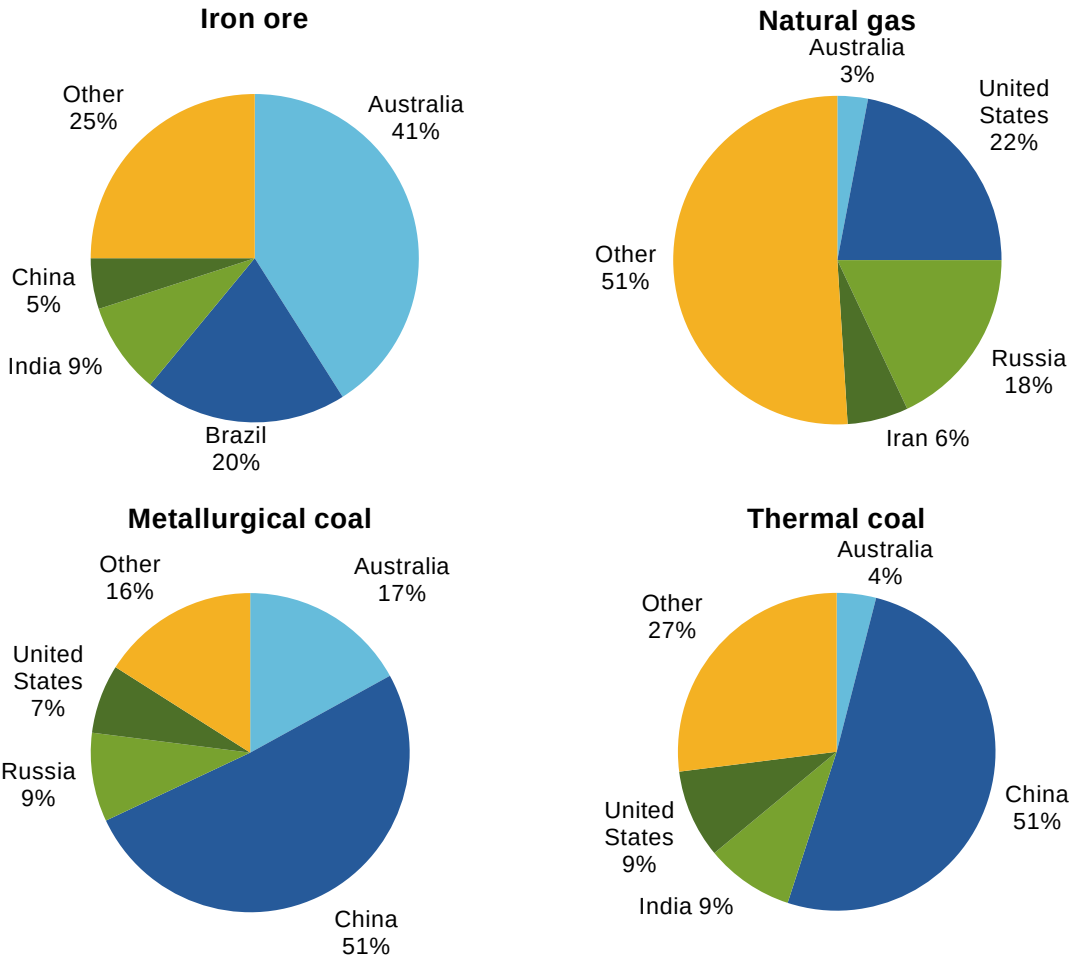


[a] Production value is estimated based on export unit values or assumptions about domestic prices. Natural gas exports are liquefied natural gas.

Source: Unpublished data from DISER.

Figure 2.8 **Key competitors for Australia's major commodities include China, the United States and Brazil**

Global resources production shares of Australia and key competitors, by volume, 2018-19

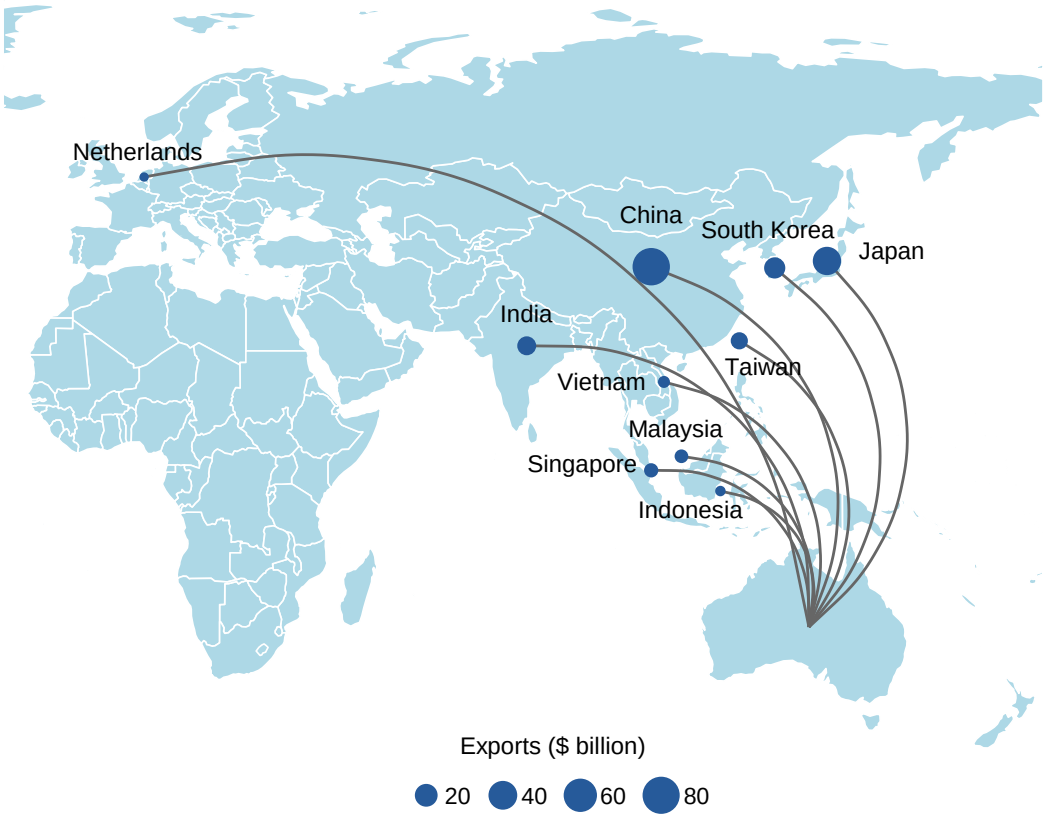


Source: Unpublished data from DISER.

Australia exports most of its resources to countries in Asia, with 71 per cent going to China, Japan and South Korea, its top three destinations (figure 2.9). In part, this reflects geographic proximity and thus lower transport costs.

Figure 2.9 **Asia is Australia's key export market for resources**

Top ten export destinations, 2018-19



Source: DFAT (2019b).

Future demand for Australia's resources will depend on a range of factors

The resources sector provides the raw materials for various other sectors worldwide. As such, it is subject to many influences within the global economy. In the short term, temporary demand events and supply disruptions (such as those due to weather events or political unrest) can significantly impact demand (DIIS 2019d, p. 4). However, in the long term, demand will be driven by sustained influences such as population growth, the rate of economic development, climate change policies (box 2.3) and technological progress.

Box 2.3 Climate change policies and demand for Australia's resources

Climate change policies in Australia and key export markets will affect future demand for energy resources. The ACF (sub. 32, p. 23) noted that:

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

The pursuit of renewable energy sources is likely to reduce the demand for Australia's non-renewable energy resources, all else equal. Japan, China and South Korea (which account for about three-quarters of Australia's thermal coal exports) all plan to transition to cleaner energy sources and are investing heavily in renewable energy (Heath 2019). China accounted for more than 45 per cent of total global renewable energy investment in 2017 (IRENA 2019, p. 28).

However, Japan and China are still rapidly building new coal-fired power stations (Hook 2019; Tabuchi 2020). India and other Asian countries are also increasing the share of thermal coal in their energy mix to meet rising energy demands (Cunningham, Van Uffelen and Chambers 2019). The net effect of these forces on the demand for Australia's thermal coal is uncertain.

The shift towards cleaner sources of energy also brings new opportunities for Australia.

- Countries shifting away from thermal coal may do so in favour of natural gas, of which Australia is a major exporter. Deputy Governor of the Reserve Bank of Australia, Guy Debelle, noted in 2019 that Australia is already experiencing an increase in the demand for natural gas due to falling thermal coal demand (Debelle 2019; Heath 2019).
- The production of renewable energy-related goods such as solar panels, electric vehicles and batteries, require a range of minerals such as aluminium, copper, lithium and rare earth elements which Australia is well placed to supply (IRENA 2019, p. 60).
- Australia may have greater export opportunities for renewable energy fuels, such as hydrogen generated by renewable energy sources (IRENA 2019, p. 48).

2.2 Resources investment in Australia

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 set about expanding production capacity, particularly in coal, iron ore and LNG.

Investment peaked in 2012-13 at $95 billion ($102 billion in 2018-19 dollars), about ten times the level of the early 2000s (ABS 2019f) (figure 2.10). At the height of the boom, the sector attracted more private business investment than all others combined (DIIS 2019a, p. 8). With resources sector investment totalling almost $750 billion in the 15 years to June 2019 (ABS 2019f), the sector has built up a large capital stock.

Since the peak of the boom, however, investment in resources has wound down considerably, and new projects have transitioned to production. Exploration expenditure has also decreased (figure 2.11). In 2018-19, investment was about $33 billion (ABS 2019f), and

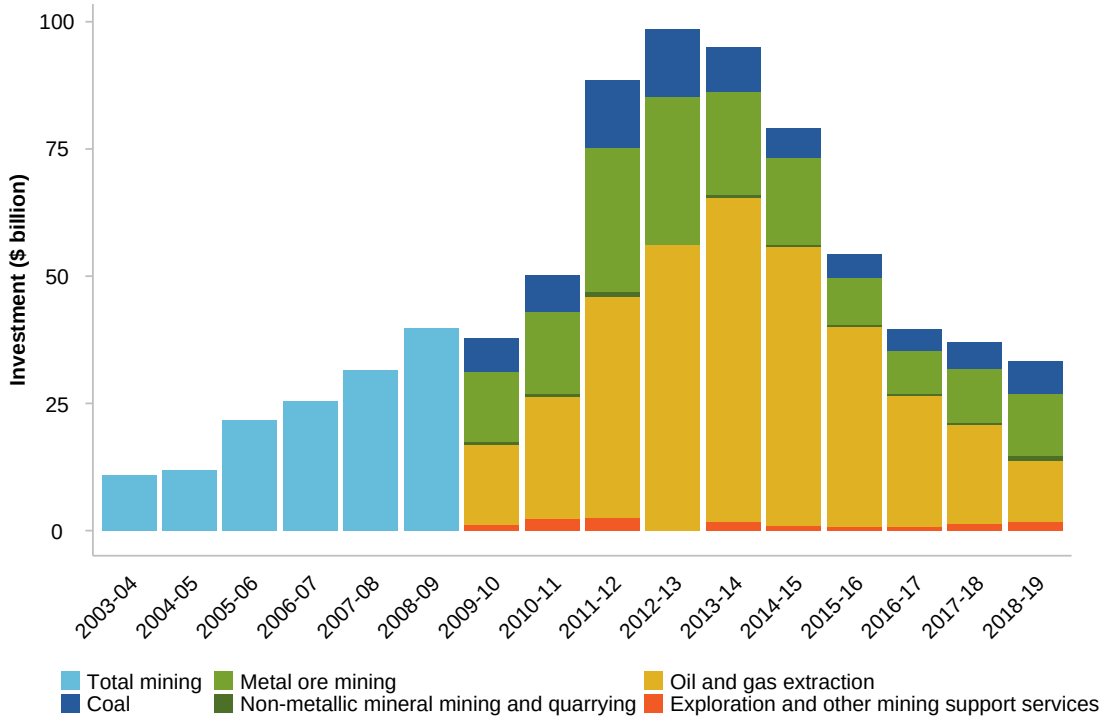
at October 2019, about $30 billion of committed major resources projects were in the pipeline, about a tenth of the level in October 2012 (box 2.4).

Nonetheless, increasing commodity prices prompted a moderate recovery in resources investment in mid- to late 2019, reaching levels similar to those a year earlier (in mid- to late 2018) (ABS 2019f). This recovery is expected to continue over the next few years as companies invest to sustain production levels and, in some cases, expand productive capacity (RBA 2019, p. 33).

It is challenging to predict the future mix and level of resources investment in Australia, as these will depend on various global and local factors including emissions policies, technological advances, economic development and population growth. However, given Australia's diverse and significant resources deposits, the potential for investment will likely remain substantial.

Figure 2.10 **The resources investment boom has wound down in recent years**

Resources sector investment by broad commodity[a,b], 2018-19 dollars

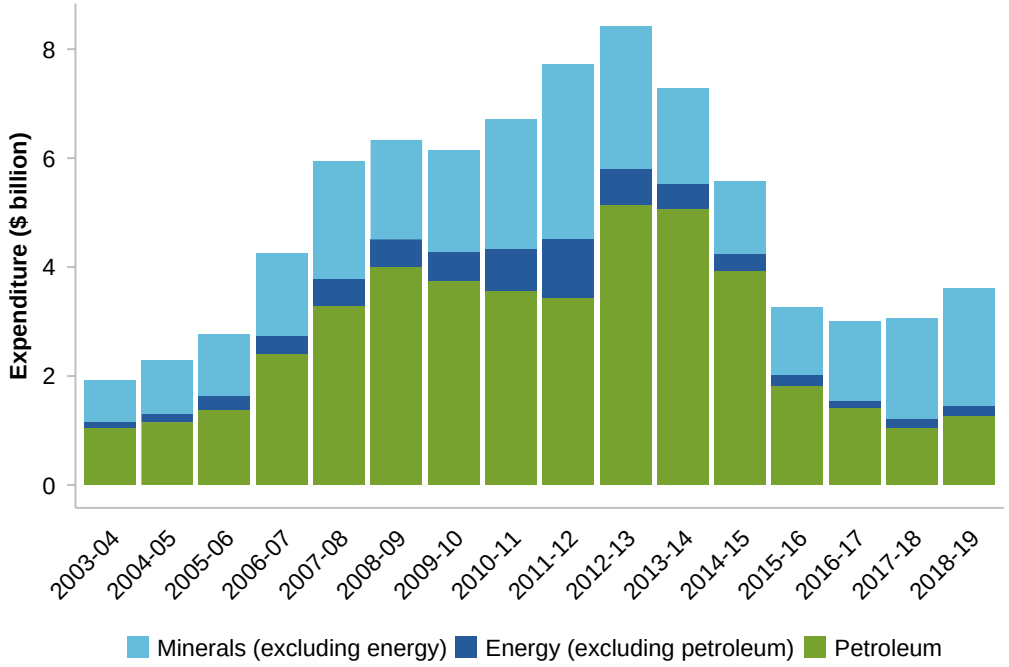


[a] Data missing for non-metallic minerals and services in 2012-13. [b] Total mining investment depicted for years prior to 2009-10 as disaggregated data are unavailable for those years.

Source: ABS (*Australian National Accounts: National Income, Expenditure and Product*, Cat. no. 5206.0, *Private New Capital Expenditure and Expected Expenditure, Australia*, Cat. no. 5625.0).

Figure 2.11 **Exploration expenditure has fallen since peak of the resources investment boom**

Exploration expenditure, 2018-19 dollars

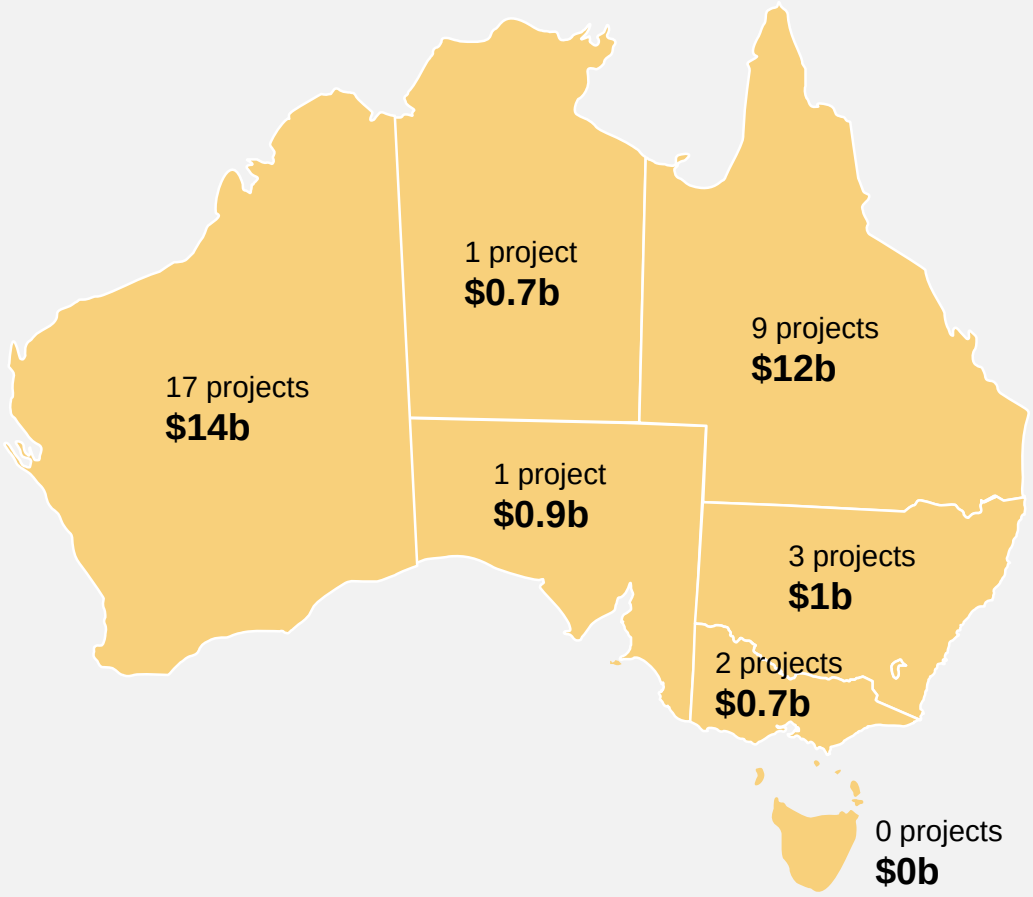


Sources: ABS (*Australian National Accounts: National Income, Expenditure and Product*, Cat. no. 5206.0, *Mineral and Petroleum Exploration, Australia,* Cat. no. 8412.0).

Box 2.4 Current major committed resources projects

Across Australia, there are currently $30 billion of committed major resources projects in the pipeline, covering over 30 different mineral varieties. Examples include the $1.7 billion Eliwana iron ore project and the $5.1 billion expansion of the Gorgon gas project in Western Australia. By value, most projects involve LNG, gas or oil (47 per cent), or iron ore developments (25 per cent). Although most States and the Northern Territory have at least one project afoot, most are occurring in Western Australia and Queensland.

Number of major committed projects and their total value by State and Territory, October 2019[a]



[a] Includes new and expansion projects valued at over $50 million.

Sources: DIIS (2019b, pp. 124, 140, 2019c).

DRAFT FINDING 2.1

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

3 Regulation: rationales, principles and landscape

Key points

- Responsibility for regulating the resources sector, including relevant environmental outcomes, lies principally with the Australian, State and Territory governments, with local government playing a subordinate role.
- As resources and minerals are owned by the Crown, governments have a role in determining the conditions under which resources can be exploited, including through determining who has the right to develop and sell resources, and setting appropriate royalty rates.
- Governments also intervene in the resources sector to mitigate the potential harm resources activity may cause to the environment, sites of cultural and heritage significance, workers, landowners and surrounding communities.
- Effective regulation seeks to promote economic, social and environmental outcomes that benefit the community overall. However, regulation is not costless.
  - It typically increases the costs of doing business (through delays and compliance costs) and can affect investment, resource allocation and innovation.
  - Governments also incur costs developing, administering and enforcing regulation.
- To maximise *net* community benefits, the benefits of regulation must be weighed against its costs. If regulation is not achieving its objectives efficiently, then this constitutes an unnecessary and ineffective use of resources to the detriment of overall community wellbeing.
- Well-designed and well-implemented regulation helps to promote certainty and limit unnecessary costs for businesses and the community. Key elements of good regulatory design are consultation and community engagement, and clearly defined objectives.
- Clear regulatory roles, responsibilities and functions are important features of effective regulatory frameworks. Effective administration and enforcement of regulation requires that regulatory bodies have adequate resources, including staff with an understanding of the issues they are regulating.
- Leading-practice regulator conduct provides clarity and predictability. Open and transparent processes promote impartiality and accountability and help build community confidence. Regulators should ensure that outcomes are consistent with policy objectives, including through monitoring and enforcing compliance.
- Regulation and regulatory practice should be reviewed periodically to ensure that they remain fit for purpose.

Resources activities are subject to a significant amount of regulation administered by all levels of government to varying degrees. Given the risks involved in resources activities, rigorous regulation of the sector is clearly warranted. As outlined in chapter 1, this study

focuses mainly on whether current regulatory regimes are as effective and efficient as they could be in achieving policy objectives.

This chapter examines the rationales for, and core elements of, an effective regulatory system. It also provides a 'helicopter' view of the resources sector regulatory framework in Australia.

3.1 Why do governments regulate resources?

Two key factors motivate government involvement in the resources sector. First, resources (with a few exceptions) are owned by the Crown, meaning governments are responsible for managing them on behalf of the community. Among other things, this means that governments have a role in specifying the conditions under which resources can be exploited, including through determining who has the right to develop and sell resources, and setting appropriate royalty rates.

Second, governments may intervene where markets fail to produce socially- or economically-optimal outcomes (box 3.1). This is particularly important in the resources sector, where the commercial assessment of a resources project may fail to fully take into account the potential negative impacts of exploration or extraction activity on the environment, sites of cultural and heritage significance, workers, landowners and surrounding communities.

Regulation also underpins well-functioning markets — for example, by facilitating safe and efficient transactions and protecting property rights. As noted by the Australian Environment and Planning Law Group (sub. 29, p. 3), regulation has the potential 'to create new "rules of the game" that generate new entrepreneurial opportunities'.

Intervention by government is only one of a number of possible options for responding to policy issues or risks, including market failures. Alternatives include voluntary codes of conduct, self-regulation or co-regulation, or information and education. The choice of approach depends on the relative costs and benefits in particular circumstances.

How far should regulation go?

Much of the regulation applying to the resources sector aims to reduce some type of risk — for example, risks of harm to the environment or sites of national or Aboriginal heritage, or risks to health and safety. While market failure may point to a need for intervention, there is no easy way to determine what constitutes a sufficient or reasonable level of risk in the eyes of the community. This is because it is difficult, if not impossible, to quantify community valuations of such detrimental impacts: that is, what people are prepared to give up to avoid them. The community will naturally have expectations that governments and industry will reduce risks as far as practicable. Governments have to make judgments that balance these expectations against the benefits flowing from resources activities.

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

Box 3.1 Rationales for government intervention

A market with effective competition is generally the best mechanism for ensuring that the level and nature of transactions and economic activity is optimal. Prices established within the market signal how much should be produced, prompt production by the most efficient companies and ensure that output goes to the consumers who value it most highly.

But when these conditions for well-functioning markets are not met, there is a potential role for governments to improve community wellbeing through regulation or other means such as government provision, taxes and subsidies. For example:

- **spill-over effects or 'externalities'** occur when the costs and benefits of undertaking an activity do not fully reflect its effects on others. Examples of negative spill-overs associated with resource activity may include air or noise pollution, damage to heritage sites or a reduction in public amenity for local residents
- **public goods** exist where provision for one person means the product is available to others at no additional cost. Public goods are also said to be non-excludable, meaning that it is difficult or costly to exclude any one person from benefiting from the good. They may therefore be underprovided because 'free riders' cannot be excluded from enjoying the benefits. Examples include national defence, flood-control dams or intellectual property such as innovations in mining technology
- **information failures** arise when consumers and investors are unable to make fully-informed decisions where they lack adequate information about matters like costs, quality or the behaviour of other parties to a transaction. For example, employers may know more about the health and safety risks of working in quarrying than prospective employees.

Sources: PC (2006a, 2009).

Regulation has benefits … and costs

While regulation has the potential to promote economic, social or environmental outcomes, it is not costless. Regulation increases the costs of doing business (for example, the time and money cost of compliance). It can affect investment decisions, either by prohibiting economic activity or making it too costly to undertake (for example, where excessive delays threaten the commercial viability of a project).

Where there are impediments to governments obtaining the information needed to design and implement effective and efficient intervention, there is also a risk that regulation may fail to improve outcomes (relative to doing nothing) or may result in unintended consequences. There will also be costs incurred in the process of policy development, and in monitoring and enforcing compliance with the regulation.

Even where regulation results in net benefits for society, if poorly designed or enforced, it can lead to unnecessary costs for individuals or industry (box 3.2). As noted by the Minerals Council of Australia (sub. 11, p. 14):

> Unnecessary regulatory 'burden' occurs where ineffective, inefficient regulation … increases the compliance costs to industry and undermines productivity without tangible benefit. These costs represent a loss to the affected industry, the community and the economy as a whole.

Box 3.2 Potential sources of unnecessary regulatory costs

Problems with the regulations themselves

- Regulations can be overly complex or excessively prescriptive, requiring legal interpretation which may make them costly to comply with or to administer (box 3.4).
- Regulations may have unclear, questionable or conflicting objectives. Clear objectives allow regulators to determine the boundaries of their authority and areas of responsibility, making it easier to assess regulator performance.

Regulatory duplication and inconsistency

- The need for industry participants to provide information to multiple regulators, or go through multiple regulatory processes or multiple regulatory bodies, can add unnecessarily to compliance costs.
- Industry participants may also be required to comply with inconsistent regulations within or across jurisdictions. There can also be variations in practices between regulators within and across jurisdictions. Such inconsistency may significantly increase compliance costs for businesses operating in multiple jurisdictions.

Poor enforcement and administration

- Heavy-handed administration of regulation, such as excessive reporting or recording requirements, can lead to unnecessary compliance costs for individuals or businesses.
- Inadequate resourcing of regulators can also lead to unnecessary costs, for example, through delays in responding to permit or licence applications. A lack of resources may also undermine regulatory objectives where regulators are unable to invest in appropriate skills and expertise, leading to poor regulatory decision-making.

Sources: PC (2006a, 2009, 2013b).

Leading practice requires that regulations maximise net benefits to the community, with the cost to governments of administering regulations, and to firms of complying with them, being the minimum necessary to achieve policy objectives.

The Australian Conservation Foundation (sub. 32, p. 23) argued that any study of the impact of regulation on industry investment should also consider factors such as government assistance and subsidies designed to promote investment, suggesting that a 'more balanced discussion on resource regulation would include information on the way governments already provide substantial support to the resources industry.'

The Commission is not in a position in this study to evaluate all policies affecting the mining industry. However, the Commission regularly publishes estimates of net effective rates of assistance to major industries including mining. In recent years, the mining industry has consistently received negligible net assistance, and less than other industries (PC 2019d, p. 30). Most of the assistance it does receive comes in the form of tax concessions such as the Research and Development (R&D) tax incentive, which is intended to address private underinvestment in R&D. However, the estimates do not incorporate all measures affecting industries (positive or negative), such as interventions by State governments.

More importantly for this study, regardless of whether the resources industry is subsidised or taxed on a *net* basis, inefficient regulation imposes unnecessary costs. A well accepted policy rule is to address inefficiencies as directly as possible at their source. Leaving in place inefficient and costly regulatory practices to counter a potential subsidy to some resources would be a blunt instrument — inefficient and quite possibly ineffective.

3.2 What does Australia's resources regulation look like?

Australian, State and Territory governments are responsible for regulating resources activities in their jurisdictions, with multiple agencies in each jurisdiction playing a role. The division of powers under the Australian Constitution confers upon the Commonwealth an exclusive power to make laws concerning a limited range of issues (for example, defence, external affairs and corporations), while the States retain powers to make laws over any area where the Commonwealth does not have exclusive powers.

While the precise division of responsibilities between levels of government varies, broadly speaking, the Australian Government is responsible for regulating matters of national environmental significance and certain heritage matters under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) (box 3.3). It also regulates developments on Commonwealth land (such as some airports and defence facilities) and waters beyond the three nautical mile limit. In addition, the Commonwealth Attorney-General administers the *Native Title Act 1993* (Cth).

As ownership of most mineral and gas resources is vested in the States and Territories, they are primarily responsible for the framework through which the right to explore for and extract minerals can be obtained by private operators. The Mining Acts in each State and Territory are the major legislation determining conditions of mineral and resources development. These Acts cover matters such as: tenement and leases, licences and permits relating to prospecting, exploration and mining; land access negotiation and compensation; and other miscellaneous issues such as royalties or dispute resolution processes. Additional State and Territory legislation exists covering issues such as environmental and culture heritage, workplace health and safety and land use planning.

Finally, while resources projects are usually assessed and approved at the State level, local governments often have a range of other responsibilities, such as granting permits and other approvals within their jurisdiction.

Box 3.3 The EPBC Act

The Constitution does not confer a general power on the Commonwealth to regulate the environment or resources. As such, environmental regulation is primarily the responsibility of State and Territory governments. However, the Australian Government has relied on its other constitutional powers, including those over external affairs (such as giving effect to international treaties), water, trade and commerce, and corporations, to pass laws relating to environmental matters such as the EPBC Act. Matters protected under the EPBC Act include both matters of national environmental significance and those involving the Commonwealth (such as actions on Commonwealth land or actions by the Commonwealth).

Each of the matters of national environmental significance in the EPBC Act are linked to these constitutional powers (such as Australia's international obligations to conserve particular environmental features). The matters of national environmental significance include:

- the world heritage values of World Heritage properties and the national heritage values of National Heritage places
- the ecological character of Ramsar wetlands
- listed threatened species, ecological communities and migratory species
- nuclear actions, including uranium mines (the 'uranium trigger') (chapter 6)
- Commonwealth marine areas and the Great Barrier Reef Marine Park
- water resources in relation to coal seam gas development and large coal mining developments (the 'water trigger') (chapter 6).

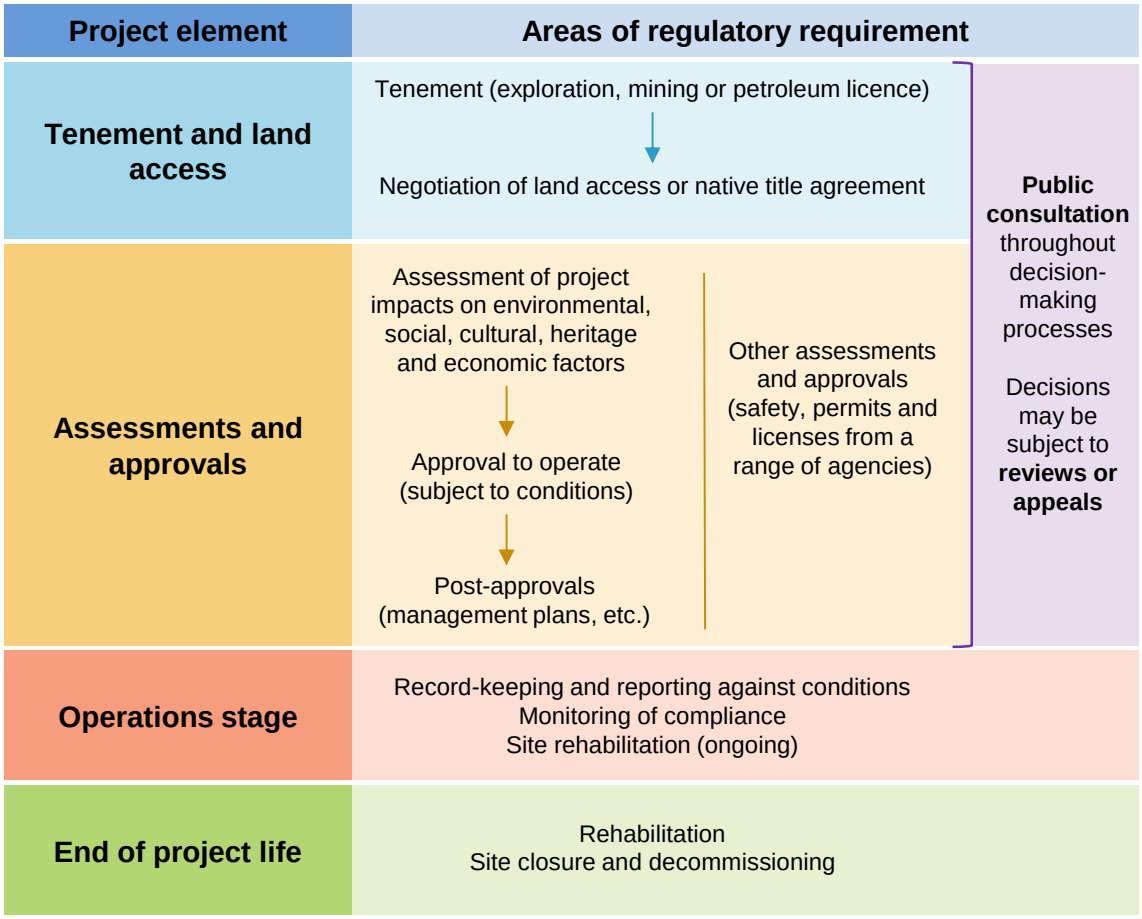
Resources regulation is complex

Given government ownership of resources and the potential for resources activity to harm individuals and the environment, it is unsurprising that the resources sector is subject to a significant amount of regulation covering every stage of a project. The sheer volume of legislation, and associated regulatory requirements, applying to the sector is difficult to synthesise. However, Peabody Australia (sub. 33, p. 3) has stated that:

> Mining is subject to more regulatory requirements than any other Australian industry, covering all stages of industry activity – from grant of tenure, exploration, extraction, processing, transportation, rehabilitation and mine closure through to relinquishment of tenure.

Producing comprehensive depictions of the regulatory landscape is challenging, even for regulators themselves. Figure 3.1 outlines some of the key regulatory requirements faced by proponents at different stages of the lifecycle of resource projects. However, this figure likely understates some of the regulatory complexity faced by resources companies.

Figure 3.1 **Spheres of regulatory requirement for resources activities**
A stylised life-cycle[a]



[a] Some spheres of regulatory effort are State and Territory responsibilities only.

The regulatory framework is further complicated by the interaction of various (and sometimes overlapping) State, Territory and Commonwealth regulations applying to the resources sector. As noted by the Institute of Public Affairs (sub. 5, p. 8):

> Not only do businesses have to deal with state government imposed regulation, they have to make sure their actions are in line with Commonwealth Government regulation. This adds to the red tape burden by increasing compliance costs that are exacerbated when the laws are inconsistent.

When navigating this regulatory framework, resources companies will generally need to work with the numerous agencies within a particular jurisdiction that play a role in administering and enforcing resources sector regulation, with each jurisdiction taking a different approach. For example, Cement Concrete and Aggregates Australia (sub. 36, p. 6) pointed to the 'convoluted process in order to obtain a permit to operate a commercial quarry' in Tasmania. Appendix B outlines some of the key features of resources regulation in each jurisdiction.

3.3 A framework for leading-practice regulation

As discussed above, while regulation seeks to ensure that resources sector activities reflect the potential for social and environmental impacts, there is a risk that some of the costs (including delays and uncertainty) imposed on resources companies are higher than necessary. Reducing the level of unnecessary, poorly designed or poorly administered regulation has the potential to improve productivity and living standards.

The terms of reference for this inquiry require the Commission to identify examples of best-practice regulation in the resources sector. (As noted in chapter 1, the Commission has adopted the terminology 'leading practice' in assessing these examples.) Leading-practice regulatory approaches require governments and regulators to take the course of action that delivers policy objectives while imposing the least burden on businesses, subject to achieving clear, evidence-based regulatory objectives. The resulting regulatory framework is one that delivers the greatest possible net benefit for the community.

Drawing on a large body of previous work by the Commission and others, along with the Council of Australian Governments' principles of leading-practice regulation, the Commission has developed assessment criteria (table 3.1) for determining whether current regulatory approaches are effective and constitute leading practice. While participants' views varied, submissions to this inquiry were generally supportive of these principles (discussed further below).

Table 3.1 **Assessment criteria for leading-practice regulation**

Regulatory design	*Regulator governance*	*Regulator conduct*
• Objectives of regulation are clearly defined and consistent across different regulations • Consultation during regulation-making is sufficient • Regulation is not overly complex or excessively prescriptive • Regulation is reviewed regularly	• Roles, responsibilities and requirements of different regulatory agencies are clear and duplication is avoided • Decision makers are accountable • Regulators are independent • Regulators are adequately resourced and have necessary capabilities	• Regulators' processes are clear, predictable, open and transparent • Regulators use their resources efficiently • Administrative costs are no higher than necessary

Sources: COAG (2007); OECD (2014); PC (2009, 2013a, 2013b).

Regulatory design

Regulatory design refers to the processes involved in the development and maintenance of regulation, along with regulatory change. Well-designed regulation helps to limit uncertainty and unnecessary costs for businesses and the community. Adequate consultation and engagement during the regulatory design phase, including through regulatory impact

assessments, can help ensure that regulations are fit for purpose and minimise unintended consequences.

A key element of good regulatory design is ensuring that objectives are clearly defined, and are consistent with other existing regulations. Clear objectives allow those who operate within the regulatory system to determine what they need to do to achieve governments' policy goals. They also set an objective standard against which regulatory outcomes can be evaluated (PC 2013a, p. 86).

A further design consideration is the extent to which project proponents must contend with overly complex or prescriptive regulation, as this can discourage businesses from developing cheaper or more effective ways of meeting regulatory objectives (box 3.4). It is also important that duplication and overlap are minimised, including across jurisdictions.

Box 3.4 Prescriptive or outcomes-based regulation?

Prescriptive regulation sets out in specific detail how regulated entities should behave, stipulating precisely what they can or cannot do. For example, section 44 of the Victorian *Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019* prescribes that, before any mining activity commences, a work plan which details, among other things, all risks the mining or exploration works may pose to the environment, to the public, or to nearby land, property or infrastructure must be approved by Earth Resources Regulation.

Prescription does have its place in the regulatory framework, and there may be some instances where it is necessary — for example, where there is a high degree of uncertainty regarding the nature or severity of project impacts. There may also be a place for prescription if there are longstanding safety issues associated with an activity, as there may be, for example, in protecting the safety of mine and oil rig workers. However, prescriptive regulation is generally inflexible, and cannot automatically adapt to changes in the regulatory environment, such as the development of new technologies. It may also encourage 'box-ticking' rather than compliance with the spirit of the law, and may discourage innovation.

By contrast, outcomes-based regulations set out the outcomes or standards that regulated entities must achieve, without specifying what steps must be taken to be compliant. For example, section 23 of the EPBC Act requires that a person not take any action that *will or is likely to have a significant impact on the environment*, but does not specify in detail what specific actions are prohibited. Such outcomes-based rules are flexible enough to accommodate different or changing circumstances, including material changes to how an industry operates, and to enable businesses and individuals to choose the most cost-effective ways of complying. However, outcomes-based strategies can be associated with regulatory uncertainty.

Sources: ALRC (2008); David Campin (sub. 49, p. 5); PC (2013a, 2013b).

Finally, regulation needs to be reviewed regularly and updated to ensure that outcomes are in line with stated policy objectives. Reviews provide an opportunity for regulation to be improved by drawing on industry experience, or to be updated to reflect community attitudes and expectations. Policy makers can ensure that regulation remains relevant by setting requirements for a review process as part of the development of new regulatory proposals, for example, by incorporating review requirements in legislative instruments. However,

review requirements should be balanced against the desirability of regulatory and policy stability to minimise compliance costs and support long-term investment. As noted by the Australian Petroleum Production and Exploration Association (sub. 44, pp. 7–8):

> … regulations that are reviewed and or revised too frequently that result in constantly changing regulations is not best practice as it lends to uncertainty that negatively impacts decision making by companies, increasing project risk and costs.

Regulator governance

Regulator governance refers to the structures through which the roles, responsibilities and objectives of regulators are set, and the means of achieving these objectives are determined. Leading-practice governance attributes — such as clear objectives, accountable and independent decision makers, and adequate resourcing and capabilities — provide the foundation for regulators to deliver outcomes that yield community benefits and build confidence in the operation of the regulatory system. Policy statements, such as a ministerial Statement of Expectations, offer an important opportunity to clarify a government's expectations of how a regulator will operate (for example, with respect to their treatment of treatment of risk and use of risk-based approaches (box 3.5)).

Box 3.5 A risk-based approach to regulation

A risk-based approach to regulation involves basing regulatory decisions and priorities on the likely risks to society, taking into account both the seriousness of the risky outcomes themselves and the likelihood of them occurring, in order to put in place appropriate and proportionate levels of control.

Risk-based regulation requires regulators to begin by identifying the risks that they need to manage, not the rules they have to enforce. This requires regulators to have accurate information and data about the operation of regulated industries. Regulators also need adequate resources in order 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.

Regulators will need to have the powers and discretion to implement a fully risk-based approach, including flexibility in how they enforce the law. Policy makers need to ensure that the degree of prescription in regulation does not unduly constrain regulators in how they respond to breaches, or preclude the use of some tools that may be necessary for effective and low-cost compliance. Ultimately, the authority for these must come from the relevant government.

Sources: Black and Baldwin (2010); PC (2013a, 2013d).

Clear regulatory roles, responsibilities and functions are a particularly important feature of effective regulatory frameworks. Where multiple bodies are responsible for regulating an industry, and their roles are not clearly defined, gaps may appear within or between regulatory regimes. This creates the risk that some behaviours or activities may be ineffectively monitored or controlled, and makes it difficult to hold regulators accountable

for outcomes. A lack of clear regulatory boundaries may also lead to duplication of processes or overlapping compliance requirements, or result in contradictory obligations.

The effective administration and enforcement of regulation also requires that regulatory bodies have adequate resources for monitoring, research and communication. Regulatory agencies also need staff with an understanding of the industry they are regulating. Industry knowledge is important for the credibility of the regulator, and can help avoid impractical or unnecessarily costly demands.

While the level of regulator funding will ultimately reflect political and budgetary priorities, regulators can only achieve what their resources will allow. A lack of resources can lead to unnecessary delays in completing regulatory processes and potentially poor decisions. In some circumstances, cost recovery measures may be an efficient source of funding for regulators (box 3.6).

Box 3.6 Cost recovery for government activity

Cost recovery through levies or fees-for-service can provide an important means of improving the efficiency with which government services are produced and consumed. The rationale for cost recovery is that assessments and approvals generate a private benefit for project proponents, and therefore the associated costs should not be borne by the wider community. Further, charges for goods and services consumed can give important messages to users or their customers about the costs of the resources involved.

As a general rule, cost recovery for government products and services is desirable where: it can be achieved efficiently and cost effectively; the beneficiaries of the product or services are a narrow and identifiable group; it would not unduly stifle competition and industry innovation; and charging is consistent with policy objectives.

However, it is generally inappropriate to cost recover regulatory activities that provide a public good (for example, general policy development, defence and national security). In other cases, cost recovery may be contrary to the intended policy outcomes: for example, charging mine operators a fee for reporting safety incidents may discourage self-reporting.

Cost recovery should be subject to the same public administration principles that apply to all government activity. Governments have published guidelines to ensure that cost-recovery arrangements are administered transparently and efficiently, and in line with government policy.

Sources: Department of Treasury and Finance, Victoria (2013); PC (2001, 2013a).

Regulator conduct

The efficiency of regulatory regimes is highly dependent on the conduct of regulators. For example, overly heavy-handed administration of regulation can introduce complex and costly regulatory processes, which may unduly impede investment or discourage the entry of new firms. Risk-based approaches to compliance and enforcement, supported by capable staff and data analytics, can reduce costs for businesses and regulators while promoting achievement of the objectives of the regulation (box 3.5).

Leading-practice regulator conduct involves clear and predictable decision-making processes, minimising unnecessary regulatory costs or delays in decision making. As noted by Roy Hill (sub. 7, p. 6), 'the opaque nature of regulatory processes makes it very difficult for business to accurately predict the time required to attain the necessary government approvals at all levels of government, which is a significant risk to business'. Regulators should also ensure that compliance with rules is consistently monitored and enforced, and that processes are open and transparent. Transparency is particularly important as it facilitates impartiality and accountability, and promotes the legitimacy of the regulatory framework for industry and the broader community.

Where multiple agencies are responsible for administering regulation, unnecessary costs can be reduced through greater coordination of regulatory activity, for example through memorandums of understanding or bilateral compliance arrangements. Regulators can also lower costs for industry by publishing timely and comprehensive guidance.

4 Resource management

Key points

- Governments own and manage resources on behalf of the whole community. They have a role in finding potential resource deposits, facilitating their commercial development and deciding who can undertake those developments.
- Information spill overs and public good characteristics of exploration information can lead to underinvestment in greenfield exploration. Governments encourage greenfield exploration by public acquisition and provision of pre-competitive geoscience data (information about the likely prospectivity of resource deposits).
- The quality of Australia's pre-competitive information is highly regarded. Although some study participants supported additional government funding, the Commission is not in a position to say whether the benefits of additional spending would outweigh the costs.
- Australia's pre-competitive geoscience arrangements are operating well and do not require major reform. However, there would be benefits in 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.
- No significant issues have been raised with the approaches taken to the allocation of licences, and no differences between jurisdictions' licensing systems appear to be creating differences in the environment for resources investment.
- In some cases, licence holders repeatedly fail to meet their regulatory obligations. Every jurisdiction has legislative provisions allowing them to examine the past compliance of licence holders before issuing new licences. A risk-based application of these provisions would focus regulators' limited capacity on those applications where non-compliance risk is high.
- Some State and Territory Governments have temporarily or permanently banned onshore gas exploration and development in response to concerns about environmental and other detrimental impacts. Governments should instead 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.
- Provision of factual information about contentious resources projects by trusted independent agencies can help to inform the public debate and improve community confidence in the resources industry.
- Pressure to keep gas prices low for consumers and domestic industry has led several governments to implement domestic gas reservation policies. These may reduce domestic prices relative to global prices in the short term, but will reduce incentives to invest and reduce potential output over time. Community wellbeing is lower than would be the case if gas could be sold for the highest possible price (which may be on export markets).

Resources companies are required to navigate a range of regulatory processes in order to explore for and extract resources (chapter 3). But there are a number of preconditions to the broader approval process for resources projects. This chapter examines the way that governments support industry's development of resources by providing pre-competitive geoscience information (section 4.1); how resources activities are licensed (section 4.2); and other direct measures taken by governments (domestic gas reservations and bans and moratoria) to manage resources (section 4.3).

4.1 Government provision of pre-competitive geoscience information encourages exploration investment

Decisions to invest in resources exploration are affected by the perceived likelihood of discovering substantial viable resources. A well-established mechanism for government to increase incentives to undertake exploration activity is by acquiring and publicly providing pre-competitive geoscience information. This is information generated from the collection and analysis of geophysical and geochemical data about the Earth's surface. The intent in collecting it is to inform understanding of the likely prospectivity of resource deposits rather than to locate specific mineral and resource deposits.

The case for government involvement in geoscience information provision

There are two main arguments justifying government involvement in the provision of pre-competitive geoscience information.

First, mineral and energy resources are owned by the Australian people through their governments (the Crown). The Australian, State and Territory governments have a responsibility to ensure that those resources are used in a manner that best promotes the community's wellbeing. To that end, governments require information about the location and nature of these resources in order to make informed decisions (PC 2013b, p. 55). The production and distribution of pre-competitive information is, therefore, akin to the cost of developing and distributing a prospectus when marketing other investment opportunities:

> Typically, the first application for pre-competitive information is in informing government decisions on which specific areas within a region or basin are viable to offer for private exploration. Pre-competitive information is then used by governments in promoting the exploration potential of Australian territory, either in general terms or for specific areas being offered for exploration permits. In both of these stages, the primary beneficiary is government in achieving the most favourable terms for the release of exploration permits. There are strong analogies to the due diligence and other costs in developing an investment prospectus for a major, complex asset. (DoFD 2011, pp. xiii, 39, 105)

Second, the benefits from information produced during early-stage exploration in frontier areas are largely external to the initial explorer. When exploration is undertaken by an entity and information is made public, significant information benefits potentially spill over to other explorers interested in adjacent areas, comparable geological structures and environments or similar exploration concepts (ACIL Tasman 2012, pp. 62–63). Thus information generated in early-stage exploration possesses some attributes of a public good. While it might be possible to restrict access to this information, it might not be practical or appropriate. Setting up systems to prevent the sharing of this information can be costly and limiting access can reduce overall efficiency in its use (DoFD 2011, pp. 38, 44). An explorer's inability to capture the full benefits of their activity would likely lead to an inefficiently low level of early-stage exploration.

It follows that there is a role for government in producing and publicly providing pre-competitive information (PC 2013b, p. 246). Other mechanisms to address the public good nature of exploration information include subsidisation of exploration in least explored areas, subsidisation of novel exploration methods, and public collection and release of exploration information generated by private explorers.

Government involvement in geoscience information in Australia

Responsibility for collecting geoscience information is shared between the Australian and the State and Territory governments. Each State and Territory has its own geological survey agency which collects and disseminates onshore pre-competitive geoscience information. Geoscience Australia (GA), an Australian Government agency, has primary responsibility for offshore pre-competitive information and mapping activities and shares responsibility with the States and the Northern Territory for onshore pre-competitive geoscience. It also conducts applied research and provides data, information and services to a wide range of government agencies, industry and international partners (PC 2013b, p. 247).

Each government also undertakes geoscience initiatives that aim to encourage private exploration activity within its jurisdiction. These initiatives include acquisition of pre-competitive information for targeted geographic regions, co-funding drilling and facilitating the transfer of exploration technology.

In addition to publicly acquired pre-competitive geoscience information, GA and State and Territory geological survey agencies collect exploration and production reports from resources companies. After a period of confidentiality, the reports are publically released and the information is then integrated into public geoscience datasets. The length of the confidentiality periods varies by jurisdiction and sometimes by resource category.

There is no case for comprehensive reform

Submissions to the current study generally commended the quality of Australian pre-competitive data and did not identify it as a material impediment to investment. There is

no reason to think on the basis of evidence presented to the study that the Commission's overarching conclusion from 2013 needs revisiting:

> Australia's precompetitive geoscience information is not viewed as a barrier to resource exploration. To the contrary, the information available in many jurisdictions, and for Australia more generally, is highly regarded by domestic and international explorers and is seen as an asset that encourages exploration investment in Australia … Comprehensive reform of Australia's pre-competitive geoscience information arrangements is not required. (PC 2013b, p. 245)

Nor does the involvement of both the Commonwealth and State and Territory agencies in the collection and dissemination of pre-competitive data appear to give rise to wasteful duplication of effort. A 2011 strategic review of GA did not identify significant issues in this regard (DoFD 2011, p. 68):

> There appears to be minimal overlap between GA's work and capabilities and those of State agencies. In particular, State agencies strongly support GA's role in providing a national perspective, national leadership, national standards, national data custodianship and national investment promotion … GA endeavours to complement State and Territory programs and link datasets together to form a nationally consistent perspective. GA may also acquire data to provide a broad national perspective on new energy resources such as geothermal.

The nature of the working relationship between GA and State and Territory agencies appears to have remained unchanged since the 2011 review, which suggests that the review's conclusion remain relevant.

That said, two issues merit consideration.

Industry has called for further funding

Some submissions supported more government funding (box 4.1) for pre-competitive data and for expansion of exploration incentive programs, such as Exploring for the Future — a $100.5 million Commonwealth government initiative to produce 'an integrated resource prospectus for key targeted regions in northern Australia and parts of South Australia' (GA 2016).

These submissions are largely consistent with the direction proposed in the National Resources Statement (DIIS 2019a, p. 32):

> The government will promote resources exploration and basin development by:
>
> - Investigating expanding the scope of Geoscience Australia's Exploring for the Future program and extending it for four years. This would extend its benefits into the southern half of the Australian continent and include targeted offshore areas to access new, deeper resources.

On the other hand, Rio Tinto (sub. 26, p. 12) submitted that:

> Public investment should encourage research programs to improve the predictive and detection capabilities for searching under cover, rather than be an alternate source capital for greenfield exploration programs that ordinarily should be funded through a company's own or investor risk capital.

Box 4.1 Submissions on pre-competitive data provision and related exploration incentive programs

Minerals Council of Australia (sub. 11, p. 24):

> Australia is a world leader in providing precompetitive data through state geological surveys and Geoscience Australia. However, more must be done to retain this source of advantage. Government funding for these programs has not been adequate despite growing tax and royalty revenue being generated by the mining industry. …
>
> Government-funded precompetitive data and exploration incentive programs are proven to deliver substantial economic benefits. For example, a review of South Australia's Plan for Accelerating Exploration found the $56 million invested by the state delivered an additional $700 million in private sector exploration and raised state mining revenues by $2.4 billion over the period 2004 to 2013.
>
> The government should continue and expand Geoscience Australia's Exploring for the Future program as an investment in Australia's mineral future. This program is essential or developing the next wave of mining projects in Australia that will supply the world's growing demand for copper, critical minerals and base metals.

The Government of South Australia (sub. 25, p. 8):

> … the South Australian Government recently launched the Accelerated Discovery Initiative (ADI). The ADI will provide co-funding opportunities to greenfields exploration activities to support new major minerals discoveries, drive further mine developments and stimulate growth, investment, exports, jobs and innovation in the state's mineral resources sector. The ADI funding commitment is $3.3 million per year, with the total cost capped at $10 million over 2019–2020.
>
> The Commonwealth Government is currently supporting a geoscience program, Exploring for the Future (EFTF), dedicated to boosting investment in resource exploration in northern Australia. This four-year program will conclude in 2020, so now is the appropriate time to establish an equivalent national geoscience initiative for southern Australia to complement the existing northern Australia program.

As a general principle, the extent of government intervention should be informed by the extent of the market failures it aims to address and the relative costs and benefits of such intervention. In the context of resources exploration, the market failures of information spill overs and public good characteristics of information are likely to be more pronounced in the case of broad-area exploration in least-explored areas. Therefore, some government involvement in greenfield exploration can be justified on that basis. There is also a rationale for government involvement in research and development of new exploration technologies — to the extent that spill overs from technological innovation cannot be captured by the innovator and cannot be realised without support (PC 2007).

The Commission does not possess sufficient data to quantify the spill overs arising from resources exploration in different geographic areas — or from innovation in exploration technologies. Therefore, it is not in a position to comment on the adequacy of the current levels of government funding for pre-competitive data and other initiatives to encourage exploration activities.

Coverage of geological databases could be extended

The Commission observed in 2013 that:

> … there is scope to improve the coverage of Australia's geological database by extending the public collection of data to those exploration companies which do not report publically on their mineral and energy reserves. This would help to address gaps in the resource reserve information base and improve the attractiveness of Australia as an exploration destination. (PC 2013b, p. 245)

Resources companies listed on the Australian Stock Exchange (ASX) were (and still are) required to report publicly on exploration results mineral resources and reserves. However, the lack of consistent reporting data for foreign entities and privately-owned Australian companies resulted in a gap in the resources information base across commodities and jurisdictions. The Commission (PC 2013b, pp. 263–265) recommended that private exploration companies be required to publicly disclose on the same basis as listed companies.

The Australian Government's interim response to the Commission's inquiry recommendations (DIIS 2014) was that:

> The Commonwealth acknowledges that accurate data on Australia's resources stocks assists with the development of investment, exploration, trade, the mining industry's 'social licence to operate' and is important for a wide range of policy applications; however, to require reporting by all exploration companies on the same basis as ASX reporting would require non-ASX companies to comply with the requirements of the Joint Ore Reserves Committee Code, imposing costs which may not be warranted. Unlisted entities may be choosing to forego the advantages of ASX listing in order to retain information in-confidence for commercial reasons.
>
> The Australian Government is currently working with the States and Territories to address data gaps around resources and reserves data.

In 2013 the Commission also noted (PC 2013b, p. 264) that States and the Northern Territory imposed reporting requirements on mineral and petroleum exploration and production licences. But those requirements varied by commodity and jurisdiction and were primarily focused on production.

Since 2013, jurisdictions have improved their reporting standards to enhance the quality and scope of the collected data and to support efforts to make it more accessible electronically. For example, the Queensland Department of Natural Resources, Mines and Energy requires all exploration data to be lodged in digital form. The Department has recently released new reporting guidelines (Qld DNRME 2018c, 2019b) specifying the digital formats for data submission and providing guidance on best practice reporting. The collected data (other than that protected by confidentiality requirements) will be made available via the Geological Survey of Queensland's Open Data Portal which 'will progressively replace the array of legacy systems, platforms and databases used to make data available to industry' (Qld DNRME 2020).

Further, the Government Geoscience Information Committee (GGIC) maintains a 'minimum National Standard for the receipt of digital data related to mineral exploration activities' that

'addresses the future use of digital files and their ability to be uploaded into another database' (GGIC 2018, p. 1). The standards are regularly reviewed by the GGIC.

The Commission also notes that the National Resources Statement (DIIS 2019a, p. 37) proposed to develop a 'holistic long-term Resources Data Strategy for the sector' that 'will provide a new approach to how data can be collected, integrated and used'. The strategy has potential to further improve the collection and management of, and access to, geoscience information.

Since 2013, there have also been legislative changes related to the length of time privately-collected data can remain confidential. While regulations regarding confidentiality of collected data and reports vary by jurisdictions, type of tenement and resource category, many (but not all) jurisdictions have legislation that supports public release of collected information after a limited confidentiality period, even when a tenement is still in force.

For example, in late 2015 and early 2016 New South Wales undertook significant amendments to the *Mining Act 1992* and replaced the *Mining Regulation 2010* with a new version. These changes introduced a five year 'sunset clause': annual operations reports lodged on or after 1 June 2016 will not be kept confidential for longer than five years after the lodgement date and the reports lodged before 1 June 2016 will not be kept confidential after 1 June 2021. Prior to this legislative change, annual reports in New South Wales could remain confidential for much longer periods. For instance, if a company holding an exploration licence subsequently was granted an assessment or mining lease, the company's annual reports (including exploration reports) would remain confidential until those leases were no longer in force. This resulted in large volumes of data generated by resources companies being collected, but not being made publically available (as mining leases are not always relinquished — chapter 7).

As noted earlier, data generated from exploration activity of an entity, if publically available, can promote information spill-overs. Further, any such information has some public good properties. When information is kept confidential, its external benefits might not be fully realised and inefficient duplication of exploration effort may occur. On the other hand, if information generated by a private entity is made public immediately, it may discourage the original entity from exploring, as others may be able to free-ride on the information the entity generates. Setting a confidentiality period for the public release of resources data generated by private activities aims to address this trade off. While the Commission is not in a position to recommend an optimal length of the confidentially period, it would seem reasonable that the length of confidentiality periods for public release of private exploration and production reports is shorter than a project's tenure.

Further, the Commission notes that the National Resources Statement (DIIS 2019a, p. 32) suggests that:

> The government will promote resources exploration and basin development by … [w]orking with industry, through the Australian Bureau of Statistics … to examine the feasibility of expanding the Survey of Mineral Exploration. Expanding this survey aims to improve the information collected about greenfield exploration to greater reflect current industry exploration activities.

The proposed expansion of the ABS Survey of Mineral Exploration might address some gaps in publicly released information on exploration activities.

DRAFT 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 generally 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.

DRAFT LEADING PRACTICE 4.1

To promote data access, 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.

4.2 Where can resources developments take place?

Governments allocate rights to explore for resources in particular locations through their resources regulators. In State and Territory Governments, these decisions are usually made by a Minister or by the mining or resources department; for offshore petroleum resources, the primary regulator is the National Offshore Petroleum Titles Administrator (NOPTA) (appendix A). If the deposits are assessed by resources companies to be commercially viable, then those companies can apply to government for the exclusive right to extract those resources and keep the minerals or petroleum found. If the resources are located on private land, then the resources company must also negotiate an agreement to access that land (chapter 5).

These rights — to explore for and extract resources in particular areas — are collectively known as tenements, leases or licences.

In Australian jurisdictions, most tenements are allocated through a 'first-come, first-served' process, where the party that first applies to explore in an area is entitled to those rights, provided it meets basic administrative requirements. Exploration permits for offshore petroleum or gas are allocated by NOPTA through a work-bid or cash-bid process, rather than a first-come first-served process.

Each State and Territory has similar information requirements and decision-making processes for the issuing of licences for exploration and extraction. The application must indicate the area where activity will take place, what the resource is, any known information about the

prospectivity of the deposit, and the proposed program of work. Many older projects in Western Australia and South Australia are subject to a separate set of arrangements for certain large projects, which exclude them from ordinary licensing requirements (box 4.2). Exemptions of this sort from standard regulatory processes have been used with some frequency to attract investment, but they have questionable merit: they run the risk of the benefits of investment being oversold and the costs understated (Banks 2002).

Box 4.2 Large resources projects are sometimes treated separately for licensing processes

Western Australia's State Agreements

For many major mining operations in Western Australia, State Agreements replace the ordinary licencing arrangements. After obtaining an exploration licence and identifying a significant resource deposit, the Western Australian Government and the proponent negotiate an agreement. Once the agreement is passed by the State Parliament, it overrides any inconsistent provisions of Western Australian law. For example, special provisions are often set in relation to project royalties. However, State Agreements do not override the *Environmental Protection Act 1986* (WA). Today, there are sixty-five State Agreements.

Many projects that are ratified by State Agreement are large enough to require significant project-specific infrastructure investments. Security of tenure for project proponents, and local content requirements, are cited by the Western Australian Government as advantages of this approach.

South Australia's Roxby Downs indenture

The Olympic Dam mine, approximately 560 kilometres north of Adelaide, produces copper, uranium, silver and gold. The mine's remote location required the establishment of a local township, Roxby Downs. Today, the mine and town are operated by BHP.

The *Roxby Downs (Indenture Ratification) Act 1982* (SA) overrides any inconsistent provisions of other laws, such as licencing, environment, heritage, and freedom of information, in the area of the town and mine. Instead, BHP has the power to make decisions about this legislation independently (in consultation with the South Australian Government). This arrangement has been subject to some controversy since its introduction for the various privileges offered to the mine:

> Olympic Dam ought to be subject to legislative and regulatory controls and standards at least as rigorous as those that apply to smaller projects. To apply considerably weaker standards is indefensible. (Green and Mudd 2011)

Sources: Hunt, Kavenagh and Hunt (2015, pp. 12–23); Western Australian Department of Jobs, Tourism, Science and Innovation (nd, nd); BHP (2020c).

However, these types of 'regulatory holiday' arrangement are not the norm for new projects. And in any case, no evidence has been presented to this study indicating that differences between jurisdictions' approaches to licensing have created impediments to investment, nor that any particular regime for the allocation of tenements is 'leading practice'. However, one difficulty relates to whether regulators should take a more proactive role in deciding who should be given mining tenements. The following section considers this issue, before raising other areas of interest to this study relating to licensing.

DRAFT 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'.

Who should be granted a licence to explore and extract resources?

Any person can apply for a resources tenement. Because of the capital-intensive and risky nature of the industry, most resources development is pursued through corporate entities (rather than by individuals in their own capacity). When a tenement is granted, it comes with various compliance obligations. However, not all companies effectively discharge their obligations as tenement holders — in particular, rehabilitating the sites of resource development, or paying fines for environmental non-compliance (box 4.3).

Box 4.3 Failure to comply with regulatory obligations might indicate a lack of suitability to hold a resources tenement again

There have been numerous public instances of non-compliance with environmental regulation. The Senate Environment and Communications References Committee's inquiry into mine rehabilitation observed that many operators avoided environmental obligations by entering liquidation, then relying on insolvency laws to disclaim tenements with rehabilitation obligations attached to them, or avoid environmental penalties (SECRC 2019, pp. 50–54, 96).

One recent instance of this was the case of Linc Energy's underground coal gasification project in Queensland's Darling Downs, which contaminated nearby air, soil and water over a period of six years. Although the company received a $4.5 million fine, Linc Energy was already in liquidation; as a result, the fine was at the back of the queue of $320 million of other debt owed by the company and thus was likely never paid (Ludlow 2018; Sibson 2018).

The Resources Law Network (sub. 22, pp. 17–18) indicated that this incident was not isolated, outlining a number of incidents where it considered that more active regulation, and awareness of past misconduct, could have averted environmental damage and later compliance enforcement.

To address the risk of repeated non-compliance, governments have introduced assessments of potential licence holders. These restrictions can generally be put into one of three categories (table 4.1):

- a 'fit and proper person test', where a Minister can refuse an application on grounds that the applicant:
  - has historical non-compliance with mining or environmental legislation
  - has other character issues (such as past criminal conduct)
  - lacks technical competency, or
  - has previously been insolvent.
- a general 'public interest' test, which, although not specifically defined in legislation, can encompass nearly any matter outside of the application itself, including historic non-compliance and character grounds (Hayward 1995, pp. 115–116; Wheeler 2013, pp. 39–45)
- 'compliance tests', where applications can be refused for non-compliance with resource-specific legislation (such as licence conditions, health, safety and environmental legislation). Some jurisdictions only examine breaches within their own territory while others examine breaches in any jurisdiction.

