To: Productivity Commission

Re: Draft Resources Sector Regulation Report

4 September 2020

Introduction

AMEC appreciates the opportunity to consult on the Productivity Commission's Draft Resources Sector Regulation report. We also appreciated the meeting with the Commission in October 2019, and for the opportunity to speak further on 27 August 2020.

AMEC continues to support the streamlining of regulation to reduce unnecessary, costly, and duplicative red tape, while maintaining risk-based regulation subject to effective oversight. Given the other extensive regulatory reforms currently underway across most Australian jurisdictions, seeking to align the report's recommendations with the other proposals and changes underway would be beneficial.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 300 mining and mineral exploration companies across Australia.

The mining and exploration industry make a critical contribution to the Australian economy, employing over 255,000 people. In 2017/18, these companies collectively paid over $31 billion in royalties and taxation, invested $36.1 billion in new capital and generated more than $250 billion in mineral exports.

In 2017/18 Australian mining and exploration companies invested $1.97 billion to discover the mines of the future.

State of the Industry

Towards the end of 2019, Australia's mineral exploration sector was well placed to be in a period of substantial growth, with the last two years of increasing exploration activity starting to pay dividend. Driven by favourable commodity prices and solid investment decisions, 2019 ended with a quiet boom underway in Australia. The real GDP grew by 2.2%, with the mining industry directly accounting for 28% of that growth, and indirectly employing over 1 million people.

Recent mineral exploration discoveries have continued a pattern of declining average sizes of deposits discovered at a greater depth. Independent research indicates only 1 in 135 mineral exploration projects will develop into a producing discovery, and there is an average delay between discovery and production of 13 years. The significant lag and the increasing difficulty at which discoveries are being made means the industry is depleting resources at a much faster rate than they are being replaced. With much of Australia still underexplored, smaller, equity-funded mineral exploration companies are reliant on Government incentives and capital raising to continue discovering the mines of the future. Over the last 50 years, it is these companies that have been responsible for the discovery of over 70% of economic discoveries.

All the largest mineral discoveries started with greenfield exploration.

Mining and mineral exploration companies were among the first to respond to the onset of the COVID-19 pandemic, reorganising their business and operations to protect the safety of staff and the remote communities in which they generally operate. The need to halt or completely stop mining, drilling and mineral exploration activity, with heavy restrictions in Commonwealth Biosecurity Areas was necessary to protect remote communities from the virus. Australia's significant advantage in the production of resource commodities over other nations was further highlighted during this time, with State, Territory and Commonwealth Governments crediting the mining and mineral exploration sector for keeping the Australian economy afloat at a time when many nations were forced to completely cease operations. However, the effects of COVID-19 were not spread evenly across industry, with small, junior mineral exploration companies who are dependent on capital raising, unable to raise necessary capital, and being the most vulnerable in the sector. AMEC's ongoing advocacy to all levels of Government resulted in much-needed cost and fee relief from most jurisdictions.

The importance of the resources sector in Australia's economic recovery from COVID-19 has been touted throughout this pandemic. Australia's minerals attractiveness is not solely based on rich and diverse geology, but a combination of advanced mining and exploration technologies, a skilled workforce, favourable geographic positioning, and relatively low sovereign risk. To sustain Australia's relatively low sovereign risk, a persistent focus on a consistent, transparent, and clear regulatory system which reduces the cost, delays and unnecessary duplication of regulatory processes is required.

Draft Report

About the study

AMEC appreciates the extension of the submission period on the comprehensive draft report released by the Productivity Commission in March 2020, due to COVID-19. The substantial report considers the resources sector before being broken down into the different components. As an industry body for mining and mineral exploration companies, AMEC will provide comments on areas of relevance to our industry and membership.

In general, industry agrees with the Report's findings that the already complex regulatory system in Australia is becoming increasingly uncertain, duplicative, and cumbersome. The findings and recommendations of previous Productivity Commission Reports identifying improvements to significant regulatory shortcomings that are yet to be introduced, despite the array of extensive regulatory reforms being proposed at all levels of Government across Australia, is a frustration. This is considered a missed opportunity by AMEC and its members, who strongly oppose regulation which hinders resource sector growth and development.

We are supportive of regulations that foster equal benefits for industry and the community and continue to advocate for improved regulatory frameworks to support the mutually beneficial development of mining and mineral exploration. It is the royalties generated by mining that support the development of new roads, schools and hospitals. This sector indirectly employs over 1 million people in Australia, and a progressive regulatory framework will enable the sector to continue supporting Australia's economy through the impending global recession.

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Regulation: rationales, principles and landscapes

AMEC is supportive of a risk-based approach to regulation, where the level of decision making is commensurate with the level of risk proposed by the activity. This should be done in a manner that is not prescriptive; rather begins with the identification of risks to be managed in order to achieve pre-determined, long and short-term outcomes. The outcomes should be driven by clear and distinct objectives to achieve them, negating the shift to over-prescriptive requirements which apply a blanket approach to regulation. Blanket approaches to prescriptive requirements by Commonwealth regulators are particularly fraught. Commonwealth prescriptions can fail to take into consideration the spectrum of differences between projects from differences in the realities of the project, the geology, and the biosphere to the State legislative parameters in each region. A risk-based regulatory framework should encourage efficient and effective use of regulatory resources and provide measurable outcomes to determine if the practices are serving their intended purpose to address the relevant legislation's overall objectives.

Western Australia[1] and the Northern Territory[2] have both independently begun to map their respective mining environmental approval process. While neither has been published to date, the Productivity Commission may be able to access a copy. AMEC has worked with both jurisdictions on these documents, and Figure 3.1 in the Draft Report, is a gross simplification of the regulatory thoroughness each project is subject to.

Industry grows increasingly concerned with the amount of information required from project proponents by regulators. They are subject to requests for excessive amounts of information to make even the most basic of determinations.

For example, low risk environmental impacts should be subject to automated environmental approvals, yet the delays outlined in this report demonstrate that is not the case. These delays have been acknowledged by various jurisdictions, with WA's StreamlineWA team seeking to introduce automated approvals within 24 hours for certain low-risk, low impact activities in areas that are considered to not be environmentally sensitive. Currently, these low impact determinations can lead to extensive development delays, creating unnecessary costs and regulatory burden, not commensurate with the level of risk posed. Furthermore, the already limited staffing within the regulator is focused on these low return regulatory activities when they could be redirected to higher risk activities.

