



Response to the

Draft Report of the

Productivity Commission Inquiry into

Resources Sector Regulation

21 August 2020

Lodged online at www.pc.gov.au/resources

Introduction

This is a response to the draft report of the Productivity Commission Study of Resources Sector Regulation released in March 2020. It has been submitted in accordance with the revised deadline of 21 August 2020.

Resources investment

The union stated in its original submission that Australia is considered a highly attractive destination for Foreign Direct Investment, which would indicate that the level of resources sector regulation is not considered onerous. At pages 84-87 the Commission appears to largely agree – the Resources Boom at its peak had the resources sector accounting for more investment (most of it foreign) than all other industries combined.

Regulatory scrutiny of applicants for licences

At pages 110-113 the Commission considers whether regulators engage in sufficient scrutiny of applicants for licences, and cites the submission of Transparency International. While regulators generally do have sufficient legal recourse to reject applicants, the union agrees with Transparency International that it is not clear that regulators always engage in sufficient due diligence with respect to the identity of applicants (i.e. beneficial owners), their history of compliance and their capacity to meet legal requirements.

Domestic gas reservation

The Commission continues with its long-held view that domestic gas reservation policies will discourage investment – pages 114-166. The union argues that the development of the east coast LNG export industry without a domestic reservation policy in place has led to over-investment in said export capacity and thence shortages in the domestic market due to long term contractual obligations to export.

The over-investment has led to large write-downs in the value of the export terminals, lower-than-expected revenues that have reduced returns to governments as the owner of the resource, and lower-than-expected tax and resource rents to the federal government. So there has been inadequate compensation for the higher gas prices that domestic users have faced.

Development of the east coast LNG export industry has been a lose-lose affair and will one day be a textbook case of how not to manage a resource industry.

Bans and moratoria

The Commission considers the current bans and moratoria that apply to certain types of resource extraction at pages 116-119. The union agrees that political practice in this area is driven by public sentiment rather than good science, and supports the draft recommendation that projects be assessed on a case-by-case basis using the best science of the day.

Approval processes

The union broadly agrees with the views of the Commission in Chapter 6 – Approval processes. The trend of increasing scope to Environmental Impact Statement requirements that leads to extremely large reports does mean that concerned stakeholders and individuals find it increasingly difficult to understand the key issues surrounding a project. How to prioritise reporting on key impacts warrants more consideration.

Lawfare

The union agrees with the finding of the Commission at 6.7 (page 180) that third party rights to seek review of approvals should be maintained. But the problem of lawfare practitioners seeking to exploit technical breaches in process-driven legislation needs to be addressed.

Resource site rehabilitation and decommissioning

The Commission finds that little of either has taken place, that there is a large legacy of abandoned mines and that there are deficiencies in current rehabilitation and decommissioning policies – page 208-209. It points out that financial sureties for mine site rehab have been inadequate (page 211) though improvements are occurring.

Of interest is the argument that final surrender of sites may be hampered by company fears of “residual liability” – that governments may come back to the mining company at some time in the future with further claims. The Commission has no answer to this.

The overall approach of the Commission to this problem seems to be better development of financial sureties, including encouragement of progressive rehabilitation. The scale of the problem is likely to mean that fixes to the financial sureties will take a long time to have substantial effect.

It should be noted at this point that good site rehabilitation, as well as having environmental merit, can also be an important part of the process of mining communities adjusting to life post-mining. Rehabilitation process may take many years and provide medium-term employment in the region. It is possible that businesses develop that specialise in mine rehabilitation. Where demand for a mineral may one day be in decline (as with thermal coal identified by the Commission at page 84) a substantial site rehabilitation task is likely to be part of the transition strategy to the post-mining period.¹

Safety

The Commission has relatively little to say about safety, noting that there has already been significant reform (pages 218-220).

The union is of the view that achieving good OHS law and regulation is achieved through tripartite consultation processes and therefore a Productivity Commission study is not the appropriate forum to produce further reform.