Table 4.1 **Jurisdictions take different approaches to assessing the character of licence applicants**

Approach	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*NOPTA*[a]
Fit and proper person test	✓	✓					✓	
Public interest			✓	✓	✓			
Non-compliance in any jurisdiction								✓
Non-compliance in jurisdiction only						✓		

[a] National Offshore Petroleum Titles Administrator.

Sources: *Mining Act 1992* (NSW) s. 380A; *Mineral Resources (Sustainable Development) Act 1990* (Vic) ss. 15-16; *Mineral Resources Act 1989* (Qld) s. 231E; *Mining Act 1971* (SA) s. 29(8); *Mining Act 1978* (WA) s. 111A; *Mineral Resources Development Act 1995* (Tas) s. 17A; *Mineral Titles Act 2010* (NT) s. 70; NOPTA (2019a, p. 8).

Transparency International Australia (sub. 12, p. 2) questioned whether regulatory agencies make any meaningful examination of the track record of resources companies. It has previously raised in a report on corruption risks in the mining approval processes of Queensland and Western Australia that:

> … government departments involved in the mining approvals process do not undertake adequate due diligence into the character and integrity of applicants, or the track record for responsible

> business conduct of the company and its directors in either Australia or overseas for mining leases. (TIA 2017, p. 50)

In particular, Transparency International Australia observed that:

- financial due diligence did not go far enough to determine the 'real owners' of resources companies (TIA 2017, p. 50).
- governments relied on self-reporting by proponents of conduct issues (TIA 2017, p. 28).

If proper due diligence is not undertaken, there is a risk that operators who consistently fail to meet environmental or community standards (as reflected in regulation and policy) may still be granted tenements. These operators may once again fail to meet basic compliance requirements in their work:

> In both Western Australia and Queensland, there is a high risk that there is inadequate due diligence on applicants' integrity (such as past unlawful conduct and compliance) and the applicants' beneficial owners. (TIA, sub. 12, p. 2)

This due diligence comes with administrative costs, particularly in relation to determining the 'real owners' of resource tenements. One individual may have a consistent history of non-compliance, but that may only become clear when their ownership of other corporate entities are uncovered.

It is not known how common these issues of repeated non-compliance are, and it is possible that they are sufficiently isolated that the costs of this due diligence exercise does not exceed the benefits of avoided compliance issues from stricter licensing requirements. There is a balancing exercise between these costs and benefits. It is also possible that other measures such as rehabilitation bonds help to mitigate the risk of resources companies disavowing their own projects.

However, a risk-based approach would help to focus regulators' limited capacity onto those applications where non-compliance is most likely. Incoming measures, such as unique director identification numbers that allow the Australian Securities and Investments Commission and other regulators to track the same individual working for multiple companies, should help to reduce the cost of this exercise (Zuchetti 2019).

But in the worst case, poor behaviour can contaminate community sentiment towards resources activity more generally, with an adverse effect on 'social licence to operate' (chapter 9):

> … the industry's reputation is only as good as its weakest operators. Those more incapable or unscrupulous and unable to run a professional operation within the industry, damage the reputation of all, and destroy industry credibility within the communities in which they currently, or will hope to [operate] in the event of a mineral discovery. (Lacy quoted in SECRC 2019, p. 34)

The Commission considers that a range of historical behaviour is relevant to, and ought to be considered in, the decision to issue a licence. Decisions to grant or renew a tenement should examine whether the applicant has previously complied with licence conditions, as

well as health, safety and environment legislation in other domestic and international jurisdictions, as well as broader grounds such as past criminal conduct, technical competency and past insolvency.

DRAFT 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 or renewing 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.

Other issues relating to licensing resources development

During this study, participants have raised few issues with the licensing process, though Peabody (sub. 33, p. 5) did raise concerns about processing times for applications:

> Peabody continues to be impacted by slow application processing times that well exceed the relevant key performance indicators … of 85 business days for the processing of an exploration licence application and 45 business days for coal exploration licence renewals, coal mining lease applications and renewals, and coal assessment lease applications and renewals.

Previously, the Commission has considered a range of issues related to resources licences, including some issues where policy has subsequently changed:

- A lack of transparency in decisions relating to the allocation of licences can lead to poorly designed and implemented policies, uncertainty for explorers and in extreme cases, corrupt practices (PC 2013b, pp. 69–71). This was particularly of concern in New South Wales, where investigations by the state's Independent Commission Against Corruption resulted in a number of reforms to mining and planning laws in that state. Most significantly the Independent Planning Commission, rather than a government minister, now makes key planning decisions, aimed at removing perceptions and risks of corruption in the approval process (NSW PC 2019, p. 15).
- Coal deposits can produce either coal or coal seam gas. However, because mineral and petroleum (gas) licences are allocated through separate systems, there is not always clear priority for coal or coal seam gas in a given deposit. (PC 2013b, pp. 75–76). In Queensland, an 'overlapping tenure framework' was introduced in 2014, through which holders of overlapping coal and coal seam gas tenements must agree to joint development plans and exchange certain key information (Business Queensland 2018).

- Although most tenement allocation is done on a 'first-come, first-served' basis, alternative tenement allocation mechanisms where there is competition for particular tenements (such as work program bidding, or cash bidding) can create efficiency concerns (in particular, work program bidding may encourage too much exploration, and cash bidding too little) (PC 2013b, pp. 71–75).
- The Australian, State and Territory Governments are involved in approving the method and rate of resource extraction based on technical advice. But, in the absence of intervention, resources companies are likely to choose the method and rate of resource extraction that maximises overall recovery from the resource (while complying with other regulation) (PC 2009, pp. 84–85).
- Retention leases (which are awarded for resources that are not immediately commercially viable) are sometimes held for long periods of time. In some cases, these resource deposits are never exploited, and remain off-limits to other resources companies. A review commissioned by the Council of Australian Governments found that there was no evidence of retention leases being used to withhold gas from the market (Noetic Group 2018b, p. 5). The review aligned with the Commission's past recommendation against 'use-it-or-lose-it' policies (PC 2009, pp. 91–96).

The Commission is seeking information on whether any licensing practices are posing a an impediment to investment, whether previous concerns remain and information on leading practice measures to improve the approach taken to the licensing of resources developments.

INFORMATION REQUEST 4.1

The Commission is seeking information on whether there are aspects of mining and petroleum licensing systems that pose a material impediment to investment.

4.3 Resource management policies

In the process of extracting resources, multiple competing interests come into play. Resources companies, landowners and communities near mines have readily apparent interests. The Australian community more broadly also has interests — both in the economic activity, government revenue and dividend streams generated by projects, and in maintaining the natural environment. This section examines two particular issues that engage competing interests: gas reservation policies and bans and moratoria on certain types of mining activity.

Domestic gas reservation policies can discourage investment in the gas industry

Since Australia became linked to the wider Asia-Pacific gas market, it has become a significant exporter of liquefied natural gas (LNG) — though LNG plays a reasonably small

role in the international gas market (chapter 2). Gas producers face the choice of selling their product domestically or to international markets (which requires gas to be liquefied). In the long term and in the absence of interventions, the local price for gas will reflect international LNG prices (adjusted for the costs incurred in processing gas into LNG, and the different transport costs involved in exporting versus domestic supply).

Some Australian jurisdictions have introduced policies aimed at reserving some level of gas supply for domestic use.

- Western Australia has a domestic gas reservation policy, requiring local producers of LNG to reserve up to 15 per cent of their product for the domestic market (WA DJTSI nd).
- Under some Queensland petroleum licences, any gas that is extracted can only be supplied to the Australian market (*Petroleum and Gas (Production and Safety) Act 2004* (Qld), Part 2A). Many new licences (though not the majority) are subject to this condition (Qld DNRME 2018e).
- The Australian Government introduced the Australian Domestic Gas Security Mechanism in July 2017. The mechanism gives the Minister for Resources and Northern Australia the power to control exports if he or she believes there will be a shortfall in domestic gas supply. This power has not yet been used (DISER 2020).
- Separately, in December 2019, the Australian Government announced that it intended to implement a national gas reservation scheme aimed at replicating the Western Australian scheme to ensure that gas is 'available and affordable for industry' (Canavan 2019). No particular detailed proposals have been made public, but the Government is currently considering its options and is due to conclude this consideration by February 2021.

Gas reservations, assuming they 'bind' and divert supplies that would otherwise be exported to the domestic market, effectively act as a tax on gas production and a subsidy to domestic gas use (DAE 2013, pp. 10–12). On face value, lower gas prices would appear to be beneficial for domestic gas consumers (including residential and commercial users). However, because lower prices result in a lower expected return on investment, gas reservation policies will likely reduce incentives to invest in gas exploration and development (PC 2015b, p. 128) and potentially limit gas supply (Andrew Garnett, sub. 24, p. 3). As INPEX (sub. 34, p. 13) put it, domestic gas reservations 'create a risk that companies will not be free to develop and sell the developed resources to the market that best suits their individual project.'

Furthermore, the Australian community overall benefits from the higher returns offered for gas on international markets. Lower revenues due to reservation policies lower the overall economic benefit generated by gas extraction (PC 2015b, pp. 52–54, 127). Neill et al. (2019) estimated that Western Australian gas reservations impose a net loss of around $600 million on Australia's annual gross domestic product, albeit a 'negligible' effect on local household income. In the longer-term, domestic gas reservation would encourage investments in gas-intensive (and related) industries on the basis of gas prices that are below levels that would have otherwise prevailed in the market, pulling resources — land, labour and capital

— into activities using the cheaper gas, and out of more economically-valuable activities that would otherwise have taken place (ERA WA 2014, pp. 377, 382; PC 2019c, p. 5).

The Commission has previously recommended against measures to reserve gas for domestic use only (PC 2009, pp. 98–100, 2015b, pp. 128–129), as has the Economic Regulation Authority of Western Australia (ERA WA 2014, p. 383). The economic evidence behind these policies has not changed: they are likely to impose net costs on the community.

DRAFT FINDING 4.3

Domestic gas reservation schemes can 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.

Bans and moratoria can prohibit activity of potential value to the community

Resources projects are usually subject to environmental conditions or offsets requirements that aim to ensure that the net environmental impact is limited to levels broadly acceptable to the community (chapter 6). However, in response to strong community views that certain types of mining activity carry an unacceptably high level of risk, some governments have legislated that particular types of activity should not occur anywhere in their jurisdictions.

Most notably, different types of onshore gas development (box 4.4) — specifically, hydraulic fracturing, a technique used in unconventional gas developments, and coal seam gas — have been subject to bans and moratoria (that is, temporary restrictions on development of projects) across the country.

- The New South Wales Government stopped granting new coal seam gas exploration licences in 2014. Later that year, the Government extinguished all existing exploration licence applications and bought back gas exploration licences as it 'paused, reset and recommenced' gas industry in the state (NSW Government 2014). The freeze on exploration has since been lifted, but no new licences have been granted.
- The Victorian Government has a moratorium on conventional onshore gas exploration until 30 June 2020 while the Lead Scientist undertakes a review of the risks, benefits and impacts associated with development of those resources. The State also has a permanent ban on unconventional gas exploration and the Government has proposed entrenching it in the Victorian Constitution to prevent any future development (Symes 2018; Vic DJPR 2019e).
- The Western Australian Government partially lifted its hydraulic fracturing moratorium in September 2018 (in place since September 2017) following an independent inquiry (Hatton 2018; Johnston 2019). However, 98 per cent of the State's area remains subject to bans.

- The Northern Territory Government undertook an independent inquiry into hydraulic fracturing in 2014, imposed a moratorium on the practice in September 2016, then lifted the moratorium in 2018 following a further inquiry (Gunner 2018; Pepper 2018, p. 11).
- South Australia has implemented a legislated moratorium on unconventional gas exploration on the Limestone Coast in the State's south-east (SA DEM 2018; SACOME, sub. 37, p. 10).

Each State and Territory with the exception of Queensland has conducted an inquiry into the safe operation of the onshore gas industry in their state (GasFields Commission Queensland 2019).

Box 4.4 Types of onshore gas development

Onshore gas developments can be divided into conventional and unconventional projects.

Conventional gas is stored in porous and permeable sedimentary rocks, such as sandstone or limestone. The gas itself is trapped in the ground by impermeable rocks above the gas deposit; a well is drilled into the permeable rock and gas flows into the well.

Unconventional gas, by contrast, is found in less porous and less permeable rocks. It can be divided into three types:

- **tight gas**: where, rather than being trapped by the surrounding rocks, as in the case of conventional gas, the gas is trapped inside impermeable sandstone or limestone
- **shale gas**: where gas is trapped in layers of sedimentary shale rocks (which are also less permeable than the sandstone or limestone deposits where conventional gas is found)
- **coal seam gas**: where methane gas, which naturally occurs in coal seams, is trapped by water pressure inside the gaps and cracks in the coal seams.

For all tight gas and shale gas developments, and some coal seam gas developments, **hydraulic fracturing** (fracking) is used to extract the gas. In this process, pressurised fluid is used to fracture the rock where the gas is trapped, releasing it.

A separate process for extracting gas from coal is **underground coal gasification**, which involves injecting gases into coal seams at a high temperature to encourage the coal to release its gases.

Source: CSIRO (2011, 2019).

Since their commencement twenty years ago, Australia's unconventional gas developments now account for a third of national gas production, and more than two-thirds of production in east coast gas markets (DoEE 2019b, p. 24).

Development of multiple projects in a relatively concentrated area can exacerbate community concerns, particularly around cumulative impacts. As the Western Australian inquiry into hydraulic fracturing observed:

> The history to date of onshore oil and gas development in Western Australia has been such that there is no opportunity for the community (or the regulators) to see the projected scale of an oil and gas field development across their region, or its impacts. Rather, development tends to proceed almost well by well. Thus, the community is left to imagine what it might eventually

look like, how close to them it will be, and the cumulative impact across the landscape and on their community. (Hatton 2018, p. 461)

Onshore gas production, both conventional and unconventional, undoubtedly creates risks of detrimental impacts to the local environment, the local community and its amenity, and agricultural activities. In both the United Kingdom and in Oklahoma in the United States, wastewater injection near fault lines has been linked to an increased risk of seismic activity (Gernon 2018; United Kingdom Department for Business, Energy & Industrial Strategy et al. 2019). In some instances, these impacts are large and long-lasting: for example, as noted above, Linc Energy's underground coal gasification project in the Darling Downs (box 4.3).

Some risks are immediate, some may arise over the course of a project, and some may not arise until extraction is completed. And some of the impacts are uncertain — they may not arise in every project, or the scientific evidence to assess their likelihood may still be developing. This uncertainty has underpinned a precautionary approach by some governments.

However, strict application of the precautionary principle brings its own risks: in particular, that no effort is made to assess the potential upsides of the banned activity (Peterson 2006, p. 16), including the benefits of increased gas supplies (PC 2019c, p. 6) and additional royalty and tax revenues. There is emerging evidence that onshore gas development has contributed to improved local employment outcomes and helped to prevent the outward migration of young workers from regional areas (Fleming and Measham 2015, pp. 91–92; Measham and Fleming 2014, p. 378).

Although the risks of unconventional gas development can cause widespread community concern, that should not preclude governments from carefully weighing the risks of each potential project, and from exploring actions to mitigate those risks. Governments have a well-established regime for assessing the risks of mining activity — particularly through the environmental approvals process (chapter 6) and environmental conditions placed on projects (chapter 7). APPEA (sub. 44, p. 26) claimed that the moratoria appear not to be driven by a technical approach to regulation but rather are 'driven for political purposes'.

For unconventional gas development, State and Territory governments have undertaken many inquiries into the specific geographic, geological and industry circumstances of their jurisdictions (APPEA, sub. 44, p. 26). The weight of evidence presented to these inquiries, and the experience of jurisdictions where unconventional gas development takes place, suggests that its risks can be managed effectively. The evidence base from operations in Queensland and overseas is building over time and likewise suggests that the risks of unconventional gas (and other controversial resources projects, such as offshore petroleum) can be managed effectively with regulation.

With effective regulation, resources companies face the full costs of the adverse results of resource extraction and have greater incentive to manage those risks. And with regards to social impacts, resources companies often undertake voluntary activity to improve the amenity of the areas in which they operate and to secure 'social licence' (chapter 9).

In short, bans and moratoria are not the only way to regulate resources activity where there is uncertainty. The scientific and other evidence of impacts should be weighed against the benefits of resources development on a project-by-project or regional basis (particularly where there are likely cumulative impacts). The Commission has previously recommended the removal of these bans and moratoria (PC 2017c, p. 161), noting that they are 'contributing to gas price pressures … and there are better ways to address community concern' (namely, better community engagement) (PC 2017d, p. 122)

DRAFT FINDING 4.4

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

DRAFT RECOMMENDATION 4.1

Rather than imposing bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the scientific evidence 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.

Provision of information by trusted sources can help allay community concerns

Calls for greater restrictions on resources development arise in part from concerns about the impacts of projects, and a lack of confidence in governments to regulate projects effectively. These concerns are far-reaching, and include:

- potential impacts on the environment, particularly groundwater
- consequential health impacts from chemical use and changes to air quality
- impacts on property values and land access (section 4.2)
- social issues associated with a rapid increase in population, or with an influx of fly-in fly-out workers (chapter 9)
- disturbance of Indigenous land
- questions about the adequacy of monitoring and compliance activity by regulators (chapter 7)
- flow-on impacts of these risks to other industries such as tourism (Hatton 2018, pp. 71–75; Pepper 2018, pp. 22–27; SLR Consulting 2014, p. 39).

Public debate about the environmental and social impacts of projects is important for ensuring a strong regulatory environment, but it is also important that debate makes use of factual and comprehensive information. Crucially, information must be perceived as independent of those who stand to gain from resources projects. Establishing agencies as 'honest brokers' or 'trusted advisors' can help to progress public policy debates when there is no values consensus and high levels of uncertainty in the community (Cham and Stone 2013, p. 262).

The Commission has received positive feedback about the regulatory architecture for gas development in Queensland (Andrew Garnett, sub. 24, p. 5; Local Government Association of Queensland, sub 50, p. 11). In particular, the GasFields Commission, the Office of Groundwater Impact Assessment and the Gas Industry Social and Environmental Research Alliance (GISERA) (box 4.5) have made a positive contribution by providing scientific information and research that is conducted independently from the regulators and proponents of resources projects. A recent report of the Queensland Audit Office (QAO 2020, p. 7) stated that 'the [coal seam gas] industry [in Queensland] has matured and is now more viable because … the regulators, GasFields Commission … and companies have invested in their relationships with landholders and communities'.

Box 4.5 'Honest brokers' in the Queensland regulatory environment

The GasFields Commission

The GasFields Commission was established by the Queensland Government in 2013 as an independent statutory body in response to issues between landholders and the (then newly-emerging) coal seam gas industry. Its functions under the *Gasfields Commission Act 2013* include:

- facilitating better relationships between landholders, regional communities and the onshore gas industry
- reviewing regulatory frameworks and advising governments about regulation, implementation and coexistence of gas and agricultural activity
- bringing landholders, regional communities and industry together to resolve disputes
- publishing information about the industry.

An independent review in 2016 concluded that the GasFields Commission 'has contributed substantially to the improved coexistence of landholders, regional communities and the onshore gas industry in Queensland particularly by influencing the methods employed by [coal seam gas] companies' (Scott 2016, p. 5). However, a 2020 audit noted that the GasFields Commission was 'not fulfilling all of its legislative functions' (QAO 2020, p. 1), particularly that it was not overseeing the regulatory framework.

(continued next page)

Box 4.5 (continued)

Gas Industry Social and Environmental Research Alliance

The Gas Industry Social and Environmental Research Alliance (GISERA) is an initiative operated by the CSIRO in collaboration with Commonwealth, State and Territory Governments and the Australian gas industry. It undertakes a wide range of research on the environmental, social and economic impacts of the onshore gas industry. Although its work covers all parts of the country where onshore gas has taken place or been considered, it has done a large share of its work in Queensland where there is a mature unconventional gas industry.

Although it receives funding from industry, GISERA maintains the peer review requirements of other CSIRO research, and industry participants do not have the right to alter or edit research outcomes. Regional committees with strong community and government representation also help to direct its research.

Sources: Business Queensland (2019), GISERA (2019).

The Queensland approach has focused on easing tensions between agriculture and coal seam gas development. However, its core elements — provision of factual material from bodies outside of the regulator and encouraging early and effective communication between stakeholders — may have broader applicability across the resources sector, particularly for types of development that are new to a particular area. For example, in South Australia, the increasing proximity of resources and more intensive agricultural activity has heightened community concerns about resources activity (Hough 2019), with a flashpoint in one particular development in the Adelaide Hills (Campbell 2016; MacLennan 2019).

DRAFT 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.

5 Land access

Key points

- Before other approvals can be provided, a resources company must have permission to access the land where resources are located.
- Resources companies and private landholders are required to negotiate conditions of land access across the different types of land tenure. However, landholders cannot generally refuse consent to a development.
- Resources are owned by the Crown on behalf of the community, and consequently, there is a public interest in resources development. A right of veto over resources activity on private land would be inconsistent with Crown ownership of resources and significantly affect distribution of the benefits of resources.
- Concerns about mixed land use are best resolved through strategic land use policies rather than complete bans or project-by-project objections to resources activity on agricultural land. Leading-practice policies seek to balance the trade-offs between resources development and other land uses to maximise economic benefits for the community. These policies 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.
- Early engagement between resources companies and landholders should be encouraged (and institutions such as the Queensland GasFields Commission facilitate this). Formal negotiation should only be required at the stage when exploration is likely to have an impact on the land.
- Many landholders likely enter land access negotiations with resources companies with little prior experience or knowledge. A standard template for land access agreements can help to set expectations for landholders and resources companies, and improve confidence in the regulatory system.
- Low-cost dispute resolution methods that take an investigative approach to resolving problems appear effective in reducing tensions between landholders and resources companies.
- Native title recognises the traditional rights of Aboriginal and Torres Strait Islander people over their land. More than 60 per cent of resources projects take place on areas with a native title claim or determination. Resources companies must either negotiate with native title holders or claimants, or show that resources activity will not affect native title holders' or claimants' interests.
- The *Native Title Act 1993* (Cth) sets out an expedited procedure that can enable low-impact exploration activity to take place without negotiation with traditional owners, potentially reducing impediments to investment. However, a case-by-case approach is needed to considering whether the expedited procedure applies.
- State and Territory Governments have some processes that depart from the NTA, aimed at improving agreement-making between Aboriginal and Torres Strait Islander groups and resources companies. These processes have developed from the varied experiences and contexts of the jurisdictions but no single approach appears to be best practice.

Although resources are owned, controlled and allocated by government, different property rights apply to the land where those resources are found. Each State and Territory has developed processes through which resources companies and landholders can negotiate conditions of land access across the different types of land tenure (box 5.1) Agreements provide for access to the site of the deposit, as well as access to other parts of the property for incidental uses (for example, to transport equipment, store waste and provide electricity and water to a mine). However, some aspects of these processes remain contentious. This chapter outlines the processes for accessing land for resources development for private land, Crown land and Indigenous land.

Box 5.1 Land tenure — property rights in Australia

Different forms of land tenure — or 'titles' — are granted by the Crown (represented by Commonwealth, State and Territory Governments) to individuals and organisations that own them (**landholders**). Different types of title come with different rights in relation to the land. The key types of title referred to in this chapter are:

- **freehold land**: grants owners practically unrestricted use of their land, subject to State and Territory laws such as planning and building regulations
- **Crown land**: all land that has not been granted as freehold, including:
  - land granted to others for particular purposes under **Crown leases**. In particular, **pastoral leases** are a common form of leasehold title, which allow the lessee to graze livestock
  - Crown land can be **reserved for particular purposes** (for example, as a park or reserve)
  - Crown land may also be subject to **native title**, a form of recognition for the traditional connection to land held by Aboriginal and Torres Strait Islander people prior to colonisation.

Both pastoral leases and freehold land are **private land**, as they are managed by a private owner (even though, in the case of pastoral leases, the Crown legally owns unrestricted title to the land).

5.1 The process for obtaining access to private land

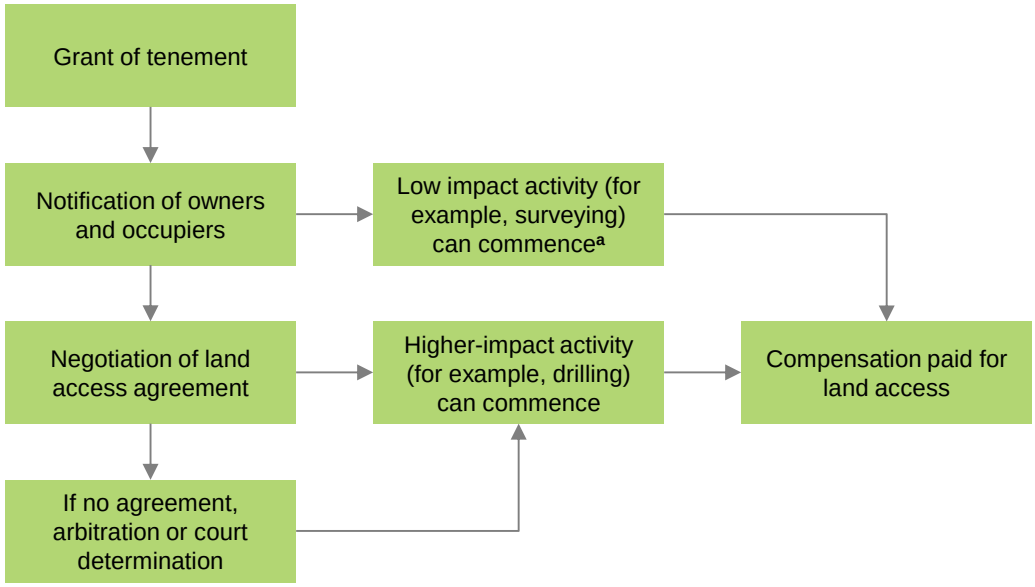
The legal process for obtaining access to private land (figure 5.1) is broadly similar across the States and Territories.

Land access agreements set out compensation to be paid by the resources company to the landholder. The exact items that are expected to be compensated differ between States and Territories but broadly include:

- deprivation of possession of land
- diminution of land value
- damage to the surface of, or any buildings and improvements on, land

- severance (separation of parts of a landholders' land)
- the costs of negotiating an agreement.[1]

Figure 5.1 **The process of obtaining land access for resources projects**



a Except in New South Wales and Victoria, where a negotiated agreement is required before undertaking any exploration activity.

Land access can be a contentious issue

Landholders reported a number of concerns with resources projects on their land, including:

- risks of contamination and long-term degradation of land and environment (SECLC 2015, p. 14)
- difficulty enforcing the conditions of access with potential effects on their ordinary business — for example, ensuring that gates are closed to prevent the intermingling of stock breeding lines (SECLC 2015, p. 13; SLR Consulting 2014, p. 106)
- a sense of intrusion on their property
- difficulty communicating their concerns to resources companies using their land (Huth et al. 2018, p. 107).

Similar concerns can emerge even when projects are taking place near non-industrial land uses (as is the case with quarries — box 5.2).

1 Even where it is not legislatively required, professional costs are usually provided as a matter of practice (for example, in the Northern Territory) (Pepper 2018, p. 391).

Box 5.2 Quarrying poses unique regulatory challenges

Quarries are open-pit mines that produce aggregate construction materials such as sand, stone and gravel (box 2.2). These materials are a key input to the building of infrastructure, roads and new houses.

There are many suppliers of construction materials, and for companies to be able to minimise transport costs and supply at competitive prices, quarries 'need … to be close to markets and efficient transport links' (sub. 36, p. 1). However, this simultaneously creates competing pressures from nearby residents, particularly as the outer boundary of residential zoning in large cities increases.

Cement, Concrete and Aggregates Australia (CCAA) identified some of the unique issues affecting the quarrying sector:

- rezoning of quarries or adjacent land for residential development, without adequate buffer protections or proper access for transport
- 'NIMBYism' — a focus on those saying 'not in my backyard' to developments rather than industry or broader community development, particularly at a local government level
- consequent 'sterilisation' of aggregate construction material resources.

CCAA (sub. 36, p. 2) argued that the industry, in order to succeed, needed 'long-term protection … from adjacent, incompatible development'.

In particular, these risks have been raised in the context of the rapid growth of onshore gas development (SLR Consulting 2014, pp. 39–51; section 4.1), and with small exploration operations facing compliance issues (for example, NSW RR 2019).

Consequently, many landholders have called for a right of veto over all resources development on private land.

> A right to say yes or no [to resources development], that is reasonably exercised, will provide farmers with greater protection in these negotiations. (National Farmers Federation, sub. 14, p. 5)
>
> Landholders should have the right of veto, so new exploration or a mine cannot proceed without the approval of the landowner. (Grain Producers SA 2017)

A veto right would amount to a fundamental shift of property rights in Australia. In effect, it would transfer ownership of resources from government to private landholders. Owners of property with resources deposits, rather than government and the broader community, would benefit from payments for the resources themselves, rather than payments for access; prices of properties with prospective resource deposits would also rise. While governments could continue to levy royalties should projects be permitted by landholders to proceed, these would effectively move from being a payment for the resource to a tax on resource production (with a likely consequence of reduced investment in resources development).

While the approach taken in Australia does not please all stakeholders, it seeks to balance the trade-offs between mining and other land uses to provide economic benefits for the community as a whole.

Indeed, resources activity does not always prevail over agricultural or other uses (in spite of its legislated precedence over other forms of title). To ensure that resources uses are seen not as dominating other land uses, governments can take proactive measures to balance the community costs and benefits of resources and other land uses. The Council of Australian Government's Multiple Land Use Framework (MLUF) (COAG SCER 2013) sets out several goals which provide a useful toolkit for governments determining land use issues:

- maximising the social, economic, environmental and heritage values of land use for current and future generations
- ensuring land use decision making does not exclude other potential uses without considering the benefits and consequences for other land users and the wider Australian community
- ensuring that directly affected landholders are informed and consulted on multiple land use options and potential for coexistence
- open and constructive debate and analysis of different multiple land use options, with stakeholders being willing to listen and appreciate the views of all land users
- easy access to accurate information regarding land capability, and examples of multiple and sequential land uses.

The MLUF's direct impact on policy appears to be limited (with only South Australia explicitly developing its own MLUF). However, similar ideas have been incorporated into the development of strategic land use policies in other jurisdictions. These policies encourage the early identification of land with non-resources value, and introduce safeguards for resources activity on that land without entirely excluding them.

For instance, the New South Wales strategic regional land use policy has identified land with the highest agricultural value in the Upper Hunter and in the north-west of New England. Any state significant resources project taking place on this land is subject to an additional degree of scrutiny through the Gateway assessment process, where an independent scientific panel assesses risks associated with the project (NSW DPIE 2019b). Similarly, in Queensland, resources activities on designated strategic cropping land require a regional interests development approval from the Department of State Development (which may apply further relevant conditions to the project).

However, it is important that strategic land use policies fully consider the costs and benefits of allowing resources development — they should not simply act as a barrier to development on agricultural land. Such policies should also only require additional processes that are proportionate to the risks of using certain types of land. There is a risk that strategic land use policies are just duplications of other environmental assessment processes, and do not specifically target the issues associated with mixed land use (a risk raised for the Gateway assessment process by the NSW Minerals Council, sub. 28, pp. 25–6).

DRAFT 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 for the resources under it.

DRAFT LEADING PRACTICE 5.1

Community concerns about mixed land use are best resolved through strategic land use frameworks rather than prohibitions on resources activity on agricultural land. Leading-practice frameworks seek to balance the trade-offs between resources development and other land uses to maximise economic benefits for the community. These framework 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.

Leading-practice approaches to land access

Negotiation should only be required when mining activity is likely to have a significant impact on the land

In most States, low-impact exploration activity can proceed without negotiating with the landholder — giving the landholder notice is sufficient. For example, in Queensland, once an exploration permit has been granted over an area, a resources company can generally undertake 'preliminary activity', such as taking soil and water samples or surveying the land, by providing ten days' notice (*Minerals and Energy Resources (Common Provisions) Act 2014* (Qld), ss. 39, 43, 70).

Some jurisdictions, however, require negotiation before *any* activity can take place. For example, in New South Wales, a land access agreement must be negotiated prior to any exploration activity (*Mining Act 1992* (NSW), s. 140). This is the case whether the activity is likely to impact the land or not. The same process applies for 'reconnaissance' (for example, aerial surveying activity), early 'follow-up activity' (such as collecting soil samples) or higher impact activity (such as drilling) (NSW Minerals Council 2013, p. 2).[2] These requirements aim to balance the rights of landholders and resources companies, 'to ensure the orderly search for resources, while recognising the rights of landholders to

[2] Low-impact exploration licences which avoid negotiation procedures are only available in relation to native title land (*Mining Act 1992* (NSW), Div. 5).

conduct their activities free from unreasonable interference or disturbance' (NSW Resources and Geoscience nd).

Victorian legislation similarly requires a negotiated agreement before an explorer can enter or access privately-owned land. However, 'informed verbal consent' is sufficient to begin activity that does not require the use of equipment, explosives or removal of trees and shrubs (Vic DJPR 2019a).

An advantage of the New South Wales and Victorian approaches is that they encourage landholders to communicate early with project proponents. This may help to solidify a working relationship, reducing the risk of a breakdown in subsequent negotiations over potential future activities. It also allows the landholder and resources company to reach early agreement about particular types of activity that are, and are not, permitted on the land — under the standard process in place in other States and Territories, there may be ambiguity about what is permitted as low-impact activity.

However, the approach also has drawbacks. 'Front-loading' negotiations in this manner increases the cost of the earliest stages of exploration, and may consequently reduce investment in exploration. Negotiation at a stage well before the interests of the landholder are materially affected could increase resistance to resources activity if landholders perceive an exploration agreement as providing implicit permission for more extensive resource extraction.

There are potentially less burdensome ways of encouraging communication between the landholder and the project proponent than mandating it in legislation. For example, the Queensland Land Access Code requires the first notification of exploration activity to be made in person (Qld DNRM 2016, p. 6). This provides an opportunity for a landholder to develop a relationship with project proponents and to raise questions that develop as early exploration activity takes place.

DRAFT 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.

Standard terms of land access and reliable dispute resolution processes can improve landholder confidence

Many landholders are likely to come to access negotiations with little experience or knowledge of resources projects, in contrast to resources companies (PC 2016c, p. 101). Consequently, they may not know about what exactly is involved in the conduct of resources activities and the value of compensation they can expect. Governments therefore have a role in establishing

reasonable expectations for the relationships between parties and for the terms of the agreements they negotiate. Governments also have a role in providing a framework to allow users of the land to resolve disputes and enforce the terms of their agreements.

To ensure that both resources companies and landholders have reasonable expectations, some (but not all) governments have established standard terms for land access agreements. For example, the Queensland Land Access Code sets out a number of best practice guidelines for good relations between landholders and resources companies:

- both sides should liaise with each other in good faith
- tenement holders should advise landholders of their intentions on the land well in advance of any works being undertaken
- tenement holders should minimise damage to the land, and rectify any damage caused
- landholders should provide reasonable access to the land, and engage in negotiation about appropriate terms of conduct and compensation (Qld DNRM 2016, p. 3).

The Code also sets out a number of mandatory conditions covering matters of importance to agriculture generally, such as minimising disturbance to livestock and preventing the spread of pests (Qld DNRM 2016, pp. 6–9).

Queensland has also released guidance for landholders for negotiating compensation, along with a standard compensation agreement template for landholders when negotiating compensation (Qld DNRME 2019a).

DRAFT FINDING 5.2

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

DRAFT LEADING PRACTICE 5.3

A standard template for land access agreements can reduce information asymmetry and 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.

With respect to dispute resolution, although all jurisdictions provide avenues for terms of agreements to be enforced in ordinary courts and tribunals, a more active approach could help to improve landholder confidence that they will be able to access mediation, should it be needed. For example, the Land Access Ombudsman (box 5.3) was established in Queensland in September 2018, with the support of both resources companies and

agricultural groups. It takes a more active and investigative role than tribunals ordinarily would, and although the institution is still in its infancy, it has been assessed as effective by those familiar with land access issues.

> … the Ombudsman's processes are less prescriptive than litigation and arbitration, which may avoid time delays and reduce costs. Additionally, the Ombudsman's role in assisting other government departments with regulatory compliance, advising on systemic land access issues and educating the government and public on land access generally, should result in future positive policy and legislative changes to the land access regime in Queensland. (Clifford and Roettgers 2019)

Alongside the other support offered to landholders who are approached for resources development on their property (such as the GasFields Commission, chapter 4), participants stated that this framework appears to be useful in overcoming the information gaps that would otherwise prohibit effective agreement-making. The Queensland Resources Council noted that:

> One area in which Queensland leads the country is land access. Over the years community sentiment in resource regions, particularly in the gasfields, has evolved into a benefit sharing arrangement. (sub. 27, p. 4)

Box 5.3 **Queensland's Land Access Ombudsman**

The Land Access Ombudsman provides a free service to resolve disputes between landholders and resources companies in Queensland. It investigates breaches of conduct and compensation agreements, as well as 'make good agreements' that provide for the reparation of damage to water bores affected by resource developments. The Ombudsman typically assesses each complaint that it receives for its materiality, investigates the dispute, and may assist the parties in resolving the dispute through mediation and similar processes. Where the parties cannot resolve the dispute together, it can make a non-binding recommendation for the issue to be remedied. It is expected that parties comply; if they do not, or if parties are unhappy with the decision of the Ombudsman, then the Land Court can make an enforceable decision.

Sources: Clifford and Roettgers (2019).

DRAFT 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.

5.2 Mining on other Crown land

Crown land is subject to unique rules for resources activity — in particular, some areas of Crown land are set aside for conservation, and therefore are closed to resources development. However, each State and Territory also has provisions to allow exploration or extraction on this land, sometimes subject to different rules.[3]

Participants did not raise any concerns about access to Crown land (except in relation to pastoral lease land, which, as noted above, is largely subject to similar procedures to private land, with the leaseholder having the right to negotiate terms of access). The Commission has previously raised concerns about whether the value of alternative land uses (conservation, resources or otherwise) has been properly considered prior to land being excluded from resources development (PC 2013b, pp. 122–127). Some States and Territories already have measures in place to avoid this issue arising. For example, in Tasmania, prospectivity assessments are made prior to land being declared as reserves; areas recognised as having high mineral prospectivity cannot be changed to reserve areas without approval of both Houses of the Tasmanian Parliament (*Mining (Strategic Prospectivity Zones) Act 1993* (Tas), s. 7).

The Commission is interested in hearing from participants about any barriers in the process of exploring for, or extracting resources on, Crown land.

5.3 Resources development on Indigenous land

Historically, there were very few legal barriers to mining on the traditional lands of Aboriginal and Torres Strait Islander people. Today, it is broadly recognised by the mining industry that co-operating and partnering with Aboriginal and Torres Strait Islander communities in the establishment of mining projects on Indigenous land is important for developing social licence to operate (MCA 2018b) and delivering sustained returns for investors (Mackenzie 2019). Langton (2015, p. 7) characterises this shift as a 'transformation from … acrimonious conflict to mutually beneficial agreement-making'.

This section deals with issues relating to resources development on Indigenous land for resources companies. Issues relating to sharing the benefits of resource development with Indigenous communities are considered in chapter 10.

How do Indigenous property rights affect resources investment?

Two key property rights affect mining activity on Indigenous land:

- Land rights laws permit the transfer of Crown land from State and Territory Governments to Aboriginal and Torres Strait Islander traditional owners.

[3] For example, in Western Australia, previously-exempted land does not follow a 'first come, first served' allocation process, but a competitive tender process (Hunt, Kavenagh and Hunt 2015, pp. 39–40).

- Native title recognises the traditional rights and interests of Aboriginal and Torres Strait Islander people over their land. The *Native Title Act 1993* (Cth) (NTA) sets out the processes of claiming and determining native title land, as well as the process for agreements to be made about other activity taking place on native title land.

The two rights differ in important ways: in particular, land rights generally provide exclusive possession of land, while native title generally does not. Consequently, most (but not all) land rights land is not subject to native title (since its owners can do everything that they would be permitted to do as native title holders, and more). Native title is also removed ('extinguished') over land when freehold rights are granted over it, or when it is developed by government. However, it can exist alongside other property rights such as pastoral leases.

More than 60 per cent of Australia's resources projects are on areas covered by a native title claim or determination (figure 5.2).

The Commission has heard that native title is the predominant focus across Australia for resources companies in terms of approvals required to develop resources. Accordingly, this chapter focuses on the barriers imposed by native title to resources development. However, some unique circumstances exist in the Northern Territory relating to its land rights laws that have been raised as a barrier to investment; they are discussed below.

As with other types of land in Australian law, resources found on Indigenous land generally remain the property of the Crown.[4] To extract these minerals, resources companies are required to negotiate with Aboriginal and Torres Strait Islander groups who have claimed native title ('native title claim groups') or for whom native title has been determined ('native title holding groups'). Collectively, these two groups are referred to as 'native title groups'. An agreement is also required where land rights have been established, or where there is Indigenous heritage in the proposed development location (chapter 6).

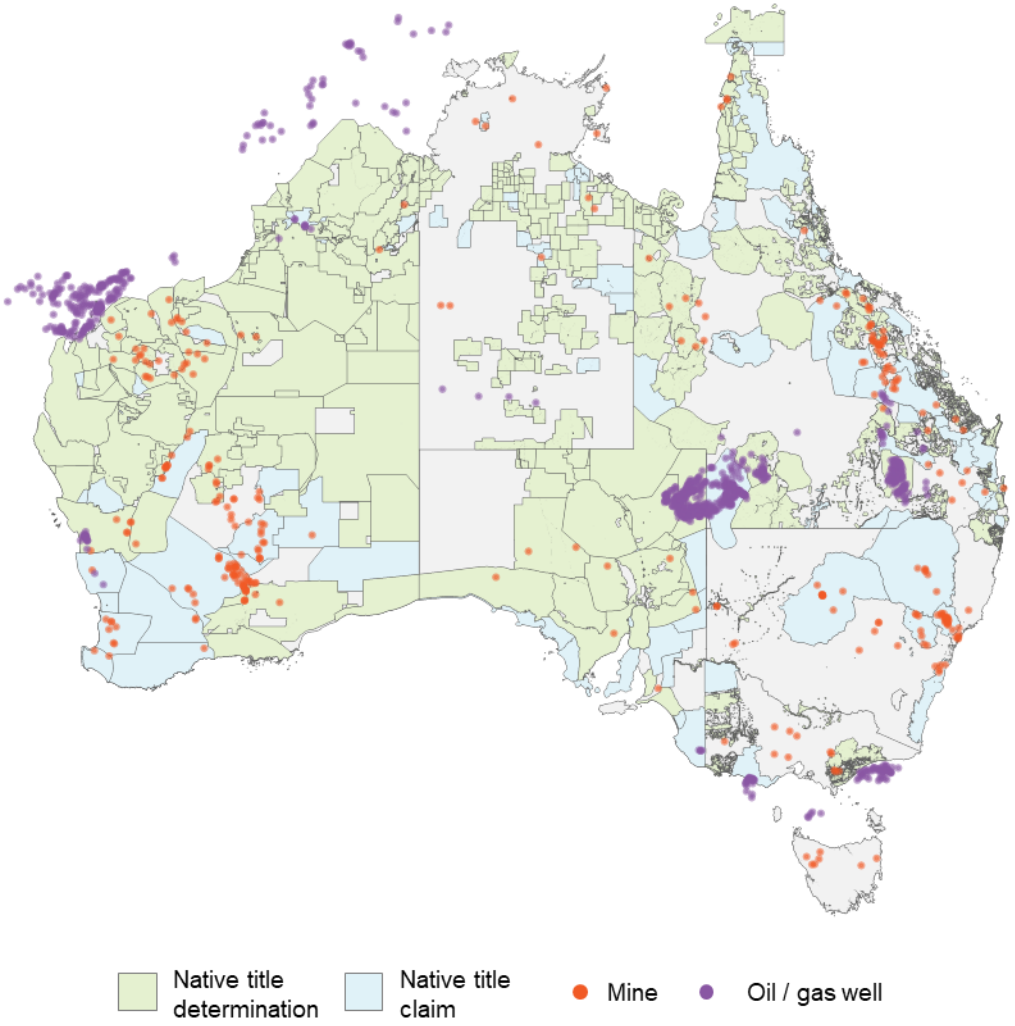
Resources companies may choose to pursue agreements even when no Indigenous property rights apply, for example, where a tenement has been held prior to the establishment of native title in law, or a development is taking place on freehold land near an Aboriginal and Torres Strait Islander community.

Land rights and native title laws have been fundamental in giving Aboriginal and Torres Strait Islander people a 'seat at the table' in negotiations about resources activity on their traditional land. However, some elements of the native title system in particular can impose barriers to investment.

4 Ownership of ochre may be incorporated into a native title claim, as ochre has had traditional uses for some time (Edgeworth et al. 2016, p. 214). Land rights grants in New South Wales include mineral rights, though not gold, silver, coal, petroleum or uranium, and resources already subject to prior tenements (*Aboriginal Land Rights Act 1983* (NSW), s. 45).

Figure 5.2 **More than 60 per cent of Australia's resources projects are on areas covered by a native title claim or determination**

Operating mines and petroleum fields (as at 2017) and native title claim and determination areas



Data sources: NNTT (2014a, 2017); unpublished data from DISER and Geoscience Australia; Productivity Commission estimate.

The typical determination process is complex and lengthy

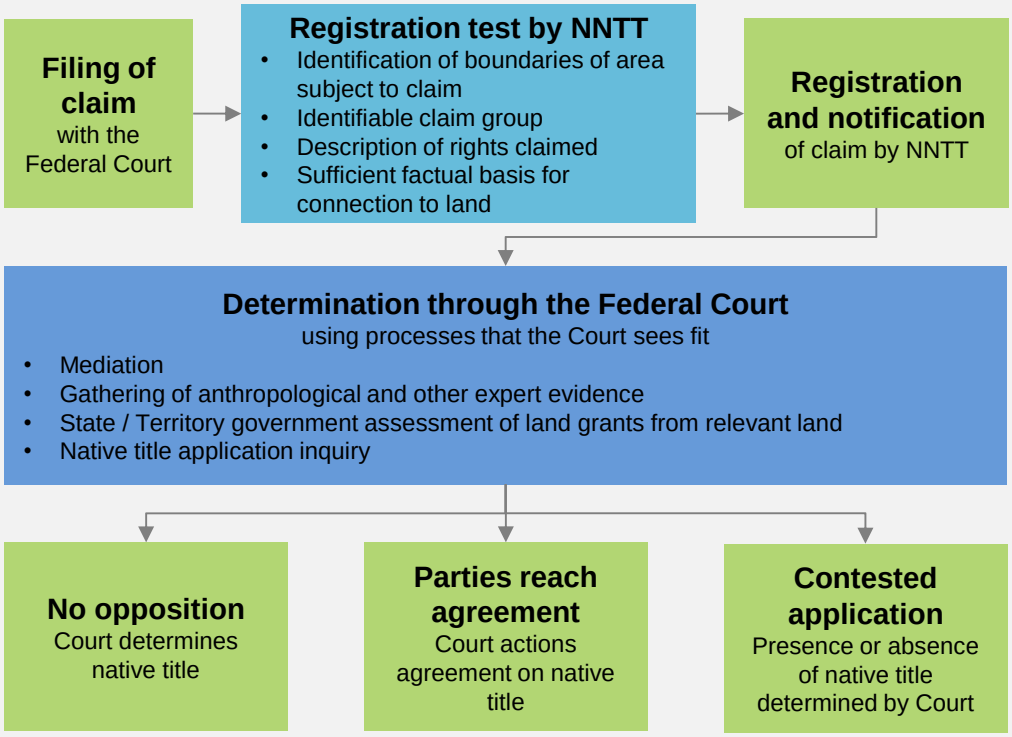
Determining native title is a complex process (box 5.4), involving the native title claim group, government, resources companies, and other land users. It is also lengthy: in 2012, the average native title claim took over 6 years to resolve, and longer still if the claim was subject to litigation (NNTT 2012, p. 2). When multiple groups have claimed native title over an area, each group has the right to negotiate an agreement with a project proponent and potentially receive compensation from the proponent until the overlap is resolved. These additional negotiation and

compensation requirements can act as a barrier to investment for some resources companies. Differences in views of the project between and within native title groups can also add to delays.

Box 5.4 The native title determination process

The native title process (illustrated in the figure) begins with an applicant group filing an application in the Federal Court of Australia. If the claim passes the National Native Title Tribunal's basic procedural requirements (the 'registration test') it is registered and published. At this point, native title is not determined to exist over the land, but resources companies looking to operate on the claimed land must negotiate with the native title claim group.

After registration, the native title claim group negotiates via the Federal Court with the relevant State or Territory Government to have the claim determined. Government must then consider whether the claim group has a connection to country in the claimed area, and whether that connection was later extinguished. The government party may then consent to native title being determined over the land, or contest elements of the application.



Sources: ALRC (2015, pp. 88–90), NNTT (2014b).

The Australian Law Reform Commission (2015) noted that some of the complexity, delay and costs in determining native title are unavoidable. Key causes of delay include:

- the difficulty of establishing connection to country — time-consuming anthropological research plays a key role in this process, particularly given the gender-restricted or secret nature of material from communities
- the relatively recent history of the NTA — litigation has been required to clarify its operation

- the process of demonstrating extinguishment — when dealing with a native title claim, the State or Territory must determine whether any other land rights have been granted over the land since colonisation.

The length and complexity of the native title process has been acknowledged by those involved in the process. The Federal Court has put significant effort into 'case management' — encouraging parties to co-operate and resolve issues quickly — to encourage more cases to be resolved by consent (ALRC 2015, p. 358). In Victoria, the *Traditional Owner Settlement Act 2010* (discussed further below) was introduced to overcome the inflexibilities of the native title system (ALRC 2015, p. 112). Proposed Commonwealth legislation would also allow parties to native title claims to disregard extinguishment of areas historically set aside for preservation purposes (such as national, State and Territory parks) (box 5.5).

The Commission supports efforts to reduce the length and complexity of native title determination process. However, it is beyond the scope of this study to assess and recommend any changes to the process. Nonetheless, the Commission considers that reforms to the law should be mindful of the impact of the native title process on resources activities, not only to allow for more streamlined development of resources, but to enable the benefits of negotiated agreements to flow more quickly to Aboriginal and Torres Strait Islander communities.

Box 5.5 The Native Title Legislation Amendment Bill 2019 (Cth)

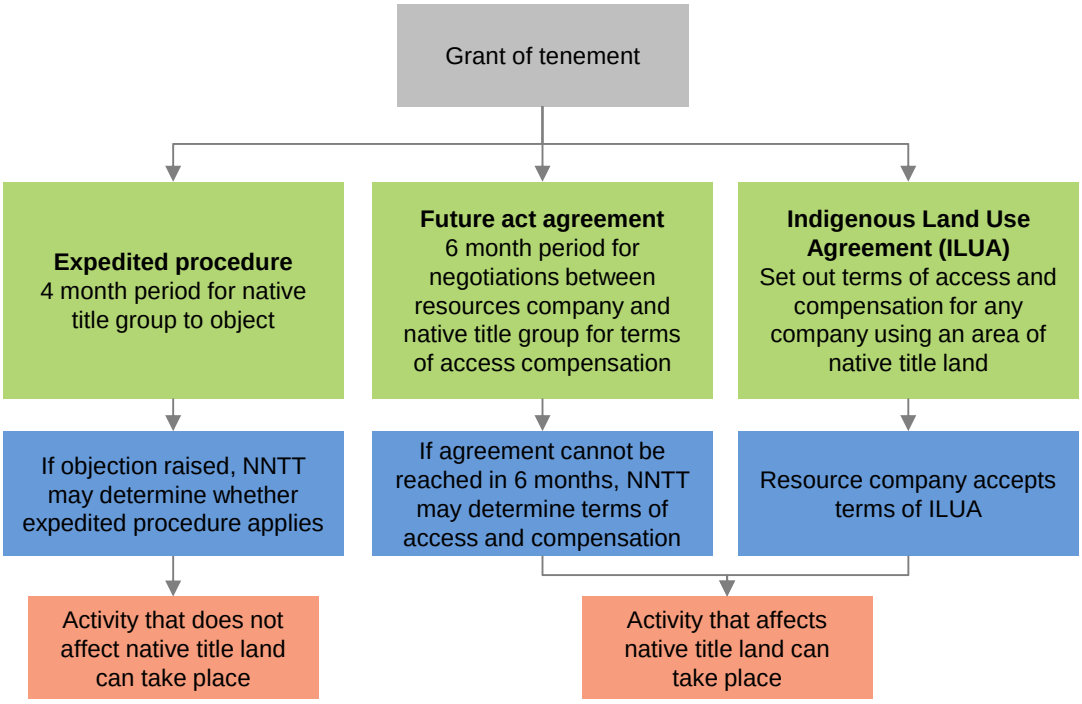
The Australian Government introduced the Native Title Legislation Amendment Bill 2019 to Parliament in October 2019. The Bill was previously introduced in February 2019 but failed to pass prior to the dissolution of Parliament before the May 2019 federal election. Its core measures relevant to the resources sector are:

- validating future act agreements where not all members of the applicant entered into the agreement
- allowing a majority of the members of the applicant to make decisions such as entering into future act agreements, rather than requiring unanimity (chapter 10)
- allowing native title groups to set out the conditions of their authority over the applicant, so that certain decisions must be approved by the entire group (chapter 10)
- allowing parties to agree to disregard extinguishment where an area was set aside for preservation purposes (such as national, State and Territory parks)
- improving transparency and accountability of prescribed bodies corporate who manage native title.

The process for developing resources on native title land depends on the impact of the proposed activity

Once a claim is registered by the National Native Title Tribunal (NNTT), any resources company proposing to develop on native title land must comply with one of three processes (figure 5.3).

Figure 5.3 **Processes to explore for and extract resources on native title land**



Source: *Native Title Act 1993* (Cth) ss. 31-2; Division 3, Subdivision B.

- For activity that is not likely to interfere with traditional activities or disturb areas of significance, an *expedited procedure* applies. Notice is given to the native title holder, and if they do not object to the use of the expedited procedure, negotiation is not required. If they object to its use, the project proponent and native title group can either negotiate an agreement for the activity or seek a determination on the matter from the NNTT.
- If an expedited procedure does not apply, then the project proponent and any native title group can negotiate an agreement with the claim group (a *future act agreement*).[5]
- The State or Territory Government, a project proponent and any native title group can reach an *Indigenous Land Use Agreement* (ILUA). Although there are multiple types of ILUAs, area ILUAs are of the most relevance for resources projects. These agreements can make general terms about any resources activity on the land that they cover. ILUAs also bind any other future native title claimant. In order to be registered, area agreements must be authorised by all people who hold or may hold native title in the area covered by the agreement — the 'native title claim group'.

5 State and Territory governments are technically party to these agreements, but in practice, they are rarely involved in negotiations, and are not party to the commercial-in-confidence terms of agreements: *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2); Brendan Wyman & Ors (Bidjara People)/Queensland* [2012] NNTTA 93, [94].

Each of these processes has advantages and disadvantages, depending on the nature of the traditional rights and interests held by the native title group, the relationship between the native title group and the project proponent, and the duration and size of the resources project.

The expedited procedure is the fastest access option for resources companies, but can only cover early-stage exploration. In general, future act agreements are the default process. Future act agreements, however, generally apply only to one activity at a time, meaning that further agreements may be required as a project is developed. Future act agreements also only bind the parties to the agreement (the State or Territory, the resources company and the listed native title groups). If other native title claim groups emerge later, project activity must cease until a further agreement is negotiated with the additional claimant.

ILUAs, on the other hand, are more involved and require a commitment to making a longer-lasting agreement. ILUAs are more likely to be used for larger projects. They can also be used to develop a single agreement covering an entire area and potentially multiple resources companies. Issues negotiating ILUAs cannot be referred to the NNTT, as they are an 'optional' agreement-making approach.

The following sections discuss issues that have been raised with this agreement-making framework.

Many current agreements may not be binding

Generally, when a native title group negotiates an agreement with a resources company, it does so through a representative individual or group known as the 'applicant', or through a legal entity established to engage in transactions with native title, known as a prescribed body corporate (chapter 10). Once an applicant has been authorised by the group, they can deal with all matters under the NTA relating to a determination, including the signing of future act agreements and ILUAs.

The *McGlade* decision of the Full Federal Court of Australia in 2017[6] created concerns about the validity of agreements that had only been signed by the majority of the individual members of the applicant. Prior to *McGlade*, many agreements were made on the basis that it was not necessary for all members of the applicant to be party to an ILUA, so long as the ILUA had been properly authorised by a claim group (King & Wood Mallesons 2017). The McGlade decision, to the contrary, suggested that *all* members of the applicant needed to sign an ILUA for it to be valid.

Amendments were made to the NTA to ensure that ILUAs need only be signed by the majority of members of the applicant (unless the native title group decides otherwise), and to maintain the validity of existing ILUAs. However, similar amendments were not made with respect to future act agreements, which has 'cast doubt over the validity of [future act agreements] which were not signed by all members of the applicant, and consequently the status of mining and petroleum leases granted on the basis of those agreements'

6 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

(MCA 2018d, p. 5). This was identified as an issue of urgency by the Association of Mining and Exploration Companies (AMEC, sub. 31, pp. 8–9).

The Native Title Legislation Amendment Bill 2019 (Cth), which at the time of this report's drafting was being considered by the Senate Legal and Constitutional Affairs Legislation Committee, proposes to make a number of amendments to the NTA, including some that will resolve this issue (box 5.5, chapter 10). These amendments should address the concerns raised by industry regarding the validity of agreements that have already been made.

DRAFT 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.

The level of compensation

The level of compensation paid for resources developments on native title land has typically been a matter for proponents and native title groups, with the details of agreements generally not made publicly available (Hunt, Kavenagh and Hunt 2015, p. 349). However a recent decision by the High Court has brought compensation, and particularly the value of native title rights and land, into public view for the first time. In the 2019 Timber Creek case,[7] the High Court of Australia ruled that the economic value of non-exclusive native title rights and interests of the Ngaliwurru and Nungali peoples was 50 per cent of the freehold value of land. The decision also established that traditional owners could further claim compensation for cultural loss deriving from the loss of traditional attachment to land.

The application of the Timber Creek case to resources activities is so far untested. A key difference between compensation for resources activity, and the compensation dealt with in the Timber Creek case, is that the latter was for full extinguishment of native title interests to build infrastructure.

Some native title groups have already begun action to test whether State and Territory governments should compensate for historic resources activity on native title land. Uncertainty remains about whether the cost of this compensation could be passed on to resources companies (Ludlow 2019). This uncertainty could pose an impediment for agreement-making with native title groups. However, the question will likely be resolved by one of the several ongoing matters testing the application of Timber Creek in the specific context of resources development, for example, the case brought by the Gumatj clan in late 2019 disputing mining leases granted over the Gove Peninsula (Gordon and Roberts 2019).

7 *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7.

DRAFT 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.

Some jurisdictions take unique approaches to reducing barriers to resources investment on Indigenous land

The NTA is designed to offer flexibility in the way it is used by State and Territory governments. They can use the process in an atypical manner, or to develop their own process to replace that set out in the NTA. And there are other systems of recognising Indigenous interests in land that interact with the NTA. This section covers approaches taken to resources development on Indigenous land in Western Australia, South Australia, Victoria and the Northern Territory.

There are many objections to Western Australia's use of the expedited procedure

As noted earlier, the expedited procedure allows activity that is unlikely to interfere with native title groups' activities or areas of particular significance. However, the Western Australian Government, as a matter of practice, declares that all exploration and prospecting licences in the state are covered by the expedited procedure. The basis for this position is that project proponents are required to comply with the State's heritage laws, which, in theory, should mean that the impact of exploration activity on native title land is managed (WA DMIRS nd).

But in practice, some exploration licences will necessarily involve a risk of damage to the native title land or interference with the native title group's activity (NNTT 2019, p. 3). In practice, more than a third of all expedited procedure declarations face objections from the native title holders or claimants (NNTT, pers. comm., 11 March 2020). There are multiple methods for resolving these objections but each method inevitably leads to some hindrance for resources projects.

- The resources company can withdraw their application for the exploration licence — which prevents the project from going ahead entirely.
- The resources company and native title group can negotiate an agreement — precisely the task that the expedited procedure seeks to avoid.
- The resources company can seek a determination in the NNTT, which can involve a potentially significant delay before a hearing can take place. In some determination hearings, the original objections are not followed up or defended. The NNTT dismisses

these cases out of hand, meaning that the project has been delayed even though the expedited procedure still applies to the project.

The issue is not the expedited procedure per se — rather, that it is being used as a matter of course for all exploration licences. Early activity that does not materially affect the activities or rights of native title holders should be permitted once notice is given — negotiation should not be required. By asserting the expedited procedure as a matter of course, objections that could easily have been anticipated put the matter before the NNTT. Somewhat perversely, in these instances the expedited procedure leads to more delay than the ordinary process of negotiating an agreement.

To avoid this cause of delay, State and Territory Governments should take a case-by-case approach to assessing whether the expedited procedure applies to a particular exploration licence. The NNTT has previously published guidance on new cases that describe the principles surrounding the expedited procedure. It is currently developing a new and more-accessible resource for practitioners (NNTT, pers. comm., 28 February 2020). Providing this guidance once again would assist State and Territory Governments in understanding the circumstances in which the expedited procedure does, and does not, apply.

DRAFT 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.

DRAFT RECOMMENDATION 5.1

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

South Australia's efforts to streamline agreement-making

South Australia's scheme for resources development on native title land, set out in Part 9B of the *Mining Act 1971* (SA), has significant overlap with the standard approach set out in the NTA. However, there are key differences, particularly at the exploration stage (Bradshaw 2016, p. 27).

- The project proponent, rather than the State, initiates the process of negotiations with native title groups; the State is not a party to the agreement (as is the case under future act agreements and ILUAs).

- Low-impact exploration activity can be carried out as soon as a licence is granted and the native title group is notified — there is no statutory period for objections to be raised before activity can begin, as occurs with the expedited procedure and objection process under the NTA. The project proponent self-assesses whether its activity affects the native title rights of claimants, and can risk their project being stopped and financial penalties if they harm native title land.
- As under the NTA, activity that is expected to affect the rights and interests of native title groups requires an agreement. However, if an agreement cannot be reached, parties can seek a determined outcome from the Environment and Resources and Development Court to intervene after four months of negotiation (compared with six months under the ordinary NTA process, and unlike under the NTA, the NNTT is not involved in decisions under the South Australian legislation).

These measures are aimed at encouraging both parties to reach a negotiated outcome more quickly than in other States and Territories. The South Australian Government considers that its framework provides more flexibility and helps to encourage exploration investment. The approach also has potential to reduce the time spent on early negotiations for exploration activity:

> Part 9B provides several advantages to explorers in terms of streamlining the process and reducing government red tape. … The Part 9B system was designed to facilitate a risk management approach to dealing with native title issues, so as to avoid imposing unnecessary regulatory burdens on explorers for low risk activities, but at the same time, providing clear processes and requirements to be followed for activities likely to affect native title. … These advantages result in it being possible for explorers to satisfy native title requirements more quickly and often with less expense than through the equivalent right to negotiate process under the *Native Title Act 1993* (Cth). (SA DMITRE 2013, pp. 13–14)

However, the approach is not without its risks. The South Australian Department for Energy and Mining is currently reviewing its impact, observing that 'the current system of self-assessment by exploration companies can sometimes create uncertainty and hinder the building of good relationships' (SA DEM 2019, p. 22).

South Australia's alternative negotiation framework does streamline certain elements of the process of making agreements. But even within South Australia, it remains contentious. And if it were introduced in other States, Aboriginal and Torres Strait Islander groups would need confidence in self-assessments made by project proponents for it to be an improvement on the ordinary procedures in the NTA.

Victoria's traditional owner settlements

The Victorian Government established the *Traditional Owner Settlement Act 2010* (TOSA) in part, in recognition of the complexity of native title. The TOSA allows the Victorian Government and traditional owners to reach settlements over Indigenous land and can include financial compensation for past government actions. Traditional owners waive their

right to pursue a native title claim if a settlement is in place. The TOSA is currently being reviewed by the Victorian Government (FVTOC 2019).

TOSA agreements also allow traditional owners to establish land use activity agreements (LUAA), which set out the terms on which resources developments may take place. Like an ILUA, the LUAA sets out that certain exploration activities can take place without negotiation between traditional owners and project proponents, so long as the project proponent minimises interference with the traditional owners' land. Exploration with a significant impact on land, and extraction, are subject to negotiation. To date, only one LUAA has been established with the Dja Dja Wurrung people.

One advantage of Victoria's LUAAs is that they allow project proponents to agree to a standard set of terms and conditions to develop resources on the land, and set default compensation amounts for particular activities (such as drilling holes for exploration) likely to arise in all projects covered by the agreement. This can help to set clear expectations, and aligns with leading practice approaches taken under the NTA (discussed in more detail below).