Delays are costly for our industry. In 2019, AMEC estimated that the administrative costs necessary to operate a mineral exploration company area were $400,000 per quarter. The cumulative impact of time delays is rarely appropriately measured.

We believe the increasing requirement for information[3] is in part attributable to the absence of practical knowledge within the regulators assessing applications, and the low capacities of regulators

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[1] Via StreamlineWA read more here: https://www.wa.gov.au/organisation/department-of-mines-industry-regulation-and-safety/mining-environmental-approvals

[2] The Northern Territory's Department of Business, Trade and Innovation has conducted several successful workshops with Industry.

[3] Addendum 1, previous AMEC submission – Company F case study

to complete assessments. The lack of common understanding and limited resources are a consistent issue across most regulatory agencies in Australia, leading to a reliance on prescriptive requirements and a shift away from risk- and outcome-based regulation. As further demonstrated in another case study[4], the excessive commentary received from regulators fell outside of their remit, causing undue costs and delays for issues they were not responsible for. In its recent submission to the Independent Review of the *Environment Protection and Biodiversity Conservation Act* (EPBC Act), AMEC highlighted the importance of ensuring the Act focuses on its intended purpose. With broader concern that the EPBC Act is used as a 'silver bullet' to come over the top of individual jurisdictions.

The need for increased training of staff within key regulatory agencies was highlighted by the Australian National Audit Office's recent *Performance Audit of Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*.

A finding was that "*Of the 252 individual registrations since 2016–17, training records show that only 16 staff have completed all six core modules, indicating that the target of delivering mandatory training for all staff in the division has not been achieved."*[5]. Ensuring that the remaining 234 staff receive the outstanding training is an obvious outcome that could lead to improvements.

Informal Industry commentary regarding regulatory performance regularly highlights the inexperience of junior approvals officers. This lack of experience is unavoidable and understandable, but it fosters caution amongst regulators, delays, and a need to 'elevate' issues up the chain of command.

Increasing regulator expertise and skills to create a common understanding and whole of Government familiarity will enable regulators to conduct consistent, thorough assessments; supporting the adoption of risk- and outcome-based regulation.

Equally important, is having the capacity within regulatory bodies to undertake the required work within designated timeframes.

Resource management

AMEC supports the Productivity Commission's finding that there is no case for comprehensive reform of the release of geoscientific data.

Geoscientific information is a public good the sharing of which lowers the barrier to entry for mineral exploration. The management of commercial information through confidentiality clauses by Geological Survey's balances the private and public benefits of geoscientific studies, whether drill cores, geophysics, or other forms.

AMEC suggests that this approach could be transposed to other data, particularly bioscientific surveys. Some areas of Australia, such as the Pilbara in WA and the Gawler Craton in SA, have

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[4] Addendum 1, previous AMEC submission – Company E case study

[5] Pg. 43, The Auditor-General Auditor-General, Report No.47 2019–20 Performance Audit of Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999. Accessed: https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2019-2020_47.pdf

been prolifically surveyed. Sharing that data publicly would not only lower costs but would also provide positive scientific externalities.

The Index of Biodiversity Surveys for Assessments (IBSA) in Western Australia provides a framework that could be emulated nationally. The objectives of IBSA are to capture and consolidate data contained in biodiversity survey reports that underpin assessments and compliance under the Environmental Protection Act 1986 and to provide a platform to make the information publicly available. In time this accumulated knowledge will not only reduce cost and delays but will allow for scientific research. Given that Western Australia is a third of the Australian continent, there is an argument of scale that would mean that there is a logic to the national adoption of the WA system.

An area that does need focused attention is inadvertently highlighted by the Commission's response regarding the difficulties to measure market failure for greater greenfield mineral exploration and industry's call for funding.

The difficulty to diagnose the market failure is due to definitions.

The current definition used by the Australian Bureau of Statistics for the mineral exploration that it classifies as 'new deposits' is too broad. The expansive definition of new deposits provides a 'false positive' for policy makers by inflating the perceived expenditure on new deposits. For example, it includes exploration with an existing mining tenement.

A mining tenement (as opposed to an exploration tenement) is tenure granted on the explicit understanding by the Government that there is mineralisation present that can be mined. Logically, this new drilling should be considered differently, as it is not a 'new deposit'. Industry widely considers such drilling as 'brownfield' exploration.

The definition of new deposit has further flaws, such as including drilling existing known mineralisation at a greater density to classify it up to the meet the JORC 'Inferred Resource' definition, and the inclusion of exploration using modern techniques to an existing deposit.

AMEC has long held that the ABS should apply a separate definition for greenfields mineral exploration, for exploration that occurs in areas where no exploration has occurred before at all.

Improving the measurement of data by greater granularity via two new classifications as proposed, greenfield and brownfield exploration~~,~~ will facilitate an improved policy response. Furthermore, increased data collection of the 'metres drilled' across greenfield and brownfield classifications will reduce the reliance on expenditure data which when considered longitudinally or interjurisdictionally suffers the distortionary effects of cost inflation.

Section 4.2 discusses the allocation of rights to explore for resources in certain locations in the jurisdiction, and the licencing of tenements. AMEC supports the "first come, first served" approach to tenure allocation. The simplicity of the system reduces administrative burden, questions of equity or preference. The introduction of Government oversight of how allocation occurs will lead to a reduction in competition, while disadvantaging smaller companies and new market entrants.

Moratoriums are a blunt instrument to manage resources (section 4.3) that undercut the risk-based approach to regulation. Moratoria are usually implemented for political rather than scientific rationale. AMEC is opposed to moratoria in principle as poor economic policy. The introduction of a moratorium

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removes certain property rights, reduces optionality for both taxpayers and investors, as well as extinguishes an economic growth pathway for a jurisdiction. In the short term, a moratorium has the most obvious negative impact directly on the affected subsection of the industry. In the longer term, the willingness of a Government to resort to moratoria erodes a jurisdiction's investment attractiveness and can lead to the disappearance of skills and understanding associated with the industry under the moratoria, which move to more welcoming jurisdictions.

