



Fortescue Metals Group Submission

Productivity Commission Draft Report

Resources Sector Regulation

August 2020

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EXECUTIVE SUMMARY

Fortescue Metals Group provides this written submission in response to the *Productivity Commission Draft Report, Resources Sector Regulation*. Fortescue Metals Group subject matter experts have reviewed the report and have provided comments in the areas relevant to the business, as detailed below.

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2. RESOURCES ACTIVITY IN AUSTRALIA

2.1 Finding

Global and local factors including emissions policies, technological advances, economic development and population growth make it challenging to predict the future mix and level of resources investment in Australia. However, given Australia's diverse and significant resources deposits, the potential for investment will likely remain substantial.

Fortescue Metals Group response

The finding accurately identifies Australia's diverse and significant resources investment potential, along with global and local macro factors which have a bearing on resources investment. Fortescue's view is that Australia is in competition for resources investment against other jurisdictions and, as in any business, capital efficiency, cost competitiveness and investment policy settings are critical to realising Australia's future potential.

4. RESOURCE MANAGEMENT

4.1 Finding

There is no case for a major reform of the Australian pre-competitive geoscience arrangements given the quality of the information is generally highly regarded. However, the coverage of geoscience databases could be further improved, for instance, by all jurisdictions adopting sunset confidentiality periods for public release of private exploration and production reports prior to the end of the tenure of a project.

Fortescue Metals Group response

Any reform program will need to respect confidentiality requirements where mineral exploration and development projects are ongoing. In our view geological data and reports should remain confidential whilst the relevant tenure is still live. The sunset period should commence after the expiration or surrender of the tenement.

4.2 Finding

No evidence has been presented to this study indicating that differences between jurisdictions' approaches to licensing have created impediments to investment, or that any particular regime for the allocation of tenements is 'leading practice'.

Fortescue Metals Group response

Every regime has its positive and negative implications. In general, the WA system tends to be more prescriptive which means that the rules (e.g. expenditure requirements) are easier to define. However, such prescriptive rules can lead to unintended or disproportionate consequences arising from minor administrative actions.

A potential concern is the effect of recent changes to the South Australian exploration licence regime via the Statutes Amendment (Mineral Resources) Act 2019 (SA), that means exploration tenure will have an ultimate expiry date. As a consequence of a new 100% surrender requirement at the end of 18 years, regardless of the level of exploration that has been completed on the tenement at that point, the tenement must be surrendered. This could create an impediment to joint ventures on mature tenure.

4.3 Finding

Domestic gas reservation schemes can reduce returns to investors and discourage investment in gas exploration and extraction, leading to higher prices in the longer run and imposing net costs on the community.

Fortescue Metals Group response

In the absence of transparent and liquid domestic gas markets the domestic gas reservation system plays an important role in ensuring some level of certainty around future gas supply and demand for domestic users making large capital investments and decarbonising.

Western Australia's domestic gas reservation policy has seen a reduction in the price and increase in the availability of gas to domestic (WA-based) users. This makes use of gas attractive to resource sector companies with large energy requirements.

4.4 Finding

Bans and moratoria are a response to uncertainty about impacts of unconventional gas operations. However, the weight of evidence available, and the experience of jurisdictions where unconventional gas development takes place, suggests that risks can be managed effectively.

Fortescue Metals Group response

Such bans and moratoria, including onshore WA, further reinforce the need for domestic gas reservation policies.

4.1 Leading Practice

To promote data access, confidentiality periods before public release of private exploration and production reports generally should be shorter than the tenure of a project. New South Wales new regulations are one example of this practice. Many other jurisdictions have similar arrangements in place.

Fortescue Metals Group response

Any regime will need to respect confidentiality requirements where projects are ongoing. In our view geological data and reports should remain confidential while the relevant tenure is still live. The sunset period should commence after the expiration or surrender of the tenement.

4.2 Leading Practice

Thorough assessments of potential licence holders address the risk of repeated non-compliance. Leading practice involves regulators taking a risk-based approach to due diligence when granting or renewing tenements and considering:

- whether the applicant has previously failed to comply with licence conditions or health, safety and environment legislation (whether in the same jurisdiction, or in other domestic and international jurisdictions)
- past criminal conduct, technical competency and past insolvency. While all jurisdictions undertake some due diligence, none fully follows leading practice.

Fortescue Metals Group response

We agree with this statement.

4.3 Leading Practice

Where resources project proposals are contentious and generate intense public concern, establishing institutions, independent of resources companies and regulators, to provide accessible information to landholders and the broader community can help inform debate. The Gas Fields Commission, the Office of Groundwater Impact Assessment in Queensland and the Commonwealth's Gas Industry Social and Environmental Research Alliance provide examples in relation to coal seam gas developments.

Fortescue Metals Group response

We agree with this statement.

4.1 Recommendation

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

Fortescue Metals Group response

In addition to assessment based on science (including developing technologies and impact mitigation and management capabilities), governments also need to consider the potential social and economic benefits of all proposals.

5. LAND ACCESS

5.1 Finding

Landholders frequently express concern about resources projects, and some have called for a right of veto over resources activity on their land. This would be inconsistent with Crown ownership of resources and would affect the distribution of the benefits of resources significantly. Landholders have a right to full and fair compensation for access to their land, but not for the resources under it.

Fortescue Metals Group response

We agree with the finding that a right of veto is inconsistent with Crown ownership of resources on behalf of all citizens. Strategic land use planning by government is best placed to determine ultimate land use taking into account competing public and private interests, particularly where benefits to the whole of society can be measured and weighed against impacts to other rights holders.

5.2 Finding

Many landholders enter land access negotiations with resources companies with little prior experience or knowledge. This information asymmetry provides a basis for government intervention.

Fortescue Metals Group response

While this may be the case in some regions, the Pilbara region of Western Australia has many land holders who are quite sophisticated in their approach to their negotiations with resources companies and are capable of bringing significant financial, technical and legal resources to bear

on agreement negotiations. Compensation flowing under ILUAs and future act agreements has seen a rebalancing of the historical disparity of resourcing and bargaining power.

