



Law Council
OF AUSTRALIA

Legal Practice Section

12 June 2020

Ms Karen Carmichael
Productivity Commission
4 National Circuit
BARTON ACT 2600

By email: resources@pc.gov.au

Dear Sir/Madam

RESOURCES SECTOR REGULATION DRAFT REPORT

1. The Australian Environment & Planning Law Group (**AEPLG**) from the Legal Practice Section of the Law Council of Australia welcomes the opportunity to make a submission to the Productivity Commission in relation to the response to its Resources Sector Regulation Draft Report.¹
2. The AEPLG notes that regulation should reduce uncertainty and serve to effectively direct human action according to government policy. It also stimulates innovation and competitiveness and is a source of information about the use of resources to enhance wealth. Regulatory change is an event from which economic activity and new business opportunities emerge.
3. The AEPLG notes and agrees with the gist of the key points as set out on page 2 of the Draft Report but would make the following comments in relation to the drafting of certain key points.
4. The first key point notes that resources activities ought to meet 'reasonable' requirements in relation to their impact on the environment, heritage, worker safety, landowners and communities but that doing so demands 'strict, often complex regulation'. The point then says that if regulation is not done well, 'this can create unnecessary costs for companies and diminish benefits for the broader community'. The AEPLG notes that poorly drafted or poorly enforced regulations can also lead to negative and potentially irreversible impacts on the environment. To put the emphasis on the cost to companies, and to omit to acknowledge the reason for some of the 'complex' regulations is to protect the environment and meet Australia's obligations under international law, diminishes the role of the natural environment in our society and ignores its intrinsic value, independent of the benefit that it provides to the broader community.
5. In the same vein, the seventh key point states 'more comprehensive arrangements for mine rehabilitation would deliver community as well as reputational benefits' seems to entirely omit the critical impact that sustainable mine rehabilitation has on the environment, immediately and into the future.

¹ Productivity Commission, Resources Sector Regulation, Draft Report (March 2020) (**Draft Report**)

6. The AEPLG also notes the fourth key point that many of the issues raised in this study have been raised in previous reviews. The AEPLG (again) expresses concern as to the undertaking of yet another study, when the issues of previous inquiries have not been adequately addressed, particularly given the significant time and cost invested in such inquiries.
7. The AEPLG endorses the conclusion drawn by the Productivity Commission in the sixth key point that leading regulatory practice supports regulators who are ‘accountable and transparent; follow clear and predictable processes ... and work to inform the community about their activities’. It notes that this approach is consistent with one of the key principles of the rule of law as set out in the Law Council’s Policy Statement on the Rule of Law Principles.²
8. The AEPLG notes, and agrees, that whilst both government and companies have responsibility for addressing the negative impacts of resources projects on local communities, the Commission’s ninth key point notes that it is not best practice for local content to be mandated, as this is better left for companies to consult with local government and community groups to promote local benefits. While it is inappropriate to mandate local content – as this may not result in any lasting benefit to local communities - the AEPLG stresses the need to exercise caution with a completely unregulated approach. Many rural and remote communities may be insufficiently resourced or supported to promote the best outcomes for themselves. The onus should be on companies to engage with and listen to local communities, Indigenous leaders and local governments, to understand their issues and to develop better ways to improve local capability and engagement with resources projects to ensure appropriately targeted and sustainable social, economic and environmental outcomes.
9. The AEPLG strongly agrees that community engagement should begin early in a project’s life and continue throughout, from construction to rehabilitation and relinquishment of tenure, and provide meaningful opportunities for the community to present their views. The AEPLG further notes that not only should affected communities have the right to present their views, they should have a right to have those views heard and, as far as practicable, addressed.
10. The AEPLG endorses the need for ongoing reform to support and improve the management of native title agreement benefits to ensure that long-term and short-term practical and tangible benefits flow to local Aboriginal and Torres Strait Islander peoples from resource projects located on land on which native title rights and interests are held or claimed.
11. The AEPLG also makes the following brief comments and observations following the elements of the Draft Recommendations in the Draft Report.