Issues that the union sees in this area demonstrate that the achievement of good OHS outcomes depends in part on other issues:

- Capture by industry. The re-identification of black lung in the Queensland coal industry showed that the safety regulator was not enforcing dust limits in mines. There was too much willingness to extend “flexibility” to mining companies regarding their legal requirements to meet dust levels.
- Turnover of staff and difficulty in retaining skills. The Commission notes at pages 16-17 that regulators can suffer from high staff turnover and difficulty in retaining skilled staff that can find better pay within the industry. This problem has occurred with respect to OHS regulation too.
- The Commission could examine whether there is a link between the number of fatalities in recent years and the increased use of contract workforces and casual labour hire in particular. It appears that contractors and labour-hire casuals are disproportionately represented in the fatality and other OHS data. This may be due to:

¹ See for example Beyond Zero Emissions (2019), *Collie at the Crossroads*, Melbourne

- Greater use of contractors including casual labour-hire results in a less-experienced workforce that is less familiar with the mine site.
 - Multiple contractors on-site and indirect employment makes it more difficult to ensure that all required OHS training has occurred, and that safe work practices are being followed.
 - A workforce that has less employment security (inherent in contractors and casual roles) being less willing to speak out on OHS issues]
- There is also the perennial problem that pay bonuses may sometimes be linked to OHS performance – leading to under-reporting of injuries and incidents as that data can lead to a loss of pay.²

Uncertain climate and energy policy

The union agrees with the finding by the Commission at page 226 that uncertainty about and inconsistent climate change and energy policies are a risk to resources sector investment.

Treatment of Scope 3 emissions

The union agrees with the view put by the Commission “that targeting scope 3 emissions on a project-by-project basis is likely to be an ineffective mechanism for reducing global emissions” (page 228) and with the content of Box 8.5 on page 229. The union has made the point on multiple occasions that the Scope 3 emissions of Australian coal that is exported are the Scope 1 and 2 emissions of activities in other countries and the responsibility of those countries to control. Australia, Australian regulators and Australian approval authorities should not be seeking to control the emissions of other countries and will be ineffective in doing so.

Workplace relations

The entirety of this section of the report at pages 232-234 concerns “greenfield agreements”.

The Commission does not adequately distinguish that greenfield agreements do not necessarily apply only to the construction phase of a project. They can be applied to any new business commencing operations and (in the union’s

² Bonuses cut ‘if miners report on-site injuries’, The Australian, 20 August 2020, page 2

direct experience) to a business taking over an existing site that has been closed for a certain period. The Fair Work Commission has adopted a view that a site closed for three months or more can be the subject of a greenfield site agreement.

The draft recommendation 8.1 at page 234 is therefore inadequate in not specifying that agreements extending beyond 4 years should only apply to construction projects for the duration of the construction phase, and not production operations.

The recommendation is also deficient in allowing for greenfield agreements of unlimited duration. This does not recognise that with each passing year, an agreement reflects less of the context in which it was negotiated. There should be progressively tougher justifications required for each year beyond 4 years.

In order to ensure that workers who do not ordinarily get to vote on a greenfield agreement have their interests protected, it should be a requirement for all such agreements to be negotiated with relevant unions that cover the work.

Social licence

While the union broadly agrees with the Commission's discussion of social licence to operate, there is inadequate distinction regarding the "community" that is affected by a resources project.

The Commissioner refers to the Maules Creek protests at page 244 without recognising that the vast majority of protesters were not from the communities near Maules Creek but from distant areas (mainly Sydney).

The attention of the Commission is drawn to the OECD definition of stakeholder and discussion of stakeholder prioritisation:

"Stakeholders are persons or groups who have interests that are or could be impacted by an enterprise's activities. Not all individuals and groups considered as stakeholders will have interests that can be affected by a specific activity carried out by an enterprise. It will therefore be important for the enterprise to identify the individuals and groups with interests that must be taken into account with respect to a specific activity (relevant stakeholders). Moreover, due diligence concerns the interests of stakeholders that have been

affected (impacted stakeholders) as well as those whose interests have not been affected but could be (potentially impacted stakeholders). Additionally, not all interests are of equal importance and it is not necessary to treat all stakeholders in the same way. Where the interest is individual human rights or collective rights (held by groups such as indigenous peoples) the stakeholders whose human rights are or may be affected can be referred to as ‘rightsholders’.” (Emphasis added)³

Note that a stakeholder must be impacted, or potentially impacted, by the business; it does not include those who may have the capacity to impact the company. And while a national “community” may have an interest affected by a specific mine, business should direct their attention to those most-impacted, and place particular priority on those whose human rights are affected (“rights-holders”).

