



Law Council
OF AUSTRALIA

Legal Practice Section

6 November 2019

Ms Lisa Gropp
Commissioner
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003

By email: resources@pc.gov.au

Lodged online at:

<https://www.pc.gov.au/inquiries/current/resources/make-submission#lodge>

Dear Ms Gropp

Submission to the Inquiry into Resources Sector Regulation

1. The Australian Environment and Planning Law Group (**AEPLG**) from the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to the inquiry by the Productivity Commission to examine regulation affecting the resources sector and highlight best practice.
2. The Australian Government Treasurer, the Hon Josh Frydenberg MP, requested the Productivity Commission on 6 August 2019 to undertake this inquiry in accordance with defined terms of reference.
3. The Productivity Commission released an issues paper in September 2019 and has called for public submissions.
4. The terms of reference require the Productivity Commission to inquire into and report on "regulation with a material impact on business investment in the resources sector". The Commission has been asked to identify "effective regulatory approaches" and highlight examples of "best-practice" regulation across Australia and internationally.
5. The terms of reference also ask the Commission to:
 - (a) Assess best practice project approval processes across Australia and internationally and identify any broader impediments to the timing, nature and extent of business investment in the Australian resources sector.
 - (b) Identify regulatory practices that have achieved evidence-based goals without imposing additional costs or regulatory burdens on industry, as well identifying jurisdictions' successful efforts to streamline or augment processes to reduce complexity and duplication and improve transparency for current and future investors.

- (c) Identify leading environmental management and compliance arrangements that have resulted in the removal of unnecessary costs for business while ensuring robust protections for the environment are maintained.
- (d) Identify best–practice examples of government involvement in the resources approvals process – taking into account the context of each development – to expedite project approvals without compromising community or environmental standards, based on sound risk-management approaches.
- (e) Examine regulatory and non-regulatory examples of effective community engagement and benefit–sharing practices, and establish best–practice examples of where mutually-agreeable relationships were successfully developed between the resources sector and the communities in which they operate, including with Indigenous communities.

6. This submission addresses points (a) and (e) of the terms of reference above.

Previous submission

- 7. We refer to the Law Council of Australia’s submission dated 29 April 2014 on best practice environmental regulation in its submission to the House of Representatives Standing Committee on the Environment’s inquiry into “streamlining environmental regulation, ‘green tape’, and one stop shops”. We enclose this submission for the benefit of the Productivity Commission and rely on the detail of that submission here as many of the observations in that submission are relevant to the Productivity Commission’s terms of reference for this review.
- 8. The Minister for Resources in a joint statement with the Treasurer says that this review is targeted at “improving the efficiency” of environmental approvals to “reduce the regulatory burden on business”.¹ The statement says that the aim of the review is to ensure resources projects are “transparently and efficiently assessed” while upholding “robust environmental standards”.² The statement also says that this review is to “complement” the upcoming review of the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).
- 9. The review of the EPBC Act was announced by the Minister for the Environment on 29 October 2019. The AEPLG looks forward to actively engaging in the EPBC Act review process and intends to undertake a thorough consultation through its members and member organisations to inform the AEPLG’s submission to that review. The AEPLG makes the preliminary observation that the EPBC Act review will necessarily be more fulsome than the current review by the Productivity Commission, particularly in relation to the impact that environmental regulation has on business investment. The AEPLG also expects that the findings of the Productivity Commission in this review will be considered by the Reviewer and review panel that have been appointed to conduct the EPBC Act review. For these reasons, the AEPLG’s submission to the Productivity Commission in this review is necessarily high level.

¹ ‘Productivity Commission to review resources sector regulation’, 5 August 2019: <https://www.minister.industry.gov.au/ministers/canavan/media-releases/productivity-commission-review-resources-sector-regulation>

² Ibid.

Best Practice Project Approval Processes

10. There is no one standard against which “best practice approvals” should be measured. The AEPLG believes that best practice ought to refer to a standard of regulation that is consistent with international law, is reflective of regulation in comparable democracies and draws on the approach taken in previous reviews and of expert courts and tribunals.
11. The AEPLG also notes the potential for environmental regulation to deliver important economic and social benefits - and not just burdens. The Commission’s approach to regulations must not omit the potential for regulation to create new ‘rules of the game’ that generate new entrepreneurial opportunities. Regulatory change is an important element from which new, innovative economic activity and new business opportunities emerge. Viewing environmental regulation as a mere burden and cost impost that must be eradicated risks impeding sustainable new venture opportunities, with flow-on effects to job creation and GDP growth.
12. In terms of the operation of resources law, the Law Council of Australia has previously submitted that it supports resources laws that:
 - (a) Are clear and consistent and reduce the regulatory burden and duplication for business;
 - (b) Ensure better clarity and guidance for the resources sector;
 - (c) Are consistent with international legal principles ratified by the Australian government;
 - (d) Provide for improved environmental standards and outcomes;
 - (e) Adopt the process of prior and informed consent where land or culture of Australian Aboriginal people(s) are affected by the project; and
 - (f) Ensure that approval conditions are monitored and enforced by regulatory authorities.
13. While it is clearly reasonable to eliminate regulation which serves no reasonable public purpose, it must be recognised that the fundamental purpose of environmental legislation is protection of the environment, within the broader policy framework of sustainable development. In determining what is best practice regulation, due consideration ought to be given to this context and to the purpose of environmental laws.
14. The AEPLG agrees with the statement made on page 7 of the Commission’s issues paper that while “regulatory approaches require governments and regulators to take the course of action that imposes the least burden on businesses”, the AEPLG stresses that this must be “subject to achieving policy goals” in order to achieve a net community benefit.
15. One such policy goal is to achieve ecologically sustainable development or what is now more commonly referred to as sustainable development, that is, “using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the

future, can be increased”.³ Sustainable development “is development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations”.⁴ This is how best practice environmental legislation seeks to achieve the balance between economic, social and environmental considerations to achieve a net community benefit.