Land Access

All mining and mineral exploration companies require certainty, clarity, consistency, and predictability through each stage of the mining cycle. This is particularly important in a competitive global market, where Australia has the geological resources to attract investment but requires a robust regulatory framework which supports development. The current policies and processes around land access are often time-consuming and subject to significant delays, reducing investor confidence and willingness to undertake greenfield projects, which are by nature, long-term investments.

There can be a fundamental misalignment in expectations and incentives between landholders and mineral exploration companies. Minerals are constitutionally the property of the community, not the land or leaseholder that happens to be above them. Some jurisdictions, such as South Australia, have sought to align incentives. In South Australia, 95% of tenement rental is paid directly to the landholder. While the Government is clear this should not be considered compensation, it is all but in name an incentive to facilitate mineral exploration.

At the 2018 South Australian Election, the Labor party took a policy proposal of paying 10% of the royalty to the landholder[6]. AMEC was supportive of this announcement at the time as a way of aligning interests, particularly in areas of established broad-acre farming.

AMEC acknowledges that land access can be a contentious issue, particularly in the peri-urban fringe and areas of broad-acre farming. AMEC is cautiously supportive of measures that seek to balance the trade-offs between resources development and benefits for the community.

Land access agreements

We are broadly supportive of, through a consultative process including industry, introducing the Report's recommendation (DLP 5.3) of a standard template for land access agreements to set expectations for landholders and resources companies, consequentially improving confidence in the regulatory system.

A concern that consistently emerges with land access agreements is the distinction between mineral exploration and mining can be lost. A company may explore a tenement for minerals but unfortunately never find an economic deposit. MinEx Consulting research shows that on average an

[6] https://www.afr.com/companies/mining/farmers-to-get-10pc-of-mining-royalties-in-south-australia-20180215-h0w41h

area is explored by 2.8 companies before a discovery is made[7]. Given the low likelihood of an economic discovery, the framing of the conversation around land access must be realistically shaped. If a deposit has been discovered that is a different negotiation, but early-stage mineral exploration can be hindered by over-prescription, deliberate delays, and stalling. Choices from the landholder that will mean the community will not enjoy a return for their minerals.

Queensland Land Access Code

We are concerned with the identification of Draft Leading Practices 5.3 and 5.4, Queensland's Land Access Code and the use of the independent Ombudsman. The provision of a combination of mandatory conditions and guidelines under Queensland's model is designed to set clear expectations, and the recently established Queensland Land Access Ombudsman has been introduced as a low-cost dispute resolution method when there is perceived conflict. Through investigation into reported breaches of conduct and compensation agreements, the Ombudsman will assess each complaint and may assist in resolving disputes or making non-binding recommendations for remedies. If parties do not comply, then the Land Court can make an enforceable decision. The Ombudsman process was introduced to be less prescriptive than current litigation and arbitration procedures, to reduce costs and time delays, while also assisting other Government departments and public on land access awareness. The idea to build awareness will be likely to influence positive land access policy and legislative regimes at a later stage.

Feedback from industry indicates that while this system is in theory designed to facilitate early engagement between industry and landholders to mitigate potential issues, it is not always the case. When the landholder is amenable and willing to actively engage with the tenement holder, the system works well in encouraging the early establishment of a productive relationship that is less costly than a negotiated agreement. However, in the event the landholder does not want to be contacted, refuses attempts at communication, or is unwilling to cooperate, the use of the Land Access Ombudsman then potentially Land Court, while low cost in itself (free in the case of the Ombudsman), causes unnecessary delays adding additional costs for tenement holders who are unable to undertake works on their tenements while still being subject to tenement rental fees and now, legal fees.

Industry welcomes the straightforward process with clearly defined flowcharts directing how to escalate issues, including contact details for relevant agencies under Queensland's model. This flowchart and method for presenting information in a simple format would help explain the complex mineral exploration to mining lease process.

However, the system will only achieve its goal of lowering the cost of land access disputes if there is a cooperative landholder. When a landholder does not want to interact with tenement holders or agree to the Ombudsman's recommendations, the process is still subject to delays and requires agreements through the Land Court. To consider this model best practice, the Productivity Commission inadvertently recommends it be adopted by other jurisdictions. While the system is generally well

[7] Slide41, Schodde, R, MinEX Consulting, presentation to 2019 Pacific Rim Conference, available at http://minexconsulting.com/wp-content/uploads/2019/04/PACRIM-Conference-April-2019-FINAL-updated.pdf

received by Queenslanders, it needs to be noted that it only achieves its purpose when a landholder is willing to engage and comply with recommendations.

Native Title legislative amendments

AMEC members support the development of strategies and initiatives that result in increased clarity, certainty, efficiency, and effectiveness of native title processes to:

- reduce delays and costs for all stakeholders; and
- ensure fair, equitable, and quality negotiated outcomes and benefits for governments, industry, and Aboriginal people.

AMEC is supportive of the *Native Title Legislation Amendment Bill 2019 (Cth)* amendments which achieve those objectives. We are pleased that the bill is intended to improve native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes.

We particularly welcome the intent to confirm the validity of certain agreements made under the *Native Title Act 1933* following the Federal Court decision in *McGlade v Native Title Registrar & Ors*. The delays in the passage of this legislation reduce certainty for the mining and mineral exploration industry.

WA Mining Amendment (Procedures and Validation) Bill 2018

It is vitally important that a proposed amendment[8] to validate Western Australian mining leases affected by the *Forrest & Forrest Pty Ltd v Wilson* case, is progressed as soon as possible.

The Western Australian Government introduced legislation on 28 November 2018[9] to confirm the validity of mining leases that have purported to be granted and whose validity might be affected by failure to have strictly complied with the requirements of the *Mining Act.*

In that context, it is understood that such validating legislation is regarded as a new "future "act" under the *Native Title Act,* notwithstanding that the future act provisions of the *Native Title Act* were complied with at the time of the original purported grant.