The mining industry in Victoria was supportive of the introduction of the TOSA in 2011, because it can more rapidly determine the rights of Aboriginal and Torres Strait Islander groups over land than the native title determination process. After its introduction, some concerns were raised about how the resources industry did not have a role in the LUAA negotiation process (MCA Victoria 2012, p. 26). No evidence has been put to the Commission about whether this remains an issue.

A difficulty with the TOSA is that it does not, and cannot, totally exclude the operation of native title. Several native title determinations were made in Victoria prior to the introduction of the TOSA; one native title determination took place in 2011 after the introduction of the TOSA (Vic DJCS 2019). Where there is a TOSA settlement and a native title determination, the requirements of both Acts need to be met (unless native title land is excised from the licence application area) (Vic DJPR 2019d). The benefits produced by more rapid determination of settlements between government and traditional owners may well be offset by the additional regulatory requirements of complying with both systems.

Aboriginal land rights in the Northern Territory

The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALRA NT) returned nearly 50 per cent of the Northern Territory's land to traditional owners. Land councils assist Aboriginal and Torres Strait Islander communities in the claiming and management of their land.

The ALRA NT predates native title, and confers full ownership of land (including exclusive possession) on traditional owners. But the ALRA NT also provides rights not available to other freehold owners of land. In particular, traditional owners have the right to veto exploration for resources on their land. Once a resources company makes a proposal, traditional owners have two years to negotiate terms and reach a decision.

Participants raised three main concerns with the ALRA NT process.

First, the Northern Territory Chamber of Commerce and Industry observed that it costs as much as $40 000 per meeting to negotiate access to ALRA NT land, and submitted that resources under ALRA NT land should largely be treated the same as other resources:

> The Chamber considers that as mining and petroleum resources are the property of the Crown, commercial transactions relating to the exploration and extraction of these resources should be managed by the government for the benefit of all Australians … the Chamber advocates consultations and negotiations between resources companies and traditional owners must be carried out expeditiously and in good faith to allow access to the Crowns' resources. (sub. 35, p. 3)

Second, since 1987, agreements under the ALRA NT have also been required to cover both exploration and extraction (that is, they are conjunctive) — meaning that resources companies are given only one chance to make a proposal and land councils are given one opportunity to veto it. The Australian Conservation Foundation raised that this had potential to cause a net loss for all parties involved.

> It would be far better if exploration and mining approvals were discrete and separate processes. Such an approach would appear beneficial for all parties by providing increased clarity and certainty for Aboriginal Traditional Owners (that saying yes to exploration did not preclude any ability to say no to future mining), for industry (as Traditional Owners would be arguably less likely to oppose exploration applications if they knew this would not constrain their options on future mining approvals) and for other stakeholders … who would have more confidence that the process facilitated and reflected full and informed consent. (sub 32, p. 28)

According to the second reading speeches when the 1987 changes were passed, the conjunctive approach to agreement-making was intended to facilitate development by providing greater certainty once an exploration proposal had been accepted by the relevant land council (Holding 1987, p. 3874). However, it appears not to have had this effect: the Minerals Council of Australia (Northern Territory Division) (2014, p. 10) reported that 'there have been few mining projects, if any' that have been successfully approved by land councils.

Third, if the traditional owners do not provide consent, then no company can propose or undertake any new resources activity on the land for five years. This statutory moratorium appears to be excessively restrictive, as another resources company could propose a project that better meets the expectations of the traditional owners. It also has potential to create perverse incentives to apply for permission to explore for resources on ALRA NT land in order to prevent competitors from applying.

Each of these three elements is likely to pose an impediment to resources investment. However, the ALRA NT has historic significance and, by its nature, is intended to give greater control over land to traditional owners than native title. There may be other factors warranting consideration. Accordingly, the Commission is seeking further information from Aboriginal and Torres Strait Islander communities, industry and government about the desirability of the following changes:

- requiring that negotiations between resources companies and traditional owners be carried out in good faith (with a potential to seek a court to determination as to whether resources development should go ahead if they are not)
- decoupling exploration and extraction approvals
- allowing other resources companies to apply to develop ALRA NT land that is subject to a moratorium for another resources company.

DRAFT FINDING 5.6

Very few projects are going ahead on land protected by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The requirements that agreements must cover both exploration and extraction, and that refusal of consent for one project in an area means that a moratorium is imposed on any other development while the original proponents retain a right to renegotiate, appear to be unnecessarily restrictive.

INFORMATION REQUEST 5.1

The Commission is seeking further information on whether reforms to the following elements of the Aboriginal Land Rights (Northern Territory) Act 1976 *(Cth) would help to enable resources sector investment while still achieving the aims of the Act:*

- *conduct of resources companies and traditional owners during negotiations (including the way that moratorium rights are exercised)*
- *the conjunctive link between exploration and extraction approvals*
- *the potential costs and benefits of allowing other resources companies to apply to develop land rights land that is subject to a moratorium for another resources company.*

There is no single leading practice for State and Territory approaches to native title

The NTA provides a framework for State and Territory Governments and local traditional owners to explore methods for more rapidly determining native title claims and facilitating agreement making that suits the local context, subject to the approval of the Australian Government. However, no single leading-practice approach has been identified.

The approaches taken in South Australia and Western Australia appear to be making investment in resource exploration easier in those jurisdictions, but these approaches remain contentious. The Victorian TOSA, while avoiding the time spent on determination, runs the risk of requiring duplicative compliance with both the TOSA and NTA.

Moreover, it is unlikely that any of these approaches could be adopted as leading practice on a national level. As the Australian Law Reform Commission (2015, p. 369) observed in the separate context of native title determinations, '[g]iven the varied experiences and contexts between the states and territories … it would be impractical to develop best practice principles that could be applied across all jurisdictions'.

DRAFT FINDING 5.7

South Australia, Victoria and the Northern Territory have implemented alternative regimes to that prescribed under the *Native Title Act 1993* (Cth) for negotiating agreements between resources companies and traditional owners. These approaches have both advantages and disadvantages; a leading-practice approach has not been identified.

Leading-practice approaches

Noting that there is unlikely to be a single best-practice model for State approaches to managing native title in the context of resources development (as described above), there are elements of the approaches taken by the Australian, State and Territory Governments that may be worth exploring for each jurisdiction.

Conjunctive agreements can better permit sequential or cumulative development

As noted above, future act agreements usually require a new agreement to be negotiated for each stage of a project. This is a natural consequence of many resource developments having multiple phases, with development of future phases being contingent on commercial conditions and other uncertain circumstances (Abdel Sabour and Poulin 2010). As a consequence, the scope of any given 'future act' on native title land can change, giving rise to a new round of negotiations.

Conjunctive ILUAs have an advantage over future act agreements (which are negotiated on a project-by-project basis) in that they can cover multiple activities. At their most advanced, conjunctive ILUAs can allow new licensees to operate in the same native title area without the need to negotiate a new agreement, by providing a standard set of terms to be accepted by the licensee (as is the case in South Australia — box 5.6).

Box 5.6 **ILUAs for exploration and extraction of resources in South Australia**

Conjunctive ILUAs for oil and gas projects

In 2007, the South Australian Government negotiated the first conjunctive petroleum Indigenous Land Use Agreement (ILUA) in a productive province in Australia, with the Yandruwandha/ Yawarrawarrka peoples (who hold native title over land in the Cooper–Eromanga Basins, a large conventional gas resource in the north of the State). More recently in 2011, another conjunctive ILUA was established with the Wangkangurru/Yarluyandi people, also in the north of the State.

Under these agreements, any prospective licensee can agree to a set of standard terms under an ILUA acceptance contract prior to the grant of an exploration licence. This agreement then covers the life cycle of each project. The standard agreement sets out standard rates of compensation for activity (which are adjusted for inflation over time). To date, 12 licensees have signed on to the Yandruwandha/Yawarrawarrka and Wangkangurru/Yarluyandi ILUAs for oil and gas projects.

Mineral exploration ILUAs

For mineral exploration, the South Australian Government has negotiated ILUAs in conjunction with the South Australian Chamber of Mines and Energy and South Australian Native Title Services. Two ILUAs are in place that provide standard form agreements for exploration activity under the *Native Title Act 1993* (Cth). As with the conjunctive gas ILUAs, a company can accept the standard terms for exploration activity and operate in areas under these ILUAs.

Source: South Australian Department of Energy and Mining (pers. comm., 26 February 2020).

Conjunctive agreements should not be the only option (as is the case under Aboriginal land rights legislation in the Northern Territory, discussed above). Because of the highly prospective nature of some resources activities, the exact nature of those activities will not always be clear prior to exploration taking place. However, by providing a framework for conjunctive agreements, State and Territory governments can allow resources companies and Aboriginal and Torres Strait Islander communities to more easily reach agreement through a standard set of terms for resource developments in a particular area.

DRAFT 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.

Good guidance helps resources companies to navigate native title

As noted earlier, native title is a complex legal regime. Since its introduction in the early 1990s, it has been subject to significant legislative amendment and decisions from Australia's higher courts. There is an array of advice aimed at helping investors understand the native title system.

For example, the Australian Trade and Investment Commission provides a brief overview about native title land, ILUAs, and the way native title operates in the Northern Territory, Queensland and Western Australia. The most comprehensive guide is the *Working with Indigenous Communities* handbook (DIIS 2016). Among other topics, it covers how native title fits into the resources approval process, the different roles of future act agreements and ILUAs, the socio-cultural background to native title and guidance on how to approach agreement-making and community engagement in a culturally sensitive manner.

By approaching negotiations in a culturally sensitive manner, incorporating the principles set out in the handbook, resources companies can improve community confidence in resources development. Conversely, 'without effective communication and shared understanding, it is difficult for companies and Aboriginal and Torres Strait Islander communities to coexist amicably or to manage issues that arise effectively' (DIIS 2016, p. 16). The Australian Government's *Working with Indigenous Communities* handbook provides four key principles for approaching communication with Aboriginal and Torres Strait Islander communities:

1. Culture is shaped by the way the world is viewed, and differences between mining culture and Indigenous cultures are significant.
2. Use plain English, interpreters and visual tools for communication. Jargon or scientific language may lead to confusion and misunderstanding.
3. Allocate sufficient time for decision-making according to Indigenous custom. Plan consultations well in advance and use a slow, steady and staged approach.
4. Respect the proprietary nature of Indigenous cultural information. (DIIS 2016, p. 16)

This type of guidance provides a leading-practice model, which could be expanded to provide guidance covering the various unique elements of state regimes (particularly South Australia and Victoria, as discussed above). As each of these systems are established under legislation by those States, they should be responsible for preparing this guidance.

DRAFT 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.

6 Approval processes

Key points

- The environmental approval process weighs the environmental, economic and social impacts of projects to determine if they can proceed and if so under what conditions.
- The assessment and approvals process is complex and often lengthy. While often commensurate with the multiple and significant risks many projects pose, there is evidence that the process can be unduly costly and time consuming.
- Leading practice can be found in different aspects of the processes applying in different jurisdictions, but there remains scope for improvements to reduce costs without diminishing environmental and other outcomes (or to achieve better outcomes without increasing costs).
- Major issues that participants have raised with current processes include:
  - approval delays, for the primary approval and for post-approvals
  - environmental impact assessments (EIAs) that are unduly costly and time consuming
  - duplication and inconsistency in Commonwealth and State or Territory processes
  - delays due to court action brought by opponents to projects.
- More thorough application of a risk-based approach to EIA would help streamline processes and deliver sounder environmental outcomes. Earlier scoping of key risks, including community consultation, would give regulators and proponents a clearer and shared understanding of what information is needed to support decision making.
- The Commonwealth and the States and Territories have distinct but overlapping responsibilities for the environment. This creates difficulties for proponents.
  - Greater cooperation between the Commonwealth and States and Territories would improve the environmental approval process. This could include out-posting of Commonwealth staff and training of State and Territory regulators' staff in the administration of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).
  - Bilateral assessment agreements that place greater commitments on the States and Territories could reduce duplication and inconsistency in approval conditions.
  - Bilateral approval agreements have the potential to simplify the approval process for proponents but the EPBC Act needs to be amended to support their negotiation
- The post-approvals stage should be made more transparent and predictable, with decisions subject to timelines and reporting on compliance with those timelines.
- Duplication and overlap across agencies within jurisdictions continues to frustrate project proponents, notwithstanding that all jurisdictions have arrangements in place to facilitate coordination, such as lead agencies or major project facilitation offices. Some jurisdictions are closer to leading practice than others.
- Delays due to reviews of environmental approval decisions in the court system may be costly. However, they are relatively infrequent and there is good reason to allow certain third parties standing to seek judicial review of environmental approvals. Legislation that is highly process-driven increases the risk of regulators making invalid administrative decisions.

This chapter focuses on the environmental approval process, which involves weighing the environmental, economic and social impacts of projects against each other to determine whether projects can proceed and if so under what conditions. This process is essential for ensuring that projects proceed only if they are in the overall national interest, but it can be unduly costly and time consuming.

Every jurisdiction's environmental approval process is different but there are some common characteristics around Australia (table 6.1). This chapter focuses on the most pressing concerns with environmental approval processes raised by study participants and identifies examples of regulatory leading practice. Issues arising from application through to assessment, in approval and conditioning, post-approvals and review processes are considered in turn. The focus is on unnecessary costs and delays, not reducing environmental standards.

The final part of the chapter discusses coordination among regulators within a given jurisdiction (because environmental approval is inevitably one among many approvals that projects require) and Indigenous heritage.

Table 6.1 **The environmental approval process**

This is a generalised description and does not completely capture what occurs in any particular jurisdiction

Stage	*Description*
Application	Proponents submit an application or referral to the regulator describing their project, possibly including information on its expected environmental impacts.
Decisions on whether approval is needed and if so the level of assessment	Regulators decide whether a project requires approval and if so what level of assessment is needed. The public may be invited to comment on these decisions.
Scoping the assessment	The scope of any assessment that proponents need to undertake is determined, typically in the form of a terms of reference. The scope is decided by the regulator but the proponent and the public may have input.
Assessment	The proponent prepares an environmental impact assessment in line with the terms of reference given by the regulator. This involves gathering information on the environment where the project will be located and its expected impacts.
Approval and conditioning	The decision maker, usually a politician, decides whether the project can go ahead and if so under what conditions. The decision maker may receive advice and recommendations from an independent environmental agency. The decision maker may request additional information from the proponent.
Post-approvals	The approval conditions may include that the proponent prepare a range of management plans that also need to be approved by the regulator before work can commence.
Review	This is not a part of the environmental approval process per se. Parties directly affected by approval decisions and certain third parties have the opportunity to have approval decisions overturned or amended.

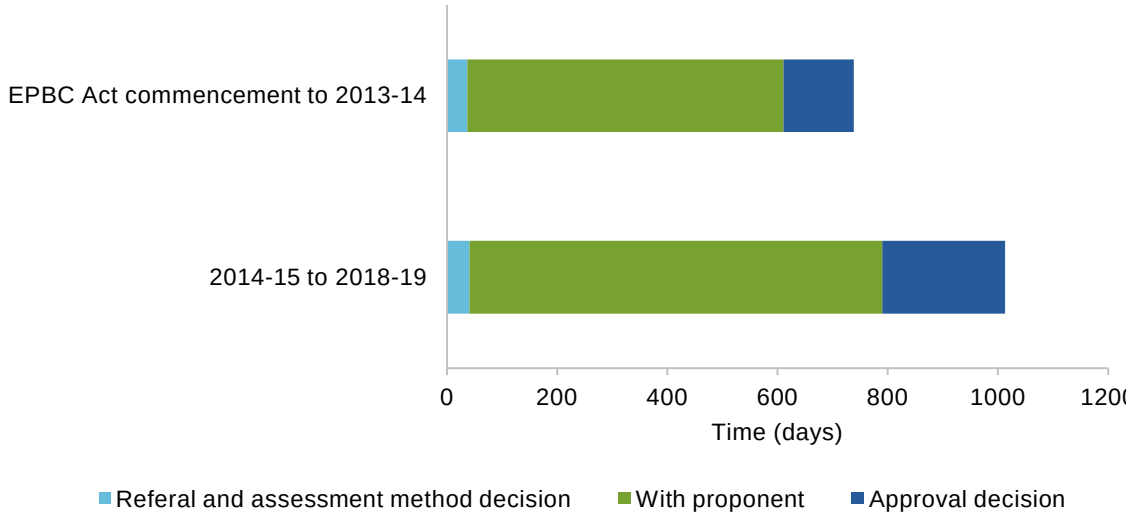
Taking the Commonwealth regulatory system as an example, the average time between project referral and approval for resources projects over the five years to 30 June 2019 was 1014 days, or nearly three years (figure 6.1).

- Proponents had carriage of environmental impact assessments (EIAs) for three quarters of this time — undertaking surveys and preparing EIA documentation, responding to regulator requests for information, or simply delaying the preparation or delivery of documentation to suit their own timing preferences.
- The time taken for the Commonwealth environment minister to make an approval decision for resources projects, after receiving the final assessment documentation from the proponent, averaged 223 days in the five years to 30 June 2019 This was around three months longer than the average between commencement of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and 2013-14.

Figure 6.1 does not include the time taken to meet any post-approval requirements, which can in some instances take just as long as the primary environmental approval (section 6.3). Nor does it include review or appeal processes (section 6.4).

Figure 6.1 **Environmental approvals can take years to secure**

Average time taken for environmental approval decisions for resources projects under the EPBC Act[a,b]



[a] 'Resources projects' includes projects classified as 'exploration (mineral, oil and gas – marine)', 'exploration (mineral, oil and gas – non-marine' or 'mining' in the database of EPBC Act decisions maintained by the Department of Agriculture, Water and the Environment. [b] The information presented for the period 1999 to 2013-14 is not completely accurate. This is because, for this period, the Commission has combined data compiled on a calendar year basis with data compiled on a financial year basis. This is likely to only have a marginal effect due to the length of time the data covers.

Source: unpublished data from the Department of Agriculture, Water and the Environment.

Obtaining approval can be costly

The direct financial costs to proponents of preparing EIAs — including the collection of environmental, social, heritage and economic information — can be in the millions of dollars. Government agencies also incur costs, including through reviewing applications and assessment documentation and advising decision makers. The greater cost to proponents, and the community, however, comes from the time it takes to navigate the environmental approval process (box 6.1).

Box 6.1 The cost of waiting is significant

Proponents typically have ongoing costs while they await regulatory approval. For example, Arafura Resources, a prospective rare earths project in the Northern Territory, noted that its overhead costs before production commences are between $350 000 and $400 000 per month (Northern Territory Social Policy Scrutiny Committee 2019, pp. 53–55). The MCA (sub. 11, p. 20) submitted that the costs of 'keeping engineering contractors, consultants, internal resources, and procurement in a "holding pattern" while delays are being addressed' can be up to $16 million per month for a large project.

More importantly, pushing out the start date of a project delays the receipt of revenue as well as the royalties and taxes that flow to the broader community. The Commission previously estimated the total cost of a one-year delay for a project to be between 7 and 18 per cent of its net present value, depending on the cost of capital (discount rate) and when the delay is experienced — revenue delays that occur after significant exploration costs have been incurred are more costly (2009, p. 218).

Any estimate of this type is driven by assumptions about the time profile of future revenue and costs, including assumptions about commodity prices. The costs of delay can be higher if projects miss out on a period of price upswing (which may have influenced the timing of the investment decision). On the other hand, the cost of waiting will be reduced if prices are lower than anticipated.

As TMEC submitted, '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' (sub. 46, attachment A, p. 1). Rio Tinto (sub. 26, cover letter, p. 1) pointed out that:

> Delays … suspend the flow of benefits to Australians and can put at risk whether a project goes ahead, as economic conditions can change, especially in a cyclical industry like mining.

DRAFT FINDING 6.1

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

6.1 Application through to assessment

The application stage has reverberations throughout the rest of the environmental approval process. At this stage, proponents submit application or referral documentation; regulators then use this documentation to inform their decisions on whether and what type of environmental assessment is needed, and the scope of any such assessment. Proponents then prepare the required assessment, often supported by a range of environmental, social and economic studies. It is also at this stage that the Commonwealth environment minister decides whether a project requires their approval.

The scope of environmental assessments

In preparing EIAs, proponents have to gather information on the environment in the project's location and identify the project's expected impacts on, for example, water resources, air quality, noise and vibration levels, Indigenous culture and heritage, and social and economic outcomes. The topics that must be addressed in an EIA are determined by terms of reference or guidelines set by regulators.

A key issue raised by study participants is that EIAs are often unnecessarily broad in scope and do not focus on the most important risks (box 6.2). This is not a new concern. Twenty-five years ago, Everitt (1995) noted the well-documented problems of 'voluminous, detailed, and exhaustive documents with unnecessarily comprehensive data', including information on 'irrelevant and insignificant issues … with consequent waste of time and money' (cited in Sadler 1996, p. 113). The MCA (sub. 11, p. 12) submitted that:

> [EIA] requirements have proliferated over recent decades as governments (state and federal) are taking an increasingly risk-averse approach to EIA. Increasing EIA information requirements are resulting in wide-ranging assessments of all impacts, regardless of materiality/level of risk, and unnecessarily increasing assessment timeframes.

The weight of submissions and other evidence suggest that this is the case, but not everyone agrees. A review of offshore environmental approval processes found that while proponents complained about 'too much scrutiny and effort being put into lower level impacts and risks', the regulator complained about a 'lack of proper and consistent risk and impact assessment methods' (National Energy Resources Australia (NERA) and Australian Petroleum Production and Exploration Association (APPEA) 2018, p. 17).

Generally speaking, the more expansive the scope of an EIA, the more expensive it is to prepare. The EPBC survey project found that the average out-of-pocket cost of assessment across the middle 80 per cent of projects (by assessment cost) was less than $60 000, but the average for the most-costly 10 per cent was over $1.2 million (Macintosh 2009, p. 85).[1] For

[1] The lower-bound figure for the average cost of assessment for the most costly 10 per cent of projects is based on information presented by Macintosh (2009, p. 85) on the total sample and the middle 80 per cent of projects (by assessment cost). Dollar figures presented by Macintosh (2009, p. 85) have been converted to 2019 dollars using the GDP price deflator (ABS 2019, table 5).

the Carmichael Coal Mine and Rail Project, the cost of *printing* the 24 copies of its environmental impact statement required by both State and Commonwealth Departments, with each copy being 11 volumes and 9428 pages, totalled around $100 000 (Adani Mining, pers. comm., 6 January 2020).

Box 6.2 Perspectives on EIAs

Broad terms of reference that do not focus on the issues that matter most have been identified as a problem by proponents and the consultants they hire to produce EIAs:

> … the Power and Water Corporation noted that it is generally difficult to filter the high priority from the very low risk matters in Terms of Reference … Terms of Reference appear to provide a catch-all approach, rather than clearly focusing on elements of the environment likely to be impacted. (DoE 2014c, p. 6)
>
> The [terms of reference] in my view take little or no notice of the risk profile presented by the project. We are required to study everything irrespective of the risk rating. Many of the studies arguably didn't need to be done to the level they were as most rely on straight forward management processes during operation to manage and mitigate impacts. (Brian Fowler, quoted in AMEC, sub. 31, p. 17)
>
> …[for] any type of project, there would be probably 40 topics that we look at and with the way the terms of reference are written all of them have pretty much equal weight. (Mr William Haylock in Commonwealth of Australia 2014, p. 16)

The size and scope of EIAs may be hindering community involvement:

> … due to government's seeming inability to prioritise assessments … to those matters which [are] of the highest risk and therefore require the greatest studies and review, the community is often required to provide submission on enormous documents which make identifying the main issues of interest almost impossible. This not only means significant time and expense for companies for little environmental or social benefit, it has created a whole industry of professional reviewing middle men when the discussion should be with the directly affected stakeholders. (QRC, sub. 27, p. 20)
>
> Ironically, forcing proponents to shout more loudly by ever thicker assessment documentation just means that the community will cover their ears more. The likelihood of a member of the community reading an environmental impact assessment document is inversely proportional to its thickness. (TMEC, sub. 46, attachment B, p. 2)
>
> The amount and complexity of information provided makes it difficult for the public to access and assess the information provided in order to make a public submission. As Finanzio [SC] notes, 'the volume of material that needs to be analysed before constructive criticism can be made is such that a meaningful contribution to the decision maker's assessment is impeded.' (TIA 2017, p. 33)

Proponents are loath to query broad terms of reference or seemingly unnecessary information requests because doing so risks further delay:

> 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)
>
> … there appears to be a vicious cycle in the assessment process originating from the Titleholder's decision not to explore perceptions of regulatory creep because it is less risky to acquiesce to regulatory feedback than to incur schedule delays. (NERA and APPEA 2018, p. 18)

The financial costs are often small relative to total project costs, but they are borne at the start of a project before it is earning revenue and often before it has finance. For example, Arafura Resources' 4000 page EIA cost $2.2 million to produce and as of early 2020 the

company was seeking US$726 million of funding to meet its capital expenditure requirements (AMEC, sub. 31, p. 18; Arafura Resources Limited 2020, p. 12).

The more significant cost of unnecessarily expansive EIAs is the time they take to prepare. The NSW Minerals Council (sub. 28, p. 13) submitted that the average assessment timeframe was just over 400 days for five resource projects prior to 2014, and nearly 1000 days across seven projects since 2016. (These figures relate to assessment within the New South Wales planning system and exclude Commonwealth approval processes.) The average time that EIAs were with proponents for resources projects being assessed under the EPBC Act, from 2014-15 to 2018-19, was 749 days (figure 6.1). As discussed above, delays to project commencement can substantially decrease the value of projects to proponents (box 6.1).

These costs would be justified if expansive environmental assessments were delivering overall benefits to the community, but this may not be the case. The New South Wales Department of Planning and Environment (DPE) (2016, p. 4) has observed that 'EIA documents are getting larger and more complex without necessarily improving public understanding or decision making'. For regulators, the sheer size of environmental assessments makes the review process and providing advice to decision makers a challenge, especially in the face of staffing constraints (chapter 11).

Even with — or perhaps because of — their extensive scope, EIAs are often deemed inadequate by regulators. This can 'cause significant delays, for example through the need for information requests and responses via more information and improved modelling' (EDO, sub. 40, p. 38).

DRAFT FINDING 6.2

Environmental impact assessments are often unduly broad in scope and do not 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.

Leading-practice EIA

Leading-practice EIA involves application of the risk-based approach to regulation (Macintosh 2010a). The approach recognises that different regulated activities or environments present different risks. Armed with knowledge of the likelihood and size of those risks, regulators can tailor the delivery of regulation so that compliance costs are proportionate to the benefits of addressing them (chapter 3).

In the context of EIA, taking a risk-based approach means aligning the level and focus of investigations with the size and likelihood of environmental risks, taking into account what is already known about those risks and how they can be managed. There are two key ways

of doing this. First, regulators can assign different projects to different 'assessment tracks' (for example, assessment on referral information or assessment using an environmental impact statement). This is widely done around Australia and represents leading practice. Second, the scope of assessments can be tailored so that they focus on more likely or harmful risks. Appropriate scoping can lead to an EIA process that costs less and counts for more in decision making (Canter and Clark 1995, p. 31).

There are examples of this second form of leading practice, or movements towards its use:

- In Queensland, regulator guidance material indicates that environmental impact statements' terms of reference will identify 'critical' and 'routine' matters, 'which allows the proponent to address each matter relative to the scale of the impact and/or its likelihood of occurrence' (Qld DSD 2015, p. 5). This distinction is not always found in the terms of reference given to project proponents.
- In New South Wales, draft guidelines on scoping environmental impact statements indicate that matters to be addressed would be categorised either as a 'key issue' (requiring detailed assessment to understand risks and identify project-specific mitigation) or an 'other issue' (where management approaches are well understood and specialist studies will not be needed in most cases) (NSW DPE 2017c, p. 8). The draft guidelines are an outcome of the state's ongoing EIA improvement project, which was in part motivated by '[l]ack of focus on the most important issues' (NSW DPE 2016, p. 3).

These examples notwithstanding, study participants have indicated that there is room for improvement. For example, AMEC (sub. 31, p. 5) submitted that incomplete understanding and application of risk-based approaches have led to 'confusion in the application and assessment stages' and 'it also impacts on condition setting and compliance'.

Regulation or regulator conduct? Or both?

Regulators may be choosing to take a 'laundry list' approach to environmental assessment at times rather than make potentially controversial decisions about the relative importance of different environmental matters. One participant in a Streamline WA workshop on environmental approvals for mining projects commented that a '[c]ulture of risk-aversion favours a practice of disproportionate overregulation' (Nous Group 2019, p. 15). This speaks to regulator conduct, not regulation. Similarly, TMEC (sub. 46, attachment B, p. 1) observed that:

> Regulatory decision makers try to deal with controversy by requiring proponents to gather more and more information, hoping that the sheer weight of evidence will address the concerns of opponents.

Regulators' conduct is guided by much more than the legislation they administer. APPEA (sub. 44, p. 13) submitted that 'The Environment Regulations under the [*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)] currently drive over emphasis on very low risk/low impact areas'. This critique notwithstanding, a number of participants have complimented the offshore petroleum regulator's conduct, and there is a clear line of sight

between the Minister's Statement of Expectations and regulator-prepared guidance on the content requirements for an Offshore Petroleum Proposal:

> I expect [the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)] to take a risk-based, graduated approach to engagement and enforcement, allowing for proportionate responses to risks suited to their size, nature and complexity. (NOPSEMA 2019c, p. 2)
>
> While all of the project's stages and activities must be included in the description, the level of detail given for each may be scaled according to the potential nature and scale of environmental impact and risk they create and the information known about those activities at this stage of planning. (NOPSEMA 2019b, p. 8)

The realisation and success of risk-based EIA depends on a number of factors. It requires: regulation that does not preclude the approach; clear understanding of the regulation's objectives; clear policies, processes and criteria by which regulatory decisions are made (and information on which to base them); and regulators with sufficient expertise. Study participants' comments suggest that these preconditions are not always in place. Anglo American (sub. 42, pp. 2–3), for example, supported the use of a risk-based approach, indicating that it would involve 'having clearer definition regarding the scope and extent of information required in support of approval applications' as well as 'encouraging stricter adherence to assessment terms of reference by regulators'.

Dealing with uncertainty

A practical difficulty with applying a risk-based approach to determining the scope of environmental assessment is that there is uncertainty about the size and likelihood of project impacts at the start of the assessment process (Hawke 2009a, p. 74). This highlights the need to refine the focus of environmental assessment as information comes to hand:

> … the ideal is that the process is iterative and reflexive, which suggests that scoping is an ongoing, consultative exercise that leads to a narrowing of issues, as unfounded concerns are taken off the table, while issues that suggest greater potential for harm are given greater attention. (Craik 2008, p. 30)

This is recognised in ministerial guidelines for environmental assessment in Victoria, which state that 'Implementation of a risk-based approach means that a staged study design may be appropriate' (Vic DSE 2006, p. 14).

A straightforward way to develop EIAs that are proportionate and targeted is to invest greater effort in the scoping stage.

Current timeframes for scoping environmental assessments are, in many cases, short and provide little opportunity for community engagement. For example, at the Commonwealth level, guidelines for preparing an environmental impact statement have to be provided to proponents within 20 business days of a decision on the assessment approach being made. There is also no requirement to seek public comment on those guidelines. In contrast, the

planning phase of impact assessment in Canada, which culminates in tailored impact statement guidelines, can take up to 180 days and involves multiple stages of consultation with Indigenous groups and other interested stakeholders (Impact Agency of Canada 2019).

A thorough scoping process, including community engagement, has the potential to reduce delays and community rancour further down the track. TMEC (sub. 46, attachment B, p. 3) submitted that the controversy surrounding the proposed Gunns Pulp Mill centred on only six issues, and that identifying and dealing with those issues early (potentially including early rejection of the project) could have avoided 'the expenditure of tens of millions of dollars on environmental studies and the generation of years of collective angst and acrimony'.

DRAFT LEADING PRACTICE 6.1

Leading-practice environmental impact assessment 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. In practice this means:

- allocating different projects to different assessment tracks depending on their level of risk, which occurs throughout Australia
- thorough scoping, including community consultation, to identify which matters need to be investigated more or less thoroughly. The ongoing EIA improvement project in New South Wales shows movement in this direction
- terms of reference that focus on projects' biggest and most likely risks
- regulators that are empowered to focus on what matters most, for example through Statements of Expectations as occurs at NOPSEMA.

Commonwealth–State issues

States and Territories have primary responsibility for environmental management but there are certain protected matters over which the Commonwealth has jurisdiction under the EPBC Act (chapter 3). A project only 'triggers' the EPBC Act if the federal environment minister judges that it is likely to have a significant impact on one or more of the these matters. Participants have raised issues with the nuclear trigger and the water trigger. Where a project is captured under a bilateral assessment agreement, a single EIA is required; otherwise, proponents have to prepare different assessments for Commonwealth and State or Territory regulators.

Triggering the EPBC Act

In 2018-19, half of all projects referred under the EPBC Act did not actually require Commonwealth approval (DoEE 2019a, p. 251). Anglo American (sub. 42, p. 13) gave some insight as to why:

> Although a self-assessment process may be undertaken to determine whether significant impacts are likely, as the assessment triggers change so frequently, proponents often seek a formal determination from the Minister to obtain certainty around the need for assessment.

The referral of projects that are then found not to require the Commonwealth environment minister's approval has been an issue since the commencement of the EPBC Act (Australian National Audit Office (ANAO) 2003, p. 13) and it 'represents a substantial amount of compliance and assessment work by business' (Wentworth Group of Concerned Scientists 2012, p. 4). Evaluating referrals also consumes the resources of the Department of Agriculture, Water and the Environment (DAWE).

Provision of better guidance to assist proponents when they are considering whether to refer their project may go some way towards addressing this inefficiency (ANAO 2003, p. 13; Rio Tinto, sub. 26, pp. 6-7). But there are inevitable difficulties when evaluating whether impacts are 'likely' and the concept of significance 'is, to an extent, inherently uncertain and subjective' (Prutej 2007, p. 5). 'It is not unusual to have experts in the same field differ markedly on questions of significance' (Hawke 2009b, p. 259).

Another way of addressing this problem, adopted in some jurisdictions, would be to require assessment and approval based on the nature and extent of proposed activities rather than their potential impacts. In Queensland, projects can proceed without assessment and operate subject to standard conditions if they meet certain eligibility criteria (referred to as 'standard application'). For example, mining projects that do not cause more than 10 hectares of land to be significantly disturbed and are not carried out in pre-defined environmentally sensitive areas may be eligible for 'standard application' (Qld DEHP 2016).

Difficulties in the EPBC referral process may be addressed in the current review of the Act (Samuel 2019, p. 19), due to be finalised in October 2020. Separate to the review process, the Australian government recently announced changes to environmental assessment under the EPBC Act and interactions with State and Territory processes (box 6.4).

Box 6.4 Recently announced changes to environmental assessment

The 'Busting Congestion in the Environmental Assessment Process' initiative has been allocated $25 million over the period 2019-20 to 2020-21 'to work through the backlog of environmental approval applications' (Australian Government 2019, p. 216). In addition, the Australian Government announced that it would:

> … partner with the Western Australian Government to develop a system that will reduce approval times, allow project proponents to submit a single application via a single online portal, track its progress and access a database of biodiversity studies relevant to their project. (Morrison 2019)

There are not currently processes in place to aggregate the environmental data that proponents collect in the assessment process (Box, Hansen and Bradsworth 2018) and the announced 'database of biodiversity studies' would fill this gap. The data could improve regulators' understanding of cumulative impacts and would be valued by a range of stakeholders. Such a repository was recommended in 2014 by the House of Representatives Standing Committee on the Environment (2014, pp. 79–81), and had broad support from the resources sector, environmental groups, consultants and the then Commonwealth Department of the Environment.

The 'nuclear trigger'

A number of study participants have suggested that the nuclear trigger is capturing projects that do not warrant Commonwealth approval (MCA, sub. 11, p. 12; AMEC, sub. 31, p. 6). The Carrapateena copper–gold project, for example, activated the nuclear trigger because its tailings dam will contain radioactive minerals, even though exposures will be below regulatory limits (OZ Minerals 2017, pp. 106–107; South Australian Government, sub. 25, p. 6). Rare earths and mineral sands projects (for example, the Nolans Project in the Northern Territory) are activating the nuclear trigger despite the explanatory memorandum of the EPBC Act explicitly stating that these are not nuclear actions (Parliament of Australia 1998, p. 31). This suggests that the Act is not operating as intended.

It is not clear how significant a problem this is for the efficiency of the environmental approval process because projects often trigger the EPBC Act for multiple reasons. The Carrapateena and Nolans projects would both have triggered the EPBC Act due to their potential impacts on threatened species (Arafura Resources Limited 2016, pp. 2–3; Wyndham 2017, p. 1). However, when projects are classed as nuclear actions they require a whole-of-environment assessment, which may mean that the assessment addresses matters already regulated by the States and Territories (Samuel 2019, p. 19).

The regulatory burden created by looking at nuclear actions under the EPBC Act may be unnecessary given the other regulatory arrangements that are in place. Australia's Nuclear Science and Technology Organisation (cited in Hawke 2009a, p. 353) has previously submitted that:

> … there is significant overlap between the role of [the Australian Radiation Protection and Nuclear Safety Agency] and the assessment of "nuclear actions" under the EPBC Act … [The Australian Radiation Protection and Nuclear Safety Agency's] expertise in radiation protection and nuclear safety establishes it as a competent regulatory body in respect of the hazards that radiation may pose to the environment, and that the dual approval system may benefit from review to the extent that the same issues are considered under both assessment processes.

The 'water trigger'

There are mixed views on the 'water trigger'. Since 2013, coal seam gas projects and large coal mines expected to have a significant impact on a water resource have been classified as protected matters under the EPBC Act, and so require Commonwealth approval.

- The NSW Minerals Council (sub. 28, p. 26) submitted that this is 'the best example of duplication of function for no clear additional benefit'. Other submissions made a similar point (AMEC, sub. 31, p. 7; APPEA, sub. 44, p. 17; MCA, sub. 11, p. 16; Origin, sub. 8, p. 4; QRC, sub. 27, pp. 13–14; QLS, sub. 41, pp. 6–7;).
- The post-implementation *Independent Review of the Water Trigger Legislation* found that 'the water trigger is an appropriate measure to address the regulatory gap that was identified at the time of its enactment' (Hunter 2017, p. 6).

The evidence that the water trigger filled a significant regulatory gap is not compelling. The post-implementation review provided three key examples to demonstrate the presence of a regulatory gap (DoEE 2016b, p. 16):

- In the case of the first example, the review noted that advice from the Independent Expert Scientific Committee (IESC) 'identified eight significant hydrological concerns'. But the eight hydrological concerns were, in fact, identified by the environment minister in a letter to the IESC, and the IESC's advice detailed whether the Commonwealth's draft approval conditions adequately addressed the concerns. In seven of eight areas of concern, the IESC noted that draft approval conditions specified the requirements outlined by the minister; in one case it noted that further clarification was needed.
- In the case of the second example, the review indicated that the Commonwealth environment minister's approval 'was limited in protecting groundwater by requiring adherence to New South Wales government approval conditions' but did not provide evidence that the New South Wales conditions were inadequate.
- In the case of the third example (which actually included reference to multiple projects), the review noted that the Commonwealth environment minster 'was only able to place conditions on the projects that directly related to the then [matters of national environmental significance]'. The IESC recommended three modifications to the New South Wales government approval conditions in relation to one project's surface water and groundwater management plans, which it otherwise supported. In relation to other New South Wales government approval conditions, the IESC advice to the Commonwealth indicated that they were 'appropriate and adequate to protect matters of national environmental significance', were 'environmental best practice' and would address identified issues (IESC 2012, pp. 2–3).

DRAFT 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 filled a significant regulatory gap is not compelling.

Bilateral assessment agreements

Bilateral assessment agreements accredit certain State and Territory processes for the purposes of assessments under the EPBC Act, allowing proponents to prepare a single EIA for both Commonwealth and State and Territory regulators.

Agreements are in place between the Commonwealth and most States and Territories[2], and the Commission sees merit in including as many State and Territory assessment processes in bilateral agreements as possible (2013a, pp. 139–144). South Australia, for example, increased the coverage of its bilateral assessment agreement in 2014, and intends to seek even broader accreditation in the future (South Australian Government, sub. 25, p. 5).

The agreements in force capture most State and Territory assessment processes, where they meet the standards for accreditation laid out in the EPBC Act. Some processes are not fully captured because they were introduced following the finalisation of the relevant bilateral assessment agreement and have not yet been re-accredited (DAWE, pers. comm., 6 March 2020).

Thirty per cent of all resources projects needing assessment under the EPBC Act have been captured under bilateral assessment agreements (unpublished data from DAWE), and a number of resources industry stakeholders have indicated support these agreements (Roy Hill, sub. 7, p. 5; NSW Minerals Council, sub. 28, p. 30; INPEX, sub. 34, p. 8; Anglo American, sub. 42, p. 15). (A further 13 per cent are captured under an 'accredited process'[2] (unpublished data from DAWE)).

On the other hand, the EDO (sub. 40, annexure 1, p. 5) submitted that 'the Commonwealth has never undertaken a comprehensive audit or systemic review of their environmental effectiveness, or of States' and Territories' compliance'.

Where projects are assessed under a bilateral assessment agreement, State and Territory regulators should be able to ensure that assessment documentation meets Commonwealth decision makers' needs. This does not always happen. For example, a review has previously found that the Commonwealth decision maker sought additional information on three quarters of Northern Territory projects assessed under a bilateral assessment agreement (DoE 2014c, p. 6). The *Environment Protection Act 2019* (NT) is expected to address this shortcoming.

DRAFT FINDING 6.4

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

2 Western Australia does not have a bilateral assessment agreement with the Commonwealth but projects may be assessed through an 'accredited process', a process 'that is accredited on a one-off basis for the purposes of the [EPBC] Act' (Macintosh 2010, p. 227). Rio Tinto (sub. 26, p. 6) see value in renegotiating a bilateral assessment agreement, and the Commonwealth environment minister has published a notice of intent to do so (Ley 2019). There is also an intention to renegotiate the Northern Territory's bilateral assessment agreement; the previous agreement lapsed with the reform of the Northern Territory's environmental legislation in 2019 (Northern Territory Department of Environment and Natural Resources, pers. comm., 6 March 2020).

6.2 Approval and conditioning

Drawing on an EIA, regulators decide whether to grant a project environmental approval, and under what conditions. Study participants have raised a number of concerns in this area, including delays, Commonwealth–State duplication and inappropriate approval conditions.

Delays at the approval stage

Delays at the approval stage are a key source of frustration for project proponents. These are delays that proponents experience while waiting to receive an approval decision after they have submitted their assessment documentation, and are often technically defined as time spent waiting in excess of statutory or target timelines.

The cause of delays at the approval stage is often disputed: proponents blame regulators or politicians, who themselves point out that they often need to request more information from proponents. A 2003 audit of referrals, assessments and approvals under the EPBC Act found that delays were caused by, among other things, 'the need to seek further advice on complex or difficult proposals' (ANAO 2003, p. 64).[3] More recently, the regulator of Australia's offshore petroleum sector has 'noted a large variation in quality of [environment plan] content' (NERA and APPEA 2018, p. 18).

Delays at the approval stage may be of particular frustration for proponents but this is only one part of the environmental approval process, and delays could be caused by issues in other parts of the process. These include, for example:

- inadequate scoping of the environmental assessment
- poor guidance from regulators on the type of information needed to meet the requirements of the assessment
- changes in the importance of different aspects of the environmental assessment as more information comes to light
- insufficient effort on the part of proponents
- inappropriate statutory timelines
- and regulator under-resourcing or staff turnover.

Where regulators operate within statutory or target timelines they may be able to 'stop the clock' when asking for additional information from proponents.[4] The 'clock' typically restarts from time zero when the regulator receives the information, but another option is for

[3] An audit with similar scope currently being undertaken by the Australian National Audit Office may shed further light on overall timelines and reasons for delay at the Commonwealth level. The report is due to be released in May 2020.

[4] Regulators may be able to stop the clock at various points, not just at the approval stage. Woodside Energy (sub. 18, p. 4) have suggested that use of stop the clock provisions 'appears routine' when regulators are deciding on the level of assessment that a project requires.

the clock to 'pause' and continue from the time it was paused once the information is received. (This latter approach has been raised as a potential improvement to Victoria's planning and building approval processes (Cronin 2019a, p. 71)).

Study participants have raised concerns about the application of stop the clock provisions. It has been submitted that the clock is often stopped late in the approval process (MCA, sub. 11, p. 19) and the need to stop the clock in some instances has been questioned. The MCA (sub. 11, p. 18) cites an example where the Commonwealth Minister extended the timeframe for an approval decision three times, 'requiring additional information on matters already addressed by the state in its approval of the project'. This apparently led to an eight month delay before the Commonwealth ultimately approved the project under the same conditions as the State regulator, with the additional condition that a review be conducted in the future.

DRAFT 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.

Leading-practice ways of reducing delays at the approval stage

The Commission (2013a, pp. 204–207) has previously recommended statutory timelines, tighter specification of stop the clock provisions and the use of deemed decisions to reduce delays in approvals.

Statutory timelines

Statutory timelines are not used in all jurisdictions and information on performance against timelines (statutory or otherwise) is patchy, but there are some exceptions:

- In Western Australia, the Department of Mines, Industry Regulation and Safety (DMIRS) reports on a quarterly basis on performance against target timeframes for mining proposals.[5] The Department also maintains an electronic system for proponents to track mineral, petroleum and dangerous goods applications.
- In South Australia, the Department for Energy and Mining (DEM) reports annually on performance against target timeframes. In 2017, 38 per cent of mining projects' programs

[5] Mining leases are distinct from environmental approvals. In Western Australia, mining leases cannot be granted unless the Environmental Protection Authority has decided not to assess the proposal or the proposal has been approved by the Minister for the Environment if assessment was deemed necessary by the Environmental Protection Authority (Environmental Defender's Office Western Australia 2011). The Environmental Protection Authority does not publish information on performance against target timelines but information is available on where projects are up to in the environmental assessment process.

for environmental protection and rehabilitation were decided within target timeframes (SA DEM 2017, pp. 58–59). The target timeframe is 92 days, and includes all time other than when proponents are responding to requests for information or have requested that an assessment is put on hold.

At the Commonwealth level, DAWE reports annually on the share of EPBC Act project decisions made within statutory timeframes. In 2018-19, 62 per cent of decisions were made within statutory timeframes and it was noted that '[d]elays are due to high workloads and working with project proponents to obtain additional information' (DoEE 2019a, p. 40). In the offshore space, NOPSEMA reports on the median time for assessment of environmental plans (identifying time spent with NOPSEMA and time spent with the applicant) (NOPSEMA 2019a).

It is important that timelines imposed on regulators are realistic. Data supplied by DAWE indicate that the average time taken to make approval decisions for resource projects was 223 days over the period 2014-15 to 2018-19, much greater than the statutory timeline of 20-40 days (depending on the type of assessment) (unpublished data from DAWE). Proponents are likely to be disappointed if they plan their projects around the statutory timeline. As a participant in a Streamline WA workshop on environmental approvals in mining said, 'It would be better if timeframes are longer and are being met rather than short timeframes that are not being met' (Nous Group 2019, p. 10).

DRAFT LEADING PRACTICE 6.2

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.

Stop the clock provisions

Stop the clock provisions complement the use of timeframes. They are not, in themselves, a barrier to effective regulator performance, so preventing their use by regulators (as the BCA suggests; sub. 43, p. 8) would not guarantee improved performance. At the Australian Pesticides and Veterinary Medicines Authority, '[c]hanges to remove clock stoppages in 2014, aimed at giving industry more certainty around assessment times [failed] to deliver' (Reason Group 2017, p. 19).

If significant matters emerge that were not identified at the scoping stage or could not have been reasonably anticipated, that are worthy of decision makers' consideration, regulators' measured performance should not suffer. However, a number of participants have suggested that this is not how the provisions are being used.

The Commission is not in a position to evaluate whether stop the clock provisions are being appropriately used — this speaks to a lack of transparency. Publishing reasons for stopping the clock, with specific reference to what information is being sought and how it will impact decision making, is a basic accountability measure that should be in place. This would take up time and resources, and would require appropriate funding.

DRAFT LEADING PRACTICE 6.3

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.

Deeming provisions

While the Commission maintains the view that primary approval decisions involving 'tradeoffs between competing environmental, social and economic values' (2013a, p. 207) are best made by elected representatives, it does seem that:

> 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 decision. (QLS, sub. 41, p. 3)

Deemed decisions are one way of addressing this problem (PC 2013a, p. 206). Deemed decisions involve the assessment agency's recommendation to the final decision maker becoming the approval instrument if the decision maker does not make a decision within statutory timeframes. The recently legislated *Environment Protection Act 2019* (NT) includes deeming provisions, so that the draft approval and conditions prepared by the Northern Territory Environment Protection Authority become the approval instrument if the Minister fails to make a decision within 30 business days of receiving the EPA's assessment report and draft approval.

The Commission (2013a, pp. 266–267) has previously argued that because deemed decisions are not made by elected representatives there should be opportunity to subject them to limited merits review (section 6.4). The *Environment Protection Act 2019* (NT) does not allow merits review of deemed decisions.

DRAFT LEADING PRACTICE 6.4

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

Regulator guidance

Proponents' ability to prepare EIAs that meet decision makers' needs depends on the quality of the guidance they receive from regulators. A recent audit of the environmental assessment process in Victoria found that:

> Proponents we interviewed have advised us that greater clarity in determining the type, depth and method of [Environmental Effects Statement] investigations arising from interpretation of the Ministerial Guidelines would assist them during [Environmental Effects Statement] scoping and preparation. The risk of additional costs and delays for both proponents and the department could be better mitigated if greater clarity was able to be achieved. (Victorian Auditor-General 2017, p. 21)

There are jurisdictions around Australia where valuable advice is provided. In 2019, the Western Australian EPA received the International Association for Impact Assessment Regional Award 'for its sustained contributions to good practice in impact assessment in Australia, visible through its pro-active and pioneering work in developing policy and guidance material' (International Association for Impact Assessment 2020). The QRC (sub. 27, p. 17) commented on the value of guidance:

> QRC welcomes recent, and ongoing, development of operational policies or guidance that provide a greater level of detail on legislative requirements, which will provide greater clarity of regulator expectations and interpretation.

Further improvement may require increased resourcing of environmental regulators. There is broad agreement among study participants on the need to resource regulatory agencies better to improve the environmental approval process and reduce delays (chapter 11).

DRAFT LEADING PRACTICE 6.5

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

Commonwealth–State duplication

Projects likely to have a significant impact on a matter protected under the EPBC Act generally require environmental approval by both the Commonwealth and the State or Territory in which they occur. Where projects require approval from both Commonwealth and State or Territory decision makers this may add to project approval timeframes and results in two sets of potentially inconsistent approval conditions (box 6.3). Complaints with conditions per se are discussed further below. Rehabilitation, offsets, and compliance monitoring and enforcement — all of which may be addressed in a project's approval conditions — are discussed in chapter 7.

It is not clear how large delays caused by the requirement for both Commonwealth and State or Territory approval are:

- AMEC (sub. 31, p. 6) submitted that triggering the EPBC Act can add a minimum of 6–9 months to project timelines.
- The post-implementation review of the water trigger estimated that the average time between State or Territory and Commonwealth approval was 105 days (DoEE 2016b, p. 23).
- The Department of the Environment reported in 2014 that the median time between State or Territory and Commonwealth approval for mining and energy projects was 69 days between 2008 and 2013 (DoE 2014b, p. 8). The maximum was 720 days. These figures may exclude projects where the Commonwealth made its approval decisions first and projects that it was assumed would not be captured under a bilateral approval agreement.
- There are instances in which the Commonwealth approval was received years before the State or Territory approval, for example, the Wandoan, Alpha and Olive Downs coal mines (Elks 2020; McGrath 2014, pp. 168–170).

Box 6.3 Inconsistency, overlap and duplication in conditions

> 81 per cent of [survey] respondents whose actions were subject to conditions under the EPBC Act and state/territory planning and environment permits, reported some or substantial overlap in the conditions. (Macintosh 2009, p. 7)
>
> 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)
>
> … what is highly concerning – and discouraging to international investors – is the excessive number of project approval conditions, their highly prescriptive nature, the inconsistency and overlap between jurisdictions, and the fundamental uncertainty of process. (MCA, sub. 11, pp. 3–4)
>
> A key factor in this case was the failure of the federal government to recognise the requirements of the WA regulatory regime. Specifically, during the federal government's eight-month delay in consideration of approval, recommendations for project conditions were made that duplicated and even contradicted WA approval conditions aimed at addressing the same issues. This occurred despite these concerns being raised by the WA Government and the proponent. (MCA, sub. 11, p. 18)

Bilateral approval agreements are one way of reducing Commonwealth–State duplication. These agreements would allow State and Territory decision makers to approve or reject projects under the EPBC Act, standing in for the Commonwealth environment minister. They would not, or should not, change the nature of the approval decision made under the EPBC Act — they would transfer the work of evaluating project impacts on matters protected under the Act to the States and Territories.

The EPBC Act has always permitted bilateral approval agreements but only one has ever been negotiated, an agreement (since expired) covering actions under the management plan for the Sydney Opera House. The experiences of successive Australian Governments have revealed the difficulties associated with negotiating satisfactory agreements:

- When the Australian Government investigated the negotiation of bilateral approval agreements in 2012, 'significant challenges that emerged meant that providing both certainty and consistency for business and maintaining high environmental standards could not be achieved' (Urquhart and Pratt 2014, p. 1).
- A subsequent Government sought and failed to make technical amendments to the EPBC Act to ensure that bilateral approval agreements would 'operate effectively and efficiently and to provide certainty to proponents' (Parliament of the Commonwealth of Australia 2014, p. 2).

The Commission maintains in-principle support for bilateral approval agreements (2013a, pp. 189–197), noting that the EPBC Act requires amendment to put them into practice. South Australia (sub. 25, p. 5) plans to pursue an agreement with the Commonwealth (subject to legislative change).

DRAFT RECOMMENDATION 6.1

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should be amended, in line with the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* (Cth), to enable negotiation of bilateral approval agreements.

The negotiation of any future bilateral approval agreements should take into consideration concerns raised with previously developed draft agreements. For example, the BCA (2014, p. 1) noted that Queensland's draft agreement only covered projects requiring the preparation of a full environmental impact statement — so smaller or less risky projects would not be captured under the agreement. In the other direction, TMEC (2014, p. 2) suggested that:

> The [Tasmanian draft agreement] as written is suitable for routine, non-controversial projects but it fails to address the problems that major projects, such as mines, face in Tasmania. … If the one-stop shop approvals shop is to be true to its intent, the Bilateral Agreement must do more than smooth the administration of simple approvals – it must tackle the hard approvals too, like mines, the very ones for which an improved approval process is really needed.

Reducing Commonwealth–State duplication

There are ways to reduce Commonwealth–State duplication with current legislative settings (with or without bilateral approval agreements). One possibility would be for the Commonwealth to rely to a greater extent on State or Territory approval conditions. Suggestions to this effect have been made in relation to groundwater conditions in particular (APPEA, sub. 44, p. 17; Origin, sub. 8, p. 4).

The Commonwealth has recognised the desirability of greater reliance on State or Territory approval conditions. It seeks to apply a condition-setting policy that has as its first-best option an approval condition that simply requires compliance with State or Territory approval conditions (DoE 2016a, pp. 5–6, 2016b, p. 4). This is not always feasible though. Rely more directly on State and Territory conditions may require additional commitments from the States in bilateral assessment agreements. The *Assessment Bilateral Agreement Draft Conditions Policy* noted that those commitments would include that States and Territories:

- ensure [their] decisions to approve actions and attach conditions (if any) address the likely significant impacts on matters of national environmental significance
- provide a recommendation report to the Australian Government on whether the action should be approved under the EPBC Act, what conditions should be attached for matters of national environmental significance, reasons for the recommended decision and conditions, and a statement that the recommendation complies with relevant legislative and policy requirements
- continue to monitor compliance with conditions, including those relating to managing impacts on matters of national environmental significance, and
- report to the Australian Government on compliance with the state conditions, and any variations or breaches to state conditions. (DoE 2015, p. 6)

DRAFT 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.*

The Commission has heard from study participants that they have had positive experiences where Commonwealth and State or Territory regulators cooperate, but this cooperation seems to evaporate if their project becomes politically sensitive. The QRC (sub. 27, p. 14) submitted that ‘In the absence of an approval bilateral, [we] would suggest that the State Government cultivate a more collaborative and communicative relationship with the Federal Government’. Similarly, Rio Tinto (sub. 26, pp. 5–6) submitted that:

> In the absence of an approvals bilateral agreement, there is also scope to reduce regulatory burden by improving existing processes under current legislation … As such it is important there is greater collaboration between the Commonwealth and the State to ensure the State assessment process meets Commonwealth requirements to avoid unnecessary delays to project approval.

Cooperation between Commonwealth and State or Territory regulators could be improved through out-posting of staff and EPBC Act assessment and approval training.

- In the past, Commonwealth staff were out-posted to work with regulators in Queensland, the ACT, Western Australia and New South Wales (DoE 2016b, p. 4). Following implementation of the Australian Government's one-stop-shop policy in 2013, Commonwealth officers were embedded in the relevant New South Wales and ACT government regulators. These roles have now ceased (DAWE, pers. comm., 6 March 2020).
- DAWE has made training in assessment under the EPBC Act available to New South Wales and Queensland regulators. To date, only officers from New South Wales have taken up this opportunity (DAWE, pers. comm., 5 March 2020). (Regulator capability is discussed further in chapter 11.)

DRAFT LEADING PRACTICE 6.6

Cooperation 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.

Inappropriate approval conditions

In addition to the issue of overlapping conditions, discussed above, a number of participants have raised concerns about how appropriate approval conditions are, and over-reliance on prescriptive conditions.

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

> Project approval conditions on minerals projects have become increasingly numerous and prescriptive. The number of prescriptive conditions imposed upon a project has been increasingly and wrongly used as a benchmark for sound regulatory process. This is of particular concern where such conditions are not risk-based, resulting in significant compliance effort for little environmental gain. (MCA, sub. 11, p. 13)

Failure to tailor conditions to projects may leave proponents facing requirements that are not fit for purpose and that may even be impossible to comply with. In one example provided to the Commission, a project's approval conditions required the proponent to survey rock art sites that they did not have access to.[6]

Proponents have a strong incentive to negotiate conditions that suit them, but doing so takes time and risks delay. '[P]rolonged consultation with proponents to ensure conditions were achievable' (ANAO 2003, p. 64) has previously been identified as a reason that timeframes under the EPBC Act are not met. The Commission has heard that some companies are loath to seek variations for fear of delay, and Origin (sub. 8, p. 3) submitted that:

> In addition to excessive delays in decisions, many of the EPBC approval conditions require a variation process to make them fit for purpose. The variation of these conditions has no statutory timeframes, making assessment timeframes very uncertain.

The Commission has heard that seeking variations to approval conditions once they have been agreed to or approvals for project extensions is a time-consuming process with uncertain outcomes. The NSW Minerals Council (sub. 28, p. 14) submitted that 'There has also been a significant increase in assessment times for modification applications for resources projects in NSW, including minor administrative modifications'. Anglo American (sub. 42, p. 7) expressed similar concerns in relation to the EPBC Act.

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

This may be putting a brake on productivity growth. As the NSW Minerals Council (sub. 28, p. 20) has submitted, mining is 'subject to changes as knowledge and technology improves' and 'it is important that mining has access to an efficient process for modifying development consents'.

Approval conditions may also be written in a way that creates difficulties for regulators who have responsibilities for monitoring and enforcement. The EDO (sub. 40, p. 38) described unenforceable or unclear conditions as 'a chronic issue in resource approvals', and BirdLife Australia (sub. 39, p. 3) made a similar point with respect to conditions imposed under the EPBC Act.

6 The example is not used to suggest the ongoing monitoring of impacts on the rock art is not appropriate. This is an example of a condition that would, potentially, be impossible to comply with.

Leading-practice condition setting

The Commission (2013a, p. 213) has previously recommended that:

> … regulators adopt a 'leading practice' framework for setting conditions. Key principles include: limiting conditions to the impacts of the development being consented, outcome-based requirements where possible and greater alignment between project-specific conditions and broader policy frameworks.

An outcomes-based or performance-based approach to regulation (chapter 3) reduces the potential for conditions to stifle innovation. The approach requires companies to achieve particular performance standards or measurable outcomes (set or agreed to by the regulator) but does not dictate how the company should achieve these outcomes.

If outcomes are well-defined and measurable they also provide a yardstick against which regulators can assess projects' environmental performance. In this vein, one of the acceptance criteria that NOPSEMA applies to proponents' environment plans is whether the plan 'provides for appropriate environmental performance outcomes, environmental performance standards and measurement criteria' (*Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth), s. 10A(d)).

A number of regulators recognise the value of outcomes-based conditions:

- The Commonwealth's *Outcomes-based conditions policy* (DoE 2016c) outlines the benefits of an outcomes-based approach and when it should be used. The policy acknowledges that some proponents 'may be unable to commit to the level of management or monitoring required for certain outcomes and may therefore prefer more prescriptive conditions' (DoE 2016c, p. 9). The Commission has heard from regulators that project proponents, at times, resist the imposition of outcomes-based conditions because the cost of meeting a given standard may be unknown at the start of the project.
- Draft guidelines in New South Wales identify three types of conditions which could be applied to projects, depending on the situation, including performance-based conditions. The performance-based conditions identify performance criteria that must be complied with to achieve an appropriate environmental outcome but do not specify how the outcome is to be achieved (NSW DPE 2017a, p. 8).

DRAFT LEADING PRACTICE 6.7

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

While blanket application of conditions designed for a particular project is likely to deliver sub-optimal outcomes, there may be efficiencies from the use of standard conditions to

manage standard risks. The Commissioner for Better Regulation in Victoria emphasised a 'standard risks, standard controls' approach when looking at the regulation of mines and quarries (Cronin 2017, p. 26-28). Different projects can create different risks, but:

> … where the nature of the action and its impact are standard, there should be codified or 'model' conditions, with the ability to vary these conditions to suit site-specific circumstances or achieve improved and innovative outcomes, with documentation only focusing on the variation. (Anglo American, sub. 42, p. 13)

This approach is taken up in a number of jurisdictions:

- As part of Queensland's Greentape Reduction project, 'a review of existing approvals … indicated that there are a range of requirements that are applied across most approvals' (Qld DERM 2011, p. 10) and this contributed to the development of the *Model Mining Conditions* (Qld DES 2017). This has been highlighted as an example of an effective regulatory approach 'that could readily be adapted at the Commonwealth level' (Anglo American, sub. 42, p. 13). This was being pursued in 2016 but model conditions have not been publicly released as of March 2020 (Woodward 2016, p. 54).
- In South Australia, low-risk quarries that have will have 'defined impacts that are consistent with the industry and therefore well understood' commit to a 'pre-determined set of environmental outcomes and measurement criteria' (SA DSD 2015a, p. 8). The assessment and approval of such projects, through the use of the 'defined impact mining proposal template', is itself a leading-practice approach to managing the scope of EIAs (section 6.1).

DRAFT 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.

6.3 Post-approvals

A project's environmental approval is typically conditional on the subsequent completion of a range of management plans, often referred to as post-approvals. These need to be prepared by the proponent and approved by the regulator, usually before project operations commence, and can include, for example, water, biodiversity and offset management plans. This approach is contrary to one of the 'key attributes of best practice regulatory approval processes' identified by the QLS (sub. 41, pp. 4-5), namely that 'there is finality in decision making, in that approval decisions avoid or minimise conditions that in effect build in a further round of decision making'.

Participants have indicated that use of the post-approval stage is expanding and that the process is unpredictable, lacking in accountability and causes delays (box 6.5). An

independent review of the Environment Protection Group within the (then) Commonwealth Department of the Environment and Energy ('the Woodward review') found that:

> EPBC approval conditions routinely rely on management plans which must be approved separately after the approval is granted. This is a common approach and also a common problem across many environmental regulators. … The Department has more management plans to review than available resources. (Woodward 2016, p. 53).

Over-reliance on management plans is a problem for environmental regulators (and by extension the community) because they 'focus both industry and Departmental resources on processes rather than outcomes' (Woodward 2016, p. 53). The Commission supports the Woodward review's recommendation that:

> Conditions should only require management plans where it is not practical to specify outcomes-based conditions that are measureable and enforceable, or where more detail is required to demonstrate that the desired outcome will be achieved. (Woodward 2016, p. 54)

The reasons for the expanded use of the post-approval stage are not entirely clear. The Commission has heard that proponents often lobby for earlier approval to aid their capital-raising activities, knowing that outstanding matters will need to be addressed in the post-approvals stage. AMEC's (sub. 31, attachment, p. 1) submission indicates that companies 'wait until after the Environmental Approval to [seek] funding' before making a final investment decision. The Woodward review suggested that:

> Management plans are often used because of time pressures, insufficient information, as a means of supporting adaptive management and due to a sense that management plans increase the Department's oversight of projects. (Woodward 2016, p. 53)

Box 6.5 Dissatisfaction with post-approval processes

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. These types of conditions may be invalid, or, in some instances, may unintentionally invalidate the entire approval; and
- 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)

Furthermore, most project approvals contain a significant number of conditions attached to project approvals and management plans … Satisfaction of these conditions often takes months, and in many cases significantly delays the commencement of the development for which approval has been granted (often after a lengthy application and assessment process taking several years). These further delays add to the uncertainty and create an additional element of commercial risk that is difficult to predict when making investment decisions. (NSW Minerals Council, sub. 28, p. 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)

DRAFT FINDING 6.6

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

If post-approvals must be used, there are ways of improving the process. The process could be made more predictable through the use of timeframes around regulator decisions and public reporting on performance against those timeframes. Whether timeframes are specified in legislation, regulations or policy, or agreed between regulators and proponents, is for each jurisdiction to determine. However, timeframes should be adhered to, and public reporting on regulator performance is one way of addressing this.