This finding would apply to smaller less sophisticated landholders and would depend on the processes in place to protect landholders' rights. For example, where there is a tribunal system that may be an effective way to resolve access issues, however where there is a court or more litigious system in place it will be harder for small landholders to be represented effectively. Noting that the existing Warden's Court process in WA allows objections to be heard by any party with an interest in land over which a mining tenement is sought. The Warden's Court has informal rules relating to evidence and procedure and therefore is less costly to be represented in than other Courts that apply more formal requirements.

5.3 Finding

The *McGlade* decision of the Federal Court in 2017 created concerns in the resources industry about the validity of native title agreements that had only been signed by the majority of the individual members of the applicant. Amendments proposed in the *Native Title Legislation Amendment Bill 2019* (Cth) should address these concerns.

Fortescue Metals Group response

The amendment of the Native Title Act to remove uncertainty around the validity of future act agreements and ILUAs is essential for confidence in the resources industry.

5.4 Finding

The level of compensation paid for resources developments on native title land has typically been a matter for proponents and native title groups. However, the Timber Creek decision of the High Court in 2019 went to the value of native title rights and interests and could affect agreement-making with native title groups. Any uncertainty will likely be resolved as access negotiations occur over time.

Fortescue Metals Group response

Uncertainty around the calculation of compensation for resources development projects will exacerbate the already lengthy, excessive periods that are required to reach agreement with Indigenous groups. It is likely that such uncertainty will see commercial negotiations look to leverage the Timber Creek decision in the expectation of equivalent levels of compensation despite the specific circumstances of that case.

5.5 Finding

Exploration activities have differing impacts on native title land. Consequently, a case-by-case approach by States and Territories to assessing whether the expedited procedure under the *Native Title Act 1993* (Cth) applies is necessary to give effect to the intention of the Act.

Fortescue Metals Group response

Agree with the finding. Expedited procedure objections are routinely made by native title parties as a matter of course and as a de facto NIGF process, using pro forma submissions with little or no evidence that the area holds any particular significance or is otherwise the subject of community activities.

5.6 Finding

Very few projects are going ahead on land protected by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The requirements that agreements must cover both exploration and extraction, and that refusal of consent for one project in an area means that a moratorium is imposed on any other development while the original proponents retain a right to renegotiate, appear to be unnecessarily restrictive.

Fortescue Metals Group response

Agree with the finding. Requiring an agreement on extraction before a deposit is identified is impractical as the size, shape, location, mining method and many other important factors are unknown at the beginning of exploration. The ALRA right of veto is inconsistent with the finding in 5.1.

5.7 Finding

South Australia, Victoria and the Northern Territory have implemented alternative regimes to that prescribed under the *Native Title Act 1993* (Cth) for negotiating agreements between resources companies and traditional custodians. These approaches have both advantages and disadvantages; a leading-practice approach has not been identified.

Fortescue Metals Group response

Agree with finding. In WA, the right to object to the application of the expedited procedure to applications for exploration tenure is regularly exercised by Indigenous owner groups. Objections are often made as a matter of course irrespective of the merits of the objection and not actively pursued. The expedited procedure is therefore somewhat ineffective at facilitating timely grants of exploration rights as an alternative to lengthy right to negotiate processes. Such delays do not support grass roots exploration that underlies resource developments.

5.1 Leading Practice

Community concerns about mixed land use are best resolved through strategic land use frameworks rather than prohibitions on resources activity on agricultural land. Leading practice frameworks seek to balance the trade-offs between resources development and other land uses to maximise economic benefits for the community. These frameworks should thoroughly consider the costs and benefits of allowing resources development and have approval processes proportionate to the risks of resources development on the relevant land. The Council of Australian Governments' Multiple Land Use Framework provides a leading-practice example.

Fortescue Metals Group response

In principle we agree that strategic land use frameworks are best used to manage mixed use rather than outright prohibitions on certain activities. These frameworks should have regard for the fact that minerals extraction activities do not represent a permanent change in land use. Where rehabilitation and closure require land to be returned to a state that facilitates the prior land use, this should be taken into account.

5.2 Leading Practice

Where planned activity will be low impact, requiring early personal engagement between resources companies and landholders can ease potential tensions and be less costly than a negotiated agreement. The Queensland Land Access Code's notification requirements provide a leading-practice example of this approach.

Fortescue Metals Group response

We do not support the imposition of further substantive procedural requirements as per the Queensland Land Access Code. The private land provisions of the WA Mining Act 1978 are sufficient to regulate the respective rights and responsibilities of the parties when access to private land is sought including with respect to compensation and oversight by the Warden's Court.

5.3 Leading Practice

A standard template for land access agreements can reduce information asymmetry and help to set expectations for landholders and resources companies and improve confidence in the regulatory system. The Queensland Land Access Code, providing a combination of mandatory conditions as well as guidelines, provides a leading-practice model.

Fortescue Metals Group response

A standard template for a landholder-explorer agreement is a good idea. We note the distinction between unsophisticated and sophisticated landholders. Sophisticated landholders will likely require bespoke agreements.

We do not support the imposition of further substantive procedural requirements as per the Queensland Land Access Code. The private land provisions of the WA Mining Act 1978 are sufficient to regulate the respective rights and responsibilities of the parties when access to private land is sought including with respect to compensation and oversight by the Warden's Court.

5.4 Leading Practice

Low-cost dispute resolution methods that take an investigative approach to resolving problems between parties can reduce tensions between landholders and resources companies. The recently established Queensland Land Access Ombudsman provides an example.

Fortescue Metals Group response

We do not support the imposition of further substantive procedural requirements. The private land provisions of the WA Mining Act 1978 are sufficient to regulate the respective rights and responsibilities of the parties when access to private land is sought including with respect to compensation and oversight by the Warden's Court.

5.5 Leading Practice

Conjunctive agreements that provide a standard set of terms for resources developments in a particular area can reduce impediments to investment on native title land. South Australia's ILUAs for gas and mineral exploration are a leading-practice example.

Fortescue Metals Group response

These have potential to be a useful option but should be voluntary and more needs to be known about the practical outcomes of their utilisation. Native Title groups are increasingly sophisticated in negotiations and will require a greater level of detail i.e. information on the resource, planned activities including engaging their own consultants to provide advice.

In general, we feel the private land provisions of the WA Mining Act 1978 are sufficient to regulate the respective rights and responsibilities of the parties when access to private land is sought including with respect to compensation and oversight by the Warden's Court.