In order to remove any uncertainty and secure the validity of tenure granted in reliance upon that compliance, the *Native Title Act,* should be amended to allow for validating legislation by the State or Territories, where it is necessary to address technical compliance with State legislation, but where there has otherwise been compliance with the *Native Title Act.*

It is critically important that relevant legislation is proclaimed to restore the assumption of validity in relation to the previous grant. In view of the prevailing uncertainty that has been created within industry by the *Forrest & Forrest* case and the associated validating legislation relating to the WA *Mining Act,* it is crucial that amendments to the *Native Title Act* are made.

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[8] Native Title Act Reform Options Paper G14

[9] https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=7E35937E3EDD385F48258353000E9C9A

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We understand that the Commonwealth and Western Australian Governments have been in close liaison to ensure passage of concurrent legislation to amend the *Native Title Act* and the WA *Mining Act* and that this is likely as soon as practically convenient.

AMEC strongly supported the original proposal[10] to shorten the objection period for acts which the government party considers attract the expedited procedure from 4 months to 35 calendar days where the entire area affected by the act is subject to a native title determination.

Our members consider that the current notification and objection period appears to be anomalous in a process specifically designed to be 'expedited'. The proposal would promote more timely outcomes. However, it will be necessary to ensure that vexatious objections are minimised.

Members have further noted that objections are invariably lodged as a 'matter of course', and that very few are progressed.

To highlight the need for a reduced objection period timeframe the WA Department of Mines, Industry Regulation and Safety (DMIRS) Quarterly Performance report includes the total timeline for Exploration Licences to be granted.

This information is extremely telling and of concern, particularly noting that for the September 2019 quarter[11] the average timeframe for the grant of an Exploration Licence was 59 weeks. This comprised:

- 7.8 weeks with DMIRS,
- 8.6 weeks with the proponent,
- 33.8 weeks in the Native Title and cultural heritage process (includes the current 4 months Native Title Act objection period), and
- 9 weeks with other Government agencies.

Despite being granted a licence the proponent, is still unable to gain access to the land for any exploration activities until negotiations with landholders, Traditional Owners or their representative bodies have been completed. These delays put the proposed investment in the project at severe risk of not progressing.

We are unaware of the reasoning for the current four months objection period but consider that there should be a significant reduction in this timeframe. Such an outcome would result in exploration activity starting earlier, with the potential of more timely identification of mineral prospectivity. This would be a win: win for all stakeholders and not diminish native title or cultural heritage values as there are already extensive negotiation and agreement-making processes in place after the grant of an Exploration Licence.

[10] Native Title Act Options Paper G1
[11] http://www.dmp.wa.gov.au/Documents/Investors/Approvals_Performance_Report-third_Quarter.pdf

Expedited procedure variations

The South Australian variation of Native Title, Part 9B, has been under active review by the State Government through the Stronger Partners, Stronger Future's which was established in 2016 to review the interactions between explorers and Native Title groups for land access[12]. It was acknowledged the current arrangement "posed challenges for Native Title groups and explorers alike"[13]. A series of workshops and stakeholder reference groups have reflected a broader conversation to seek a more widely supported approach.

AMEC has advocated for South Australia's adoption of the Commonwealth's Right to Negotiate model to provide certainty for all regarding how Native Title is treated.

Aboriginal Land Rights Act in the Northern Territory

In the Northern Territory, there is a high entry cost to 'get on the ground and explore'. This is a substantial barrier to investment as mineral exploration companies are generally smaller equity funded companies. These companies do not have a producing asset that is a source of revenue to provide critical cash flow.

Industry has suggested the Northern Territory has the highest non-government costs for gaining land access. This is particularly acute if mining or mineral exploration occurs on Aboriginal Freehold Land, which represents 46% of the Territory.

These costs include but are not limited to:

- Land Council Agreement negotiation and 'signature' costs;
- Travel and arrangement of on-country meetings;
- Anthropological and archaeological survey and consultant fees; and
- Costs of sacred sites surveys.

Most of these payments are opaque and bound in confidentiality agreements that do not allow a mining or mineral exploration company to reveal the true cost they bear.

Some are on public record. Newmont published in the *Newmont Tanami Operations Social Impact Assessment* for 2019 that outlined between 2014 and 2017, they paid $55m in land-use payments[14] to the relevant Indigenous corporation and $179m in royalties to the Government[15]. This highlights the 'double payments' to both Land Councils and the Government that make the Territory expensive.

These high costs are coupled with a lack of certainty of access under terms that are exploring for or extracting a viable deposit. The five-year veto on land access through the *Aboriginal Land Rights Act*

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[12] https://energymining.sa.gov.au/minerals/land_access/stronger_partners_stronger_futures
[13] Pg. 7, Co-Designing the Future Workshop Issues Paper, available at: https://sarigbasis.pir.sa.gov.au/WebtopEw/ws/samref/sarig1/wci/Record?r=0&m=1&w=catno=2039850
14 Pg. 7-4
[15] Pg. 7-2, Newmont Tanami Operations Social Impact Assessment, University of Queensland https://www.csrm.uq.edu.au/publications/newmont-tanami-operations-social-impact-assessment

1976, increases the risk when considering exploring or mining in the Territory. Between 2007 and 2012, 123 Exploration Licences were refused consent[16].

As a result of the complexities and costs of accessing Aboriginal Freehold, there is relatively little mineral exploration that occurs there. Published Government statistics suggest that in 2012, there were only 236 Exploration Licences active on Aboriginal Freehold, as opposed to 1,255 on other land. In the five-year period prior to 2012, 133 Exploration Licences were granted on Aboriginal Freehold as opposed to 1,419 on other land[17]. This is a marked difference.

Conjunctive agreements

Industry has expressed reservations regarding considering conjunctive agreements as a 'leading practice'. A conjunctive agreement may be attractive from a landholder's perspective by streamlining paperwork, but do not reflect the commercial reality of mineral exploration and mining. A company does not know what sort of resource they may discover, and the discovering company may not be interested in being the developer. Forcing a mineral exploration company to define the terms of a mineral, which has not been discovered yet, that will be mined is not supported.

Approval processes

The benefits of adopting bilateral assessments and approvals are considerable for the proponent as well as the related State, Territory and Commonwealth Governments. Where multiple agencies are responsible for administering regulation, especially within the environmental requirements of the mining and mineral exploration industry, both industry and the Government would benefit from reductions in costs and delays by implementing measures to coordinate regulatory activity.