16. It must be borne in mind that this is the policy objective sought to be achieved through much of environmental regulation applying to the resources sector. It is a reasonable standard and policy goal. The Law Council has recently adopted its own Sustainable Development Policy which articulates the principles that underpin the concept of sustainable development as described in the previous paragraph. A copy of the Policy is attached for the Commission’s reference.
17. The APELG draws the Commission’s attention to the findings of the 1999 Hawke Review of the EPBC Act that:⁵
 - the regulatory environment needs to be reformed so that unnecessary regulation is removed and more efficient approaches are adopted; and
 - administration needs to be funded so that early investments can be made in the things that will make the regulatory system work smoothly.
18. The Hawke Review recommended ways to simplify the drafting of national legislation, in order to reduce regulatory duplication and contribute to improving the environmental regulatory system. These centred around removal of overlap and duplication, resourcing the Department responsible for administration of the EPBC Act, and included a clear articulation and adoption of the underlying principles of sustainable development to underpin decision-making. None of these recommendations were subsequently translated into amendments to the EPBC Act.
19. Clear and consistent criteria for assessment provides certainty for proponents and for communities affected by resources projects. The adoption of the principles of sustainable development as a criteria for assessment assists in ensuring that all projects are assessed against a level playing field, encouraging investment through certainty of process.

Effective community engagement

20. It is a well-founded proposition that better outcomes are obtained when environmental decision-making includes public participation and independent arbitration through third party appeal rights.
21. The Hawke Review recognised that this included third party appeal rights. That review found:⁶

³ *Australia’s National Strategy for Ecologically Sustainable Development (1992)*, <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>

⁴ Ibid.

⁵ Fact Sheet 6, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, <https://webarchive.nla.gov.au/awa/20130410073034/http://www.environment.gov.au/epbc/review/publications/pubs/fact-sheet-6-improving-regulatory-efficiency.pdf>

⁶ Hawke Review at 14.2 and 14.20.

“Environmental decisions generally affect the community in some way and therefore, including the public in decision-making processes makes good sense and good governance.

...

“Public participation is a critical process needed to inform high-quality decision-making. It provides a form of review of material put before the decision-maker and contributes further evidence on environmental, social and economic impacts of proposed developments.”

22. The evidence suggests that the existence of third party appeal rights does not “open the floodgates” to litigation. Rather, third party appeals may actually improve outcomes, provide a forum where those affected by decisions can be heard and ensure that individual rights are weighed against collective concerns.⁷
23. Perhaps most importantly, third party appeal rights ensure greater transparency in development decision making, are a means of checking that regulatory authorities are not acting capriciously, and dispel fears about corruption or collusion providing for greater community confidence in assessments and approvals processes.⁸ Indeed, it is the experience of AEPLG members that the vast number of appeals are taken by a developer, not by third parties.
24. Effective community engagement does not simply begin and end with appeals. It starts much earlier in the assessment process. Where there is a lack of effective community engagement through statutory assessment processes, or before, this has the potential to lead to perceptions of bias and collusion, and a greater risk and number of appeals.⁹ This would suggest that best practice regulation provides for public participation in assessment processes, in a clear, consistent and transparent way, and to ensure that community input is properly considered in decision-making.
25. There is a trend to reduce public participation in environmental decision-making, through constraining the scope of submissions or the assessment, removing decisions from statutory frameworks, or, in the case of the EPBC Act, overly relying on placing conditions on pre-approvals through the “not a controlled action” decision. There is also a trend to remove third party merits review rights from decisions, constraining the role of courts and tribunals as the independent and expert arbiter of disputes about planning and environment issues.
26. The AEPLG suggests that this devolution of public participation in decision-making has served to reduce transparency with consequences for public confidence in decision-making. Further, any perceived benefits gained in preventing third party appeal rights may not be seen, as parties instead take recourse to higher courts in judicial review proceedings with consequential delays. The AEPLG would caution against any retrograde step to reduce merits review.
27. Further, where there are approvals required, there is anecdotally very little monitoring undertaken by regulatory authorities and similarly very little compliance action taken in respect of any breaches discovered. This likewise has the potential to erode public confidence, and underscores the importance of third party civil enforcement, to ensure

⁷ Judge Trenorden 2009. ‘Third Party Appeal Rights: Past and Future’, https://www.sat.justice.wa.gov.au/files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf

⁸ Ibid.

⁹ Ibid.

that where regulatory agencies fail to act, third parties can take action to ensure resources projects are operating within the confines of their approvals.

28. The Law Council is looking forward to participating in the later stages of the Commission's review and would welcome the opportunity to discuss this submission with the Commission. In the first instance, please contact AEPLG Chair, Robyn Glindemann

Yours sincerely

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Chief Executive Officer