5.1 Recommendation

The National Native Title Tribunal should publish guidance about the circumstances in which the expedited procedure will apply.

Fortescue Metals Group response

Better guidance is useful in theory, however the general principles of when the expedited procedure will apply are well known. Guidance won't assist much if the expedited procedure objection process continues to be used by Native Title groups as a proxy for the negotiation in good faith (NIGF) process.

6. APPROVAL PROCESS

6.1 Finding

Unnecessary delays in project commencements can be costly for proponents and the community, and typically dwarf other regulatory costs.

Fortescue Metals Group response

Agree with the finding. Delays in project commencement increase the overall capital cost which is in part time based and reduces the effective return on investment. Moreover, the delay in bringing the project to market defers revenues and the associated taxes, royalties, employment and other community benefits.

Delays can result in expenditure on standby rates for contracts and contractors, manufacturing components going offshore due to schedule constraints and faster offshore fabrication, etc. In addition, the complexity and timing of approvals will be a significant factor to be considered where there is competition for the allocation of their capital between domestic and foreign projects in any organisation.

6.2 Finding

Environmental impact assessments are often unduly broad in scope and do not focus on the issues that matter most. This comes with costs — the direct costs of undertaking studies and preparing documentation and the more significant cost of delay to project commencement. Disproportionate and unfocused environmental impact assessments are also of questionable value to decision makers and the community.

Fortescue Metals Group response

We do not agree with this. The scope of a project is largely up to the proponent to propose and agree with the EPA (or equivalent) during the assessment scoping phase.

6.3 Finding

The referral process for the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and the nuclear and water triggers are creating unnecessary regulatory burden:

- Over half of all projects referred under the EPBC Act do not ultimately require Commonwealth approval.
- Projects ruled out as nuclear actions in the EPBC Act explanatory memorandum are being treated as nuclear actions requiring Commonwealth environmental approval.
- The evidence that the water trigger filled a significant regulatory gap is not compelling.

Fortescue Metals Group response

We agree that the referral process for the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) is creating unnecessary regulatory burden.

We believe there is an opportunity for clearer guidance regarding 'calculation' of significant impact on a matter of significance. Determining significance is currently quite subjective. Often proponents will refer for 'legal certainty' as calculation of impact cannot currently be undertaken by a proponent due to lack of quantifiable guidance documentation.

Third party referral of a proposal runs the risk of inaccurate representation of the proposal and these referrals need to be validated with the proponent.

6.4 Finding

Bilateral assessment agreements significantly reduce regulatory burden for projects that require Commonwealth and State or Territory environmental assessment.

Fortescue Metals Group response

Agree, however an assessment on the State's report, recommendations and applicable approval conditions is still undertaken by the Commonwealth and projects can be approved by the State and not approved by the Commonwealth. A logical step would be for comprehensive bilateral agreements to be in place that provide for both assessments and approvals.

6.5 Finding

Unpredictable and lengthy delays at the approval stage are a key frustration for project proponents. That frustration is compounded where delays are seen as unnecessary or their cause is unclear.

Fortescue Metals Group response

We agree with this statement.

6.6 Finding

Project approvals are often conditional on the preparation of management plans that also need to be approved by regulators ('post-approvals'). The process and timelines for securing post-approvals are often unpredictable, and over-reliance on management plans is not a first-best approach to achieving environmental outcomes.

Fortescue Metals Group response

We agree. Contributing to the frustration is the absence of timeframes for management plan approval following 'Approval' of a project. Where conditions prevent implementation of a project prior to a Management Plan's approval, there is no certainty for proponents with regard to start dates (with obvious implications for workforce mobilisation, infrastructure fabrication and contract award).

Environmental management plans should be a reiteration of management and impact mitigation commitments made within an assessment document (allowing for an adaptive approach), along with monitoring frameworks to verify that objectives for a specific factor are being achieved.

6.7 Finding

Court cases brought by third-party opponents to resources projects may cause delay, but this does not imply that third parties should be excluded from seeking judicial review. Process-driven legislation creates opportunities for regulators to make invalid administrative decisions that open the door for judicial review.

Fortescue Metals Group response

Where there are opportunities for third parties to contribute to a project's assessment and approval recommendation (appeals for and against), the opportunity for judicial review should be reviewed. A proponent invests significant capital into project assessment and development and to have this put at risk following the grant of an approval, and in particular commencement of a project, as a result of possible vexatious litigation is unfair and risk investment.

6.8 Finding

Resources projects typically require a range of assessments and approvals by multiple regulators within a jurisdiction. While regulatory coordination has improved over the past decade, proponents still report difficulties navigating the regulatory landscape. Lack of coordination can cause costly delays and liaising with multiple agencies can also give rise to significant compliance costs.

Fortescue Metals Group response

Regulatory overlap and duplication continue to delay approvals, projects and operations. Provisions for projects subject to 'formal' assessment are required that result in factors (e.g. heritage, flora, fauna) only being assessed once for a project, and only by one government agency.

6.9 Finding

Strategic assessments are costly but may reduce regulatory burden in the long run where they reduce the cost or number of future project approvals.

Fortescue Metals Group response

We are yet to see transparently how a strategic assessment 'secondary' approval actually works in practice, therefore we have no comment at this stage.

6.2 Leading Practice

Timelines, statutory or otherwise, provide proponents with information about how long regulatory processes ought to take, which supports project planning. They also focus regulators' attention, and public reporting of regulator performance in meeting those timelines is a means of keeping them accountable. For example, both Western Australia and South Australia report on the share of mining proposals and other approvals finalised within target timelines.

Fortescue Metals Group response

Care needs to be taken with reporting against approvals KPIs to ensure that the calculation of approvals within target timeframes matches with user experience. This is particularly important in the absence of statutory approval timeframes, such as in relation to WA Mining Act Proposals.

'Stop the clock' options can be exercised by regulators with little transparency on the reasons why, or efforts made by the regulator to 're-start' quickly, (e.g. in WA we see an almost standard 21 day stop the clock for external department reviews of proposals regardless of their relevance to other departments). Complete proponent experience, or total assessment days (i.e. from the

date of lodgement to the date of approval) would be another useful metric to be measured in order to support appropriate resourcing of relevant agencies.