The Australian National Audit Office (ANAO) audit of the administration of Referrals, Assessments and Approvals of Controlled Actions under the EPBC Act underscored the urgency of reform.

The findings found included the following:

- The Department of Agriculture, Water and Environment (DAWE) administration of referrals, assessments, and approvals of controlled actions under the EPBC Act is not effective.
- The Department's regulatory approach is not proportionate to environmental risk.
- The administration of referrals and assessments is not effective or efficient.
- Conditions of approval are not assessed with rigour, are non-compliant with procedural guidance and contain clerical or administrative errors.

The Department is not well-positioned to measure its contribution to the objectives of the EPBC Act.

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[16] Northern Territory Government submission to the 2012 Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976. Found on page 199 of https://www.dss.gov.au/sites/default/files/documents/06_2013/alc_review_of_part_iv.pdf

[17] Northern Territory Government submission to the 2012 Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976. Found on page 198 of https://www.dss.gov.au/sites/default/files/documents/06_2013/alc_review_of_part_iv.pdf

The following statistics are of concern for AMEC. In 2019 it was estimated that the administrative costs necessary to operate a mineral exploration company area were $400,000 per quarter[18]. Most resources companies awaiting EPBC Act approval are mineral exploration companies, that lack a source of revenue:

- 116 days average overrun of statutory timeframes for approval decisions in 2018-19.
- 6,253 Actions referred for assessment.
- 1,846 Actions referred that were determined to be controlled actions.
- 79% Approvals assessed as containing conditions that were non-compliant with procedural guidance or contained clerical or administrative errors.

In the ANAO audit referenced above, it was found that the number of proposed actions processed per FTE staff is correlated and has remained relatively consistent from 2011–12 to 2018–19. As the delays show, the administration of the EPBC Act has consistently been hampered by a lack of Federal Government staff. As at February 2020, 141 staff were allocated to referral, assessment, and approval related work, with the numbers only recently boosted by Federal Government funding[19].

To achieve the proposed outcomes of the large number of regulatory reforms currently underway, staff need to be sufficiently trained to do so, otherwise, the proposed reforms will struggle.

The interaction and overlap of different regulations are complicated for businesses to understand, and the extent of information required by regulators assessing impacts beyond their remit, is unfortunately too common in this sector.

Significance

A national policy question with both State and Commonwealth application is the definition of significance. This slippery, and ultimately subjective, concept must underpin the judgement of many regulators and despite being included in the legislation is not quantified.

Guidance

Guidance assists partially in ameliorating the lack of clarity of the definition of significance. AMEC would commend the *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the Environmental Protection Act 1986 (WA[20])* (the Quinlan Review) be applied to the administration of all environmental legislation nationally.

The Quinlan Review caused a seismic shift in the application of environmental legislation and the associated guidance material in Western Australia. Rather than expanding the scope of the Act the

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18 Holding cost figures were based on a survey of 52 ASX listed mineral exploration companies Appendix 5B forms. With the expenses identified as “staff costs” and “admin and corporate costs” in the Appendix combined. A mineral exploration company was defined as one that received no revenue from an operating mine.

19 Pg. 43, The Auditor-General Auditor-General, Report No.47 2019–20 Performance Audit of Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999. Accessed: https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2019-2020_47.pdf

20 http://www.epa.wa.gov.au/sites/default/files/EPA%20Legal%20and%20Governance%20Review%20-%20Final%20Report%20-%20Quinlan%20et%20al-170516.pdf

review focused on improving the processes within the existing byzantine legislation and reducing the "Kafkaesque experience"[21] of navigating the policies and guidelines.

Using memorandums of understanding (MOUs) and bilateral arrangements, the duplication and inconsistency between State / Territory and Commonwealth conditions can be significantly reduced.

The ANAO Report's finding that for the EPBC, the average time between project referral and approval for resources projects over the five years to 30 June 2019 was 1014 days, is just one demonstration of the inefficiencies currently plaguing the sector. The recently released Independent Review into the EPBC Act recommended improving the Act to facilitate more bilateral assessments and approvals, urging the Commonwealth to devolve its assessment powers to accredited States. Under the current legislation, the triggering of the Commonwealth legislation in addition to the State / Territory requirement is unnecessary. States and Territories have primary responsibility for environmental management within their jurisdictions, so it is unnecessary for the Commonwealth to also require the submission of an environmental impact assessment, subject to inconsistent conditions.

EPBC nuclear and water trigger

The EPBC Act's water trigger and nuclear trigger are opposed by AMEC.

Australian uranium projects are one of the most heavily regulated areas of the mining sector. This is primarily undertaken through the robust guidance provided by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA). Industry fully adheres to the ARPANSA National Standards for radiation protection in mining and minerals processing and accordingly has a track record of meeting the highest standards of environmental approval under mainstream project assessment and approval processes.

We understand that as the Department of Environment and Energy does not have the skills sets or experience to deal with radiation assessment and management, specialist advice is sought from ARPANSA and jurisdictional regulatory agencies. This creates additional delays and unnecessary costs to industry and government alike.

Limited Commonwealth Government resources would be better utilised by relying on the expert advice of ARPANSA and respective State and Territory Governments to ensure that the assessment process continues to meet world best practice and that a consistent approach is taken across the nation.

AMEC also understands that radiation exposure to workers and the public are consistently well below the required management levels.

There is no justification for uranium mining to be treated in the *EPBC Act* in a different manner to other mining activities unless the project is likely to have a significant impact on one of the other Matters of National Environmental Significance. The current situation is discriminatory and inequitable.

[21] Pg. ix, Ibid.

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Previous analysis by the then Western Australian Department of Mines and Petroleum (DMP) showed the extensive range and large number of assessment steps that are undertaken for uranium related projects (including *EPBC Act* assessment). The analysis indicated:

- The accumulated timeframe to complete mineral exploration assessment and processes alone can be around 800 days, provided there are no objections or unforeseen delays in overcoming each of the approval related hurdles (This timeframe can be reduced if parallel processing is used), and
- If the project is deemed a 'controlled action' under section 67 of the *EPBC Act* add an extra 600 days for related assessment processes to be undertaken, provided there are no unforeseen objections or delays.

