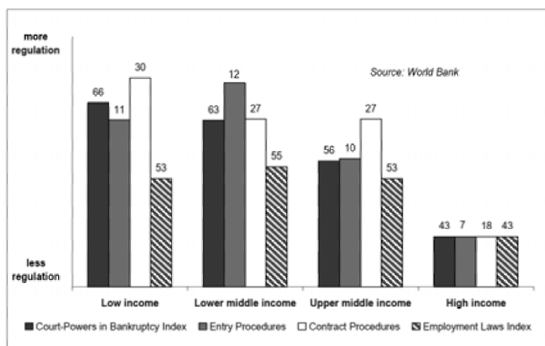
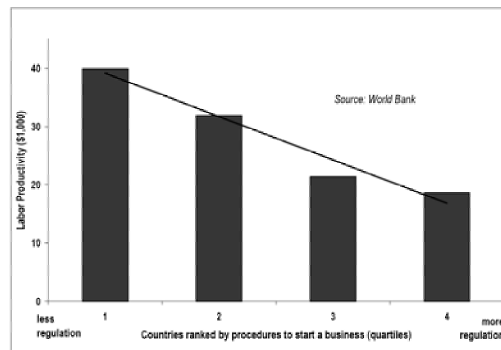
SUBMISSION:

TASKFORCE ON REDUCING THE REGULATORY BURDEN ON BUSINESS

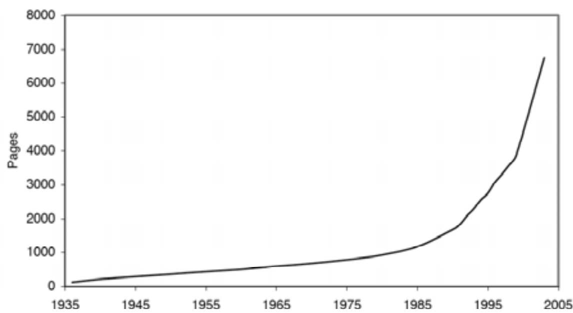
DECEMBER 2005



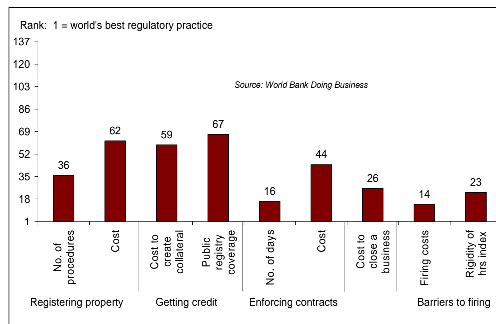
More regulations lead to greater rigidity



Better regulations lead to higher productivity



Australia's income tax (and general level of) legislation has risen dramatically



Australia can do better at improving/reducing regulation

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

This inquiry is very timely

Economic prosperity and growth depend on stable, well performing government institutions. The regulatory system — the laws, regulations, standards and codes, and the ways in which they are implemented in practice — provides the nuts and bolts to implement legislation and government policies.

The prosperity Australia has enjoyed in the last two decades is partly the result of past deregulation. Paradoxically, in recent years Australian governments have been adding new rules and regulations faster than they have removed or simplified existing rules.

The extraordinary growth in the length of our tax laws, despite significant reforms of the tax system over the past ten years, and the trend to increasing use of subordinate legislation in the Commonwealth Parliament both illustrate this problem. So does the multiplicity of competition policy and other rule making bodies across Australia. It is also recognised that major reforms that involve the Australian, State and Territory Governments take time to bed down. However, while they are moving in the right direction, reforms of our electricity and water arrangements have been far too slow.

Regulation - the good, the bad and the ugly

Perhaps more so than any other industry, regulation impacts all stages of minerals industry activities from exploration, mining, processing and closure to relinquishment of tenure.

Regulation can help overcome market failure, ensure efficiency and enable a smooth-running society. Yet regulation can create more problems than it solves when it is inappropriately targeted, created for the wrong reasons or left too long unchecked. Where this is the outcome, the economy is unable to achieve its full potential as businesses incur unnecessary direct and indirect costs. Regulation therefore requires careful consideration at the drafting, implementing and review stages.

Australian Government regulatory compliance

The increasing demands on governments to do more with less resources leads to pressure on resources available to administer regulatory systems. Even if the regulatory system is well designed if the resources are not available to administer it efficiently and effectively then the system will fail.

The MCA supports the Council of Australian Government's (COAG) Principles of Good Regulation. Such systems to promote "good" regulation appear to be working reasonably well at the Commonwealth level, although, as Productivity Commission annual reports indicate, there is always room for improvement. Elsewhere, new regulations could be improved by greater consultation with industry, more effective cost/benefit assessments and better definition of objectives.

Much more needs to be done at the State, Territory and Local Government levels. While some States are attempting to improve their approach to regulation, the general approach suffers from being too limited in coverage and from inadequate resourcing of independent, regulatory review agencies. Given the amount of regulation relevant to the minerals sector at the State level, it is important that the minerals industry and government work together to improve the situation.

"Beyond compliance"

Specific regulation of the mining and minerals processing industry has in general been embraced and adopted by the industry as an essential element underpinning the industry's ongoing "social licence to operate".

However, regulations should be employed to enhance rather than impede the minerals industry's contribution to achieving an enduring balance between the financial viability of the industry, its environmental credentials and its positive social contribution.

Government legislation, regulations and codes set the minimum standards for mining. However the more reputable companies operate at a higher level than this. It is in the industry's interests to promote a level of performance above the minimum standard expected by the community and for poor performers in the industry to have their shortcomings brought to their attention and encouraged to adopt good practice.

For this reason, the Australian minerals industry has for many years been a leader - both here and internationally – in developing self- and co-regulatory processes.

The most recent example is '*Enduring Value—the Australian Minerals Industry Framework for Sustainable Development*'. This framework provides a program of continuous improvement and

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encourages companies to achieve environmental standards beyond the minimum standard set by regulation.

The philosophy of *Enduring Value* is consistent with the COAG regulatory principles. The overall strategic objective is for continuous improvement in social and environmental performance in exploration and mining projects that is attuned to community expectations and, where possible, recognised and rewarded in statutory approval processes that are nationally consistent and efficient.

However, attempts to achieve performance above minimum standards can be frustrated when juxtaposed with prescriptive rather than performance-based regulation, especially when it does not make allowance for risk.

First policy choice – the market

The greatest challenge facing governments is to change the mind-set that sees regulation as the natural first, and sometimes only, means of addressing perceived problems with market outcomes. The recommended position of the minerals industry is:

> first policy choice – the market: there should generally be a presumption that the free and unhindered operation of the market will lead to efficient outcomes;

> in instances where regulation is warranted due to market failure, light-handed regulation (eg reporting and monitoring) should be applied by the regulator;

> more intrusive approaches should only be used where light-handed approaches and non-regulatory options have demonstrably failed;

> government regulation should only be used where it is demonstrably the most economically efficient way of addressing the problem or issue in question;

> efficiency (least cost), national consistency, harmonisation and coordination should be the hallmarks of regulation;

> COAG Ministerial Councils should be responsible for prioritising streamlining and simplifying Australian regulations;

> regulations should be targeted at the identified problem or issue and not impose unnecessary burdens on those affected.

Stocktake of mining industry permits/licenses

Given the differing responsibilities of government in Australia, regulations impacting on exploration, mining and mineral processing inevitably involve a multitude of regulations at all three tiers of government and, where approved by the Australian Parliament, international regulations.

An MCA audit of Commonwealth, state and territory minerals regulations suggests that:

> the design of long established parts of the regulatory system, such as issuing exploration, retention and mining licenses/permits, have been well refined over many years;

> there is potential for improvement in the evolving policy areas affecting the environment and land access;

> the efficiency of day-to-day administration of all parts of the approval system in all jurisdictions needs attention. Approval processes will only be as good as the agencies that administer them and efforts are needed to improve inter-agency and inter-governmental accountability, cooperation and communication, staff numbers and skills.

The MCA's recommendations to the Taskforce:

> emphasise the importance of high-level principles for best practice in regulation;

> emphasise adoption of the most efficient regulatory approach available to address a defined problem (including no regulation);

> emphasise an on-going process to review legislation;

> set out ways to reduce the impact of Commonwealth regulation on the minerals sector and ways of reducing duplication of Commonwealth/state/territory regulation; and

> emphasise ongoing consultation with industry.

RECOMMENDATIONS

Regulatory reform:

The MCA recommends:

> An ongoing process of reviewing legislation (proposed and existing) to minimise its regulatory impact and reinvigoration of the Council of Australian Government's (COAG's) role in this area;

> Minimisation of all regulatory costs, such as compliance and adverse side-effects;

> All COAG Ministerial Councils be requested to:

  - seek stakeholder input on what priorities should be given to reduce the regulatory burden in areas for which they are responsible as part of a review of how Commonwealth/State/Territory regulatory approaches can be enhanced, harmonized and simplified;
  - identify best practice regulatory approaches and agree reform priorities in consultation with industry and other key stakeholders;
  - apply reforms uniformly across Australia;
  - report publicly on outcomes annually;
- COAG itself agree to include in Explanatory Memoranda provided to their respective parliaments not only the financial impact of a proposal but also its regulatory impact.

Gate-keeping arrangements

- The MCA endorses the Productivity Commission's Review of National Competition Policy proposals on gate-keeping arrangements for new and amended regulation, vis:
  - all Australian governments should ensure they have in place effective and independent arrangements for monitoring new and amended legislation; and
  - governments should also consider widening the range of regulations encompassed by gate-keeping arrangements and strengthen national monitoring of the procedures in place in each jurisdiction and the outcomes delivered;
- In addition, all Australian governments need to provide sufficient funds to be able to independently and effectively undertake these tasks and report them regularly to respective parliaments;
- Disallowable Instruments associated with Commonwealth Acts of Parliament should be used to cover matters of detail and matters liable to frequent change in a manner consistent with the essential principle of delegated legislation. Otherwise, it is difficult for those firms and individuals that will be impacted by the regulations to understand clearly their responsibilities and for courts to interpret the intent of a regulation;
- The Council of Australian Governments establish a Regulatory Impact Taskforce to report on how to ensure that the OECD's "world's best practice for the process of regulatory review" is implemented at Commonwealth, State and Territory levels:
  - this to be achieved through enhancement of the application of the *COAG Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* to ensure improved regulatory practice to decisions of COAG, Ministerial Councils, intergovernmental standard-setting bodies and bodies established by government to deal with national regulatory problems;
  - such an action is superior to a subjective "one in one out" approach to regulatory review but sunset clauses are very useful;
- The Australian Public Service Commissioner and state counterparts advise on how departments and agencies can use the OECD's "best practice for the process of regulatory review" with a view to continually improving their approach in developing new regulation, revising and removing out-of-date regulations and reporting annually on their achievements;
- The Australian Public Service Commission and federal Office of Regulation Review be better resourced to develop, in consultation with industry, in-house regulatory and consultative training modules for government officials involved in the design, legal drafting and review of regulations on the principle that to get better regulation we need better regulators.

Audit of minerals permit/approval regulations

- All States and Territories should publish on their websites clear, comprehensive guides to exploration and mining project approval processes;
- States and Territories make 'one-stop-shop' approval processes, currently restricted to large exploration and mining projects, also available to companies with smaller mining projects;
- All jurisdictions should move towards a risk- and performance-based approach to regulation of the mining industry based on COAG regulatory principles;
- Recognising the potential benefits of nationally consistent approaches and the need to tailor standards to particular

circumstances, the Ministerial Councils on Mineral and Petroleum Resources and Environment and Heritage should appoint a taskforce to review environmental regulation of exploration and mining and to recommend uniform or harmonised standards. This joint taskforce should include representatives from the minerals industry;

> All jurisdictions should stipulate, monitor and publish timeframes for their exploration and mining approval processes. For some areas set (e.g. legislated) timelines will be appropriate while for other, more complex areas, timelines negotiated between the proponent and government are more practical;

> All jurisdictions should review the administrative resources available for the exploration and mining approvals systems to ensure that they are adequate:

- training and capacity building programs should be implemented to augment agency skills; and
- administrative requirements should be reduced by reforming the systems and moving to more efficient regulatory modes; and

> The Ministerial Council on Mineral and Petroleum Resources should establish a joint government/industry working party to consider alternative approaches to assessment and monitoring, including third-party accreditation, and co-management arrangements, but only where there is transparency;

Self-regulation & co-regulations

> All governments should seek to adopt the best regulatory approach available to address a defined problem. This should include an assessment of whether self-regulation, co-regulation or no regulation is the most efficient public policy choice.

Environment Protection and Biodiversity Conservation Act

> Those states that are yet to enter into bilateral agreements with the Commonwealth be encouraged to do so to achieve desirable efficiency improvements and reduce compliance costs and delays in approval processes;

> The relevant COAG Ministerial Council examine how to improve the timeliness, efficiency and certainty of existing bilateral agreements on environment assessment systems; and

> A process of review be initiated by COAG to reduce inconsistencies in environmental legislation outside the assessment and approval system on a prioritised basis and report annually on progress.

National Environmental Protection Measures (NEPM)

> To overcome inappropriate use of data by regulators under the Site Contamination NEPM and the National Pollutant Inventory NEPM, specific guidance needs to be included to ensure that data users are aware of the limitations of the data and the contexts in which the data is designed to be used.

Taxation

> The Taskforce recognise that regular consultation with peak industry bodies can assist in improving the structure and drafting not only of taxation laws, rules and guidelines, but also other areas of regulation, so that:

- the resulting regulations are more robust, are based upon explicit principles and on an understanding of industry; and
- the end result is legislation that is durable and capable of future modification without doing damage to the framework on which it is based;

> The MCA favours a principled and consultative approach to tax reform as recommended by the Review of Business Taxation. Specific examples of tax reform requirements in minerals tax areas are provided in the submission.

Australian equivalent International Financial Reporting Standards

> To ensure the ongoing transition to Australian equivalent International Financial Reporting Standards does not impose an unnecessary regulatory burden on the Australian minerals industry, the Australian Accounting Standards Board be asked to ensure the International Accounting Standards Board's extractive industries reporting standard is developed expeditiously.

Competition Policy

With regard to the export infrastructure regulatory system, there is a need to:

> Narrow the scope of regulation to areas

where there is a demonstrable case that it is needed and that regulation will in fact lead to a better outcome than non-regulation (including self-regulation);

> Better define regulatory objectives so that access proposals are evaluated on the basis of their "reasonableness" rather than requiring them to be optimal or "first best";

> Reduce the fragmentation and inconsistency in regulatory arrangements across the country; and

> Improve the administration of competition policy by:

  – streamlining its application across Australia "to ensure that universal and uniformly applied rules of market conduct apply to all market participants";
  – narrowing the scope of regulation to areas where it is clearly needed;
  – clarifying regulatory objectives, with a primary objective being to foster efficient investment in infrastructure capacity; and
  – reducing the inconsistency in arrangements.

With regard to access arrangements:

> Part IIIA of the Trade Practices Act 1974 be amended to provide for an "efficiency override", whereby key infrastructure facilities could be declared exempt from third-party access by the Treasurer;

> A government/industry working group be set up to assist in the development of the Prime Minister's Exports and Infrastructure Taskforce's Recommendations 3 and 4.

A Single National Ballast Water Management Framework for Shipping

> The MCA recommends adoption of a nationally consistent and harmonized, non-prescriptive model for national ballast water management to minimize the risk of marine pest incursion or translocations, rather than other more prescriptive options; and

> A single national charge be levied on a quarterly basis for ship movements around the Australian coast rather than each jurisdiction having its own arrangements and separate charging regimes.

National Pollutant Inventory

> More resources should be applied to the National Pollutant Inventory to improve its focus, provide adequate contextual data, update the Mining Handbook, improve the National Pollutant Inventory's measurement and reporting techniques and develop a more effective, efficient and informative on-line resource;

> Resources need to be directed at capacity building in State and Territory governments to ensure that a single process exists for the electronic reporting of information and its inclusion in the national database; and

> Regulators should develop an understanding of the limitations of the NPI data and its inappropriateness as a proxy data source in lieu of collecting proper scientific data on emissions.

Greenhouse Gas Regime

> The various Commonwealth and State Government Greenhouse Strategies and reporting initiatives be harmonised as part of an effective *national* policy response to climate change with strong policy co-operation and co-ordination across all Australian jurisdictions and led by the Commonwealth.

Occupational Health and Safety

> It is timely for Australia to adopt a single national Occupational Health and Safety regulatory system for the minerals industry based on outcomes and systems rather than prescription; and

> There should be a nationally consistent approach to enforcement policies and their implementation should be based on the existing legislative regime for negligent, wilful or reckless behaviour causing fatalities or other serious injuries under the Crimes Act.

1. BACKGROUND

The Minerals Council of Australia (MCA) welcomes this inquiry into practical options for alleviating the compliance burden on businesses from Commonwealth Government regulation. It represents a most important initiative of the Australian Government.

1.1 The Minerals Industry in Australia

The MCA represents Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. MCA member companies produce more than 85 per cent of Australia's annual mineral output.

The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally and socially responsible, attuned to community needs and expectations.

The minerals industry accounts directly and indirectly for around 8 per cent of Gross Domestic Product. It underpins vitally important supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors. It is one of the most technologically advanced in the world and is also at the forefront of new investment in Australia. Being a highly capital intensive industry, it currently accounts for over 20 per cent of total private new capital investment in Australian industry.

Australia's ability to export its minerals wealth has long benefited from the fact that the most dynamic part of the world economy is on our northern doorstep. Our exports to the region have increased over many years as Asian nations have steadily industrialised. In turn, much of the related Australian economic growth and wealth creation has been due to the growth of Australia's minerals sector.

Australia's economic future looks likely to emulate our recent past, with the emergence of China and India as "industrialising economies" requiring Australian exports of minerals. Moreover, Japan, the Republic of Korea and Taiwan will continue to be important trading partners with Australia. Given this background, if Australian policymakers are able to provide the appropriate economic and regulatory environment, the future for Australia's minerals exporters looks bright.

1.2 The Importance of the Inquiry

The importance of this inquiry lies with the promise that it will both identify specific areas of Commonwealth Government regulation where reform can produce immediate gains to business and ensure longer-term gains by providing a blueprint for improving the processes of regulation-making and review.

To retain its competitiveness in highly competitive, international markets the minerals sector relies on the economic efficiency of the sectors providing it with key inputs. The minerals industry therefore has two particular areas of interest in the current inquiry:

(a) to ensure regulation of the overall economy achieves desired outcomes efficiently with minimum necessary direct control of economic agents by government authorities; and

(b) to ensure that necessary economic regulation of the minerals industry is applied in the most economically efficient manner to achieve identifiable outcomes but not further inhibit what otherwise would be voluntary actions.

Chapter 2 examines the first of these two areas of interest and Chapters 3 and 4 the second.

2. MINIMUM EFFECTIVE REGULATION – A GOAL FOR THE NATIONAL ECONOMY

2.1 The Important Role for Sensible Regulation

Regulatory issues can be defined as any government action that either directly or by financial inducement, encourages businesses to alter their commercial behaviour. This can be via acts of parliament, subordinate legislation and/or administrative measures. At its broadest, regulation encompasses the vital legal and institutional framework that underpins the economy. Narrowly defined, regulations influence business decisions about the form and level of production, and therefore the cost of products to consumers and the level of returns to shareholders. Regulation can therefore be seen as a **matter of degree** with a regulated industry or activity as one that is "more subject to control by government authorities, and less to natural forces of supply and demand". [1]

Regulation can help overcome market failure, ensure efficiency and enable a smooth-running society. Yet it can create more problems than it solves when it is inappropriately targeted, created for the wrong reasons or left too long unchecked. So regulation carries risks – it can exaggerate market failure and burden businesses and individuals with avoidable or unnecessary costs. It therefore requires careful consideration at the drafting, implementing and review stages.