6.3 Leading Practice

Leading-practice use of stop the clock provisions means placing limits on when they can be used — when matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated — and transparency about why the clock is stopped. No examples of leading practice have been identified.

Fortescue Metals Group response

As above response to 6.2 Leading Practice.

6.4 Leading Practice

The use of deemed decisions, whereby the assessment agency's recommendation to the final decision maker becomes the approval instrument if a decision is not made within statutory timeframes, is a leading-practice approach to reducing delays. At the same time, deemed decisions should be subject to limited merits review. No jurisdiction ticks both boxes — the *Environment Protection Act 2019* (NT) introduced deemed decisions but does not allow them to be subjected to merits review.

Fortescue Metals Group response

Agree. Deemed decisions provide a proponent some certainty around the timing for a decision (positive or negative).

Merits reviews are appropriate, as long as they are limited to the scope of the approval relevant to the referred/ assessed proposal. Similarly, timeframes for merits reviews would be required.

6.5 Leading Practice

Clear guidance on regulators' expectations about the content and quality of environmental impact assessments reduces the need for additional information requests. Western Australia and Queensland are examples of leading practice in this area.

Fortescue Metals Group response

Agree. However, interpretation and applications of the guidelines by individuals within proponents or government agencies can often still result in requests for further information. Additional efficiency and benefit could be realised via joint industry/ agency communication and training on guidance material.

6.6 **Leading Practice**

Cooperation between the Commonwealth and the States and Territories in environmental assessment and approval processes can be supported by:

- the Commonwealth out-posting staff with State and Territory regulators, prioritising jurisdictions where more projects require approval by both levels of government
- State and Territory regulators taking up opportunities to have their staff trained in the application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

New South Wales is an example of leading practice with respect to both initiatives.

Fortescue Metals Group response

Fortescue wholeheartedly supports the recent introduction of the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* that will facilitate the devolution of environmental approval to the States and Territories and looks forward to early adoption within Western Australia.

6.7 **Leading Practice**

Outcomes-based approval conditions enable companies to choose least-cost ways of achieving defined environmental outcomes. The Commonwealth's *Outcomes-based conditions* policy outlines a leading-practice approach to outcomes-based condition setting.

Fortescue Metals Group response

Agree to a point, however, the objective is not to find 'least-cost' ways of achieving defined outcomes but achieving outcomes in the most efficient way. Outcomes based conditions allow adaptive management and the application of innovation and technology improvements to achieve an objective. It lets the outcome drive the activities rather than compliance with actions within a potentially outdated plan. It also reduces administrative burden on both proponents and government agencies alike by avoiding the requirement to update management plans and have them approved prior to a changed activity being implemented.

6.8 **Leading Practice**

The use of standard conditions for standard risks can deliver efficiencies to approval processes. Queensland's Model Mining Conditions are leading practice.

Fortescue Metals Group response

Agree. Similar to the above response to 6.7, standard outcome-based conditions (or a step further - relying simply on the specific resource related Acts and Regulations) and putting the onus on proponents to demonstrate how they have met the requirements, is the ultimate goal. This obviously requires environmentally focussed and responsible proponents. We suggest there should be an opportunity for proponents to be able to demonstrate their performance and 'qualify' for standard conditions.

Any simplification of WA tenement conditions would be welcome.

6.9 Leading Practice

Regulator decisions in the post-approval stage should be subject to timelines — statutory or otherwise — and regulator performance against those timelines should be publicly reported. The New South Wales Department of Planning, Industry and Environment has recently announced its intention to report on performance against timelines for post-approvals.

Fortescue Metals Group response

Agree in as much as this relates to the development of post-approval management plans. The absence of timeframes for management plan approval following 'approval' of a project makes planning difficult. Where conditions prevent implementation of a project prior to a management plan's approval, there is no certainty for proponents with regards to start dates (with obvious implications for workforce mobilisation, infrastructure fabrication and contract award). Environmental management plans should simply be a reiteration of management and impact mitigation commitments made within an assessment document (allowing for an adaptive approach), along with monitoring frameworks to verify that objectives for a specific factor are being achieved.

6.10 Leading Practice

Clear guidance from regulators on the type and quality of information that post-approval documentation needs to include can help make the process more efficient. An example of such guidance is the *Instructions on how to prepare Environmental Protection Act 1986 Part IV Environmental Management Plans* produced by the Western Australian Environmental Protection Authority.

Fortescue Metals Group response

Agree. However, interpretation and applications of the guidelines by individuals or proponents or government agencies can often still result in requests for further information. Additional efficiency

and benefit could be realised via joint industry/ agency communication and training on guidance material.

6.12 Leading Practice

Effective coordination among agencies within a jurisdiction reduces uncertainty, facilitates timely processing and minimises overlaps and inconsistencies. This can occur through:

- a lead agency or major project coordination office that provides guidance to proponents and coordinates processes across agencies (without overriding the decision-making capacity of other regulators). The coordination models in Western Australia and South Australia, and the case management system in Northern Territory have been highlighted as leading practice by study participants
- cooperative arrangements between agencies. These include the use of memorandums of understanding, inter-agency working groups or taskforces such as those in Western Australia. South Australia's approach of using costs recovered from resources companies to pay staff in multiple regulatory agencies also supports faster approvals and better inter-agency communication.

Fortescue Metals Group response

It's not clearly apparent that a government agency taking on a project facilitation role is an effective model. To work well, project facilitation agencies need a thorough understanding of regulatory frameworks in order to advise and coordinate processes. In practice this isn't necessarily the case. Fortescue has also proposed a cost-recovery model in the past, but this was rejected by the relevant agencies.

In general, Fortescue supports funding from resource companies being used to employ staff in regulatory agencies to enable faster approval processing and better inter-agency communication with appropriate controls.

6.2 Recommendation

When bilateral assessment agreements are renegotiated, State and Territory governments should consider making additional commitments to address inconsistencies and overlap in project approval conditions. These commitments could be modelled on those described in the *EPBC Act 1999 Assessment Bilateral Agreement Draft Conditions Policy*.