DRAFT LEADING PRACTICE 6.9

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

Predictability could also be improved by regulators providing clear guidance on their expectations of what management plans must contain — this would improve the chances of proponents producing documents that meet regulators' needs. Both general material and project-specific guidance should be made publicly available. This would act as a check on regulators shifting the goalposts and seeking unnecessary additional information, and help future proponents better anticipate regulator needs. Many regulators already provide post-approvals guidance — for example, the *Instructions on how to prepare* Environmental Protection Act 1986 *Part IV Environmental Management Plans* produced by the Western Australian EPA (2017) and the *Environmental Management Plan Guidelines* at the Commonwealth level (DoE 2014a) — but they should ensure that information remains up to date and is useful to proponents.

At the Commonwealth level, there is a business improvement project under way that responds to problems in the post-approval stage. The project will 'monitor timeframes for approving management plans and variations to conditions, and … provide clear guidance for approval holders in relation to requirements for approved management plans' (DoEE 2016c, p. 14).

DRAFT LEADING PRACTICE 6.10

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

6.4 Review mechanisms

Review mechanisms are an important check on the legality and quality of regulator decision making — effectively, avoiding 'false positive' decisions (where projects that should be rejected under the legislation are approved) and 'false negative' decisions (where projects that should be approved under the legislation are rejected). They also play a role in clarifying ambiguous areas of law.[7] Reviews can, however, delay projects and discourage investment. Benefits and costs of review mechanisms need to be balanced. Recent examples of 'lawfare' have caused some stakeholders to question the current balance.

[7] For example, the Nathan Dam case (*Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463, [53]) clarified that both direct and indirect impacts must be considered under the EPBC Act.

The appropriate role of judicial and merits reviews

There are two types of review mechanism, each with different roles:

- Judicial review, undertaken in courts, focuses on whether the original decision was made lawfully (that is, followed proper procedures). Judicial review is ordinarily available as a right to anyone affected by a government decision, but has limited scope (the legality of the decision).
- Merits review, undertaken by government departments or tribunals, allows the reviewer to reach a 'correct and preferable' decision based on the facts of the case, without being constrained by the initial decision.

Not all decisions are suitable for merits review. In particular, there are risks associated with offering merits review for decisions made by a Minister, decisions of a high political content, and decisions allocating a finite resource between competing users (ARC 1999). These types of decisions involve the weighing of values by the decision maker and should be placed in the hands of politicians who are elected to represent the values of their constituents.

However, where approval decisions are made by public servants or other officials who do not face the same political accountability as Ministers, merits review should be available (PC 2013a, p. 268). The Northern Territory's recent reforms to its environmental protection legislation incorporate this principle — certain decisions made by the CEO of the Environment Protection Authority can be subject to merits (and judicial) review (*Environment Protection Act 2019* (NT), ss. 276–7).

This is not the case in all jurisdictions. The Queensland Land Court is ostensibly given the jurisdiction to conduct a full merits review of environmental approvals for major projects granted by the Coordinator-General. It faces a critical constraint on its ability to do this, however, because it cannot impose any condition inconsistent with those set out by the Coordinator-General (*Environmental Protection Act 1994* (Qld), ss. 190, 205). This does not entirely preclude the addition of new conditions. However, any new conditions must not 'contradict or lack harmony' with the Coordinator-General's conditions.[8]

This issue was raised by the EDO (sub. 40, Annexure 3, p. 19):

> … the Land Court undertakes a full merits review with expert assistance to [analyse] the application material before it – often leading to better understanding of the likely impacts – after the Coordinator-General provides these conditions. It also restrains specialist experts in the Department of Environment and Science in providing conditions. … [which] significantly limits the Court in providing positive solutions through amended conditions as a result of the outcomes of an objection hearing.

On multiple occasions, Land Court members have commented that the requirement for consistency with the Coordinator-General's conditions has constrained them in their

8 *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24 (*New Acland Coal*).

decision-making.[9] This includes scenarios in which new information arises that suggests the Coordinator-General's conditions are not appropriate:

> Given the time between when the [Coordinator-General] may condition a project and when the Land Court may hear and determine any objections relevant to that project; relevant laws, policies and guidelines may change. This then creates a difficult situation where the new law/policy etc. may require a change to the outdated [Coordinator-General] conditions but the Court can not recommend a change if it is inconsistent.[10]

The Commission (2013a, pp. 265–268) has previously recommended that merits review avenues should be limited for decisions not made by Ministers — but this limitation was in relation to the material that can be brought before the new decision maker, not on the findings or outcomes of the review. There is no clear justification for a limitation on the types of conditions that can be imposed by the Queensland Land Court. New information about the impacts of a project could reasonably provide a basis for new conditions on a project that are quite different to those suggested by the Coordinator-General.

DRAFT LEADING PRACTICE 6.11

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

'Lawfare'

A small number of resources project approvals have been challenged in the court system in recent years. These include approvals for the Shree Minerals iron ore mine in Tasmania and the Adani coal mine in Queensland.[11] These and other cases brought by environmental or community groups opposing resources projects have been characterised as 'lawfare' by some commentators. Cases relating to decisions under the EPBC Act have received perhaps the greatest attention, and prompted the Australian Government to seek to modify legislation in response, but examples of 'lawfare' exist at the State and Territory level too (for example, cases relating to the New Acland coal mine in Queensland).

Concern with the impact of 'lawfare' on investment motivated the Australian Government's unsuccessful attempt to remove the 'extended standing' provisions of the EPBC Act in 2015

9 These cases are summarised in *New Acland Coal* [2017] QLC 24, [177]-[182].

10 *New Acland Coal* [2017] QLC 24, [190].

11 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 and *Mackay Conservation Group v Commonwealth of Australia* [2015] FCA NSD 33/2015.

(Power and Tomaras 2015). These provisions allow individuals and groups that have recently engaged in conservation activity to seek judicial review of decisions under the Act.

The Commission has previously recommended, in the context of major project approvals, that standing be extended to 'those who have taken a substantial interest in the assessment process' (2013a, p. 35) because the effects of projects can be felt beyond proponents and others directly impacted by approval decisions. The extended standing provisions in the EPBC Act align with this position, as do the standing provisions in the Northern Territory (*Environment Protection Act 2019* (NT), s. 276).

The AEPLG (sub. 29, p. 5) submitted that 'The evidence suggests that the existence of third party appeal rights does not "open the floodgates" to litigation', and this is backed up by the evidence. According to the data, environmental citizen suits are few in number and have not caused significant delays (Australian Senate Environment and Communications Legislation Committee 2015, pp. 4–6; Macintosh, Roberts and Constable 2017). Furthermore, courts have the power to strike down vexatious litigation — that is, legislation brought on trivial matters or for ulterior purposes (PC 2013a, p. 277).

Recent cases of 'lawfare' brought in relation to decisions made under the EPBC Act indicate that the Act has procedural pitfalls. An overly prescriptive Act, with many *procedural* requirements rather than a focus on *outcomes*, creates opportunities to make objections that delay projects, without any consequential benefit for biodiversity or conservation. The first independent review of the Act found that it was 'too repetitive, unnecessarily complex and, in some areas, overly prescriptive' (Hawke 2009b, p. ii).

DRAFT FINDING 6.7

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

6.5 Broader approval processes

Overlap and duplication within jurisdictions

Resources projects are often complex and involve activities that are regulated by multiple pieces of legislation administered by a number of regulators within jurisdictions (chapter 3). Project proponents require a range of assessments and approvals in areas such as environment, planning and water. These can create difficulties. AMEC (sub. 31, p. 15) recounted an example where:

> … the Company has spent an enormous amount of time constantly following up with the different NSW Government departments for progress updates and simple clarifications.

The existence of multiple regulators can also give rise to overlaps in requirements, where the boundaries of their responsibilities are unclear or where regulators overstep their remit. Effective coordination between regulators and regulatory processes is critical to guiding proponents through the approvals system, reducing uncertainty, facilitating timely processing and minimising overlaps and inconsistencies.

While regulatory coordination has improved over the last decade, proponents still have difficulties navigating the regulatory landscape. The MCA (sub. 11, p. 17) submitted that '[m]anaging the myriad approvals and licensing processes can and does lead to additional confusion, costs and delays'. Lack of coordination can cause costly delays and liaising with multiple agencies can also give rise to significant compliance costs.

> Due to policy change, increased regulation, re-structure and an apparent lack of coordinated communication systems between Water NSW, Natural Resources Access Regulator (NRAR), Department of Planning and Environment (DPE) Water and NSW Land Registry Services, the Company has encountered significant issues and waited over 17 months for an approval to de-water the mine workings, and is still waiting. This has caused critical delays to its mine development schedule requiring expensive workaround solutions that may not negate the impact of the delays. (AMEC, sub. 31, p. 15)

> Where multiple agencies have jurisdiction over a project, or an aspect of a project, a number of issues can occur. 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 Energy Ltd, sub. 18, p. 4)

> In Queensland, resource projects have two major licences that must be obtained … The legislation demands the two processes are consistently speaking to each other, however in practice, each [agency's] management system is completely separate. This duplication creates huge inefficiencies and compliance costs for proponents having to navigate two distinct management systems. (QRC, sub. 27, p. 16)

DRAFT 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.

Leading-practice approaches to coordination

The Commission has previously recommended the use of lead agencies or major project coordination offices to improve coordination (2013a, p. 23). Under a 'lead agency' approach, a single agency coordinates project processes across government agencies and provides guidance to proponents. They may have some responsibilities for assessment and

approval but generally do not have responsibility for *all* approvals — the Commission previously commented that this would likely be infeasible and risk regulatory capture (2013a, p. 24). A major projects coordination office performs similar functions to a lead agency but does not have assessment or approval responsibilities.

The Commonwealth and most States and Territories have some variation of a lead agency model and all jurisdictions other than the ACT provide coordination for major projects (which are often subject to a more complex array of approvals) (appendix B). A number of study participants have spoken positively about the approaches that Western Australia and South Australia take to coordination, described in box 6.6.

Most jurisdictions appoint case managers for major projects, which provide proponents with a single point of contact. Participants have spoken positively about existing case management systems, such as that of the Northern Territory Government:

> Whole-of-government support from the Northern Territory Government continued through granting Major Project status and ongoing case management ensured the project was assessed to a high standard in a cooperative manner and the project proceeded. (INPEX, sub. 34, p. 16)

As part of a coordination system, agencies may have memorandums of understanding and administrative arrangements. These define the role of each party and set out procedures and responsibilities for approvals, including under what conditions proposals are referred between agencies. These arrangements can minimise confusion of regulatory boundaries and promote cooperation between agencies. In South Australia, for example, the Department for Energy and Mining (DEM) has arrangements with other agencies covering water, native vegetation, Aboriginal Heritage and environment protection. Victoria's *Mineral Resources Strategy 2018–2023* indicates a commitment to closer coordination and information sharing between regulators (Victorian Government 2018, p. 25).

Box 6.6 Coordination approaches in Western Australia and South Australia

Western Australia

Western Australia provides a lead agency approach with the Department of Jobs, Tourism, Science and Innovation designated as the lead agency for major projects and DMIRS for other resource projects. Projects receive a level of service dependent on their size, complexity, or environmental, economic and social impacts.

The lead agency provides:

- a single entry point for project proponents
- coordination of the approvals process across government for all proposals. It facilitates parallel processing and negotiates timelines between agencies for provision of approvals and advice
- case management officers or teams for larger or more complex projects. Other projects (which represent the majority) receive advice and support from a project officer and referral to relevant agencies
- online application and approvals tracking services.

Cooperative mechanisms include:

- memorandums of understanding
- officer working groups, which include case management officers from different agencies who meet regularly to resolve issues surrounding approvals. These groups are formed on a case-by-case basis
- inter-agency taskforces or committees, which are chaired by the lead agency and comprise of senior or directorial officers from different agencies. Taskforces or committees monitor the progress of approvals, resolve issues and provide advice to relevant Ministers (WA DMIRS nd; WA DPC nd).

South Australia

The lead agency approach in South Australia, provided by DEM, shares similar characteristics with that in Western Australia. It also provides a single entry point, coordination of approvals and case management for major mining projects.

The coordination approach is facilitated by Memorandums of Understanding and Administrative Arrangements between DEM and its co-regulators. Regulators work in parallel, rather than in series, and multi-agency taskforces are assembled for complex projects. DEM uses funds from costs recovered from companies to pay the salaries of staff in other regulatory agencies, which supports more efficient approvals processing (pers. comm., 5 March 2020). This arrangement is likely to also support inter-agency communication.

Parallel processing should be used where possible to minimise delays — such as concurrently processing environmental and development approvals. In Western Australia, the lead agency may facilitate parallel processing from the outset (WA DPC nd, p. 19). Where different agencies require the same information from proponents, they should share information. In Tasmania, the EPA and Mineral Resources Tasmania each have roles in the assessment of 'Level 2' mining and extractive industries projects. To support parallel

processing and continuity of assessment they share publicly available proponent-approved documentation (Tasmanian Department of State Growth, pers. comm., 4 March 2020).

The coordinating agency should not override the decision-making capacity of other regulators who may have greater expertise or further information. Participants have raised concerns about this with regards to the regulatory framework in Queensland (section 6.4) and New South Wales, where:

> … coordination is done by the planning department and for some categories of major projects there are constraints on what conditions can be proposed by expert agencies – i.e., they must be consistent with the approval. This is not an effective concurrence mechanism for agencies with relevant expertise. (EDO, sub. 40, pp. 34–35)

State Agreements (chapter 4) have been seen as another way for governments to facilitate major project approvals. In Western Australia, the State Agreement proposals mechanism provides coordination and a single point of contact within the State (where these were otherwise lacking in the past). The last State Agreement was enacted in 2013. One assessment of these agreements concluded that:

> [T]hey should only be used as a facilitative means of last resort. A significant element of their facilitative value is based on their ability to operate outside the general legislation. In the long run, government action may be better directed towards improving the existing legislative framework. An efficient system should not require exceptions to be made to it, especially where establishing these exceptions is a 'lengthy and expensive process'. (Hillman 2006, p. 329)

Well-coordinated approaches within jurisdictions negate the value of State Agreements as a mechanism for facilitating major project approvals.

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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
- cooperative 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.

Indigenous heritage

Resources project proponents need to identify whether the location of a proposed activity has heritage significance and, if so, the appropriate options for managing that heritage. The Commonwealth and States and Territories each have laws covering the protection of Indigenous and other heritage during resources developments. The Commission has previously made recommendations on Indigenous heritage in the context of mineral and energy resource exploration (table 6.2). Those recommendations have not been fully implemented.

Table 6.2 **Previously identified concerns and recommendations relating to Indigenous heritage**

Concerns
• Inadequate protection of Indigenous heritage. • Overlap between Commonwealth and state/territory legislation. • Inadequate heritage registers and associated information problems. • Costs of conducting cultural heritage surveys, particularly when the area has been surveyed previously. • Delays in identifying, consulting and negotiating with Indigenous parties.
Recommendations
Recommendation 6.1 — The Australian Government should establish a system to accredit appropriate state and territory Indigenous heritage protection regimes, thus reducing the potential for regulatory duplication. Accreditation could only occur once Commonwealth requirements and standards are met.
Recommendation 6.2 — 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 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), on the basis of agreed protocols.
Recommendation 6.3 — State and Territory governments should manage Indigenous heritage on a risk assessment basis. • Where there is a low likelihood of heritage significance in a tenement and the exploration activity is low risk, a streamlined 'duty of care' or 'due diligence' process should be adopted. • Where there is a high likelihood of heritage significance and the exploration activity is higher risk, agreement making should be adopted. • When negotiated agreements cannot be reached, all parties should have access to a facilitation process. • When facilitation is unsuccessful, governments should make decisions about heritage protection based on clear criteria, transparency and consultation with the proponent and Indigenous parties that have authority to speak for country.

Source: (PC 2013b, pp. 146, 170, 177, 188).

Although Indigenous heritage regulation was not a strong focus of submissions, several participants made comments, especially around consultation and compliance monitoring:

- The QLS (sub. 41, p. 8) raised a number of concerns, including: whether Indigenous communities are adequately consulted on heritage when a tenement is renewed or retroactively expanded; a lack of monitoring of heritage compliance during exploration;

and a lack of coordination between the grants of mining tenements and the notification of heritage and other issues.

- The NSWALC (sub. 47, p. 2) expressed serious concerns 'about the lack of enforceability and poor compliance monitoring' of that State's current approach to Aboriginal cultural heritage.
- AMEC (sub. 31, p. 10) pointed to the ongoing Aboriginal heritage-related reforms in Western Australia and Queensland and to the contribution of AMEC members to these processes, including the recommendation for creation of a 'robust and accurate Register of Aboriginal Places and Objects, including site protection by mandatory disclosure'.

INFORMATION REQUEST 6.1

The topic of Indigenous heritage has not been raised by many participants to this study and it is not clear which jurisdictions, if any, could be described as leading practice. Could interactions between Indigenous heritage and the resources sector be improved? Which jurisdictions manage these interactions well already? How do they do it?

Box 6.7 Current reviews of Indigenous heritage legislation

Western Australia is currently reviewing the *Aboriginal Heritage Act 1972* (WA), with the aim of making it 'more culturally appropriate and equitable for Aboriginal people, and more efficient for industry'. After two initial periods of consultation, the Western Australian Government is planning on publishing an exposure draft of the bill (at a date currently unknown) (WA DPLH 2019). This process has been endorsed to this study by Roy Hill (sub. 7, p. 8).

Queensland is reviewing its cultural heritage Acts to examine whether they are operating as intended, are achieving outcomes for Indigenous peoples, and to examine whether they are compatible with the current native title landscape. Consultation closed in mid-2019 and submissions are currently under review (Qld DoATSIP 2020).

New South Wales has consulted on a new Aboriginal Cultural Heritage Bill, which involves multiple measures, including better information management and a new assessment pathway (NSW OEH 2018, pp. 2–5).

South Australia is presently reviewing its approach to cultural heritage management alongside its approach to resources development on native title land, with the aim of providing 'greater clarity for all parties as to when exploration activities affect … Aboriginal heritage' (South Australian Government, sub. 25, p. 11).

Tasmania has also begun a review of the *Aboriginal Heritage Act* 1975 (Tas) its Aboriginal heritage act, with consultation ongoing throughout 2020 (Tas DPIPWE 2019).

Strategic assessment

Project-by-project environmental approval processes are the focus of this chapter but other approaches are possible. Strategic assessments involve assessment of 'the potential impacts of plans, policies and programs across an entire region, catchment area, activity or industry' (PC 2013a, p. 318). They are done in advance of the decision to undertake a particular project, where a plan, policy or program 'has been conceived and is being developed' (Hawke 2009b, p. 79). In this way, they have the potential to improve decision making with respect to cumulative impacts and reduce regulatory burden by making future project approvals within the scope of the assessment less costly and time-consuming.

APPEA (sub. 44, p. 19) submitted that strategic assessments:

> … could address all the low risks and impacts across the sector so the focus of project approvals moving forward could be on the site-specific issue to be considered for an activity.
>
> Strategic assessments may also be able to provide clarity across a broader region to assist in determining what types of activities are acceptable and in what areas, which could streamline the Environment Plan assessment process. It would also be useful in highlighting where certainty in information was low and where potentially future baseline environmental studies for example, should focus.

The Commission continues to support strategic assessments where they can reduce regulatory burden while maintaining or improving environmental outcomes (2013a, p. 339). They may have greater applicability in urban development areas, where the range and scale of future activities is relatively predictable — housing, hospitals, schools, quarries to supply construction materials, transportation corridors and other supporting infrastructure.

Opportunities for strategic assessments covering resources development may be limited. In regional and remote areas, 'the location, size and nature of future resource projects may be difficult to predict' (PC 2013a, p. 324), which can tend reduce the value of strategic assessment. The only strategic assessment that has been completed for the purposes of Commonwealth environmental assessment of resources activities is the *BHP Billiton Iron Ore Pilbara Strategic Assessment* (BHP Billiton 2017). BHP funded this strategic assessment because it expects to be operating a range of iron ore projects in the Pilbara over the long term. Such an undertaking may not be feasible or worthwhile for smaller companies.

DRAFT FINDING 6.9

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

7 Managing environmental and safety outcomes

Key points

- On the whole, Australia's resources regulation delivers relatively good environmental outcomes, but there are certain weak points.
- Several high-profile environmental incidents may be indicative of non-compliance with conditions or ineffective regulations. While systemic improvements have been made to regulators' compliance programs:
  - inadequate resourcing, outdated information systems and limited problem-solving and innovation within regulatory agencies may be compromising regulators' ability to follow a risk-based approach. Resolving these issues would enable a focusing of both regulator and industry resources on serious compliance risks
  - regular reporting that describes compliance and enforcement activities in ways that are accessible to the general public, and communication of serious contraventions and how they have been dealt with, would improve accountability and build trust.
- Environmental offsets offer a way for economically valuable projects to go ahead without hurting biodiversity at a wider scale. But deficiencies in their implementation add to costs and lower the odds that their objectives are achieved.
  - Some offset projects have not been implemented on schedule or as planned, and more generally there is little information to assess whether offsets are achieving their objectives. Offset schemes should be backed by public registers, including information on whether and how offsets have been evaluated.
  - Without an overarching strategy, a series of individual offsets can add up to a patchy whole. Schemes that allow companies to pay into a government-administered offset fund can deliver better outcomes while reducing costs for both companies and governments.
- Many studies have noted that little rehabilitation of resources sites has taken place in Australia.
  - Surety arrangements for rehabilitation generally have been inadequate in practice, but are improving. Where they are used, rehabilitation bonds should cover the full cost of the potential rehabilitation liability — both to minimise the risk to governments and to provide companies with incentives to rehabilitate. Pooled approaches need to manage the risk of moral hazard, and to minimise the possibility of the fund being insufficient to cover a company's rehabilitation liabilities.
- The major resources States are in the process of reviewing or reforming their workplace health and safety frameworks for resources extraction. Recent safety incidents raise concerns about the effectiveness of existing frameworks.

The focus of previous chapters has been on the regulatory systems shaping resources exploration and project development in Australia. This chapter focuses on the effectiveness and efficiency of environmental and safety regulation once projects are operational.

On the whole, Australia's resources regulation delivers relatively good environmental outcomes. The 2016 State of the Environment Report noted that Australia's resources regulation was effective (Metcalfe and Bui 2017, p. 124), and the 2018 Environmental Performance Index produced by Yale and Columbia Universities ranked Australia's environmental performance at 21st out of 180 countries (Wendling et al. 2018, p. vii).

Nonetheless, there have been several high-profile incidents that may be indicative of poor extractive practices, non-compliance with conditions or ineffective regulations. Resources activities are also one of many sources of pressure on Australia's biodiversity, owing both to their geographical footprint, and the risks associated with abandoned mines (OECD 2019). Rehabilitation has been identified as an area for policy improvement (Metcalfe and Bui 2017; OECD 2019), while concerns have also been raised about the performance of environmental offsets and the effectiveness of regulators' monitoring and enforcement activities.

DRAFT FINDING 7.1

Environmental report cards indicate that Australia's resources regulation has been effective in delivering relatively good environmental outcomes. But there have been several incidents and resources activities are one source of pressure on Australia's biodiversity.

Section 7.1 considers current monitoring and enforcement regimes and whether they could be improved, while sections 7.2 and 7.3 discuss potential improvements to environmental offsets and rehabilitation. Section 7.4 examines regulation of workplace health and safety.

7.1 Compliance monitoring and enforcement

Regulators must be able to monitor whether companies are complying with their environmental obligations, and, if necessary, take action to address any breaches — ideally *before* irreversible damage is done. In other words, regulators need to have eyes and teeth. Extending the metaphor, they also need a mouth to provide guidance. Companies with a clear understanding of what they are required to do are likely to be better placed to comply. On the other hand, a poorly designed and administered compliance program can impose unnecessary costs.

Many of the conditions in project approvals require companies to report to regulators on their environmental management processes and performance. Compliance monitoring programs back up this self-reporting with 'boots on the ground' inspections or audits of

project sites. Regulators may be looking for breaches relating to outcomes (such as the amount of wastewater being discharged from a mine) or to processes (such as whether a company is managing the discharges in accordance with a regulator-approved plan). Enforcement actions can range from a verbal warning to a criminal prosecution.

What is leading practice?

Given limited resources, regulators have to manage risks by prioritising their monitoring efforts and choosing how best to respond to different breaches.

A risk-based approach to compliance focuses these decisions around the likelihood and seriousness of adverse outcomes (chapter 3). This approach has found favour among regulatory theorists, and most resources sector regulators now emphasise their adoption of it (see, for example, the Australian Department of the Environment and Energy's compliance policy (2019c)), although how risk-based approaches are applied in practice can vary.

To apply the approach meaningfully, regulators need information and a good understanding of the activities they are regulating so they can identify where the greatest risks lie. A risk-based approach also requires that regulators have the discretion to tailor their response when problems arise, such as choosing between different enforcement options. Inflexible enforcement options (such as requiring particular penalties in certain cases) can constrain the ability of regulators to adopt low-cost enforcement approaches (PC 2019a).

An effective compliance program is also a trusted compliance program. Regulators (and the responsible company) should put a premium on transparency in scenarios where there is a possibility that a regulatory breach has put the environment or health of a community at risk. This means actively seeking to provide the public with information when things have gone wrong, rather than waiting for questions to come to them. A perception that regulators are not interested in keeping the community informed about adverse impacts on the environment, or worse, that they are prioritising sparing their own or a company's reputation, clearly has the potential to damage the community's trust in the regulatory system, and its acceptance of the resources industry as a whole.

Furthermore, transparency adds to companies' incentives to behave well. Being identified as an environmental offender risks damage to a company's social licence (chapter 9), which can be just as powerful a deterrent as any official punishment for an offence.

Clarity around how regulators operate and what their expectations are also makes compliance more straightforward for companies, and may promote their acceptance of regulations and inclination to comply.

Leading practice regulators look for the best way to solve problems. For instance, after noticing a particular problem occurring at a handful of resources sites (perhaps not limited to their own jurisdiction), a regulator might establish an audit into whether companies across the board are equipped to deal with it.

In the longer term, learning and adaptation are core to leading practice. As resources companies adopt new technologies and processes, regulators must be able to keep up to date to understand the implications for regulated outcomes. New scientific knowledge relating to the detection of environmental impacts may also emerge, and leading-practice regulators look for opportunities to incorporate new technologies or uses of data into their practices. Actively following what other regulators are doing around the world or in other Australian jurisdictions can be instructive. Rather than just being a distinct element of leading practice, these sorts of organisational traits are indicative of a sense of purpose at an organisation level, which is likely to flow through to better performance across the board.

Finally, the regulatory bodies responsible for monitoring and enforcement have a unique line of sight when it comes to observing how the nature of approval conditions affects their ability to protect the environment. The Commission has previously noted the potential benefits of a 'feedback loop' between the compliance monitoring and condition-setting processes, whereby any redundant or ineffective approval conditions are systematically communicated to the bodies responsible for setting conditions. A recommended way of doing this would be for regulators to produce an annual major projects compliance statement reporting on their activities and identifying redundant or ineffective approval conditions (PC 2013a).

DRAFT 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.

Compliance systems at a glance

Responsibilities for monitoring and enforcing environmental regulations in States and Territories are spread across a range of government departments and bodies. In some jurisdictions, environment departments oversee most or all environmental regulations (such as in Queensland), while in others industry departments have more of a role (such as in South Australia), and in others again a statutory body takes the lead (such as in Tasmania) or has specific functions that complement those of a department (such as in Victoria).

Two Commonwealth regulators also play important roles. The Department of Agriculture, Water and the Environment (DAWE) monitors and enforces matters protected under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) (chapter 3). There are no formal, documented arrangements for the DAWE to delegate this responsibility to State regulators, but the Department's compliance policy states that it will 'work with co-regulators to ensure an appropriate approach is taken' (DoEE 2019c, p. 11). Offshore petroleum activities in Commonwealth waters are regulated by the National

Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), a statutory agency.

The enforcement toolkit

With the exception of the Northern Territory, where resources regulation is being substantively reformed, the Commission has not seen evidence to suggest that regulators have been hampered by a lack of enforcement options.

Enforcement powers among regulators are largely similar. The Queensland Department of Environment and Science, for example, uses:

- warning letters
- infringement notices (small fines used for minor contraventions)
- administrative actions
- civil court orders
- enforceable undertakings (which legally require an operator to take or cease certain actions)
- suspensions or cancellations of licences, permits or authorities
- prosecutions (Qld DES 2019a).

Likewise, the various compliance frameworks and strategy documents published by Australian resource regulators do not reveal any glaring inter-jurisdictional differences in how regulators are *using* their enforcement powers. Most regulators refer to some form of the 'responsive regulatory pyramid' developed by Ayres and Braithwaite (1992), where more supportive actions are used in the first instance, with a willingness to escalate to a stronger enforcement response as needed.

Is monitoring and enforcement effective and efficient?

Evidence on the effectiveness and efficiency of monitoring and enforcement activity throughout Australia is limited — in large part a reflection of the lack of available information (discussed further below).

There have been incidents in the resources sector over the past several years that may indicate a level of non-compliance — mine fires, tailings dam failures and a major oil spill have all occurred since 2009, along with numerous smaller infringements. The degree to which these incidents were due to inadequate monitoring and enforcement, however, is unclear. Ineffective regulations, rather than non-compliance with them, could be to blame.

Some participants have suggested that regulators across the board are not fulfilling their compliance roles adequately. The Australian Environment and Planning Law Group (sub. 29, p. 5) claimed that:

> … there is anecdotally very little monitoring undertaken by regulatory authorities and similarly very little compliance action taken in respect of any breaches discovered.

The Environmental Defenders Office (sub. 40, p. 32) had a similar view, observing that a 'lack of resourcing for the regulator such that assessment and compliance processes are jeopardised' is 'common to most jurisdictions'. And the Queensland Law Society (sub. 41, p. 8) raised non-compliance with mining tenement boundaries as a specific concern, noting the potential adverse impacts on native title holders (chapter 5) as well as the environment.

Findings from significant incidents in recent years point to some deficiencies. The Hazelwood Mine Fire Inquiry described that incident as a 'foreseeable risk that slipped through the cracks between oversight agencies' (Teague, Catford and Petering 2014, p. 150), and a dam collapse at the Clarence coal mine which contaminated a river in 2015 was described by the NSW Environment Protection Authority's (NSW EPA) legal representative as 'a disaster waiting to happen' given the 'significant incompetence' which characterised the dam's management (Brown 2017; NSW EPA 2015). Linc Energy was found by a Queensland judge to have offended 'persistent[ly] and in clear breach' of obligations at its underground coal gasification plant over the course of seven years up to 2013, having allowed toxic gasses to escape and contaminate surrounding air, soil and water (Sibson 2018). Monitoring and remediation of the site, which a court was told could take decades to complete, has been left to the Queensland Government after Linc entered liquidation (Ludlow 2018; Qld DES 2019b).

There have also been instances of repeated offences or failures at some sites, suggesting that regulators have not always escalated scrutiny and enforcement in accordance with non-compliance risk. The McArthur River mine in the Northern Territory has been in the headlines several times for different environmental problems (Arnost 2013; Bardon 2016; Davidson 2017); a 1400 cubic metre leak of radioactive slurry at the Kakadu based Ranger uranium mine in 2013 followed tailings dam leaks into surrounding creeks in 2009 and 2010 (ABC News 2016; Murdoch 2010); and the Abbot Point port in Queensland has seen two coal spills in as many years (Crockford 2019; Robertson 2019).

Conversely, the New South Wales Minerals Council (sub. 28, p. 37) claimed that regulators in the state take an overly harsh compliance approach, 'often presuming an offence has occurred without affording the proponent or operator an opportunity to explain the circumstances,' and maintaining 'strict adherence to a stick rather than carrot approach in circumstances where not warranted'. Similarly, a sizeable 38 per cent of stakeholders disagreed that the Department of Environment and Energy's (now DAWE) compliance and enforcement actions were proportional to the level of risk when surveyed in 2017-18 (DoEE 2019f, p. 35).

A general caveat around the discussion of these incidents is that compliance arrangements have undergone substantial changes in recent years (discussed below). Regulatory deficiencies that played a part in some of the incidents may have since been addressed.

The remainder of this section considers examples of regulatory behaviours or activities that are consistent with the leading-practice features of compliance programs identified above, and of those (or their absence) that are *not* consistent. The Commission is seeking further evidence that would help to determine the degree to which regulators across the board are meeting leading practice.

INFORMATION REQUEST 7.1

Is there evidence of any systematic deficiencies in the compliance monitoring and enforcement effort of regulators overseeing resources projects? In particular:

- *Are regulators adequately resourced to carry out effective monitoring and enforcement programs?*
- *Do the monitoring and enforcement approaches of regulators represent good risk-based regulation?*

Do regulators have the information and knowledge to identify risk?

A number of audits into regulators in the last decade have revealed deficiencies in the use of information, many of them serious enough to compromise the adoption of a risk-based approach. Audits of the Queensland and Western Australian environmental regulators in 2013-14 and 2011 respectively, give an indication of how fundamental these deficiencies can be. In Queensland, a third of the regulator's proactive inspection records over a period of several months 'did not contain sufficient information to identify whether there were non-compliance issues' (QAO 2014, p. 38), while in Western Australia, the regulator 'rarely knew' if mine operators had lodged compulsory annual environmental reports (OWAAG 2014a, p. 6).

While follow-up reports on those audits found that the problems identified had largely been remedied, more recent revelations suggest some regulators are still lacking in this area.

The Australian Department of Environment and Energy (now DAWE) recently told Senate Estimates that providing a list of the offsets its staff had monitored for compliance with their approval conditions, or a list of which projects had offset requirements in their approvals, would take 'extensive searching of records' (SECRC 2019, p. 2). This followed a 2016-17 report on the compliance functions of the same department by the Australian National Audit Office that noted 'continuing IT system functionality limitations' affecting the department's ability to monitor its own performance (ANAO 2017b, p. 9).

Another audit in the same year in New South Wales found major shortfalls in the state regulator's monitoring of mine rehabilitation, including inadequate information requirements in mine operators' annual reports, and an inability to verify some information that *was* reported to them (Audit Office of New South Wales 2017). Reforms aimed at addressing some of these shortfalls are underway (NSW DPE 2017b).

More recently, an audit into the regulation of coal seam gas by the Department of Natural Resources, Mines and Energy and the Department of Environment and Science in Queensland found a lack of risk targeting, and that inadequate data collection prevented both agencies from assessing how effective their enforcement activities are. Limited data sharing between the two departments meant that overall regulatory effectiveness was further compromised (QAO 2020, p. 5).

Study participants have pointed to the impact of capability gaps on regulators' treatment of risk. The New South Wales Minerals Council (sub. 28, p. 37) stated that:

> Officers of the Resources Regulator [are] lacking in experience and understanding of the exploration sector. Or the expertise of the regulator is often not relevant to the present project or the issue being dealt with — issues arise where a person undertaking an inspection has expertise in an area and incorrectly makes recommendations based on this expertise, even if not relevant to the present context of the situation.

Similarly, Arafura Resources told the Commission that a lack of understanding of mining in the Northern Territory regulator was an underlying problem, and gave an example of an operator needing to perform monthly tests that produced easily predictable results (pers. comm., 28 February 2020).

Chapter 11 discusses the capability of regulators more broadly.

Learning and problem-solving

As noted earlier, leading practice requires that regulators seek to improve their regulatory practices through learning and adapting to regulatory issues (policy departments may also have a role in research and information gathering to improve regulators' knowledge).

The New South Wales Resources Regulator offers a leading practice example of a problem-solving mindset to compliance. Its biannual *Compliance Priorities* documents describe targeted programs it will carry out over a six-month period, often in response to issues identified through regulatory activity, such as non-compliances being at the root of recent incidents, or emerging technologies. For example, the January–June 2020 edition describes the regulator's plan to improve industry's understanding of tailings dam management, after a project revealed uncertainties and knowledge gaps (NSW RR 2020, p. 4).

Beyond trying to ensure that industry is following leading-practice environmental management, regulators can play a role in research to uncover new best practices or sources of problems. Between 2011 and 2015, the NSW EPA conducted a series of activities

designed to improve the understanding and control of dust emissions from coal trains. This culminated in the commissioning of a detailed statistical analysis which suggested that particulate emissions near the rail corridor mostly came from dust being stirred up off the tracks or wagon parts, rather than emanating directly from loaded train wagons or diesel exhaust fumes as had been hypothesised (NSW EPA 2019b; Ryan and Malecki 2015).

Two other examples from the NSW EPA over 2018-19 exemplify the sorts of improvements regulators should be looking for, relating both to their processes and use of technology.

- The EPA's Gas Regulation branch found that about 20 per cent of active licence conditions in the Narrabri Santos Gas Project could be regulated using remote sensing technology, and that all compliance tasks would be more effectively performed using the technology based on a cost–benefit analysis (NSW EPA 2019d, p. 47).
- As part of an internal review, the EPA found that half of companies eligible for reduced licence fees in exchange for having good environmental management systems had been reporting incorrect information to the EPA about those systems, and that certifications of the systems had been of poor quality. The findings have fed into revised annual reporting questions and guidelines for the management systems (NSW EPA 2019d, p. 49).

The problems regulators can help solve can also extend beyond the practices of companies. In 2018-19, the Western Australian Department of Mines, Industry Regulation and Safety identified an area of mineral sands tailings as being safe to use as road fill, saving the state from needing to purchase other materials and reducing the environmental impact of a new road building project (WA DMIRS 2019a).

These examples are not intended to be exhaustive — there may be many cases of other environmental regulators doing similar sorts of things, perhaps without always documenting them publicly.

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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 respective examples of these practices.

Regulators could be more transparent

While regulators in all jurisdictions provide reports summarising their 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 the most consequential activities a regulator has been doing throughout the year, and to assess the overall state of play with compliance.

Community confidence in the regulation of the sector could be enhanced by publicly-oriented reports that qualitatively describe regulators' activities, with a particular focus on projects that have generated the most community concern. On the latter, it would be ideal for regulators to focus on specific issues that have been raised by communities, spelling out their responsibilities in addressing them and how they have been discharging those responsibilities.

A finding from the Australian National Audit Office's 2016-17 report (2017b, p. 31) into the Australian Department of the Environment and Energy's (now DAWE) EPBC Act compliance monitoring gave a blunt assessment of this information gap.

> Performance information reported externally by Environment does not currently provide stakeholders with sufficient insights into the extent to which compliance monitoring activities have been effective in protecting the environment from significant impacts.

The Commission is not aware that reporting has been brought up to standard since. The Department publishes an annual list of audits into individual companies noting any instances of non-compliance with approval conditions, as well as a register of infringement notices (although it has only issued six of these since 2015 (DAWE nd)), but there is no document summarising the Department's thinking about its compliance activities, such as the lessons it has learned.

In September 2018, the gas company INPEX was found by the Department of the Environment and Energy (now DAWE) to have released certain chemicals into the air in breach of the company's approved management plan, which 'may have placed the immediate environment including Darwin Harbour at risk of heightened PFAS [the chemicals] levels' (DoEE 2019d, p. 2). However, the only reference to this on the Department's website is a single-sentence on its infringement notices page stating that the company was issued with 'an infringement notice of $12 600 for contravening condition 8 of EPBC 2009/4208' (DAWE nd). The findings of the investigation were only released and reported due to a Freedom of Information request by the Australian Conservation Foundation (Bardon 2019).

Similarly, NOPSEMA's *Annual Offshore Performance Report* for 2016 noted a 10 500 litre oil spill (NOPSEMA 2017, p. 31), but the regulator did not publicise its location or the name of the company responsible, claiming it had 'an implied duty of confidence' to companies that reported leaks (Slezak and Robertson 2017).[1]

Chapter 11 discusses how separating regulatory from policy responsibilities may promote transparency.

[1] In this instance, the company (Woodside) came forward voluntarily following media reporting of the leak.

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Limited transparency in most jurisdictions means that evidence about the effectiveness of compliance monitoring and enforcement activity is limited. This situation risks damaging public confidence in the regulation of projects.

Some initiatives exemplify leading-practice transparency

That said, some leading-practice examples of transparency can also be found.

The NSW Resource Regulator publishes a range of comprehensive reports on its activities, including the full text of its enforceable undertaking documents, investigations (though most of these relate to safety rather than environmental practices), and summaries of the outcomes of the compliance priority programs discussed above. And NOPSEMA publishes a quarterly online magazine aimed at a general audience.

The NSW Resource Regulator's *Compliance Priority* documents also serve to provide clarity for industry. The documents function as a warning to companies of what the regulator will be scrutinising, giving them a chance to get their houses in order. The outcome reports detail the number of sites visited as part of the programs and any actions taken, so companies know how others were treated by the regulator.

The NSW EPA consults four times a year with community-based committees located in the state's coal-mining regions on measures to monitor and improve air quality (box 7.1), enabling a regular dialogue through which it can explain its activities and receive feedback.

Box 7.1 **Air quality committees in New South Wales**

Consultative committees made up of community, industry, and local and State government representatives provide advice to the NSW Environment Protection Authority (EPA) on air quality monitoring and management in the Upper Hunter and the Namoi, and on environmental management more broadly in Newcastle. The Newcastle and Upper Hunter committees were originally established to advise on the design and operation of local air quality monitoring networks, which provide public access to hourly, real-time data.

Minutes from the committee meetings, and presentations made at them, are published on the EPA's website. Examples of meeting items include:

- presentations from the EPA, such as one analysing trends in complaints made coal mine dust
- seasonal air quality reports from the NSW Department of Planning, Industry and Environment
- a local council's overview of a consultation session for a review of national air quality standards for SO_2 and NO_2, with a discussion of the council's position
- a request from an industry representative for the group to assist in facilitating greater access to real-time DPIE data, to help projects to improve their predictions of dust and blast impacts.

Sources: NSW EPA (2019a, 2019c).

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Regular public-facing statements describing regulators' compliance activities and lessons learned from them, such as the New South Wales Resource Regulator's *Compliance Priorities Outcomes* reports, or NOPSEMA's *The Regulator* magazine, help to improve community confidence in the sector's regulation.

Regulators should also inform the community of any contraventions that may have put the environment or community at significant risk, and any actions they have taken in response. The New South Wales Resource Regulator's investigation information reports, and its publication of enforceable undertakings, are good examples.

Monitoring and enforcement have been evolving

Governments and regulators have actively sought to improve their monitoring and enforcement approaches in various ways over the past several years.

New regulators (such as NOPSEMA and the New South Wales Resources Regulator) have been established, and major inquiries and reviews have prompted reforms to regulators' practices or to regulations themselves.[2] Follow up reports to the audits of the Department of Environment and Energy (ANAO 2017b), and the Queensland (QAO 2017) and Western Australia (OWAAG 2014a) regulators, found that the major weaknesses identified had largely been addressed.

Governments and regulators have shown a willingness to accept criticisms levelled at them in these reviews. For example, the Northern Territory Department of Environment and Natural Resources fact sheet on Environmental Reforms (2019, p. 1) spells out several inadequacies identified in their current system, and states that:

> These issues result in our current system being slow and costly for industry and government, complex for regulators and unclear in its outcomes for the community. These are not matters that can be resolved with minor 'tweaking' of the existing legislation. These inadequacies have contributed to a general lack of confidence in the Territory's capacity to manage the environment, and to attract and facilitate industry investment for ecologically sustainable development.

For all this, the resourcing of regulators (chapter 11) will ultimately be a major factor in the success of their compliance efforts.

2 For example, the Independent Inquiry into the Environment Protection Authority Victoria (2016), the Audit Office of New South Wales' Mining Rehabilitation Security Deposits Report (2017), and the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (2018) have all influenced significant reforms.

7.2 Offsets

One common approval condition for resource projects is that the proponent take action to *offset* some or all of the project's adverse impacts on some measure of biodiversity. What counts as an offset can vary. The most common type are actions that protect or improve the environmental quality of an area of land, but less direct activities such as research projects are also sometimes allowed. Most policies also require or prefer that offsets deliver benefits that are 'like-for-like' with the effects of a project. For example, a project that clears an area of koala habitat may be required to protect or establish an area of koala habitat elsewhere.

The motivation behind offsets is to allow for environmentally damaging but economically valuable developments to go ahead without compromising overall environmental quality, but achieving this goal is not straightforward (box 7.2).

Resources projects make up a minority of the activities requiring offsets (housing, transport infrastructure and agricultural projects make up the majority), but can account for a large share of offset expenditure.[3] For example, a development at the Hail Creek coal mine in Queensland in 2018 involved a $24 million offset payment, a figure several times greater than the sum of all other offset payments made in the state between 2014 (when the current scheme commenced) and July 2018 (Queensland Government 2019a, p. 10, 2020).

Box 7.2 Offsets are a mechanism for reflecting environmental damage in project costs

As outlined in chapter 3, it is appropriate that the external costs of resources projects (such as habitat and biodiversity loss due to land clearing) are fully factored into investment decisions.

Valuing habitat and biodiversity is fraught as there is no observable market price. Offsets essentially seek to impose a 'price' by requiring like-for-like replacement of affected vegetation or animal habitat.

But like-for-like is not always achievable, as an offset may not replicate the ecosystem adversely affected by a resource development. Hence offsets policies use rules of thumb to determine the level and nature of offset required to replace affected vegetation. These rules of thumb can mean that offset costs exceed or fall below the value of the environmental damage.

Offsets policies that allow more degrees of freedom in meeting offset obligations, such as financial contributions, can reduce some of the costs to companies, including by providing greater clarity. Financial contributions can also give governments more freedom and control to deliver priority environmental services at scale. The challenge is to determine the appropriate level of contribution.

3 Based on listings from the public registers of the Queensland, Western Australia and South Australia offset schemes.

Offsets can be unduly costly for resources companies…

That offsets can be costly for companies is not in itself a problem. However, some aspects of offsets policies or their implementation may be creating unnecessary costs and project delays.

The handling of the EPBC Act offsets policy is a source of frustration

Study participants noted poor processes and a lack of transparency from the Australian Department of the Environment and Energy (now DAWE) in applying the EPBC Act offsets policy. Both the NSW Minerals Council (sub. 28, p. 35) and the Queensland Resources Council (sub. 27, p. 18) pointed to changing interpretations of offsets policy with little transparency. For example:

> A simple offset land swap was proposed with the Commonwealth assessment officer requesting onerous reassessment that was inconsistent with the original approved assessment. The officer indicated that an 'evolution of the interpretation of the offsets policy' was the driver for the additional information required. This was not clear, predictable, open or transparent. (NSW Minerals Council, sub. 28, p. 35)

In addition, Anglo American (sub. 42, p. 10) noted the lack of statutory timeframes for Offset Management Plan approvals and emphasised that 'the timing of [Offset Management Plan] approvals are becoming one of the biggest risks of delays to the commencement of mining projects'.

Offsets are an area of Commonwealth–State duplication

Offsets are a major source of the Commonwealth–State approval conditions duplication discussed in chapter 6 (Anglo American, sub. 42, p. 3; NSW Minerals Council, sub. 28, p. 35; Rio Tinto, sub. 26, p. 6).

Some State offset policies have provisions that attempt to streamline offset processes in these instances, but differences in the types of biodiversity values the policies are meant to protect, and in their rules for what is an allowable offset, mean this might not be straightforward. For example, the Western Australia Environmental Offsets Guidelines (Government of Western Australia 2014, p. 6) note that:

> … the [matters of national environmental significance] that are considered by the Commonwealth Government (for example threatened species and ecological communities) are only a subset of the matters that the State considers (e.g. biodiversity, wetlands). As such, the State may require offsets to other environmental values which are not relevant to the EPBC Act.

The Queensland Resources Council argued that although the state's *Environmental Offset Act 2014* minimised duplication by not requiring an offset for 'the same matter' as required under the EPBC Act, 'greater clarity is needed as to what is considered "substantially the same matter"' (sub. 27, p. 14).

On the face of it, it seems unlikely that there would be any *philosophical* differences between the Commonwealth and State policies large enough to warrant them running parallel schemes. There is already some movement towards harmonisation, with the New South Wales and Australian Governments currently working towards a formal alignment of their schemes (NSW DPIE 2019a). Chapter 6 discusses possible pathways towards harmonising Commonwealth and State approval conditions more broadly.

…and it can be difficult to translate theory into practice

Offsets may not deliver intended environmental benefits

For one activity to be considered an offset to another, it must be additional to what would have occurred in its absence (the baseline).

Determining the baseline is not straightforward, and the assumptions made in predicting it are not always clearly spelled out in offset policy documentation. They also differ significantly across jurisdictions. One study estimated that the baseline rates of vegetation loss implicitly assumed when calculating the benefits of land conservation for offsets was several times higher than recent observed rates of deforestation in some States (Maron et al. 2015). If the rates of loss assumed in offset determinations are as inaccurate as this suggests, a meaningful proportion of claimed offset benefits may be illusory.

Some offset activities or policy rules appear to have violated the additionality principle more blatantly. Despite acknowledging the need for additionality, a previous New South Wales offsetting policy explicitly allowed for the same land management actions to generate credits both for biodiversity offsetting and for a separate carbon offsetting scheme (NSW OEH 2014). In one case, the Department of Environment deemed the ACT Government's rezoning of an area of land as a nature reserve to be a 'de facto' offset for a residential development (DoE 2014d, p. 19). The rezoning occurred 12 years in advance of the development and before any offset policy was in place, and was not described as being linked to offsetting when it was announced (DoE 2014d, p. 19; Gibbons and Zeil 2014).

Not all projects achieve their objectives

There is at least one case of a company not having finalised its offsets years after having commenced the mining activities necessitating them. The Ulan coal mine, approved by the New South Wales Department of Planning in 2010, was still in the process of securing offsets attached to the approval as of 2019 (DoEE 2019e). Questions were also raised in 2019 over whether the Maules Creek coal mine in New South Wales had secured the offsets required under its EPBC Act approval, four years after having begun land clearing (Parliament of New South Wales 2019; Slezak 2018).

Further, implementation of an offset project does not guarantee its success. One $200 000 project aimed at replicating nesting sites for three threatened bird and possum species was

found to have made almost no impact on those animals (Lindenmayer et al. 2017). An analysis of offsets in Western Australia found that 30 per cent produced no outcome (May, Hobbs and Valentine 2017, p. 6), some due to non-compliance with approval conditions while others failed despite fulfilling them. The same study found that almost a quarter of offsets currently being implemented had unknown reporting requirements, meaning their future outcomes may be difficult or impossible to determine (May, Hobbs and Valentine 2017, p. 4).

There is a view among some experts that while in some cases the principles behind the methods used to assess the environmental impacts of a land-clearing activity or offset are sound, the application of these principles by regulators is not consistent, nor always of a high standard (Maron, pers. comm., 22 February 2020). The complexity of ecological science, and resourcing issues in regulators (chapter 11), may be one reason for this.

Greater transparency is needed

There is little transparency around the status and outcomes of offsets, and the decisions regulators make when applying offset policies to project approvals — often the only public information about their status comes from (costly) freedom of information requests.

Statements by two conservation groups during a New South Wales Legislative Council Inquiry into koala populations and habitat give a picture of the difficulty such organisations have had in understanding how the State's offset policy is being applied.

- A representative for the Wando Conservation and Cultural Centre expressed confusion over continued extensions granted to the Maules Creek mine to secure long-term conservation agreements for its offsets:

  > That is the question we ask year after year and extension after extension. Why are they getting extensions? The documents that we have received are the culmination of literally years of community groups writing to the department through the community consultative committee and through GIPAA [Government Information (Public Access) Act, analogous to Freedom of Information in other jurisdictions] requests. (Parliament of New South Wales 2019, p. 6)

- When a representative from the NSW Wildlife Information, Rescue and Education Service was asked if she was able to release rescued koalas in offset areas, she explained that she could not because no one had given her access to where those areas were located (Parliament of New South Wales 2019, p. 8).

The Australian Conservation Foundation (sub. 32, p. 12) also noted that:

> There is also a significant absence of evidence that demonstrates, at a policy level, that biodiversity offsets are fulfilling their stated objectives of no-net loss and/or improvement and maintenance of the populations of threatened species.

While it can often take some time before the outcomes of an offset project can be evaluated, the onus should still be on governments to publicly communicate what they do and do not know. Transparency around how policies are carried out and regulated is important for

supporting community and industry confidence in the regulatory system (chapter 3). At the moment, however, it is difficult for an outside observer to feel assured, based on the limited publicly available information provided by regulators, that offset conditions as spelled out in project approvals are being delivered, and that the stated objectives of offset policies are being achieved.

A role for registers

One tool for governments to improve the transparency of their offset schemes is to maintain a public register of planned and existing offsets. These are already in place in Queensland, Western Australia and South Australia, and, in a more limited fashion[4], in New South Wales.

The 2012 *EPBC Act Environmental Offsets Policy* stated that a register would be made available on the Department of Environment's website (DSEWPaC 2012, p. 24). The department acknowledged the register's absence in 2014 and stated that it was still being considered (SECRC 2014, p. 83), but never went on to establish it.

Registers should include basic information about both the projects with offset conditions placed on them, and the offsets themselves, including their biodiversity values, location, date of approval, completion status, and follow-up evaluations of benefits. Western Australia's offset register is an example of leading practice.

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

Making offsets go further

One point of difference between offset schemes in different jurisdictions is the process for selecting an offset activity. In some cases, the onus is on companies to propose an acceptable offset; in others they also have the option of paying into a government-administered fund to be used for offset purchases. The latter approach effectively turns offsets into a hypothecated tax intended to be equivalent to environmental impacts. Beginning in 2014 with one in

4 The New South Wales Biodiversity Offsets Scheme transactions register provides information about the region and vegetation type of credit exchanges representing the acquisition of offsets from a landholder, along with the number and cost of credits, but does not identify the land-clearing activities the credits are being used to offset.

Queensland, funds have now also been established in New South Wales, South Australia, and Western Australia for projects in the Pilbara region (where it is the only option for proponents). New South Wales also has a market for offsets — in lieu of using the fund, proponents can purchase offset credits generated by landholders to meet their offset requirements.

Under certain conditions, offset fund models can improve environmental outcomes as well as potentially reduce costs for companies. In particular, governments may be better placed to determine what offset projects are likely to deliver the highest gains for the community.

Putting the selection of offset projects in the hands of government bodies and decoupling it from the project approval stage removes some of the heat on the assessment process (regulators still need to assess the biodiversity impacts of the land-clearing activity in either case, including whether it can be adequately offset at all). Instead of regulators needing to cast a critical eye over another set of documentation provided by companies and testing it against a minimum requirement, government bodies can develop strategies to find offsets with the best prospects of achieving good outcomes (see below).

There is also the benefit of aggregation. With a fund, money that would otherwise have to go towards smaller offsets can be pooled for larger ones. This can open up opportunities for more promising types of offsets that are only possible at a larger scale. For example, Western Australia's Pilbara Environmental Offsets Fund will be used to deliver 'larger and more strategic landscape-scale projects than would occur if individual offset projects were delivered independently' (WA DWER 2019, p. 1).

Finally, the option of paying into a fund saves companies from facing another discrete regulatory process in the form of an offset strategy, or the inefficiency of shopping for suitable offsets in a thin market. The Queensland Resources Council (sub. 27, p. 15) noted this advantage of 'greater flexibility' when comparing the payment option in Queensland's offset scheme to the EPBC Act offsets policy. Similarly, the NSW Minerals Council (sub. 28, p. 53) has promoted offset funds as 'a win-win for business and the environment'.

What makes for a good offsets fund?

A number of characteristics makes for a good offsets fund.

First, a fund will only be as good as its governing rules, the thinking that goes into identifying offset opportunities, and the work that goes into executing those strategies. There is merit in splitting some of the responsibilities for these different elements.

- Government environment departments, subject to ministerial oversight, should set the principles behind the fund's use and the offset scheme more broadly — this involves making value judgements, which elected officials should be able to influence.
- The management of the fund, including developing strategies for offset projects as well as their actual selection and procurement, is best handled by a separate statutory body such as the Biodiversity Conservation Trust in New South Wales. This would help to

ensure that offset schemes do not become deprioritised or lost within large departments. For example, the Biodiversity Conservation Trust provides ongoing guidance to landholders it has made conservation agreements with, helping to grow a supply of offsets (NSW Government Biodiversity Conservation Trust 2018). However, the benefits of this separation may not be worth the costs for jurisdictions with lesser volumes of offsets.

- Evaluations of the success of offset policies in achieving their objectives should be carried out by an independent body, so as to avoid conflicts of interest.

Second, any fund will operate within the context of a range of other government activities aimed at improving the environment, and should complement those activities where possible.

Third, offset strategies should be informed by the best available data and science to allow funds to achieve their greatest benefits. This allows departments to focus their attention and resources on certain areas identified as having the greatest potential for good biodiversity outcomes, and work with local landholders who might have a role to play in achieving them. For example, Queensland's Brigalow Belt offsets tender project involved mapping properties in the region for their biodiversity values and making contact with target landholders before setting up a tender (Queensland Government 2019b).

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

While the principles behind the use of such funds, including on what basis prospective offsets 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, such as the Biodiversity Conservation Trust in New South Wales.

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Science-based implementation strategies for the use of offset funds are key to achieving their intended purpose. These should have regard to any existing recovery plans for relevant species, and be publicly available. Queensland's Brigalow Belt offsets tender project is a leading-practice example.

7.3 Resource site rehabilitation and decommissioning

Resource site rehabilitation refers to the activity needed to enable a site to be productive after mining is complete. This activity may include restoring the land to its pre-mining state, or remodelling it for different uses. The Australian Government (2016b, p. 3) noted that rehabilitation should have three broad objectives:

- long-term stability and sustainability of landforms, soils and hydrology
- partial or full repair of ecosystems
- prevention of pollution to the surrounding environment.

In all States and Territories, rehabilitation objectives are required to be set during the initial approval process, and some form of financial assurance has to be given to support planned rehabilitation (appendix B).

There are also decommissioning and rehabilitation requirements for oil and gas extraction facilities. Under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), companies must remove all structures that are not to be used for operations authorised by their title.

This section considers whether rehabilitation and decommissioning policy has been effective, and presents best-practice approaches to this element of regulatory systems.

Little rehabilitation and decommissioning has taken place

Despite the focus that has been placed on rehabilitation and decommissioning, several recent reviews and studies have noted that little rehabilitation has occurred in Australia.

- 'There are few examples of large mines in NSW which have been successfully rehabilitated and closed to modern environmental standards' (Audit Office of New South Wales 2017, p. 6).
- Areas being rehabilitated in Queensland are about 9 per cent of the disturbed mining area — and areas certified as rehabilitated represented less than 0.25 per cent of the area of land disturbed (QTC 2017, p. 34).
- In 2017, the Australia Institute conducted a study into the number of mines that had been rehabilitated. While information is incomplete, it only found 22 mines that had been listed as rehabilitated and relinquished (mostly barite or older mines in South Australia). (Campbell et al. 2017, p. 10)
- While some small oil and gas projects have been decommissioned, as of 2018 the Commonwealth regulatory framework had not been tested on larger projects (DIIS 2018, p. 6).

The lack of rehabilitation and decommissioning reflects, at least in part, the fact that policy frameworks for the rehabilitation and decommissioning of resources projects only became a

focus for jurisdictions in the latter half of the 20th century. This has led to a large legacy problem of mines abandoned by companies. Unger et al. (2012) estimated that there could be more than 50 000 abandoned mine sites in Australia.

However, the lack of rehabilitation and commissioning may also reflect other factors including the longevity of resource sites and deficiencies in current rehabilitation and decommissioning policies.

DRAFT FINDING 7.3

There are few examples of large resource extraction sites being rehabilitated or decommissioned in Australia — in part because rehabilitation and decommissioning only became a policy focus for governments in the latter half of the 20th century. As a result, there is a large number of legacy abandoned mines.

Many mines have been placed into care and maintenance

Where mining operations have been suspended, but not permanently shut down, they are described as being in 'care and maintenance'. Participants in this (and previous studies) have raised concerns about companies placing mines into care and maintenance to avoid having to rehabilitate a site (CFMEU, sub. 16, p. 4; EDO 2017, p. 6).

There are legitimate reasons why mines are placed into care and maintenance. The key driver is often low commodity prices that affect the financial viability of a site. In these cases, the company may choose to manage the site until economic conditions improve (Government of Tasmania 2017, p. 5; MCA 2017, p. 23).

Mines in care and maintenance must continue to comply with their environmental and other obligations. For example, they must continue to maintain the site safely, and hold financial assurances where required (discussed below). The liability for rehabilitation remains with the company. However:

> Sites in C&M present a higher risk to the State with less operator personnel on site to maintain vital infrastructure and monitor performance. Progressive rehabilitation activities may cease … Entering into C&M may be a precursor to the operator's default. Often such sites slowly decline and only have their profile raised when environmental harm spreads to adjoining properties. (QTC 2017, p. 37)

The Commission does not see a strong case for limiting the ability of a company to place a mine into care and maintenance. Nonetheless, given the greater risk to the State when a mine is placed in care and maintenance, it seems reasonable that there would be a commensurately greater level of scrutiny placed on these mines. Several States have requirements on mines entering care and maintenance — for example:

- Western Australia requires resources companies to prepare a care and maintenance plan

- recent amendments in Queensland require that the manager of the financial assurance scheme be notified when a mine enters care and maintenance.

However, the Senate committee inquiry into mine site rehabilitation (SECRC 2019, p. 1) noted that 'most states and territories do not appear to hold detailed records of the number of sites in care and maintenance and the length of time these sites have been in that state'. Similarly, Campbell et al. (2017, p. 1) noted the data limitations in this area.

The Commission considers that best practice requires that the regulator at least be notified when a mine is entering care and maintenance, to allow it to manage the environmental and financial risks. Additional care and maintenance plans may be needed to manage these risks.

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Resources sites that are placed into care and maintenance can pose risks to the environment, and the operator may be at greater risk of default. These risks can be managed by a requirement to notify the regulator where a site is placed into care and maintenance, and the preparation of care and maintenance plans that identify these additional risks, such as those required in Western Australia.

Selling sites with rehabilitation and decommissioning liabilities outstanding

Some participants to the Senate inquiry into mine site rehabilitation expressed concern at the practice of mines with significant rehabilitation liabilities being sold to smaller miners, who may be less capable of fulfilling their responsibilities (for example, DIIS 2017, p. 37; EDO 2017, p. 13).

These concerns highlight the need to get the financial assurance mechanisms right. If a company sells a mine with financial assurance that covers the potential cost of rehabilitation, governments can access the bond in the event that the smaller company is unable to fulfil its obligations. The practice of selling resource sites late in their life is more of a concern where financial assurance is inadequate. Financial assurance is discussed further below.

DRAFT FINDING 7.4

Concerns about resources sites being sold to smaller firms that may not have the resources to rehabilitate them are best addressed through effective rehabilitation bonds (draft leading practice 7.9).

Financial surety arrangements have been inadequate

All State and Territory governments have arrangements in place to cover the costs of mines in the event that companies do not fulfil their rehabilitation requirements. These arrangements fall into two categories.

- Most State and Territory governments require rehabilitation bonds, often in the form of bank guarantees (or cash bonds or insurance bonds in some cases). Bank guarantees are an agreement between the financial institution and the relevant regulator that the bank will cover the company's rehabilitation liability up to an agreed amount, if the company is unable to fulfil its rehabilitation obligations.
- Both Queensland and Western Australia use a rehabilitation pool. Companies make an annual contribution to the pool based on their rehabilitation liability (and, in the case of Queensland, their financial risk). The Government can use the funds in the pool to cover the cost of rehabilitation in the event that a company is unable to fulfil its obligations. The interest gained from the funds in the pool can also be used to rehabilitate abandoned mines.

In 2018, the COAG Energy Council endorsed a set of principles to underpin reform of financial surety arrangements across Australia (box 7.3).

Box 7.3 National principles for managing rehabilitation financial risks

In August 2018, the COAG Energy Council agreed to the following principles to manage rehabilitation financial risks.

- Responsibility for rehabilitation lies with the tenement holder.
- Rehabilitation and closure plans should be established before project commencement.
- Governments should hold financial securities for rehabilitation that reflect the level of disturbance and risk of the operation.
- Risk-based mechanisms should be in place to ensure cost estimates for rehabilitation remain current throughout the life of the project.
- Monitoring processes should be applied to identify early any risk that the company may not be able to fulfil its rehabilitation requirements.
- Mechanisms are developed to monitor and apply financial obligations for closure.
- Financial assurance policies should encourage progressive rehabilitation and improved closure planning.