In announcing the inquiry, the Prime Minister said:

> *Regulation is necessary to protect the public interest but it can become too burdensome and there has been a growing chorus of concern expressed by both small and large businesses about the regulatory burden.*

The MCA accepts a role for government to pursue certain goals through regulation. The challenge is to ensure governments design and apply the minimum regulation consistent with achieving sustainable economic growth that balances financial, environmental and social equity goals.

Though little is known about the size of the stock of regulation in Australia, data on the creation of new regulation (the flow) confirms the common perception that it is growing. To date, this mounting quantity of regulation has caused little concern among most Australians. Perhaps our economic success over the last decade and a half has lulled consumers, businesses and governments into a false sense of security. The reach, complexity and costs of regulation today seem to be given scant regard. Yet, paradoxically, Australia owes much of its recent strong economic growth to the flexibility and scope for innovation arising from the significant deregulation measures that took place over the last two decades.

Both State and Australian Governments played a part in deregulating money and foreign exchange markets, in addressing, refining and reforming National Competition Policy (including the wholesale review and reform of the stock of anti-competitive legislation and regulation) and in winding back regulation of labour markets. Australia's recent prosperity is inextricably linked to these reforms. Yet this same prosperity has allowed our policy makers scope to tackle policy with often less-than-carefully-tested regulation responses.

The MCA strongly endorses the proposition that competitive markets will generally best serve the interests of Australian consumers and the wider community. The minerals sector thus has a strong interest in maintaining the conditions for competition in all sectors of the Australian economy.

2.2 World's best regulatory practice

In 2004 the World Bank released its first major study on regulation, *Doing Business 2004*. An update was released this year.[2] The study examines the regulatory practices of 137 countries and ranks them against their peers. It effectively determines 'world's best practice'.

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[1] J.J. Pincus and GA Withers, "Economics of Regulation" in F.H. Green (ed) (1981), *Surveys of Australian Economics*, Vol 3, p.10.

[2] World Bank (2005), *Doing Business in 2005: Removing Obstacles to Growth*, Washington D.C., (see http://www.doingbusiness.org/documents/DoingBusiness2005.PDF).

A cornerstone of prosperity comes from the ease with which businesses can operate, interact and transact. But the study finds that in Australia:

> the cost of starting a business is unnecessarily high;

> it takes 157 days, 11 procedures and over 14 per cent of the money owed to enforce a contract;

> comes in 23rd on the rigidity of hours index; and

> while insolvency procedures lead to higher recovery rates when businesses close the cost of closure is unnecessarily high.

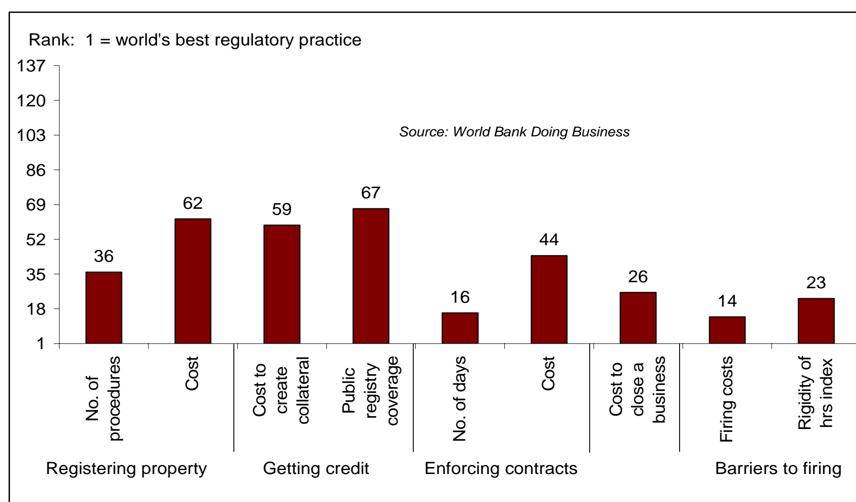
More generally, the study finds that:

> regulation is best used to lay down the basic ground rules of society and the economy;

> prosperity is higher where regulation is less complex and, as we have seen in Australia's experience over the past two decades, prosperity grows faster after deregulation;

> there are close links between regulation and national income.

Chart 2.1: Australia's Ranking – We could do better in some areas of regulation



The World Bank concludes that countries that have performed well economically have five common elements in their approach to regulation. They consistently:

> protect property rights with simple and clear rules but otherwise regulate lightly – and deregulate in existing markets;

> use new technologies to reduce compliance costs to business;

> minimise recourse to lawyers and the courts; and

> maintain an ongoing program of regulatory reform, including stakeholder consultation, recognising the fact that deregulation is never finished.

2.3 High level principles for best practice regulation

There is a very wide range of regulatory measures available to the Government, ranging from black letter law to voluntary codes of conduct or practice. The manner in which regulation is developed and applied distinguishes four broad categories of regulation:

> regulation which the Government develops and enforces;

> co-regulation where an industry develops and administers a Code of Conduct and Government provides the ability to enforce the Code by providing legislative backing in some form;

> quasi-regulation where industry adopts or uses a Code of Conduct which the Government assists in creating, or endorses, but Government does not enforce the Code; and

> self-regulation where industry sets its own standards or conducts and promotes those standards without Government involvement.

The minerals industry in Australia wants and needs to be internationally competitive. It therefore requires an operating environment that is conducive to innovation, investment, growth and profitability and founded upon some fundamental principles for the development of sound public policy.

The ultimate goal of public policy ought to be to facilitate the attainment of high levels of sustainable growth in productivity for industry and in living standards for all Australians. In the view of the MCA the fundamental principles for the development of public policy that will promote that goal are as follows:

> the preservation of open and competitive markets;

> transparent, secure and transferable property rights;

> minimum and only necessary government intervention;

> constructive government/stakeholder consultation in developing regulations and guidelines;

> policy measures which create incentives for pro-competitive conduct; and

> government intervention to be limited to correcting demonstrated instances of market failure in a non-discriminatory and non-distortionary manner.

The MCA would argue that the appropriate role for regulation must be to operate, and be seen to operate, within the framework provided by these policy principles.

It is clear that regulation can be pro-competitive or can be advantageous to the community in other ways that promote growth in productivity and living standards. This can be the case, for example, by helping complex societies deal with otherwise intractable economic, social and environmental problems. At their best, regulation can create order and provide a basis for stable progress.

Unfortunately, the multiplicity of Government agencies from which authority for mineral activities must be obtained is very large. This multiplicity greatly adds to the cost, timing and difficulty of undertaking such developments.

2.4 Micro-economic reform of regulation

Over the past eight years there have been a number of useful reforms by the Council of Australian Governments (COAG) and individual Governments aimed at the removal of inefficient and unnecessary regulation of the minerals industry. These reforms have included the removal of export controls on coal, mineral sands and alumina which restricted the ability of Australia's internationally operating minerals companies.

COAG has adopted 'best practice' guidelines for the development of national standards or regulation and for the preparation of regulatory impact statements as part of its ongoing commitment to micro-economic reform.[3]

The MCA supports the COAG Principles of Good Regulation, which cover:

> the need for regulation, including robust policy development processes;

[3] Council of Australian Governments (COAG) (2004), Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies (see http://www.coag.gov.au/meetings/250604/coagpg04.pdf)

- alternative approaches, from 'black-letter' law, co-regulation, quasi-regulation, to self-regulation and voluntary actions and codes;
- encouraging consistency among jurisdictions to avoid inconsistency and duplication of processes;
- regulatory failure, where regulation may not make things better, or may even makes things worse;
- analysis of the benefits and costs of regulation;
- public consultation and community support;
- transparency and accountability;
- minimising adverse effects of regulation, including on competition;
- encouraging efficient outcomes, particularly through use of performance-based rather than prescriptive measures;
- ensuring good administration, including consistency and predictability in decision-making; and
- ensuring consistency with international standards and practices.

Ensuring that these principles are rigorously applied through both the policy development process and practical implementation is a challenge for any government, particularly given the ever-expanding reach and scope of governmental responsibilities. In a complex federal system like Australia's, where national and state/territory responsibilities interact, it is particularly difficult. But it is necessary in the interests of promoting greater efficiency and national welfare.

These COAG Principles represent a means of identifying regulations that affect business costs and identifying priorities for review and reform.

Since the COAG initiative, there is evidence that at least some of the resulting regulatory reforms have streamlined and simplified regulation in Australia and improved harmonisation between jurisdictions and with international regulations. This reform process, however, appears to have only occurred to a relatively minor extent in various states.

Whilst systems to promote "good" regulation appear to be working reasonably well at the Commonwealth level, elsewhere the system could be improved by greater consultation with industry, more effective cost/benefit assessments and better definition of the objectives of the regulation.

In fact the State, Territory and Local Government levels, much more needs to be done. While some States are attempting to improve their approach to regulation, the approach suffers from being more limited in coverage and from not granting independence to their regulatory review agencies.

The legislation review program (LRP) has played an important role in reducing barriers to competition and efficiency in many economic activities.

The Productivity Commission's 2005 final report on National Competition Policy found that much of the current LRP is or will shortly be completed. It recommends that governments should complete this program before embarking on a more targeted, agreed regime, which should be better focussed on significant anti-competitive legislation and involve increased transparency and independence of review processes.

The Competition Principles Agreement obliges governments to ensure any new legislation that restricts competition is in the public interest. This is to ensure that no unwarranted, anti-competitive restrictions re-emerge in new or amended legislation.

Not all jurisdictions require the preparation of regulatory impact statements (RISs) for new legislation containing restrictions on competition. In addition, the types of legislation subject to scrutiny and the extent of monitoring and public reporting of the outcomes of gate-keeping activity, vary considerable across jurisdictions.

Recommendations:

The MCA recommends:

> **An ongoing process of reviewing legislation (proposed and existing) to minimise its regulatory impact and reinvigoration of the Council of Australian Government's (COAG's) role in this area;**

> **Minimisation of all regulatory costs, such as compliance and adverse side-effects;**

> **All COAG Ministerial Councils be requested to:**

  – **seek stakeholder input on what priorities should be given to reduce the regulatory burden in areas for which they are responsible as part of a review of how Commonwealth/State/Territory regulatory approaches can be enhanced, harmonized and simplified;**

  – **identify best practice regulatory approaches and agree reform priorities in consultation with industry and other key stakeholders;**

  – **apply reforms uniformly across Australia;**

  – **report publicly on outcomes annually;**

> **COAG itself agree to include in Explanatory Memoranda provided to their respective parliaments not only the financial impact of a proposal but also its regulatory impact.**

2.5 Gate-keeping arrangements for new and amended regulation

In addition to the processes endorsed above for ongoing review of existing regulation and legislation, **there is a need for greater gate-keeping [4] arrangements for new and amended regulation, particularly at the State and local government levels.**

There are already mechanisms in place at the Australian Government level to monitor the overall regulatory burden. Regulation proposals formulated at the Australian Government level must be accompanied by a Regulatory Impact Statement (RIS) that explicitly sets out the potential costs and benefits of the regulation for all parties. Such a process, when functioning properly, helps to focus on cost minimisation when new regulations are being developed. The Office of Regulation Review (ORR) located within the Productivity Commission also has an ongoing role in monitoring the impact of regulation on business.

Whilst the ORR plays a watchdog role and some review processes are in place, it has to be questioned whether both the RIS process and the ORR are effective, given the general disquiet within the business community at the mounting cost associated with regulation. Indeed, the Productivity Commission reports on Australian governments' regulatory compliance[5] suggest that the processes have become less effective, at least in part because of reluctance to adhere to them at all levels of government (executive and administrative). There is also the problem that these review processes are not as well entrenched in other levels of government, and almost not at all in local government.

The MCA shares the concerns about the rising burden of new economic regulations. It is also important to consider whether the level of scrutiny of new regulations is being maintained. There certainly appears to be a feeling, both within government and business, that the gatekeeper role of the ORR is less effective now than was intended when it was first established. This decrease in vigour is also evident in state based processes, so much so that in many cases they are given little credibility by business and regulators alike. This is due to the limited funds made available, which limits the reviews to cursory examinations only.

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[4] The Competition Principles Agreement requires governments to ensure new legislation that restricts competition is in the public interest. This is referred to as "gate-keeping".

[5] Productivity Commission (2005), *Regulation and its Review 2004-05*, Annual Report Series, Productivity Commission, Canberra (see http://www.pc.gov.au/research/annrpt/reglnrev0405/reglnrev0405.pdf).

The original intent of developing a RIS with a new piece of legislation was that the RIS would genuinely inform the direction the legislation would take – that is, that policymakers would consider the regulatory burden in their decisions. However, it appears that the development of a RIS is more of an after-thought – a compliance cost itself which is now often completed in a hurry at the end of a policy development process, rather than as a central element of that process with the genuine capacity to influence.

The RIS is also necessarily an *ex ante* assessment of regulatory impact, and may bear no relation to the actual effects and compliance costs once the regulation is implemented. Not only is there a need for better *ex ante* assessment of regulation, but that assessment should outline the benchmarks against which the regulation should later be reassessed, *ex post*.

Although the processes for good regulation making ought to be well known, the greatest challenge facing governments is to change the mind-set that sees regulation as the natural first, and sometimes only, means of addressing perceived problems with market outcomes. Without this change, policy makers at all levels of government, and at all levels, will continue to add to the regulatory burden facing business (and ultimately the community as a whole).

Instead, time and effort should be invested in assessing the nature of the perceived problems and searching for alternatives to prescriptive black-letter regulation. In some cases governments may have to be willing to accept and acknowledge that, however bad the market outcome appears, intervention will not lead to an improvement. In those cases, government needs to resist the temptation to introduce regulation that acts as a symbol of its concern, but does little more than impose costs on the economy without solving or addressing the original problem.

BOX 1: CASE STUDY – TREND TO OVER USE SUBORDINATE REGULATIONS OR DISALLOWABLE INSTRUMENTS

"It is a breach of parliamentary propriety for delegated legislation to deal with matters more appropriately included in a Bill. These are matters which, by their nature, should be subject to debate and the other procedural safeguards provided by the parliamentary passage of a Bill." [6]

The Senate Economics Legislation Committee has for some time raised concern about the increase in the use of subordinate legislation in its reports on Bills before the Senate. [7]

A recent example of the growing use of regulations is provided in the *Energy Efficiency Opportunities Bill 2005.* There are many instances where this Bill provides for further provisions to be provided in **unspecified regulation with the open possibility of unlimited additions to regulations in the future**. The most outstanding example – but not the most concerning – is to be found in the interaction of parts of clause 18.

As the Chair of the Senate Economics Legislation Committee stated with regard to this example:

> *I am struck by the extent to which the bill leaves it to the regulations to really impose the obligations. Rather than take you through it chapter and verse, can I just point out what seems to me to be the most egregious example of this: in clause 18(7) and (8), the assessment plan.*
>
> *First of all, the obligation in relation to the assessment plan is to be found in clause 15(1) which provides that the registered corporation has to give the secretary an assessment plan meeting the requirements of subclauses 18(1), (2) and (3). So, subclauses (4) and following of clause 18 seem to be otiose. But in any event, clause 18(7) then states, after certain requirements are specified, 'The assessment plan must meet any extra requirements set out in the regulations.'*
>
> *Then subclause (8) bizarrely and absurdly states, 'without limiting subclause (7)'. It is a little difficult to see how you could limit words of that generality.*
>
> *'Regulations made for the purposes of that subclause may*
>
> *(a) set out requirements for a proposal in relation to the following:*
>
> *(1) the types of actions mentioned in subclause (4)', which is very general in any event.*
>
> *'(2) the deadlines for doing those actions, and (3) any other matter.'*
>
> Now, how on earth are corporations meant to know what are their obligations if they are so open-ended that an assessment plan can be required to meet any extra requirement in relation to any other matter? [8]

[6] Regulations and Ordinances Committee (June, 2005), Report Number 112 , page 59.

[7] For two recent examples, see Senate Economics Legislation Committee, *Report on the Inquiry into the Provisions of the Energy Opportunities Bill* (November 2005) and *Report on the Inquiry into the Provisions of the Trade Practices Amendment (National Access Regime) Bill* (September 2005).

[8] Senator Brandis, Senate Economics Legislation Committee Hearing, Friday, 28 October 2005 Hansard, page E 28 to E 29.

The Senate Economics Legislation Committee in its capacity as a "gate keeper" for the Commonwealth Parliament has been consistently raising concerns about the overuse of sub-ordinate legislation under Acts of the Parliament of Australia. As the Committee stated in a recent report to the Senate:

> "…a trend that has concerned the Committee for some time … is, drafters are placing many requirements in subordinate legislation rather than in the statute itself. These regulations are not available for perusal by those that will be affected by the legislation, nor by the Committee during its inquiry, prior to the parliamentary consideration of the Bill." [9]

The Senate Standing Committee on Regulations and Ordinances also reports on Disallowable Instruments. In its latest report it "notes that the number of instruments made in the reporting period continues to be significantly greater than a decade ago." [10]

While there was a reduction in the number of concerns raised by the Committee in its latest report in comparison to the 39th Parliament, the reasons for this reduction are not clear. As the Report states:

> "The Committee is also concerned about the continuing proliferation of instruments and often seeks clarification where multiple instruments are made at the same time on the same matter, rather than a single instrument." [11]

It is recognised that Ministerial regulations are appropriately used to cover matters of detail and matters liable to frequent change. The MCA accepts such an approach is covered by the essential principle of delegated legislation. In effect this principle states that while the Parliament deals directly with general principles, the Executive, or another body empowered to make subordinate legislation, attends to matters of administration and detail. [12] In this way, Parliament can debate the broad principles contained in bills and still retain control over the detailed implementation of that policy by judicious use of its powers of disallowance.

The MCA has two primary concerns:

> there seems to be a trend by officials providing instructions to legal drafters and possibly by the legal drafters themselves in consultation with officials developing policy, to include general principles in delegated legislation rather than in the primary statute; and

> there also seems to be a trend not to include guidance in a Bill about the scope of any associated regulations.

It is accepted that it may be entirely appropriate for detailed provisions to be included in regulations. [13] However, **without a general outline of the purpose and scope of these in the Bill itself, there may be no restraints on the regulations and no limit on what might be required under them. Furthermore, there is the potential for future regulations to be altered in unspecified and unlimited ways. This may make it difficult for courts to interpret the law. Under the *Legislative Instruments Act 2003*, a court has regard to the Act of Parliament and *may* consider the Explanatory Memorandum and Second Reading Speech and other material but is not required to do so.**

Recommendations:

> **The MCA endorses the Productivity Commission's Review of National Competition Policy proposals on gate-keeping arrangements for new and amended regulation, vis:**

– **all Australian governments should ensure they have in place effective and independent arrangements for monitoring new and amended legislation; and**

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[9] Senate Economics Legislation Committee, *Report on the Inquiry into the Provisions of the Energy Opportunities Bill* (November 2005), p 4.

[10] Regulations and Ordinances Committee (June, 2005), Report Number 112 , p 14.

[11] Ibid, p 25.

[12] Harry Evans (ed), *Odgers' Australian Senate Practice*, 11th edition 2004, Australian Senate, p. 321.