Fortescue Metals Group response

Agree. However, we believe a better opportunity would be for comprehensive bilateral agreements to be in place that provide for both assessments and approvals. Under the current

arrangements, assessment on the State's report, recommendations and applicable approval conditions is still undertaken by the Commonwealth, and projects can be approved by the State and not approved by the Commonwealth. The bilateral approval agreement opportunity will address this. Until such time as this is in place, each agency (State and Commonwealth) are obligated to ensure conditions are relevant to 'their legislation' and matters of interest.

6.1 Information Request

The topic of Indigenous heritage has not been raised by many participants to this study and it is not clear which jurisdictions, if any, could be described as leading practice. Could interactions between Indigenous heritage and the resources sector be improved? Which jurisdictions manage these interactions well already? How do they do it?

Fortescue Metals Group response

There will generally be room for improvement in all jurisdictions. In particular proposed State Government policy objectives of achieving an enhanced focus on agreement making between Aboriginal people and developers on the Land will be an important factor, as well as preserving a role for Government in making decisions that balances the preservation of heritage and the broader public interest in circumstances where agreement cannot be reached about a development. Duplication of Federal and State law over the same subject matter does not lead to substantively better outcomes, but does result in increased cost, uncertainty and delay.

No recommendation on leading practice is made in this comment.

7. MANAGING ENVIRONMENTAL AND SAFETY OUTCOMES

7.1 Finding

Environmental report cards indicate that Australia's resources regulation has been effective in delivering relatively good environmental outcomes. But there have been several incidents and resources activities are one source of pressure on Australia's biodiversity.

Fortescue Metals Group response

Obviously, resource industries and associated proposals will continue to pressure Australia's biodiversity, as will unplanned events – including unplanned events from industry and activity other than those from the resources sector. However, other industries, including agriculture also contribute to cumulative impact on Australia's biodiversity.

Proponents of resource proposals in WA are obligated to assess not only the potential impact of their own projects, but those others that are either already in operation or development, or reasonably expected to proceed; with a cumulative impact lens.

7.2 Finding

Limited transparency in most jurisdictions means that evidence about the effectiveness of compliance monitoring and enforcement activity is limited. This situation risks damaging public confidence in the regulation of projects.

Fortescue Metals Group response

We disagree on this in respect to regulation in WA. The Department of Water and Environmental Regulation publishes environmental protection notices on its website as well as an annual report outlining compliance processes, audits and enforcement actions. In addition, approval under the EP Act generally conditions proponents to submit annual compliance reports to the department which can be made publicly available.

7.3 Finding

There are few examples of large resource extraction sites being rehabilitated or decommissioned in Australia — in part because rehabilitation and decommissioning only became a policy focus for governments in the latter half of the 20th century. As a result, there is a large number of legacy abandoned mines.

Fortescue Metals Group response

We disagree with this finding. Any mine that has been closed, regardless of the condition of the mine or level of rehabilitation that has been completed, is currently classified as "abandoned". As a result, the statement while true has little meaning, as it doesn't address whether the closed "abandoned" mines pose any environmental threat or safety hazard.

Recent findings published by the Department of Mines, Industry Regulation and Safety (DMIRS) on abandoned mines at the Mine Closure Conference (2019) debunked the notion of 'large numbers of abandoned mines'. They found the data being used pointed to spurious mine features and features that were no longer present in the landscape, rather than actual mines. As a result of this work, the number of abandoned mines was brought down dramatically to single digits.

We suggest that the reason there are so few examples of large resource extraction sites being rehabilitated or decommissioned stems from the fact that most large mines are still in operation.

7.4 Finding

Concerns about resources sites being sold to smaller firms that may not have the resources to rehabilitate them are best addressed through effective rehabilitation bonds (draft leading practice 7.9).

Fortescue Metals Group response

We disagree with this finding. Rehabilitation bonds are only as good as the cost estimate that supports the bond calculations. As bond calculators have historically failed to effectively estimate individual site rehabilitation costs it is unlikely that rehabilitation bonds will address any concerns pertaining to the transfer of rehabilitation liability to smaller firms. To address this issue, the Western Australian Government no longer routinely applies bonds under the Mining Act in most cases (it retains the right to do so) and introduced the Mine Rehabilitation Fund which provides a pool of funds. State Agreement mines still have rehabilitation bonds. Pools distribute the rehabilitation risk over more companies, rather than limiting mining to a few large companies that can afford to underwrite the full cost of rehabilitation prior to mine development.

An alternative approach to give government added security and oversight of risk would be to monitor the provisions made by companies for rehabilitation. Under the Corporations Act both private and public companies are required to make provisions to for rehabilitation obligations imposed by government. These provisions are reported publicly by public companies and therefore could be compiled into a register if the government so desired.

Financial provisions for closure are developed and maintained for all Fortescue sites. These provisions are detailed in our Annual Reports which can be found at www.fmgl.com.au

7.5 Finding

Rehabilitation pools can reduce incentives for companies to rehabilitate their sites and there are risks that the pool will be insufficient to cover the cost of rehabilitation if a large company does not fulfil their rehabilitation requirements. These pools should be used with caution and must be paired with effective compliance and enforcement arrangements. State and Territory Governments that use pooled arrangements for rehabilitation surety should ensure that levies reflect the risk of the company passing their liabilities to the government. Larger companies should be separate to the pool and covered using rehabilitation bonds. Queensland's rehabilitation pool is a good example of this model.

Fortescue Metals Group response

We disagree with this finding. On the point that larger companies should be separate to rehabilitation pools we make the comment that large companies provide the bulk of funding to a pool which gives certainty of funds to rehabilitate genuinely abandoned mines. Pools distribute the rehabilitation risk over more companies, rather than limiting mining to a few large companies that can afford to underwrite the full cost of rehabilitation prior to mine development. As bond calculators have historically failed to effectively estimate individual site rehabilitation costs it is unlikely that bonds will address any concerns pertaining to the transfer of rehabilitation liability to smaller companies. To address this issue, the Western Australian Government now generally does not apply bonds and introduced the Mine Rehabilitation Fund.