Source: COAG Energy Council (2018b).

Some sites are not covered by financial surety arrangements

While most resources sites are covered by some form of financial surety for their rehabilitation and decommissioning obligations, there are exceptions. Most notably, the regulatory framework for Australia's offshore oil and gas resources does not include an explicit requirement for financial surety for decommissioning. Titleholders are required to maintain

financial surety that will allow them to meet the costs of complying with requirements under the Offshore Petroleum and Greenhouse Gas Storage Act, however, there is no provision that allows governments to access these funds if necessary (DIIS 2018, p. 40).

The lack of financial surety could result in the Australian Government footing the bill if a company is unable to meet its obligations — decommissioning liabilities in the oil and gas sector have been estimated at more than US$21 billion over the next 50 years (Deloitte 2017, p. 5). Recently, the operator of the Northern Endeavour project has been placed into administration, reportedly leaving the Government with a potential $120–200 million repair and rehabilitation bill (Macdonald-Smith 2020).

Similarly, Western Australian oil and gas projects are not covered by the Mining Rehabilitation fund, nor are mining projects covered by State agreements.

Not having financial assurance mechanisms in place exposes governments to high levels of financial risk. While financial assurance mechanisms can result in costs to companies, they also provide incentives for companies to fulfil their rehabilitation and decommissioning obligations. It is leading practice that some form of financial assurance be provided for all projects, based on the risks that the project represents to governments.

DRAFT LEADING PRACTICE 7.8

Having financial assurance arrangements in place to cover rehabilitation, based on the risk the project poses to the taxpayer, provides incentives for companies to undertake rehabilitation and minimises the risk that governments will be left responsible. These arrangements are present in most (but not all) jurisdictions.

Bonds have often underestimated rehabilitation costs

Where used, rehabilitation bonds should cover the full cost of rehabilitating a mine. This ensures that taxpayers are not left with the bill if a mining company does not fulfil its rehabilitation responsibility. It also provides incentives for mining companies to rehabilitate — Roche and Judd (2016, p. 27) argued that where the costs of closure are greater than the loss of bonds, there is little financial incentive for a company to rehabilitate and close the mine (although reputational risk and social licence factors may be a driver — chapter 9).

However, there are many examples where the level of bond has been set far below the potential rehabilitation liability.

- In New South Wales, a 2017 auditor-general report found that bonds were unlikely to cover the full cost of rehabilitation — due to inaccuracies in the calculator used to estimate rehabilitation liabilities and lack of regular updating of bond estimates (Audit Office of New South Wales 2017, p. 2).

- In Victoria, an inquiry into the Hazelwood mine fire in 2016 found that the estimated liability for Hazelwood would be between $264 million and $357 million, but its bond was set at $15 million (Hazelwood Mine Fire Inquiry 2016, pp. 105, 119). The discrepancy between the bond and estimated liability was similar for the other Latrobe Valley mines. The rehabilitation bond for Hazelwood was increased to $289 million in 2017 (Allan 2017).
- In Queensland, prior to recent reforms, bond discounts were available to companies with a good environmental performance. This reduced the bond levels by $1.2 billion, but was not based on the financial risk to the State (QTC 2017, p. 1).
- In Western Australia, the Government stated that rehabilitation bonds covered about 25 per cent of potential liabilities, prior to reforms to introduce a pooled arrangement (WA DMP 2014).

As highlighted above, recent reforms in several States have resulted in increases in rehabilitation bonds, or moves away from bonds to a pooled risk system. All jurisdictions that use rehabilitation bonds have a policy that they should cover the full rehabilitation liability. Nonetheless, risks remain — rehabilitation calculators used by governments, such as the one used in New South Wales, can often underestimate the liabilities, and bonds are usually not regularly updated to reflect the most up-to-date information.

DRAFT LEADING PRACTICE 7.9

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.

Pooled approaches have risks

Both Western Australia and Queensland have moved towards a rehabilitation pool instead of rehabilitation bonds. However, there are some key differences between the Western Australian and Queensland approaches.

- In Western Australia, all participating resources companies are required to pay 1 per cent of their rehabilitation liabilities into the fund each year (WA DMIRS 2019c). In Queensland, the level of payment varies depending on the company's risk of default — 0.5 per cent for very low-risk companies, 1 per cent for low-risk companies and 2.75 per cent for moderate-risk companies (Queensland Treasury 2019, p. 11).
- The Western Australian scheme covers all miners (except those covered under a state agreement). In Queensland, larger miners or higher-risk miners are excluded from the pool. Higher-risk miners are required to provide surety through a rehabilitation bond (Queensland Treasury 2019, p. 10).

The Queensland Treasury Corporation (2017, p. 45) noted that a pooled approach can offer the same protection for governments at a lower cost to industry. However, there are some risks involved in these approaches. Pools can result in moral hazard for operators — companies have less incentive to fulfil their rehabilitation requirements because any non-compliance will be met by the cost of the pool. And if pooled approaches are not paired with other compliance and enforcement arrangements, the incentives to undertake rehabilitation will be diminished or non-existent.

In addition, pools are unlikely to be sufficient to cover costs if a large operator fails to meet its obligations, and in these cases, the government faces the residual risk — at least in the short term. For example, as of June 2019, the Western Australian Mining Rehabilitation Fund totalled $150 million (WA DMIRS 2019c, p. 1) — unlikely to be sufficient if a major mine handed its rehabilitation liabilities to the government.

DRAFT FINDING 7.5

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

State and Territory Governments that use pooled arrangements for rehabilitation surety should ensure that levies reflect the risk of the company passing their liabilities to the government. Larger companies should be separate to the pool, and covered using rehabilitation bonds. Queensland's rehabilitation pool is a good example of this model.

Incentives to rehabilitate progressively are leading practice

Most participants to this and other inquiries have acknowledged that there are benefits to rehabilitating sites progressively, rather than leaving all rehabilitation to the end of the project. For example, the Senate inquiry into rehabilitation heard that progressive rehabilitation can lead to better understanding of rehabilitation requirements, ensure that funds are made available, can reduce the total costs of rehabilitation, improve health and safety outcomes and provide community confidence in the operator's commitment to rehabilitate. It can return land to a productive use post-mining earlier than would have otherwise been the case (SECRC 2019, pp. 41–42).

However, there are mixed views as to whether the amount of progressive rehabilitation that has taken place is adequate, and whether companies are complying with rehabilitation requirements (section 7.3). For example, the Queensland Treasury Corporation (2017, p. 34) noted that the level of land being progressively rehabilitated in Queensland had fallen over time, and, as noted above, only 0.25 per cent of disturbed land was certified as being rehabilitated. In Victoria, the Hazelwood Mine Fire Inquiry (2016, p. 142) noted that

deficiencies in rehabilitation bonds at the time had reduced the incentives for progressive rehabilitation.

On the other hand, the Audit Office of NSW (2017, p. 27) noted that progressive rehabilitation was taking place in New South Wales.

> Consistent with best practice, the Department encourages ongoing rehabilitation through security deposits and targets in [mining operation plans]. Clearly there is a financial incentive for companies to undertake rehabilitation to reduce the required security deposit. We saw evidence during our site visits and in annual reports that ongoing rehabilitation is occurring at most of the sites we reviewed.

Progressive rehabilitation can be encouraged by including requirements in approvals plans. In addition, the financial surety system can also include incentives to rehabilitate — by updating a company's rehabilitation liability as they undertake progressive rehabilitation and adjusting the amount of surety (or levy) required accordingly.

For example, following the Hazelwood mine fire inquiry, Victoria's rehabilitation policy for its Latrobe Valley mines was updated to state that:

> Regular review of bond amounts using a consistent and transparent tool (the RLA Framework) provides the best incentive for operators to undertake progressive rehabilitation and thereby reduce the bond. The completion of progressive rehabilitation that contributes to the final landform will be directly reflected in a reduction in liability assessments, translating to a reduction in the bond amount. (Vic DEDJTR 2017, p. 3)

This practice has been missing in some jurisdictions. In addition, where the level of surety is set too low, this will distort the incentives to undertake progressive rehabilitation.

DRAFT LEADING PRACTICE 7.10

Progressive rehabilitation can lead to 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 financial surety requirements being reduced commensurate with ongoing rehabilitation work. Victoria's rehabilitation policy for Latrobe Valley mines represents a good example.

Residual risks associated with rehabilitated sites

Following surrender of a mine site, some environmental risks can remain, which will need to be managed by the government. Governments may require a payment to cover these residual risks — for example, in Queensland, resources companies relinquishing land must

complete an environmental risk assessment, and provide payment to cover the residual risks remaining at the site.

Some participants raised concerns about post-relinquishment obligations — particularly in Queensland. Concerns were raised that governments may seek financial redress in the future if the mine site deteriorates.

> QRC believes that an element of the development assessment and approvals framework that is often overlooked, as is the case in the Issues Paper, is the ability to surrender (following rehabilitation) tenements and other approvals and obligations with a certainty that Governments will not look for financial or other redress in the future. The ability to remove contingent liability upon surrender is a material issue for existing operations and future investment. (QRC, sub. 27, p. 15)

> Australia has many outstanding examples of rehabilitated land, but in recent decades, the difficulty has been in achieving the regulatory step of surrender of the mining tenement post-rehabilitation, enabling the freehold to be sold to another entity for commercially productive purposes. From an investment perspective, it is critical to have a clear and timely framework to remove contingent liability from accounts, by completing rehabilitation and achieving surrender, not completing rehabilitation and never being able to surrender. (AngloAmerican, sub. 42, p. 4)

Queensland is currently undertaking reforms to its residual risk framework, to improve the transparency and consistency of arrangements. AngloAmerican (sub. 42, p. 14) noted that aspects of Queensland's new rehabilitation framework are 'worthy of consideration by other States and Territories' and that the proposed framework for residual risk was a positive step. The Commission is seeking further feedback on the extent to which reforms in Queensland have addressed the above concerns, whether post-relinquishment obligations are a barrier in other States and Territories, and best-practice approaches in this area.

INFORMATION REQUEST 7.2

To what extent are post-relinquishment obligations on resources companies a barrier to investment? What are leading-practice ways of managing the residual risk to the Government following the relinquishment of a mining tenement?

Reopening and rehabilitating abandoned mines

As noted earlier, there is a large volume of legacy abandoned mines in Australia. These are mines where a mining lease no longer exists, and responsibility for rehabilitation falls with the Government. While many of these mines are small and pose a low environmental risk, there are exceptions. For example, of Queensland's 15 000 abandoned mines, about 120 are larger, modern abandoned mines (Qld DNRME 2018a, p. 6).

Abandoned mines can result in a range of issues, including:

- environmental risks, such as increased salinity and acidity of groundwater, flooding of pit voids, and a failure to return the land to a productive landscape
- safety risks
- societal issues associated with disrupted communities (SECRC 2019, pp. 6–7).

Most jurisdictions (with the exceptions of South Australia and Victoria) have a formal abandoned mines policy, which prioritises mines to be monitored and rehabilitated. Jurisdictions are attempting to generate a funding source for these policies — for example, Western Australia and Queensland can use the interest generated from their rehabilitation funds to manage abandoned mines, and the Northern Territory has placed a levy on the industry for abandoned mines. Nonetheless, the level of funding for these programs is low relative to the task — the Northern Territory has estimated that the cost to rehabilitate all abandoned mines in the Territory would be about $1 billion, while the levy generates about $14 million per year (SECRC 2019, p. 63).

In some cases, abandoned mines could contain resources that have become economically viable due to improvements in technology, for example. A new operator re-opening the mine could help address the rehabilitation burden. However, there are some barriers to this operating in practice.

- Resource leases and approvals would be required to extract resources, including those from tailings.
- Resources companies are reluctant to take on the entire historic liability of rehabilitation.

In 2018, the Queensland Department of Natural Resources, Mines and Energy (2018a, p. 11) released a discussion paper on abandoned mines in which it noted that:

> In all instances of repurposing, there are likely to be benefits to streamlining the current legislation without undermining the intent of the relevant Acts (e.g. Mineral Resources Act and Petroleum and Gas Act) to help facilitate the uptake of repurposing options that mitigate the State's contingent liability.

The Government proposed introducing an abandoned mine tenure type, which would streamline licensing processes, although this has not yet occurred.

The Senate inquiry on rehabilitation pointed to the Savage River Rehabilitation Project in Tasmania as an example of a successful government–industry partnership project. The Savage River mine was abandoned in 1996 and had caused significant environmental issues to the river (Tas EPA nd). In 1997, a new owner was indemnified against past environmental damages, but the agreement provided a source of funding to rehabilitate the river. Independent water quality reviews have noted that the program has been successful in improving water quality.

DRAFT LEADING PRACTICE 7.11

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

7.4 Safety

Resources sites are subject to regulations to safeguard workers. Sites are subject to standard workplace health and safety laws, and often to additional legislation, such as the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW) and the *Mines Safety and Inspection Act 1994* (WA).

There has been reform to safety legislation

Over the past decade, there has been a push to modernise and harmonise workplace health and safety legislation across Australian jurisdictions. Model regulations have been developed and adopted by most jurisdictions (with some amendments in some cases).

However, reforms to resources safety regulations have been slower. Many jurisdictions did not agree to the mining section of the model workplace health and safety regulations. This was due to a belief that:

> The major mining states of Queensland, New South Wales and Western Australia require more extensive and flexible laws than the other states and territories. This is to address the broader range of mining operations in these three states which range from small gemstone mines to large, complex mining operations including underground coal mines. (Qld DNRM 2013, p. 1)

New South Wales, Queensland and Western Australia negotiated a set of 'non-core' regulations designed to supplement the core workplace health and safety regulations. New South Wales reformed its legislation in 2014, while Queensland made reforms in 2018 that aimed to:

> … achieve greater mining safety and health consistency with the other major mining state of New South Wales in key areas, rather than uniformity of wording and structure of the Acts and Regulations. This is partly due to the different legislative models to be used by each state. (Queensland Government 2018, p. 23)

Western Australia is currently considering reforms to its workplace health and safety framework.

Has safety regulation been effective?

Reviews of the NSW mine safety regulations have noted that the safety regulations are performing well. A review by Noetic (2018a, p. 30) in 2018 noted that:

> … the regulator is well on its way to becoming a safety regulator comparable with good practice high hazard regulators in other parts of the world.

The review noted that the regulator had embedded a risk-based approach to safety regulation, with good engagement and transparency and effective data to underpin the approach. The review noted some room for improvement, but stated that the regulator was aware of, and was addressing, these concerns.

The NSW mine safety scheme is being independently reviewed, with a reporting date of November 2020.

The Queensland reforms are still in their infancy, but there have been numerous high-profile safety incidents in Queensland mines over the past two years. Between 2018 and early 2020 there were eight deaths in Queensland mines (Walsh 2020). This has triggered a safety 'reset' and a review of the mine safety framework.

As noted, the Western Australian Government is in the process of reforming its workplace health and safety laws. And safety regulations for Australia's offshore oil and gas sector are currently under review.

With the major resources states all in the process of reviewing or reforming their safety legislation, identifying leading practice in this area is difficult — although the New South Wales framework appears promising. Few participants to this inquiry raised safety as an issue — one exception was APPEA (sub. 44, p. 13) which noted that:

> Safety legislation and regulations also provide an example for over prescription and complexity. Safety legislation and regulations are fragmented within and amongst jurisdictions with most having overlapping regimes in Health and Safety, Energy/Resources. … In some instances, design of regulations has resulted in overly cumbersome and complex outcomes. For example, the Maritime Transport and Offshore Facilities Security Act and Regulations are 400 pages in total.

Nonetheless, there are reasons for a further focus on resources health and safety. Fatalities in the mining industry have risen in recent years, after falling in the early part of the 2010s. There were nine mining-related fatalities in 2018 (Safe Work Australia 2019), and there is evidence of similar or higher numbers in 2019 (including the Queensland fatalities mentioned above).

The Commission is seeking further information and evidence on best-practice safety regulation for the resources sector.

DRAFT FINDING 7.5

The major resources states are in the process of reviewing or reforming their workplace health and safety frameworks for resources extraction, making identifying a leading practice in this area difficult. Recent safety incidents raise concerns about the effectiveness of existing frameworks.

INFORMATION REQUEST 7.3

The Commission is seeking further information about the effectiveness of resources health and safety legislation across Australian jurisdictions, including:

- *whether there would be benefits in greater consistency across jurisdictions*
- *approaches that represent leading practice health and safety legislation for resources*
- *how health and safety approaches in each jurisdiction could be improved.*

8 Other factors affecting investment

Key points

- Investment decisions in resources projects are influenced by a multitude of factors both commercial and policy-related. This chapter draws together policy issues raised by participants.
- Policy and regulatory uncertainty is regarded as a major impediment to investment:
  - While Government policies necessarily evolve in response to changing economic conditions, technology development and shifts in broader societal values and priorities, participants criticised abrupt policy changes introduced without adequate consultation, highlighting changes to various royalty regimes and the biosecurity levy.
  - Several participants noted uncertainty about long-term climate policy, inconsistencies between emissions policies across jurisdictions with implications for a national approach to energy policy and high energy costs.
  - Concerns have been raised about the inconsistent application of regulations across similar resources projects, particularly in the context of treatment of scope 3 emissions.
- The availability of skilled workers, particularly in growth phases, and the mismatch of the expiry date of greenfields agreements and the life of the relevant resources project are seen as key workplace impediments.
- Australia's capital intensive resources sector is heavily reliant on foreign investment. Several participants considered that the current foreign direct investment screening regime added a layer of uncertainty for foreign investors and imposed unnecessary costs.
- A number of participants also claimed that the sector was taxed at a high rate relative to competing countries. In addition, participants raised concerns about Australia's system of horizontal fiscal equalisation and Australia's anti-dumping policies and commented on the need for government involvement in coordination and provisions of infrastructure services.

Resources projects are typically long-lived and often require substantial and largely irreversible (sunk) investments before any revenue can be derived from a project. This means that decisions about resources investments can be particularly sensitive to uncertainty about future cash flows and to potential time delays between the investment and production stage.

Regulatory processes directly affecting resources sector investment have been discussed in earlier chapters. The focus of this chapter is on other aspects of government activity identified by participants as having a material impact on resources investment decisions. These include policy and regulatory uncertainty (section 8.1), regulation of industrial relations and other workforce issues (section 8.2), foreign investment policies (section 8.3) and the level of industry taxation (section 8.4). Section 8.5 briefly surveys other issues raised by study participants.

Many of the specific issues raised are complex and cannot be fully assessed in this study. Where relevant, Commission recommendations from other inquiries and studies are noted.

8.1 Policy and regulatory uncertainty

Study participants have emphasised the importance of policy and regulatory certainty and stability for continued investment in the resources sector. For example, AMEC (sub. 31, p. 4) submitted that:

> All mining and mineral exploration companies require clarity, certainty, consistency and predictability throughout the mine cycle, particularly for investment and business decision making in a globally competitive resources environment.
>
> This includes policies and processes around taxation, royalties, fees and charges, approvals, compliance, red tape and regulation.

Frequent and/or abrupt changes to government policies and objectives, a lack of consistent long-term policy direction, as well as inconsistent application of existing legislation and policies can increase investors' perception of regulatory risk and impede investment.

For example, APPEA (sub. 44, p. 19) referred to 'Insecurity associated with changing or potentially shifting processes, changing interpretation of legislation, changing government attitudes towards resource projects and future regulatory positions'.

'Surprise' policy changes risk destabilising investor confidence

Over time, some degree of regulatory change is inevitable. Government policies should adjust, for example, in response to changing economic conditions, the development of new technologies and shifts in broader societal values and priorities. At the same time, frequent and/or abrupt changes to government policies and objectives can impose costs on companies and communities, including those due to the effect on investor confidence.

As government policies evolve, so do the expectations of investors. If investors are 'surprised' by an adverse policy change after they have committed capital to a project, they may be less likely to make future investments for fear of further adverse policy changes. A risk that the value of investments will be reduced due to future changes in government policies is sometimes referred to as *sovereign risk.*

Study participants pointed to recent examples of policy changes affecting the resources sector (box 8.1).

Box 8.1 Participants noted the effects of abrupt policy changes

Royalty increases in Victoria, Western Australia and Northern Territory (MCA, sub. 11):

> In June 2019 the Victorian Government announced a new gold royalty in its budget without any industry consultation. Its Regulatory Impact Statement was released after the announcement and demonstrated a highly flawed understanding of an industry that has significant growth potential but faces challenges in attracting sufficient investor capital …
>
> Similar proposals to increase royalties without proper industry consultation have occurred in Western Australian in 2017 – where a proposal to raise gold royalty rates was also first announced in the State Budget – and in the Northern Territory in 2018. (p. 10)
>
> Arbitrary government actions to vary royalty rates post project development reduces expected financial returns on investments. While existing mines have little choice but to pay the higher royalty, such changes destabilise investor confidence in a jurisdiction. (p. 25)

Royalties on coal seam gas in Queensland (Professor Andrew Garnett, sub. 24, p. 3):

> 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).

Biosecurity import levy (MCA, sub. 11, p. 11):

> In June 2018 the federal government announced a new biosecurity import levy to be imposed on sea containers and non-containerised cargo from 1 July 2019 (later postponed to 1 September 2019) … The announcement was not accompanied by a biosecurity risk assessment or regulation impact statement. Following criticism from a range of industries, the government formed an industry steering committee in February 2019 to provide input into the design of the levy. The government subsequently deferred the levy so it could consider the committee's recommendations.

Local government rates in Queensland (QRC, sub. 27, p. 22):

> One area that requires greater transparency and predictability in the process is on the rating of resource sector tenement leases. In Queensland, Local Governments have an unfettered power to apply rates to different rate payers. QRC understands the need for Local Governments to set their own rates as this income goes towards providing essential services to the community as a whole …
>
> The resources industry is a cyclical, long-term industry with project investment timeframes typically in excess of 20-30 years. Resource project investment decisions are based on clearly defined assumptions including operating costs (of which local government rates are a component). Unpredictable increases in rates represent a risk to the viability of existing operations. Furthermore, heightened uncertainty can deter future investment in Queensland by raising the level of sovereign risk for investors.

As foreshadowed in chapter 3, stability and predictability of the regulatory environment support long-term investment. Governments can mitigate investors' concerns by clearly articulating how a policy change would deliver net benefits, and by engaging in meaningful early public consultation on new regulatory policy proposals.

Study participants commented on the importance of public consultation. For example, QLS (sub. 41, p. 2) submitted:

> QLS has seen a number of legislative changes impacting the resources sector made in compressed timeframes, making it difficult for stakeholders to properly consider the changes and provide

useful feedback. 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.

Formulating clearly articulated policy objectives and communicating them to the public in a transparent fashion (chapter 11) can further reduce investors' perception of regulatory risk. For example, in the context of domestic gas market policies, Andrew Garnett (sub. 24, p. 3) submitted that:

> Measures such as price controls, broad market supply obligations or threats thereof, such as Australian Domestic Gas Security Mechanism (ADGSM), are not inherently consistent with a policy aim of maximising supply or minimising prices … The alternative concept in Queensland of tenement release for domestic supply only, has the big advantage of being clear 'up front', which improves the investment environment from the perspective of predictability, though, if it impacts price significantly, it is not likely to improve the economic attractiveness.

DRAFT FINDING 8.1

Government policies necessarily evolve in response to changing economic conditions, technology development and shifts in broader societal values and priorities. However, abrupt policy changes with inadequate consultation can undermine investor confidence and discourage investment.

Investor risk associated with inconsistent and uncertain climate and energy policy frameworks

Several study participants raised uncertainty about Australian, State and Territory policies on climate change, and in the related area of energy supply, as an impediment to resources investment (box 8.2).

Inconsistent and uncertain greenhouse gas emission targets and lack of clarity and stability about the policy instruments for achieving them makes it more difficult for companies to predict future costs and revenues associated with investment in a broad range of resources projects. For example, costs (and revenues) will be affected by energy prices, while different targets and policy instruments will have different implications for the viability of various technologies (for example, carbon capture and storage) and not least future exports and production of certain resources.

Box 8.2 Uncertainty about and high costs of climate and energy policy were raised by a number of participants

SACOME (sub. 37, p. 14) commented on the importance of 'clear, agreed national energy policy' for 'future investment by major resources sector operators':

> A lack of clear direction at the Federal level resulted in Australian States and Territories pursuing their own energy policy agendas with a range of unplanned consequences …
>
> These effects have wide-ranging implications for the whole of the Australian economy, including future investment by major resources sector operators.
>
> Long-term consistency in national energy policy is needed to resolve the regulatory and policy uncertainty that has operated as a disincentive to investment in energy generation.

Several other participants also commented on the rising energy costs and supply risks.

The Minerals Council of Australia (sub. 11, p. 27) submitted:

> Australia's rising energy costs and supply risks are affecting the commercial viability of new mining and mineral processing projects in Australia …
>
> Australian manufacturing, minerals processing and other energy intensive activities are increasingly finding themselves priced out of international markets. Any policy approach should aim to reduce energy costs in Australia and retain a focus on securing reliable lowest cost dispatchable energy supply that is available 24/7.

And Rio Tinto (sub. 26, p. 3):

> We believe that energy policy should deliver more affordable and reliable supplies of energy, while meeting Australia's emissions reduction targets in accordance with the Paris Agreement, and that policies to deliver emissions reductions also need to maintain the competitive position of Australia's world-class mining assets and improve the competitive position of its smelting and refining assets.

Alcoa (sub. 45, p. 2) drew a link between climate and energy policies by identifying 'uncertainty regarding federal and state climate policies and the flow on effect for energy generation of the availability of internationally competitive energy prices' as an example of 'regulatory issues which challenge the ability of business in Australia to be internationally competitive'.

On climate policies, APPEA (sub. 44, p. 11) submitted:

> … APPEA supports a national climate change policy that delivers greenhouse gas emissions reductions at least cost and facilitates broad-based investment decisions consistent with an international price on carbon … The continued policy uncertainty and frequent framework shocks that have occurred in Western Australia and Australia more broadly have greatly increased investment uncertainty and risk which must be (negatively) factored into business decisions.

INPEX (sub. 34, p. 9) commented on the effect of inconsistent approaches to emissions reduction across jurisdictions:

> Across Australia, states and territories are taking different approaches to emissions reduction targets. The inconsistency of approaches and quantum of targets creates uncertainty and scope for duplication in regulatory processes.

INPEX (sub. 34, p. 10) further recommended that 'a national approach, or in the absence of that, a harmonisation of state approaches to greenhouse gas emissions reduction be adopted'.

The Commission has previously recognised the importance of climate policies in the context of resolving the issues confronting the Australian energy market. It observed that a 'lack of clear stable signals concerning emission policy has created an uncertain investment environment and raised concerns around sovereign risk as policies and rules change after

investments have been made' (PC 2017d, p. 19). The Commission recommended that Australian governments 'stop the piecemeal and stop-start approach to emission reduction, and adopt a proper vehicle for reducing carbon emissions that puts a single effective price on carbon' (PC 2017c, p. 164).

DRAFT FINDING 8.2

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

Inconsistent regulatory treatment of similar projects undermines investor confidence

Investors' perceptions of regulatory risk (along with the overall efficiency of economic outcomes), are also negatively affected if projects with similar characteristics are treated inconsistently by regulatory agencies. Several study participants commented on this issue and provided examples — some related to inconsistent treatment of projects by the same regulator, others to inconsistencies and misalignment of regulation across agencies and jurisdictions. Participants' general comments are presented in box 8.3, while participants' comments on treatment of scope 3 emissions in recent regulatory decisions are further discussed below.

One reason for inconsistent application of regulation across projects relates to varying capability across regulators, which can be influenced by factors such as tight budgets, high staff turnover and increasing complexity of projects. These factors and relevant best practices are further discussed in chapter 11.

Another reason stems from the lack of clear guidance in regulatory policies and their objectives, which leaves regulators too much room for interpretation. This problem appears to be most pronounced with respect to application of environmental regulations and interpretation of climate change impacts in this context. As noted above (and discussed in chapter 11), providing regulators with clear guidance on policy objectives and consistent policy on greenhouse gas emissions, could mitigate this problem.

Box 8.3 Examples of inconsistent treatment of projects

Examples of the effects of inconsistencies in the application of regulation were raised by a number of participants including:

EDO (sub. 40, p. 29) submitted that:

> 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 …

APPEA (sub. 44, p. 21) commented:

> … APPEA members advise that they have noted inconsistency in decision making and in the interpretation of legislation in Queensland. Consequently, this has made planning for industry difficult as internal departmental policy and interpretation of legislation is not consistent over time. This uncertainty is aggravated by a perceived reluctance by the Queensland regulator, in many instances, to put policy and legislative interpretation advice in writing which makes relying on their advice difficult.

APPEA (sub. 44, p. 10) submitted that:

> NOPSEMA is required to regulate the Environment Protection and Biodiversity Conservation (EPBC) Act related to offshore petroleum activities in Commonwealth waters (rather than the Department of the Environment and Energy (DoEE) which is usually the case). While this arrangement is good, it is not working as well as it could be at a practical level. For instance, most recently industry has observed differences in considerations of climate change impacts and greenhouse gas emissions. NOPSEMA and DoEE have had different views on the policy/guidance required for titleholders on this matter and it has created inefficiencies and inconsistencies during the assessment process of recent project applications.

EDO (sub. 40, p. 30) commented on the lack of clear guidance on how climate change should be addressed in environmental decisions:

> Climate change and its related impacts, increasing rapidly through greenhouse gas emissions, are the biggest threat to our environment at present, and our economy. However, due to vague environmental laws which frequently do not require decision makers to avoid or mitigate activities which may increase greenhouse gas emissions, either directly or through downstream impacts, various courts hearing objections on the basis of climate change impacts have interpreted the duty to consider this environmental impact in inconsistent ways. This lack of guidance as to how decision makers should address climate change impacts further increases the need for this matter to be addressed through court review.

Treatment of scope 3 emissions in recent regulatory decisions

Several study participants raised the treatment of scope 3 emissions[1] in recent regulatory decisions as an example of inconsistency.

For example, ACF (sub. 32, p. 19) submitted:

> At both state and federal levels, there is an acknowledgement that the scope three emissions of proposed projects are relevant to their assessment. However, there is not a consistent approach

[1] Scope 3 emissions are indirect emissions, other than emissions created via the generation of electricity used by an organisation (scope 2 emissions). They stem from activities of an organisation but are created by entities that it does not own or control (for example, as products sold by the organisation are processed or used by others) (Compare Your Footprint 2018).

as to how the contribution of [greenhouse gas] emissions to global climate change should be assessed and how this should be factored into the public interest of a project proceeding.

Other participants referred to treatment of scope 3 emissions in recent regulatory decisions for coal projects by the NSW Independent Planning Commission (NSW IPC) (box 8.4).

Box 8.4 Scope 3 emissions and recent approval decisions for coal projects in New South Wales

Scope 3 emissions have been a factor in recent approval decisions for coal projects in New South Wales:

- In February 2019 the Chief Judge of the NSW Land and Environment Court indicated that scope 3 emissions were a relevant factor in considering a company's appeal of the NSW Planning and Assessment Commission's (NSW PAC) refusal of a Development Application for the Rocky Hill coal project. The Judge did also note that the 'significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated' provided sufficient grounds to refuse the project'.[2]
- In August 2019 the NSW Independent Planning Commission (NSW IPC) (formerly NSW PAC) approved the United Wambo coal project under the condition that its coal only be exported to countries that are signatories to the Paris Agreement (or that have functionally similar policies in relation to greenhouse gas emissions) (NSW IPC 2019c, p. 18).
- In September 2019 the NSW IPC refused the Bylong coal project's Development Application, citing a number of reasons, including the project's direct and indirect greenhouse gas emissions and their impact on climate change (NSW IPC 2019b).
- In October 2019 the NSW IPC approved a 21-year extension of the Rix's Creek coal mine. Scope 3 emissions again formed part of the NSW IPC's considerations, but it concluded that 'the consumption of coal in countries that are signatories to the Paris Agreement or have other [greenhouse gas] reduction targets in the export countries should lead to minimised Scope 3 emissions from the Project to the greatest extent practicable' (NSW IPC 2019a, p. 86).

Notwithstanding that targeting scope 3 emissions on a project-by-project basis is likely to be an ineffective mechanism for reducing global emissions (box 8.5), recent decisions do not appear to be invalid under current laws. But study participants suggested that the NSW IPC's recent decisions have created uncertainty for investors, in particular with respect to the weight that might be given to scope 3 emissions in future regulatory decisions. For example, the NSW Business Chamber (sub. 3, pp. 1, 3) commented:

> Had it been clear from the outset that, for example in the case of Bylong, 'scope 3' emissions would be a significant factor in the way the application was to be assessed, it is possible the proponent would have taken a different approach to the application. There is a risk if such factors are seen to be brought in 'at the last minute', that proponents have little ability to meet review bodies' expectations … For clarity, this is not an argument that Scope 3 emissions or other factors should not be applied in assessing projects, but it should be clear to proponents and other

[2] [2019] NSWLEC 7, [487]–[513], [556]. The PAC cited similar reasons when it initially refused Rocky Hill's Development Application (NSW PAC 2017, p. 1). Scope 3 emissions did not factor in its decision.

stakeholders what factors will be used to judge a project from the outset, not seemingly have them introduced at the last moment.

Consistent with the study submissions, it appears that regulatory uncertainty with respect to treatment of scope 3 emissions stems from the lack of clear and consistent policy guidance on the issue. As noted in the recent review of the NSW IPC's role and operations undertaken by the NSW Productivity Commission, '[m]ost of the criticisms of the IPC's interpretation of policy relate to certain policy areas where there are gaps or lack of clarity' (NSW PC 2019, p. 46).

Box 8.5 Project-by-project approvals and emissions in export markets

Assessing (and possibly rejecting) individual projects on the basis of their potential scope 3 emissions in export markets is unlikely to be an effective way of reducing global emissions.

- Climate change is the cumulative result of multiple individual actions. Environmental approval processes in Australia are largely configured to manage the risks and impacts created by individual projects — they are not set up to manage cumulative impacts. A decision in one jurisdiction to stop a new coal mine, for example, will not contain exports from existing mines in Australia or from around the world, or stop new projects from being approved in other Australian States or Territories or in other countries.
- Under the global emissions reduction architecture individual countries are responsible for reducing their scope 1 and 2 emissions. How they achieve their targets is then up to them. Abatement actions will likely affect their consumption of coal and fossil fuels to varying degrees, including their consumption of Australian exports of these commodities. There is no case, or need, for Australia to do anything to try to influence or override abatement actions designed to achieve agreed emission targets in these countries, as acknowledged by the NSW IPC (box 8.4).
- For countries that have not agreed to carbon emissions abatement targets the question is would reducing Australia's exports (project-by-project) reduce their consumption of coal or gas overall or could they simply switch to other sources? While Australia is a large exporter it is not a dominant global producer of thermal coal or gas, and a small reduction in its exports would be expected to have a negligible impact on world prices and total consumption and hence global emissions. Moreover, disallowing Australian exports to some countries only would allow exports to switch to countries with emissions targets (while exports from other countries would switch to markets vacated by Australia), further reducing the likelihood of any overall reduction in global consumption and emissions.

DRAFT FINDING 8.3

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

DRAFT FINDING 8.4

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

DRAFT LEADING PRACTICE 8.1

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

Clear policy objectives aid consistent and predictable regulatory decision making. 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.

8.2 Workforce issues

A number of workforce issues are relevant to resources sector investment.

As noted in chapter 2 (figure 2.1), resources projects in Australia directly employ about 250 000 people. Technological advances over the past couple of centuries have made resources exploration, assessment, development and production more capital-intensive. Nonetheless, the availability and cost of skilled labour can still impact the timing and profitability of resources projects in a material way.

Workplace relations policies, such as those related to the maximum duration of greenfields agreements, also affect the level of certainty about the overall costs and timeframes of resources projects and therefore affect investment decisions, especially at the resources development stage. As the MCA (sub. 11, p. 26) commented:

> A degree of certainty about the industrial environment – including employment conditions and projected labour costs – over the life of a complex and lengthy construction project is vital to providing investors with confidence and making Australia an attractive destination for new capital investment.

Further, public perception of a resources project depends, at least to some extent, on the promise for the project to deliver new jobs, as well as the employment arrangements of the resources company (including management of health and safety risks, opportunities for local communities and use of temporary migrants), along with its workplace relations culture. These factors contribute to a company's 'social licence to operate' and can, therefore, ultimately affect the bottom line of a resources project (chapter 9).

Issues relating to the availability of skilled workers and greenfields agreements are discussed below.

Availability of a skilled workforce

Demand for resources tends to go through cycles, and investment adjusts as marginal projects become more or less attractive. The cyclical nature of the resources sector can lead to temporary shortages and surpluses of skilled labour.

Governments can influence the availability of skilled labour through migration and education/training programs. Flexible and responsive skilled (temporary) migration can help meet increased demand for skilled labour over the shorter term. Governments can address longer-term imbalances in the skill pool of the Australian labour force through their coordinating roles in the tertiary education system. Governments' role in developing and supporting a skilled workforce was addressed in the National Resources Statement (DIIS 2019a, p. 40):

> It will be important to draw on skills mapping already underway by industry to understand the needs of the entire resources sector supply chain. A more coordinated approach is needed. Governments and industry need to determine the sector's future skills requirements and how best to meet the needs of a changing sector. The findings will be used to better develop curricula that meet the needs of the sector. This process should be informed by knowledge of the commodities that will form the foundation of Australia's future resources economy, such as battery and critical minerals.

The availability of skilled labour in the Australian resources sector has been raised as an issue by relatively few study participants.

A submission from the CFMEU (sub. 16, p. 7) suggested there was a limited need for further temporary foreign workers and any shortages could be addressed by offering better conditions to Australian workers:

> With some 1.5 million foreign citizens with work rights already in Australia, 718,000 unemployed and a further 1.1 million underemployed it is difficult to see why the Australian mining industry, with less than a quarter of a million workers, needs more temporary foreign workers.
>
> The union has always acknowledged some need for genuinely specialised workers from overseas where new technologies are being introduced … But this is not usually the case sought by mining companies …
>
> As the [Australian Council of Trade Unions] policy notes, many employer respondents to a survey that complained about labour shortages had steadfastly refused to consider increasing their pay offers. In the mining industry there has been considerable pay reductions through the use of casuals via third party contractors (notably labour hire firms).

Rio Tinto (sub. 26, p. 14), on the other hand, submitted that:

> The current immigration framework enables Rio Tinto to source skills critical to our business. However, we believe improvements to the structure of the Temporary Skill Shortage visa

(subclass 482) including 'red tape' reduction could position Australian businesses to compete more effectively for global talent and reduce timeframes for onboarding talent.

Rio Tinto (sub. 26, p. 14) further proposed the government should '[e]xpand access to long-term visas with route to permanent residency', '[m]ove away from the occupational listing model for skilled visas' and '[r]emove the labour market test'.

The BCA also submitted that (sub. 43, p. 5):

> Inefficient visa processes delays access to critical staff and essential skills that are needed from overseas.

Australian immigration policies — including the Temporary Skill Shortage (subclass 482) visa regime — are not specific to the resources sector and should be analysed in the context of their overall impact on the Australian economy. Previous Commission work on this topic included a finding that employers' incentives to invest in workforce training are likely to be dampened as a result of ready access to skilled immigrant labour (PC 2016b, p. 210). A Senate inquiry into the impact of temporary migration 'on the Australian economy, wages and jobs, social cohesion and workplace rights and conditions' is under way, with a final report to be presented by 2 December 2020 (Parliament of Australia 2020).

The Commission also notes that it is undertaking a review of the National Agreement for Skills and Workforce Development. As part of this work, the Commission is to have regard to current and potential funding arrangements, existing skills programs and contemporary policy settings, and labour market needs. The interim report is due by March 2020 and a final report by November 2020 (PC 2019b, pp. iii–v).

Workplace relations

Greenfields agreements are a form of enterprise agreement that can be made under the *Fair Work Act 2009* (Cth) (Fair Work Act) before any employees have been engaged at a new enterprise (DoJSB 2017, p. 6). These types of enterprise agreement are highly relevant for new resources projects — they can provide companies with greater certainty about future labour costs and therefore help secure finance and other approvals.

Like other types of enterprise agreement, greenfields agreements generally expire within four years of the date they are approved by the Fair Work Commission.

The MCA noted (sub. 11, pp. 26–27):

> The current duration of greenfields agreements is out of step with the realities of major project work, which often extends beyond four years.
>
> After a greenfields agreement has passed its nominal expiry date, industrial action may be taken. This means that employers may be subject to significant uncertainty and additional costs at a critical time of project construction when the greenfields agreement passes its nominal expiry date. Extending the duration of greenfields agreements to match the life of projects would increase industrial certainty for employers and investors and encourage additional employment.

The Commission has previously made a similar observation (PC 2015c, p. 689):

> … greenfields agreements … are not intended to be enduring, but logically should survive for the duration of construction of a particular project. Any agreement with a life less than the expected duration of the project exposes the business to substantial risks. Delays in negotiating a greenfields agreement can lead to underutilised capital and may cause the contractor to incur a penalty for delay in the delivery of the project. This creates an imbalance in bargaining power. Even if employees do not actually use this leverage, the ex-ante risk of it raises investor risk and may add to project cost.

The Commission (PC 2015c, p. 691) recommended that the Fair Work Act should be amended to allow an enterprise agreement to specify a nominal expiry date that matches the life of a greenfields project. And that when the duration of a greenfields agreement is longer that the standard duration[3] of an enterprise agreement, 'the business would have to satisfy the Fair Work Commission that the longer period was justified'. The Commission also made other recommendations in relation to greenfields agreements (PC 2015c, p. 719), in particular, those aimed at resolving negotiation stalemates.

A review of greenfields agreements in 2017 considered the Commission's recommendation, but concluded that the basis for the extension of the potential duration of greenfields agreements for construction and resource development projects 'has not been made out in the material provided to this review' (DoJSB 2017, p. 47). The review also noted that:

> The review has considered the extent to which the nominal expiry date for greenfields agreements should be extended to five years or the life of a given project. Extending greenfields agreement duration in this manner would deny employees the capacity to make decisions about their employment arrangements for what might be very long periods of time. Further, if greenfields agreements are able to operate for the duration of a given project, the review is concerned that wages and conditions agreed at the commencement of one project could adversely affect other projects, commenced in entirely different commercial circumstances.

As the Commission noted in 2015, negotiating parties are not compelled to agree to longer durations if, for example, they consider that their industries are likely to face changing conditions over that term. The benefits of allowing extended durations are, therefore, likely to accrue to the group of firms and employees who have a strong interest in stability (PC 2015c, pp. 690–691).

In September 2019 the Attorney-General's Department released a discussion paper and invited submissions on whether and how enterprise agreements might be applied for the life of greenfields projects (AGD 2019). The Commission notes that consultation on the matter is in progress.

The Commission considers that its 2015 recommendation regarding the nominal expiry date of enterprise agreements for greenfields projects remains relevant.

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3 In 2015 the Commission has also recommended that a nominal expiry date for enterprise agreement can be up to five (rather than four) years. This recommendation was not adopted.

DRAFT FINDING 8.5

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

DRAFT RECOMMENDATION 8.1

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.

8.3 Barriers to foreign investment

As noted in chapter 2, a high proportion of resources companies operating in Australia are foreign owned or draw on foreign investment as a source of funding, with the Australian resources sector having a greater stock of foreign direct investment (FDI)[4] than any other sector. Rules and regulations around foreign investment can have a potentially significant effect on overall investment in the sector.

Australia's foreign investment policies aim to ensure that investments are not contrary to the national interest, for example, due to potential national security risks or erosion of the tax base. Foreign investment proposals require approval if they meet certain screening criteria. For example, for resources projects an approval may be required to acquire an interest in a tenement, the underlying land, or an operational business, or to start a new Australian business (FIRB 2020). Screening thresholds vary by sector and by country of the investor, as well as other factors. The screening conditions also differ for foreign government investors. The Treasurer can prohibit foreign investment proposals found to be contrary to the national interest, or can impose conditions on an investment to address national interest concerns. When making decisions on foreign investment, the Treasurer receives advice from the Foreign Investment Review Board (FIRB). In practice, foreign direct investment proposals subject to screening are rarely rejected, they often have conditions attached (FIRB 2018, pp. 24–25).

4 Two main ways in which foreign residents or companies can invest funds in Australian economy are portfolio investment and foreign direct investment. Portfolio investments do not offer the investor any control over the operation of the enterprise. Foreign direct investment is when a foreign resident or entity establish a new business or acquire 10 per cent or more of an Australian enterprise and so have some control over its operations (DFAT nd).

While foreign investment policies are not meant to impede foreign investment anticipated to be of net benefit to Australia, they can result in increased costs to investors, both in terms of time and uncertainty.

A couple of submissions to the study commented on the foreign investment policy framework.

MCA (sub. 11, p. 28) submitted that:

> … investment policy settings need to support Australia's attractiveness as a destination for international investment, ensure the foreign investment and foreign influence review process does not needlessly create political tensions, and provide clarity and transparency for foreign investors seeking to invest in Australia … The government should ensure that Foreign Investment Review Board (FIRB) screening requirements are the same for all private investors, irrespective of their country of origin. Screening thresholds in non-sensitive sectors should be raised from $261 million to $1.13 billion for non-FTA nations, consistent with the level that applies to Australia's FTA partners.

BCA (sub. 43, p. 5) submitted:

> Foreign Investment Review Board decision-making timeframes is a source of uncertainty for overseas investors, with delays specifically noted in the oil and gas sector.

International analysis suggests that Australia's FDI regime for the mining and quarrying sector (including oil extraction) is relatively restrictive — sitting above the average level for the OECD countries (figure 8.1). The ranking reflects both screening and approval provisions.

The Commission has not undertaken a holistic assessment of policy obstacles to foreign investment for this study, but has made observations about elements of Australia's policy framework in previous studies. In particular, the Commission (PC 2017b, p. 90) observed that:

> … Australia's FDI screening processes lack consistency and merit policy attention … One option to simplify the process would be to extend the higher threshold to other trading partners. Some of the screening criteria, particularly when national security concerns are raised, are broad and vague, making regulatory approvals less predictable.

It concluded that (PC 2017b, p. 91):

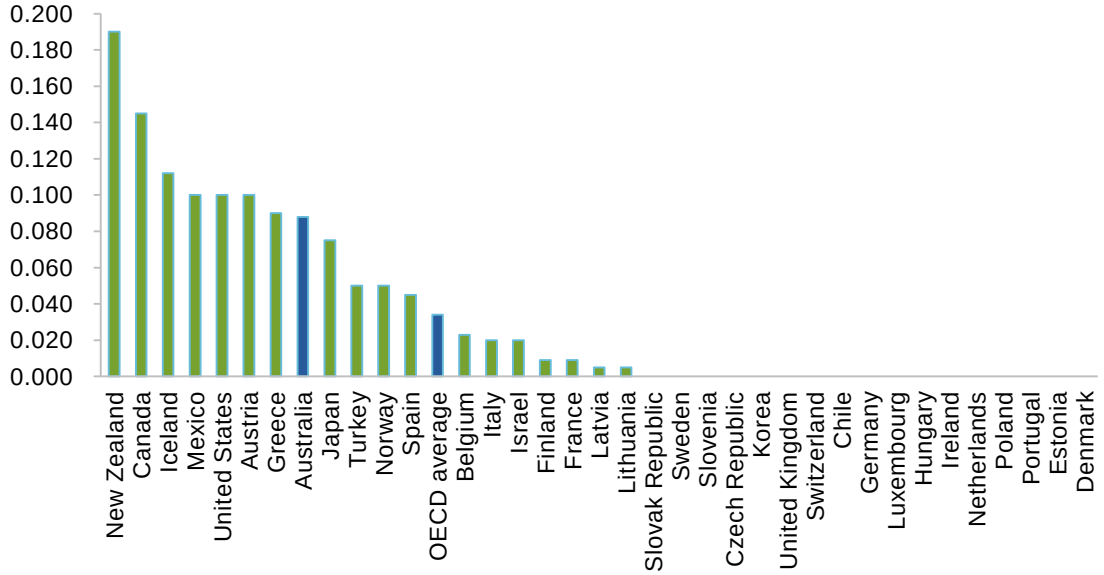
> Australia's reputation as an attractive destination for international investors could be strengthened through more consistent, transparent and predictable approval processes while preserving our vital national security interests.

The Commission also recommended making screening thresholds consistent across investors from different countries in its 2015 research report on barriers to growth in service exports. The Commission noted that '[l]ower foreign investment screening thresholds should not be maintained solely for use as a bargaining chip in trade negotiations' (PC 2015a, p. 102).

Australia's foreign investment policy remains a source of uncertainty for investors. The identified opportunities to improve the regime remain.

Figure 8.1 **Australia's screening of FDI in mining and quarrying (including oil extraction) is relatively restrictive**

OECD FDI Regulatory Restrictiveness Index[a], Mining and quarrying (including oil extraction), OECD countries, 2018



[a] The FDI Regulatory Restrictiveness Index measures statutory restrictions on FDI. Restrictions are evaluated on a 0 (open) to 1 (closed) scale.

Source: OECD (2018)

8.4 Taxation

Several study participants submitted that the tax burden on the resources sector in Australia is high by international standards and suggested measures that would lower the effective company tax rate on resources companies.

For example, the MCA (sub. 11, p. 25) submitted that:

> Australia's 30 per cent company tax rate is too high for a capital-hungry country … The combination of a high company tax rate and a broad base in the absence of investment allowances or accelerated depreciation of investment costs delivers Australia a high and uncompetitive effective company tax rate.
>
> Consideration should be given to other measures that reduce the tax burden on new investment, such as accelerated depreciation. The latter will reduce the effective company tax rate for capital intensive industries and encourage new capital investment. It is important that there are limited exclusions from accelerated depreciation (typically only passenger motor vehicles and office buildings) and that it be consistent with current depreciation tax treatment, which would reduce complexity and compliance costs.

Similarly, Rio Tinto (sub. 26, pp. 15–-16) submitted that '[i]n recent years, Australia's tax competitiveness has declined compared to both OECD member countries and our regional competitors' and named the company tax rate, capital allowances regime, funding rules, stamp duty among the 'factors which impact on tax competitiveness'.

Anglo American (sub. 42, p. 16) supported either or a combination of 'a reduction to the headline corporate tax rate' and 'introduction of some form of accelerated depreciation for new investment' as 'incentivizing additional investment in the Australian mining sector'.

Andrew Garnett (sub. 24, p. 2) observed that:

> A reduction (or delay) of government take [the direct benefit to governments] can have a significant incentivising impact on new investment. In addition to simple rate reductions, other jurisdictions have employed a range of further measures such as accelerated depreciation, uplift, royalty holidays and exploration or R&D tax credits …

He further referred to the 'possibility to tune tax and royalty arrangements to the quality, location and maturity of the resource' (sub. 24, p. 6).

The Commission has not reviewed resources sector taxation or corporate income taxation more generally, and examination of the taxation regime lies beyond the scope of this study.

8.5 Other factors raised in submissions

Study participants also suggested a number of other factors affecting resources sector investment that are briefly discussed below.

Horizontal fiscal equalisation

Alex Dobes (sub. 2) raised concerns about Australia's system of horizontal fiscal equalisation (HFE), which underpins the distribution of goods and services tax revenue to the States and Territories. Alex Dobes proposed that (sub. 2, p. 10):

> The Commonwealth Government and the Productivity Commission should re-consider the option of applying a discount to resources revenues in calculating equalisation payments.
>
> Any discount for resources revenues should apply only to future projects, to ensure that states with a smaller resource endowment are left no worse off than the status quo.
>
> To overcome Western Australia's current disadvantage, the Commonwealth Government should consider a time-limited decreasing subsidy.
>
> The Commonwealth Government should consider the option of providing incentive payments to the states for project approvals and legislative changes that facilitate resources development.

In 2018 the Commission commented on the proposal to impose discounts to the mining revenue assessment (PC 2018, pp. 210–211):

> On balance, the introduction of a discount for particular revenue assessments is not justified on equity or efficiency grounds. A discount is inconsistent with the broad objective of HFE. Mining revenue, in particular, is a prime example of a source-based advantage that should prima facie be included in the equalisation process … Permanent discounts should also not be introduced to provide a supposed solution in cases where jurisdictions have managed the fiscal returns of buoyant conditions in a less than ideal way over time. The temporary use of a discount factor is also far from ideal, and runs the risk that it would become permanent over time …
>
> Discounting mining (or other revenue categories) in the HFE process — or removing it entirely — is not justified and would come at a high cost to fiscal equality.

The Commission's earlier observations remain relevant.

Public investment in infrastructure, including export infrastructure

Several participants commented on the need for government involvement in coordination and provision of infrastructure services.

For example, SACOME (sub. 37, pp. 12–13) cited infrastructure availability as one of 'the two major impediments materially affecting resources sector investment in South Australia' (the other being energy security) and noted the 'importance of maintaining "economic infrastructure" so that existing resources projects can continue to operate efficiently'.

Similarly, QRC (sub. 27, p. 21) submitted that:

> Timely access to competitively-priced infrastructure services such as rail, water, port, energy, pipelines, roads, mobile and internet services are imperative to support industry growth. The government's planning and coordination of infrastructure is essential.

And Andrew Garnett (sub. 24, p. 4) observed that 'public investment or partial investment in new export infrastructure can be a significant accelerator for new, long term, gas to market'.

In a similar vein, the National Resources Statement (DIIS 2019a, p. 32) noted that:

> The opening up of new basins is always challenging given the up-front costs of developing infrastructure and the need for coordination between producers, investors and customers. Governments can help facilitate and plan for such developments, especially to ensure that local communities maximise the benefits of such new investments.

The Commission has previously considered the role of governments in infrastructure provision (PC 2014b, pp. 60–62). Rationales for governments taking a lead role include to:

- ensure equitable access to a basic quality of service (for example, to water or sewerage)
- address market failures, for example, where:
  - a natural monopoly occurs making it more efficient for one business to supply an entire market
  - the infrastructure in question has public good characteristics (consumption by one person does not diminish consumption by another and excluding consumers is technically impossible or economically too costly)
  - externalities that arise for users from others' use of infrastructure
- (historically) take on the risks of an infrastructure improvement sought by the community where markets or institutions have not been sufficiently mature.

The Commission noted that (PC 2014b, p. 62):

> The existence of market failure indicates a departure from an economically efficient ideal. Whether or not government involvement would be able to produce an overall improvement needs to be considered on a case-by-case basis, having regard to the severity of the market failure, and the costs and benefits of potential government actions. There is a range of ways that governments can respond to market failures, for example, they can choose to provide the infrastructure, or they can subsidise or regulate private provision.

In essence, government should demonstrate a sound business case for providing or funding any infrastructure, including infrastructure that might directly or indirectly benefit the resources sector. The Commission has also previously argued that to provide signals about net economic benefits, the total costs of providing freight infrastructure, for example, are appropriately met from users of that infrastructure unless parts are provided as a Community Service Obligations (PC 2006b, pp. 56–57).

Trade regulations

On the issue of trade restrictions, Alcoa (sub. 45, p. 2) submitted:

> Less obvious examples [of regulatory issues which challenge the ability of business in Australia to be internationally competitive] can be found in government regulations which support interventions in markets for imported goods and raw materials, including in relation to antidumping provisions under the *Customs Act 1901* and associated regulations.
>
> Alcoa made a submission in response to the recent Anti-Dumping Commission inquiry into alleged dumping of ammonium nitrate by China, Sweden and Thailand into the Australian market. The Commissioner upheld the dumping allegation and approved several anti-dumping measures. The effect of those measures will be to lower import competition from international sources into Australia and impact on Alcoa's ability to negotiate on a level playing field to source an internationally competitive contractual supply of ammonium nitrate.

While the discrete impact of this type of regulations is modest, the combined effect of these and the broader regulatory hurdles present material challenges to the competitiveness of Australian operations in a global context.

The Commission conducted a comprehensive review of Australia's anti-dumping system in 2009 (PC 2010) and updated its observations in 2016 (PC 2016a). As the Commission observed, imposing anti-dumping measures largely ignores the resulting costs for downstream users and the wider economy (PC 2016a, p. 79). The Commission suggested that 'a fundamental rethink on anti-dumping policy in Australia is required'(PC 2016a, p. 80).

9 Community engagement and benefit sharing

Key points

- Resources projects generally bring net benefits to both the economy as a whole and to the local communities in which they operate. But both positive and negative impacts on local communities are typically amplified relative to the broader community.
- Some consider that resources companies should do more to manage the negative impacts of resources extraction and provide greater benefits to local communities, leading to calls for more intervention. The relevant policy question is what should companies be expected to do (or pay for) and what impacts are more efficiently managed by governments.
  - It is appropriate that companies are required to conduct social impact assessments to identify potential negative effects of a project, and to be responsible for mitigating negative externalities they create such as noise and dust.
  - Impacts such as volatile house prices are a market response to increased demand that signal a need for adjustment and should not be suppressed. It is more appropriate that governments address any impediments to adjustment, such as through planning policy. Alternatively, the use of external workforces can moderate housing price increases (but would likely reduce the local employment benefits).
  - Companies should generally be expected to provide or pay for infrastructure that is built solely for their operations. Governments are likely better placed to coordinate the provision of shared infrastructure and provide additional services for local population growth.
  - Requiring companies to use local workers or services can be costly — reducing both opportunities to generate services or employment in other parts of Australia and company profitability. Assisting businesses and prospective employees in local communities to build relationships with resources companies is likely to provide more enduring benefits.
  - It is appropriate that governments fund regional services. However, hypothecated royalties for regions can encourage spending on projects without fully considering the payoffs.
- Resources companies voluntarily contribute to local communities beyond their normal economic benefits, such as through financial payments, investment in infrastructure, programs to increase local employment and approaches to mitigate negative social effects.
  - Where businesses engage in these activities, engagement can help identify the community's wishes. Leading practice involves the coordination of benefit-sharing activities with the local government, such as through formal partnerships or less formal consultative approaches.
- Community engagement allows communities to have a say in projects that affect them, and can be a valuable tool in creating support. Early engagement can help to identify issues and impediments to projects proceeding. Guidance to companies on how to engage is plentiful. Most frameworks cover similar themes and there is no one leading practice set of guidelines.

Community engagement and benefit sharing are two distinct but interrelated sets of activities.

Community engagement refers to activities undertaken by companies to communicate and consult with key stakeholders, and can range from simply providing information to providing a vehicle through which stakeholders can influence company decisions.

There is no standard accepted definition of benefit sharing. It can include the 'normal' (or 'market-related') economic benefits of new activity that flow through via new jobs, higher wages, local rates, consumption of local services and provision of infrastructure. It can also include companies making a contribution to local communities beyond that which would occur naturally through their commercial activities (and taxation and royalty payments). This may include:

- financial payments beyond compensation payments for land access (covered in chapter 5), such as contributions to local councils and payments to Aboriginal and Torres Strait Islander communities through native title and other agreements (chapter 10)
- investment in key infrastructure needs, such as roads and water networks, and community services such as gyms and education facilities
- programs to increase the use of local workers and services
- approaches that seek to mitigate the negative social or other effects that resources projects can have on communities — such as developing and implementing social impact management plans at the outset of the project.

This chapter focuses on these 'beyond market' activities.

Community engagement and benefit sharing can be mandated by governments — for example, community engagement may be a requirement of licences, and governments often require some action on issues identified by companies through social impact assessments.

In addition, companies will often participate in community engagement and benefit-sharing activities voluntarily, over and above regulatory requirements.

This chapter outlines the rationale for benefit sharing and community engagement — what companies and governments are seeking to achieve (section 9.1). It also outlines leading-practice approaches to community engagement (section 9.2) and benefit sharing (section 9.3). Community engagement and benefit sharing in Indigenous communities is covered in chapter 10.

9.1 What problems are community engagement and benefit sharing trying to address?

Within the broader economy, businesses are typically not expected or required to contribute to the community over and above their economic contribution, and beyond meeting regulatory and taxation requirements. Many businesses do seek to build relationships with

the communities in which they operate to some degree — supporting the local footy team, for example.

Expectations of the resources sector, however, seem to be higher. For example, the Australian Small Business and Family Enterprise Ombudsman (sub. 23, p. 1) stated:

> … there remains a need to ensure that economic benefits derived from resource extraction projects flow through to local communities. This should not be limited to royalties and the flow through of taxation, but through supply chain engagement for small businesses and employment for local workers.

These expectations are understandable. The fortunes of many towns and residents rise and fall with those of nearby resource projects. Local communities can suffer from congestion of health and education services, dust and noise, boom and bust cycles and multiple legacy issues, among other impacts. As a result, many resources companies invest in local communities voluntarily, such as by constructing infrastructure and making efforts to employ local workers.

However, the Commission has heard of pressure by local communities on governments to require some level of benefit sharing, such as by requiring companies to employ local workers or use local goods and services. Calls for regulated benefit sharing should be linked to a clear rationale. In this context, it should be noted that mining generally also brings substantial economic benefits to communities (section 9.3). Furthermore, governments need to consider the costs and benefits of resources activities to the whole Australian community, given resources are owned by the Crown on behalf of the entire community.

This section outlines some of the reasons why voluntary community engagement and benefit sharing may take place and possible roles for government to regulate or support community engagement and benefit-sharing activities.

Why do companies go beyond regulatory requirements?

The social licence to operate

The changing expectations of society in recent years have heavily influenced the way resources companies conduct their business. Increasingly, many businesses feel that they need to go beyond simply meeting regulatory requirements to obtain broad community acceptance for resources projects (Moffat and Zhang 2013, p. 61). This concept of community acceptance is often called a ‘social licence to operate’.

The term social licence to operate emerged in the late 1990s, due to a lack of trust in the resources industry globally (Gehman, Lefsrud and Fast 2017, p. 294). However, the term has gained significant traction in recent years:

> … after mentioning the concept of social license in less than 10 articles a year from 1997 through 2002, news media mentioned social license in more than 1000 articles a year from 2013 to 2015, and more than 2000 articles in 2016. (Gehman, Lefsrud and Fast 2017, p. 293)

In a 2018 survey, mining and metals companies nominated licence to operate as their biggest risk going forward (EY 2018, p. 5).

Several factors may explain why the social licence to operate has gained prominence.

- Over the past few decades, resource operations have become increasingly automated and efficient. This has perhaps led to less (or different) employment of local community members. Boutilier, Black and Thomson (2012, p. 231) noted that 'since there are often not enough jobs for local residents to satisfy sentiments of social and/or economic equity … there has to be more than employment in the social contract'.
- Boutilier, Black and Thomson (2012, p. 230) also noted that resource projects are increasingly using land that is already used for other purposes, such as agriculture, creating tension between landowners and resources companies.
- There is a broader trend in society towards increased community and stakeholder involvement. There is an increasing number of non-government organisations involved in raising the profile of issues — particularly environmental issues — that arise from resources developments (Boutilier, Black and Thomson 2012, p. 231). Increased global connectivity and use of social media has increased the influence of stakeholders in decision making and political processes (Meesters and Behagel 2017, p. 274).

What effect does a social licence to operate have on a business?

Whether or not a project is accepted by the community can have a substantial effect on its profitability. Most prominently, conflict between the community and the project proponent can lead to costly delays, restriction of access to resources needed for the project to operate, or the project being scrapped altogether. These outcomes can emerge as a result of protests or blockades, political pressure leading to governments retracting legal licences to operate, or financiers withdrawing funding from projects (Boutilier 2014).

Within Australia, there are many examples of conflict between project proponents and communities. In 2014 and 2015, protesters at the Maules Creek mine locked themselves to equipment to prevent clearing of the Leard State Forest, disrupting the development of the mine (Sturmer 2015). In 2013, a gas terminal at James Price Point was abandoned on commercial grounds following pressure from a local Indigenous group and environmental groups. A former head of the Kimberley Land Council noted that:

> In retrospect the environmental groups have created that much pressure on Woodside that we missed the window. Because it was dragged out because the protesting took so long, it destroyed the commercials of the project. (Bergman quoted in Patrick 2018)

Similarly, protests have affected the coal seam gas industry in some regions. Luke (2017, p. 267) noted that:

> Protests in the Northern Rivers ultimately led to the exit of the [coal seam gas] industry from the region in 2015. Such a result could be considered costly, both for the companies that had sought

to operate there, and for the New South Wales Government who brought back the license of one company, Metgasco, for AUD $25 M.

Internationally, Boutillier (2014, p. 267) pointed to the example of mineral exploration in Ontario, Canada.

> When the indigenous people of the Kitchenuhmaykoosib Inninuwug First Nation blocked mineral exploration by Platinex Inc. that had been legally licenced by the Canadian Province of Ontario, and succeeded in gaining news media coverage for their protest against the exploration, the government backed down in 2009, rewrote its regulations on mineral exploration and reimbursed Platinex CAD$5 million.

Even when the conflict does not result in the proponent withdrawing from the project, the costs can be substantial. For example, Franks et al. (2014, p. 3) cited a Latin American mine where conflict led to a nine-month delay during construction, costing the company US$750 million. Another company noted that conflict cost one of its projects US$100 million per year.