[13] A good example is the policy modifications to the petroleum resource rent tax regulations released on 19 December 2005 following detailed industry consultation. The regulations and attachments are some 75 pages long. The petroleum and natural gas industry had been working with officials for some time to assist in the development of the regulations.

  – **governments should also consider widening the range of regulations encompassed by gate-keeping arrangements and strengthen national monitoring of the procedures in place in each jurisdiction and the outcomes delivered;**

> **In addition, all Australian governments need to provide sufficient funds to be able to independently and effectively undertake these tasks and report them regularly to respective parliaments;**

> **Disallowable Instruments associated with Commonwealth Acts of Parliament should be used to cover matters of detail and matters liable to frequent change in a manner consistent with the essential principle of delegated legislation. Otherwise, it is difficult for those firms and individuals that will be impacted by the regulations to understand clearly their responsibilities and for courts to interpret the intent of a regulation.**

2.6 Australian performance against international benchmarks for regulatory process

New regulation will tend to be better if it is correctly scrutinised before it is put into place. But how can this be achieved? The Organisation for Economic Cooperation and Development (OECD) has outlined what it suggests is world's best practice for the process of regulatory review.

Australia's current practice in regulatory impact statements (RISs) at the Federal and State levels can be benchmarked against the OECD's ten recommendations following a suggestion by the Business Council of Australia. [14] These criteria can also be used to assess the development/review of regulations by departments and agencies (refer Box 2):

BOX 2: INDUSTRY CONSULTATION IMPROVES REGULATORY EFFICIENCY & EFFECTIVENESS

On many occasions during industry consultations on proposed policy approaches, the MCA has recommended government officials discuss their approach with the Office of Regulation Review *at an early stage* and seek their advice on aspects similar to the 10 OECD recommendations. **These suggestions are not often taken up and then usually at the last stages of regulation design.** Officials are often not aware of the role of industry associations, which ones to approach or how best to do this.

It is clear that a better outcome is achieved where industry is involved *in the whole process* of developing policy positions and in commenting on exposure draft legislation, draft regulations and their associated guidelines – not just in the development of a RIS. Confidentiality can be, and is regularly requested by the MCA to be, addressed through standard confidentiality agreements. The Ralph Review of Business Taxation and the Tax Law Improvement Project rewrite of the mining provisions of the Tax Act are outstanding examples of such a process.

The Australian Maritime Safety Authority has a process for consultation on new and revised Marine Orders; the Australian Taxation Office and Commonwealth Treasury have developed processes for engagement with the minerals industry concerning mining rulings and new legislation; the Australian Quarantine Inspection Service has established various avenues to consult and develop its forms (eg the Quarantine Pre Arrival Report for Vessels) and RISs; and the National Transport Commission has developed processes for industry engagement as it develops template legislation and draft recommendations for government. Another positive approach has involved joint industry/government Ministerial Council working groups such as: the National Introduced Marine Pest Coordination Group and the Carbon Dioxide Capture and Storage Stakeholder Group.

(1) Maximise political commitment to RIS. The problem is that regulating away a problem is often the fastest way to get it off the front page rather than the best policy response. Partial protection against that risk exists when strong processes are enshrined in legislation.

The Australian Government RIS requirements are set out in *A Guide to Regulation* (Office of Regulation Review 1998), and further advice on the adequacy of RISs can be sought from the Australian Government Office of Regulation Review (ORR). But if a Department or Minister wishes to rush something through with little examination, it is hard to stop them – by the time that any non-compliant government parties are reported in the ORR's Annual Report and there is little scope to revisit the regulation or penalise the authors of an inadequate RIS assessment. Firmer consequences for non-compliance would strengthen the process, as would procedures aimed at ensuring the publication of relevant RISs, as well as extra funding for the ORR.

[14] Business Council of Australia (2005), *Business Regulation Action Plan for Future Prosperity*, Melbourne, 23 May (see http://www.bca.com.au/content.asp?newsid=97546).

(2) Allocate responsibilities for RIS program elements carefully. Individual Australian Government departments and agencies are responsible for RISs – in other words, assessing their own proposals for regulation. These are then assessed by the ORR, who report on their compliance or otherwise in an Annual Report. That means there is no central body with the skills and authority to oversee the RIS process to ensure consistency, credibility and quality. It also places the poachers in charge.

(3) Train the regulators. To get better regulation we need better regulators – not only the ACCC and ASIC, but also those charged with preparing RISs in Australian Government departments and agencies. The ORR trains officials through formal seminars, meetings and ad hoc advice in addition to publication of *A Guide to Regulation* and distribution of example RIS material, including on websites. While limited in-house training is provided by some departments and agencies, there is definitely room for improvement.

(4) Use a consistent but flexible analytical method. Regulation needs to be tested using sound cost-benefit analysis in regulation reviews. Yet provided the RIS identifies and weighs all significant positive and negative effects and integrates qualitative and quantitative analyses, the method can vary. The Commonwealth stipulates that all significant economic, social and environmental costs and benefits must be identified, but the degree of detail and depth of analysis (and requirement for quantification) depends on the significance and impact of proposals. For those proposals which maintain or establish restrictions on competition, the COAG requirements must also be met.

(5) Develop and implement data collection strategies. Without adequate information and data then the decision-makers are only guessing (meaning that they run the risk of assuming that they can achieve better outcomes than markets without the data to analyse that key proposition). The problem with this approach is that data reporting and collection are themselves costly, and the returns to investment in information gathering are necessarily uncertain or unknowable ex ante. There consequently needs to be a reasonable expectation that the information gathered might ultimately yield benefits from improved regulation that will outweigh the costs imposed.

(6) Target RIS efforts. Regulators should worry most about the regulations with the largest potential impacts (whether they be deadweight losses, compliance or administration costs). The ORR devotes more resources to proposals of high significance where a higher level of analysis is expected, but **in Australia the separation between significant and non-significant proposals is less clear-cut than in other countries**.

(7) Integrate RIS with the policymaking process as early as possible. Though Australian Government departments and agencies are required to consult the ORR at an early stage in policy development, **current Australian practice appears to suggest that a RIS is compiled more as an add-on than an integral part in the process**. Assigning responsibility to Australian Government Ministers for ensuring compliance with the RIS process (and identifying penalties for failure) would go some way towards ensuring that a RIS is completed as part of the policy making process.

(8) Communicate the results. RIS results must be communicated clearly, using a common format that can be easily interpreted by the decision-makers (and by the public). A useful addition to requirements would be stipulating an upper page limit and the need for an executive summary (as is the case in NZ). Such measures can facilitate decision-making by streamlining information into a digestible format. It is always difficult to keep track of the latest round of potential regulation coming out of government, and there are myriad government websites to review. Publishing on the web is a necessary part of disseminating proposals but, where possible, the existence of proposals needs to be directly communicated to affected parties.

(9) Involve the public extensively. The OECD indicates that interest groups should be consulted widely and within an appropriate timeframe – hence the consultation process is likely to contain several steps. The RIS should incorporate a consultation statement, stating the number of national and other industry organisations, companies and individuals that were consulted and summarising views or reasons why consultation was inappropriate. A final RIS for bills and disallowable instruments must be tabled. It is recommended that RISs for other instruments should be otherwise made public (for example, on a website), but this is not a requirement.

Federally, the release of a 'draft' RIS for public consultation is encouraged but not required, although recent legislative changes (including the *Legislative Instruments Act 2003*) attempt to enshrine the consultation process.

(10) Apply RISs to existing as well as new regulation. As times and circumstances change, the need for regulation changes too. RIS processes should therefore also apply to reviews of existing regulation. Federally, preparation of a RIS is required for all reviews of existing regulation, except where proposed changes are minor or the scope of the original RIS was detailed and complex enough to encompass proposed changes. Nevertheless, monitoring is sometimes irregular and not particularly systematic.

Recommendations:

> **The Council of Australian Governments establish a Regulatory Impact Taskforce to report on how to ensure that the OECD's "world's best practice for the process of regulatory review" is implemented at Commonwealth, State and Territory levels:**
>
> – **this to be achieved through enhancement of the application of the *COAG Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* to ensure improved regulatory practice to decisions of COAG, Ministerial Councils, intergovernmental standard-setting bodies and bodies established by government to deal with national regulatory problems;**
>
> – **such an action is superior to a subjective "one in one out" approach to regulation review but sunset clauses are very useful;**

> **The Australian Public Service Commissioner and state counterparts advise on how departments and agencies can use the OECD's "best practice for the process of regulatory review" with a view to continually improving their approach in developing new regulation, revising and removing out-of-date regulations and reporting annually on their achievements;**

> **The Australian Public Service Commission and federal Office of Regulation Review be better resourced to develop, in consultation with industry, in-house regulatory and consultative training modules for government officials involved in the design, legal drafting and review of regulations on the principle that to get better regulation we need better regulators.**

3. MINIMUM EFFECTIVE REGULATION: A STOCKTAKE OF THE MINERALS INDUSTRY

3.1 Minerals industry expectation of regulation

What the minerals industry wants is ***minimum effective regulation*** which is performance-based (non-prescriptive) as far as possible, we also advocate the development of operational guidelines for government and industry that underpin the non-prescriptive approach in order to remove subjectivity.

Regulations should be targeted at the identified problem or issue and not impose unnecessary burdens on those affected. Regulation should only be used where it is demonstrably the most economically efficient way of addressing the problem or issue in question. The minerals industry also wants regulation that assists it in meeting the criteria of community acceptance and in underpinning its implied 'social licence to operate'. Guidelines required for the implementation of regulations should be developed through an open and transparent stakeholder engagement process.

The overall intent of minimum effective regulation is to ensure that the regulatory regime is relevant, its policy objectives are sound and capable of being achieved, and that its administering agency is fully engaged in and committed to achieving the desired policy outcomes. The regulatory regime should be effective in establishing a minimum platform of performance which provides for adequate protection of the community, business and the environment, while establishing a clear, unambiguous set of consistent standards.

All the costs associated with the regime, such as its administration costs, its compliance costs and any economic opportunities foregone as a consequence of it should be minimised. The proposed regime should represent the best regulatory approach to the problem being addressed, and should be based on an assessment of whether self-regulation or no regulation may be more appropriate policy choices.

3.2 Stocktake of regulation of the minerals industry

Perhaps more so than any other industry, regulation impacts all stages of minerals industry activities. This covers: exploration, mining, processing, transport of inputs and final products, sales, closure of mining activities, rehabilitation and final relinquishment of tenure (see **Table 3.1**).

The MCA is undertaking a national audit of regulations influencing mining exploration and project approval processes. This section summarises the preliminary results of this audit.

The National Context

Not surprisingly, given the differing responsibilities of government in Australia, regulations impacting on exploration, mining and mineral processing inevitably involve a multitude of regulations at all three tiers of government and, where approved by the Australian Parliament, international regulations.

For example, in gaining exploration and mining project approvals in all Australian jurisdictions all levels of government can be involved. The MCA is currently conducting a review of these regulations with a view to identifying significant opportunities for improving these processes based on best practice processes conducted both here and overseas.

Key mining project approval steps that involve significant government intervention at the Commonwealth, state/territory and local level are noted below. The jurisdiction principally involved in each issue is noted in brackets:

- Allocation of mineral resources and ensuring a return to the public from their utilisation (state/territory);
- Land access for crown land and private land (state/territory, Commonwealth);
- Environmental protection (state/territory);
- Planning approval (state/territory, local);

Table 3.1: MINERALS REGULATORY STOCK TAKE – OVERVIEW OF REGULATIONS IMPACTING ON THE MINERALS SECTOR [(a)]

ISSUE	NATIONAL	STATE/TERRITORY	LOCAL GOVERNMENT	INTERNATIONAL	BEYOND COMPLIANCE
Exploration and Mining Permitting	Uranium mining permitting (Northern Territory only) and through EPBC Act for all new mining	Eg. Mineral Resources Act 1989 (Qld) and associated regulations	Eg. Planning and Environment Act (Vic) and associated Council Planning Schemes		*Enduring Value* (EV)
Land Access	Native Title Act Heritage Legislation	Eg. Crown Lands Reserves Act (Vic), National Parks Act (Vic)		United Nations Convention on Biodiversity, Wetlands, Environment & Law of the Sea	EV
Environment	Environmental Protection & Biodiversity Conservation (EPBC) Act	Eg. EPA Act 1994 (Qld), Victorian ballast water management	Council Planning Guidelines	United Nations Convention on Biodiversity, Wetlands, Environment & Law of the Sea, Protection of the Sea	EV Greenhouse Challenge
Trade	Australian Constitution Federal Law	State/Territory Laws (Eg. Quarantine)		WTO, UN Conventions (Eg. Law of the Sea, Basel)	EV, UN Transnational Enterprise Guidelines
Transport	Federal Law; Council of Australian Governments; National Transport Commission; AQIS; AMSA	State/Territory Laws	Council/Shire requirements	International Maritime Organisation (IMO) (Eg. Ship safety), OECD & UN recommendations on transport of dangerous goods	EV IMO - Bulk Cargoes Code, Safe loading/unloading Code & Manual, Green Award

Heritage Cultural	Currently covered by 5 key Acts focussed on Aboriginal & Torres Straight Islander Heritage, World Heritage & the protection of moveable heritage	State/Territory Laws relating to Cultural Heritage, Archaeological & Aboriginal Relics as well as Environmental planning & assessment	Local Planning Laws	Convention concerning the Protection of World Cultural & Natural Heritage (the World Heritage Convention 1972)	EV
Other	EPBC Act				
Safety & Health	Quarantine, NOHSC Regs, Shipping – Australian Marines Notices	State based safety Laws and mine safety regulations, quarantine		ILO Safety & Health in Mining	MINEX, EV
Workplace Relations	**Federal law**	State law		ILO	*Enduring Value*
Transport	**DOTARS – Continuous/Single Voyage Permits** Navigation Act			IMO (Safety of Life at Sea)	
Energy Efficiency	**Bill currently before Federal Parliament**	Victoria, Queensland and NSW have their own requirements Other states (?)			
Foreign Investment	**Foreign Investment Review Board**	Many applications also involve state/territory considerations.		Links through APEC and bilateral Investment Promotion and Protection Agreements	

Note: (a) Taxation, standards (eg Australian Accounting Standards Board, National Standards Commission, National Association of Testing Authorities, Standards Australia, International Standards Organisation) and corporations law issues not included.

> Heritage issues (state/territory, Commonwealth);
> Regional economic and social issues (all levels);
> Water access (state/territory);
> Occupational health and safety (state/territory);
> Uranium-exploration and/or mining (state/territory and in NT, Commonwealth) and export (Commonwealth);
> Competition policy (state/territory, Commonwealth);
> Taxation arrangements (state/territory, Commonwealth); and
> Foreign investment approvals (Commonwealth[15]).

Government intervention occurs not only through legislation and regulation but also through codes of practice. For example, in Queensland there are 15 codes for conducting small mining operations.

More generally, corporate governance has come to embrace a very wide range of issues in Australia. "At its core, it deals with the way in which management is composed and the mechanisms which are put in place to ensure that executive management is accountable to the board and that the board is accountable to shareholders. The issues raised include the independence of directors, the separation of the roles of CEO and Chairman of the Board and the use by the company of audit and other committees."[16]

International Context

Through Australia's involvement with the United Nations, the Organisation for Economic Development and Cooperation, Asia-Pacific Economic Cooperation, numerous treaties, etc, there are many instances where the Australian minerals sector and its service providers are required to meet Australian and international legal requirements (such as the Law of the Sea, International Ship and Port Facility Security Code and Convention for the Safety of Life at Sea).

State/Territory Context

Minerals exploration and mining activities in Australia's six States and the Northern Territory (NT) are usually administered by a state/territory department of mines, minerals and energy, or similar titled body. [17] **As a general observation, the design of long established parts of the regulatory system – such as issuing exploration permits, retention licenses (where applicable) and mining titles – have been clearly articulated and refined over many years.**

While all States and the NT have their own laws governing mineral activities, in content and administration they are similar. Each jurisdiction publishes information that summarises key aspects of its mining law and administration and an overall summary is provided at the Commonwealth level. [18]

Typically, current tenement information for both exploration and mining titles in Australia is accessible in each jurisdiction via computerised, information systems. This enables identification of tenement status and title-holders, and immediate registration of applications for new titles. Information is also readily available on previous exploration activity in the States/NT and on the availability of data.

Although the approach is well established, it is still very complex. For example, **Attachment A** sets out the objectives and administrative responsibilities for Victoria.

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[15] Many proposals also require assessment under **State/Territory** environment legislation. To avoid duplication, arrangements are made with the States and Territories to facilitate joint or cooperative assessments of proposals.

[16] Australian Government Solicitor (1997), "Duties of Directors and Corporate Governance," *Legal Briefing Number 38*, 9 October (see http://www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings/br38.htm).

[17] The mining of uranium in the Northern Territory is an exception. Here the approval of a mining operation is the responsibility of the Commonwealth.

[18] Department of Industry, Tourism and Resources (2004), *Exploration and Mining Legislation – On Shore* (see http://www.industry.gov.au).

In summary, the preliminary results of the MCA national audit suggest that:

> **the design of long established parts of the regulatory system, such as issuing exploration, retention and mining licenses/permits, have been well refined over many years;**

> **there is potential for improvement in the newer and evolving policy areas affecting the environment and land access;**

> **the efficiency of day-to-day administration of all parts of the approval system in all jurisdictions needs attention. Approval processes will only be as good as the agencies that administer them and efforts are needed to address inter-agency and inter-governmental accountability, cooperation and communication, staff numbers and skills.**

3.3 Commonwealth legislation

While land management and mining is not generally a federal responsibility, the exploration and mining approval regulatory framework is affected by the Commonwealth's international and inter-jurisdictional powers. This includes the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) and legislation regarding Native Title and cultural heritage. The Commonwealth also has control over exports. In the past this power affected the coal industry, but its current application is limited to uranium.

International treaties to which Australia is a signatory are also relevant, for example the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention) and the Montreal Protocol on Substances that Deplete the Ozone Layer.

A major increase in the Australian Government's regulatory impact on mining followed the High Court's recognition of common law Native Title rights in 1992, in the passage of the Native Title Act 1993, which was significantly amended in 1998, and prescribes processes for determining Native Title claims and a regime governing future grants and acts affecting Native Title.

Regulation put in place by the Commonwealth builds on these responsibilities and the necessity to manage nation-wide or inter-jurisdictional issues.

This section gives an overview of the key Commonwealth regulations relevant to the mining industry.

3.3.1 EPBC Act

The EPBC Act is concerned with matters of national environmental significance. It sets the condition for Commonwealth involvement, particularly to require an Environmental Impact Assessment, and provides legislative timeframes in which Commonwealth decisions must be made.

The following are currently defined as matters of national environmental significance:

> World Heritage properties

> National Heritage properties

> Wetland declared as a Ramsar wetland of international significance

> Nationally listed threatened species and ecological communities

> Listed migratory species

> Activities relating to nuclear energy, including uranium mining

> Commonwealth marine environment

Process

> When a project is likely to have a significant environmental impact or impact on sensitive areas, it must be referred to the Minister for the Environment and Heritage, who will decide whether the project requires an environmental assessment and a decision under the EPBC Act.

> The Commonwealth can delegate the supervision of the process to the relevant state, provided agreements are in place between the state and the Commonwealth that accredit the state's environmental assessment processes and systems. To date, assessment bilateral agreements have been signed with the Northern Territory, Queensland, Tasmania and Western Australia, whereas agreements are still in draft form with New South Wales, Victoria and South Australia and ACT.