Bonds tie up large amounts of capital, sufficient to cover the entire cost of mine closure, at the commencement of a project before any capital has been earned. This makes investment in mining projects in Australia significantly less attractive. Companies are already required to make provisions for the liability of the cost of meeting all mine closure obligations (including rehabilitation). These provisions impact the value of each company. This requirement, combined with a broad rehabilitation pool which covers mining companies of all sizes such as is in place in WA, are a more effective way to ensure the development of mines occurs and government is not exposed to too great a risk if the cost of rehabilitation and closure is not met by individual mines.

Should governments wish to have more security and oversight of risk, they could monitor the provisions made by companies for rehabilitation. Under the Corporations Act both private and public companies are required to make provisions to for rehabilitation obligations imposed by government. These provisions are reported publicly by public companies and therefore could be compiled into a register if the government so desired. Financial provisions for closure are developed and maintained for all Fortescue sites. These provisions are detailed in our Annual Reports which can be found at www.fmg.com.au

7.6 Finding

The major resources states are in the process of reviewing or reforming their workplace health and safety frameworks for resources extraction, making identifying a leading practice in this area difficult. Recent safety incidents raise concerns about the effectiveness of existing frameworks.

Fortescue Metals Group response

There needs to be clear division between the provision and enforcement of safety legislation and the promotion of leading safety practice. It is not practical or possible for a regulator to investigate and potentially prosecute and at the same time promote. Resource companies are reluctant to share leading practices from incidents when the possibility of enforcement from the same department is possible.

Promotion and enforcement need to be separate regulatory bodies.

Our company wide focus on improving safety has seen our Total Recordable Injury Frequency Rate (TRIFR) reduce by 44 per cent over the past five years to 2.4 including a reduction of 14 per cent over the last year.

7.1 Leading Practice

Regulators' experiences of monitoring compliance with approval conditions provide useful information about the efficacy of approval conditions in protecting the environment. Leading practice involves regulators employing a 'feedback loop' between the compliance monitoring and condition-setting processes, where any findings of redundant or ineffective approval

conditions are communicated to the bodies responsible for setting those conditions. An example has not been identified.

Fortescue Metals Group response

Agree. We have had numerous experiences with approvals in which those responsible for setting conditions do not adequately consider or consult with their post-approvals counterparts on the 'enforceability' of conditions. This can lead to unintended consequences such as unenforceable conditions or approvals requiring administrative changes to ensure compliance can be maintained.

7.3 Leading Practice

Regular public-facing statements describing regulators' compliance activities and lessons learned from them, such as the New South Wales Resource Regulator's *Compliance Priorities Outcomes* reports, or NOPSEMA's *The Regulator* magazine, help to improve community confidence in the sector's regulation.

Regulators should also inform the community of any contraventions that may have put the environment or community at significant risk, and any actions they have taken in response. The New South Wales Resource Regulator's investigation information reports, and its publication of enforceable undertakings, are good examples.

Fortescue Metals Group response

Agree. Western Australian examples include the DWER publication of environmental protection notices on its website as well as an annual report outlining compliance processes, audits and enforcement actions.

In addition, approval under the EP Act generally conditions proponents to submit annual compliance reports to the department which can be made publicly available.

7.4 Leading Practice

Public registers of activities with offset obligations and the projects developed to fulfil them provide valuable transparency about the application of offset policies. Information on offset projects should include their biodiversity values, location, date of approval, completion status, and follow-up evaluations of benefits. Where companies fulfil their offset obligations by paying into a fund, the register should include the size of the payment. Western Australia's offset register is a leading-practice example.

Fortescue Metals Group response

Agree to an extent. Transparency regarding offset projects and the proponents/projects that are supporting them is critical to give the public confidence that offset commitments are an appropriate, albeit last resort, management measure to protect the environment. The Western Australia offset fund and register is still being developed and is a long way off leading practice as it does not make clear what projects are related to which resource proposals, the residual impacts the offsets are intended to address, and the net benefits the offset is set to deliver.

7.5 Leading Practice

Schemes that allow companies to meet their offset obligations by paying into a fund can reduce costs for both companies and governments and can create opportunities for better environmental outcomes. New South Wales, Queensland, South Australia, and Western Australia's Pilbara Fund all offer examples of this.

While the principles behind the use of such funds, including on what basis prospective offsets projects should be evaluated, should be set subject to ministerial oversight, the fund's administration and selection of offset projects is best left to a separate body, like the Biodiversity Conservation Trust in New South Wales.

Fortescue Metals Group response

Agree to a point. The suitability of such offset arrangements should be assessed on a case-by-case basis as there are many factors that need to be considered in the design and subsequent delivery of offset projects across the country. There is not a single solution for project selection. Access to land and negotiation with third parties (e.g. with overlapping land tenure in instances where freehold land is not available, or where land purchase is not part of the proposal) is critical in ensuring the protection or enhancement of land in perpetuity.

The interests of traditional custodians also need to be considered for areas where native title exists.

This could however be achieved via the model proposed if only projects that have met all stakeholder requirements qualify to pay into the offset fund.

Funding to government agencies should not pay for activities that are the role of government including the management of national parks. Those that contribute to any funds must be able to have a say in how funds are spent, i.e. this should not be managed solely by regulators. Proponents need to be able to make sure that their legislative obligations are being met.

7.7 Leading Practice

Resources sites that are placed into care and maintenance can pose risks to the environment, and the operator may be at greater risk of default. These risks can be managed by a requirement

to notify the regulator where a site is placed into care and maintenance, and the preparation of care and maintenance plans that identify these additional risks, such as those required in Western Australia.

Fortescue Metals Group response

Agree to a point though this would be hard to enforce. A consistent definition or set of terms are required. There are numerous terms that can be used to 'get around' this for example temporary suspension, suspended operations, low-grade operations, etc rather than care and maintenance.

Site activity or production criteria such as a reduction of throughput or production > 75% (or something like that which may indicate a significant slowdown and potential risk of closure) could be considered a trigger that requires additional environmental protection measures to be planned and implemented.

7.8 Leading Practice

Having financial assurance arrangements in place to cover rehabilitation, based on the risk the project poses to the taxpayer, provides incentives for companies to undertake rehabilitation and minimises the risk that governments will be left responsible. These arrangements are present in most (but not all) jurisdictions.