These time-consuming processes create significant 'holding' costs to companies that undertake extensive research and provide volumes of supporting data through the whole assessment process at significant expense.

To overcome this, a redefinition of the 'nuclear action' provisions contained in Section 22(1)(d) of the *EPBC Act* is required. This should remove reference to '*mining or milling uranium ore*' from the requirement for assessment unless the project itself impacts on '*Matters of National Environmental Significance'*.

There is no scientific justification for the argument that uranium '*mining or milling of uranium ore'* poses an inherent danger or increased risk to the environment, and therefore there is no need for the provisions of the *EPBC Act* to be 'triggered'. The regulatory framework for the uranium industry is 'best practice' without duplicative and, arguably, discriminatory treatment under the *EPBC Act.*

The Senate Red Tape Committee Inquiry into Environmental Assessment and Approvals completed in October 2017, recommended that uranium mining not be included as part of the 'nuclear actions' of the *EPBC Act*.

The Government simply 'noted' the recommendation on the basis that the regulatory framework is based on internationally recognised standards and fulfils obligations under treaties and conventions that Australia has ratified.

This, and other reform strategies detailed below, should be adopted in the current review of the *EPBC Act.*

The independent review of the *EPBC Act* 'water trigger' tabled in Parliament in June 2017 found that the 'water trigger' is an appropriate measure to address the regulatory gap that was identified at the time of its enactment in 2013.

In its submission to that review, AMEC expressed strong opposition to the 'water trigger', as management of water resources has almost always been a matter for the States and Territories and not the Commonwealth Government, or an independent expert Scientific Committee.

AMEC is extremely concerned that retention of the current provisions for large coal and coal seam gas projects being caught under the 'water trigger' has the potential for broader application through the resources sector and should be removed.

The Senate Red Tape Committee Inquiry into Environmental Assessment and Approvals completed in October 2017, recommended that the 'water trigger' be removed from the *EPBC Act*.

The Government did not support the recommendation as the trigger provided additional protection of water resources from coal seam and large coal mining developments.

If the 'water trigger' is not removed from the EPBC legislation, duplicative processes should be addressed through bilateral agreements with complying and accredited State / Territory Governments.

A lead agency or major project coordination office that facilitates knowledge sharing between departments is a welcome approach to reducing delays and regulatory burden. The provision of the same information to different agencies and Governments creates a situation which generally results in inconsistent feedback, creating confusion and further delays for projects. The use of bilateral agreements will seek to address this inefficiency by streamlining approvals without compromising the obligations to the environment.

AMEC has, and continues to, support amendments to the EPBC Act to facilitate the simplification of the approval process by permitting bilateral approvals. Greater cooperation between the Commonwealth and State and Territory Governments would deliver substantial benefits. The use of bilateral assessment agreements significantly reduces regulatory burden for mining and mineral exploration projects requiring State / Territory and Commonwealth approvals.

Commonwealth, State and Territory crossover

The duplication and overlap across agencies within jurisdictions and between jurisdictions and the Commonwealth create unnecessary delays and avoidable costs for project proponents.

The EPBC Act, for example, creates unnecessary regulatory duplication given the other regulatory mechanisms that coincide with the operation of the Act, and are better placed to address issues of national significance. It was unsurprising to see this Draft Report's findings that 81% of survey respondents reported some or substantial overlap in the conditions under the EPBC Act and State / Territory planning and environment permits. The excessive number of project approval conditions and the inconsistency between jurisdictions with overlapping interactions, diminish regulatory certainty, and reduce investor confidence.

In our submission to the Interim Review of the EPBC Act, AMEC recommended that Aboriginal Heritage issues, inherently sensitive in nature, are best addressed by reforms to existing State legislation, rather than under the EPBC Act or further Commonwealth intervention. With Native Title and Aboriginal Heritage reforms either recently undertaken or currently in progress across most jurisdictions, there is no requirement for amendments to the EPBC Act to create further regulatory burden by duplicating and expanding the already substantial requirements under existing legislation.

The goal of the Pilbara Environmental Offsets Fund (PEOF) was to enable sustainable mining development by offsetting impacts that are unavoidable and can't be mitigated. However, this is challenging to implement due to the overlap on the crown land between pastoral, mining and native title interests. Forecast to deliver more than $90 million of projects over the next 40 years, the fund aims to deliver environmental offset outcomes through a strategic landscape-scale approach. The fund's management is the responsibility of WA's Department of Water and Environmental Regulation

(DWER), with funds raised from Part IV of the *Environment Protection Act 1986* (EP Act), and contributions which may be combined with Part 9 or 10 of the EPBC Act. However, the Minister for Environment is the key decision-maker, receiving advice from DWER and the Department of Biodiversity, Conservation and Attractions.

With the provision of clear boundaries outlining each regulator's responsibilities and remits, actions to streamline approvals processes and reduce the overlap between jurisdictions can be undertaken. The use of bilateral assessments and approvals will facilitate the reduction in overlap, reducing regulatory burden and inconsistencies. In order to maintain a stable investment environment, the Government needs to undertake reforms to reduce regulatory uncertainty by facilitating timely processing to minimise overlaps and inconsistencies caused by duplication.

Other factors affecting investment

Australia has a relatively attractive investment environment, with great natural mineral resources and relatively low sovereign risk, albeit a somewhat restrictive investment framework. Due to the cyclical nature of mining, for every 135 discoveries made, approximately only 1 is turned into a producing mine, and there is a delay of roughly 13 years between discovery and first production. Small mineral exploration companies rely on investment to fund inherently risky exploration activity; deemed risky due to their long-term nature. In order to maintain investment attractiveness, Governments and regulators have a role to play in maintaining stability, enhancing investment attractiveness through measured and considered policy reforms, and reducing perceived investment risks.

Over 60% of Australia's resources projects are located on land covered by native title claims or determinations. Determining native title is a complex and lengthy process, which can serve as a barrier to investment. In 2012, native title claims took an average of over 6 years to resolve, if the claim was not subject to litigation. When multiple groups claim native title over an area, each group has a right to negotiate an agreement to potentially receive compensation from the proponent. Due to the complexities and time taken to reach a final native title determination, the additional compensation requirements payable to all claimants during the determination process can deter investment into resource projects.