Operation

Where bilateral agreements between the Commonwealth and the States are not in place, the duplication of processes can turn into a major issue for the industry. Even when accreditation processes are in place, delays occur as DEH is struggling to meet the deadlines for project assessments.

3.3.2 Native title

Indigenous communities are given the opportunity to claim their Native Title rights and interests in land through the Native Title Act. The Native Title Act also specifies the circumstances where Native Title rights and interests have been extinguished. The Act provides a regime for processing future grants and acts affecting native title rights and interests, such as the granting of an exploration licence or a mining lease.

Process

Native Title is a complex area of law. It has been extensively researched and continues to evolve. The following gives a brief overview of the main procedures for future acts.

When a project proponent applies for an exploration or a mining permit on Crown land, there are several possible processes that apply under the Act:

> **Right to Negotiate** procedure: This procedure starts with a public notification period (three months) so that potential claimants have an opportunity to register their claim. Claims must be accepted and registered with the National Native Title Tribunal (NNTT) within four months to attract the right to negotiate under the Act. The project proponent must then negotiate (in good faith) with the registered Native Title parties. After 6 months of negotiations, any of the parties can ask the NNTT to make a determination as to whether the act may be done.

> **Expedited procedure**: When a future act is deemed unlikely to interfere directly with community or social activities, unlikely to interfere with sites of particular significance, or unlikely to involve major land disturbances, the expedited procedure can apply as an alternative to the right to negotiate procedure. There is notification that a future act attracts the expedited procedure, and in the absence of any objection by a registered native title party during a four month period, the future act can be approved. If an objection is sustained by the NNTT, the right to negotiate provision applies. In most states, this procedure has been applied to exploration activities.

> **Other procedural rights** : The Native Title Act provides other procedures for specific future acts. For example, special provisions apply for the construction of an infrastructure facility associated with mining. Such acts attract a right of notification, a right to object, a right to be consulted and a right to be heard on the objection.

> **Indigenous Land Use Agreements** (ILUAs): ILUAs provide the project proponent and the native title claimants or holders, the mechanisms to reach agreement on a range of issues including alternative procedures for dealing with future acts. Introduced in the 1998 amendments to the Act, the ILUA provisions allow for the registration of an agreement such that it is binding on all Native Title holders for the length of the agreement, even if Native Title holders were not all involved in the agreement.

> ILUAs can also provide a more systemic approach to agreement making, through the development of template or generic regional ILUAs that can be negotiated in advance of specific projects, and which effectively increase efficiency in project approvals under the Native Title Act. For example, such ILUAs have been negotiated in South Australia with several claimant groups, covering a significant part of the State.

Native Title Representative Bodies have an important role in the native title system, in providing facilitation, assistance, certification and dispute resolution functions to native title claimants for the effective resolution of native title claims and future act negotiations.

The NTRBs play a critical role in the native title system in effectively representing the rights and interests of native title claimants and holders. The MCA is keen to ensure that the regulatory impositions on NTRBs do not impede their effective operation and are consistent with good business practice. We remain concerned that overly onerous governance requirements on NTRBs would distort their focus from their core business – that of claims resolution and the completion of future act processes.

Reforms

The Attorney-General recently (7 September 2005) announced a package of practical reforms to improve the efficiency and effectiveness of the native title system. .

The MCA supported this announcement as an opportunity to explore measures that could improve the efficiency and effectiveness of the native title system, and result in more timely and cost effective access to land and mineral resources, without diminishing the rights and interest of Indigenous Australians already secured.

The MCA is responding to the various opportunities in the reform process to provide suggestions for improved efficiencies and effectiveness. The MCA is developing its responses in consultation with the members of the Indigenous Leaders Dialogue (ILD). The ILD was established in 2004 to provide an opportunity for dialogue between the MCA Board members and Indigenous leaders towards building mutually beneficial partnerships with Indigenous communities in education and training, employment, and community development.

Importantly, as well as providing an opportunity for technical amendments to the Native Title Act, the reform agenda also provides an opportunity to review all aspects of the native title system, including the role and interaction of the NNTT and the Federal Court, and the management and resourcing of Native Title Representative Bodies and Prescribed Bodies Corporate. This is recognition that reforms to improve the native title system also require a review of the institutional arrangements that operate within the system.

3.3.3 Heritage issues

As of 1 January 2004, a new system replaced the Australian Heritage Commission Act 1975, which was established at a time when State heritage protection laws did not exist. It was therefore felt that there was a need to avoid duplications between the jurisdictions and to offer specific protection to nationally significant heritage. The former Act has been replaced by an amended *Environment Protection and Biodiversity Conservation Act 1999* which incorporates 'heritage' as a matter of 'national environmental significance'.

The relevant legislation is three-fold:

- Environment and Heritage Legislation Amendment Act (No. 1) 2003
- Australian Heritage Council Act 2003 (establishes a new heritage advisory body to the Minister for the Environment and Heritage and retains the Register of the National Estate),
- A transitional Act

The referral and approval process for heritage matters therefore follows the rules described above for the EPBC Act.

Altogether, mining companies do not seem to have significant problems meeting the requirements of this Act.

3.3.4 Aboriginal and Torres Strait Islander Heritage Protection Act 1984

This Act provides for the preservation and protection of 'significant Aboriginal areas' and 'significant Aboriginal objects' of particular significance to Aborigines in accordance with the Aboriginal tradition.

The Act is only triggered when an Indigenous person (or someone representing him/her) applies for protection under the Act. The application can trigger an emergency provision (when the damage is imminent) or a normal investigation.

An amendment of the Act that was providing for an accreditation system between the states and the Commonwealth was rejected by the Senate in 1998. There have been calls from the industry for a review of the process to avoid duplications, as they can lead to major delays (up to 12 months additional delays in the industry's experience).

3.3.5 Transport Regulations

Australia's international dry bulk commodities shipping task and its international minerals shipping task are the world's largest. Because of the significant increase in coal and iron ore exports over the past few years, the total tonnage of dry bulk commodities imported, exported or shipped domestically is expected to exceed 700 million tonnes in 2005. Land based transport and intermodal transport efficiency impacts industry competitiveness. **Table 3.2** includes examples of transport regulations that impact on the minerals sector.

Many mineral and agricultural commodities, particularly iron ore and coal that dominate in volume terms, have relatively low values per tonne and shipping costs are a significant proportion of the delivered cost of the commodity. The minerals industry exports close to 99 per cent of its product by volume via shipping, so the efficiency of this trade is very important to the MCA.

The ship chartering market is set globally and shipping assets are mobile and transferable. Australian flagged ships carry a minor proportion of Australia's international sea-borne trade and a declining proportion of Australia's coasting trades. Australian shippers therefore require access to internationally competitive quality shipping to maintain existing markets and to service new market opportunities. The effectiveness of access regimes and the timing of investment in transport infrastructure are also important influences on transport efficiency.

The Australian minerals industry is not only a major charterer of ships but also an owner/operator of major private ports and facilities throughout Australia. Some view that the charterer's responsibility ends at the ship's rail. While this position has some legal standing, it does not accord with the commercial reality. As producers, our interests can extend across the entire spectrum of the value chain from the mine to the end user. Moreover, increasingly society expects this of us.

Australia's port state control measures are arguably the best in the world and have raised the standard of ships visiting Australian ports. Moreover, ship-vetting practices in Australia are now highly regarded within the global shipping market. Australian charterers have a heightened awareness of the community's expectation for quality ships that are concerned with the safety and skills of seafarers, the safety of the ship and its cargo and the need to protect the Australian marine environment.

Significant reform has occurred within Australia's transport sector. Major cost savings have been achieved in domestic shipping through reduced crewing costs and in a number of port/waterfront related facilities. The real cost of navigational aids has reduced by 40% over the past decade and real reductions in Port Authority costs and charges have been reported.

In terms of land transport, the National Transport Commission has a mandate from COAG to progress regulatory and operational reform for road, rail and intermodal transport in order to deliver and sustain uniform or nationally consistent outcomes. The States, Northern Territory and the commonwealth regulate ports and local government plays a role too (eg in restricting haulage of mineral product on shire roads).

TABLE 3.2: SOME TRANSPORT REGULATIONS THAT IMPACT ON THE MINERALS SECTOR

Mode	Regulations
Road	> Heavy vehicle regulations, environmental issues and vehicle safety, intermodal issues (National Transport Commission) > Compliance and Enforcement legislation (template for all jurisdictions) – mass, dimension, load restraint, enforcement powers along the chain of responsibility and to be introduced by end 2005. Explains duties and penalties
Rail	> Environment and safety reform is a responsibility of the National Transport Commission > 7 rail safety regulators (more than there are national operators) with 9 different pieces of legislation > 3 transport accident investigators > 15 pieces of legislation covering occupational health and safety of rail operations > 6 access regulators > 75 pieces of legislation with powers over environmental management
Road & Rail	> Australian Dangerous Goods Code aims to bring Australian domestic practice into line with equivalent international maritime and air regulations > Code of Practice for Compliance with Container Weight Declaration Duties > State/Territory explosives legislation (Australian Explosives Code)
Ports	> Harbour Master > Marine pests management (two COAG Ministerial Councils) > State legislation – environment, safety, quarantine, marine pests (Vic only), explosives > Preventive security for ports and waterways complementing new Commonwealth security powers and States work with Commonwealth on counter terrorism initiatives

Some comments on the regulation of shipping are included in section 4 of this report. The MCA is also a member of the National Bulk Commodities Group and supports the NBCG submission to this inquiry.

3.3.6 Competition Policy

The competition policy reforms of the mid 1990s were intended to establish a national approach to competition issues across jurisdictions and markets. The reality however is that there has been a proliferation of different access regimes at the State and Territory level.

There are currently 22 State-based regimes in operation covering rail, ports, gas and electricity and 11 Federal, State and Territory economic regulators:

- Australian Competition and Consumer Commission (ACCC)
- Australian Energy Regulator (AER)
- Essential Services Commission of South Australia (ESCOSA)
- Essential Services Commission, Victoria (ESCVic)
- The ACT Independent Competition and Regulatory Commission (ICRC)
- Independent Pricing and Regulatory Tribunal of NSW (IPART)
- Queensland Competition Authority (QCA)
- Economic Regulation Authority of Western Australia (ERA)
- Northern Territory Utilities Commission

> Office of the Tasmanian Energy Regulator (OTTER)

> Tasmanian Government Prices Oversight Commission (GPOC)

The establishment of the **Australian Energy Regulator** as a one-stop shop for energy regulation will shortly cut through the maze in gas and electricity for participating jurisdictions. **Rail** has six access regulators, which can differentially impact on the same transport and logistics chain.

Recommendations:

- **All States and Territories should publish on their websites clear, comprehensive guides to exploration and mining project approval processes;**
- **States and Territories make 'one-stop-shop' approval processes, currently restricted to large exploration and mining projects, also available to companies with smaller mining projects;**
- **All jurisdictions should move towards a risk- and performance-based approach to regulation of the mining industry based on COAG regulatory principles;**
- **Recognising the potential benefits of nationally consistent approaches and the need to tailor standards to particular circumstances, the Ministerial Councils on Mineral and Petroleum Resources and Environment and Heritage should appoint a taskforce to review environmental regulation of exploration and mining and to recommend uniform or harmonised standards. This joint taskforce should include representatives from the minerals industry;**
- **All jurisdictions should stipulate, monitor and publish timeframes for their exploration and mining approval processes. For some areas set (e.g. legislated) timelines will be appropriate while for other, more complex areas, timelines negotiated between the proponent and government are more practical;**
- **All jurisdictions should review the administrative resources available for the exploration and mining approvals systems to ensure that they are adequate:**
  - **training and capacity building programs should be implemented to augment agency skills; and**
  - **administrative requirements should be reduced by reforming the systems and moving to more efficient regulatory modes; and**
- **The Ministerial Council on Mineral and Petroleum Resources should establish a joint government/industry working party to consider alternative approaches to assessment and monitoring, including third-party accreditation, and co-management arrangements, but only where there is transparency;**

3.3.7 Occupational Health and Safety – National Agenda

The MCA supports a nationally consistent approach to occupational health and safety regulation in the minerals sector. The current approach, based on 8 separate State / Territory legislative regimes is inefficient, adds cost, complexity and uncertainty for industry, and undermines the industry capacity to share information and learn from experience.

While the National Mine Safety Framework (NMSF), endorsed by the Ministerial Council on Minerals and Petroleum Resources in March 2002, was intended to achieve a nationally consistent approach towards legislation, enforcement, compliance, competency, data, consultation and research, implementation has been very slow. This has largely been due to a lack of a dedicated implementation team, no specific resource allocation and poor coordination of effort.

The minerals industry is concerned that the responses to recent state reviews in Western Australia, NSW and Queensland have the potential to undermine efforts to achieve national consistency including the NMSF, and has drawn its concerns to the attention of the MCMPR and its Standing Committee of Officials.

The industry is also concerned at the inconsistent approach to industrial manslaughter laws across Australia with differences in penalties, length of jail terms, the nature of an offence subject to prosecution, the availability of defences and the basic rights of appeal.

The MCA considers it is timely for Australia to adopt a single national approach to OHS regulation of the minerals industry based on outcomes and systems rather than prescription. The ultimate goal should be a single national regulatory body replacing the existing state bodies, and a single piece of national legislation supplanting the existing state legislative frameworks.

A substantial change of this nature is required if the Australian minerals industry is to maintain its global leadership in safety performance.

3.4 Examination of non-regulatory options

Self-regulation has a number of potential advantages over black letter law. In particular, it allows those most knowledgeable about the pros and cons of the alternative means of achieving a regulatory objective to achieve the most cost effective and flexible means of doing so.

In the changing environment brought on by globalisation during the past decade, governments have found it challenging to respond to community expectations especially given the increasing complexity of world finance and commerce.

In recognition of the very wide scope for self-regulation in Australia, the Federal Government established a Taskforce on Industry Self-Regulation in 1999. This Taskforce recognised that, in the changing environment brought on by globalisation, there is an expanded role for self-regulation. In particular, the Taskforce on Industry Self regulation found that "the failure of firms to act in a manner consistent with society's broad social objectives can have a damaging effect on overall reputation and profitability and that this provides a real incentive to implement self regulation". The role for self-regulation has been recognised by the Commonwealth Government which has said that "industry should take on increased ownership and responsibility for developing efficient and effective self-regulation where it is the most appropriate regulatory response."

Minerals companies too face new challenges, particularly the implicit need to alter their performance and behaviour in response to both business and general community expectations.

In this context, codes or codified frameworks have become increasingly important tools in encouraging improvement in the minerals industry's performance in a range of areas from environmental management to reporting resources. Codes do not replace legislation but instead complement it.

3.4.1 Enduring Value

In supporting more efficient and effective regulation, the Australian minerals industry is seeking to ensure that investments in mineral projects are financially profitable, technically appropriate, environmentally sound and socially responsible. To this end, the MCA worked closely with the International Council on Mining and Metals (ICMM) development of sustainable development principles. These have been adapted for application at the Australian mine site level through '*Enduring Value—the Australian Minerals Industry Framework for Sustainable Development*', which replaced the *Australian Minerals Industry Code for Environmental Management* in 2005. That Code was the first of its type in the world and *Enduring Value* represents the first industry framework for the application of sustainable development principles at the operational level.

Government legislation, regulations and codes set the minimum standards for mining. **However the more reputable companies operate at a higher level than this (ie "beyond compliance")**. A poor performing mining company impacts on the image of the entire industry, not just the company. **It is in the industry's interests to promote a level of performance above the minimum standard expected by the community and for poor performers in the industry to have their shortcomings brought to their attention and encouraged to adopt good practice.** For this reason the industry has developed self-regulation processes. A good example

is *Enduring Value*. This framework provides a program of continuous improvement and encourages members to achieve environmental standards beyond the minimum standard set by regulation.

Signature to *Enduring Value* is a condition of membership for the Minerals Council of Australia. However all exploration, mining and minerals processing companies and contractors are eligible to become signatories to *Enduring Value*, provided that they commit to meeting the *Enduring Value* obligations.

As part of the obligations under *Enduring Value*, signatories are required to publicly report site level performance, on a minimum annual basis, with reporting metrics self-selected from the Global Reporting Initiative (GRI), the GRI Mining and Metals Sector Supplement or self-developed. These reports address performance across the full scope of social, environmental and financial aspects of the business. **The Chief Executive Officer or equivalent is required to sign the annual *Enduring Value* report. In the case of multi-national companies, sign off is from the head of the Australian operations.**

This philosophy of *Enduring Value* is consistent with the COAG regulatory principles. The overall strategic objective of the project is for continuous improvement in social and environmental performance in exploration and mining projects attuned to community expectations and, where appropriate, recognised and rewarded in statutory approval processes that are nationally consistent and efficient.

However, attempts to achieve performance above minimum standards can be frustrated when juxtaposed with prescriptive rather than performance-based regulation, especially when it does not make allowance for risk.

3.4.2 The JORC Code

Australia is also recognised as the world leader in mineral resources and reserve reporting standards through the *Australasian Code for Reporting of Identified Mineral Resources and Ore Reserves* (the JORC Code). This Code has formed part of the Listing Rules of the Australian and New Zealand Stock Exchanges for close to two decades. It is the model used by many other mining nations and companies when formulating codes and guidelines dealing with pubic statements on ore reserves designed to inform the investing community.[19]

The JORC Code was initiated by the Minerals Council in 1971 and is now jointly administered by the MCA, the Australasian Institute of Mining and Metallurgy (AusIMM) and the Australian Institute of Geoscientists (AIG). A Committee representing these organisations (and also including invited representatives from the Australian Stock Exchange and Securities Institute of Australia) guides its ongoing evolution.

Australia has a well developed legal and regulatory framework that governs the disclosure and reporting of exploration results, Mineral Resources and Ore Reserves by listed public companies. The regulatory framework is set out principally in the Corporations Law and the Listing Rules of the ASX. It is underpinned by the requirements of the JORC Code. The Code is also backed by the two professional bodies, AusIMM and AIG, which both have the procedures to review, and if necessary discipline Competent Persons who do not follow the Code.

The JORC Code is used to assist minerals companies to develop resources and build associated plant and infrastructure and to provide evidence to banks for borrowing purposes. It was drawn on by the Ralph Review of Business Taxation in its recommendations concerning the taxation of financial arrangements in the minerals sector and is being employed by the Australian Taxation Office (with MCA assistance) in developing a Life of Mine/Project Ruling under the Uniform Capital Allowance regime of the Tax Act.

3.4.3 The VALMIN Code

The purpose of the VALMIN Code (the *Code for The Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports)* is to provide a set of fundamental principles and supporting recommendations regarding good professional practice to assist those involved in the preparation of Independent Expert Reports that are public and required for the assessment and/or valuation of Mineral and

[19] For further details, see http://jorc.org/main.php. The JORC Code has been used both as an internal reporting standard by a number of major international mining companies, and as a template for countries in the process of developing or revising their own reporting documents, including the United States of America, Canada, South Africa, the United Kingdom/Europe, Chile and Peru.

Petroleum Assets and Securities so that the resulting Reports will be reliable, thorough, understandable and include all the Material information required by investors and their advisers when making investment decisions.