Fortescue Metals Group response

We are not aware of any evidence to demonstrate that financial assurance arrangements provide incentives for large companies to undertake rehabilitation. Most forms of financial assurance have flaws. We believe WA's Mine Rehabilitation Fund is generally a good approach. We note that there are penalties under the Corporations Act that can be imposed should a company not provide for its closure obligations for a mine and these should be enforced by ASIC.

Should governments wish to have more security and oversight of risk, they could monitor the provisions made by companies for rehabilitation. Under the Corporations Act both private and public companies are required to make provisions for rehabilitation obligations imposed by government. These provisions are reported publicly by public companies and therefore could be compiled into a register if the government so desired.

Financial provisions for closure are developed and maintained for all Fortescue sites. These provisions are detailed in our Annual Reports which can be found at www.fmg.com.au

7.9 Leading Practice

Rehabilitation bonds that cover the full cost of providing rehabilitation offer the highest level of financial assurance for governments and provide companies with full incentives to complete

rehabilitation in a timely way. Jurisdictions are heading in this direction, but a leading practice example has not been identified.

Fortescue Metals Group response

We disagree that rehabilitation bonds are leading practice. Ultimate financial assurance in the form of bonds that cover the entire cost of final rehabilitation will make investment in mining in many cases unviable. There is also no evidence that bonds provide a better system, given the historical failure of bond calculators.

We support the approach taken by the Western Australian Government to establish the Mine Rehabilitation Pool which is being used to rehabilitate legacy, genuine abandoned mines, and will be available should a company that owns a mine be unable to meet its mine closure obligations. A broad rehabilitation pool which covers mining companies of all sizes is an effective way to ensure the development of mines occurs and government is not exposed to too great a risk if the cost of rehabilitation and closure is not met by individual mines.

In Western Australia, modern (post 2000) mining approvals contain significant mine closure conditions, including for progressive rehabilitation, which must be satisfied before a mine site can be relinquished. Mining companies are required under the Corporations Act to provide each year for the cost of meetings these obligations, while also contributing significant payments to the Mine Rehabilitation Fund. If a company has State Agreement projects, it will also have funds tied up in bonds.

Should governments wish to have more security and oversight of risk, they could monitor the provisions made by companies for rehabilitation. Under the Corporations Act both private and public companies are required to make provisions to for rehabilitation obligations imposed by government. These provisions are reported publicly by companies and therefore could be compiled into a register if the government so desired.

7.10 **Leading Practice**

Progressive rehabilitation can lead to better understanding of rehabilitation requirements, ensure that funds are made available, reduce the total costs of rehabilitation, improve health and safety outcomes and provide community confidence in the operator's commitment to rehabilitate. Progressive rehabilitation can be encouraged by financial surety requirements being reduced commensurate with ongoing rehabilitation work. Victoria's rehabilitation policy for Latrobe Valley mines represents a good example.

Fortescue Metals Group response

We agree that progressive rehabilitation conditions are leading practice. In Western Australia, modern (post 2000) mining approvals contain significant mine closure conditions, including for progressive rehabilitation, which must be satisfied before a mine site can be relinquished.

Progressive rehabilitation conditions allow for progressive accrual of rehabilitation liabilities with the progressive disturbance of land, and also reduced liability as rehabilitation costs are expended and work completed. There is evidence that progressive rehabilitation allows for better final rehabilitation outcomes and lower costs. In many cases, progressive rehabilitation can reduce the need for further land disturbance as former mine pits can be backfilled with waste rock and earth (that may otherwise be placed on undisturbed land) as part of a rehabilitation program to meet mine closure requirements.

7.11 Leading Practice

There is merit in governments working with industry to reopen and rehabilitate legacy abandoned mines, such as through streamlined approval processes (without compromising the intent of regulation) and indemnities against past damages. The Savage River Rehabilitation Project in Tasmania is an example of a successful government–industry partnership.

Fortescue Metals Group response

Agreed. There is merit to this approach.

7.1 Information Request

Is there evidence of any systematic deficiencies in the compliance monitoring and enforcement effort of regulators overseeing resources projects? In particular:

- Are regulators adequately resourced to carry out effective monitoring and enforcement programs?
- Do the monitoring and enforcement approaches of regulators represent good risk-based regulation?

Fortescue Metals Group response

Yes. The current compliance and inspection regime is appropriate.

7.2 Information Request

To what extent are post-relinquishment obligations on resources companies a barrier to investment? What are leading-practice ways of managing the residual risk to the Government following the relinquishment of a mining tenement?

Fortescue Metals Group response

Post-relinquishment obligations create a perpetual liability which would be a massive barrier to investment in mining. This is not advantageous to companies, society generally or governments. For this reason, it is very important that regulators are able to competently and sufficiently manage and certify relinquishment of mining operations after closure obligations are met. Companies should not carry the risk of regulatory failure in approving mine closure and relinquishment.

The Western Australian guidelines for mine closure are designed to ensure that risks are identified and documented and obligations for closure are set to the satisfaction of the regulator – before disturbance of land occurs.

An instructive example of the importance of investment in regulator capacity can be seen in the response of State and Federal governments to a spate of well blowout events in the offshore oil and gas industry. The Deepwater Horizon oil spill in the Gulf of Mexico, started in 2010, and closer to home, the Montara oil and gas leak in 2009 brought huge international attention to the risk of well blowout. This led to the Australian and State governments reforming regulation and regulator management in Australia, the establishment of NOPSEMA and NOPTA and recruitment of the industry's best and brightest to roles in regulation. This was accomplished through matching regulator salaries to those offered within industry.

7.3 Information Request

The Commission is seeking further information about the effectiveness of resources health and safety legislation across Australian jurisdictions, including:

- whether there would be benefits in greater consistency across jurisdictions
- approaches that represent leading practice health and safety legislation for resources
- how health and safety approaches in each jurisdiction could be improved.

Fortescue Metals Group response

Agree the adoption of model regulations has achieved a degree of consistency. The effort of further alignment would seem disproportionate to benefits likely to be realised.

While the regulator is responsible for both sharing leading practice and enforcement, health and safety is unlikely to improve significantly.

Our company wide focus on improving safety has seen our Total Recordable Injury Frequency Rate reduce by 44 per cent over the past five years to 2.4 including a reduction of 14 per cent over the last year.