Communities affected by projects may also lobby governments for increased regulation on a project. Boutillier (2014, p. 267) noted that:

> Another hypothesis suggested by observations and conversations with mining executives is that [governments] have an interest in receiving assurances that the company has done the socio-political groundwork needed to ensure that the government's popularity would not suffer were it to grant a legal licence. If this hypothesis is supported, it would imply that it is foolhardy for companies to count on a legal licence without addressing the stakeholder concerns that would win it a social licence.

Failure to obtain a social licence to operate can affect the 'reputation capital' of a company (Gunningham, Kagan and Thornton 2004, pp. 320–321). Companies with a good reputation have easier access to development approvals, the trust of regulators and less risk of being targeted by community groups and government policies. On the other hand, companies with a poor reputation face the risk of product boycotts, conflicts with communities and effects on investor confidence. For example, Gunningham, Kagan and Thornton (2004, p. 323) noted that:

> … when members of an environmental group at a European port painted a derogatory 100-meter-long slogan on the hull of a Canadian cargo ship carrying pulp and lumber, naming the companies involved, this caused not only major embarrassment to one of the companies in our sample but also a threat of boycotts by industrial customers and ultimate consumers.

What is involved in obtaining a social licence to operate?

There are several models available that outline the factors that underpin a social licence to operate. One of the most common is the pyramid model, which suggests that the key factors needed for a social licence are legitimacy (whether a stakeholder gets a net benefit from the project), credibility and trust (box 9.1). Similarly, the Gas Industry Social and Environmental Research Alliance (GISERA) identified key factors needed for a social

licence as the perceived effects of a project, trust in the industry, procedural fairness and the quality of relationships with the company (Walton, McCrea and Jeanneret 2018, p. 28).

One of the key takeaways from these (and other) models is the importance of trust in obtaining a social licence. Moffat and Zhang (2013, p. 62) noted that:

> We expect trust to be a central element of a model of social licence to operate, representing a mechanism by which perceptions of impacts from mining operations, intergroup contact experiences and perceptions of procedural fairness relate to acceptance and approval of a mining operation.

Box 9.1 The pyramid model of social licence

The pyramid model of social licence was developed by Boutilier and Thomson (2011). It contains four broad levels of social licence.

- At the lowest level, the social licence is **withdrawn**. This creates a high level of risk for a company.
- The next level is **acceptance** of the project. This occurs when the project is seen to have legitimacy. According to Boutilier, Black and Thomson (2012, p. 236), legitimacy occurs when stakeholders see a personal net benefit in the project proceeding. However, the social licence is unstable — 'the cost/benefit calculation is recalculated daily with no forgiveness for temporary lapses' in company behaviour.
- **Approval** of the project occurs where the company has credibility with stakeholders — it is seen as conforming to local ideas of how a company should behave. Boutilier, Black and Thomson (2012, p. 236) noted that the most important factors for gaining credibility are 'listening to stakeholder concerns, planning a solution together and collaboratively implementing the plan'.
- The highest level of social licence is **psychological identification**. This requires full trust by the community in the company. 'This takes repeated experiences of having the other party take the initiative to protect and promote one's interests' (Boutilier, Black and Thomson 2012, p. 236).

Communities are more likely to trust companies where they demonstrate integrity and competence, manage risks, work collaboratively with the community and do not take advantage of the vulnerabilities of the community (Moffat and Zhang 2013, p. 62). Importantly, effective community engagement is central to obtaining trust from the community — trust requires genuine engagement with stakeholders, and addressing their concerns. Indeed, even if a company is providing benefits to the community or mitigating its effects, this will be for naught if the community is unaware of these actions.

On the other hand, transactional approaches such as simply providing communities with new infrastructure may create acceptance for the project and avoid conflicts in the short term. However, absent other initiatives, it is unlikely to lead to long-term trust in the company.

Companies seek to attract and retain workers

Beyond dampening community disquiet, there are other reasons why companies participate in benefit-sharing activities. In particular, benefit sharing can help to attract workers to local (often remote) communities, and retain them. For example, community facilities such as gyms, and infrastructure such as better roads, make communities more desirable places to live, and make it easier for companies to attract skilled workers.

Benefit sharing can also make workers within the community more productive. For example, some companies invest heavily in education facilities, which can improve the productivity of the workforce over time. A participant in Bice (2013, p. 143) noted that:

> … growing concern for corporate social responsibility is linked partly to companies' apprehension about the effects on productivity which may occur where a rural community does not have the capacity to support the mining workforce: If you look at [a certain mining operation], they had huge issues where they couldn't even get the workforce to work because of child care issues. So, how do you help the community to build capacity to become more productive?

Indeed, for many companies, workforce retention and productivity may have been a bigger driver of their investments than the need for a social licence (Brannock and Tweedale 2012, p. 3).

What is the role of governments?

Given the importance of social licence, companies have a strong incentive to participate in community engagement and benefit sharing without government regulation. Many companies have policies on community engagement and benefit sharing. However, the Commission (PC 2013b, p. 142) has noted that some minerals and energy explorers may lack the skills or motivation to obtain the support of the community — in some cases because explorers sell the rights to any discoveries they find, and thus view obtaining a social licence as unimportant.

Thus there may be a role for government to protect the interests of stakeholders, including local communities. The key question is whether voluntary community engagement and benefit sharing is optimal for the community as a whole, or whether government regulation may be needed. There are several reasons why government involvement may be warranted.

Regulating the adverse effects of resources extraction

As noted in earlier chapters, resources activities can have negative effects, for example, on the environment and on the owners of land on which resources activity takes place. Governments usually regulate company activities to limit (or compensate for) these negative effects.

Resources activities can also have negative social and economic effects on nearby communities (box 9.2). These can range from increased noise and demands on key infrastructure to changes in the social dynamics of a community.

There are some social and economic impacts on communities that are appropriately the domain of the company (box 9.3). Externalities occur when a decision by a company affects a person's wellbeing, but that effect is not taken into account by the decision maker — leading to a sub-optimal outcome (chapter 3). For example, noise and dust can cause effects on communities, but, without intervention, these effects may not be adequately considered by companies. It is reasonable and efficient that companies are required to address negative externalities.

Box 9.2 Social impact assessment — Carmichael coal mine and rail corridor

The social impact assessment for Adani's Carmichael coal mine considered the effects of the mine and rail corridor on neighbouring towns and the broader region. The assessment outlined a range of potentially negative social effects, including:

- a higher cost of living in the neighbouring town of Clermont as a result of higher house prices
- a reduction in the ability for local businesses to meet local needs, as people moved to being employed in the mining sector
- traffic disruptions and delays, and increased road maintenance requirements
- increased noise and dust
- disruptions to nearby cattle farms
- increased fire risks along the rail corridor
- increased demands on emergency and social services due to an increased population
- a low risk of increased crime and antisocial behaviour.

The assessment also found a range of positive effects from the mine — mostly economic, such as increased employment, opportunities for local businesses and development within the region.

Source: Adani (2015).

Box 9.3 The role for governments and companies — addressing social effects

Governments provide essential services to communities

All levels of governments provide a range of essential infrastructure and services to communities. For example, the Commission (PC 2012, p. 52) has previously noted that a role of local governments is to:

> … provide and plan for adequate, appropriate and equitable services and infrastructure in their local communities (either directly or on behalf of other levels of government) striking a balance between social, environmental and economic objectives.

These services and infrastructure can include (but are not limited to) roads, healthcare, education, waste collection, water, power and sewerage.

Governments often provide these services because they would be underprovided (or not provided efficiently) by the private market. Some services are public goods, have positive externalities, or are natural monopolies (chapter 3). In some cases, services are provided for equity reasons — there is an expectation that these services should be available to all members of the community. Rather than providing the infrastructure or services themselves, governments may also choose to regulate or subsidise private provision.

Governments plan the effective functioning of communities

Governments are involved in planning communities to manage their growth, coordinate community services and promote the orderly and economic use of land (PC 2011, p. 1). The Commission (PC 2017a, p. 3) has noted that:

> Planning policies particularly affect the productivity and growth of cities through their determination of possibilities for the use of land, coordination of different activities, and the management of positive and negative spillover effects from concentrations of people and activity.

Companies should be responsible for negative externalities

An externality refers to the effects of an activity that are not taken into account in businesses' decisions, and which affect another person's wellbeing. An example is pollution — without regulation, businesses would not take pollution into account in their production decisions, but it can have harmful effects for society.

Governments generally require businesses to manage externalities, either through requiring them to change their practices, or requiring them to pay a tax or other charge.

It is important to draw a distinction between technical externalities and pecuniary externalities. Technical externalities refer to direct effects on people or communities, such as the pollution example above. Failing to address these externalities would result in a net loss to society.

On the other hand, pecuniary externalities are related to changes in prices resulting from businesses' activities. For example, where a new firm enters an industry, it may drive down the price received by other firms. However, these effects do not reduce welfare for society — rather they reflect price changes needed for the effective functioning of markets. Pecuniary externalities should not be regulated, although governments should be aware of these effects to facilitate their planning decisions.

Price signals should not be supressed

However, many of the social and economic effects are so-called 'pecuniary externalities' — changes in prices of goods and services due to project-induced shifts in demand. While significant price changes will have social effects, they are not a market failure or negative externality — they signal the market adjustments needed and should not be supressed (box 9.3).

For example, one of the commonly cited effects of resources projects on nearby towns is higher house prices. In the Pilbara town of Karratha, median house prices rose from $250 000 in 2004 to just over $700 000 in 2009, before falling to about $300 000 by 2018 (Regional Development Australia 2018, p. 37; WA PC 2010, p. 31). Similarly, in the Queensland town of Moranbah, median rents for a three bedroom home increased by almost 400 per cent between 2001 and 2006 (Haslam McKenzie et al. 2009, p. 72). While high house prices and rents can benefit home owners, they crowd out other residents, particularly key workers such as nurses, teachers and police who earn lower incomes than the resources workforce (Haslam McKenzie and Rowley 2013, p. 15).

Such price signals indicate the need for more accommodation in towns for resources workforces. Attempting to supress prices would reduce the incentives for developers to construct new housing, leading to housing shortfalls. Rather than placing requirements on mining companies, approaches such as appropriate planning including ensuring the easing of supply impediments (such as land use restrictions) can moderate price spikes.

Another commonly cited issue is the effect of fly in, fly out (FIFO) workers on the community. For example, a House of Representatives Standing Committee on Regional Australia inquiry (HRSCRA 2013, p. 44) stated that the use of FIFO workers near towns can affect social cohesion.

> A large influx of non-resident workers is a permanent disruption to the social fabric and feeling of a town and this 'shadow population' has a serious and negative impact on the safety, image and amenity of communities.

But unnecessarily reducing the flexibility of companies could have unintended impacts. Restricting the ability of companies to hire FIFO workers to encourage companies to shift workers to local townships will likely exacerbate house price increases as they compete for the existing housing stock. The effects of FIFO workers are discussed further in section 9.3.

Public infrastructure is generally the domain of governments

Resources companies may also have an effect on community infrastructure. An influx of new residents can place pressure on economic infrastructure such as roads and power lines and social infrastructure such as schools and hospitals.

Companies should be required to provide or pay for infrastructure or other services that they use, for example, road or rail transport to and from their projects. Alternatively, governments

can recoup the cost of infrastructure they provide through developer charges — up front contributions that property developers are required to make to the infrastructure associated with the land they develop (PC 2014b). And users of infrastructure can be required to pay prices based on the cost of provision. These are effective means of funding infrastructure, as they require users or developers to take into account the cost of infrastructure in their decision making.

However, companies should not be required to fund or construct infrastructure that is not directly associated with their projects — such as water and power expansions needed due to the increasing population of the community. Such public infrastructure is generally the domain of governments, and the costs can be recouped by charges on developers of housing, or on the users of the infrastructure (for example, through direct user charges or indirectly through council rates) whether they are associated with the resource operation or not.

Some companies voluntarily invest in these areas to improve community amenity for their workers and to build community support, but they should not be expected to do so, unless they are users of the infrastructure. For example, Bice (2013) highlights several communities which have become reliant on resources company investment in infrastructure because adequate investments have not been made by governments.

DRAFT FINDING 9.1

The effects of resources extraction, both positive and negative, are amplified for local communities. Resources extraction can stimulate economic activity in the community, but also lead to effects such as house price fluctuations and strains on local infrastructure.

It is appropriate that resources companies are required to address significant negative externalities associated with resources extraction, such as noise and dust, and provide or pay for infrastructure that they directly use. However, effects such as fluctuating house prices signal the need for market adjustments and should not be supressed. Approaches such as appropriate planning can moderate price spikes.

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

Meeting regional development objectives

Regulated benefit sharing may be seen by governments as an opportunity for promoting regional development or equity goals. Resources extraction generally takes place in regional areas where access to key amenities such as education and healthcare can be relatively limited, and funding from resources companies may be seen as one way of developing these amenities.

There is a growing sentiment that local communities located near resources projects should receive benefits from resources companies over and above those from employment and other

economic effects. For example, the House of Representatives Standing Committee on Industry, Innovation, Science and Resources (2018, p. 30) stated:

> In addition to compensating communities for the negative impacts of mines, mining companies should support mining regions by reinvesting a reasonable percentage of the wealth they generate back into the regions where mines are located.

Some local communities appear to believe that they have ownership rights over nearby resources.

In fact, as discussed in chapters 4 and 5, resources are owned by the Crown on behalf of all Australians, not just those located near resource extraction sites. It is unclear why communities located around resources projects should benefit over and above other regional communities from resources royalties as a matter of right rather than of need — especially given that resources communities generally benefit substantially from resources projects.

DRAFT FINDING 9.2

Resources are owned by the Crown on behalf of all Australians. Although negative externalities of resource projects on local communities should be efficiently addressed, these communities should not benefit over and above other regional communities from resources royalties as a matter of right.

Coordinating and planning investment

As noted above, resources companies often invest in a range of infrastructure, notably social infrastructure services such as pools, schools and community hubs. However, if this investment is not coordinated, particularly where there are several resources companies investing in a community, it may not deliver the greatest possible benefits to the community. Brannock and Tweedale (2012, p. 1) noted that the 'strategies adopted by mining corporations to address the social externalities of resources development are often ad hoc, isolated and reactive'. Similarly, Dhawan (2014, p. 4) stated that 'many organizations struggle to demonstrate the effectiveness of their [social investment] expenditure'. There is a risk that companies are spending money on projects that are not valued by the community, potentially undermining the reasons for doing it.

In the context of Chile, Martinez and Franks (2014, p. 301) noted the issues that can arise when investments are not coordinated.

> A lack of coordination among mining companies has resulted in overlaps of investments, and increased inequality between communities that are not defined as impacted by a mine site, and those that are. Re-thinking the current degree of collaboration is required. This also applies internally to the different units of operation of … corporations.

The Centre for Social Responsibility in Mining (2012, p. 15) noted that in some cases, mining company investment can even add to the burden faced by local governments.

> Australian local government already has a backlog of infrastructure renewal works, particularly in the areas of community infrastructure such as swimming pools, community centres and libraries. In some cases it appears that mining company contributions to the local region (through swimming pools, libraries and even jetties) simply increase that backlog when they include infrastructure works that require ongoing maintenance, even after mining activity has ceased.

This suggests there may be a role for government, particularly local governments, to assess the community's needs and coordinate benefit-sharing projects within their community. This could be through ongoing engagement with resources companies (section 9.3).

Providing guidance to companies

Engaging with the community and obtaining a social licence is the responsibility of companies. Indeed, given that a social licence is often seen as involving activities that go beyond government requirements, Lacey, Parsons and Moffat (2012, p. 5) noted that 'the combining of community relationships and formal licencing accountabilities is potentially problematic'.

Nonetheless, where companies are struggling to obtain a social licence (and thus projects with net benefits to the wider community are facing delays or being abandoned) there may be scope for governments to issue guidance on community engagement and benefit sharing. This may be particularly useful for smaller miners (who may not have experience of the approvals process) or foreign miners (who may not be as familiar with the Australian culture).

Guidance for companies is discussed further in sections 9.2 and 9.3.

Aboriginal and Torres Strait Islander communities

Resources companies may engage with and provide benefits to Aboriginal and Torres Strait Islander communities. The principles behind these activities are similar to other community engagement and benefit-sharing activities, although legislation requires engagement and benefit-sharing activities in some cases. This is discussed further in chapter 10.

Comparing the costs and benefits of benefit sharing

The above sections provide some reasons as to why benefit sharing may be beneficial for companies and local communities. However, this does not necessarily mean that benefit sharing should proceed, or that an unlimited amount of benefit sharing is of highest value to Australia — benefit sharing has costs that need to be weighed against the benefits. These costs may include:

- forgone tax and royalty revenue for governments, and a reduction in investment, if benefit-sharing activities become so onerous that companies do not proceed with projects

- a reduction in employment and service provision opportunities in other communities, particularly where governments restrict FIFO workforces or encourage local procurement
- reduced company profitability, which reduces returns to shareholders.

DRAFT FINDING 9.3

Companies have an incentive to engage and share benefits voluntarily with communities, to obtain 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.

9.2 Identifying leading-practice community engagement

As noted in section 9.1, effective community engagement is crucial for obtaining community support for resources projects that are likely to affect communities — and thus avoid the risks of costly delays or projects not proceeding. There are several reasons why this is the case. Involving stakeholders shows respect for them, and recognises that they have a long-term interest in the outcomes of the project (COAG Energy Council 2016, p. 10). It can provide an opportunity for stakeholders to inform companies about their concerns, and provide companies with a chance to take these concerns into account in the operation of their project. Providing communities with agency can allow them to adapt better to changing circumstances. And community engagement can be a way for companies to inform communities of the benefits of a project, and allay community fears.

Guidance for companies is available

There are many guidelines and leading-practice examples of community engagement. These include guidelines from:

- Australian Government agencies and the Council of Australian Governments (Australian Government 2016a; COAG Energy Council 2016; MCMPR 2005)
- State and Territory Government departments (for example, NSW DPE 2017e; Vic DJPR 2019b)
- international organisations, such as the International Association for Public Participation (IAP2 2014), the Mining Association of Canada (MAC 2019), and the US Environmental Protection Agency (US EPA 2008) and National Coalition for Dialogue and Deliberation (NCDD 2009).

The guidelines generally cover similar themes, and the Commission has not identified a set of guidelines that are better than the others. These themes include:

- engage early, often and meaningfully
- undertake engagement transparently
- consult with a diverse range of stakeholders
- provide opportunities for marginalised stakeholders to participate
- adopt a fit-for-purpose approach (discussed below).

A commonly cited framework for understanding community engagement is the spectrum designed by the International Association for Public Participation (figure 9.1). Some articles suggest that approaches to the right of the spectrum — collaboration and empowerment — are more effective forms of engagement, but this is not always the case. Sometimes more basic forms of engagement, such as information provision, will be entirely appropriate (Australian Government 2016a, p. 5). Information provision can be used to easily reach a wide range of stakeholders, and may be suitable when companies are undertaking activities such as less invasive exploration.

Involvement, collaboration and empowerment may be used once a company is more advanced in its project, or where its activities are likely to have a substantial effect on stakeholders. These types of engagement may include workshops, interviews, reference groups and discussion groups (Australian Government 2016a, p. 5).

Irrespective of the consultation approach used, it is important that participants can see that their engagement has had an impact or influence on the decisions made by the company. If there is no follow through, or engagement is of a 'tick a box' nature, then stakeholders will, unsurprisingly, be less likely to engage in the future and may express dissatisfaction.

DRAFT FINDING 9.4

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 there is no one leading practice set of guidelines.

Figure 9.1 **Community engagement spectrum**

	Inform	*Consult*	*Involve*	*Collaborate*	*Empower*
Participation goal	To provide the public with information to help them understand issues and opportunities	To obtain feedback	To work with the public to ensure that concerns are understood and considered	To partner with the public in each aspect of the decision	To place final decision making in the hands of the public
Participation promise	We will keep you informed	We will keep you informed, listen to concerns and seek feedback	We will work with you to ensure your concerns and aspirations are reflected in the alternative options developed	We will look to you for advice and incorporate your advice to the maximum extent possible	We will implement what you decide

Source: IAP2 (2014).

How are companies engaging with communities?

Industry participants to this study emphasised the importance of community engagement in their operations. For example:

> Effective community engagement underpins the acceptance of the mining industry across regional and remote Australia. Industry engagement with regional communities has evolved over past decades, in line with improved understanding and the development of innovative approaches. (MCA, sub. 11, p. 29)

> Community engagement is a two-way process and INPEX is grateful for the feedback the community has provided which enhances decision-making processes on issues that may affect local people's wellbeing and/or interests. (INPEX, sub. 34, p. 18)

> Today, more than ever, interactions between company and community that aim to increase understanding on all sides, build trust, and strengthen relationships are vital to the success of resource operations. (QRC, sub. 27, p. 19)

Most resources companies have a stakeholder engagement strategy that sets out who they plan to engage with, and how they plan to engage with them. (This can be a requirement of the approvals process — discussed below.) For example, Glencore's stakeholder engagement strategy for its Mt Owen mine identifies a range of stakeholders, including

landowners and neighbouring landowners, community groups, Indigenous heritage groups, government departments and the local government. It outlines a plan to engage with each of these stakeholders, generally through annual or biannual one-on-one meetings, group meetings and mailouts (Glencore 2019).

Community engagement by companies is more effective when it is undertaken early and has a meaningful impact on the decisions made by the company. For example, early consultations by INPEX in relation to its Ichthys liquefied natural gas project identified concerns about plans to blast a shoal in the Darwin harbour. Following this, INPEX announced it would not blast in the harbour (COAG Energy Council 2016, p. 29). INPEX (sub. 34, p. 18) noted that it uses 'a wide range of avenues … to stay in contact with local people' including community feedback lines, advertising, industry forums and information stands. The COAG Energy Council (2016, p. 28) noted that:

> It is widely accepted that the level of community and stakeholder engagement by Inpex on behalf of its joint venture partners has been extensive, embracing and effective at all levels of the community and at each and every stage of the construction project thus far.

Companies are also increasingly seeking to survey community attitudes, to be better informed about the concerns of the community. Several companies, including BHP and Rio Tinto, have engaged CSIRO to undertake regular surveys of the community through its Local Voices program to assess community attitudes to issues such as dust, employment, and the effectiveness of community investment and engagement (CSIRO 2020a, 2020b). Similarly, GISERA, a partnership between governments and industry, undertakes regular surveys of community attitudes to conventional and unconventional gas to inform community engagement activities. Andrew Garnett (sub. 24, p. 6) noted the role that independent institutions can play in community engagement:

> There is a trust 'ladder' and both government and industry tend to be relatively low down. While trust in societal institutions as a whole is reducing, the Universities and CSIRO tend to retain a high place. While clearly also in our interest, we feel that the promotion and dissemination of independent research can play a useful part in engagement.

In general, companies have a strong incentive to engage with key stakeholders, to help projects run smoothly.

Requirements to consult with the community

Despite the incentive for companies to engage, some lack the capacity, incentive or the inclination. While the companies themselves will be exposed to many of the negative effects arising from a lack of community engagement (section 9.1), it can also affect the reputation of the industry as a whole. This may result in a negative externality on the industry, and there may be a case for government intervention. Governments have some regulatory approaches in place to ensure that interested stakeholders can comment on resources projects.

Consulting on environmental impact assessment processes

In all jurisdictions, regulations require that stakeholders are provided with an opportunity to comment during the environmental impact assessment process for resources projects. This generally includes opportunities to comment on both the terms of reference for the environmental impact statement, as well as the statement itself.

The Commission has heard concerns that consultation requirements can be time consuming for little benefit, particularly where few to no material submissions are received. Nonetheless, consultation processes do have benefits, even where there are no submissions. Giving people the option to engage can increase community confidence and trust in the process, and improve knowledge about resources activities (NOPSEMA, sub. 13, p. 11). They help improve decision-making processes and help build a social licence for the company (EDO, sub. 40, p. 16). And, as noted by the Law Council of Australia (sub. 29, p. 5):

> Where there is a lack of effective community engagement through statutory assessment processes, or before, this has the potential to lead to perceptions of bias and collusion, and a greater risk and number of appeals.

The Commission considers that community consultation through the assessment period is leading practice — this is a requirement in all jurisdictions and no approach stands out as better than the others. This should include an opportunity to comment on both the draft terms of reference and the environmental impact assessment. Chapter 6 also considers consultation in assessment processes.

Other regulatory requirements

Each jurisdiction also places other requirements on resources companies to consult with local communities and other key stakeholders. Companies are generally required to prepare a stakeholder engagement plan during the approvals process, which sets out the engagement that has taken place to that point, how companies have responded to this engagement and plans for further engagement.

Jurisdictions may require certain types of community engagement through the regulatory process. For example, in New South Wales, community consultative committees may be required for major projects, which include members of the community, members of the project team and the local government (NSW Government 2019).

In Victoria, requirements go further. Mining licence holders have a general 'duty to consult' with the community under the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (s. 39A). This requires companies to share any information about the project that may affect the community, and give the community reasonable opportunity to express their views. Victoria also explicitly considered a company's capacity to engage with the community in a tender process for exploration in the Stavely Arc in western Victoria. Finally, Victoria has a fit and proper person test for companies to obtain mining licences — guidance issued in 2019 confirmed that a licence can be rejected or withdrawn if a company has 'behaved

unethically towards or failed to work cooperatively with relevant landholders and local communities' (Vic DJPR 2019c, p. 5). This guidance is still in its infancy, and it remains to be seen how it will operate in practice. Chapter 4 considers fit and proper person tests in approvals processes further.

9.3 Identifying leading-practice benefit sharing

As noted above, benefit sharing covers a wide range of activities undertaken by resource companies to provide benefits to communities. These include:

- assessing and mitigating the economic and social effects of resources projects
- purchasing goods and services from local businesses, or employing local people
- building infrastructure for the community
- providing financial benefits to landholders and the community.

This section considers what is leading practice in each of these areas, and also considers the role for government.

Identifying and addressing environmental and social costs

International guidelines recommend that communities be, at a minimum, 'protected from harm and recompensed for damage done to them by resource projects' (IFC 2015, p. 62). Social and economic effects (as well as environmental effects — chapter 6) on communities are considered through the approvals process, either through the environmental impact assessment or a dedicated social impact assessment (table 9.1). Social impact assessment:

> … includes the processes of analysing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. (Vanclay 2003, p. 6)

It is often the social and economic effects identified in these assessments that motivate benefit-sharing activities, such as the construction of infrastructure to mitigate congestion on existing infrastructure.

The principles for social impact assessment are similar to those for other parts of the approvals process (chapters 3 and 11). They should be risk based — prioritising the areas most likely to be of significance for the community. They should consider cumulative effects of multiple projects where feasible. And there should be the flexibility to update them as new information becomes available over the life of the project.

Social impact assessment is a useful tool for identifying social effects on a community early so that they can be addressed by the company or government where desirable. What a social

impact assessment should take into account, and how one should be undertaken, will vary depending on the community involved, the project and its likely effects.

Table 9.1 **How are social effects considered in State and Territory approval processes?**

State	*Legislative requirements*	*Guidance*
New South Wales	The *Environmental Planning and Assessment Act 1979* (NSW) requires social and economic effects in a locality to be considered in the assessment of a development application (s. 4.15).	The Department of Planning and Environment has issued guidelines for social impact assessments for resources projects (NSW DPE 2017d). A template scoping spreadsheet for social effects is also available.
Victoria	Section 10 of the *Environmental Effects Act 1978* (Vic) allows the minister to make guidance about what should be included in environmental effects statements.	Ministerial guidance defines the environment to include social impacts. The guidance includes a range of social impacts that may be considered (Vic DSE 2006a).
Queensland	The *Strong and Sustainable Resources Communities Act 2017* (Qld) requires large resource projects to prepare a social impact assessment as part of their development application (s. 9).	The Coordinator–General has issued detailed guidance, which includes the process for conducting a social impact assessment, and what should be considered (Qld DSDMIP 2018).
Western Australia	The *Environment Protection Act 1986* (WA) definition of environment includes social and economic effects, where these are affected by changes to physical or biological surroundings (s. 3(2).)[a]	Statutory guidance for mine closures notes that it is good practice to consider the economic and social effects of mine closure (WA DMP 2015).
South Australia	The *Mining Act 1971* (SA) defines environment to include infrastructure, land use, and public health, safety and amenity (s. 6(4)).[a]	Guidance notes that factors to be considered in mining plans include the local community, infrastructure, amenity and land use (SA DSD 2015b).
Tasmania	The *Environment Management and Pollution Control Act 1994* (Tas) requires that key social and economic effects must be considered in a notice of intent for a resources project, to allow the Environment Protection Agency (EPA) to determine the class of assessment. The EPA is required to issue guidance to proponents about what should be considered in environment assessments (s. 27B).	EPA guidance states that socio-economic effects should be considered in the environment impact statement (Tas EPA 2019).
Northern Territory	The *Mining Management Act 2001* (NT) defines the environment to include the wellbeing of humans, structures made or modified by humans, amenity value and economic, cultural and social conditions (s. 4).[a]	Guidance for mining management plans outlines the expectations for social and economic effects to be considered. The guidance notes that the minister may require a community benefits plan and a socio-economic management plan (NT DPIR 2017).

[a] Where the definition of environment includes social and economic impacts, these would be required to be considered as part of the environmental impact assessment process.

Like other aspects of the approvals process, companies need guidance as to what social effects governments expect them to consider, and how they should be considered. Detailed

guidance is available in jurisdictions such as Queensland and New South Wales that outlines what is expected of proponents, but in some other jurisdictions, requirements are less clear (table 9.1). Guidance would help improve the quality of assessments, and potentially improve community faith in social impact assessment processes.

The next question is, once impacts have been identified, how are they best managed? Some jurisdictions require social impact management plans — for example, Queensland's social impact assessment guidance states that companies must have:

- a local business and industry procurement plan for the construction and operational phases of the project which includes measures to mitigate potential negative impacts on local industries
- housing plans, with the objective of ensuring that the project does not contribute to significant affordability impacts on housing
- workforce management plans, with measures to enhance employment opportunities for local communities (Qld DSDMIP 2018).

However, the responsibility for addressing negative effects identified in social impact assessments should not always fall on companies. As noted by Holm et al. (2013, p. 219) the identification of an effect in a social impact assessment 'should not necessarily require a resources company to provide or fund a service that is normally within the responsibility of government'. Governments may be better placed to address certain social impacts (section 9.1). Similarly, as noted by the OECD (2017, p. 9):

> Regions and cities have a key role to play in mitigating these costs [associated with mining] and investing in measures to take advantage of the opportunities associated with mining and extractive industries. It is important to develop a vision for the development of the region in collaboration with public and private sector actors, and include citizens and community organisations (particularly hard to reach and vulnerable groups) in this dialogue.

This suggests that companies and governments should work together to manage the effects on local communities, and ensure that benefits are maximised and impacts are mitigated where feasible.

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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 suggests that social impact assessments should provide a framework for companies and governments to work together to address these effects, in line with the principles outlined in draft finding 9.1. The Commission has not identified a leading practice jurisdiction in this area.

Using local goods and services

Resources companies generate benefits to a local community through their use of local goods and services. This can occur at all stages of the resources project — from construction through to rehabilitation — and can offer significant benefits, including additional employment, diversification of the local economy and development of new skills (South Australian Government, sub. 25, p. 13).

Resources companies contribute significantly to local businesses

Many resources companies have made commitments to source goods and services from the regions in which they operate. The MCA (2018c, p. 10) noted that:

> Suppliers in host communities and regions are an important source of high-quality mining equipment, technology and services for the Australian mining industry. The minerals industry also recognises that engaging local suppliers is part of its broader commitment to ensure shared benefits from minerals development.

The House of Representatives Standing Committee on Industry, Innovation, Science and Resources heard many examples of where resources companies had engaged with local businesses, for example:

- In Mackay, in 2016-17 the resources sector spent $2 billion with 1733 local businesses, and in the Hunter Valley it contributed $15 billion to the local economy.
- Rio Tinto stated that it had spent $1.5 billion with Queensland businesses, and $244 million of that with businesses in Cape York.
- Fortescue stated it had spent $2 billion on procurement with Western Australian businesses (over 3 years), with $200 million of that sourced from the Pilbara region.

- Glencore stated that about 80 per cent of the $4.8 billion it spent on goods and services was with local and regional businesses in 2017.
- Peabody Energy stated it spent about $280 million on suppliers in the Mackay and Bowen Basin regions in 2017-18, and about $160 million in New South Wales in communities close to its operations (HRSCIISR 2018, pp. 34–37).

Participants to this inquiry noted further examples of local procurement practices. The MCA (sub. 11, p. 20) observed that the New Acland Mine injected 'more than $110 million into the Darling Downs economy each year and more than $300 million into the broader south-east Queensland economy each year'. INPEX (sub. 34, p. 5) stated that its Ichthys LNG project engaged with more than 1150 local businesses, and that more than $175 million in contracts have been awarded to Aboriginal and Torres Strait Islander businesses.

Resources companies have also noted that they have initiatives to help local businesses to improve their capabilities. Resources companies: provide support to help businesses with tender processes; invest in local business capability through regional industry bodies; hold forums for local businesses; and maintain databases of local businesses.

One approach to increasing local procurement is BHP's Local Buying Program (box 9.4).

Box 9.4 BHP's Local Buying Program

BHP's Local Buying Program was established in Queensland in 2012, and provides support to local small businesses looking to supply to BHP. BHP has engaged with a provider, C-Res, to deliver a platform for businesses to engage with BHP as well as deliver a streamlined procurement and payment process. C-Res also provides mentoring and other direct support to businesses. The platform has been expanded to cover all of BHP's operations in Australia.

Between 2012 and March 2020, the Local Buying Program has spent over $450 million with 1400 suppliers (BHP 2020b).

The South Australian Government (sub. 25, p. 13) noted some of the benefits of C-Res in South Australia:

> A C-Res business engagement adviser in Roxby Downs offers direct support to local businesses, backed by a program administration team. Since opening in October 2017, the program has delivered over 379 new work opportunities involving 85 approved businesses. Total spending is over $3.2 million (to April 2019), with an average payment time of 12 days. Local businesses have provided services and goods including freight and logistics, maintenance and repair hardware, training, office supplies and other consumables.

Similarly, in its submission to the House of Representatives Inquiry into Resources Industry Support for Local Businesses, Isaac Regional Council (2018, p. 6) described C-Res as an example of genuine mining industry support for regional businesses.

Resources companies can benefit from using local businesses in several ways. Local businesses may be able to offer a cheaper product to the company, if transport and other costs are lower, and products and services may potentially be provided more quickly. Local

procurement can also help a company to maintain a social licence to operate and improve the liveability of the community for its workforce (section 9.1).

Mandating local procurement is likely to be costly

Governments at all levels in Australia have programs in place to increase procurement opportunities for local businesses. These programs can be divided into two broad categories:

- approaches to increase the capacity of local businesses to win contracts with larger companies
- requirements on resources companies to source a proportion of their goods and services locally.

Small regional businesses can face several barriers to engaging with mining companies, including difficulties with complex tendering processes, resource company headquarters being located away from regional areas, and a lack of skills and labour — particularly where resources companies in the region attract the available skilled labour (Office of the Australian Small Business and Family Enterprise Ombudsman, sub. 23, p. 2). Governments attempt to address these barriers in several ways.

- Some State and local governments employ people whose role is to promote local content opportunities. For example, in Western Australia, regional development commissions employ local content advisers, who connect local businesses to opportunities in the region, provide advice on procurement processes and provide support for infrastructure and training (PDC nd).
- Regional Development Australia Committees are an Australian Government initiative that can, amongst other roles, provide support for businesses in regional areas (HRSCIISR 2018, p. 56).

These approaches have some merit in principle as they seek to fill information gaps, although there is limited evidence on their effectiveness. A 2016 review of the Regional Development Australia initiative found significant shortcomings, including a lack of performance indicators and evidence on the success of the committees, large variation in the quality of regional plans, and limited capacity to implement those plans. The review noted that more focus needed to be put in areas such as developing skills, business competitiveness and access to markets (Smith 2016). The Commission (PC 2017e, p. 35) has previously recommended that the Regional Development Australia scheme be abolished, in large part due to duplication of State and Territory schemes.

Despite the volume of local procurement that already takes place, governments are placing an increasing focus on local procurement. For example, as noted earlier, Queensland requires companies to develop a local content plan as part of its social impact assessment processes. Western Australian state agreements often require companies to use local goods and services where feasible — although this generally refers to Western Australian goods and services

rather than the local region. Some local councils have also reported that they require companies to meet local content targets (HRSCIISR 2018, p. 56).

There are calls for this practice to become more widely used. In particular, the House of Representatives Standing Committee on Industry, Innovation, Science and Resources (2018, pp. xi–xii) recommended that:

> … the Federal Government work with state, territory and local governments, and land councils, who make licensing agreements with companies to ensure these agreements:
>
> - include targets for minimum levels of true local procurement, based on the specific circumstances of the region and the project, including regional business capability; …
> - require companies to make procurement opportunities readily available and accessible to regional small and medium enterprises and locally-based businesses of any size, and to advertise their contracts and tenders for at least 30 days; and
> - require companies to ensure their higher-tier contractors also commit to local procurement.

Local procurement requirements are likely to be costly from a whole of community perspective and may not even help local business in the long run. Resources companies will source goods and services from local communities where the service is the most efficient or highest quality and/or because it helps with social licence objectives. Mandating procurement beyond this level implies that businesses are required to use lower-quality or higher-cost goods and services. This has flow-on effects to shareholders and taxes and royalties, and may reduce investment in resources, leading to longer-term detrimental effects on the community. Local businesses can become reliant on procurement targets — leading to issues when the resources extraction site eventually closes.

Local procurement requirements will also affect businesses in other regions of Australia which lose resources company contracts. This includes businesses from other regional areas. It is unclear why businesses located near mines should benefit over and above those in other regions.

In sum, local procurement requirements are likely to be an inefficient way of supporting local development. Providing businesses in regional areas with the support needed to engage with resources companies, such as local content advisers, is likely to be a better way of encouraging procurement from regional areas.

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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.

Employing local workers

Resources companies share benefits with local communities by employing local workers. This contributes to the economic prosperity of a region by, for example, increasing employment, wages and providing incentives for people to move to the region.

The resources industry is a large regional employer

While resources companies often use FIFO workers, there remains a large local employment component. For example, in New South Wales, 80 per cent of the workforce lives close to resources operations (HRSCIISR 2018, p. 137). In Western Australia, FIFO is more prevalent — at least in part reflecting the more remote nature of the industry and the scale of the workforce required — with 63 per cent of the mining workforce estimated to be FIFO (HRSCIISR 2018, p. 135).

While most FIFO workers come from major cities, a sizeable proportion comes from regional areas. For example, Rio Tinto has a program of sourcing FIFO workers from other regional areas — about 2300 Rio Tinto employees fly in from other regional Western Australian areas (HRSCIISR 2018, p. 140).

Some resources companies are also making efforts to increase their local employment. Through consultations, the Commission heard that companies such as Yara Pilbara and Woodside are moving towards, or have, residential workforces in the Pilbara. Companies such as Glencore and Origin Energy provide incentives to promote local residence by their employees.

FIFO is a valuable tool for companies

FIFO remains heavily used in some regions — the Commission has estimated that there were about 60 000 FIFO workers in Australia in 2016 (including non-resources employees) (Productivity Commission 2020, p. 258). There are several reasons for this. FIFO can allow companies to obtain workers and skills that may not be available in the local region. In mines that are situated far from major towns, FIFO may be the only option. And FIFO was instrumental in allowing companies to meet their workforce needs during the resources boom, particularly to accommodate temporary workers during construction (PC 2017e, p. 103).

FIFO can also moderate the effects of resources extraction on communities, particularly during the relatively short-lived construction phase. Without FIFO, the price fluctuations, including house prices, in resources communities during the resources boom would have been even more pronounced (PC 2014a, p. 25).

FIFO can also spread the benefits of resources to other, non-resources regions. As noted above, this includes both capital cities and non-resources regional areas.

However, there are also long-standing concerns about the negative effects of FIFO. As previously noted by the Commission (PC 2017e, p. 103), non-resident populations may be less committed to the community and temporary populations can place strains on community resources.

Local communities are also concerned about the economic effects of FIFO. In particular, some communities have in the past been faced with the burden of providing infrastructure for temporary residents, without receiving the funds to do so (for example, HRSCRA 2013, p. 58). Reforms in Western Australia to allow local governments to levy rates on resources camps are a positive move that should address this problem somewhat.

Finally, there are also concerns about the effect of FIFO practices on the workers themselves and their families, including mental health issues and the effects of workers spending long periods of times away from their families.

The above concerns have led to governments beginning to legislate against FIFO practices. In particular, the Queensland Government passed reforms in 2018 that prevent resources companies located near regional towns from having a 100 per cent FIFO workforce. The effect of this legislation is unclear — the Queensland Resources Council (sub. 27, p. 6) noted that, when the legislation commenced, none of the regulated companies had a 100 per cent FIFO workforce.

As the Commission has previously argued, FIFO has many benefits, both for companies and the broader community, and it is a business decision as to whether to employ workers locally. Indeed, employing local workers has benefits for companies, including building a social licence in the community, and some companies are implementing strategies to reduce FIFO, and to minimise its negative effects when used. For example, the Commission heard examples of companies locating FIFO workers closer to nearby towns, and promoting their engagement within the community. Regulating the practice is not warranted.

However, at the outset of a project, companies should identify through social impact assessment processes whether FIFO workers will be used, and what the negative effects might be. Engagement between resources companies and the community about the reasons why FIFO workforces are used may help to ease community resistance to the practice. This is a preferable approach to using regulation to curtail the practice.

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Fly-in, fly-out workforces provide flexibility for companies, and distribute the benefits of resources development around Australia. The use of fly-in fly-out 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.

Building local infrastructure

Local resources communities often need additional infrastructure to manage the influx of population associated with new investments. This can range from essential infrastructure such as roads and electricity networks to community infrastructure such as swimming pools and town halls. Resources companies themselves require infrastructure to be constructed to operate.

Many resources companies invest heavily in local infrastructure

Many large resources companies invest in community infrastructure facilities in regions near their projects, such as community hubs, education and healthcare. This can occur through direct investment or through providing funding to local governments. For example:

- Rio Tinto has contributed $8.5 million to a community hub in the Shire of Ashburton, and $8 million to a community hub in the City of Karratha (MCA 2018a).
- Anglo American (2020) has a Moranbah community investment program — a $20 million fund it has used to invest in infrastructure such as an aquatic centre, housing infrastructure and upgrades to local infrastructure.
- INPEX (sub. 34, p. 18) noted that it had spent more than $4.5 million on community programs since 2012, plus $9 million to develop education and training institutions in the Northern Territory.
- Shell has established a program in the Western Downs regions of Queensland to deliver telehealth services to students (QRC, sub. 27, p. 20).
- The NSW Mineral Council (sub. 28, p. 39) noted that New South Wales resources companies provide community contributions to local governments through voluntary planning agreements — for example, KEPCO provided about $9 million over 27 years to the Mid-Western Regional Council in New South Wales for community facilities.

Community use of resources company infrastructure

Resources projects require a range of infrastructure to operate, such as road and rail links, ports, electricity, telecommunications and water. One approach to provide benefits to the local community is to construct resources infrastructure in a way that it can also be used by the local community. For example, this may involve building a road to a mine in such a way that it can also be used by the community, or generating excess power from a mine site so that can be fed into the grid at low cost.

Dobbs et al. (2013, p. 10) found that up to 30 per cent of resources company infrastructure investment globally could be shared with other (non-resources) users. They found that infrastructure such as power and roads was most amenable to sharing, with infrastructure such as rail and ports more costly to share with other users.

There are many potential benefits to sharing resource infrastructure with the community. It can be a way of providing infrastructure to the community more efficiently. However, there can also be costs — particularly where the costs of coordinating multiple users of the infrastructure are high.

Despite the benefits that can arise from sharing infrastructure, Ramdoo (2015, p. 4) noted that there are few examples of successful greenfield multi-user resource infrastructure projects in the world, and the Commission has not identified any such examples in Australia. The Commission is seeking further information on the opportunities that exist for sharing resources infrastructure with communities, and whether there are any examples of this in practice.

INFORMATION REQUEST 9.1

Is there scope for greater sharing of resources company infrastructure with communities? Are there any examples of where this has been done effectively?

Coordination is key

As noted in section 9.1, there are cases where resources companies struggle to demonstrate the value of their community investments, or their investments can even add to the burden on local governments if there is an ongoing maintenance cost. It is crucial that community infrastructure investments are coordinated if the benefits from these investments are to be maximised.

> In some cases, the infrastructure investment may not turn out to be very productive or of much benefit if it is not part of an integrated approach that ensures that the teachers, nurses, doctors, and medicines needed to operate services will be available. Even more basic infrastructure investment, such as for roads, needs to be integrated into an appropriate process for maintenance and repair if the benefits are not to be quickly lost. Close coordination with and support for relevant government agencies may be needed. (IFC 2015, p. 46)

Isaac Regional Council (sub. 48, p. 7) noted that partnerships between local governments and resources companies are needed to ensure that the benefits from investments are maximised:

> Experience in the Isaac has taught us that what has worked is that local government needs to be a genuine partner in the process. Experience has also highlighted that the best outcomes are achieved when local government identifies community-based solutions.

There are several examples of such partnerships. In the Pilbara, Rio Tinto entered into partnerships with the Shire of Ashburton and the City of Karratha in 2012 to deliver infrastructure and services to the community. These partnerships have been used to deliver community hubs, events, festivals, upgrades to public amenities and community development programs.

The City of Karratha (2019, p. 1) has noted that:

> The Partnership Agreement between the City of Karratha and Rio Tinto has been instrumental in enhancing community life through the delivery of new and improved services, the support of festivals and events and through seminal investments in key civic infrastructure projects.

In Queensland, the Isaac Affordable Housing Trust is an initiative funded by Isaac Regional Council and companies including BHP Billiton Mitsubishi Alliance and Rio Tinto. The trust invests in affordable housing, to reduce the effects of increased housing demand on the community. Isaac Regional Council (sub. 48, p. 8) noted:

> An objective of the trust is to provide long-term sustainable housing investment in the Isaac region by bringing together resource proponents, developers, investors and the [trust] manager will ensure that all parties work together towards this goal.

In late 2018, the Shire of Coolgardie in Western Australia signed a memorandum of understanding with ten resources companies to work collaboratively to deliver economic and social benefits to the community (Shire of Coolgardie 2019). Such an approach has promise, although there is limited evidence of its effectiveness thus far.

Another approach that has been used is to coordinate projects with a consultative committee consisting of a broad range of stakeholders. For example, Hillgrove Resources has established a consultative committee with the Kanmantoo and Callington communities in South Australia. Through this committee they have established a 'master plan' to set up a long-term vision for the community after the mine ceases production. Current and future projects established through the plan include irrigation systems, improvements to halls and community centres, and the establishment of heritage trails, open air museums and nature corridors. The South Australian Government (sub. 25, p. 15) noted that:

> The community's vision is that this process will be held up as a model for mining companies across Australia to positively engage with their host communities for the collective betterment of regions, the mining industry and government into the future.

Coordination between local government, resources companies and other stakeholders can draw together expertise from both the public and private sectors. Resources companies often collaborate with local governments and other stakeholders when making investments, but more formal partnerships like those outlined above may help to strengthen relationships, and deliver greater benefits for communities.

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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.

Local government capacity

The above identifies a role for local governments to coordinate and provide infrastructure related to resources developments. As noted earlier, there is also a role for local governments to mitigate some of the negative effects of resources development, such as through planning frameworks. Andrew Garnett (sub. 24, p. 7) noted the need for capacity building for local governments to fulfil their roles.

The Commission has previously considered the capacity of local government in its role as a regulator, and noted that many local governments faced capacity constraints — including financial capacity and the available of skilled staff (PC 2012). The Commission identified the need for State governments to assess the capacity of local governments, and identified benefits from State governments reviewing individual local governments, such as Promoting Better Practice Review program in New South Wales. These leading practices are also relevant for the role of local government in benefit-sharing activities. Chapter 11 also considers the capacity of local government.

Sharing financial benefits

Companies can also provide benefits for stakeholders in the form of financial agreements. These come in several broad forms:

- As noted above, companies can provide funding to local government to be used on infrastructure projects.
- Companies enter into financial agreements with Indigenous communities as part of native title and other obligations. This is discussed in chapters 5 and 10.

Governments have also implemented other initiatives to share the financial benefits of resources with local communities, typically referred to as royalties for regions programs.

Royalties for regions is not the best answer

Several States have, or have previously had, 'royalties for regions' schemes. These schemes hypothecate a proportion of royalty revenue from resources into a fund which is used for regional development initiatives. For example:

- Western Australia has had a royalties for regions program since 2008, which pays 25 per cent of forecast royalty revenues into a fund. The program has invested over $9.3 billion into projects in regional areas since its inception (WA RDT 2019, p. 7).
- A royalties for regions program operated in Queensland from 2012-13 to 2015-16 (HRSCIISR 2018, p. 18).
- South Australia introduced the Regional Roads and Infrastructure Fund in 2018-19. 30 per cent of revenue from resources royalties are paid into the fund (South Australian Government, sub. 25, p. 12).

There is pressure on other jurisdictions to adopt similar approaches. The House of Representatives Standing Committee on Industry, Innovation, Science and Resources (2018, pp. 30–31) stated that many regional communities are not getting their fair share of the wealth generated from the resources sector, and that, at the time, the WA Royalties for Regions program was the only program that returns a significant proportion of royalties to resources-affected communities. The Committee (HRSCIISR 2018, p. 32) recommended that:

> … the Federal Government advocate through the Council of Australian Governments for states and territories with significant mining and resources sectors to adopt 'Royalties for Regions'- type programs, which guarantee a share of royalties from resource extraction are reinvested in regional areas, especially those directly impacted by mining.

However, reviews of royalty for regions programs have identified several flaws. In 2018, a special inquiry in Western Australia was conducted to review several government programs, including Royalties for Regions. The review found severe deficiencies in the program:

> It is evident that the Royalties for Regions program has many shortcomings in governance, strategy and administration. … Hypothecation creates a strong incentive to spend money faster than may otherwise be optimal for the State. … The ongoing rationale for a hypothecated program of the size and scale of the Royalties for Regions program should be reviewed. (Langoulant 2018, p. 147)

The review noted that the hypothecated nature of the program created incentives to spend money on projects without developing a strong business case. In addition, because royalty revenue is shared throughout Australia through horizontal fiscal equalisation, in some cases the Government needed to borrow money to fund Royalties for Regions. The review also noted that there was limited evidence that outcomes for regions had improved due to the program:

> From the indicators available, it is not clear whether there has been any significant or consistent economic or social progress in WA's regional development areas since the introduction of the Royalties for Regions program. (Langoulant 2018, p. 145)

Similar concerns were found in a 2014 Auditor General's report:

> The audit also left us with some concerns about the extent that projects were funded without long term viability being a key consideration and that project evaluations were focusing on what had been done rather than on whether the desired outcomes were achieved. (OWAAG 2014b, p. 4)

And also in an audit of the previous Queensland scheme:

> The R4R grant program is delivering much-needed infrastructure to regional communities, and in this respect is fulfilling its aims. However, [the Department of State Development, Infrastructure and Planning] cannot demonstrate the suite of projects funded under this program represented the optimal mix and so, best value for money. (QAO 2015, p. 2)

These programs typically provide support to all regions, which can spread the benefits of resources to non-resource regions. Nonetheless, a central theme from reviews of royalties for regions programs is that their hypothecated nature weakens incentives for good governance and oversight of expenditure to ensure that it is in the best interests of the community. The Commission (PC 2017e, p. 163) has previously noted that:

There is scope to achieve considerably improved outcomes for regional communities by changing the way regional programs are designed and delivered. Fundamental to this is applying rigorous and transparent processes for choosing, implementing, and evaluating regional spending.

And, to some extent, royalties for regions programs may simply substitute for other government spending — an increase in royalties for regions funding may be offset by a reduction in other government funding sources for regional areas.

Royalties for regions programs create incentives that may be inconsistent with a rigorous process for selecting and evaluating spending. While it is important that regional areas have the infrastructure and other services they need, royalties for regions programs are unlikely to be a leading-practice way to share the benefits of resources extraction across regional areas.

DRAFT FINDING 9.6

It is reasonable that governments provide funding and support for services in regional areas. However, there is no case for hypothecating royalty payments to communities near resource projects — this can weaken governance and encourage money to be spent on projects without fully considering their pay offs. Royalty revenues should be spent wherever community net benefits would be greatest.

10 Indigenous community engagement and benefit sharing

Key points

- Community engagement and benefit sharing with Aboriginal and Torres Strait Islander people occurs within legal frameworks that recognise their cultural rights and interests, such as native title, land rights and heritage legislation, and social impact assessment processes.
- It also occurs outside of these requirements. Voluntary arrangements, such as training and employment commitments, can benefit larger groups of Aboriginal and Torres Strait Islander people, including those who reside in communities near resources projects but do not have a cultural connection to that land.
- Aboriginal and Torres Strait Islander people have a right to give or withhold their free, prior and informed consent (FPIC) to developments affecting their traditional lands. FPIC is not a right of veto, but creates a process for resources companies and communities to negotiate the details of the proposed development. Some companies have incorporated FPIC into their engagement with Aboriginal and Torres Strait Islander communities.
- The engagement capacity of some prescribed bodies corporate can limit their ability to give free, prior and informed consent, and act as a barrier to effective benefit sharing. While the level of funding of PBCs may be an issue, it is unclear if the use of existing funding through government programs has been effective in increasing capacity.
- Some are concerned that allowing native title applicants to enter into future act agreements by majority jeopardises the interests of claim groups. However, proposed amendments to the *Native Title Act 1993* (Cth) (NTA) would mitigate this risk.
- The unclear duties of native title applicants and, relatedly, whether claim groups or native title holders are the rightful owners of funds from native title agreements exposes these funds to the risk of misuse by applicants. Proposed amendments to the NTA do not fully resolve these issues.
- Native title funds can also be misused by private agents, such as legal advisors, either of their own volition or on native title applicants' instructions. One reason for this 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.
- Some Indigenous organisations consider that they are unable to use native title funds held in charitable trusts for long-term economic development, and that these limitations require changes to charity and taxation law. However, non-legislative approaches may go some way to resolving these issues.

Chapter 9 established principles for effective community engagement and benefit sharing in the context of the whole Australian community. This chapter discusses community

engagement and benefit sharing as it relates specifically to Aboriginal and Torres Strait Islander people. Section 10.1 discusses the various forms that community engagement and benefit sharing with Aboriginal and Torres Strait Islander people can take, and sections 10.2 and 10.3 discuss effective Indigenous community engagement and benefit sharing respectively.

10.1 Understanding Indigenous community engagement and benefit sharing

Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people

Requirements to engage and share benefits with Aboriginal and Torres Strait Islander people can be categorised in two ways:

- requirements to engage and/or share benefits with the broader community, which includes Aboriginal and Torres Strait Islander communities
- requirements to engage and/or share benefits with only (certain groups of) Aboriginal and Torres Strait Islander people.

Social impact assessments are an example of the former (chapter 9). As part of undertaking social impact assessments, resources companies are usually required to identify the impacts of proposed resources developments on communities, which includes Aboriginal and Torres Strait Islander communities. As chapter 5 notes, more than 60 per cent of Australia's resources projects are on areas covered by a native title claim or determination.

Requirements to engage and share benefits with Aboriginal and Torres Strait Islander people also arise from their unique rights and interests in their traditional lands. Land is integral to Aboriginal and Torres Strait Islander peoples' cultures, spirituality and identities, and governments have recognised this special relationship with land through legislation. The relevant legislative frameworks are:

- the *Native Title Act 1993* (Cth) (NTA) and related State and Territory legislation
- land rights legislation, such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA NT) and *Aboriginal Land Rights Act 1983* (NSW) (ALRA NSW)
- heritage legislation, both at the Commonwealth and State levels.

These legislative frameworks can require resources companies to engage and/or share benefits with certain Aboriginal or Torres Strait Islander groups when seeking access to land in which these groups have an interest. For example, resources companies wishing to conduct resources activity on native title land may be required to consult or negotiate an agreement with the native title claimants or holders. An agreement with the relevant land council (organisations that help Aboriginal people claim land and protect sacred sites, and that may hold land on behalf of Aboriginal people) is also required where companies wish

to explore for resources on ALRA NT land, and may be required for mining activity on ALRA NSW land (ALRA NT s. 40, ALRA NSW s. 45). Agreements can include delivering benefits to local Indigenous communities such as training and employment opportunities, business development and financial payments (box 10.1).

Box 10.1 What benefits do agreements contain?

Agreements between Indigenous groups and resources companies are generally confidential private contracts. As such, it is difficult to know precisely the types and scale of benefits negotiated within them. This makes it difficult to evaluate the effectiveness of agreements and identify leading practice, as well as to understand the scale of some of the issues identified in this chapter.

Some evidence illuminates the types of benefits that may be negotiated within agreements. With respect to native title agreements, O'Faircheallaigh (2016, p. 67) found that benefits generally fall under seven categories. These are:

- environmental management
- cultural heritage protection
- rights and interests in land
- financial payments
- employment and training
- business development
- implementation measures.

Similarly, the Northern Territory Chamber of Commerce (sub. 35, p. 9) submitted that native title and ALRA NT agreements generally provide for employment, training and business commitments, environmental commitments, sacred site protection processes, cultural inductions, liaison committees, the provision of information by resources companies and financial benefits.

The *Aboriginal Land Rights Act (1983)* (NSW) (ALRA NSW) states that an Aboriginal Land Council may give consent to mining operations on its land subject to terms and conditions, including those that relate to the payment of fees and royalties (s. 45(5)).

The financial payments under agreements are generally likely to be in the millions of dollars, although exact amounts can depend on variables such as the profit or revenue of the mine and the number of years the mine is expected to operate. INPEX (sub. 34, p. 18) submitted that its 2018 agreement with the Larrakia people in the Northern Territory, which established the Larrakia Ichthys LNG Foundation Trust, is valued at $24 million. The Northern Territory Chamber of Commerce (sub. 35, p. 9) said that financial payments under native title and ALRA NT agreements generally amounted to between 1.5 and 4.5 per cent of project revenue.

Given the rights defined by legislation, not all Aboriginal and Torres Strait Islander people within a community may benefit from agreements. For example, in the case of the NTA, only native title holders and claim groups have a right to negotiate regarding future acts (chapter 5). They are therefore likely to be the primary beneficiaries of future act agreements. Others may still benefit indirectly, but their share of the benefits is likely to be small. Conversely, individuals who are native title holders or part of a claim group may receive large benefits even though they do not live within the local community.

Most of the issues raised by study participants in the context of Indigenous community engagement and benefit sharing related to that under the legislative frameworks mentioned above — particularly native title. As such, the bulk of the discussion in sections 10.2 and 10.3 focuses on community engagement and benefit sharing where Aboriginal and Torres Strait Islander people have cultural rights and interests in land that are recognised under law. Where such rights and interests do not apply, the principles of effective community engagement and benefit sharing are those identified in chapter 9.

Voluntary Indigenous community engagement and benefit sharing

In addition to regulated community engagement and benefit sharing activities, resources companies may undertake a range of voluntary activities that benefit Aboriginal and Torres Strait Islander people.

- Resources companies undertake general community engagement and benefit sharing programs (chapter 9), which can benefit Aboriginal and Torres Strait Islander people as members of the broader community. For example, an Indigenous business may win a contract to supply services to a resources company as part of a voluntary local procurement program in which non-Indigenous businesses can also participate.
- Resources companies may also operate programs that, though similar to those that benefit the broader community, specifically aim to benefit Aboriginal and Torres Strait Islander people. For example, resources companies often have Indigenous employment targets that are separate from their local employment targets (Evans 2019). Companies may also choose to embark on joint ventures with Indigenous organisations (box 10.2).

Unlike regulated community engagement and benefit sharing activities, the beneficiaries of voluntary activities are not limited to Aboriginal and Torres Strait Islander people whose legal rights and interests are affected by resources activity. As such, voluntary activities have the potential to benefit larger groups of Aboriginal and Torres Strait Islander people. This includes those who reside in communities near resources projects, but are not the native title holders.

Indirect benefit-sharing schemes

Benefit sharing between the resources sector and Aboriginal and Torres Strait Islander people can also occur indirectly through legislative schemes designed for this purpose. For example, the ALRA NT establishes the Aboriginals Benefit Account, which receives royalty equivalents from the Commonwealth based on the estimated value of statutory royalties generated from mining on ALRA land in the Northern Territory (DPMC 2015, p. 203). Funds from the Aboriginal Benefits Account are used, among other things, to administer the four land councils set up under the Act, and to support projects that benefit Aboriginal people living in the Northern Territory. Under indirect benefit-sharing schemes, the benefits received by Aboriginal and Torres Strait Islander people do not necessarily derive from

resources projects on their traditional lands or near the community. Indirect benefit-sharing schemes are not a focus of this chapter, as participants did not raise issues relating to them.

Box 10.2 Examples of joint ventures between resources companies and Indigenous businesses

The Njamal Pilbara Joint Venture (NPJV)

The NPJV is an unincorporated joint venture between Njamal Services Pty Ltd and the Pilbara Resource Group Pty Ltd. Its services include civil works, transport and logistics and labour hire. Its work has included construction of the Carlindi Camp in Port Hedland, valued at $4.7 million, and the upgrade and construction of the Pippingarra Road that provides access between the Pilgangoora mine site and Port Hedland. This project was expected to be valued at $9.5 million and completed in December 2018 (NPJV 2020c, 2020a, 2020b).

The Yagahong Alliance

The Yagahong Alliance is a joint venture between Central Earthmoving Pty Ltd (Centrals) and the Yugunga-Nya people. In 2017, it was awarded an $8.2 million civil and earthworks contract for the Monty copper-gold mine in Western Australia. The contract involved constructing local access roads and a 14 km haul road from Monty to the DeGrussa copper mine, as well as infrastructure earthworks and drainage (Centrals 2018; McKinnon 2017).

The Barrooghumba WPH Joint Venture

The Barrooghumba WPH Joint Venture is a fully incorporated 50:50 joint venture between Western Plant Hire Pty Ltd (WPH) and Nyiyaparli Engineering and Mine Maintenance Services (NEMMS). NEMMS is an Indigenous-owned business formed by senior Nyiyaparli Traditional Owners, and WPH is a business offering crushing and screening, bulk haulage and earthworks services and plant rental. The joint venture's contracts have included iron ore crushing for Fortescue Metals Group and Leighton Contractors (Barrooghumba WPH JV 2020, pp. 4, 6).

DRAFT FINDING 10.1

Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people, particularly under native title legislation, can mean that only small groups of Indigenous people benefit from resources activity. Voluntary activities offer the potential for larger groups of Aboriginal and Torres Strait Islander people to benefit, including those who reside in the local community but are not native title holders.

10.2 Effective Indigenous community engagement

While the principles of effective community engagement identified in chapter 9 often also apply in the Indigenous context, specific cultural characteristics, governance structures or traditional ways of interacting among Aboriginal and Torres Strait Islander people may require resources companies to employ different methods of engagement (ICMM 2015,

p. 10). For example, decision-making processes within Aboriginal and Torres Strait Islander cultures tend to be driven by consensus, and can also be influenced by complex kinship relationships within and between families and groups in a way that does not apply in non-Indigenous communities (Bauman et al. 2004, p. 10). This may require resources companies to identify and interact with those in the community who, according to traditional law and culture, have the authority to speak on behalf of the group. Indigenous cultural training can also help organisations be aware of the circumstances in which a different way of interacting is warranted.

Free, prior and informed consent

When seeking to access Aboriginal and Torres Strait Islander peoples' traditional lands, one consideration that applies is the right of traditional owners to give or withhold their 'free, prior and informed consent' (FPIC) (FAO 2020) (box 10.3). FPIC is recognised in the United Nations Declarations on the Rights of Indigenous Peoples, and has been identified as 'the highest standard for the participation of Indigenous communities in decision-making' (DIIS 2016, p. 20) and 'an international framework of best practice for engagement [with Indigenous people]' (Hunt 2013, p. 1). The Resources Law Network (sub. 22, p. 13) also submitted that 'where Indigenous interests are concerned, best practice approaches to community engagement involve FPIC'.

Box 10.3 What is free, prior and informed consent (FPIC)?

The scope of FPIC can be understood through each of its constituent elements.

- 'Free' means the absence of both direct and indirect factors that may hinder Indigenous peoples' free will. This includes that:
  - negotiations are free from coercion, force, manipulation and intimidation
  - the relationship between parties is characterised by trust and good faith, rather than suspicion, violence or prejudiced views
  - Indigenous people have the opportunity to contribute to defining timelines, rather than have these imposed on them.
- 'Prior' means that:
  - Indigenous people are involved as early as possible in the process, rather than only after crucial decisions have been made
  - Indigenous people have the necessary time to absorb, understand and analyse information and undertake their own decision-making processes.
- 'Informed' means that Indigenous people have sufficient information that is objective and clear, and which is communicated in a manner and form that is understandable (such as in a traditional language).

Source: UNHRC (2018, pp. 6–7).