The main impetus for the development of a valuation and assessment code for the mining and petroleum industry came from the National Companies and Securities Commission (NCSC) in June 1988 with the release of draft guidelines dealing with the assessment and valuation of mining and petroleum assets. They were subsequently withdrawn for revision by an Australian Institute of Mining and Metallurgy (AusIMM) led committee of those industry and professional bodies to be affected by the guidelines and were reissued in March, 1990 as NCSC Release 149: "Expert Reports on Mining and Petroleum Securities and other Assets". [20]

In January 1991 the NCSC ceased operations to be replaced by the Australian Securities Commission (ASC) so that all NCSC releases ceased to be legally binding. In order to fill this gap with an improved and binding document, the AusIMM formed the VALMIN Committee in April, 1991 comprised of representatives from AusIMM and the Mineral Industry Consultants Association (MICA) and observers from the Australian Stock Exchange (ASX), Australian Securities Commission (now the Australian Securities & Investments Commission, ASIC), Australian Mining Industry Council (now the Mineral Council of Australia, MCA) and the Securities institute of Australia (SIA). Since that time, representatives of the Australian Institute of Geoscientists (AIG), the Petroleum Exploration Society of Australia (PESA) and the Australian finance industry have joined the Committee as members or observers.

The first version of the VALMIN Code was issued in June 1995.

The VALMIN Code provides guidance on matters that may be subject to the *Australian Corporations Act 2001*, the associated Corporations Regulations, other provisions of Australian law, the published policies and guidance of Australian Securities and Investments Commission (ASIC) and the Listing Rules of ASX or of other relevant recognised stock exchanges. The Code applies in any particular circumstance only if, and to the extent that it is not inconsistent with the law, ASIC policy and guidance or the requirements of the relevant recognised stock exchange.

ASIC refers to the VALMIN Code when reviewing mining and exploration prospectuses and takeover documents. ASIC regards the Code as indicative of best practice, and expects that when specialist mining terms used in the Code are contained in such documents that they will have the same meaning as in the Code. Compliance with the Code does not relieve issuers and others involved in the preparation of prospectuses and takeover documents from their broader disclosure obligations under the Corporations Act.

The Australian Stock Exchange supports the issue of the Code and any serious breaches of which the ASX is aware will be brought to the attention of The AusIMM and AIG, which both have an Ethics Committee to consider such matters.

The VALMIN Code has also been drawn on by other mining nations in developing valuation and reporting codes.

3.4.4 Other Codes

A common reason for self-regulation, is a desire to raise industry standards and to demonstrate an industry's transparent commitment to leading practice. A good example of this is the Esmeralda gold mining cyanide leak in Europe — and the impetus that it gave to the development of the ***International Cyanide Management Code***.

If the minerals industry expects to have a workable regulatory environment, it recognises it must continue to take the initiative and act pro-actively to engage with Government and other stakeholders to develop sensible approaches consistent with society's expectations. In this way the industry will not be driven into outcomes which may hinder operations and make it difficult to operate and effectively contribute to the nation's wealth and job creation.

[20] M J Lawrence, "History and Relevance of AusIMM's VALMIN Code 1981-2001", in ***Mineral Asset Valuation Issues for the Next Millennium 2001***, proceedings of a conference organised in Sydney Australia, 25-26 October 2001, Australian Institute of Mining and Metallurgy, page 202.

Once a resource is mined it must be transported to markets. In this context, Australia initiated the now internationally adopted ***Code of Practice for the Safe Loading and Unloading of Bulk Carriers*** (BLU Code) in the early 1990s. It became the first land-based code adopted by the International Maritime Organisation (in 1997).

Australia abides by many other IMO requirements and convened the international group that recently completed a revision the ***Bulk Cargoes Code***,[21] the next edition of which will incorporate the essence of the Australian developed *Manual of Safe Loading, Ocean Transport and Discharge Practices for Dry Bulk Commodities*. Australia also uses the OECD land transport guidelines and the MCA assists in the development of relevant Australian Maritime Safety Authority Marine Notices and in related Australian Quarantine and Inspection Service guidelines.

These are some of the codes that have evolved within the minerals industry in recognition that mining and its associated activities bring into sharp focus issues of resource management, safety, environmental performance and transparency. The important point is industry's transparent commitment to best practice with emphasis on performance-based approaches that are in tune with community values.

However, MCA is aware that self-regulation requires the strong support of the industry. When supported it can be a valid adjunct to co-regulation and performance based regulatory regimes.

In addition, it is also important that industry codes are sensibly developed, are only adopted if they are necessary and evolve through engagement with stakeholders with a legitimate interest in their implementation and success. To be effective codes must respond to real and identifiable needs.

Indeed, if the minerals industry expects to have a workable regulatory environment, it recognises it must continue to take the initiative to engage with government and other stakeholders to develop sensible approaches consistent with societal expectations. In this way the industry will not be driven into outcomes that may hinder operations and make it difficult to operate and effectively contribute to the nation's wealth and job creation.

Recommendation:

> **All governments should seek to adopt the best regulatory approach available to address a defined problem. This should include an assessment of whether self-regulation, co-regulation or no regulation is the most efficient public policy choice.**

[21] For further details, see http://www.imo.org/home.asp.

4. IMPROVING COMMONWEALTH REGULATION OF THE MINERALS SECTOR AND REMOVING DUPLICATION

This section of the submission considers from a minerals sector perspective various Commonwealth and Commonwealth/State/Territory regulations with a view to reducing their impact and duplication.

4.1 Environment Protection and Biodiversity Conservation Act 1999

The Australian minerals industry has significant interaction with the Commonwealth's principal environmental legislation, the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act). The scale and location of many mining developments, combined with the fact that the Act is weighted towards the regulation of single large projects, results in approximately 50% of minerals projects 'referred' under the EPBC Act requiring formal assessment and approval by the Environment Minister.

Given this high rate of environmental assessment under the EPBC Act, the negotiation of bilateral agreements, where the Commonwealth accredits the environmental assessment processes of State and Territory governments are critical for the smooth running of this system. However, of all the States and Territories, only Tasmania, Queensland, Western Australia and the Northern Territory have bilateral agreements in place, and while assessments can be accredited on a case-by-case basis, this is not an acceptable level of certainty for business. It is not unusual for environmental assessments to extend over several years, which has the potential to jeopardise the development of new minerals projects .

In addition, even where bilateral agreements are in place, the focus of negotiation between governments has been on ensuring that the State and Territory systems meet minimum legal requirements. The MCA consider this a missed opportunity for reforms in areas such as improving the timeliness, efficiency and certainty of these environmental assessment systems. There is also significant room for reducing inconsistencies in environmental legislation outside the assessment and approval processes. By way of example, the MCA welcomes the recent work by the West Australian government to align its threatened species lists with the EPBC threatened species lists, and encourages the Australian Government to expand this approach nationally.

Recommendations:

> Those states that are yet to enter into bilateral agreements with the Commonwealth be encouraged to do so to achieve desirable efficiency improvements and reduce compliance costs and delays in approval processes;

> **The relevant COAG Ministerial Council examine how to improve the timeliness, efficiency and certainty of existing bilateral agreements on environment assessment systems; and**

> **A process of review be initiated by COAG to reduce inconsistencies in environmental legislation outside the assessment and approval system on a prioritised basis and report annually on progress.**

4.2 National Environmental Protection Measures (NEPMs)

The MCA is concerned that the Site Contamination National Environmental Protection Measure (NEPM) leads to the inappropriate use of data by regulators, specifically the use of trigger levels for initial investigation as a trigger for clean-up operations. The current structure of the NEPM provides a staged approach to assessing a site, where an initial assay is done to determine if further investigation is warranted. However, if levels of contaminants are above a certain level, then remedial action is required straight away. The specific problem being encountered is that regulators are confusing the initial trigger levels with the triggers for site clean-up, resulting in a significant increase in the burden for companies.

The principal issue with this and some other NEPM's is the use of data and trigger levels in an inappropriate fashion. Two examples are:

> the use of trigger levels under the site contamination NEPM; and

> the use of aggregated data from the National Pollutant Inventory in international emissions reporting (a job which the NPI was not designed to do).

Both of these issues relate to a lack of appropriate contextual information in these NEPM's.

Recommendation:

> **To overcome inappropriate use of data by regulators under the Site Contamination National Environmental Protection Measure and the National Pollutant Inventory NEPM, specific guidance needs to be included to ensure that data users are aware of the limitations of the data and the contexts in which the data is designed to be used.**

4.3 Taxation

The MCA has long supported simplification of Australia's business income tax system to make it more equitable, efficient and transparent. It is the combination of all business tax rates and measures, and not just the corporate rate (or any other single tax measure), which is important in assessing project viability. In this context, the MCA welcomes the pragmatic approach the Australian Government has taken in many aspects of its ongoing reform of the Australian business taxation system.

The minerals industry accounts for a significant proportion of revenue collected by all levels of government in Australia. Australian Taxation Office (Tax Office) statistics [22] show that the nearly 4,000 business operating in the mining industry (excluding the substantial Australian minerals processing sector, which is included in the manufacturing industry) paid $3.7 billion in company net tax in 2002-03, 12 per cent of the total. This was the third largest of any industry (behind the finance and insurance and manufacturing industries) and second largest among large companies (those with total income of $100 million or more). In that same year, the industry also paid $1.9 billion in mineral royalty payments to State and Territory governments.

The 2005-06 Australian Government Budget Papers note company tax revenue, which had grown to $36.3 billion in 2003-04 and $43.1 billion in 2004-05,[23] is expected to increase in 2005-06 to total $48.0 billion, largely as a result of a stronger outlook for company profits. This, in turn, reflects the higher export prices for exports of coal and iron ore in the last quarter of 2004-05 and through 2005-06.[24] The minerals industry is Australia's key export and wealth producing industry, and consequently bears a commensurately large tax burden, both in terms of tax paid and the costs of compliance with the tax system.

The importance of an efficient and internationally competitive tax system for the competitiveness of the Australian minerals industry reinforces the MCA's desire to ensure that ongoing business tax reform follows the principles of simplicity, equity and efficiency. Reform of the tax system should:

> ensure Australia's corporate tax burden does not act as a disincentive to investment into or out of Australia or impinge on Australia's international competitiveness;

> ensure all business expenditures are treated appropriately and there are no "black holes" (that is, no non-deductible business expenditures); and

> remove taxes on business inputs, notably on fuel and other essential inputs.

Many of these outcomes hinge on good policy design, but the efficiency and international competitiveness of the tax system also depends on the details of the legislation and other regulations that implement that design. These

[22] Australian Taxation Office (2005), *Taxation Statistics 2002-03*, Canberra, p. 55 (see http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/54378.htm&page=1&H1).

[23] This number has been updated to reflect the final 2004-05 Budget outcome, as reported in Commonwealth of Australia (2005), *Final Budget Outcome 2004-05*, Canberra, 23 September, p. 3 (see http://www.budget.gov.au/2004-05/fbo/html/index.htm).

[24] Commonwealth of Australia (2005), *2005-06 Budget Paper No. 1 Budget Strategy and Outlook 2005-06*, Canberra, 10 May, p. 5-11 (see http://www.budget.gov.au/2005-06/bp1/html/index.htm).

should not impose unnecessary regulatory burden on business, not impose excessive or unnecessary compliance costs and not be characterised by inefficient or inappropriate administration.

As discussed above, the MCA works closely with policy makers and regulators on matters related to the industry. This includes consultation with the Treasury, the Australian Tax Office and major inquiries and reviews of tax policy and its implementation. **From discussions with Government officials, Parliamentary Committees and accounting bodies, it is generally accepted that these processes of consultation have led to improved minerals taxation policy outcomes and better designed tax regulation than would have emerged otherwise**.

The process is not uniformly positive (eg the MCA is concerned about the re-emerging trend to "legislate by press release" – something that we saw before the Ralph Review of Business Taxation process). But the experience reinforces the MCA position that **both formal and informal review of proposed taxation regulations, from legislation to specific rulings, is best done with substantial input from the affected industry, often best represented by peak bodies such as the MCA**. This is even more important in an industry such as mining and minerals processing, which:

> is subject to a wider range of taxation rules than any other industry in Australia;

> is substantially affected by technological change, thus rendering a tax system that is based on past technology and legal precedent unable to cope with future product and process innovations (eg satellite exploration, new mining or exploration technologies and multi-million dollar scientific instruments that are made redundant if an improved version becomes available); and

> must deal with its own, specially designed area of the Tax Act – which is of specialist interest and highly technical in its language and effect.

Moreover, the MCA is conscious that effective consultation can assist in achieving three important objectives of the Tax Office as well as facilitate the development of tax policies and rules that will stand the test of time:

> "**Optimising economic growth**: Improving Australia's international competitiveness and economic growth depends on several factors, one of which is maintaining the integrity and transparency of the tax system. This provides confidence for those investing in Australia. At the same time, if compliance and administrative costs are high, economic growth will be hindered. For instance, compliance activity that reduces tax avoidance helps to keep general rates of taxation lower.

> "**Generating community confidence:** Any perception that the Tax Office is not fully committed to ensuring corporate compliance makes the wider administration of the tax system more difficult. Perceptions of the compliance levels of large business influence the wider community's confidence in the integrity and equity of the system. More than ever before, the community expects large business to contribute their fair share to the community via the tax system. A system that is widely perceived as fair will be better supported and more effective.

> "**Building cooperative relationships with business:** Compliance strategies that are understood by business, and take into account the 'real world' concerns of business, will encourage voluntary compliance. A conscious effort by the Tax Office and business to co-design compliance solutions in problem areas will produce greater certainty, reduce compliance costs and provide improvements in the law and tax administration." [25]

This section does not attempt to assess the overall regulatory burden imposed on the minerals industry by Australia's taxation system. Rather, and consistent with the Taskforce's terms of reference, the following examples are presented to identify specific areas of Australian Government taxation and associated regulation which are unnecessarily burdensome, complex, redundant or duplicate regulations in other jurisdictions and, in particular, to indicate those areas in which regulation should be removed or significantly reduced as a matter of priority. Further details on each of these examples is provided at **Attachment C**.

[25] Australian Taxation Office, *The Cooperative Compliance Model*, http://www.ato.gov.au/print.asp?doc=/content/22630.htm.

4.3.1 Fuel tax reform

The phasing in of reductions in taxation of fuels used as business inputs is desirable. It is possible that aspects of the current proposals could impose an unnecessary regulatory burden on the Australian minerals industry. To reduce the potential for this to occur, it is desirable to ensure:

> the range of activities eligible for credits is not restricted during the transition to the new arrangements;

> compliance costs are minimised by making the administration and compliance regime (under the umbrella of the *Taxation Administration Act 1953*) that underpins the reforms as efficient and effective as possible. Aggregating fuel tax credit claims in the running balance accounts will be problematic, so this might include, for instance, addressing concerns with the Tax Office's administration of the GST refunds;

> businesses required to be members of the *Greenhouse Challenge Plus Program* (as they claim over $3 million per annum in fuel tax credits) and meet all relevant requirements under existing and new schemes should *not* be impacted by the transition;

> *de minimus* and safe harbour requirements are included in the legislation, to give effect to the intended reduction in record-keeping required to substantiate entitlements once the fuel tax credit system is fully implemented; and

> e-grant claims for fuel tax credits are continued instead of being made through the Business Activity Statement (BAS), as currently proposed, because that would raise compliance costs. Although the BAS arrangement would align the mechanism for claiming fuel tax credits with that for claiming GST input tax credits, it would remove a recently introduced arrangement that is beginning to gain acceptance and generate benefits.

4.3.2 Foreign resident withholding arrangements

The current Tax Office interpretation of the regulations governing withholding of payments to foreign residents for construction 'works' and 'related activities' is inconsistent with the overall policy intent of the legislation. The MCA's understanding was that the withholding tax would only apply to the provision of relevant activities by non-residents *in Australia*, not to the full imported capital cost of constructing or purchasing assets (as the Tax Office are inappropriately attempting to imply). The Tax Office approach would impose significant administrative and financial costs on Australian industries by:

> requiring otherwise unnecessary applications for variation;

> higher prices charged by foreign contractors to recover the time costs and foreign exchange risk associated with large Australian dollar denominated tax refunds; and

> (in some circumstances) contracts requiring Australian companies to bear the withholding tax cost.

4.3.3 Fringe benefits tax (FBT)

As currently enforced, aspects of the FBT raise compliance costs in a number of ways:

> limits on the housing exemption and various exceptions to it compromise its effectiveness, increasing regulatory burden and creating an inequity between minerals companies operating in remote areas depending on which type of housing they provide to their employees;

> the present FBT exemption for child-care benefits is restricted to the provision by an employer that either operates or co-manages a child-care facility on its business premises. This may be very difficult in a remote mine sites, and imposes a significant and unnecessary regulatory burden on impacted companies. Providing relief via the FBT regime would be more efficient and make child-care more widely available;

> water for remote area houses is not an excluded fringe benefit (it is not considered to be 'residential fuel'), but creates a (possibly unintended) inconsistency within the reportable FBT and increases its regulatory burden; and

> the regulatory burden associated with FBT reporting would be reduced if, rather than separate returns currently required, the Tax Office introduced a consolidated FBT return, appropriately designed (in consultation with industry).

4.3.4 Goods and Services Tax (GST)

Industry remains concerned by the potential uncertainty that can arise when commercial activities are influenced via the application of GST Taxation Rulings or interpretive positions that are at odds with normal practice. There are a number of areas in which the Tax Office and large companies could engage in dialogue to find ways to reduce compliance costs without compromising the integrity of the GST system.

4.3.5 R&D Tax Concession

Significant regulatory burden is currently incurred for companies in completing R&D Project Plans and subsequent Industry Research and Development Board (IR&DB) registration associated with the R&D Tax Concession program administered by AusIndustry.

Acquisitions and demergers part way through a month – end-of-month accounts cannot be adopted under current legislation, and significant compliance costs are imposed on companies that undertake an acquisition or a demerger part way through a month. Those costs arise from, for instance, the vast number of potentially complex calculations to apportion transactions and obligations between the two entities. A Tax Office administrative power that granted it the ability to adopt end-of-month accounts (with appropriate safeguards) would significantly reduce those costs.

Recommendations:

> **The Taskforce recognise that regular consultation with peak industry bodies can assist in improving the structure and drafting not only of taxation laws, rules and guidelines, but also other areas of regulation, so that:**

– **the resulting regulations are more robust, are based upon explicit principles and on an understanding of industry; and**

– **the end result is legislation that is durable and capable of future modification without doing damage to the framework on which it is based; and**

> **The MCA favours a principled and consultative approach to tax reform as recommended by the Review of Business Taxation. specific examples of tax reform requirements in minerals tax areas are provided in Attachment C.**

4.4 Australian equivalent International Financial Reporting Standards

From 1 January 2005 all Australian entities have been required to prepare their financial statements under Australian equivalent International Financial Reporting Standards (Ae-IRFS). This is a response to the increased demand for improved and consistent standards of accounting throughout the world as businesses globalise.[26]

As noted above, the new standards came into force as at 1 January 2005. In addition, financial reporting requirements will call for comparative information for 2004 to be presented in accordance with Ae-IFRS as well.

There were forty-one Australian Accounting Standards in place and this requirement has had a far-reaching impact on industries such as the minerals industry, Australia's most globalised industry. Whilst it has been argued that the change will result in increased transparency in financial reporting, at the same time it has challenged the ways in which companies measure performance and communicate with investors and the financial markets.

[26] See, for example, Pearce MP, the Hon C (2005), *The Importance of Cross-Border Cooperation in an Environment of Global Capital Markets*, Speech to the IFRS Regional Policy Forum, Sydney, 24 October (see http://parlsec.treasurer.gov.au/cjp/content/speeches/2005/016.asp).