Foreign Investment Review Board

Reforms currently underway by the Foreign Investment Review Board (FIRB) serve as another potential barrier to much-needed investment into the mining and mineral exploration sector. Australia's current screening thresholds, particularly for mining, are already considered one of the most restrictive among advanced economies. While supportive of screening measures to protect Australia's national security, foreign investment remains a significant source for the development of the Australian economy and the eventual community benefits derived from mining activity. AMEC is concerned that the extent of reforms proposed under the guise of national security is open to interpretation and could have a detrimental effect on foreign investment. We agreed with the Report's findings that Australia's current foreign direct investment processes lack consistency, but particularly for national security concerns, the criteria are too broad and vague, reducing the predictability of regulatory approvals. If investment is made to appear too litigious and subject to uncertainty, foreign investors will avoid undue risks by seeking alternate investment locations.

The level of foreign investment into the mining and quarrying sector is almost triple that of the next closest industry, manufacturing. Should the reforms proceed, it is probable that mining and quarrying will also be the most negatively impacted sector. To reduce investment attractiveness through FIRB reforms will somewhat paradoxically, adversely impact the industry that has been credited by State, Territory and Commonwealth Governments as the industry to support Australia's economy through the COVID-19 recession much of the world has already entered.

The enormity of the changes proposed under the reforms, raise serious concerns that Treasury could inadvertently destabilise Australia's already restrictive foreign investment environment. A paper produced by Treasury in 2012 estimated that a reduction in capital inflow and investment equal to 1% of Gross Domestic Product (GDP), would reduce Australia's gross national income by approximately 0.5% per year, over a ten-year period[22]. This figure represents that any measures to restrict Australia's economy, will likely result in a reduction of the wellbeing of its citizens. As identified by the Productivity Commission in their submission on Treaty-Making in Australia, also applicable to the proposed FIRB reforms, changes can affect broad sections of the community with differing needs and interest, and their effects are not always easy to identify[23].

Regulatory reforms impacting investment attractiveness should not be undertaken lightly, and the full extent of the impacts of potentially discouraging foreign investment needs to be considered. The current vast ambitions of State, Territory and Commonwealth reforms need to be considered in line with the Report's best practice regulation findings, that consultative, considered reforms are required so as not to jeopardise Australia's investment attractiveness. Clearly articulated policy objectives communicated in a transparent manner will reduce investors' perception of regulatory risk.

An unanswered question of policy for the Commonwealth Government is what is their responsibility if FIRB decides to reject an investor? A project will be delayed and possibly not proceed at all because of this decision. Significant economic and social benefits will be forgone, and the State and local community will bear the cost.

Sourcing early capital investment is an extremely challenging task. Certain countries have much greater risk appetites and willingness to invest at an early stage, agree to offtake and other commercial arrangements. If the Commonwealth Government is going to reject investment, there must be a willingness to have a conversation about how this investment will be replaced or alternatively sourced. The current national conversation around FIRB appears singularly focused on the national security dimension, but broader consideration of the opportunity cost of these decisions is needed.

Managing environmental and safety outcomes

Western Australia's introduction of the Mining Rehabilitation Fund (MRF) has been broadly welcomed by industry and is proving to be a positive step forward. The industry in WA recognised that the lack of financial surety exposes Governments to high levels of financial risks. AMEC continues to advocate

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[22] Gali, J. and Taplin, B, 2012, *The macroeconomic effects of lower capital inflow,* Economic Roundup Issue 3, 2012.
[23] https://www.pc.gov.au/research/supporting/treaty-making/treaty-making.pdf

for the introduction of the MRF across all Australian jurisdictions. The upfront costs of the financial assurance mechanism can result in initial costs to companies, but it provides these companies with incentives to fulfil their rehabilitation and decommissioning obligations, with the level of risk posed by the project commensurate to the risk posed to taxpayers.

The use of rehabilitation bonds does not provide adequate incentives for mining companies to rehabilitate and close mines, nor do bond calculators accurately estimate rehabilitation liabilities to cover the full cost of rehabilitation. Where rehabilitation bonds do cover the full cost of rehabilitation, the upfront costs to companies creates an unnecessary layer of financial burden, that is ratified using the MRF instead. While providing the same level of assurance as that of the highest bond calculations, the MRF comes at a lower cost to industry, by using a pooled approach.

The interest earned from the MRF, which does not require tenements with an estimate below a threshold of $50,000 to pay, must be kept and focused on rehabilitating 'legacy' mine sites. This provides Governments with monies that were not previously available to them, without accessing taxpayer dollars. This last resort fund does not eliminate proponents' environmental obligations, rather it adds a layer of protection for Government without industry incurring undue additional costs.

The WA Government ensured safety and environmental risks were addressed using the MRF at the Ellendale Diamond Mine in the West Kimberley region of the State. Without the MRF, the State would have had to draw upon consolidated revenue to sufficiently rehabilitate the site.

When paired with effective compliance and enforcement measures, as well as recognition of the importance of social licence to operate, the use of MRF could lower environmental bonding costs and lead to better environmental outcomes across Australia. Already successfully operating in Western Australia, South Australia and the Northern Territory are already seeking to implement similar initiatives.

Improving regulator governance, conduct and performance

The absence of a national approach to a range of issues pertaining to the mining and mineral exploration industry creates unnecessary regulatory burden and duplication. The Report's best practice examples highlight the lack of synchronisation between the jurisdictions. With mining subject to more regulatory requirements than any other Australian industry, producing comprehensive depictions of the regulatory landscape of each jurisdiction is challenging, particularly when considering the interaction of overlapping Commonwealth regulations.

The red tape and burden placed on businesses and Governments in the resources sector could be addressed by introducing more consistent laws, and the adoption of national harmonisation measures. While we understand this is outside the scope of this Report, the recommendation is one that cannot be overlooked when undertaking a holistic review of the resources sector regulations. The shift to a harmonised resources sector regulation framework will result in a reduction in the number of opaque regulatory requirements, to limit uncertainty and unnecessary costs for businesses and the community. For example, the use of the MRF in certain jurisdictions but environmental bonds in others creates uncertainty and increases the resources required by the Commonwealth Government when reviewing performance and possible changes, as there are multiple approaches to the situation, all requiring equal consideration.

