

# AUSTRALIAN PRODUCTIVITY COMMISSION RELEASES DRAFT REPORT INTO REGULATION OF RESOURCES SECTOR: REDUCING THE REGULATORY BURDEN WITHOUT DILUTING REGULATORY OUTCOMES

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Legal Briefings - By **Leon Chung, Christine Wong and Brigid McManus**

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## WHAT WAS THE PRODUCTIVITY COMMISSION EXAMINING?

In August 2019, the Australian Productivity Commission (**Productivity Commission**) commenced a study into effective regulatory approaches to the resources sector and consideration of best-practice regulatory examples in Australia and internationally.

The Productivity Commission's key focus is whether regulatory processes could be improved to reduce unnecessary burdens and therefore encourage investment, while building community trust and confidence in the robustness of the regime by not diluting environmental and other regulated outcomes.

The Productivity Commission's Terms of Reference are to:

1. assess best-practice project approval processes across Australia and internationally and identify impediments to business investment in the Australian resources sector.
2. identify leading regulatory practices that have achieved evidence-based goals without

imposing additional costs or regulatory burdens on industry.

3. identify leading environmental management arrangements that reduce unnecessary costs for business while ensuring environmental protections are maintained.
4. identify best-practice examples of government involvement in the resources approvals process.
5. examine regulatory and non-regulatory examples of effective community engagement and benefit-sharing practices.

## WHAT HAS THE PRODUCTIVITY COMMISSION RECOMMENDED IN ITS DRAFT REPORT?

In March 2020, the Productivity Commission released its draft report (the **Draft Report**) for comment (the Draft Report and an overview can be found [here](#) and [here](#)).

Overall, while the Draft Report found that many regulatory processes remain unduly complex, duplicative, lengthy and uncertain, with unnecessary delay in approval processes. The NSW Mineral Council noted that the average assessment timeframe for five projects since 2016 was nearly 1,000 days.

Key recommendations in the Draft Report canvass:

1. **To reduce delays and burden**, particularly in project commencement and approval processes, best practice guidelines and principles, include:
  - risk and outcomes-based regulation to assist with focusing on the things that matter. Leading practice environment impact assessment involves allocating different projects to different assessment tracks depending on the level of risk involved, thorough scoping to identify which matters warrant deeper investigation and empowering regulators to make these decisions.
  - greater streamlining and coordination between agencies to reduce duplication, delay

and inconsistency.

- timelines to provide business with information about how long regulatory processes ought to take.
- use of deemed decisions, subject to limited merits review.
- use of standard conditions for standard risks.
- clear guidance on regulators' expectations about the content and quality of environmental impact assessments.

2. **Better regulator capability, accountability and transparency** could significantly reduce unnecessary costs and improve regulated outcomes – currently, limited transparency means it is difficult to assess the effectiveness of compliance monitoring and enforcement activity. Leading practice includes regulators informing the community of any contraventions that put the environment or community at significant risk and actions taken in response to those contraventions, as well as maintaining public registers of activities with offset obligations. However, capability gaps within regulators pose a key issue, including inadequacy of funding, technical expertise and use of data and technology. Information and data should be better harnessed to assist.
3. **Project-specific approach to regulation.** Imposing bans and moratoria on certain types of resources activity was not recommended. Rather, governments should weigh the scientific evidence on the costs of a particular project against its benefits on a project-by-project (or regional) basis.
4. In terms of assessments of **potential licence holders**, the Draft Report recommends a risk based approach to due diligence, which includes consideration of previous failures to comply with conditions or regulations and past criminal conduct.
5. To address significant uncertainty about the ownership and permissible use of funds from **native title agreements**, steps should be taken by Government to review the issue, including the duties owed to beneficial owners of the funds and the guidance on permissible uses. The Draft Report also makes a number of other findings aimed at ensuring that business engagement with Aboriginal and Torres Strait Islander communities is genuine and best positioned to benefit the community.
6. In terms of **community engagement**, mandating requirements such as local content is not leading practice. Instead consultation and coordination between companies, local government and community groups should occur. In particularly contentious cases where there is intense public concern, the Draft Report suggests establishing independent institutions to provide information to community to inform debate.

## WHAT DO WE EXPECT NEXT?

The Productivity Commission invited interested persons and organisations to make written submissions by August 2020. Over 90 submissions were received during the initial stages and following the release of the Draft Report. Submissions were received from a range of organisations including major energy and resources companies, peak bodies such as the Business Council of Australia and the Minerals Council of Australia and local and regional government bodies.

Those submissions will be considered by the Productivity Commission prior to the release of the Final Report. The Final Report is due to be handed to the Australian Government in November 2020, and publicly released shortly thereafter.

The Draft Report appropriately warns against abrupt policy changes with inadequate consultation as that may undermine investor confidence and discourage investment. Accordingly, we expect there to be a period of public and stakeholder consultation on any key areas of reform proposed by the Government arising from the Productivity Commission's work.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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