The Australian business community has generally welcomed this initiative as an important part of assisting companies in accessing international capital markets and achieving better comparability with international competitors. Whilst overall the benefits are clear, there are some important challenges for Australian companies working in the minerals industry.

While many countries are moving into an IFRS regime, the USA and Canada are not. Further, South Africa moved into a regime similar to IFRS some years ago and therefore does not face the implementation issues Australia is facing. Australia is therefore unusual in being a major minerals-reliant country entering this regime.

Importantly, from the perspective of the Taskforce, the minerals industry in Australia has long operated under a set of accounting rules that deal with certain unique aspects of the industry, through a specific Australian Accounting Standard (AASB 1022 *Accounting for the Extractive Industries*). Going into the Ae-IFRS regime, no such Standard presently exists.

The International Accounting Standards Board (IASB) plans to undertake a comprehensive project and preliminary work is currently underway through the AASB.

Recommendation:

> **To ensure the ongoing transition to Australian equivalent International Financial Reporting Standards does not impose an unnecessary regulatory burden on the Australian minerals industry, the Australian Accounting Standards Board be asked to ensure the International Accounting Standards Board's extractive industries reporting standard is developed expeditiously.**

4.5 Case Studies Regarding the Need for Coordinated Reform

4.5.1 Competition Policy

Competition Policy and Export Infrastructure

The MCA is a strong advocate for competitive and integrated national public road, rail and port infrastructure, which is critical to the continued competitiveness of the industry and the economic and social welfare of all Australians.

The Pilbara iron ore industry owns and operates highly integrated mining, transport and ship loading assets. This has produced very high levels of efficiency. These efficiencies are a major source of competitive advantage for Australia's globally traded iron ore. In fact, this integration has become so advanced that the facilities operate as a unified production process.

The Reserve Bank in its *Statement on Monetary Policy* in February 2005 [27] recognised that this model has been the most responsive to changes in market demand. So did the Prime Minister's Exports and Infrastructure Taskforce in its Report *Australia's Export Infrastructure* provided in May 2005. The Taskforce found **there was a stark contrast between:**

(a) **the more responsive vertically integrated transport chains** (particularly the Pilbara iron ore chains); **and**

(b) **those parts of the economy** (eg the Goonyella rail system and the Dalrymple Bay Coal Terminal at Mackay) "**where economic regulation sits between investors in export related infrastructure and users**" (page 2).

The different outcomes in cases (a) and (b) led the Taskforce to the conclusion that:

> the current economic regulatory framework is adversarial, cumbersome, complicated, time consuming, inefficient and subject to gaming by participants; and

[27] Reserve Bank of Australia (2005), *Statement on Monetary Policy*, Sydney, 18 February (see http://www.rba.gov.au/PublicationsAndResearch/StatementsOnMonetaryPolicy/statement_on_monetary_0205.html).

> there are too many regulators and regulatory issues are slowing down investment in infrastructure used by export industries. For example, the Queensland Competition Authority is responsible for access prices, regulation and arbitration for rail and port but the ACCC is responsible for considerations regarding the Queue Management System (QMS) at DBCT. These are complex issues but the Prime Minister's Taskforce found the process is often cumbersome and that time is lost due to lack of knowledge of the issues and some unnecessary research undertakings. It is clear that such specialised inquiries require expert knowledge. As an example, the coal industry found the ACCC's knowledge of the PWCS CDS helped it to make a more speedy decision on DBCT's QMS application.

In the long run, it is hard not to accept a case for examining "the scope for establishing a single national regulator or in other ways reducing the number of regulators affecting Australia's export oriented infrastructure." [28] The challenge is how best to transition from the current to this longer-term solution.

The MCA considers the question of whether there is an infrastructure crisis in Australia to be a moot point. The MCA is more concerned in seeking a balance between the needs of today and the demands of tomorrow

The best approach to addressing these needs involves:

> **relying on the market**: i.e. providing a presumption that issues to do with export infrastructure access and pricing are best left to the market via commercial negotiation between the infrastructure providers and users;

> where regulation is warranted, light handed regulation applied in the first instance;

> more intrusive regulatory approaches to situations **where regulation has demonstrably failed**;

> Where there is direct public sector involvement in infrastructure, ensuring the circumstances do not develop where government, either advertently or inadvertently, abrogates its responsibility to ensure scoping and planning of essential multi-user export infrastructure and, where applicable, contribute to its funding and/or ensure recovery of costs from other users;

> public/private sector investment in infrastructure based on an **equitable sharing of the costs and benefits** of the infrastructure;

> a **consistent national regulatory framework** that promotes localised/regionalised and national decision making on the development and expansion of export infrastructure; and

> **providing opportunities for contestability** at regular intervals where private sector bodies are leasing public infrastructure. Success in renegotiation should only follow consideration by the government owner of the:

– adequacy of the lessee's response to exporters' infrastructure needs;
– provision of timely resolution to any conflicts that arise; and
– the "reasonableness" of access arrangements and charges.

Recommendations:

With regard to the export infrastructure regulatory system, there is a need to:

> **Narrow the scope of regulation to areas where there is a demonstrable case that it is needed and that regulation will in fact lead to a better outcome than non-regulation (including self-regulation);**

> **Better define regulatory objectives so that access proposals are evaluated on the basis of their "reasonableness" rather than requiring them to be optimal or "first best";**

> **Reduce the fragmentation and inconsistency in regulatory arrangements across the country; and**

> **Improve the administration of competition policy by:**

[28] Export and Infrastructure Taskforce Report, page 52.

- **streamlining its application across Australia "to ensure that universal and uniformly applied rules of market conduct apply to all market participants";** [29]
- **narrowing the scope of regulation to areas where it is clearly needed;**
- **clarifying regulatory objectives, with a primary objective being to foster efficient investment in infrastructure capacity; and**
- **reducing the inconsistency in arrangements.**

Competition Policy and Third Party Access

Recent competition policy access applications have introduced regulatory uncertainty and could provide a disincentive or cause delays in further investment in similar, highly efficient, integrated systems.

The Export Infrastructure Task Force in its report recommends that there should be a means to exempt such integrated facilities from the operation of Part IIIA of the *Trade Practices Act*. There are two recommendations made in this regard:

> that there be "an 'efficiency override' for applications for declaration of export related facilities under Part IIIA or its associated regimes. Part IIIA lacks any authorisation mechanism, based on efficiency, that could be used to limit the scope of access"; [30]

> that the "production process exemption" should be amended so as to make it "clear that the purpose of the exemption is to prevent the imposing of third party access in vertically integrated, tightly managed, logistics chains, especially those related to our export industries." [31]

The Taskforce also states, the purpose of such modifications to Part IIIA would be to "minimise the risk that access regimes would disrupt **the very areas of the economy that have performed best in the management of export related infrastructure**". [32]

The decision to exempt a facility on national interest grounds from the operation of Part IIIA could be made by the Treasurer. It would not be appropriate for a competition authority, such as the National Competition Council (NCC) or the Australian Competition and Consumer Commission (ACCC), to deal with national interest applications for exemption, as the focus of such bodies is on broader competition issues, not on efficiency or other national interest issues.

Some amendments to Part IIIA are currently before the Senate in *Trade Practices Amendment (National Access Regime) Bill 2005.* This Bill proposes, inter alia, to include a new "objects clause" into Part IIIA. This amendment would have the effect of requiring all decision makers to have primary regard to economic efficiency rather than more uncertain notions such as "industry development" and seek to encourage a consistent approach. This is a welcome development.

However, Part IIIA still does not provide sufficient protection via the public interest criterion in Section 44G(2)(f) of the Trade Practices Act. This is the last of the criteria to be satisfied, it is expressed in the negative (ie, 'is access against the public interest', rather than 'is access in the public interest') and it is administered and applied by the NCC and the Australian Competition Tribunal (ACT), both of which have technical competition considerations (which includes, but is broader than, economic efficiency) as their focus and must be mindful of past and future access precedents that apply to, or will flow from, their decisions. The designated Minister's decision can be appealed and overturned by the ACT.

To clarify the position once and for all and meet the concerns raised in the Prime Minister's Exports and Infrastructure Taskforce, **the MCA recommends that Part IIIA (of the Trade Practices Act 1974) be amended**

[29] Second Reading Speech, Competition Policy Reform Bill, 1995, 20 June 1995.
[30] Prime Minister's Exports and Infrastructure Taskforce Report, **Australia's Export Infrastructure**, Commonwealth of Australia, May 2005, page 39.
[31] Ibid, page 40.
[32] Ibid, emphasis added.

to provide for an "efficiency override", whereby key infrastructure facilities could be declared exempt from third-party access by The Treasurer.

The MCA also endorsed the Taskforce's findings that:

> "the Government, where it has powers to do so, should direct regulatory agencies that are within its control and are regulating export orientated infrastructure to consider, in reaching regulatory decisions relevant to logistics chains, the implications of those decisions **for the chain as a whole**."[33] This statement recognises that the productivity of infrastructure assets is significantly affected by the extent to which investment in infrastructure itself is consistent and coordinated with other investment decisions being made along the logistics chain;[34]

> that the "greatest impediment to the development of infrastructure necessary for Australia to realise its export potential is the way in which the current economic regulatory framework is structured and administered." To address this, the Taskforce recommends examining "the scope for establishing a single national regulator or, in other ways, reducing the number of regulators affecting Australia's export oriented infrastructure" – a recommendation subsequently endorsed by COAG.[35]

The MCA has concerns however with recommendations 3 and 4 of the Taskforce report (refer **Attachment B**). These deal with (a) the way that access regimes are developed for export infrastructure and (b) the declaration of an export infrastructure facility under Part III A of the *Trade Practices Act.* The Minerals Council recommends these **recommendations need further refinement and this should be accomplished via a working group of state and federal officials and key peak industry representatives.**

Recommendations:

> **Part IIIA of the Trade Practices Act 1974 be amended to provide for an "efficiency override", whereby key infrastructure facilities could be declared exempt from third-party access by the Treasurer;**

> **A government/industry working group be set up to assist in the development of the Prime Minister's Exports and Infrastructure Taskforce's Recommendations 3 and 4.**

4.5.2 A Single National Ballast Water Management Framework for Shipping

The MCA supports the implementation of a nationally consistent, regulatory framework for ballast water management aimed at managing the risk of marine pest incursions and translocations. This framework should also be consistent with the International Maritime Organisation's (IMO) Ballast Water Convention and other existing international maritime regulation frameworks.

The shipping industry is a well-organised global industry and operates within a highly regulated environment established by the IMO and implemented by nation states. Global consistency in regulation is of paramount importance to shipping operations and services and is achieved through consistent national implementation of international conventions.

Understanding obligations and requirements under IMO regulations (and thence under Australian law), is a fundamental aspect of ship operation. The industry has a proven record of compliance with these existing safety and environmental regulations.

The Australian Quarantine and Inspection Service is to be commended for its implementation and management of Australia's mandatory ballast water requirements since 1 July 2001, which have enabled industry to demonstrate its ability to comply with the Australian requirements.

The MCA supports a non-prescriptive model to deliver an acceptable balanced outcome in line with the objective of the IMO Ballast Water Convention and Australia's implementation of this Convention. Other options are far more invasive, more expensive and administratively complex. International vessels are aware of Australia's strict

[33] Export and Infrastructure Taskforce Report, page 6 of the Report, emphasis added.
[34] See also Productivity Commission (2005), *Review of National Competition Policy Reforms*, Inquiry Report No. 33, February, page 210ff.
[35] Export and Infrastructure Taskforce Report, page 2 and page 52 respectively.

Port State Control and of our ballast water management requirements and, given this experience, are unlikely to deliberately attempt to breech what they have already experienced in terms of policy arrangements in Australia. Similarly, inter- and intra- state movements of Australian flag shipping is aware of the implications of any failure to observe Australian Maritime Safety Authority, state of federal quarantine requirements, or any other requirement by law.

Recommendation:

> **The MCA recommends adoption of a nationally consistent and harmonized, non-prescriptive model for national ballast water management to minimize the risk of marine pest incursion or translocations, rather than other more prescriptive options; and**

> **A single national charge be levied on a quarterly basis for ship movements around the Australian coast rather than each jurisdiction having its own arrangements and separate charging regimes.**

4.5.3 National Pollutant Inventory

The National Pollutant Inventory (NPI) , administered by the Commonwealth Department of the Environment and Heritage, has been a key area of interest for the MCA during 2005. The NPI is currently undergoing a review by the Environment Protection and Heritage Council. The NPI provides publicly accessible information on pollutant emissions via the internet, and is intended to assist communities determine which pollutants are being released in their local area. This annual collation and reporting of data for the 90 substances covered under the NPI represents a significant commitment of resources within the minerals industry.

The MCA remains supportive of the role of the NPI in meeting the community's right to know regarding its exposure to pollutants, and their potential community and environmental health risks, and has contributed towards the development and refinement of the NPI since its inception.

The MCA, however, remains concerned at some of the proposed changes to the NPI, as these do not address the some of the key weaknesses in the existing scheme and in fact, diverge from the very intent of the NPI – the public's right to know about significant pollutant emissions. A case in point is the proposal to add the reporting of greenhouse gas emissions (see next sub-section) and waste transfers to the scope of the NPI. Neither of these proposed reporting areas represent a release of toxic pollutants to the environment and adding these areas to the NPI would represent a very significant additional cost to industry, with little discernable public utility, and would place additional pressure on an already under-resourced scheme.

The MCA also considers that there is a pressing need for an immediate and ongoing increase in the resources allocated to the NPI. In particular, the ongoing failure by government to adequately fund the NPI has manifested itself in areas such as the lack of adequate contextual data and the failure to keep pace with improvements in measurement and reporting techniques, and the updating of handbooks (the Mining Handbook is long since out of date). The significant gaps in the contextual information on substances are a particular problem, as it makes it difficult for users to form an accurate view of the risks from an emission.

The MCA notes that the NPI is a little-used resource by the community, with only 6% of the community even aware of its existence, with regular active users representing a small fraction of this. Providing a more effective, efficient and informative online resource, particularly through the provision of more accurate and easily accessible contextual information would be one strategy for improving the use of this resource.

Recommendation:

> **More resources should be applied to the National Pollutant Inventory to improve its focus, provide adequate contextual data, update the Mining Handbook, improve the National Pollutant Inventory's measurement and reporting techniques and develop a more effective, efficient and informative on-line resource;**

> **Resources need to be directed at capacity building in State and Territory governments to ensure that a single process exists for the electronic reporting of information and its inclusion in the national database; and**

> **Regulators should develop an understanding of the limitations of the NPI data and its inappropriateness as a proxy data source in lieu of collecting proper scientific data on emissions.**

4.5.4 Harmonized, coordinated Single Greenhouse Gas Reporting Regime

The MCA strongly supports the adoption of a nationally consistent and co-ordinated approach to climate change policy across all jurisdictions in Australia.

Such an approach is essential if cost-effective and equitable solutions are to be implemented. Currently a number of State Governments are moving ahead with the development and implementation of their own greenhouse policy strategies and reporting measures.

The MCA is particularly concerned about the risks and uncertainties of such un-coordinated national and State-based measures.

The MCA is strongly supportive of public greenhouse gas (GHG) emissions reporting consistent with international standards and consistently applied nationally.

TABLE 5.1: SOME CURRENT GREENHOUSE GAS REPORTING REGIMES

COMMONWEALTH MEASURES	Greenhouse Challenge Plus Program Greenhouse Gas Abatement Program National Pollutant Inventory (Proposed greenhouse reporting regime currently being considered – refer to MCA submission)
STATE MEASURES **Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002** 13% Gas" Cleaner Energy Strategy	 The Electricity Supply Amendment Act establishes a greenhouse gas benchmark scheme for the electricity industry in NSW. The target is set as a 5% reduction in per capita GHG emissions from 1989-90 levels by 2007, equating to a benchmark of 7.27 tonnes per capita in 2007. Licence obligations for electricity retailers will be put in terms of emissions performance against a specified benchmark. The Act and Scheme will override any earlier requirements to negotiate GHG reduction strategies. Queensland Energy Policy - A cleaner energy strategy Program aimed at encouraging the diversification of the states energy mix towards the greater use of gas and renewables. It requires Queensland energy utilities to provide at least 13% of Queensland's energy needs from gas from 1 January 2005 Various state governments (eg WA and South Australia) are also developing their own greenhouse strategies and an Inter-Jurisdictional Working Group is developing an Emissions Trading proposal for consideration by First Ministers. The next meeting of Ministers is on 20 December 2005.
INTERNATIONAL STANDARDS Draft ISO 14064: *Greenhouse Gases* [in final draft international standard stage – expected to be released as a final draft standard in early 2006] International measurement and reporting guidelines	 *PART 1 – Specification for the quantification, monitoring and reporting of organization emissions and removals* PART 2 – Specification for the quantification, monitoring and reporting of project emissions and removals PART 3 – Specification with guidance for validation, verification and certification Validation and verification. Draft ISO 14065: *Greenhouse Gases - Requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition* Greenhouse Gas Protocol sponsored by the World Business Council for Sustainable Development (WBCSD)

Australia's emissions are reported voluntarily and publicly through a number of channels and the MCA and other members of the Australian Industry Greenhouse Network have jointly written to relevant Australian and State/Territory Government ministers to advise they are prepared to engage with governments to devise reporting arrangements to satisfy any reasonable requirements. Once developed and implemented, such an approach would enable the removal of existing inefficient state reporting requirements, reducing the compliance burden on industry and harmonizing reporting across the nation, consistent with internationally accepted standards.

The most important criterion, from industry's perspective is that GHG emissions reporting in Australia should be managed in a single, national system, in accord with internationally recognised measurement and reporting guidelines like the Greenhouse Gas Protocol sponsored by the World Business Council for Sustainable Development (WBCSD). Such a system would be efficient and the reporting consistent for industry and government.

Proposal to Include Greenhouse Gases in the National Pollutant Inventory (NPI)

Australia's Environment and Heritage Ministers are examining a proposal to include greenhouse gases in the NPI in the context of a broader review of the NPI. The Environment Protection and Heritage Council (EPHC) is also examining other options for streamlined company reporting of GHG emissions in cooperation with the Ministerial Council on Energy (MCE).

The MCA believes there is a better framework for Australia for GHG emissions reporting than the NPI. Many of our members currently report emissions to air under the NPI and, from this experience, consider the NPI to be an inappropriate platform for delivery of GHG information to the public.

The reporting of greenhouse gas emissions needs to be more informative than is possible under the NPI. For policy purposes, more contextual information is required, concerning energy use, production processes and output, for example. Prospective future policy developments on greenhouse — domestically and internationally — demand a degree of flexibility not possible under the NPI. By contrast, the WBCSD-sponsored protocol and the emerging international standard ISO 14064, anticipate this requirement, as the industry/government *Greenhouse Challenge Plus* program recognises.

The National Greenhouse Gas Inventory (NGGI), which is based on an International Panel on Climate Change protocol, is another reporting option and is capable of further industry and regional disaggregation. These options raise the profile of GHG reporting rather than submerge it under a broader reporting mechanism like NPI.

There are important legal and commercial reasons why industry does not wish to have carbon dioxide, methane and other greenhouse gases included in the NPI and legally defined as either wastes or pollutants. Methane, in particular, is sold commercially as natural gas and LNG. This important business could be prejudiced if contingent liability concerns associated with sale and disposal of pollutants and wastes are raised in respect of trade in natural gas.

Also, identifying carbon dioxide as a waste might raise legal questions about treaty obligations and liability, seriously impede the demonstration and deployment of carbon geosequestration technologies which, amongst other means of carbon capture and storage, are now widely recognised to be an essential component of any global effort to stabilise concentrations of GHGs in the atmosphere.