FPIC is not a right of veto. Minerals in Australia are reserved to the Crown (chapter 5), and governments, in balancing the rights and interests of all Australians, generally have the final say on whether resources development should be allowed to proceed. Amnesty International Canada (2013, p. 2) explained that, although FPIC confers a right on Indigenous people to withhold their consent:

> … human rights, including the rights of Indigenous peoples, are generally relative and not absolute. International and regional human rights bodies have been clear that the standard of FPIC is not absolute, FPIC must be applied on objective grounds, based on consideration of all the rights at stake and the importance of their protection.

The Australian Human Rights Commission (AHRC) (2018a, p. 7) also said that:

> The principle of free, prior and informed consent is not a right to veto, as the rights of Indigenous peoples exist in relation to the rights of other non-Indigenous peoples.

Instead, FPIC creates a basis on which Indigenous people can meaningfully participate in decisions regarding their traditional lands. In requiring resources proponents and governments to strive to obtain the consent of Aboriginal and Torres Strait Islander peoples, FPIC requires that parties genuinely engage with communities to understand why they may oppose certain proposals. This creates the opportunity for Indigenous communities to express their views and negotiate the details of development proposals — including modifications to the design or offsetting and benefit-sharing arrangements. Ultimately, FPIC creates an environment in which governments, resources proponents and Indigenous communities can 'come to an agreement that all parties can accept' (AHRC 2018b, p. 5).

Despite good-faith engagement, however, Aboriginal and Torres Islander communities may still withhold their consent. In this instance, resources companies may still be considered to have adhered to FPIC if they have made a genuine attempt to reach an agreement with the Indigenous community. The Mcdonald-Laurier Institute explained that:

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

And, while a lack of consent usually does not prohibit development from proceeding, it makes the concerns of traditional owners clear, and places the onus on governments and proponents to explain why they have chosen to proceed despite these groups' objections. In this way, FPIC can increase transparency and hold governments and proponents accountable for their decisions.

FPIC applies to traditional lands with which Aboriginal and Torres Strait Islander people have a cultural connection (which may be mirrored by legal rights). Even where there is no such connection, however — such as where individuals do not reside on their traditional lands — resources companies may wish to engage with Aboriginal and Torres Strait Islander people in the local community. As noted in section 10.1, in these instances, the principles outlined in chapter 9 which relate to engaging with the broader community apply.

Some resources companies have implemented FPIC

Recognising its merits, various industry organisations around the world have adopted the principle of FPIC. For example, the International Council of Mining and Metals' (ICMM) position statement on indigenous peoples and mining includes a commitment to:

> Work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of indigenous peoples and are likely to have significant adverse impacts on indigenous peoples … (ICMM 2013, p. 4)

Echoing this, BHP's *Indigenous Peoples Policy Statement* also states that it commits to:

> Working to obtain the consent of Indigenous Peoples to BHP Billiton activities consistent with the ICMM Position Statement. (BHP 2020a)

That said, the Queensland Law Society identified greater scope for FPIC to be implemented (box 10.4).

Box 10.4 **Greater scope for the implementation of FPIC**

The Queensland Law Society (sub. 41) identified areas where there was greater scope for the principle of FPIC to be implemented. In relation to the notification of tenement grants, it said that:

> Native title holders often do not receive notifications of a tenement grant in a timely manner … Where the native title group does receive notification of the grant, it may not always receive additional information such as environmental authorities or resource authorities. The native title group does not always receive notification of applications to assign or transfer tenements. … Delay in notification often results in delay in consultation and payment of the first annual administration fee. (p. 7)

In relation to the granting of tenements, it also said that:

> In some cases, a grant may even be retrospectively approved to extend a mining lease area where a miner has mined outside of that area … this may have adverse effects on cultural heritage and native title rights and interests. (p. 8)

Some companies may also go beyond the requirements of FPIC and withdraw development proposals if an Indigenous community withholds its consent. The Commission did not encounter examples of this. However, the United Nations Global Compact, a voluntary initiative based on CEO commitments to implement universal sustainability principles and support UN goals, advises members in its business reference guide on the United Nations Declaration on the Rights of Indigenous Peoples 'not to proceed with a project after the withholding of consent by indigenous peoples' (UNHRC 2018, p. 9). The ICMM position statement (2013, p. 5) also commits member companies to determining 'whether they ought to remain involved with a project' where consent is not forthcoming despite the best efforts of all parties. As such, where Indigenous communities do not give consent, companies are likely to seriously consider the implications of proceeding, which in some cases may mean that they do not do so.

DRAFT FINDING 10.2

Effective engagement with Aboriginal and Torres Strait Islander communities regarding the use of their traditional lands for resources development incorporates the principle of free, prior and informed consent (FPIC). FPIC is not a right of veto, but creates a process of genuine engagement where governments, resources proponents and communities aim to come to an agreement that all parties can accept.

The engagement capacity of Indigenous communities

Obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander communities requires not only that resources companies give communities the opportunity to be involved in decision making, but that communities have the ability to engage meaningfully in decision-making processes (box 10.2). In this context, the Commission heard that some Prescribed Bodies Corporates (PBCs) (also known as Registered Native Title Bodies Corporates (RNTBCs) — box 10.5) lack capacity on several fronts, which hinders their ability to engage meaningfully with the resources sector. For example, the Environmental Defenders Office (sub. 40, p, 24) submitted that:

> The imbalance of knowledge, skills and power between native title holders and mining companies means that they do not enter negotiations on a truly equal playing field.
>
> Transparency International Australia gives the example of negotiations between a mining company and the Yindjibarndi Aboriginal Corporation, in which a 'breakaway group' of elders consented to non-exclusive native title. The report notes that the Federal Court later found that none of the elders 'had any understanding whatsoever' of the implications of this consent, which significantly reduced the amount of compensation they were entitled to.

These concerns are not new. A 2014 review of the roles and functions of native title organisations for the Department of Prime Minister and Cabinet observed that:

> … most RNTBCs struggle with the capacity to meet their regulatory responsibilities and pursue wider community aspirations … this gap between capacity and aspirations [is] a source of considerable frustration and distress among native title holders. The limited capacity of RNTBCs seriously constrains their ability to give effect to the Act. (DAE 2014, p. 2)

Similarly, the AHRC (2016, p. 128) stated that:

> In particular, PBCs have suffered from a lack of ongoing funding certainty for their core functions. … PBCs are rarely sufficiently resourced to meet the costs of:
>
> - compensation claims over areas that have been excluded from native title determinations due to extinguishment
> - litigation to enforce the terms of Indigenous Land Use Agreements
> - other negotiations, dispute resolution or litigation, e.g. in relation to membership disputes or future act matters.

Box 10.5 Native title organisations

Native title representative bodies (NTRBs) and native title service providers (NTSPs)

Prior to a native title determination, NTRBs or NTSPs may provide legal and other services to a native title group making agreements on native title land. Both organisations have a role enshrined in the *Native Title Act 1993* (Cth) to represent native title groups. NTRBs are appointed by the National Indigenous Australians Agency (NIAA) to represent native title groups in a particular region of Australia, and are usually Indigenous corporations, while NTSPs (often ordinary corporations) are funded (by the NIAA) when there is no NTRB in the region (The Aurora Project 2019). NTRBs and NTSPs are generally involved in all legal processes prior to determination of native title, including claims and the negotiation of future act agreements and Indigenous Land Use Agreements (ILUAs). They work closely with native title claim groups to take instructions and represent their interests in both the native title determination process and agreement making. As of March 2020, there were 15 NTSPs and NTRBs operating across Australia (NIAA 2020).

Prescribed bodies corporate (PBCs)

Once native title is determined, responsibility for making and administering agreements on native title land moves to a PBC. PBCs that are registered on the National Native Title Register are formally known as registered native title body corporates (RNTBCs), but often continue to be referred to as PBCs. There are 212 PBCs operating nationally (AIATSIS 2018).

PBCs are corporations established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). The CATSI Act sets out an alternative regulatory regime for Indigenous corporations, with different governance requirements than those for companies regulated under the *Corporations Act 2001* (Cth) — for example, they are regulated by the Office of the Registrar of Indigenous Corporations rather than the Australian Securities and Investments Commission, and the majority of their board members must be Indigenous (ORIC 2018).

The role of a PBC is to manage determined native title land on behalf of the native title holding group. The PBC takes on the role as the legal entity that engages with other parties for the use of native title land, such as resource exploration. The PBC is expected to consult with the native title holding group about their desires for these agreements and obtain their consent for any decisions that are made. PBCs negotiate and implement native title agreements, and are also ultimately responsible for holding and investing payments for mining activity on native title land (ORIC 2014, pp. 2–3).

Resourcing and capacity constraints not only affect engagement with Aboriginal and Torres Strait Islander communities, but also impose a barrier to effective benefit sharing. These constraints may mean that communities are unable to collectively determine or negotiate the benefits they would like from agreements, or that they are unable to receive high-quality advice. Benefit sharing is discussed in section 10.3.

DRAFT FINDING 10.3

The capacity of Prescribed Bodies Corporate to engage meaningfully with resources companies is critical to Aboriginal and Torres Strait Islander people being able to give their free, prior and informed consent to resources development on their traditional lands, and to negotiating effective agreements. However, many Prescribed Bodies Corporate lack this capacity.

Government and company funding is available

In 2014-15, the Australian Government introduced the Indigenous Advancement Strategy, which consolidated various Indigenous programs into five (now six) streams. Funding for PBCs, Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) to fulfil agreement making functions is available under the jobs, land and economy stream.

- NTRBs and NTSPs receive Australian Government funding via individual program funding agreements to perform their core functions. In 2018-19, the Government provided $74 million of funding through this scheme (DPMC and AGD 2019, p. 37).
- PBCs receive basic support funding through NTRBs and NTSPs. This funding is designed to meet basic administrative expenses such as 'retaining a part-time bookkeeper, [assisting] with holding meetings or [assisting] with basic office equipment' (Australian Government nd, p. 2). In 2018-19, 103 PBCs received $6.8 million in total through this scheme — about $66 000 per PBC on average (DPMC and AGD 2019, p. 37).
- PBCs can receive capacity-building funding to improve their capacity to generate economic benefits from native title land. This funding can be provided to support effective native title agreement making. Between 2016 and January 2019, about $10.6 million of funding was approved under this program (DPMC and AGD 2019, p. 38).

Other government funding is also available to support the development of native title land, such as through the Land Tenure Reform Pilots program (DPMC and AGD 2019, p. 38). In total, the Australian Government provides approximately $110 million per year to support the native title system (DPMC and AGD 2019, p. 3).

Resources companies may also be required to meet some of the costs that PBCs incur in negotiating agreements (NTA, s. 60AB). This can include the cost of travel when meetings are required.

Beyond direct funding, resources companies may provide voluntary support to the agreement-making process. The MCA (2019, p. 9) noted that:

> Many MCA member companies support, or have provided support, for Indigenous organisations and businesses and community groups to participate in governance training and education.

The MCA (2019, p. 10) also highlighted the Traditional Owner Governance for Prosperity Program — a partnership between the Queensland Resources Council and the Queensland Government which assists traditional owners with making agreements in Queensland.

Is the level of funding sufficient?

Despite the funding available to PBCs, NTRBs and NTSPs, concerns about capacity constraints remain. For example, Alcoa (sub. 45, p. 3) submitted that:

> While changes may usefully be made to the Aboriginal Land Rights Act to streamline and clarify existing processes, more fundamentally, the [Northern Land Council] needs to be funded to fulfil its legislated role; including the number of positions it has, its ability to seek out, attract and retain high-quality staff, and resourcing for its officers to deepen their understanding of its stakeholders, including the ability to offer further training and more frequent travel into remote areas.

Similarly, Roy Hill (sub. 7, p. 8) noted that additional funding could be beneficial.

> Additional funding to address the capacity constraints of PBCs will enable greater cooperation and capacity building for increasing the involvement of Traditional Owner groups in the mining industry, from both an employment and community perspective.

A lack of resourcing for PBCs, NTRBs and NTSPs was a consistent theme in submissions to a Senate inquiry into engagement with traditional owners in the economic development of Northern Australia (for example, Kimberley Land Council 2019, pp. 3, 5; MCA 2019, p. 13; WA Government 2019, p. 2; YMAC 2019).

In its pre-budget submission, the National Native Title Council also considered that the current level of funding was insufficient to meet the basic functions of Indigenous bodies. It recommended that PBCs be provided with three-year recurrent funding of $300 000 per year per PBC for core statutory functions, and that funding for NTRBs and NTSPs be increased by $50 million (NNTC 2018, pp. 2, 3).

Analysis by the Australian Institute of Aboriginal and Torres Strait Islander Studies and Eastern Maar Aboriginal Corporation provides some support for the need for more funding of PBCs. In 2015-16, the median income for a PBC was about $50 000 (Johnston and Burbidge 2018, p. 2). However, the Eastern Maar Aboriginal Corporation (a PBC) estimated that it would need a minimum of $150 000 per year to ensure its basic operations, in addition to support from Native Title Services Victoria (its local NTRB) (Burbidge and Clark 2017, p. 16). (The Commission did not attempt to corroborate this figure.) The Australian Institute of Aboriginal and Torres Strait Islander Studies considered that the operating costs of small PBCs not supported by their local NTRB would be substantially higher (Johnston and Burbidge 2018, p. 3).

That said, resourcing constraints do not affect all PBCs, and PBCs vary significantly in size (and therefore minimum funding requirements). Between 2010-11 and 2015-16, the seven largest PBCs had a combined net income of about $34 million, while the 112 smallest PBCs had a combined net income of about $5.4 million (Johnston and Burbidge 2018, p. 2).

Are funds used effectively?

While the quantum of funding is one issue, programs to increase the capacity of Indigenous organisations must also be as effective as possible for a given level of funding. If such programs are successful, they could improve the ability of Indigenous communities to negotiate financial payments and other benefits, potentially reducing the need for government funding in the future. In this way, making funding available at the start of the agreement-making process to enable PBCs to better negotiate and engage with resources companies, and determine the benefits that best align with their aspirations, can be viewed as a long-term investment.

It is unclear to what extent government programs are meeting their objectives. An Australian National Audit Office (2017a, p. 8) examination of the implementation of the Indigenous Advancement Strategy found that:

> The performance framework and measures established for the Strategy do not provide sufficient information to make assessments about program performance and progress towards achievement of the program outcomes.

Since then, the Department of Prime Minister and Cabinet (now the National Indigenous Australians Agency) has implemented an evaluation strategy. The PBC capacity building program was scheduled to be reviewed in 2018-19, with completion expected in 2019-20 (NIAA 2019, p. 3).

INFORMATION REQUEST 10.1

The Commission is seeking more information on government programs that fund Indigenous prescribed bodies corporate, native title representative bodies and native title service providers. In particular:

- *Have the current funding programs met their objectives? Can you provide examples where funding has made a tangible difference to the native title agreement-making process, or where it has reduced reliance on government funding?*
- *Are there alternative approaches that could improve the capacity of Indigenous organisations, such as training programs?*

10.3 Effective Indigenous benefit sharing

The Commission received mixed views about the effectiveness of benefit sharing by resources companies with Indigenous communities. Resources companies, peak bodies and governments pointed to examples of benefit sharing that they considered to be effective (box 10.6). However, the NSW Aboriginal Land Council (sub. 47, p. 2) submitted that:

> It is difficult to cite encouraging examples of benefit sharing that have genuinely advanced the rights and interests of Aboriginal peoples. Where benefit sharing arrangements are utilized,

concerns have been raised that 'benefits' are very limited, are not premised on genuine ownership and profit sharing arrangements with Aboriginal communities, can favour small sections of communities, are not sustainably implemented, and can be confused with compensation arrangements.

Box 10.6 Participants' examples of effective benefit sharing with Indigenous communities

Submissions received by the Commission contained examples that participants considered to be effective benefit sharing with Indigenous communities.

- **APPEA** (sub. 44, pp. 28–29) gave the example of Buru Energy's benefit sharing activities with the Noonkanbah community. This included on-site training, assessment and certification in a range of trades by the Kimberley Training Institute and an environmental cadet program at the institute.
- The **South Australian Government** (sub. 25, p. 15) pointed to Iluka Resources' Jacinth-Ambrosia mine in the Yellabinna Regional Reserve on the Northern Eyre Peninsula.

  Implementation of the Native Title Mining Agreement (NTMA) and a strong relationship with the Far West Coast Aboriginal Corporation has resulted in the achievement and maintenance of a 20 percent aspirational employment target of Indigenous people throughout mining operations, including a recent 18 month idle period in 2016 and 2017. The program of in-house environmental rehabilitation implemented during that idle period achieved multiple benefits including the ongoing employment of the local and Indigenous workforce.
- **Rio Tinto** (sub. 26, p. 17) highlighted several examples of its benefit-sharing activities, including its Amrun Project Local and Indigenous Participation Strategy, which was recognised at the 2019 Queensland Resources Council Indigenous Awards for creating sustainable Indigenous procurement and employment opportunities.
- The **NSW Minerals Council** (sub. 28, p. 40) said that:

  … Glencore has established a number of cultural heritage conservation areas including the Yorks Creek Conservation Area in the NSW Hunter Valley. The Yorks Creek Voluntary Conservation Area, which commenced in 1994, was the first voluntary conservation agreement in the Hunter Valley formalising the protection of significant Aboriginal sites. The area covers 28.5 hectares along Yorks Creek adjacent to Glencore's Mt Owen mine and contains artefact scatters and open camps sites and hearths. The local Aboriginal community has access to the site, which provides a significant area where learning about Aboriginal culture can take place.

The Environmental Defenders Office (sub. 40, p. 24) also submitted that effective benefit sharing was hampered by a lack of effective implementation of agreements.

> The concern is that the implementation of the terms of agreements are not monitored and there is limited transparency in negotiations, meaning that there is a risk the benefits negotiated in [Indigenous Land Use Agreements] or right to negotiate processes are not always distributed to the community.

The lack of effective implementation of agreements may be linked to capacity issues discussed in section 10.2.

One example of effective benefit sharing highlighted by the Human Rights and Equal Opportunity Commission (now the AHRC) in its 2006 Native Title Report was the Argyle Participation Agreement (box 10.7).

Box 10.7 The Argyle Participation Agreement

The Argyle Participation Agreement is an Indigenous Land Use Agreement between the traditional owners of the East Kimberley region of Western Australia, the Kimberley Land Council and the Argyle Diamond Mine. The agreement was highlighted by the Equal Opportunity and Human Rights Commission in 2006 as an example of effective benefit sharing. The success of the agreement was attributed to, among other things:

- strategic preparations for negotiations that included a process for recognition of, and co-operation between, Western and Indigenous systems of law
- redress of power imbalances between mining and traditional owner interests by ensuring the communication was tailored to the needs of traditional owners
- the provision of adequate resources for negotiations, both by Argyle Diamond Mines and the Australian Government
- the ability of traditional owners to engage with the resources company and make decisions about social, economic and development opportunities on their own terms, according to traditional culture
- the forming of a 'Relationship Committee' comprising traditional owners to monitor the implementation of the agreement for the duration of its life.

Source: HREOC (2007, pp. 125–136).

Impediments to effective benefit sharing in native title

As mentioned in section 10.1, issues raised in relation to benefit sharing with Aboriginal and Torres Strait Islander communities largely related to native title. The issues that participants considered impeded or had the potential to impede effective benefit sharing were that:

- proposed amendments to the NTA regarding who must be a party to future act agreements (also known as 'section 31 agreements') might not adequately safeguard claim groups' interests
- the duties of applicants towards claim groups and/or ultimate native title holders were unclear (box 10.8)
- private agents, such as lawyers, accountants and fund managers, who provide services to Indigenous groups may not be sufficiently regulated to ensure outcomes in the best interests of claim groups
- regulatory requirements imposed barriers to Indigenous organisations using native title payments for long-term economic development.

Each of these is discussed below.

Box 10.8 Who are native title applicants, claim groups and holders?

Native title claims are made by groups of Aboriginal and Torres Strait Islander people ('claim groups') based on their communal rights and interests arising from their traditional laws and customs. Claim groups can be described as descendants of a particular ancestor, or as individuals named on a list on the claimant application form (NNTT 2008, p. 14).

However, litigation and agreement making with large groups of people quickly becomes unmanageable. In addition, there can be constant change in the composition of claim groups due to births and deaths. For this reason, a representative group known as the 'applicant' or 'registered native title claimant' makes native title claims and signs agreements on the broader claim group's behalf. Claim groups must appoint their applicant through a traditional decision-making process if one exists, or using another decision-making process agreed by the group.

Once appointed, the applicant is responsible for pursuing the determination of native title as well as making agreements with resources companies and others (the latter responsibility transfers to prescribed bodies corporate once native title has been determined to exist — box 10.4). Indigenous Land Use Agreements require authorisation from the broader claim group once they have been made (box 10.9); future act agreements can be approved by the applicant alone.

Native title holders are those that the Federal Court determines to hold native title when it makes a determination that native title exists. However, native title holders are not necessarily those who comprised the claim group. This may be because:

- the process of determining native title can be lengthy, and in the interim, some members of the claim group may pass away, while others may be born
- determining native title often requires anthropological research, through which it may be discovered that persons who were not part of the claim group also hold the rights and interests comprising the native title claimed.

Further, in determining a claim, the Court may find that native title does *not* exist. This creates the possibility that, in the future, a different claim group making a different native title claim may be determined to hold native title over that area.

Safeguarding claim groups' interests in future act agreements

As discussed in chapter 5, the Federal Court decision in *McGlade*[1] meant that all members of the applicant for a native title claim were required to be parties to Indigenous Land Use Agreements (ILUAs) in order for them to be valid. Parliament subsequently amended the NTA to confirm the validity of existing ILUAs that had not been signed by all members of the applicant, and to allow future ILUAs to be signed by the majority of the applicants as the default. The Government has since proposed further amendments through the Native Title Amendment Bill 2019 (Cth), which would allow claim groups to impose conditions on the authority of applicants (including with respect to entering into ILUAs and future act agreements), and require members of the applicant that enter into an ILUA as a majority to notify the remaining members (that is, those that do not form the majority).

1 *McGlade v Native Title Registrar & ors* [2017] FCAFC 10.

The current reforms also propose to extend the 'majority default' rule to future act agreements. This would create consistency between the requirements for ILUAs and future act agreements, and prevent delays and costs associated with a dissident minority frustrating negotiations despite broad support from the claim group. The explanatory memorandum to the Native Title Legislation Amendment Bill 2019 said that the proposed amendments allowing applicants to act by majority by default:

> … aim to address concerns that agreements that have been validly authorised by the broader native title claim group can be frustrated in circumstances when members of an applicant disagree. Disputes between applicant members and the broader claim group can lead to delays and burdensome costs. (Parliament of the Commonwealth of Australia 2019, pp. 9–10)

However, allowing a majority of the applicant to enter future act agreements by default can also increase the risk of applicants entering into future act agreements *against* the wishes of the claim group. The minority of the applicant refusing to enter the agreement may have sound reasons for doing so, and may in fact more accurately represent the views of the broader claim group. Allowing agreements to proceed without consideration of the views of the minority of the applicant, where the claim group has not explicitly required otherwise, may risk eroding the broader claim group's interests.

Authorisation for future act agreements?

Given this risk, some have argued that authorisation should be required for future act agreements to safeguard claim groups' interests. Authorisation is required for ILUAs, and provides a mechanism by which a claim group can show its support for the ILUA (box 10.9). Future act agreements, in contrast, are not required to be authorised.

The options paper discussing the proposed NTA reforms said that, due to the increased potential for harm to claim groups' interests, any move to allow a majority of the applicant to enter future act agreements by default would also require a process of authorisation.

> [T]he reduced threshold necessary to make the agreement would require an additional safeguard, so this option would also include an authorisation process for section 31 agreements, which is not currently required for this kind of agreement-making. (AGD 2017, p. 5)

Box 10.9 **Authorisation of Indigenous Land Use Agreements (ILUAs)**

Before ILUAs can be registered (and therefore legally binding), they must be authorised by those who hold or may hold native title in the area covered by the agreement ('the native title group'). Authorisation is the mechanism by which the native title group shows its support for the agreement entered into on its behalf by the applicant.

Section 251A of the *Native Title Act 1993* (Cth) stipulates that authorisation must occur according to a traditional decision-making process, if one exists. If there is no such process, authorisation must occur according to an alternative decision-making process which has been agreed and adopted by the group.

The 2018 exposure bill for the reforms and the Native Title Legislation Amendment Bill 2019 did not, however, include such a process. As at March 2020, the Legal and Constitutional Affairs Legislation Committee was conducting an inquiry regarding the bill, and is due to report in April 2020. The AHRC (2019, p. 2) said in its submission to that inquiry that it:

> … maintains its view that the majority default rule should not be extended to section 31 agreements until the authorisation requirements in the Native Title Act are the same for ILUAs and section 31 agreements. There should be no difference in the level of control that a native title group has over the validation of ILUAs and section 31 agreements.

However, there *is* a difference in the level of control that native title holders and claim groups have over the outcomes of ILUA and future act processes. This stems not from the different authorisation requirements, but from the potential for negotiation parties to lodge a future act determination application (FADA) with the National Native Title Tribunal (NNTT) once six months from the notification date has elapsed.[2] Whereas ILUAs are voluntary and a refusal by the claim group to authorise an agreement forces proponents back to the negotiating table, in the case of future act agreements proponents have the option of lodging a FADA, effectively rendering authorisation redundant. (The question of whether allowing parties to lodge a FADA six months from the notification date increases pressure on native title parties to come to quick agreement that may not be ideal is beyond the scope of this study.)

In addition, of the 127 cases in which the NNTT has made a determination about whether or not a future act could be done, it has determined that:

- in three instances, the act could not be done
- in 54 instances, the act could be done subject to conditions
- in the remaining 70 instances, the act could be done without conditions. (NNTT 2020)

This suggests that, if a FADA were lodged, there is a greater chance that native title parties would not receive a determination in their favour.

The effectiveness of requiring authorisation for future act agreements as a means of protecting claim groups' interests therefore depends on the extent to which proponents choose to allow future act negotiations to continue, despite having the option of lodging a FADA. Data from the NNTT (pers. comm., 12 March 2020) suggest that, for the most part, proponents do allow negotiations to run their course — between 1 July 2016 and 30 June 2019, only about 6 per cent of future act negotiations begun and concluded within that time resulted in a FADA (approximately half of negotiations were not yet concluded).[3] Further, where FADAs were lodged, the average time elapsed since the notification date was the same as the average time taken to come to a future act agreement (15 months), with the

[2] Before a future act is done, the Government must give notice of the act to any relevant PBCs or native title claimants. The notice must specify a notification date, which must be a date by which the Government considers it reasonable that PBCs and native title claimants would have received the notice.

[3] This excludes negotiations resulting from expedited procedure objections being upheld.

majority of FADAs lodged between 12 and 24 months after the notification date. It appears that, where FADAs are lodged, proponents have generally allowed negotiations to run their usual course before applying to the NNTT for a determination.

If, however, requiring future act agreements to be authorised results in agreements becoming harder to reach (because, for instance, there are logistical challenges in bringing members of a claim group together to conduct an authorisation meeting, or applicants do not act in claim groups' interests — discussed below), proponents may be incentivised to lodge FADAs more often. Requiring authorisation for future act agreements is therefore not a comprehensive way of protecting claim groups' interests.

Other measures better safeguard claim groups' interests

Developments in native title law, and other measures in the proposed amendments to the NTA, are likely to provide a better avenue for safeguarding claim groups' interests than requiring authorisation. Recent case law has established the nature of the fiduciary duties that applicants owe to their broader claim group (discussed below). Reforms to the NTA also include a proposed amendment (s. 62B) to clarify that these common law duties apply, notwithstanding applicants' other obligations under the NTA. This could discourage applicants from entering into future act agreements against the wishes or interests of the broader claim group.

Further, the proposed amendments allow claim groups to impose conditions on the authority of the applicant. For example, claim groups could require applicants to bring back certain types of decisions to the claim group for consideration or authorisation (Parliament of the Commonwealth of Australia 2019, p. 10). They could also require that future act agreements are signed by all members of the applicant — or specify some other majority threshold — if they considered that allowing applicants to enter agreements as a simple majority would pose heightened risks to their interests.

DRAFT FINDING 10.4

Proposed amendments to the *Native Title Act 1993* (Cth) (NTA) will allow applicants to enter into future act agreements as a majority by default. This could increase the risk of a majority of the applicant entering into a future act agreement that is not consistent with the wishes of the claim group. However, other proposed amendments to the NTA protect claim groups against this risk. They include allowing claim groups to impose limits on the authority of applicants, and clarifying that applicants owe fiduciary duties towards the claim group.

Duties of native title applicants in agreement making

Before a determination of native title has been made, applicants typically represent native title interests in ILUAs and future act agreements (box 10.8). Reports have surfaced of applicants diverting funds arising from these agreements for their own benefit, calling into question whether they are sufficiently regulated in performing their roles. For example, the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group said that it was:

> … aware of instances where individuals have diverted for their own benefit the proceeds (or significant portions of them) from native title-related 'future act' agreements that were intended by the Native Title Act or the terms of an agreement to be enjoyed by an entire community. (Treasury 2013, p. 17)

The Commission also came across examples where native title applicants used private agents, such as lawyers acting as trustees of native title trusts, as a means of diverting funds for their own benefit. Private agents are discussed in more detail below.

The duties of native title applicants in making agreements are not always clear. While applicants do have some duties under common law, these are not always well defined. And the NTA does not impose any statutory duties on applicants with respect to receiving and managing native title funds. These are longstanding issues which have been raised in various reviews, but which have not been fully resolved.

Applicants' duties under common law

In *Gebadi (No. 2)*,[4] the Federal Court established that applicants owed certain fiduciary duties towards their claim groups when entering into native title agreements. These were:

- an obligation not to place themselves in a position where their private or personal interests came into conflict with the interests of the members of the claim group
- an obligation not to pursue and secure a personal benefit
- an obligation not to make a profit from their position of trust unless expressly permitted to do so with the informed consent of the claim group
- an obligation not to place themselves in a position where their personal interests or duties conflicted with duties owed to the native title claim group.

This is consistent with the Court's earlier view in *Mandandanji*[5] that the authorisation of applicants by claim groups under s. 251B of the NTA (to make native title applications and deal with all matters arising in relation to it) 'had hallmarks of a fiduciary relationship'. While in this case the Court stated its view in principle, it did not set out any specific duties.

4 *Gebadi v Woosup (No.2)* [2017] FCA 1467.

5 *Weribone on behalf of the Mandandanji People v State of Queensland (No. 2)* [2013] FCA 485.

A duty towards native title holders?

Gebadi (No. 2) established applicants had fiduciary duties towards claim groups. However, it did not address the relationship between applicants and *ultimate native title holders* (box 10.8 explains why these two groups might differ). Whether or not applicants owe duties towards ultimate native title holders depends on whether native title holders, rather than claim groups, are considered to be the true owners of native title funds. The NTA does not explicitly confer ownership of native title funds on either claim groups or native title holders.

Mandandanji considered that native title holders were the true owners of funds arising from native title agreements. The Court said that:

> It can hardly have been the intention of the Parliament that persons who were simply claimants be able to use their mere and contestable status to enrich themselves to a substantive and permanent extent at the expense of the true native title holders. [45]

As such, it suggested that applicants may have fiduciary duties towards ultimate native title holders, in addition to claim groups. However, it did not set out what these duties might be. Ambiguity therefore remains as to the specific nature of the relationship between applicants and native title holders under common law, and the duties owed by applicants towards native title holders.

Statutory duties on native title applicants

There have been longstanding calls for the NTA to impose statutory duties relating to agreement making on native title applicants, including by clarifying and incorporating the outcomes of case law. For example:

- the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group recommended that the Government take urgent steps to amend the NTA to clarify that native title holders are the beneficial owner of funds generated by native title agreements, and that applicants are in a fiduciary relationship with native title holders (Treasury 2013, p. 6)
- the Forrest Review of Indigenous Training and Employment, which considered how to empower Indigenous people in remote communities to end disparity with non-Indigenous people, supported the recommendation of the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (Forrest 2014, p. 60)
- the 2014 Review of the Roles and Functions of Native Title Organisations (DAE 2014, pp. 40, 44) supported proposals to clarify, through amendments to the NTA, any fiduciary duties of applicants and claim groups towards native title holding groups. The report noted broad agreement among submissions to the review that such obligations should exist
- the 2015 review of the NTA by the Australian Law Reform Commission (ALRC 2015, p. 32) recommended that the NTA be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of common law native title holders.

In essence, these reviews favoured duties on applicants towards ultimate native title holders, rather than claim groups (although the 2014 review of the roles and functions of native title organisations also sought clarification on the relationship between *claim groups* and native title holders). The ALRC (2015, p. 16) explained that it favoured a duty on applicants towards native title holders rather than claim groups, because:

> … it is their interests that are at risk of being harmed by an applicant that acts inappropriately … a person who is in the claim group, but who does not in fact hold native title rights and interests at common law, does not have any interests to be protected by a statutory duty.

That said, duties towards ultimate native title holders may be more difficult to define than those towards claim groups. Members of claim groups (at a certain point in time) are relatively easy to identify, whereas native title holders are not identified until the Court determines that native title exists, which may be after an agreement is made. Moreover, native title holding groups generally exist in perpetuity, which could require applicants to consider the interests of individuals who are not yet born at the time the agreement is made or funds are received.

The current Native Title Legislation Amendment Bill includes a provision that clarifies that applicants' duties towards their claim group at common law apply in the context of the NTA. This would make it clear that the result in *Gebadi (No. 2)* — that applicants owe fiduciary duties towards their claim group — applies to all applicants entering agreements, which may dissuade some who may otherwise be tempted to act purely in their own interests. However, it does not clarify the suggestion in *Mandandanji* that applicants may also owe fiduciary duties to native title holders (which implies that native title holders are the beneficial owners of funds), or define the nature of these duties. The Commission considers that, while clarification of this issue may be achieved through the courts over time, a review is likely to be more expeditious.

DRAFT FINDING 10.5

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

DRAFT RECOMMENDATION 10.1

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

The behaviour of private agents

In addition to actions of rogue applicants (discussed above), there is concern that the use of private agents, such as legal practitioners, can contribute to funds arising from native title agreements being misused. For example, the ALRC (2015, p. 312) said that:

> There are some concerns that funds are not always held for the benefit of the entire native title group, particularly when the applicant is represented by private agents rather than [native title] representative bodies.

The services of private agents may include representing claim groups in negotiations, acting as trustees of native title funds, and providing legal or commercial advice. While many of these services are also offered by NTRBs or NTSPs, native title groups may prefer to engage private agents because, for example, they believe that private agents provide higher-quality services. NTRBs/NTSPs may also be resource-constrained and unable to provide the required services (DAE 2014, pp. 116, 120–121).

Evidence suggests that, in some instances, private agents engage in unscrupulous conduct, which allows them to benefit at the expense of claim groups and native title holders. Native Title Services Victoria (2013, p. 16) observed that this behaviour typically occurs as follows.

> An "agent" will approach a member of a native title claim group that has had notice of a significant future act proposal. The agent will suggest that the relevant [Native Title Representative Body or Native Title Service Provider] is not securing for the claim group that quantum of benefits that the agent could secure (and) or that these benefits could be secured more quickly by the agent. The agent will then facilitate a meeting of the native title party group (often of dubious legitimacy) to appoint them to undertake the future act negotiations. The negotiations conducted by the agent will not result in any overall higher level of benefits or more expeditious outcomes. However, the agent will secure for themselves a proportion of the benefits; the balance is paid to the native title party without regard for the structuring of these benefits to delivering long-term economic development outcomes to the native title party. At times the balance of funds may be paid to a nominated corporate entity which is not inclusive of the overall claimant community.

However, in other instances, applicants or claim groups appear to engage private agents to pursue specific legal outcomes. For example, in its submission to the 2014 review of the roles and functions of native title organisations, Queensland South Native Title Services (2014) provided examples of claim groups hiring private agents to avoid advice from NTRBs or NTSPs that other ancestral groups needed to be added to the native title claim group (which would require the benefits of native title agreements to be shared more widely). Where applicants or claim groups seek specific outcomes, their use of private agents may extend to searching for *particular* agents who are willing to offer advice or act in line with their interests.

The potential for native title funds to be misused when private agents are involved appears to stem, at least in part, from the fact that private agents do not have the same obligations as NTRBs and NTSPs. In assisting native title groups to make agreements, NTRBs and NTSPs are required to 'consult with, and have regard to the interests of, any registered native title bodies corporate, native title holders or persons who may hold native title who are affected

by the matter' (NTA s. 203BC). Private agents do not have these obligations, and in some cases appear to consult only with their client — that is, the particular applicant or claim group engaging their services, rather than broader groups that may also be affected. O'Gorman (2013, pp. 19–20, 45) said that:

> … private agents may discuss financial affairs only with the applicant group, without any transparency or input from the broader native title claim group … These situations in turn can generate divisions and disputes within the claim group …

Private agents should presumably be aware that applicants represent claim groups, and that good practice would involve ensuring that applicants' actions have the support of their claim groups. The lack of requirements on private agents to consider claim groups interests, in contrast to requirements on NTRBs and NTSPs, thus appear to allow private agents to avoid accountability for their actions.

INFORMATION REQUEST 10.2

In principle, it appears appropriate for private agents to have obligations towards all those who hold or may hold native title (as native title representative bodies do). Should the Native Title Act 1993 (Cth) be amended to impose statutory obligations on private agents that are equivalent to those imposed on native title representative bodies? Why or why not?

Using agreement funds for long-term economic development

Native title funds are commonly held and managed through charitable trusts, although data on the exact amount and share are difficult to obtain (Treasury 2013, p. 14). Charitable trusts are a form of charity, and are regulated by the Australian Charities and Not-for-profits Commission (ACNC).

Several stakeholders and previous reviews have suggested that charitable trusts have shortcomings as a vehicle for managing native title funds. In particular, they consider that Indigenous organisations are not able to use funds held in charitable trusts for long-term economic development. For example, the NNTC (2019, p. 3) said that:

> The current arrangements [around the management of native title monies] often provide a positive *dis*incentive for native title holders to utilise native title monies for long term economic development in favour of restrictive charitable trust or immediate disbursement.

The MCA (2019, p. 18) also said that:

> … the use of charitable trusts to manage these monies places limits on how these funds can be used and embeds notions that native title monies are charitable funds. … this can inhibit or discourage Traditional Owner organisations from realising greater intergenerational economic development from native title payments.

And the 2013 Taxation of Native Title Benefits and Traditional Owner Benefits Governance Working Group (Treasury 2013, p. 15) said that:

> … there are limitations around the purpose of charitable trusts in particular as regards economic development or business investment purposes.

Evidence is scarce on why so many organisations holding native title funds choose to be registered as charities. One major drawcard is likely to be the tax concessions associated with being a charity, which includes the income tax exemption. Native title benefits are often already income-tax-free — in 2013, the Government clarified that native title benefits were not subject to income tax in the hands of Indigenous persons or Indigenous holding entities.[6] However, any income earned from those benefits (such as interest or investment income) would be taxable if the receiving entity was not entitled to a general income tax exemption (as charities are).

Indigenous charities sometimes also pursue registration as a 'public benevolent institution' (PBI), a subtype of charity, in order to receive the fringe benefits tax (FBT) exemption box 10.10). (Most other types of charities only receive the FBT rebate.) Murray (2015, p. 431) explained that, for native title organisations:

> The FBT exemption is very significant for attracting staff. At the state, territory and local levels, being a PBI also often allows more consistent and broader access to tax benefits.

Box 10.10 What is a public benevolent institution (PBI)?

When seeking registration as a charity, an organisation may nominate to be registered under the 'public benevolent institution' subtype. PBIs must have benevolent relief as their main purpose, and must provide this relief to people in need.

The Australian Charities and Not-for-profits Commission explained that 'benevolent relief includes working for the relief of poverty or distress (such as sickness, disability, destitution, suffering, misfortune or helplessness)'.

Other factors relevant in determining whether a PBI provides benevolent relief include that the need being met is:

- significant enough (and the circumstances difficult enough) to arouse compassion in people in the community
- beyond the suffering experienced as part of ordinary daily life, and
- concrete enough — that is, aimed at helping people who are recognisably in need of benevolence.

Source: ACNC (2020).

6 Indigenous holding entities are: Aboriginal Land Councils established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976;* corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; other incorporated bodies that are established by or under Commonwealth or State or Territory law that relates to Indigenous persons, and that are empowered or required (by law or otherwise) to pay moneys received to Indigenous persons, or to apply them for the benefit of Indigenous persons; trusts where beneficiaries can only be Indigenous persons or Indigenous holding entities; and registered charities (*Income Tax Assessment Act 1997* (Cth) s.59-60(6), *Income Tax Assessment Act 1936* (Cth) s.128U).

Being a PBI also enables an organisation to be endorsed as a deductible gift recipient — although it is not clear how important gifts are to the operation of native title organisations.

However, registration as a charity also limits the types of activity that organisations may conduct or support. Specifically, to maintain registration as a charity with the ACNC, charities must only be involved in activities that are:

- consistent with their charitable purpose (charitable purposes are listed in the *Charities Act 2013* (Cth))
- for the public benefit (ACNC 2014, p. 1) (box 10.11).

PBI activities are also restricted to those that provide benevolent relief to people in need (box 10.10). These rules apply to all charities, not just those that receive native title payments.

Box 10.11 **The public benefit test**

In addition to having a charitable purpose, charities must operate for the public benefit. The explanatory memorandum to the Charities Bill 2013 (Parliament of the Commonwealth of Australia 2013, p. 15) explained that there are two aspects to the public benefit test:

- there must be a purpose, the achievement of which is of public benefit
- the benefit from the purpose must be broadly available to a sufficient section of the public.

The second of these does not apply to organisations that receive, manage or hold benefits relating to native title or land rights — such organisations are considered for the public benefit even though their members or beneficiaries may be related to each other (s.9(2) of the *Charities Act 2013* (Cth)). The introduction of this provision in the Charities Act resolved longstanding concerns that organisations receiving native title benefits were not able to be charities because members of a family or clan were not obviously 'sufficient sections of the public'.

In 2013, the Australian Charities and Not-for-profits Commission released its Commissioner's Interpretation Statement on Indigenous Charities, which set out its understanding of how the public benefit test applied to Indigenous charities. It clarified that:

- where a charity addresses Indigenous disadvantage by relieving poverty, there is no need to meet the public benefit test
- where a charity addresses Indigenous disadvantage by relieving impotence, there is a presumption of meeting the public benefit test. The contemporary meaning of the term 'impotence' was explained as ' … beyond sickness and disability, the underprivileged, the vulnerable, the dependent and those without family' (2013, p. 2).

It also confirmed that organisations whose membership or beneficiaries were defined in terms of family relationships because they were for native title or traditional owners groups would be considered to be benefitting a sufficient section of the public.

In *Northern Land Council v Commissioner of Taxes* [2002] NTCA 11 [75], the Court found that direct assistance provided to Indigenous people by the Northern Land Council satisfied the public benefit test, despite this being the outcome of the Northern Land Council performing its statutory functions.

Concerns reflect legal ambiguity regarding permissible activities

The key issue in using funds from charitable trusts for economic development is that activities must be consistent with the organisation's charitable purposes, and be for the public benefit. In this context, some were of the view that these requirements precluded charities from engaging in commercial activities. For example, Langton (2015, p. 54) said that:

> … the situation for most Indigenous parties involved in agreements is that the land-related payments are trapped in the charity and not-for-profit (NFP) sector by legal limitations on directly releasing these funds for commercial activities. …
>
> The legal definition of 'charitable purposes' is the primary limitation to the ways in which funding can be invested. This can pose difficulty for native title arrangements to participate in initiatives of a commercial nature and many community development and capacity building programs.

However, charities can engage in some commercial activities. The ACNC (2016) gave the example of an organisation providing accommodation for homeless youth operating a recycled clothing shop, where the profits raised are used to provide this accommodation. In this instance, the organisation is likely to maintain its entitlement to registration as a charity, as the ultimate use of the business' profits are consistent with the organisation's charitable purposes, and the operator of the shop does not gain a private benefit (profits).

Even where commercial activities make a profit, however, charities may still be considered to be operating consistently with their charitable purposes and for the public benefit — case law provides some examples of this (box 10.12). As such, the range of economic development activities that Indigenous charities may undertake may be wider than what is perceived to be the case.

That said, this is an area of legal ambiguity. Whether or not particular for-profit activities can be considered for the public benefit is highly context-specific, and achieving clarity is likely to require case-by-case regulatory decisions by the ACNC, and decisions by the Administrative Appeals Tribunal and courts where the ACNC's decisions are appealed. As such, Indigenous charities may be reluctant to take risks, especially as failure could result in revocation of their registration as a charity.

There are ways of mitigating this risk, however. The ACNC's regulatory approach involves educating and supporting charities to prevent problems, working collaboratively with charities to address concerns, and revoking registration only in the most serious cases where charities have significantly and persistently failed to fulfil their obligations (ACNC 2019, pp. 6, 10). Thus, by instituting sound governance structures, engaging with the ACNC and obtaining advice where required, Indigenous charities can demonstrate their intention to conduct commercial activities within the limits of the law. Information and guidance from the ACNC may also reduce the (actual and perceived) risks of undertaking for-profit commercial activities as a charity.

Box 10.12 Commercial activities, charitable purposes and the public benefit test

Case law provides some examples of commercial activities that have been deemed to have a valid charitable purpose and to be for the public benefit. For example, in *Tasmania Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* [2005] FCA 439, Tasmania Electronic Commerce Centre (TECC) was a company limited by shares. It was reliant on funding by the Federal Government, industry and investors. TECC's purpose was to increase the competitiveness of Tasmanian business and industry by raising awareness of e-commerce and information technology through a media presence and presentations at industry events, rural towns and primary schools. It also provided targeted funding for IT projects in competitive businesses.

The Court held TECC to be a charitable institution. It found that:

> … assistance to business and industry can provide a public benefit of the kind which the law recognises as charitable …
>
> In a capitalist economy like Australia's, a prosperous and productive private sector generates profits and creates employment which in turn raises incomes which individuals can either spend, creating demand, or save, creating capital for further investment. Either way, people can make a better life for themselves and their families. In a prosperous economy, more money can be raised by taxes to improve education, health and other essential public services. [56, 58]

Further supporting evidence included that Tasmania was viewed as relatively disadvantaged compared to other states due to declining population, persistently low employment and income levels and distance from markets.

Similarly, in *Commissioner of Taxation v Triton Foundation* [2005] FCA 1319, Triton was a company limited by guarantee, funded by two States and an individual. Triton's main objective was to promote innovation and entrepreneurial activities among the Australian public. It focussed its efforts on providing commercial advice to inventors and access to a panel assessment by experienced volunteers. Its activities included media events, running an innovation competition and supporting a national award program for inventions.

The Court found that the activities of Triton were able to be considered charitable because it promoted commercial activities which had been accepted as charitable in previous cases. These included developing and investing in new ideas with commercial applications. Triton's efforts were also targeted towards the young, with programs in public school education.

The Court also held that Triton provided public benefits because their inventor assistance and guidance was open to anyone. Although the panel assessment was limited to high-performing inventors, the Court held that this was rational due to the resource-intensive nature of the activity. It was also consistent with the organisation's purpose, since it enabled Triton to promote case studies of successful inventors and inventions. However, the Court cautioned that:

> If Triton were significantly to change its operations by, for example, charging market rates for most of its services, then it might be liable to lose its charitable status for another period of inquiry under the Act. [38]

DRAFT FINDING 10.6

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. This may be an overly narrow interpretation of the law, but there is legal ambiguity regarding the scope of permissible activities.

DRAFT RECOMMENDATION 10.2

The Australian Charities and Not-for-profit Commission should publish plain English guidelines on activities that are likely to be consistent with a charity's charitable purposes and for the public benefit, and those which are likely to be outside this scope. This would reduce the risks associated with any for-profit long-term development or commercial activities that Indigenous charities may wish to undertake.

A special case for organisations receiving native title benefits?

The National Native Title Council and Minerals Council of Australia have for several years been advocating for an alternative tax designation for Indigenous organisations that receive native title benefits — the Indigenous Community Development Corporation (ICDC). The ICDC proposal was reviewed in 2018 in light of the state of the law at that time, as well as new research and emerging practice, which led to a revised proposal — the PBC Economic Vehicle Status (EVS) (MCA 2019, p. 18). The PBC-EVS proposal is largely similar to the ICDC, but would apply only to PBCs (NNTC, UoM and MCA 2019, p. 10). Both proposals would allow organisations receiving native title benefits to access the tax concessions associated with charities, while allowing them to undertake a broader range of economic development activities (MCA 2019, p. 18).

It is not clear why organisations addressing the challenges faced by Indigenous communities require an alternative tax designation. The current regulatory regime for charities allows Indigenous organisations operating for charitable purposes to receive the tax concessions available to all charities. As discussed above, this may include some economic development activities not currently thought to fall within the scope of permissible activities. Further, organisations that are not charities can also receive native title benefits income-tax-free, as long as they satisfy the definition of an Indigenous holding entity. Being an Indigenous holding entity does not restrict the use of native title funds to charitable activities.

Associations of native title payments with welfare

One argument that has been put forward in support of an alternative tax entity for Indigenous organisations is that native title payments should not be associated with notions of charity or welfare. For example, the MCA (2019, p. 18) said that the PBC-EVS proposal would allow 'a clear focus on economic development to break away from notions that native title monies are

charitable welfare'. The Taxation of Native Title Benefits and Traditional Owner Benefits Governance Working Group (Treasury 2013, p. 15) also said that, among other reasons:

> … charitable trusts are not a neat fit for managing land-related payments and other income because:
>
> - the use of the term 'charity' conveys a welfare rather than a development approach …

However, native title payments are not required by law to be held in charities — owners of native title funds may hold money in whichever way they choose. Where funds are to be used for charitable purposes, they may be held within charitable trusts so that organisations may benefit from the applicable tax concessions. However, where they are not, they are not compelled to be associated with notions of charity.

Funds already within charitable trusts

One remaining issue concerns native title funds already held within charitable trusts, which Indigenous groups may now wish to use for non-charitable purposes or private benefit. Generally, such uses would not be permitted under law. This underscores the importance of Indigenous groups obtaining accurate information and high-quality advice, being able to negotiate effectively with resources companies, and establishing robust internal decision-making processes for holding and managing native title funds.

However, there may be scope for exceptions to be made — for example, where misconduct or misinformation on the part of private agents or native title applicants meant that communities were not aware of the implications of holding funds within charitable trusts, or that charitable trusts were being used at all. Such an exception could, for example, provide a one-off opportunity for native title funds to be transferred from charitable trusts into other types of entities currently available to all Australian organisations. It may also need to consider the tax implications of removing funds from charities, since these funds would have been the subject of various tax concessions while being held by charities.

It may be that a clearer understanding of the types of commercial activities that charities may undertake lessens calls for funds to be removed from charitable trusts. Still, there may be principled reasons to allow Indigenous organisations to do so. The Commission is seeking views on circumstances under which it could be considered reasonable to allow funds to be removed from charitable trusts, and how this could be done. The implications of proposals for non-Indigenous charitable trusts should also be considered.

INFORMATION REQUEST 10.3

- *What are some potential reasons to allow native title funds to be removed from charitable trusts?*
- *What are some mechanisms through which funds may be removed from charitable trusts, and what might the tax implications be? How would these proposals affect non-Indigenous charitable trusts?*

Issues limiting returns from native title funds

During consultations, participants raised other issues that may limit the ability of Aboriginal and Torres Strait Islander communities to maximise the returns from native title funds. These included:

- overly complex benefit management structures, resulting in an inordinate amount of time and money spend administering them
- funds being held in cash rather than being invested in higher-yield portfolios, reducing the funds available for the community in the long term.

In part, these issues appear related to capacity issues in PBCs, and NTRBs and NTSPs (section 10.2). However, the Commission is seeking further information on the extent to which the ways in which native title funds are held and managed limits returns for the community, and possible solutions.

INFORMATION REQUEST 10.4

The Commission is seeking more information on whether there are barriers, unrelated to tax and charity law, to maximising benefits to communities from native title funds, including in relation to benefit management structures and the investment of native title funds. What are potential solutions to these issues?

11 Improving regulator governance, conduct and performance

Key points

- Analysis in earlier chapters has highlighted many examples of leading practice, but also numerous areas for improvement, notwithstanding reforms in all jurisdictions in recent years.
- Broader application of leading-practice regulatory approaches would strengthen the foundations of regulatory systems and lift regulators' performance, reducing unnecessary costs for industry and the community while delivering robust and transparent regulated outcomes.
- Maintaining leading-practice regulatory systems requires ongoing effort and innovation. There would be merit in a formal process whereby regulators involved in the resources sector periodically meet to discuss leading regulatory practices. The Council of Australian Governments should take the lead on establishing this forum.
- Elected governments have ultimate responsibility for ensuring that the pre-conditions of robust regulatory systems are in place. Without them, reforms elsewhere in the system will be less likely to succeed. These pre-conditions include:
  - establishing clear regulatory objectives and providing unambiguous guidance to regulators on Governments' expectations of them in pursuing these objectives, complemented by regular independent review and evaluation to ensure systems remain fit for purpose
  - ensuring regulators have appropriate levels of funding to implement leading-practice regulation, and considering the potential role for greater use of cost recovery to achieve this
  - institutional arrangements and procedures that deliver accountability and independence to foster trust in the system.
- Regulators are facing capability challenges and their activities can lack transparency, diminishing the quality and efficiency of their decisions, imposing unnecessary costs and risking public confidence in regulatory efforts. Leading-practice improvements include:
  - developing staff expertise through training to enhance technical skills, and greater knowledge sharing between agencies and knowledge transfer from industry (such as through secondments and site visits)
  - regulators' senior management fostering a culture which emphasises ongoing capability development. Strategies include appointing a regulatory champion within an agency, awarding staff performance and engaging with broader networks
  - better use of data and technology, both in terms of adopting a more strategic approach to information use overall, and in specific applications of data and technology to improve regulator efficiency and communication with industry and the broader community
  - building public understanding of regulatory processes through a multi-layered approach, including sharing accessible information about general regulator functions and specific project details, as well as proactive regulator engagement with communities.

This report has outlined a range of shortcomings in the regulation of resources management, land access and project assessment and approvals which unnecessarily add to project costs. Impediments stemming from broader regulatory settings have also been considered. Furthermore, the report has examined the costs and robustness of environmental management and compliance arrangements, and considered both regulated and voluntary community engagement and benefit sharing practices — in the community at large and within Indigenous communities.

A number of issues cut across these areas — impeding both investment and robust regulatory outcomes. Broadly speaking, they relate to governments' role in providing the foundations for a robust and efficient regulatory system, and the actions of regulators themselves.

Many of the regulatory issues presented to the Commission through the course of this study have been examined previously. Enduring improvement requires the pre-conditions for a robust regulatory system to be in place, and these pre-conditions are the ultimate responsibility of elected governments. They include clear policy and regulatory objectives, adequately resourced institutions and effective governance and accountability arrangements.

Regulator capability is a ubiquitous challenge, and there remains a lack of transparency in aspects of the regulatory system. There is scope to develop staff's technical expertise and for better use of data and technology, in order to improve both the quality and efficiency of regulator decision making. In addition, greater information sharing and regulator engagement with the public can improve community confidence in the regulatory system.

These issues and a set of leading practices and recommendations that address them are discussed in this chapter.

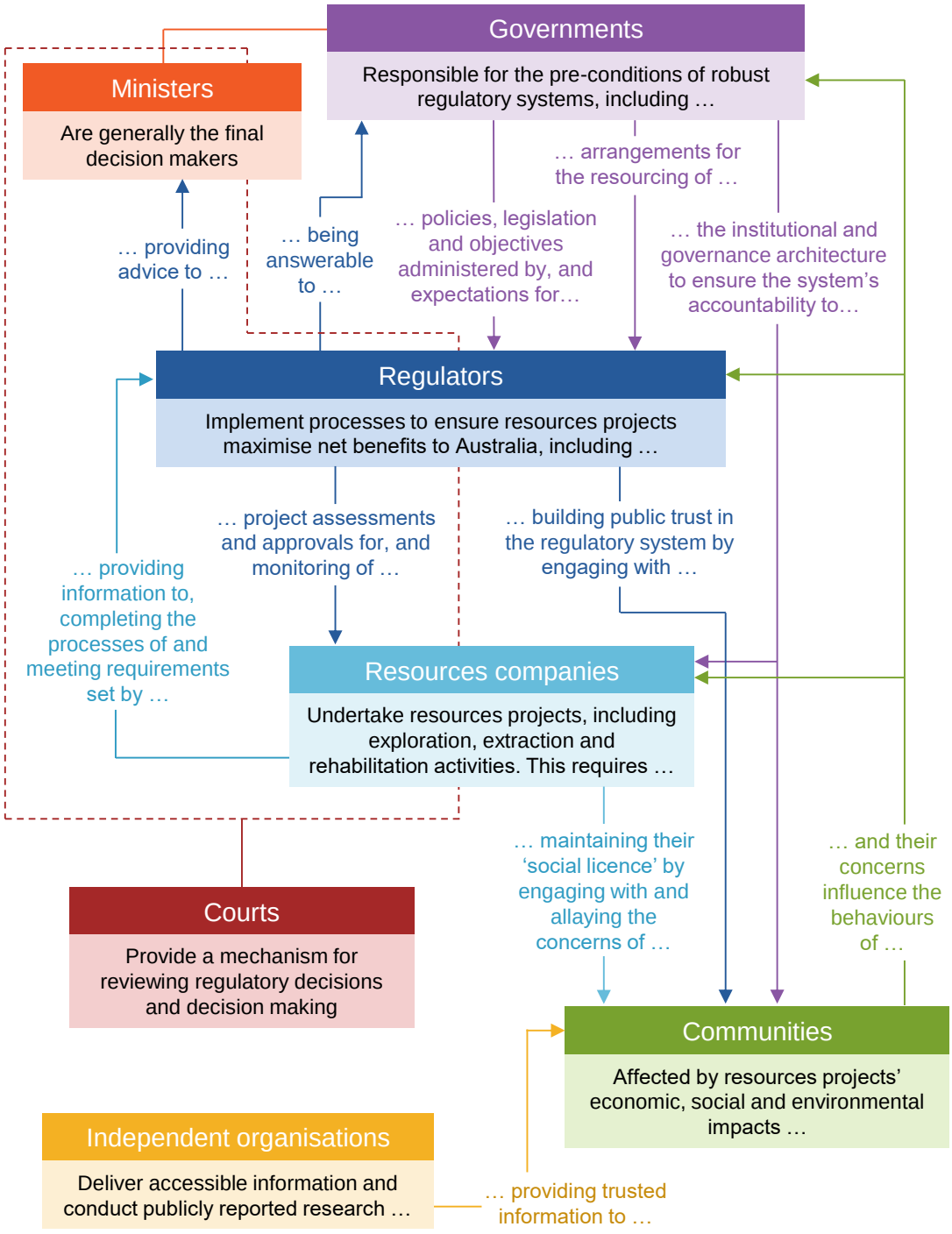
11.1 Governments are responsible for the foundations of robust regulatory systems

Pre-conditions for leading-practice regulation need strengthening

The pre-conditions for leading-practice regulatory systems ultimately rest with elected officials. Governments set policies and related regulatory objectives, establish the institutional and governance architecture, set expectations of regulators, provide or make arrangements for the resourcing of regulators and are often the final decision makers (figure 11.1).

Figure 11.1 **Roles and responsibilities in the resources regulatory system**

Governments' pivotal role in setting pre-conditions for the regulatory system



In response to many previous reviews, reforms of one type or another have recently been introduced or are being progressed in every jurisdiction (box 11.1).

Box 11.1 **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 has resulted in 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 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 2020 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 ensure 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 will focus environmental assessment on projects' significant impacts and increase transparency.

Notwithstanding these measures, interested parties have continued to identify scope for improvement. This study has found that frequent and/or abrupt changes to government objectives, a lack of consistent long-term policy direction and inconsistent application of existing policies can increase investors' perception of regulatory risk and impede investment (chapter 8). Some participants have also raised concerns that regulatory objectives are not sufficiently clear, and in some cases are inconsistent (box 11.2).

Box 11.2 Participants' views on the clarity of regulatory objectives

A number of participants raised concerns that regulatory objectives in the resources sector are not sufficiently clear, and in some cases are inconsistent. For example, Peabody Australia Coal (sub. 33, p. 4) commented that:

> When 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 regulatory entity.

Chandler (sub. 19, p. 3) noted that:

> This is not assisted by Australia's economic policy objectives for its natural resources like petroleum being cast in broad terms such as 'increasing national prosperity', or 'giving an appropriate return to the community'. The lack of precision in these expressions and the lack of objectives in the system have been subject to criticism going back to at least 2000 …

The MCA (sub. 11, p. 11) provided an example of the water trigger:

> The regulatory outcomes sought by the trigger — to improve environmental outcomes and enhance community confidence — were poorly defined, being broad and difficult to measure.

Participants have also raised concerns that many regulators face resource constraints, limiting the resources they can allocate to the various aspects of the regulatory process. Inadequate funding is a consequence of budget cuts and efficiency dividends introduced by governments over a number of years. For example:

- the number of staff working on assessments relating to Parts 7–10 of the *Environment Protection and Biodiversity Act 1999* (EPBC Act) at the Australian Department of Agriculture, Water and the Environment (DAWE) declined from 119.1 full-time equivalent staff in August 2012 to 55.3 in February 2019 (unpublished data from DAWE). Reflecting this, the 2019-20 Mid-year Economic and Fiscal Outlook provided $25 million to the Department over two years from 2019-20, in order to enable it to 'work through the backlog of environmental approval applications' (Australian Government 2019, p. 216) and reduce unnecessary delays in environmental assessments. This will support a significant expansion of staffing for assessments, with 52 additional staff intended to be recruited by 30 June 2020, and a further 27 staff in 2020-21 (unpublished data from DAWE)
- a range of submissions highlighted that resourcing constraints are affecting regulators' ability to make timely decisions (for example, Woodside Energy Ltd, sub. 18, p. 9; Rio Tinto, sub. 26, p. 6; ACF, sub. 32, p. 9). In particular, Rio Tinto (sub. 26, p. 10) emphasised the importance of 'ensur[ing] policy is aligned with sufficient resourcing within government'.

More broadly, elected officials play a significant role in creating and supporting a regulatory system that is transparent, follows due process and draws on evidence and analysis that is robust and publicly available (Banks 2009). Failure to do this undermines the regulatory process, detracts from accountability and can lead to a lack of trust in the system.

There needs to be transparency in the nature of the government's relationship with regulators to ensure that elected officials are not able to unduly affect regulated outcomes in ways that are not immediately obvious. Banks (2009, p. 7) noted that '… policies are not made in a vacuum. Rather, they typically emerge from a maelstrom of political energy, vested interests and lobbying'. A lack of transparency on these potential political influences can damage confidence in the overall regulatory system.

Ultimately, decisions about resources projects come down to the judgment of elected officials (or their delegates) and the way that they weigh up different considerations. This is an important part of a democratic system. However, over the course of this study, the Commission has heard examples of complex and protracted regulatory processes being used for political ends. In some cases, regulators may be pressured to alter their regulatory approach; for example, to go beyond standard requirements, leading to drawn-out assessment and approval processes for controversial projects. The motivations for such interventions are not always clear. In some cases a government may not want a new resources development, or it may be a reaction to community disquiet.

For example, CCAA (sub. 36, p. 7) described the process that one proponent, Boral, went through to receive an operating permit for a new quarry on the Gold Coast, commenting that the company:

> … had an [Environmental Impact Statement] approved in 2013 by the then Queensland Coordinator-General and Deputy Premier and Minister for State Development and Trade. … Further approvals were subsequently received from the Federal Environment Minister under the Environmental Protection and Biodiversity Conservation Act (EPBC) and the Queensland Department of Environment & Heritage in 2014. These approvals then led Boral to submit a formal development application with the Gold Coast City Council. In July 2014, the Council rejected the development application, despite Council planning staff recommending its approval.

Further, regarding the EPBC Act, the Australian Conservation Foundation (sub. 32, p. 14) noted '… the potential for conflicts of interest in relation to the independent assessment of projects and avenues of direct political interference in regulatory decisions'.

This study has highlighted several specific examples of ways in which the political context can adversely affect regulatory processes and investment, including:

- governments making changes to policy in response to concerns raised by industry or the community but without fully assessing the costs and benefits. For example, chapter 4 outlines instances where bans and moratoria have been imposed on unconventional gas projects without apparent comprehensive consideration of the costs and benefits
- regulatory risk associated with uncertainty in long-term policy direction. For example, chapter 8 highlights how uncertainty and inconsistency in Commonwealth and State policies on energy supply and climate change can act as an impediment to resources investment.

DRAFT FINDING 11.1

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

Governments must set clear regulatory objectives

Objectives can be set out in the relevant legislation, or documents that support legislation, such as explanatory memoranda and second reading speeches. However, it may be the case that the nature of the regulatory system, made up of a range of individual legislative instruments, makes it difficult to give a broad sense of the Government's objectives. In such a case, governments can look to other policy processes, such as policy statements and white and green paper processes, to articulate their objectives clearly. The Australian Government's National Resources Statement — which is underpinned by the Resources 2030 Taskforce Report — is one example of this latter type of policy process (DIIS 2019a).