Price signals and housing supply in mining communities (page 250)

The Commission’s study here does not examine the shift that has occurred in the mining industry over recent decades from company-supplied housing to requiring mineworkers to pay for their own housing.

The Commission sees only the actions of supply and demand in determining house prices in mining regions and say the market should be allowed to sort out the under-and-over-supply of housing stock.

This neglects to see that what has occurred with the shift away from company-supplied housing is that risk has been transferred from the mining company to individual workers. The question should be asked – “who is best placed to shoulder the risk of housing supply in a remote area?” – the mining company with a 20 year or longer mine plan, or the individual worker who has far less capacity to project and protect their housing (and family and career) needs over a 20 year period?

Another way to put it might be that mining town accommodation is not a deep or liquid market, leading to extreme price volatility that is relatively inefficient in achieving optimal resource allocation compared to the largest player in the region (the mining company) planning the housing supply required for its workforce.

³ OECD (2018), Due Diligence Guidance for Responsible Business Conduct, Paris, page 48

Using local goods and services (page 262)

The Commission finds that “mandating local procurement is likely to be costly” at page 264 but does not explore benefits of local procurement that may extend beyond the company. There is no evidence presented; the assertion seems to have only a theoretical basis.

Many resource companies invest heavily in local infrastructure

At page 268 the Commission cites certain local infrastructure investments made by companies as evidence of heavy investment. For this to be established it is necessary to cite not only the quantum of the monies expended, but their significance relative to other expenditure or value-added. This could include (say) the spend as a proportion of local GDP per year, or as a proportion of project revenue or project EBITDA. Figures that are summed over several years and not given a context are relatively meaningless.

One example of the significance of community contributions is that supplied by the NSW Minerals Council in its Mining Expenditure Impact Survey 2018-19. A total of \$9.5 million in NSW is identified at page vi, of which \$1.9 million occurred in Sydney (rather a long way from mine communities!) This amount was equal to 0.3% of the \$29.9 billion value-added to the Gross Regional Product in NSW contributed by the mining companies (page iv). And it was equal to 0.29% of mining turnover of \$33.4 billion in NSW.

In a similar vein, BHP Group Ltd in its 2019-20 annual results released on 18 August 2020, states at page 4 that it spent US\$149.6 million globally in “social investments”, and that this met its target of no less than 1% of pre-tax profit. This was in a year where revenue was US\$43 billion and attributable profit was US\$8 billion.

Once given the context of the scale of the industry, it is difficult to see the spending of these amounts as “heavy investment”.

FIFO (page 266)

It is not disputed that Fly-In, Fly-Out is a valuable tool for companies; the correct question is whether it results in a fair distribution of benefits for local communities.

In a brief 1.5 pages the Commission does not examine the interaction between working hours, fatigue and FIFO at all. It spends just three lines on mental health issues, including suicide, that are exacerbated by FIFO.

As has become apparent since the COVID-19 pandemic began in 2020, FIFO also increases the risk of disease transmission and various companies have had to engage in large relocations of their FIFO workforce to cope with State border closures seeking to limit the spread of the disease.

When companies seek to prohibit local employment, as BHP did with its Daunia and Caval Ridge mines in central Queensland when it mandated that workers must live within a certain distance of Brisbane and Cairns airports⁴, it is difficult to see how the policy could be fair to local residents, or promote safety (it requires long commutes at the beginning and end of rosters) or be resource efficient.

Agreements between indigenous groups and resources companies

The union will not seek to comment much on Chapter 10, but notes that the agreements described at Box 10.1 (page 277) do frequently concern employment issues and in that respect are of particular interest to the union.

The Commission notes that these agreements are generally confidential private contracts. In contrast, all enterprise agreements that the union negotiates are publicly available on the website of the Fair Work Commission. Having transparency in wages and conditions does not only help ensure that collective agreements are fair and reasonable; it is also a requirement of an effectively functioning labour market.

The high levels of confidentiality with respect to indigenous land use agreements means that it is difficult to ascertain trends, progress or even minimum reasonable standards in such agreements. Even the public announcements as to their benefits are often problematic. Summing estimated revenue streams to indigenous people over the life of a project fosters little understanding as to tangible benefit flows from year to year.

⁴ <https://www.abc.net.au/news/rural/2013-07-08/locals-out-of-mine-work/4805790>