The importance of carbon dioxide not being classified as a waste or hazardous substance was recognised in the final report of the Ministerial Council on Mineral and Petroleum Resources' Carbon Dioxide Geosequestration Working Group to the Council's Standing Committee of Officials last year, and we understand this was endorsed by all jurisdictions.

Recommendation:

> **The various Commonwealth and State Government Greenhouse Strategies and reporting initiatives be harmonised as part of an effective *national* policy response to climate change with strong policy co-operation and co-ordination across all Australian jurisdictions and led by the Commonwealth.**

4.5.5 Occupational Health and Safety – National Agenda

The MCA supports a nationally consistent approach to occupational health and safety regulation in the minerals sector.

Key areas of focus are:

> national consistency in both legislation and its application;

> opposition to the introduction of a separate statutory offence of industrial manslaughter either as a sentencing penalty or as a separate crime of industrial manslaughter,

Nationally consistent legislation and applications

The current approach to OHS regulation in the minerals sector is based on 8 separate State / Territory legislative regimes resulting in inefficiency, unnecessary cost, complexity and uncertainty for industry. The extremely aggressive approach by the inspectorate to incident investigation, the prosecution of individuals through the courts, and the potential for adoption of increasingly restrictive state occupational health and safety legislation, is undermining the industry's capacity to share information and learn from experience.

While the National Mine Safety Framework (NMSF), endorsed by the Ministerial Council on Minerals and Petroleum Resources (MCMPR) in March 2002, was intended to achieve national consistency in relation to legislation, enforcement, compliance, competency, data, consultation and research, implementation has been very slow. This has largely been due to a lack of a dedicated implementation team, no specific resource allocation and poor coordination of effort. While policies are generally consistent, it is in the application of those policies where differences occur.

The minerals industry is concerned that the responses to recent state reviews in Western Australia, NSW and Queensland have the potential to undermine efforts to achieve national consistency specifically through the NMSF, and has drawn its concerns to the attention of the MCMPR and its Standing Committee of Officials.

The MCA considers it is timely for Australia to adopt a single national OHS regulatory system for the minerals industry based on outcomes and systems rather than prescription. The ultimate goal should be a single piece of national legislation supplanting the existing state legislative frameworks.

A national OHS regulatory system of the minerals sector should:

> incorporate high level concepts founded in a risk management preventive systems approach to OH&S;

> embrace the requirement for the development of safety plans with attendant compliance, enforcement and verification provisions;

> emphasise models which place the primary onus of responsibility for risk management with the company (providing for flexibility to tailor safety management plans to company specific circumstances) and incorporate a regulatory role in both the internal and external audit and monitoring of preventive systems safety management plans; and

> ensure support systems underpin the safety plans, such as agreed standards.

Prosecution and Industrial Manslaughter

The industry is also concerned at the inconsistent approach to industrial manslaughter laws across Australia with differences in penalties, length of jail terms, the nature of an offence subject to prosecution, the availability of defences and the basic rights of appeal.

The MCA opposes:

> prosecutions that are pursued as part of an industrial agenda or could be construed as politically motivated;

- specific industrial manslaughter laws that seek to identify industrial manslaughter as a separate crime or, extend existing sentencing penalties to gaol terms for Directors;
- specific industrial manslaughter laws forming part of occupational health and safety legislation, separate and discrete from consideration of negligent, wilful or reckless behaviour causing fatalities or other serious injuries under the Crimes Act;
- the current system in New South Wales where alleged breaches of criminal law in respect of occupational safety and health are heard in the arbitration courts, rather than the criminal courts; and
- the transfer of regulatory frameworks governing the safety and health of operations to agencies with responsibility for workers' compensation.

The MCA advocates:

- policies directed towards before the fact prevention, rather than after the fact retribution;
- the rationale for enforcement to be based primarily on the desire to improve standards at a particular mine and across the industry;
- a nationally consistent approach to enforcement policies and their implementation; and
- any judgement of the public interest in relation to a prosecution be based on considerations of equitable treatment (same response for the same circumstances), efficiency (could the limited resources be better used doing something differently), and effect (would the prosecution improve safety performance).

The MCA considers a national approach to OHS regulation of the minerals sector an essential pre-requisite to the Australian minerals industry maintaining its global leadership in safety performance.

Recommendations:

- **It is timely for Australia to adopt a single national Occupational Health and Safety regulatory system for the minerals industry based on outcomes and systems rather than prescription; and**
- **There should be a nationally consistent approach to enforcement policies and their implementation should be based on the existing legislative regime for negligent, wilful or reckless behaviour causing fatalities or other serious injuries under the Crimes Act.**

MINERALS COUNCIL OF AUSTRALIA
DECEMBER, 2005

ATTACHMENT A: THE VICTORIAN REGULATORY SYSTEM

The following is a very simple explanation of project approval processes in Victoria. Other States use different terms and slightly varying procedures but are essentially similar.

TO DRILL ON AN EXPLORATION LICENCE

1. Apply for an Exploration Licence (EL)
2. ELA advertised in local and general newspaper
3. Objections (if any) assessed by Department.
4. If EL covers Crown land then a Right To Negotiate (RTN) agreement or Indigenous Land Use Agreements (ILUA) is required with native title claimants (if any)
5. Minister for Resources grants EL
6. Licensee can commence low impact exploration (no drilling)
7. Work Plan (including location of drill sites) submitted to Department.
8. If EL covers Restricted Crown land then consent of the Minister for Environment required
9. Rehabilitation Bond lodged
10. Compensation agreements with land holders registered
11. Work plan approved
12. The hole is drilled

TO DIG ON A MINING LICENCE

1. Apply for a mining licence (MIN Application)
2. MIN Application is advertised in local and general newspaper
3. Objections (if any) are considered by Department.
4. If MIN Application covers Crown land then a RTN agreement or ILUA is required with native title claimants (if any)
5. Minister for Resources grants MIN
6. Mark-out the licence boundaries
7. If on agricultural land then prepare a statement of economic significance
8. Draft work plan in consultation with Department of Sustainability and the Environment (DSE), Department of Primary Industries (DPI) and Council officers
9. Work plan endorsed by DPI
10. Rehabilitation bond assessed by DPI
11. Apply for planning approval, either:
    - apply for a planning permit from local municipal council; or
    - submit an Environment Effects Statement (EES) to the Minister for Planning
12. Planning approval granted
13. Work plan approved
14. If MIN covers Restricted Crown land then consent of the Minister for Environment required
15. Rehabilitation bond lodged
16. Compensation agreements with land holders registered
17. Work Authority granted and registered
18. The hole is dug

EXTRACT FROM "THE VICTORIAN REGULATORY SYSTEM", VICTORIAN COMPETITION AND EFFICIENCY COMMISSION, JAN 2005

(1) DEPARTMENT OF PRIMARY INDUSTRIES: MINERALS AND PETROLEUM REGULATION BRANCH

Objectives*

> To provide a consistent, transparent and secure tenement administration regime for the mineral, petroleum and extractive industries;

> To provide health, safety and environmental standards, monitoring and enforcement to ensure that industry

operations meet community expectations; and

- To partner industry and provide leadership in achieving regulatory reform.

Administered Acts and Regulations*

Mineral Resources Development Act 1990

- Mineral Resources Development Regulations 2002

Occupational Health and Safety Act 1985

- Occupational Health and Safety (Asbestos) Regulations 2003
- Occupational Health and Safety (Certificate of Plant Users and Operators) Regulations 1994
- Occupational Health and Safety (Confined Spaces) Regulations 1996
- Occupational Health and Safety (Hazardous Substances) Regulations 1999
- Occupational Health and Safety (Incident Notification) Regulations 1997
- Occupational Health and Safety (Issue Resolution) Regulations 1999
- Occupational Health and Safety (Lead) Regulations 2000
- Occupational Health and Safety (Major Hazard Facilities) Regulations 2000
- Occupational Health and Safety (Manual Handling) Regulations 1999
- Occupational Health and Safety (Mines) Regulations 2002
- Occupational Health and Safety (Noise) Regulations 2004
- Occupational Health and Safety (Plant) Regulations 1995
- Occupational Health and Safety (Prevention of Falls) Regulations 2003

Dangerous Goods Act 1985

- Dangerous Goods (Explosives) Regulations 2000

Total Number of Acts 7

(2) DEPARTMENT OF SUSTAINABILITY AND ENVIRONMENT: CROWN LAND MANAGEMENT

Objectives*

- To oversee the appropriate management and administration of Crown land.

Land Act 1958

- Land Act Regulations 1996

Crown Land (Reserves) Act 1978

(3) LAND STEWARDSHIP AND BIODIVERSITY

Objectives*

- To improve the management and use of public and private land to enhance, protect and restore biodiversity assets and ecosystem services; and
- To establish Victoria as a leader in environmental sustainability debate and practice, making full use of the capabilities of government and of strategic partnerships.

Name of Act No. of times amended*

Flora and Fauna Guarantee Act 1988

- Flora and Fauna Guarantee Regulations 2001

(4) EPA VICTORIA

Objectives*

> To protect and enhance Victoria's environment by protecting the beneficial uses of our air, water and land from the adverse impacts of waste and unwanted noise.

Enabling Acts and Regulations*

Environment Protection Act 1970

> Environment Protection (Fees) Regulations 2001
> Environment Protection (Prescribed Waste) Regulations 1998
> Environment Protection (Scheduled Premises and Exemptions) Regulations 1996
> Environment Protection (Vehicle Emissions) Regulations 2003
> State Environment Protection Policy (Air Quality Management)
> State Environment Protection Policy (Ambient Air Quality)
> State Environment Protection Policy (Control of Noise from Commerce, Industry and Trade)
> State Environment Protection Policy (Groundwaters of Victoria)
> State Environment Protection Policy (Prevention and Management of Contaminated Land)
> State Environment Protection Policy (Waters of Victoria)
> Industrial Waste Management Policy (National Pollutant Inventory)
> Industrial Waste Management Policy (Prescribed Industrial Waste)
> Industrial Waste Management Policy (Waste Acid Sulfate Soils)
> Industrial Waste Management Policy (Movement of Controlled Waste between States and Territories)
> Waste Management Policy (Ballast Water)

(5) PARKS VICTORIA

Objectives*

> To conserve, protect and enhance environmental and cultural assets; and
> To contribute to the social and economic well being of Victorians.

Parks Victoria Act 1998
National Parks Act 1975

> National Parks (Park) Regulations 2003

Water Industry Act 1994

> Water Industry (Reservoir Parks Land) Regulations 2001
> Water Industry (Waterways Lands) Regulations 2002

Crown Land (Reserves) Act 1978

> Land Act Regulations 1996

Land Act 1958

Forests Act 1958

B. OTHER DEPARTMENTS:

(6) ESSENTIAL SERVICES COMMISSION

Objectives*

> To provide continued and expanded support of the Victorian Government's microeconomic reform programme; and

> To protect the long-term interests of Victorian consumers with regard to the price, quality and reliability of essential services' (Essential Services Commission Act 2001)

Enabling Acts and Regulations*

Essential Services Commission Act 2001

> Essential Services Commission Regulations 2001

Electricity Industry Act 2000

National Electricity (Victoria) Act 1997

(7) OFFICE OF THE CHIEF ELECTRICAL INSPECTOR

Objectives*

> To minimise injury, loss of life and damage to property due to electrical causes;

> To maximise compliance by all sectors of the electrical industry and other associated industries;

> To continually review the legislative and regulatory framework under which the OCEI operates to ensure its effectiveness; and

> To maximise proclaimed electrical products carrying the energy rating label and meeting minimum energy performance standards.

Enabling Acts and Regulations*

Electrical Safety Act 1998

> Electricity Safety (Electric Line Clearance) Regulations 1999

> Electricity Safety (Equipment Efficiency) Regulations 1999

> Electricity Safety (Equipment) Regulations 1999

> Electricity Safety (Infringements) Regulations 2000

> Electricity Safety (Installations) Regulations 1999

> Electricity Safety (Management) Regulations 1999

(8) STATE REVENUE OFFICE

Objectives*

To provide customers with quality revenue management services which are fair, efficient and deliver benefits for all Victorians.

Enabling Acts and Regulations*

Taxation Administration Act 1997

> Taxation Administration Regulations

Debits Tax Act 1990

> Debits Tax Regulations 1998

Duties Act 2000

Financial Institutions Duty Act 1982

Land Tax Act 1958
- Land Tax Regulations 1998

Pay-roll Tax Act 1971
- Pay-roll Tax Regulations 1998

(9) VICTORIAN WORKCOVER AUTHORITY

Objectives
- To help avoid workplace injuries occurring;
- To provide reasonably priced insurance for employers;
- To help injured workers back into the workforce;
- To enforce Victoria's occupational health and safety laws; and
- To manage the workers' compensation scheme by ensuring the prompt delivery of appropriate services and adopting prudent financial practices.

Enabling Acts and Regulations*

Accident Compensation Act 1985
- Accident Compensation Regulations 2001

Accident Compensation (WorkCover Insurance) Act 1993
Accident Compensation (Occupational Health and Safety) Act 1996
Dangerous Goods Act 1985
- Dangerous Goods (Storage and Handling) Regulations 2000

ATTACHMENT B: ANALYSIS OF THE EXPORTS AND INFRASTRUCTURE TASKFORCE'S RECOMMENDATIONS 3 AND 4

(A) Access regime conditions

Recommendation 3 *Where more heavy handed regulation is warranted, the Coalition of Australian Governments make changes to the regulatory framework to improve timeliness, consistency and clarity of objectives through the elements shown in the left hand column in the table below.*

The MCA tested this suggestion utilising the Prime Infrastructure [36] application for third party pricing and access arrangements at Dalrymple Bay Coal Terminal (DBCT) in 2004/05 as a test case.

The "semi-privatisation model" provided a lease for 50 years with an option to extend the lease by a further 49 years. Coal producers were excluded from bidding for the lease.

The MCA suggests recommendation 3 is deficient in the areas set out in the following table (column two).

ASSESSING RECOMMENDATION 3 OF THE TASKFORCE REPORT

RECOMMENDATION 3 ELEMENTS	*MCA COMMENT*
• Place time limits on all regulators and parties to the regulatory process to streamline processes and provide more certainty about the time involved at each stage.	• Agreed, but report does not explain or explore what sort of time limits are to be set.
• Apply a simplified "reasonableness" test to proposals by infrastructure owners to test if the access regime being proposed by the infrastructure owner is reasonable in the commercial circumstances and falls within a reasonable range of outcomes given statutory objectives.	• Agreed, but the suggested "reasonableness test" requires greater specificity. • There is a need to streamline and reduce the number of parameters to be considered by the regulator (eg given this risk profile, the level of return should be in such and such a range that suggests the following price and tonnage triggers). • COAG should develop a set of principles to apply to ensure the regulator is not dealing with unnecessary detail or requiring information from the users that is not germane to the case. • Similarly, there should be a process for ensuring the transparent application of regulatory processes, to avoid the situation arising where there are significant disagreements between the regulator and infrastructure provider over the capacity of a rail system *yet neither* the regulator's nor the infrastructure provider's assessment is made available in developing an industry response to the access undertaking. • A whole of chain, whole of government approach should be adopted to recognise that regulators of different levels of government may be responsible for different but interconnected aspects of an export transport chain and that efficiency is an overriding consideration.

[36] Now Babcock and Brown infrastructure

• Subject to a time limit, provide the opportunity for "merits review" but limit this to those issues in dispute and using only the information before the regulatory decision maker at the time the decision was made (subject to parties having a right of reply to the regulator's arguments).	• Agreed – this provides for a restriction to those areas in dispute but the time limit is not specified. • A whole-of-chain and whole of government approach should be applied: the law should ensure that *competition* is improved provided it is not at the expense of the *efficiency* of the whole transport chain.
• Parties may appeal to the Australian Competition Tribunal (ACT) if the regulator fails to make a decision by the end of the time limit set – but the ACT itself has a time limit to make a determination.	• Agreed. Time limits need to be specified. • The ACT should have regard to the implications of the decision on the efficiency of the whole transport chain. • An efficiency override or clear objects clause in the legislation should be included to make it clear that competition policy should not lead to less efficient outcomes.

(B) For applications for the regulator to declare a service

Recommendation 4 *That in circumstances where a six month period has passed and the relevant regulatory process is at an impasse, with no acceptable regulatory outcome in prospect, the federal Minister be given the power to declare the service, without reference to the National Competition Council and without further appeal. The matter would then be referred to the Australian Competition and Consumer Commission for arbitration (again on the 'reasonable test', with a strict six months time limit, and with the right of appeal to the ACT).*

The MCA also tested this suggestion utilising various applications for third party access in vertically integrated, tightly managed, export logistics chains. It found that **recommendation 4 was deficient in that:**

(a) **it does not provide for an "efficiency override" to prevent the declaration of export related facilities under Part IIIA or its associated regimes as recommended by the Taskforce (at page 39);**

(b) **it does not provide for a definition of the term "production process" to make it clear that the exemption is to prevent imposing third party access in vertically integrated, tightly managed, logistics chains, especially those related to export industries (as recommended by the Taskforce at page 40); and**

(c) **while the approach where a declaration is made allows for arbitration (by the ACCC) and appeal (by the ACT) time limits are only imposed in the case of the ACCC - not the ACT - and the same concern raised in regard to Recommendation 3 above regarding what is meant by the "reasonableness text" exists here.**

ATTACHMENT C: REGULATORY BURDEN IN THE TAXATION SYSTEM – SPECIFIC AREAS FOR REFORM

As outlined in Section 4.3, this Attachment provides further details on specific areas of Australian Government taxation and associated regulation which are unnecessarily burdensome, complex, redundant or duplicate regulations in other jurisdictions and, in particular, to indicate those areas in which regulation should be removed or significantly reduced as a matter of priority.

Fuel tax reform

Fuel tax has been a major issue for the minerals industry for many years. Fuel represents one of the principal variable inputs into the diverse, capital intensive, internationally competitive minerals industry. Policies in relation to the taxation of fuel are critical to both government revenue and the sustainability of export oriented business operations.

The MCA is fundamentally opposed to taxes on business inputs. A tax on business inputs distorts both production and consumption decisions, adversely impacting on resource allocation decisions and reducing overall economic welfare.

After many years of strong advocacy by the MCA, the Council welcomes the proposed changes to fuel tax arrangements announced in the Government's June 2004 *Energy White Paper* and presented in further detail in the Government's May 2005 *Fuel Tax Credit Reform Discussion Paper*,[37] even though they are constructed to be phased in over the next eight years.

The announced reforms, commencing on 1 July 2006, will effectively reduce fuel excise collections from businesses and households by around $1.5 billion phased in from 2008 to 2012. There will be significant benefits to the minerals sector and more broadly. Ultimately, fuel excise will only apply to business use of fuel in on-road applications in vehicles with a gross vehicle mass of less than 4.5 tonnes and private use of fuel in vehicles and certain off-road applications. When complete, the changes will contribute to meeting a key objective of removing taxes on business inputs – in this case, on all fuels, whether they are used for transport, minerals extraction, minerals processing, construction or so on.

It is vital to ensure, however, that the transition to the new fuel tax system and the ongoing administration of the new arrangements, due to impose an unnecessary regulatory burden on the Australian minerals industry and importantly during the transition to the new arrangements (prior to the further changes to eligibility in 2008 and 2012) the range of activities eligible for credits is not restricted.