In addition, a clear understanding of governments' expectations, including the relative priority and weighting that regulators should give to different (sometimes competing) objectives, assists regulators to implement regulation effectively and consistently. Well-defined government objectives can also enable the identification and resolution of inconsistencies and/or duplication in the regulatory processes of different agencies and jurisdictions (as described in chapter 6).

A Ministerial statement of expectations can clarify how a government expects a regulator will operate (including the appetite for risk) and how performance against these expectations will be measured. Such a statement is important for aligning regulator incentives with the policy objectives of governments and, in particular, reducing 'grey' areas and ambiguity that create scope for inconsistent decision making and excessive risk aversion. In essence, clear statements of expectations both empower and authorise regulators to make decisions and make them more accountable.

A number of jurisdictions have adopted this approach. For example, in Victoria, the Minister for Resources issued a Statement of Expectations for Earth Resources Regulation over the period 2018–20. The Statement sets out the Minister's expectations and identifies the key areas of governance and operational performance where there are opportunities for the Earth Resources Regulator to improve regulatory practice (Minister for Resources, Tim Pallas, MP 2018).

Statements of Expectations are also a policy of the Australian Government. For example, the Australian Treasury (nd) has issued its ten portfolio agencies with Statements of Expectations, for the purpose of providing guidance on agency conduct:

> The Australian Government agreed that Ministers would issue Statements of Expectations to statutory agencies. Through issuing a Statement of Expectations, Ministers are able to provide

> greater clarity about government policies and objectives relevant to a statutory authority, including the policies and priorities it is expected to observe in conducting its operations.

The Minister's Statement of Expectations for the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) sets out how the agency is expected to exercise its legislated functions by regulating petroleum activities in a manner that reflects international leading practice (NOPSEMA 2019c, p. 1; chapter 6).

DRAFT LEADING PRACTICE 11.1

Statements of Expectations from Ministers to regulators are one effective way for Governments to clearly set out their objectives for the regulatory system. Examples include the Statements to Earth Resources Regulation in Victoria and to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) at the Commonwealth level.

Periodic independent reviews are critical

Periodic independent review and evaluation of the regulatory framework and its objectives are key features of a leading-practice regulatory system (chapter 3). The Independent Review of the NSW Regulatory Policy Framework, for example, highlighted a 'lifecycle' and 'whole of system' approach for developing and managing regulation, as is used in Canada and New Zealand, in order to ensure that regulatory frameworks remain fit for purpose over time. In particular, the Review (Greiner, McCluskey and Stewart-Weeks 2017, p. 20) stated that:

> Regulatory stewardship requires government to treat regulation as they would any public service or public asset. … The duty to persistently manage regulation over its whole lifecycle is a defining characteristic of stewardship. Managing the stock and flow of regulation requires active monitoring on a continuous basis under regulatory stewardship to ensure that they produce the outcomes required.

As noted earlier, a number of jurisdictions have recently undertaken or are progressing reforms of their regulatory frameworks. Reviews are part of this process.

- Victoria's *Environment Protection Amendment Act 2018* — which is due to take effect from 1 July 2020 and focuses on risk-based regulatory oversight — is based on recommendations from an inquiry into its Environmental Protection Authority (Environment Protection Authority Inquiry Ministerial Advisory Committee and Environment Protection Authority Inquiry Ministerial Advisory Committee 2016).
- NOPSEMA is subject to an 'independent operational review of its regulatory performance and its performance as the sole environment regulator for offshore petroleum activities in Commonwealth waters' every five years, with the next review scheduled for 2020 (NOPSEMA 2019e, pp. 2–4).

- The Australian National Audit Office is currently undertaking a performance audit of DAWE's effectiveness in undertaking referrals, assessments and approvals of controlled actions under the EPBC Act, having previously examined the Department's performance in this area in 2003. The report is due to be tabled in May 2020 (ANAO 2019a).

There are many institutions that are well placed to undertake these reviews and facilitate better regulation, and more generally, jurisdictions have pursued institutional change to improve oversight of the regulatory system. 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 (PC 2011, 2012, 2013a; The Treasury 2019; Western Australian Government 2020).

DRAFT LEADING PRACTICE 11.2

Regular independent review and evaluation of regulatory frameworks and objectives drives continuous improvement and ensures they remain fit for purpose. 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 'lifecycle' approach for managing regulation over time ensures that frameworks remain fit for purpose.

Regulators need to be appropriately resourced

Governments, regulators and resources companies all have an interest in ensuring that regulators receive appropriate funding. Ultimately, however, it is governments that are responsible for funding their regulators, whether through budgetary appropriations or in setting cost recovery parameters. Regulators cannot be expected to process higher volumes of, and more complex, applications under time constraints when budgets and staffing levels have been reduced. Digital technologies have the potential to expedite processing times, although these technologies typically require up-front investment in information systems (discussed below).

Risk- and outcomes-based approaches to regulation were identified as leading practice in chapter 6. Their effective implementation relies on proficient regulators and hence adequate funding.

Acknowledging government budget constraints, there may be scope for some regulators to adopt greater cost recovery (chapter 3). If implemented appropriately, cost recovery can allow regulators to process applications more efficiently and for other services, such as guidance materials, to be made more effective. Directly recovering these costs from industry also recognises that there are private benefits that accrue to resources companies from the faster processing of applications. An additional benefit for governments from more efficient application processes is the potential for earlier access to royalty and tax revenue streams.

For example, NOPSEMA operates with full cost recovery for its activities through levies and fees collected from industry (NOPSEMA 2018a, p. 14). These revenues accrue to the agency rather than going into consolidated revenue, meaning NOPSEMA is not subject to the same budgetary pressures as other agencies. When the work flow increases, NOPSEMA's revenue also increases and the agency can take on additional staff to manage demand. The National Offshore Petroleum Titles Administrator also fully cost recovers, while reporting strong stakeholder satisfaction (NOPTA 2019b, p. 1). And South Australia's Department for Energy and Mining (SA DEM) shares cost-recovered funding to assist agencies with maintaining resourcing requirements proportional to anticipated workloads from SA DEM (SA DEM, pers. comm., 5 March 2020).

It should be noted that different agencies are bound by different rules with regards to how their cost recovery revenues may be spent. These rules may constrain or enhance regulators' ability to use these funds to attract staff with required expertise and scale staff numbers up or down.

Participants expressed mixed views about cost recovery. AMEC (sub. 31, pp. 12–13) for example, noted:

> AMEC continues to be strongly opposed to any cost recovery regime to fund 'core' Government statutory based activities or generate additional income to support a budget shortfall. … The mining and mineral exploration industry has limited discretionary expenditure or capacity to bear any further increases in business input costs without unintended economic and social consequences.

Conversely, SACOME (sub. 37, p. 11) commented:

> Feedback from industry members has broadly been that a fee for service arrangement is supported where it can reduce the time associated with securing regulatory approvals.

Any government assessment of the scope to enhance the role of cost recovery should be done in consultation with industry to ensure that potential cost recovery models would lead to demonstrably improved regulatory outcomes.

While maintaining appropriate funding for agencies is a necessary condition for a leading-practice regulatory system, it is not a sufficient one. Other factors must also be in place for regulators to adopt leading practice, such as having a strong regulatory culture — discussed below.

DRAFT RECOMMENDATION 11.1

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.

Independence across regulatory and policy functions can improve governance and accountability

The Commission (2013a, p. 169) has previously commented on the desirability of institutional independence across regulatory and policy functions within a jurisdiction:

> Where not already the case, the Australian and State and Territory Governments should institutionally separate regulatory assessment and enforcement functions from environmental policy functions, provided that the expected benefits exceed the costs.

Such an approach can 'limit opportunities for "bureaucratic drift" away from the legislative mandate, improving credibility, stability and consistency in regulatory decisions' (PC 2009, p. 232). It can also improve transparency around reporting, in cases where there is confusion between the regulatory functions within a policy agency and its broader reporting functions.

A number of jurisdictions have separated these responsibilities. For example, in Western Australia, the Northern Territory, South Australia and Victoria, the Environmental Protection Authority (EPA) is independent — it is not subject to the direction of the Minister. In fact, the recent review of the Victorian EPA (Environment Protection Authority Inquiry Ministerial Advisory Committee and Environment Protection Authority Inquiry Ministerial Advisory Committee 2016, p. xiv) commented that:

> We recommend the EPA play a greater role in regulating the mining sector. … This will also assist in addressing concerns about the potential conflict of interest of having the primary mining regulator – Earth Resources Regulation – in the same department that seeks to develop the industry ([Department of Economic Development, Jobs, Transport and Resources]).

NOPSEMA (2020) was established as an independent statutory regulator:

> … to ensure that decisions to accept or refuse risk management plans for safety, well integrity and environment focus exclusively on the technical and scientific merits of the proposal. These decisions are made independently of economic, commercial and political factors and the workings of government.

However, in some jurisdictions, regulatory processes are conducted within the broader policy department. For example, environmental assessments related to the EPBC Act are undertaken by DAWE. In Queensland, environmental regulation is administered by the Department of

Environment and Science (Qld DES). And the National Offshore Petroleum Titles Administrator remains part of the Department of Industry, Science, Energy and Resources.

A number of participants in this study have advocated for the establishment of an independent national environmental protection agency (ACF, sub. 32, p. 14; Birdlife Australia, sub. 39, p. 4). For example, the Environmental Defenders Office (sub. 40, p. 4) noted that:

> A new National EPA can greatly assist in effectively addressing challenges through acting as a trusted institution capable of undertaking independent assessment and enforcement, as well as providing independent advice to decision-makers on, and oversight of, national resource regulation outcomes. An independent National EPA can operate at arm's-length from government to remove the risks of corruption or conflicts of interest and to ensure regulations are implemented efficiently, in a non-biased, non-political way.

The Commission has previously proposed that 'jurisdictions pursue the institutional separation of their environmental assessment and enforcement functions from their environmental policy functions' (PC 2013a, p. 19). However, while an independent EPA would have benefits, there would also be costs. These could include costs associated with the agency's establishment and transition (where the agency does not already exist). Further, it may not be necessary to separate functions where there are appropriate lines of responsibility. AngloAmerican (sub. 42, p. 6) commented that:

> There is considerable evidence available that the concept that regulators should be 'independent' has tended to be inconsistent with the more important requirement that regulators should be 'accountable'.

The Queensland Law Society (sub. 41, p. 5) noted that:

> The primary consideration, regardless of which entity within the executive branch of government holds decision making power, is that the process for decision making is clearly defined by legislation, exercised in a timely and transparent manner, and subject to appropriate checks and balances, including judicial review.

The Commission is seeking views on the merits of institutional separation and whether there is a case for separating functions in jurisdictions where this does not currently occur.

INFORMATION REQUEST 11.1

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

11.2 Regulator performance is also key to outcomes

Regulators face capability challenges and their decisions can lack transparency

Limited technical expertise leads to regulatory delays

Regulation is only as good as the agency that implements it. The Commission has heard from participants that regulators face a range of challenges related to their skills and expertise that affect their ability to engage with resources companies, process applications and approvals and ensure that robust regulatory outcomes are achieved (box 11.3).

Box 11.3 Participants' views of regulatory expertise

Regulators' capability was a focus for many participants, for example:

> … in 2016, Northern Territory Department of Primary Industries and Resources advised proponents planning to establish a rare earth mine and processing facility that waste rock with a low level of radioactivity needed to be disposed of in line with a set of environmental guidelines it provided to the proponent. The proponents recognised that guideline values were not consistent with industry practice and upon further scrutiny the proponents discovered that the department had in fact provided guidelines for the disposal of radioactive medical waste. (MCA, sub. 11, p. 19)
>
> The issues paper seeks information on regulator capability and on 'under-resourcing'. We recognise this 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)
>
> There has undoubtedly been an increase in cost associated with regulatory related issues around compliance and enforcement associated with … officers of Resources Regulator lacking in experience and understanding of the exploration sector. Or the expertise of the regulator is often not relevant to the present project or the issue being dealt with — issues arise where a person undertaking an inspection has expertise in an area and incorrectly makes recommendations based on this expertise, even if not relevant to the present context of the situation. (NSW Minerals Council, sub. 28, pp. 36–37)
>
> … many issues and current blockages … [are] exacerbated by the lack of experienced and suitably qualified staff to deal with some of the complexities, idiosyncrasies and specialised nature of some projects … (AMEC, sub. 31, p. 10)
>
> Industry has observed some significant differences in the capability and consequent resourcing of agencies and regulators as they relate to the petroleum industry. This difference in capability can at times be drawn into stark contrast in situations where differing agencies are administrating the same Act and subsidiary legislation. This point is highlighted when comparing the administration of the EPBC Act by NOPSEMA in Commonwealth Offshore areas in comparison to the administration of this act in non-Commonwealth areas by the Department of the Environment and Energy. 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. 18)

The Commission has specifically heard that agencies lack adequate scientific and technical expertise, and rely on generalist staff with limited knowledge of or experience in the sector. Staff may not understand the technical details associated with an application, be up to date

with technological progress or be able to match an appropriate regulatory response to the risks associated with a project. Woodside Energy Ltd (sub. 18, p. 4) commented that:

> 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 lived industry experience within the regulator.

Industry participants have also reported that regulators have high staff turnover, affecting the extent to which there is continuity across the course of an application and assessment (which, as described in chapter 6, can often take a number of years). For example, the MCA (sub. 11, p. 18) noted that:

> Staffing turnover is also a key issue, affecting the consistency in which the way regulation and policy is interpreted and applied. This is particularly problematic for the long assessment processes typical of minerals projects and can result in constant re-learning by assessment officers and repeated requests for further information over the course of an assessment.

Continuity in assessments can also be negatively impacted by staff reductions at regulators over time, as in the case of the declining number of staff working on environmental approvals at DAWE discussed above.

A lack of technical expertise can lead to delays in the processing of applications. It can also lead to higher upfront costs for the project proponent, as regulators may request more information than is necessary to assess the project adequately (issues discussed in chapter 6). Furthermore, it can deter proponents from adopting more efficient and cost-effective technologies, if the regulator does not understand new and more innovative practices. And it can impair monitoring of compliance with, and enforcement of, regulatory requirements — putting robust regulatory outcomes at risk (chapter 7).

Not all reports of regulators' technical expertise have been negative. For example, a review from the Australian Government Chief Scientist found NOPSEMA to be extremely technically competent, with 'the diverse experience, backgrounds and capabilities of the technical staff cover[ing] all the disciplines needed to assess environment plans' (Finkel 2019, p. 33). NOPSEMA (2018b, p. 14) has stated that its independence and cost-recovery framework (discussed above) enable it to employ staff with the required technical skills:

> NOPSEMA's independent, cost recovered framework allows the authority to continue to attract and retain highly skilled specialist staff that is comparable to leading industry practice. As a statutory authority, NOPSEMA has greater freedom to offer competitive salaries and adjust expenditure according to industry activity and regulatory need.

Data and technology are not used to the fullest extent

In addition to the technical expertise of staff, regulatory capability is also influenced by an agency's use of data and technology in conducting regulatory processes. Participants have

highlighted that regulators could make better use of the available data and information to improve the approach they take to regulation.

For example, the EPBC Act proponent data project analysed 20 cases referred to the then Department of the Environment and Energy (DoEE) for EPBC Act approval. It identified references to 416 datasets — 52 per cent of which were fauna datasets and 42 per cent flora — in these cases (Box, Hansen and Bradsworth 2018, pp. 4, 21). Yet, the same project found that the data underlying an application were often not provided to DoEE, nor were they publicly released for the use of other resources companies, researchers and the general public. This limits the potential value that may otherwise be gained from using the data for environmental impact assessment, approval and monitoring under the EPBC Act.

An important use of data and information to improve regulatory decision making can be seen in the implementation of risk-based approaches to environmental assessment, which are widely regarded as leading practice (discussed in chapter 6). The data that are necessary for informing the implementation of a risk-based regime are, in many cases, not used to the extent that they could be. Potential uses include assessing a project's risks or monitoring compliance (chapter 7); to inform the pre-competitive data provided by governments (chapter 4); or as part of a regulator's broader analysis of risks and emerging issues.

There is a significant volume of data that regulators could potentially use to inform their processes and decision making. Regulators are increasingly recognising that collecting and utilising this information requires strong technological capabilities. However, current technology and information systems may be inadequate, and room for improvement has been identified in a range of jurisdictions (box 11.4).

A lack of regulator transparency inhibits accountability

Finally, no matter how robust a regulatory system might be, confidence in it can be undermined by a lack of transparency. Transparency ensures that regulators can be held accountable to the objectives that are commonly understood to be their remit by project proponents and the broader community.

Over time, regulators in various jurisdictions have sought to improve accountability and transparency around their processes and decisions. For example, all jurisdictions now publish reports outlining their environmental assessments (these include EPA WA nd; NT EPA nd; SA DPC 2018). However, participants have raised a range of concerns, including:

- a lack of clear and transparent assessment policies to guide proponents (chapter 6; NSW Minerals Council, sub. 28, p. 20)
- significant delays to approvals, without justification, and lack of reporting on whether timeframes are achieved (for example, Roy Hill, sub. 7, p. 6; MCA, sub. 11, p. 4; BCA, sub. 43, p. 5; chapter 6)
- little accountability or transparency in the post-approvals process (chapter 6)

- a lack of transparency around offsets (chapter 7). For example, the ACF (sub. 32, p. 12) noted:

  … there are systemic issues with how biodiversity offsets are tracked and disclosed under the EPBC Act. This lack of data capture and transparency creates issues with offset delivery and compliance with offset obligations. Whilst this is challenging for business, it presents a serious risk to environmental outcomes …

- a lack of accessible reporting on regulators' monitoring and compliance actions (chapter 7)
- AMEC (sub. 31, p. 12) noted differences in the nature, extent, quality, regularity, terminology and processes associated with reporting of performance data, which does not create an environment that allows for jurisdictional benchmarking and performance comparison.

Box 11.4 Digital technologies could be used better

The Independent Inquiry into the Environment Protection Authority (EPA) in Victoria highlighted several areas where the EPA's technological capabilities could be improved. These include the use of monitoring technologies — such as sensors, GPS and unmanned drones — to collect information, better data storage and sharing by using cloud computing, and data analytics software to assist with designing and evaluating regulatory tools (Environment Protection Authority Inquiry Ministerial Advisory Committee and Environment Protection Authority Inquiry Ministerial Advisory Committee 2016, pp. 351–352).

The Regulatory Maturity Project — which assessed the ability of the then Australian Department of the Environment and Energy's Environment Protection Group to fulfil its regulatory functions — found that 'the current business and IT systems are inadequate to meet the Department's requirements' (Woodward 2016, p. 10). It recommended that an end-to-end IT system be developed to manage projects from pre-referral to compliance stages.

The Report of the Digital Environmental Impact Assessment Working Group in Western Australia noted that 'current approaches for undertaking environmental assessment are largely based on a history of paper-based documents' (WABSI 2020, p. 10). A separate report on environmental approvals in mining prepared as part of the Streamline WA initiative to improve statewide regulatory practice also found that 'IT systems and processes are not capable of consistently meeting user demands' (Nous Group 2019, p. 14).

DRAFT FINDING 11.2

The ability for regulators to operate effectively and efficiently is constrained by capability challenges, including limited technical expertise and inadequate use of data and technology. In addition, a lack of clarity and regulator transparency inhibits accountability, 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.

Training and knowledge sharing would help to develop expertise

The Commission has heard of a number of instances of agencies supporting the development of technical skills and expertise amongst their staff. Leading-practice approaches include:

- secondments to other regulators, with the goal of sharing leading practice across agencies and learning new approaches. For example, in 2017, the NT EPA entered into an agreement with the WA Department of Water and Environmental Regulation for an officer exchange program. The aim of this program is to 'enhance [the] skills and capability of environmental officers, share learnings and improve collaborative and consistent environmental regulation' (NT EPA 2018, p. 27)
- supporting senior executives to continue to develop their leadership potential. For example, in 2017-18, the Tasmanian Department of State Growth supported a number of senior executive staff to undertake leadership training through the Australia New Zealand School of Government and the Tasmanian State Service (Tas DSG 2018, p. 8)
- supporting all staff to undertake formal training on effective regulatory practices. For example, NOPSEMA enables all of its inspectors to undertake a Certificate IV in Government (Statutory Compliance) and a Certificate IV in Government (Investigations) (DIS 2015, p. G1). The NSW EPA, in partnership with registered training organisations, offers a range of training courses to Australian, State and Territory and local government organisations (NSW EPA 2020). The EPA's programs are specifically designed to provide regulatory staff with the specialist skills and knowledge they require
- targeting the specific skills — in particular, technical expertise — that are lacking and developing a strategy for how to obtain them. For example, the Victorian EPA has developed an Applied Science Strategy with the intention of attracting, developing and retaining applied science specialists, expanding knowledge and better understanding environmental technologies (EPA Vic 2018)
- drawing on the communities of practice and organisations that provide support and training for regulators, such as the Australasian Environmental Law Enforcement and Regulators Network's Better Regulation Working Group. This working group aims to develop products and tools to assist its members to implement leading-practice regulation, and to provide a platform for members to share experiences and ideas related to regulatory practice (AELERT 2020)
- site visits that allow regulatory staff to develop a better understanding of a particular project and contribute to their knowledge of resources activities more generally. The Victorian Earth Resources Regulator has committed to a program of quarterly site visits so that all staff visit a mine and quarry annually. Preference is given to new starters. The regulator also plans to invite staff from other relevant agencies to these visits to increase industry exposure across government (Cronin 2019b, p. 4).

To pursue the last of these options — site visits — regulators should work with industry to develop a program of visits. Regulators could liaise with industry associations (such as the Minerals Council of Australia and the Australian Petroleum Production and Exploration

Association) in the first instance to discuss the types of visits that would be of particular benefit. The program of site visits could then be established on an ongoing basis, potentially as part of an induction program for those that are new to the regulator.

There may be circumstances where a regulator requires expertise that cannot be found internally. Where this is the case, a short-term contract with an appropriate expert may fill the identified gap. Yet the process of contracting external parties has the potential to slow down the regulatory process. Regulators could consider whether there are alternative options, including maintaining a pre-approved panel of experts (with skills varied enough to suit different scenarios) on hand and/or a fast-tracked procurement process.

As with cultural change (discussed below), enhancing the skills of regulatory officers is the responsibility of senior management. Training opportunities are an important investment in agency capability that can improve performance and productivity outcomes, and lead to greater job satisfaction and staff retention.

DRAFT LEADING PRACTICE 11.3

Approaches to improving staff capability and technical expertise include:

- secondments — as have been established in the officer exchange program between the Northern Territory Environment Protection Agency 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
- development of strategies to target particular skills gaps, including technical expertise — as has been the case in the Victorian Environment Protection Authority
- 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
- site visits — as offered by the Victorian Earth Resources Regulator.

DRAFT RECOMMENDATION 11.2

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

A strong culture promotes the adoption of leading practice, and underpins capability

A regulator's culture embodies the implicit rules, beliefs and expectations of behaviour under which regulatory officers operate. It determines the way the regulator exercises discretion in its assessment of proposals, responds to non-compliance and uses enforcement tools (PC 2013c, p. 8). A leading-practice regulator fosters a culture that supports the adoption and promotion of modern regulatory practices and that develops the capabilities required to pursue these outcomes.

There is no single formula for doing this and agencies need to find the approach that works best. That said, a key determinant of regulator culture is the leadership of senior management. Senior management can champion the adoption of good regulatory conduct, including through emphasising the importance of ongoing capability development to ensure that staff have the technical expertise and access to technology required to implement leading practice. Giving prominence to the theory and practice of good regulation and how it applies to resources projects, the agency's functions and how staff perform these functions signals that it is a priority.

One approach to promoting good regulatory practices and cultural change is for a senior member of staff to take on this responsibility — akin to a 'principal regulatory officer' or a 'regulatory champion'. It is their role to ensure that the agency has the necessary policies, procedures and capabilities for implementing leading-practice regulatory conduct. This has been employed at the then Department of Agriculture, which established the position of Principal Regulatory Officer in 2018 (DAWE 2019, p. 3). The aim of this role was to promote a professional regulator culture amongst staff working to regulate live animal exports.

Few regulators operating in the environmental and resources space currently appear to do this. One exception is the then DoEE (now DAWE). While not identical to the approach identified above, it has:

- noted in its 2016-17 Corporate Plan (DoEE 2016a) that building a positive risk management culture is an agency priority
- appointed a Chief Risk Officer, described as an 'agent for change', who seeks to raise awareness about the benefits of engaging positively with risk within sensible boundaries, enabling decision makers to capitalise on the opportunities presented by risks (DoEE 2018, p. 56)
- established a Regulatory Steering Committee to have oversight of regulatory issues, policies and major pieces of public guidance. Senior Executives of the department are members of this committee, including the Department's Chief Risk Officer (DoEE 2016c, p. 4).

There are also a range of other (and complementary) approaches that jurisdictions could take to develop a strong regulatory culture that underpins ongoing capability development among staff. These include:

- rewarding activities or outcomes that are consistent with the desired culture, including drawing upon incentives to recognise and promote the right behaviours. For example, in Queensland, the Department of Natural Resources, Mines and Energy (DNRME) has developed CUDOS, an online reward and recognition system. It provides staff with the ability to easily recognise the accomplishments and performance of their colleagues and enables management to reward team and individual performance (Qld DNRME 2018b)
- developing an internal working group to identify cultural issues and propose initiatives to promote positive cultural change. For example, NOPSEMA has established an Organisational Culture Group, which contributes on an ongoing basis to building a 'collegiate and transparent culture' (NOPSEMA 2019d, p. 83). Engaging with broader external networks, such as the Australasian Environmental Law Enforcement and Regulators Network's Better Regulation Working Group (discussed above), can also provide a forum for discussing the cultural changes required to promote leading practices
- reporting on regulator performance, including successes. Reporting can not only improve culture, it can also foster confidence in the regulatory system by improving transparency regarding regulatory activities, successes and learnings from any failures. For example, SA DEM releases a mineral resources regulation report on an annual basis that sets out the work the Department has undertaken to uphold the state's mining laws (SA DEM 2017). In Western Australia, the Department of Mines, Industry Regulation and Safety (WA DMIRS) reports its target timeframes and its performance against achieving these targets, including how long an application spends with WA DMIRS, other agencies, on Native Title processes and with the proponent (WA DMIRS 2019b).

DRAFT LEADING PRACTICE 11.4

Senior management have a key role in fostering a culture that supports ongoing capability development and adoption of modern regulatory practices. 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 Natural Resources, Mines and Energy
- 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.

Data could be much better used

A number of regulators have already recognised the role that data and other information can play in efficiently carrying out their tasks and have sought to adopt a more strategic approach to data and information use.

- DoEE (now DAWE) has developed a Technology and Information Strategy 2019–2023 to guide how it will leverage the opportunities presented by advances in technology and information (DoEE 2019g).
- Both Qld DNRME and Qld DES have adopted a commitment to providing open data, through the State's Open Data Strategy. Through this strategy, Qld DES has committed to data-related principles such as 'open by default', 'timely and comprehensive' and 'for improved governance and citizen engagement' (Qld DES 2019c, p. 4).
- WA DMIRS has adopted as one of its priorities in its Strategic Plan (to 2024) that it will 'improve the use of government data and information to deliver better outcomes' (WA DMIRS 2019d, p. 1).

As part of the National Resources Statement, Council of Australian Governments (COAG) Energy Ministers committed to developing a Resources Data Strategy (DIIS 2019a, p. 37):

> The government sees benefit in a holistic long-term Resources Data Strategy for the sector. A clear strategy will improve the scope and curation of key datasets, such as geoscience, environment, biodiversity and heritage. This would not only reduce the risk of exploration investment but would also help governments make more informed decisions and better coordinate and prioritise research efforts. It would also enhance environmental management practices and outcomes, and improve information transparency to build community trust.

Adopting a strategic approach to the collection, storage and use of data, as the examples above point to, helps ensure that jurisdictions are leveraging maximum value from the data they collect from industry. It can also lead to the adoption of more innovative practices by regulators, which will ultimately enhance the efficiency of the system and facilitate investment. Furthermore, better use of data can lead to increased regulator transparency and provide the foundations for more informed consultation between regulators and communities (discussed below). However, it should be noted that the Commission has little further information on the effectiveness of the above Strategies given the early stage in their adoption.

DRAFT LEADING PRACTICE 11.5

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.

The application of new data management and technological practices also provides regulators with opportunities to improve their productivity by working 'smarter'. This has the potential to alleviate resourcing pressures to some degree:

> Some of the toughest operational challenges facing regulators — resource constraints, backlogs, massive volumes of public comments — also offer some of the biggest opportunities for new technologies and techniques. (Eggers, Turley and Kishnani 2019, p. 10)

Data and technology will not replace all of a regulator's activities. Regulators will always be required to make judgments throughout the regulatory process, and these should be made by appropriately skilled and trained staff, as discussed above. However, there are elements of the regulatory process that can be automated, reducing waiting times and allowing staff to focus their efforts on areas where they can provide greater value.

For example, regulators in Australia and other parts of the world have started to use robotic process automation, which mimics the steps staff would take to complete tasks, such as filling out forms, transferring data between spreadsheets or accessing multiple databases (Eggers, Turley and Kishnani 2019, p. 6). Technologies are also enabling agencies to gain a better understanding of community expectations, including through the use of open-source tools to map the opinions of the community, while the Victorian EPA has drawn upon unmanned aerial vehicles to capture video evidence of illegal dumping (D'Ambrosio 2016).

A number of regulators are looking to the opportunities offered by technological solutions. For example:

- the WA EPA has formed a Working Group to investigate ways in which digital technologies could be used to streamline the capture, supply and interpretation of data in the environmental impact assessment process. The NT EPA and NOPSEMA are also involved in this work as members of the Working Group (WABSI 2020, p. 3)
- as noted above, DoEE has developed a Technology and Information Strategy 2019–23, which seeks to strengthen the department's capability to achieve its business objectives through better use of technology and information (DoEE 2019g)
- the Australian Government has announced the development of a biodiversity database and online portal, in order to provide greater data access and assist in improving the efficiency of the assessment process (box 11.5)
- Garnett (sub. 24, p. 5) noted that the Queensland Office of Groundwater Impact Assessment is a 'most important innovation', commenting that 'the State government has built significant, internal technical expertise (at a world level) in large-scale, groundwater impact modelling'.

Box 11.5 Commonwealth measures to improve EPBC Act efficiency

The Australian Government announced on 21 November 2019, as part of its deregulation agenda, that it was partnering with the Western Australian Government to develop an online platform for environmental assessment and approval processes, supported by a database of biodiversity information, as the first step towards a nationally consistent approach to a digital environmental approval regime.

The platform will allow project proponents to submit a single application addressing both Commonwealth and Western Australian regulatory requirements via an online portal and to track its progress through this portal. The database of biodiversity studies will store and share information provided by project proponents.

The Government anticipates that these two projects could reduce the timeframe taken for the State and Commonwealth assessment process of some projects by 6–18 months through the better use of technology.

Sources: Australian Government (2019), Morrison (2019).

Due to fewer opportunities to realise economies of scale, some smaller agencies may find it hard to capture the benefits presented by data and technology. However, cross-agency co-operation — as demonstrated in the WA EPA example above — can help to spread upfront costs and enable the creation of technologies that can be used across jurisdictions. More standard reporting and data requirements would assist industry as well, allowing companies with resources projects in multiple jurisdictions to provide similar types of information to agencies across these jurisdictions.

DRAFT LEADING PRACTICE 11.6

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.

Information sharing and regulator engagement with communities build confidence

Information and data sharing by regulators can be valuable both for resources companies and the general public. The importance of providing guidance on regulatory processes and sharing information with project proponents has been discussed in chapter 6. More broadly, the benefits of public consultation in the context of reducing investors' perception of regulatory risk have been highlighted in chapter 8, and engagement between resources companies and the community is discussed in chapter 9. This section focuses on leading practices related to regulators sharing information with communities, in order to improve transparency and build public understanding and confidence in the regulatory system.

Improving confidence in the system requires a multi-layered approach. Key to this is having regulations that are designed and implemented well, as outlined throughout this report. In addition, confidence comes from the public understanding regulatory processes and those processes being transparent. Communities can gain this understanding through information published by regulators, as well as ongoing engagement between regulators and the public.

Information availability plays a key role in informing the broader community through fostering an understanding of resources activities and helping to clarify regulatory objectives and whether they are being met. In cases where there is tension in communities around resources activities, information provision can help, over time, to abate that tension.

However, in some cases, confidence in the regulatory approach in Australia is unnecessarily undermined by jurisdictions' systems not being well understood. This can lead to the community questioning whether regulation is capable of achieving the government's (community's) objectives. A range of factors likely contribute to this, including that: systems are complex; jurisdictions can take divergent approaches; and sometimes regulatory outcomes are not clear.

It is not necessary for the general community to understand all the intricacies of the system. But regulators should be able to clearly explain their systems' key components, overall aims and the opportunities for public engagement (discussed below). In particular, there is a role for regulators to explain how the regulatory system deals with risks to the environment and communities.

There are some instances where information has been used effectively and has led to greater public understanding of and confidence in the regulatory system. Over the course of this study, a number of participants identified examples within the sector that are leading to greater accessibility of information for the general public.

- Regulators that publish accessible information — information that is simple and in plain English — contribute to a better public understanding of the overall regulatory process. An example is NOPSEMA's (2019e) *Introducing NOPSEMA* brochure, which sets out the regulator's purpose, functions, stakeholder engagement and regulatory process.

- Western Australia has a public register of planned and existing offsets that includes information such as biodiversity value, location, date of approval and completion status (chapter 7).
- Other independent bodies can support regulators in delivering more accessible data and information to the general public. For example, the GasFields Commission in Queensland is an independent statutory body that publishes factual data that can be accessed by the whole community, while the Gas Industry Social and Environmental Research Alliance is a government and industry collaboration established to undertake publicly reported research informed by and of benefit to the community (chapter 4).

DRAFT LEADING PRACTICE 11.7

The provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector. There are a number of instructive examples, including 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.

In addition to publishing information about regulatory activities, agencies that proactively engage with the public about the regulatory system can enhance public understanding. This engagement can take two forms.

- Engagement with the public on specific projects, throughout the life of that project. Many regulators already have public consultation periods as part of the regulatory process. One area where there has been less uptake in Australia, and for which there would be merit, is for the regulator to consult with the public in the initial scoping stage of a project (outlined in chapter 6). This would enable the regulator to outline the regulatory process, answer questions and provide guidance to those seeking more information. Consultation at this early stage is a key part of the impact assessment processes recently introduced in Canada (Government of Canada 2019).
- Engagement with the public at a broader and more general level, to understand their expectations around acceptable risks and regulatory objectives. This information can also be provided to policy makers and governments so that they can seek to improve the responsiveness of the regulatory system. Some jurisdictions have these processes in place, including dedicated teams for liaising with the community. For example, the Community Engagement Team within the New South Wales Department of Planning and Environment works closely with stakeholders through face-to-face meetings, workshops and public information sessions, and Community Consultative Committees (NSW RR 2017).

DRAFT LEADING PRACTICE 11.8

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

- engaging with local communities on the regulatory process throughout the lifecycle 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.

Opportunities abound for jurisdictions to learn from each other

This study has identified a range of leading-practice approaches to designing, administering and enforcing regulation in Australia's resources sector. These leading practices span a diverse set of resources activities and include regulator governance and conduct across the lifecycle of a resources project.

As the resources landscape is continually evolving, maintaining a leading-practice regulatory system will require ongoing effort and innovation. This will ensure that regulatory policies, frameworks and activities remain fit for purpose — a 'set and forget' approach to regulation would deliver inferior outcomes for all stakeholders in the sector over time.

In this context, there would be merit in a formal process whereby regulators involved in the resources sector periodically meet to discuss leading regulatory practices, including the sharing of learnings from initiatives implemented in their jurisdictions. COAG should take the lead on establishing this forum.

DRAFT RECOMMENDATION 11.3

Ministers, through the Council of Australian Governments, 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.

Finally, in identifying leading practices over the course of this study, the Commission has drawn on examples provided by study participants or from publicly available information. It is likely that there are good examples that have not yet been identified. The Commission welcomes feedback on leading practices that have been overlooked.

INFORMATION REQUEST 11.2

The Commission is seeking feedback on leading practices that it has overlooked. Information on how these practices have contributed to improved regulatory outcomes would also be appreciated.

A Conduct of the study

The Commission has actively encouraged public participation in this study. This appendix outlines the consultation process and lists the organisations and individuals that have participated.

The consultation process was as follows:

- Following receipt of the terms of reference on 6 August 2019 an advertisement was placed in *The Australian* and *Australian Financial Review* newspapers, and a circular was sent to identified interested parties.
- An issues paper was released on 17 September 2019 to assist those wishing to make a written submission to the study. Following the release of the issues paper, 53 submissions were received (table A.1). The submissions are available online at https://www.pc.gov.au/inquiries/current/resources/submissions.
- Consultations were held with representatives from major stakeholders in the resources sector (table A.2).

The Commission welcomes further contributions to the study from interested parties. Submissions on this draft report are due by **Friday 5 June 2020**.

The final report will be published in August 2020.

Table A.1 **Submissions**[a]

Participant	*Submission number*	
Adani Mining Pty Ltd	38	
Alcoa	45	
Anderson, John	21	
AngloAmerican	42	#
Association of Mining and Exploration Companies (AMEC)	31	#
Aurizon Network	30	
Australian Conservation Foundation (ACF)	32	
Australian Environment and Planning Law Group Law Council of Australia (AEPLG)	29	#
Australian Petroleum Production and Exploration Association (APPEA)	44	#
Australian Small Business and Family Enterprise Ombudsman	23	
Birdlife Australia	39	
Brown, Jason	20	
Burnett, Peter	15	
Business Council of Australia (BCA)	43	
Cement Concrete and Aggregates Australia (CCAA)	36	
Chandler, John	19	
Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)	16	
Campin, David	49	
Dobes, Alex	2	
Environmental Defenders Office (EDO)	40	
Garnett, Professor Andrew	24	
Glazebrook, Peter	17	
Hunter Business Chamber	10	
INPEX	34	#*
Institute of Public Affairs	5	
Isaac Regional Council	48	
Jenkins, Brian	4	#
Local Government Association of Queensland	50	#
Minerals Council of Australia (MCA)	11	#
Moore, Simon	3	
National Farmers Federation	14	
National Offshore Petroleum Safety and Environmental Management Authority	13	
Noonan, David	1	#
Northern Territory Chamber of Commerce and Industry	35	

a An asterisk (*) indicates that the submission contains confidential material NOT available to the public. A hash (#) indicates that the submission includes attachments.

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Table A.1 (continued)

Participant	*Submission number*	
New South Wales Aboriginal Land Council (NSW ALC)	47	
New South Wales Minerals Council (NSWMC)	28	
Origin	8	
Peabody Australia Coal Pty Ltd	33	
Queensland Law Society (QLS)	41	
Queensland Resources Council (QRC)	27	
Resources Law Network	22	#*
Rio Tinto	26	#*
Roy Hill	7	*
South Australian Chamber of Mines and Energy (SACOME)	37	
South Australian Government	25	
Sydney Marine Sand Pty Limited	6	
The Wilderness Society Ltd	9	
Townsville City Mayor Jenny Hill	51	
Transparency International Australia	12	
Tasmanian Minerals, Manufacturing and Energy Council	46	
Woodside Energy Limited	18	

a An asterisk (*) indicates that the submission contains confidential material NOT available to the public. A hash (#) indicates that the submission includes attachments.

Table A.2 **Consultations**

ACT

Adani

Attorney-General's Department (AGD)

Australian National Audit Office

Australian Trade and Investment Commission (Austrade)

Australian Petroleum Production and Exploration Association (APPEA)

Department of Agriculture, Water and Environment

Department of Industry, Science, Energy and Resources

Department of Infrastructure, Transport, Cities and Regional Development

Department of Prime Minister and Cabinet

The Treasury

Deregulation Taskforce

Geoscience Australia (GA)

German-Australian Chamber of Industry & Commerce

Indigenous Land and Sea Corporation (ILSC)

MacIntosh, Professor Andrew

Minerals Council of Australia (MCA)

National Indigenous Australians Agency (NIAA)

Office of the Registrar of Indigenous Corporations (ORIC)

Verdant Minerals

Woodside Energy Limited

New South Wales

Australian Human Rights Commission (AHRC)

Biodiversity Conservation Trust (BCT)

Cement Concrete & Aggregates Australia (CCAA)

Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)

Department of Planning, Industry and Environment (DPIE)

NSW Aboriginal Land Council (NSWALC)

NSW Environment Protection Authority (NSW EPA)

NSW Resources Regulator (NSW RR)

NSW Minerals Council (NSWMC)

Swords, Kimberley

(continued next page)

Table A.2 (continued)

Northern Territory

Aboriginal Areas Protection Authority (AAPA)
Arafura Resources Limited
EcOz Environmental Consultants
Environmental Defenders Office (EDO NT)
Northern Territory Chamber of Commerce
Department of Environment and Natural Resources
Department of Primary Industries and Resources (DIPR)
Kirkland Lake Gold
Minerals Council of Australia, Northern Territory Division (MCA NT)
Newmont Goldcorp Australia

Queensland

AgForce
BHP
Bowie Law
Christie, Daniel
CQG Consulting
Department of Aboriginal and Torres Strait Islander Partnerships (Qld DATSIP)
Department of Environment and Science (Qld DES)
Department of Natural Resources, Mines and Energy (Qld DNRME)
Department of Premier and Cabinet
Garnett, Professor Andrew
GasFields Commission
GHD Townsville
Gas Industry Social & Environment Research Alliance
Glencore
Hill, Jenny (Mayor of Townsville)
Isaac Regional Council
Local Government Association of Queensland (LGAQ)
Maron, Martine
McCullough Robertson
National Native Title Tribunal
Office of the Coordinator General
Peabody Energy
Queensland Resources Council
QLD Perpetual

(continued next page)

Table A.2 (continued)

Rio Tinto
Townsville Chamber
Townsville Enterprise Limited
Western Downs Regional Council

South Australia

Department of Energy and Mining (SA DEM)
Department of Premier and Cabinet (SA DPC) and Commissioner for Aboriginal Engagement
Grain Producers SA and Primary Producers SA
South Australian Native Title Services (SANTS)
Santos
South Australian Chamber of Mines and Energy (SACOME)
South Australian Department of Environment and Water

Tasmania

Environment Protection Authority Tasmania
Tasmanian Government Department of State Growth
Tasmanian Minerals, Manufacturing and Energy Council
West Coast Council

Victoria

Adani
Allens
Arnold Bloch Leibler
Australian Charities and Not-for-profits Commission (ACNC)
Australian Law Reform Commission
Better Regulation Victoria
BHP
Business Council of Australia (BCA)
Chapman, Hilary
Clayton Utz
Department of Environment, Land, Water and Planning (Vic DELWP)
Department of Economic Development, Jobs, Transport and Resources (Vic DEDJTR)
Department of Justice and Community Safety (Vic DJCS)
EnergyAustralia
Exxon Mobil
Langton, Professor Marcia
Minter Ellison

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Table A.2 (continued)

National Indigenous Australians Agency (NIAA)
National Offshore Petroleum Titles Administrator (NOPTA)
National Native Title Council (NNTC)
Origin
PwC Australia
South32
The Nature Conservancy
Woodside Energy
Western Australia
Alcoa of Australia Ltd
AngloGold Ashanti Australia Ltd
Association of Mining and Exploration Companies (AMEC)
BHP
Department of Jobs, Tourism, Science and Innovation (WA DJTSI)
Department of Planning, Lands and Heritage (WA DPLH)
Department of Mines, Industry Regulation and Safety (WA DMIRS)
Gold Fields Australia Pty Ltd
Iluka Resources Limited
Karratha City Council
Mineral Resources Limited
National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
Pilbara Development Commission
Rio Tinto Iron Ore
Roy Hill Holdings
The Chamber of Minerals & Energy of Western Australia
Woodside Energy Limited
Yamatji Marlpa Aboriginal Corporation
Yara Pilbara

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Table A.2 (continued)

INTERNATIONAL

Canada

Mining Association of Canada

Impact Assessment Agency of Canada

Norway

Ministry of Petroleum and Energy

B Regulatory arrangements across jurisdictions

Table B.1 **Regulatory arrangements in New South Wales**

Category	Approach
Land access regime	
Agreement with a private landholder	A written land access arrangement must be negotiated prior to any exploration activity (Mining Act 1992 (NSW), s. 140; Petroleum (Onshore) Act 1991, s 69C). (Also applies to public holders.)
Terms and conditions	A voluntary Land Access Arrangement Template for Mineral Exploration (the template) aims to assist both landholders and mineral exploration companies operating in NSW to negotiate an access agreement. This template is intended to cover mineral and coal exploration but does not address access to land for the purposes of opal prospecting or petroleum (including coal seam gas) exploration.
Native title arrangements	Exemptions from the application of the 'right to negotiate' with reference to: • s. 26A of the NTA: replacement of the right to negotiate provisions for an approved exploration etc. act with a right to be consulted about ways of minimising the impact of the grant (mining and petroleum); • s. 26C of the NTA: exemption from the right to negotiate for certain opal or gem mining on land that has previously been mined.
Institutional arrangements	
Environment regulator	NSW Environment Protection Authority, Department of Planning, Industry and Environment
Resources regulator	NSW Resources Regulator
Heritage regulator	Heritage NSW, Aboriginal Cultural Heritage Advisory Committee, Heritage Council of NSW
Other arrangements	The Independent Planning Commission is the consent authority for certain State significant development proposals in NSW.
Coordination mechanisms	
Lead agency	Yes — Department of Planning, Industry and Environment
Major projects coordination	Yes — Department of Planning, Industry and Environment (Planning and Assessment Group).
Decision-maker	
Minister or alternative	The consent authority for 'State significant development' (SSD) is either the Minister for Planning and Public Spaces or the Independent Planning Commission (IPC).

(continued next page)

Table B.1 (continued)

Category	Approach
Other decision-makers	*The consent authority for regionally significant development is the relevant planning panel for the area. Otherwise, the consent authority is the council for the area in which the development is to be carried out.*
Review and appeals	
Merit review	In some cases, applicants and third-party objectors may appeal to the NSW Land and Environment Court against the merits of a determination (*Environmental Planning and Assessment Act 1979*, Division 8.3). Where the IPC is the consent authority, no merit review is available if the IPC has held a public hearing.
Judicial review	Under Section 9.45 of the *Environmental Planning and Assessment Act 1979*, any person may commence proceedings in the NSW Land and Environment Court to seek an order to remedy or restrain a break of the Act, including any decision on a SSD development application..
Approach to offsets	
Fund/pay-in-lieu option	Yes
Public register	Partial — register of offset credit transactions does not include information on the project requiring the offset.
Rehabilitation arrangements	For SSD applications, the Department of Planning, Industry and Environment and the consent authority assess the rehabilitation proposal and proposed post-closure land use. If the application is approved, the these are incorporated into the conditions of the development consent. The operator must then submit more detailed rehabilitation plans, objectives and completion criteria for approval. A rehabilitation security deposit must be lodged before the project starts to cover the full potential cost of rehabilitation.

Table B.2 **Regulatory arrangements in Victoria**

Category	Approach
Land access regime	
Agreement with a private landholder	Victoria requires a negotiated agreement before a proponent can enter or access privately-owned land. However, 'informed verbal consent' is sufficient to begin 'low impact exploration', which is activity that does not require the use of equipment, chemical treatment, explosives or the removal of certain amounts and types of vegetation.
Terms and conditions	The Commercial Consent Agreement for Access to Private Land in Victoria is currently being trialled in part of the state and provides a voluntary set of terms for land access for exploration — covering access to the land, conditions of access, compensation and dispute resolution — and can be tailored to suit personal needs.
Native title arrangements	The *Traditional Owner Settlement Act 2010* (Vic) (TOS Act) allows the Victorian Government and Traditional Owners to reach settlements over Traditional Owner land. Traditional Owners agree not to pursue a native title claim under Commonwealth law if a settlement is in place. TOS Act settlements also allow Traditional Owners to establish land use activity agreements (LUAAs), which set out the terms on which resources exploration and development on relevant land may take place.
Institutional arrangements	
Environment regulator	Environment Protection Authority Victoria
Resources regulator	Earth Resources Regulation, Department of Jobs, Precincts and Regions.
Heritage regulator	Heritage Victoria and Aboriginal Victoria.
Other arrangements	Memoranda of Understanding with other regulators and government entities to clarify regulatory roles and processes.
Coordination mechanisms	
Lead agency	Yes — Earth Resources Regulation, Department of Jobs, Precincts and Regions.
Major projects coordination	Yes — Invest Assist, Department of Jobs, Precincts and Regions.
Decision-maker	
Minister	The Minister for Resources grants resources related licences and extractive industry authorities. The Minister for Planning provides recommendations for projects that have the potential for 'significant environmental effects' under the Environment Effects Statement process.
Other decision-makers	The Department Head of the Department of Jobs, Precincts and Regions approves or refuses work plans, which are required for extractive and mineral exploration and mining that is over a certain risk threshold.

(continued next page)

Table B.2 (continued)

Category	Approach
Review and appeals	
Merit review	The *Mineral Resources (Sustainable Development) Act 1990* (MRSD Act) provides mineral licensees and extractive industry authority holders with external review through the Victorian Civil and Administrative Tribunal for decisions regarding work plans and work plan variations, and conditions set by the Minister for Resources for extractive industry authority holders only. Under the MRSD Act and in relation to minerals licences only, the Mining Warden is empowered to resolve disputes through alternative dispute resolution methods such as mediation and arbitration.
Judicial review	Judicial review under the *Administrative Law Act 1978* may be available for Ministerial decisions on licensing and other matters under the MRSD Act for which merits review is not available.
Approach to offsets	
Fund/pay-in-lieu option	No
Public register	No
Rehabilitation arrangements	All mines and quarries must be rehabilitated. Exploration and retention licence holders and some extractive industry authority holders must rehabilitate in accordance with the licence/work authority (where a work plan is not required). Mining or prospecting licensees and extractive industry work authority holders must rehabilitate land in accordance with a rehabilitation plan, which forms part of the work plan. From 1 July 2020, any new or varied rehabilitation plans must demonstrate how the licensee will achieve a safe, stable and sustainable landform, supported by closure criteria and progressive rehabilitation milestones. Similar requirements will apply to extractive industry work authority holders from 1 July 2021. Rehabilitation bonds are collected to mitigate risk to the state, covering the full expected rehabilitation liability.

Table B.3 **Regulatory arrangements in Queensland**

Category	Approach
Land access regime	
Agreement with a private landholder	Preliminary activity is permitted once 10 days' notice has been provided to the landholder. (An activity is not a preliminary activity where it is an authorised activity carried out on land that is less than 100ha in size and is being used for intensive farming or broadacre agriculture.) Conduct and Compensation agreement required prior to any other activity.
Terms and conditions	Standard terms and conditions are set out in the Queensland Land Access Code. A Conduct and Compensation agreement may also contain additional terms.
Native title arrangements	Expedited native title process exist for mining exploration permits.
Institutional arrangements	
Environment regulator	Department of Environment and Science (DES)
Resources regulator	Department of Natural Resources, Mines and Energy
Heritage regulator	Department of Environment and Science, Department of Aboriginal and Torres Strait Islander Partnerships
Other arrangements	• Office of the Coordinator-General (CG), Department of State Development, Manufacturing, Infrastructure and Planning — coordinates environmental, social and economic impact assessment processes • GasFields Commission — facilitates engagement between landholders, communities and gas industry • Land Access Ombudsman — investigates and facilitates resolution of disputes between landholders and resources companies • Office of Groundwater Impact Assessment — manages the cumulative impacts of resource operations on groundwater • Queensland Treasury – administers the Financial Provisioning Scheme
Coordination mechanisms	
Lead agency	Yes — Department of Natural Resources, Mines and Energy.
Major projects coordination	Yes — Office of the Coordinator-General.
Decision-maker	
Minister	Decision maker
Other decision-maker	DES is the 'administering authority' for environmental approvals. DES cannot grant environmental authority for coordinated projects with conditions inconsistent with those recommended by the CG.
Review and appeals	
Merit review	Proponents and 'submitters' can apply for merit review in the Land Court following the granting (or refusing) of an environmental authority. If the project has been recommended with conditions by the CG the Land Court cannot effect any change inconsistent with those conditions.
Judicial review	Judicial review is not excluded from the *Environmental Protection Act 1994* (Qld) so normal judicial review provisions apply.
Approach to offsets	Environmental Offsets Act 2014 — administered by DES. The State cannot impose an offset condition for impacts already requiring an offset under the EPBC Act policy.
Fund/pay-in-lieu option	Yes — accounts for 98 per cent of offsets under the current policy.
Public register	Yes.
Rehabilitation arrangements	Companies are required to have a progressive rehabilitation and closure plan. Most companies pay a proportion of their expected rehabilitation liabilities into a pooled fund each year. Higher risk companies and very small companies are required to provide financial surety.

Table B.4 **Regulatory arrangements in Western Australia**

Category	Approach
Land access regime	
Agreement with a private landholder	A tenement may be granted on private land but the land owner must be notified and mining cannot commence without written consent and payment of compensation. A compensation agreement isrequired prior to any mining or resource activity. For minerals, landholder consent is required for the top 30 metres of private land to be included into a tenement. Compensation must be agreed or determined prior to the commencement of operations. Landholder's consent is not required for the issue of a 'Permit to Enter' (to search for minerals and mark out a tenement), however, the landholder must be notified prior to entry. For petroleum/geothermal resources, titles are granted over private land without landholder consent, providing the area is greater than 2000 square meters. A landholder is notified when the proponent wishes to enter the land to undertake an activity, after the title is granted. Consent is only required for a limited category of land (such as dwellings and burial grounds) when a proponent wishes to actually enter the land to conduct an exploration or production activity. Compensation must be agreed/determined prior to the commencement of operations.
Terms and conditions	The Australian Petroleum Production and Exploration Association (APPEA) produced a template agreement for WA landowners and petroleum explorers.
Native title arrangements	No unique arrangements
Institutional arrangements	
Environment regulator	Environmental Protection Authority (EPA), Department of Water and Environmental Regulation (DWER), Department of Mines, Industry Regulation and Safety (DMIRS)
Resources regulator	Department of Mines, Industry Regulation and Safety (DMIRS)
Heritage regulator	Department of Planning, Lands and Heritage (DPLH)
Other arrangements	'State agreements' between proponents and the Western Australian Government (and ratified by Acts of Parliament) specify terms and conditions of project development (including royalties).
Coordination mechanisms	
Lead agency	Yes — Department of Mines, Industry Regulation and Safety.
Major projects coordination	Yes — Department of Jobs, Tourism, Science and Innovation.
Decision-maker	
Minister	Minister for Environment determines whether or not environmental approval will be granted and under what conditions, informed by the EPA.

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Table B.4 (continued)

Category	Approach
Other decision-maker	The EPA decides whether proposals, if implemented, are likely to have a significant environmental impact and therefore need assessment under the *Environmental Assessment Act 1986* (WA), and makes recommendations to the Minister for the Environment on whether projects should proceed and under what conditions. DMIRS determines mining proposals and mine closure plans under the *Mining Act 1978* (WA). The Minister for Mines and Petroleum determines grant or refusal of mining lease. Under section 111A of the *Mining Act 1978*, the Minister may refuse an application where the Minister is satisfied on reasonable grounds that it is in the public interest.
Review and appeals	
Merit review	Anyone can seek merits review of EPA decisions not to assess a proposal or in relation to the content of or recommendations in an EPA report, conditions or procedures imposed by the Ministerial Statement. Appeals are not available against decisions to assess a proposal or refusal of a proposal.
Judicial review	No unique arrangements for applications for judicial review. Public interest standing may be granted.
Approach to offsets	
Fund/pay-in-lieu option	Yes (mandatory) for projects in the Pilbara region. No elsewhere
Public register	Yes
Rehabilitation arrangements	Companies must develop mine closure plans. Companies with over $50 000 in estimated rehabilitation liabilities must contribute to a fund each year (does not apply to tenements granted or held pursuant to State Agreement Acts). The principal of the MRF can be used to rehabilitate abandoned mines, the interest generated on the fund is available to rehabilitate legacy sites.

Table B.5 **Regulatory arrangements in South Australia**

Category	Approach
Land access regime	
Agreement with a private landholder	To access land for exploration, the resources company must either effectively consult with the landowner and provide a notice of entry; or negotiate an agreement. Additional requirements apply at later stages of the project cycle.
Terms and conditions	A *Mining and Resources Industry Land Access Dispute Resolution Code* provides a series of dispute resolution methods for farmers and resource companies.
Native title arrangements	Section 58 and Part 9B of the *Mining Act 1971* (SA) is the State's alternative 'right to negotiate' scheme. Part 9B includes requirements for exploration and the grant of production tenements on 'native title land'. The holder of an exploration licence does not have any right to carry out activities that affect native title without: (a) an agreement with the relevant native title group; or (b) a determination from the Environment, Resources and Development Court. The Commonwealth *Native Title Act 1993* applies to tenements granted under the *Petroleum and Geothermal Energy Act 2000* where a combination of Indigenous Land Use Agreements and Right to Negotiate Agreements are used.
Institutional arrangements	
Resources and Environment regulator	Department for Energy and Mining
Environment co-regulators	South Australia Environment Protection Authority, Department for Environment and Water
Heritage co-regulators	Department for Environment and Water, State Aboriginal Heritage Committee
Other arrangements	Safework SA, Department of Planning, Transport and Infrastructure
Coordination mechanisms	
Lead agency	Yes — Department for Energy and Mining.
Major projects coordination	Yes — Department for Energy and Mining.
Decision-maker	
Minister	Minister for Energy and Mining makes approval decisions on mining and petroleum tenements and programs for environment protection and rehabilitation.
Other decision-makers	Minister for Planning (Environmental Impact Statements for major developments or projects under the *Development Act 1993*)
Review and appeals	
Merit review	No. Merits review is only available to proponents if the decision maker has requested alterations.
Judicial review	Yes. Judicial review is available for approval decisions on mining leases and programs for environment protection and rehabilitation.

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Table B.5 (continued)

Category	Approach
Approach to offsets	
Fund/pay-in-lieu option	Yes
Public register	Yes
Rehabilitation arrangements	Tenement holders must prepare a program for environment protection and rehabilitation before commencing regulated activities. Government policy requires a rehabilitation bond to be provided covering the full potential cost of rehabilitation for mineral mines, and for petroleum, a risk based approach is used to determine the level of bond based on the financial health of the tenement holder and the potential cost of outstanding rehabilitation For quarries, the extractive areas rehabilitation fund applies, which hypothecates a proportion of royalties from quarries for the purpose of financial assurance for rehabilitation of quarries.

Table B.6 **Regulatory arrangements in Tasmania**

Category	Approach
Land access regime	
Agreement with a private landholder	Once an exploration licence is granted, the licensee can explore on private land after providing 14 days' notice, except within 100 meters of a body of water or dwelling on the land. Before a mining lease can be granted, the licence applicant must enter a compensation agreement with the owner of any private land in the lease area. Prospecting licences (rather than exploration licences) can only be used on private land with the consent of the owner or occupier.
Terms and conditions	No standard set of terms and conditions provided.
Native title arrangements	No unique arrangements in relation to native title.
Institutional arrangements	
Environment regulator	Environment Protection Authority (EPA), or Local Government Authority (LGA) for smaller projects
Resources regulator	Mineral Resources Tasmania (MRT), within the Department of State Growth
Heritage regulator	Heritage Tasmania, Aboriginal Heritage Tasmania
Coordination mechanisms	
Lead agency	Yes — MRT for exploration licences; MRT, EPA or LGA for mining leases (depending on the scale and nature of the project).
Major projects coordination	Yes — Tasmanian Planning Commission for Level 3 projects – Projects of State Significance and the Office of the Coordinator-General provides coordination but is not responsible assessment or approvals.
Decision-maker	
Minister	The Minister for Resources is responsible for granting mining leases and exploration licences.
Other decision-makers	Mining leases or exploration licences cannot be granted in respect of Aboriginal land without the agreement of the Aboriginal Land Council of Tasmania. LGAs issue land use permits that are also required for mining activity to occur. The EPA has a role in assessment and providing advice to LGAs and Mineral Resources Tasmania on mining developments. The EPA assesses larger proposals and the EPA Board recommends conditions that should be imposed if the development is approved.
Review and appeals	
Merit review	Appeals on EPA determinations can be brought to the Resource Management and Planning Appeal Tribunal.
Judicial review	Judicial review can be sought under the Judicial Review Act 2000.
Approach to offsets	
Fund/pay-in-lieu option	No
Public register	No
Rehabilitation arrangements	Rehabilitation bonds are required to cover the cost of the potential rehabilitation liability.

Table B.7 **Regulatory arrangements in the Northern Territory**

Category	Approach
Land access regime	
Agreement with a private landholder	Agreement is required for substantial disturbance activities such as land clearing, earthworks and drilling. For lesser activity, 14 days' notice must be provided.
Terms and conditions	No standard terms and conditions are provided.
Native title arrangements	The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) covers nearly 50 per cent of the land mass of the Northern Territory, and has unique provisions relating to resources development (chapter 5).
Institutional arrangements	
Environment regulator	Northern Territory Environment Protection Authority
Resources regulator	Department of Primary Industry and Resources
Heritage regulator	Heritage Branch within the Department of Tourism, Sport and Culture; Heritage Council.
Other arrangements	Aboriginal Areas Protection Authority.
Coordination mechanisms	
Lead agency	Yes — Department of Primary Industry and Resources. However, following new reforms, there will not be a lead agency.
Major projects coordination	Yes — Department of Trade, Business and Innovation.
Decision-maker	
Minister	The Minister for Environment makes environmental approval decisions, supported by advice from the Environment Protection Authority.
Other decision-makers	Recommendations from the Environment Protection Authority will be used as the decision instrument if the Minister does not make a decision within statutory timeframes.
Review and appeals	
Merit review	In relation to environmental approval decisions, merit review is available for reviewable decisions made by the CEO or an environmental officer.
Judicial review	In relation to environmental approval decisions, extended standing for people who have made a genuine and valid submission during the environmental impact assessment process.
Approach to offsets	No current policy — proposed policy in draft form
Fund/pay-in-lieu option	No
Public register	Yes (under proposed policy draft)
Rehabilitation arrangements	Rehabilitation bonds are required to cover the cost of the potential rehabilitation liability. Companies are charged 1 per cent of their estimated rehabilitation liability each year. The proceeds are used to rehabilitate legacy abandoned mines.

Table B.8 **Regulatory arrangements for Commonwealth waters, and Commonwealth protected matters under the EPBC Act**

Category	Approach
Land access regime	No unique arrangements. Any projected approved under the EPBC Act taking place on Commonwealth land could be subject to conditions in relation to land access.
Native title arrangements	No unique arrangements. The *Native Title Act 1993* (Cth) applies to all developments on Commonwealth land or in Commonwealth waters.
Institutional arrangements	
Environment regulator	Australian Department of Agriculture, Water and the Environment (DAWE), National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
Resources regulator	NOPSEMA
Heritage regulator	DAWE
Other arrangements	DAWE is also responsible for administering the: *Environment Protection (Alligator Rivers Region) Act 1978; Environment Protection (Sea Dumping) Act 1981*; *Great Barrier Marine Park Act 1975*; *Underwater Cultural Heritage Act 2018 and Commonwealth fisheries legislation.* Other Commonwealth agencies may have a regulatory role where activities take place on Commonwealth Defence land or Airports.
Coordination mechanisms	
Lead agency	No, with the exception of offshore petroleum, for which NOPSEMA is the single regulator and the National Offshore Petroleum Titles Administrator (NOPTA) is the single titles administrator.
Major projects coordination	Yes — Major Projects Facilitation Agency, Department of Industry, Innovation and Science.
Decision-maker	
Minister	The Environment Minister is responsible for approval decisions under the EPBC Act, except for those that come under NOPSEMA's jurisdiction.
Other decision-makers	As at 28 February 2014, NOPSEMA was appointed the independent regulator and makes decisions without the direct involvement of Ministers.
Review and appeals	
Merit review	A limited set of decisions made by a delegate under the EPBC Act may be subject to merits review at the Administrative Appeals Tribunal (AAT), for example, decisions relating to wildlife trade permits or conservation orders. Decisions relating to the referral, assessment and approval of actions under the EPBC Act are not subject to merits review. A limited set of decisions made by the Minister or the Titles Administrator may be reviewed by the Administrative Appeals Tribunal under the OPGGS Act.
Judicial review	There are extended standing provisions in the EPBC Act. There are no extended standing provisions under the OPGGS Act.

(continued next page)

Table B.9 (continued)

Category	Approach
Approach to offsets	
Fund/pay-in-lieu option	No
Public register	No
Rehabilitation arrangements	No specific rehabilitation requirements under the EPBC Act, however it may be required as a condition of approval or as part of an enforcement action under the EPBC Act. The base case for decommissioning offshore oil and gas infrastructure is complete removal, although other options can be considered. Some offshore decommissioning options may require a permit under the *Environment Protection (Sea Dumping) Act 1981*.

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