Draft Recommendation 4.1: Rather than imposing bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the scientific evidence on the costs of a particular project on the environment, other land users and communities against the benefits on a project-by-project (or regional) basis

² Law Council of Australia, Policy Statement – Rule of Law Principles (March 2011); available at <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>

12. The AEPLG expresses a high degree of concern with this statement and recommends extreme caution in promoting such an approach.
13. If a particular activity is deemed harmful enough, or the environmental impacts, either short or long term, are sufficiently unknown then, consistent with the precautionary principle and the other related principles underlying the broad concept of 'sustainable development' which all Australian State and Territory Governments and the Commonwealth Government have agreed to uphold³, a moratorium may be warranted until there is a greater understanding of the potential impact of that activity. This creates industry certainty and consequential economic benefits.
14. The AEPLG endorses the balancing of scientific evidence, the impacts on other land users and communities and the economic benefits of a resource activity but notes that a case by case analysis may not always be sufficient. The AEPLG believes that greater use of strategic and regional environmental and social impact assessments is warranted and can provide better information for better medium- and long-term decision making.

Draft Recommendation 6.1: The *Environment Protection and Biodiversity Conservation Act 1999 (EPBC) (Cth)* should be amended, in line with the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth)*, to enable negotiation of bilateral approval agreements.

15. The AEPLG maintains the view that the Commonwealth must maintain its role in the legislative framework for environmental protection and biodiversity conservation in Australia and thus has reservations concerning a further delegation of Commonwealth responsibility under Parts 7 to 9 of the EPBC Act via the development of bilateral approval agreements.
16. If bilateral approval agreements are to be implemented, and the non-regression principle is to be met,⁴ such agreements cannot operate and should not operate without robust and comprehensive Commonwealth oversight. This oversight, which must be properly resourced in both financial and human terms, is necessary to ensure that Commonwealth standards of assessment and approval are maintained, the Commonwealth's international obligations under the international treaties to which it is a signatory are met, and public confidence and trust is maintained
17. In the absence of Commonwealth oversight, the AEPLG is concerned that over time, the standards of assessment and approval will not be maintained by state and territory regulators. This slip in standards is unlikely to be intentional but is more likely to be as a result of the increased workload shouldered by those regulators as a result of assuming both assessment and approval roles for themselves and on behalf of the Commonwealth.

Draft Recommendation 11.1: Governments in each jurisdiction should assess whether regulators of resources-sector activity are appropriately funded to enable timely processing of applications and effective adoption of a risk-based

³ For a brief background on the principles of sustainable development, see the Law Council's Policy on Sustainable Development (14 September 2019) at <https://www.lawcouncil.asn.au/docs/ee45282d-3cdb-e911-9400-005056be13b5/Policy%20on%20Sustainable%20Development%20-%2014%20September%202019.pdf>

⁴ The non-regression principle is a principle that prohibits the revision of established environmental legislation if the effect of the revision will diminish the existing level of environmental protection. The principle has its origins in international human rights law.

regulatory system and opportunities for enhancing regulators' cost recovery processes

18. The AEPLG agrees with this recommendation and further notes the importance of ensuring that regulators are sufficiently funded to both ensure their independence and to retain technically skilled and experienced employees to ensure adequate oversight of all projects undertaken within the resource sector. It is critical to avoid regulatory capture and the significant problems that this creates.
19. The AEPLG also agrees with Draft Recommendations 11.2 and 11.3 as a means of enhancing and sharing knowledge and expertise. The AEPLG considers that such knowledge sharing is an essential prerequisite to the effective implementation of bilateral approval agreements.
20. The AEPLG would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact AEPLG Chair, Robyn Glindemann

Yours sincerely

Margery Nicoll
Acting Chief Executive Officer