The following key areas need to be addressed:

(i) Compliance costs

The papers notes the Fuel Tax Act will operate under the general compliance and administrative umbrella of the *Taxation Administration Act 1953*. Matters such as the operation of running balance accounts, the public and private rulings system, taxation objections, reviews and appeals and the collection and recovery of tax-related liabilities are administered under this Act.

Aggregating fuel tax credit claims in the running balance accounts will be problematic, as demonstrated by the recent Inspector-General of Taxation Report, *Review of Tax Office administration of GST refunds resulting from the lodgement of credit BASs*,[38] which found significant areas of concerns with the Tax Office's administration of the GST refunds, including the running balance account system.

While the MCA acknowledges that the primary focus of the May 2005 Discussion Paper is the legislative framework that will give effect to the Australian Government's policy, the administration and compliance

[37] Department of the Treasury (2005), *Fuel Tax Credit Reform Discussion Paper*, Canberra, 27 May (see http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=986).
[38] Inspector-General of Taxation (2005), *Review of Tax Office administration of GST refunds resulting from the lodgment of credit BASs*, Sydney, 19 January (see http://www.igt.gov.au/content/reports/GST_refunds/GST_refunds_Contents.asp).

regime to be administered by the Tax Office is a crucial element of the overall reform process, influencing crucially the regulatory burden that will be associated with the new regime.

Ensuring that the administration and compliance regime that underpins these reforms is as efficient and effective as possible will be crucial in ensuring that the benefits flowing to the industry and to the broader Australian economy are maximised and any unnecessary transitional and compliance costs are eliminated.

This will ensure that one of the primary objectives of the reforms – to minimise compliance costs – is, in fact, achieved.

Recommendation:

The MCA recommends the Tax Office commence detailed consultation with industry as soon as possible to ensure that the administration and compliance regime is developed appropriately.

(ii) Greenhouse Challenge Plus Program

Businesses claiming over $3 million each year in fuel tax credits must be members of the Greenhouse Challenge Plus Program.

Recommendation:

The MCA recommends that the transition to these new arrangements be as seamless as possible.

For example, an existing member of the Greenhouse Challenge Plus Program is currently claiming more than $3 million in energy credits and meeting all relevant requirements under both schemes should not be impacted by the transition to the new requirements post-1 July 2006. This is particularly important in light of the GST joint venture and GST group arrangements that are used by the industry;

This is particularly important in light of the GST joint venture and GST group arrangements that are used by the industry.

Recommendation:

In addition, the MCA recommends the Department of the Environment and Heritage (Australian Greenhouse Office) commence consultations on the details of these requirements as soon as possible to ensure that those impacted have sufficient time to prepare for the new arrangements.

(iii) E-grant

One of the key features of the reforms is that businesses will claim their fuel tax credits on the Business Activity Statement, thus aligning the mechanism for claiming fuel tax credits with the mechanism for claiming GST input tax credits.

The May 2005 *Discussion Paper* notes that "*… another arrangement – e-grant – allows for fuel claims to be made through a fuel supplier or fuel card provider. Almost all e-grant claims are for fuel used in road transport. These arrangements will be discontinued under the fuel tax credit system as they are contrary to the intent of the reform that all business claims for fuel tax credits will be made on the Business Activity Statement according to fixed monthly, quarterly or yearly reporting periods. In addition, third party arrangements do not fit with the wider tax implications that are intended to be met under fuel tax credit reform, such as accounting for other tax liabilities*".

The MCA is disappointed by this proposal, which would remove an arrangement that has been advocated by the industry for many years and, after only being introduced recently, is beginning to gain acceptance within the industry, particularly amongst larger claimants. This proposal also runs counter to one of the primary aims of the reforms – to lower compliance costs (and regulatory burden) for business.

Recommendation:

The MCA recommends the e-grant arrangement continue to operate under the arrangements post-1 July 2006.

(iv) De minimus principle

When the fuel tax credit system is fully implemented, business entities will no longer need to estimate fuel use in various uses at various times according to complex and inconsistent criteria. This will lead to a significant reduction in record-keeping required to substantiate entitlements.

Nevertheless, a number of sections in the May 2005 *Discussion Paper* that indicate complexity will remain. For example: an adjustment to the amount of fuel tax credit will need to be made where it turns out that the fuel is not used for a creditable purpose, such as when a supply of fuel that an entity has paid for or been invoiced for, is cancelled or not delivered or the fuel is lost, stolen or otherwise disposed of.

Recommendation:

In such cases, the MCA recommends reasonable de minimus or safe harbour requirements should be included in the legislation; for vehicles that travel both on and off-road reasonable de minimus or safe harbour requirements should be included in the legislation; and in addition, the discussion of incidental use of fuel could usefully include a definition of incidental and a simple safe harbour test.

Foreign resident withholding arrangements

On 11 May 2004, the (then) Minister for Revenue and Assistant Treasurer announced publicly that payments under contracts for the construction, installation and upgrading of buildings, plant and fixtures and for associated activities will be covered by the new foreign resident withholding arrangements.[39]

Regulations were issued on 3 June 2004 prescribing certain payments to be subject to a 5 per cent withholding. Regulation 44C of the *Taxation Administration Regulations 1976* states that a payment made under a contract entered into after 30 June 2004 (including payments to subcontractors) for 'works' or 'related activities' is prescribed.

Each of these terms is defined as follows:

Works is defined to include "the construction, installation and upgrading of buildings, plant and fixtures", citing the following examples:

> *Dam, electricity links, mine site development, natural gas field development, natural resource infrastructure, oilfield development, pipeline, power generation infrastructure, railway or road, residential building, resort development, retail or commercial development, upgrading airport, upgrading telecommunications equipment, water treatment plant.*

The Explanatory Statement for the definition of 'works' states that it is the ordinary meaning that is used and understood in the construction, infrastructure and resources sectors. It states that it is broadly the activity of creating or altering a physical asset such as a building or structure, changing the form of the earth such as earthworks, or a combination of such activities.

The term ***Related Activities*** is defined to include "activities associated with the construction, installation and upgrading of buildings, plant and fixtures", and the following examples are given:

> *Administration, assembly, de-commissioning plant, design, commissioning and operation of facilities, costing, engineering, erection, fabrication, hook-up, installation, project management, site management, supervision and provision of personnel, supply of plant and equipment, warranty repairs.*

Application of Provisions

The MCA argues the current Tax Office interpretation of the Regulations is inconsistent with the overall policy intent of the legislation. In particular, it was the MCA's understanding in discussions with the Treasury that the withholding tax on payments to non-residents on construction and related activities would only apply to the

[39] Coonan, Senator the Hon Helen, (then) Minister for Revenue and the Assistant Treasurer (2004), 'Foreign Resident Withholding Arrangements', *Media Release C030/04*, 11 August (see http://assistant.treasurer.gov.au/atr/content/pressreleases/2004/030.asp).

provision of relevant activities by non-residents **in Australia** and would not apply to the full imported capital cost of constructing or purchasing assets (as the Tax Office are inappropriately attempting to imply).

Section 6-5(3) of *Income Tax Assessment Act 1997* states that the assessable income of a foreign resident only includes income derived from sources in Australia. The source of the income derived from activities such as those included in 'works' or 'related activities' would generally be where the activities are undertaken. Thus it could be expected that only activities undertaken in Australia in respect of such activities should be captured.

In his letter to the MCA of 30 August 2004, the Minister for Revenue and the Assistant Treasurer, in response to a submission by the MCA, stated that:

> *"the regulation does not apply to payments in respect of which there would be no Australian income tax liability."*

The legislation itself supports this view, including sub-section 12-315(3) of the *Tax Administration Act 1953*, which states:

> *Before the Governor-General makes a Regulation for the purposes of paragraph (1)(b), the Minister must be satisfied that each payment set out in the Regulation is a payment of a kind that could reasonably be related to assessable income of foreign residents.*

Any interpretation that is contrary to this leaves open the possibility that the entire Regulation is invalid, as the Minister could not have otherwise been satisfied appropriately in accordance with sub-section 12-315(3).

The current Tax Office interpretation of the Regulations is therefore inconsistent with this policy, and the legislation. For example, the Tax Office has stated in written correspondence to the MCA that the withholding tax should apply to the full payments made in the following circumstances:

> the full imported capital cost of equipment when there is only minor associated installation performed in Australia; and

> the full cost of foreign engineering and consulting services undertaken overseas where there are brief visits made to Australia to take instructions.

Tax Office Administration – creating unnecessary compliance costs

The Tax Office's administration of the Regulation should change to become consistent with the policy intent of the Regulation as stated by the Minister and remove the significant administrative and financial impost on Australian industry caused by incorrect interpretation of the regulation, results in the following:

> foreign contractors charging more for their goods/services to compensate for lost time value of money (opportunity costs) and foreign exchange risk associated with large Australian dollar denominated tax refunds;

> in certain circumstances, contracts requiring Australian companies to bear the withholding tax cost; and

> costs of applying for a variation. NAT 11097-07.2005, the Tax Office's *FRWV withholding variation application* form,[40] requires over sixty questions to be answered, and requires Australian payers to procure the provision of information about foreign recipients which is complex and detailed, and completely irrelevant where foreign recipients have no relevant connection to Australia. Where, for example, an Australian payer imports a ready to install item of equipment that has been wholly manufactured overseas by a non-resident, these questions are irrelevant, and it does the tax system no credit to force payers to go through the significant regulatory burden involved in answering them. All that should be required is a statement from the Australian payer that the item has been wholly manufactured overseas, and the name and address of the supplier.

[40] Which can be found at http://ato.gov.au/individuals/content.asp?doc=/content/60234.htm.

Recommendation:

This is, in the MCA's view, one of the clearest examples of a specific area of Commonwealth Government regulation which is unnecessarily burdensome and complex. It should, as a matter of priority, be removed or significantly reduced.

The current entirely inappropriate situation it is most directly resolved by the Tax Office only levying the 5 per cent withholding tax on Australian sourced income of foreigners involved in 'works' and 'related activities'. It is submitted that a purposive interpretation of the Regulation, taking into account the Explanatory Statement, sub-section 12-315(3) of the Taxation Administration Act 1953, and the other background material produced by Treasury during the confidential consultation process, would allow the Tax Office to interpret the Regulation in an appropriate manner.

If such an outcome cannot be achieved, then the MCA recommends Regulation 44C of the Taxation Administration Regulations 1976 be amended (for payment(s) made under a contract entered into after 30 June 2004 (including payments to subcontractors)) to ensure the definitions of 'works' and 'related activities' read as follows (additional words added in [parenthesis]):

> *Works is defined to include "[works done in Australia on] the construction, installation and upgrading of buildings, plant and fixtures".*
>
> *Related Activities is defined to include "activities [undertaken in Australia] associated with the construction, installation and upgrading of buildings, plant and fixtures".*

These amendments would ensure that only one interpretation of the Regulation would be open to the Tax Office – that which is appropriately in accordance with the Minister's stated policy intent.

Fringe benefits tax

As currently enforced, the fringe benefits tax (FBT) raises compliance costs in a number of ways.

(i) Remote area housing

Minerals companies working in remote areas are obliged to provide housing for employees. The type of house varies depending on the location and size of mine. The Australian Government exempted all employees from FBT for remote area housing from 1 April 2000.[41]

Examples of remote area housing benefits which are intrinsically associated with the house but which are currently taxable are:

- reimbursement/payment of remote area home loan interest or rent (a 50 per cent reduction applies);
- certain housing ownership schemes and other housing benefits not meeting the exempt housing definition;
- electricity, gas or other residential fuel (a 50 per cent reduction applies);
- remote area holiday transport (as is customary in the minerals industry an employee working in a remote area may be reimbursed for the costs of travelling from, or provided with transport from the area for the purpose of having a holiday) (a 50 per cent reduction applies); and
- water (the 50 per cent reduction does not apply to water as it is not defined as a 'residential fuel').

Thus, the application of the housing exemption remains limited and accordingly there are many exceptions to the exemption. Also, the exemption does not extend to related services (such as power and water). This compromises the effectiveness of the exemption, increasing regulatory burden, and has an adverse impact on the

[41] For further details, see Costello MP, the Hon Peter, Treasurer (1999), 'FBT Exemption for Remote Area Housing to Help Regional Australia', *Media Release 079*, 25 November (see http://www.treasurer.gov.au/tsr/content/pressreleases/1999/079.asp).

fiscal competitiveness of Australia's minerals taxation system. This limited application of the exemption has created an inequity between minerals companies operating in remote areas depending on which type of housing they provide to their employees.

Recommendation:

The MCA recommends:

> **an extension and simplification of the application of the remote area housing exemption. This would correct the current inconsistencies between the FBT treatments on different arrangements for the provision of remote area housing;**

> **an exemption for other housing related remote area benefits (such as power and water). As remote area housing is intended to be exempt it would be consistent that services provided in relation to the housing itself should also be exempt; and**

> **an exemption for remote area holiday travel allowance.**

(ii) Child care facilities

In a similar way, the present FBT exemption in relation to child-care benefits is restricted as it exempts from FBT the provision of child-care services by an employer in only limited circumstances – the employer is required to either operate or co-manage a child-care facility on its business premises in order to take up the exemption.

This may be very difficult in a remote mine sites, and imposes a significant and unnecessary regulatory burden on impacted companies. As a consequence, the is a limited number of employers will be able and/or willing to take on such a responsibility and cost.

The Australian Government has acknowledged the high costs of child-care and has attempted to implement mechanisms to provide some relief in this regard. However, the mechanisms presently offered are complicated and administratively burdensome. Providing relief via the FBT regime would not only be more efficient but would also make it available to a much wider section of the population.

Recommendation:

> **The MCA recommends the Taskforce recommend to the Australian Government that it consider announcing the introduction of an FBT exemption in relation to childcare benefits. This may comprise widening the exemption available to consider child care in other circumstances (such as child care centres, home based care, nannies) and which can be utilised at all hours (assisting, particularly in a minerals industry context, with shift work, overtime, after-school care, emergency/sick care for children away from school).**

(iii) Reportable fringe benefits

In addition, certain benefits are excluded from the reportable fringe benefits requirements. These exclusions extend to remote area housing and residential fuel. However, fringe benefits in relation to water for remote area houses are not an excluded fringe benefit (as noted above, it is not considered to be 'residential fuel'). This creates what may be an unintended inconsistency within the reportable fringe benefits regime, increasing its regulatory burden.

Recommendation:

> **The MCA recommends that the list of excluded fringe benefits (Section 5E(3) of the Fringe Benefits Tax Assessment Act 1986) be extended to include fringe benefits in relation to water for remote area housing.**

(iv) Consolidated FBT return

Finally, the regulatory burden associated with FBT reporting would be reduced if, rather than the separate returns currently required, the Tax Office introduced a consolidated FBT return, appropriately designed (in consultation with industry).

Recommendation:

> **The MCA recommends the Tax Office develop (in consultation with industry) a consolidated FBT return to replace the separate returns currently required.**

Goods and Services Tax (GST)

The GST was introduced with a view to replacing a range of business related taxes, fees and charges with a regime that taxes outputs. A number of administrative and interpretive issues connected with the regime remain of concern to industry and/or are outstanding, imposing unnecessary regulatory burden on the industry.

The industry remains concerned by the potential uncertainty that can arise when commercial activities are influenced via the application of GST Taxation Rulings or interpretive positions that are at odds with normal practice.

Specific areas of concern are as follows:

> GST compliance costs are a significant cost to large companies. The Tax Office and large companies should engage in dialogue to find ways to reduce compliance costs without compromising the integrity of the GST system. Some areas for consideration are:

- a taxable transaction between related entities that are not in the same GST Group where the recipient entity acquires the goods/services solely for a creditable purpose should fall outside the GST regime;
- taxable transactions between non-related entities but confined to a specific class of transaction within a specific industry should fall outside the GST regime;
- manager/operator of multiple joint ventures (JVs) to report GST obligations of the JVs in the manager/operator Business Activity Statement (BAS);
- streamline reporting global GST obligations of members within a GST Group;
- transactions between parties where the consideration is non-monetary. For example, the requirement to issue tax invoices in relation to barter transactions represents a significant administrative burden for business. The need to issue tax invoices (in many cases manually created tax invoices) should not be applicable in business-to-business transactions where parties are entitled to a full input tax credit (that is, the transaction is revenue neutral), which in the case of barter transactions is almost always the case. It is important to note both parties to the barter transaction are exposed to interest and non-deductible penalties if they do not possess valid tax invoices; and
- the merits of an accreditation system should be investigated under which the Commissioner could exempt transactions such as those above if both the supplier and recipient are meet specified criteria and are accredited by the Commissioner.

Recommendation:

> **The MCA recommends the Taskforce recommend to the Australian Government that a 'Working Party' be established to examine and report on ways of reducing compliance costs without compromising the integrity of the GST system.**

Other

(i) R&D Tax Concession

At present, significant regulatory burden is incurred for companies in completing R&D Project Plans and subsequent Industry Research and Development Board (IR&DB) registration associated with the R&D Tax Concession program administered by AusIndustry.[42]

Annual registration of R&D activities with the IR&D Board is a prerequisite for claiming the Tax Concession. Registration applications must be lodged annually within ten months of the end of the company's year of income. In addition, a company that undertakes research and development activities is required to prepare a research and development plan (R&D Plan) that covers the research and development activities undertaken by the company. A tax deduction is not allowable for activities commenced after 30 June 2002 that are not included in the R&D Plan prior to their commencement.

The MCA notes AusIndustry is currently completing an evaluation of the new elements of the R&D Tax Concession (the Tax Offset and the 175 per cent Premium, announced in the 2001 innovation statement *Backing Australia's Ability*). Once this evaluation is completed, AusIndustry should commence an evaluation of the administrative/registration requirements of the R&D Tax Concession (including the preparation of R&D Project Plans), to reduce the regulatory burden associated with legitimate access to the program.

Recommendation:

> **The MCA recommends that AusIndustry conduct an evaluation of the administrative/registration requirements of the R&D Tax Concession ((including the preparation of R&D Project Plans), with explicit aims (that could be expressed in the terms of reference for any evaluation) to reduce the regulatory burden associated with legitimate access to the program.**

(ii) Acquisitions and demergers part way through a month

At present, significant regulatory burden is incurred for companies who undertake an acquisition or a demerger part way through a month.

The income tax provisions require the completion of tax returns for the entities acquired or demerged up to the period of either acquisition or demerger. In a number of scenarios, these dates could fall part way through a month and current income tax legislation does not allow the Commissioner to grant the use of end -of-month accounts. Consequently, companies are then required to undertake significant compliance costs in determining accounts part way through a month and includes undertaking a vast number of potentially complex (and often manual) calculations to, for example, apportion transactions and obligations between the two entities. In addition, there is often a number of difficult practicalities associated with reconciliation of trading stock part way through a month, which is normally prepared at the end of the month.

A Tax Office administrative power that granted it the ability to adopt end-of-month accounts (with appropriate safeguards) could significantly reduce the regulatory burden associated with part way through the month acquisitions or demergers.

Recommendation:

> **The MCA recommends the Income Tax Assessment Act 1997 be amended to grant the Tax Office the administrative power to adopt end-of-month accounts for taxation purposes in relation to acquisitions or demergers that take place part way through the month. This would be for both tax return purposes and for allowable cost amount (ACA) purposes for the Tax Consolidation regime.**

[42] See http://www.ausindustry.gov.au/content/level3index.cfm?ObjectID=40CEE157-EC9F-4AE3-863FFB2EEFE79ED9&L2Parent=AEB901E5-7CB8-4143-A3BF33B2423F9DA6 for further details.