The findings and recommendations of this draft Report for example, are not enforceable. Regulatory reforms to implement the recommendations would be subject to extensive crossover as the relevant legislation interacts with other concurrent pieces of State / Territory and Commonwealth legislation. The harmonisation of the Australian Government's approach to resources sector regulation would be aided by the presence of more national harmonisation. Until that is done, however, it will be difficult to implement the improvements recommended in this Report.

Community engagement and benefit sharing

The recommendations highlighted throughout this draft report are vast and will be challenging to agree and implement, especially due to the number of agencies currently undertaking simultaneous reforms.

Industry highlights the importance of engaging in ongoing consultation to ensure there is adequate representation from different States and Territories, within realistic timeframes. AMEC supports efforts to streamline processes, reduce red tape and regulatory uncertainty, but cautions that undertaking significant reforms without sufficient time, resources, or consultation, could result in reforms which do not best serve the intentions of the legislation.

The same applies to community engagement and benefit-sharing. Early, transparent engagement, aims to build relationships and transparency in an informal way that does not slow development. However, community engagement needs to be specific, measurable, achievable, time-bound, and focused. In our recent submission to the Northern Territory EPA regarding the draft Stakeholder Engagement and Consultation Guidance for Proponents, AMEC noted the requirement to quantify engagement was questionable, and the absence of timeframes created uncertainty. Quantifying engagement, and determining the amount of engagement required, without adequate measures, is ambiguous and will undoubtedly lead to conflicting interpretations and delays. The need for timeframes will provide the community, regulators, investors and project proponents with the required certainty they need to make decisions.

Ambiguous wording and time frames, common to provisions for community engagement, cause delays in the preparation of assessment material and the actual assessment of materials. Delays suspend the flow of benefits to the community and can compromise a project proceeding due to the cyclical nature of the mining and mineral exploration industry. High-quality guidance will facilitate investment in the resources sector, which will have a flow-on effect to increasing the benefits experienced by communities.

Indigenous community engagement and benefit sharing

AMEC acknowledges the need for building positive and long-standing relationships with local Traditional Owners and Indigenous groups, built on respect, clear communication and understanding. Currently, there is plenty of duplication between Commonwealth and State / Territory legislation. There are ongoing Aboriginal heritage-related reforms in WA and Queensland, to make legislation more culturally appropriate and equitable for Aboriginal people.

The Interim Report into the EPBC Act recommended the introduction of national level protections, which have not been supported by AMEC, due to sufficient legislation already existing to protect

Indigenous heritage. We continue to have long-standing objectives for increased clarity, certainty, efficiency and effectiveness of native title and cultural heritage processes to enhance, and not diminish native title or cultural heritage values. These objectives can be achieved by modern Cultural Heritage legislative reviews. We believe the proposed changes are outside the scope of the EPBC framework and are not the best-placed mechanism to address cultural heritage protections.

The Western Australian *Aboriginal Heritage Act (1972)* amendments are currently being drafted. A part of that process is the consideration of removing Aboriginal cultural heritage from the duplicative definition of 'social surroundings' from the Western Australian environmental legislation and providing these provisions in the amendments to the *Aboriginal Heritage Act (1972)*. AMEC continues to strongly recommend the EPBC review consider the Western Australian example and reduce the overlap and duplication of how this sensitive area is regulated.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) provides protection for areas and objects that are of significance to Aboriginal people. The ATSIHP Act allows the Environment Minister, on the application of an Aboriginal person or group of persons, to make a declaration to protect an area, object, or class of objects from a threat of injury or damage.

The overlap between Commonwealth and State / Territory legislation is a long-standing concern of industry, reflected in the 2013 Productivity Commission Inquiry into *Mineral and Energy Resources Exploration in Australia*[24] which identified the ATSIHP Act*:*

- Is considered ineffective and costly to administer.
- Is seen by some as being redundant, as they argue that all States and Territories now have legislation protecting Indigenous heritage. Others, however, question whether legislation is effective in some States.
- Could result in 'jurisdiction shopping', causing delays and duplication for explorers.

The Commission proposed that~~,~~ to address overlap between Commonwealth and State and Territory legislation, the ATSIHP Act should be amended to allow State and Territory arrangements to be accredited if Commonwealth standards are met. To date, no amendments to the ATSIHP Act have been made.

The *Native Title Act 1993* while not directly addressing cultural heritage, makes provision for Traditional Owners that hold determined Native Title to reach a range of different types of agreements with proponents seeking to carry out future act activities. The negotiation of Indigenous land use agreements, Section 31 agreements, and ancillary agreements all allow Native Title holders an opportunity to identify cultural heritage protection and monitor safeguards before future Act works are undertaken.

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[24] Page 22, Productivity Commission 2013, *Mineral and Energy Resource Exploration*, Inquiry Report No. 65, Canberra. Available: https://www.pc.gov.au/inquiries/completed/resource-exploration/report/resource-exploration.pdf

Any move to expand the existing duplication of Commonwealth legislation will be an overreach. We recommend Aboriginal Heritage issues will be best, and most appropriately protected through State legislation.

Closing comment

AMEC appreciates the opportunity to consult on the Productivity Commission's substantive reports which will underpin the resource sector's reforms for years to come. From the Commission's last review, we are still awaiting the implementation of changes and recommendations supported by industry, particularly those with a focus to streamline processes, reduce regulatory uncertainty, and improve the interaction of overlapping State / Territory and Commonwealth legislation. The resources sector is already subject to intense scrutiny and duplicative regulations, and as an industry body, AMEC is willing to participate and facilitate the streamlining of such processes where possible. Creating a more stable and transparent regulatory framework for the resources sector will maintain investment without compromising the ambitious goals of the report.

Finally, the report is one of the few comprehensive, detailed overviews of all the regulation that pertains to the mining and mineral exploration sector. The anticipated scale and breadth of the final report will, we assume, lead to a vast spectrum of recommendations and findings. The prioritisation of the most pressing of those findings would be beneficial to ensure that the volume does not cloud their urgency.

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