8. OTHER FACTORS AFFECTING INVESTMENT

8.1 Finding

Government policies necessarily evolve in response to changing economic conditions, technology development and shifts in broader societal values and priorities. However, abrupt policy changes with inadequate consultation can undermine investor confidence and discourage investment.

Fortescue Metals Group response

Consultation is critical to ensure all aspects are considered before policy changes are progressed.

Genuine consultation with industry and community can produce 'better' policy with positive outcomes.

8.2 Finding

Uncertainty about and inconsistent climate change and energy policies across jurisdictions risk impeding resources sector investment.

Fortescue Metals Group response

Unfortunately, the politicisation in Australia of climate change debate has produced sub-optimal policy outcomes leading to duplication of approvals and uncertainty in relation to transition risks. Climate policy should be managed by the federal government given it has accountability for Australia's Nationally Determined Contributions as part of the United Nations Framework Convention on Climate Change. Bipartisanship is currently lacking and the politicisation of climate change is leading to uncertainty and the development of policy in isolation and with little consultation e.g. the GHG guideline developed by the EPA WA.

8.3 Finding

Lack of clarity in policy objectives can lead to inconsistent and unpredictable application of regulations across resources projects, creating investor uncertainty (such as in relation to approval decisions and conditions on the basis of scope 3 emissions).

Fortescue Metals Group response

Agree. Investor certainty and customer outcomes would be improved by greater alignment between state and federal policy on the energy transformation that is currently underway.

Emissions and abatement, to meet Australian commitments, are the responsibility of federal government under a national scheme. National climate change or emissions related policy is

required to provide the framework for Australia to meet its Paris Agreement nationally determined contributions and targets. Emissions-related policy requires a (nationally) consistent approach that continues to incentivise economic development and job creation. State by state policy should then naturally cascade and apply to emissions generated within its geographic boundaries generated by state-controlled facilities.

Certainty and consistency across jurisdictions are required in this space.

8.4 Finding

Not approving proposed resources projects or curtailing their exports on the basis of potential greenhouse emissions in destination markets is an ineffective way of reducing global emissions.

Fortescue Metals Group response

Agree. Australia should leverage its comparative advantage in the production of renewable energy as a way to offset this risk of scope 3 emissions originating in Australia diminishing the value of our traditional energy export sectors.

The United Nations Framework Convention on Climate Change is quite clear and mandates that individual nations take responsibility for emissions within their own borders. In addition, limiting resource project of companies committed to emissions reduction targets and especially net-zero ambitions, could potentially reduce revenue required to pursue advancement in emissions reduction related technologies with the potential for global implementation.

8.5 Finding

Allowing parties to negotiate greenfields enterprise agreements with durations that match the life of a greenfields project would improve investor certainty.

Fortescue Metals Group response

We agree. While not directly a concern for our company given our approach to construction (with suppliers negotiating their own agreements) this would be of benefit in providing certainty during the project life.

8.1 Leading Practice

Early public consultation on new policy proposals, accompanied by clear evidence-based articulation of why a proposed change is the best way of addressing an issue (for example, through regulatory impact assessments), can avoid policy surprises.

Clear policy objectives aid consistent and predictable regulatory decision making. Policymakers can achieve this by avoiding the use of vague language in policy documents and providing clearly articulated guidance on the intention and interpretation of policies and legislation.

Fortescue Metals Group response

Agree.

8.1 Recommendation

The Australian Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that matches the life of a greenfields project. The resulting enterprise agreement could exceed four years, but where it does so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

Fortescue Metals Group response

We agree. While not directly a concern for our company given our approach to construction (with suppliers negotiating their own agreements) this would be of benefit in providing certainty during the project life.

9. COMMUNITY ENGAGEMENT AND BENEFIT SHARING

9.1 Finding

The effects of resources extraction, both positive and negative, are amplified for local communities. Resources extraction can stimulate economic activity in the community, but also lead to effects such as house price fluctuations and strains on local infrastructure.

It is appropriate that resources companies are required to address significant negative externalities associated with resources extraction, such as noise and dust, and provide or pay for infrastructure that they directly use. However, effects such as fluctuating house prices signal the need for market adjustments and should not be suppressed. Approaches such as appropriate planning can moderate price spikes. Companies should not be required to fund or construct infrastructure that is not associated with their project (although they may do this voluntarily).

Fortescue Metals Group response

We agree with the statement that appropriate planning will reduce the impact on the housing market in regional areas caused by mining cycles. We disagree with the statement that mining companies should pay for the use of public infrastructure given the substantial contribution mining already makes through royalties and corporate taxation receipts. Public infrastructure such as public road networks can be important pre-competitive investments by government to develop a

stronger resources sector and such investments will provide a return to the relevant jurisdiction in economic activity.

9.2 Finding

Resources are owned by the Crown on behalf of all Australians. Although negative externalities of resource projects on local communities should be efficiently addressed, these communities should not benefit over and above other regional communities from resources royalties as a matter of right.

Fortescue Metals Group response

It is clear that government service provision in the Pilbara does not match levels of government service provision in metropolitan areas of the state. Communities with small population bases continue to face disadvantage in terms of outcomes in health, education, and economic participation. There is a case for not just addressing negative externalities, but also investing in mining communities to strengthen health, education and community infrastructure in order to build a stronger human capital pool to support industry.

9.3 Finding

Companies have an incentive to engage and share benefits voluntarily with communities, to obtain a social licence to operate and improve the liveability of local communities for their workers. The appropriate role for government in this area is limited to coordinating resources companies' community-focused investments, providing guidance to companies and efficiently regulating negative externalities borne by communities due to resources extraction.

Fortescue Metals Group response

Fortescue has hundreds of employees who live and work in regional areas. Many mining companies invest resources into these regional towns to create a vibrant, liveable environment not just for their employees but for the whole community. These investments are initiated with input from local community stakeholders, not necessarily influenced or coordinated by government.

9.4 Finding

There is sufficient guidance available to companies from a range of institutions on how to engage with communities and other stakeholders. Most cover similar themes, and there is no one leading practice set of guidelines.

Fortescue Metals Group response

We broadly and generally support this statement. Should regulators require consultation in a particular manner then this information/process needs to be clearly stated. Community engagement including consultation should be genuine, recorded and allow significant issues to be addressed so the outcome can be understood by interested parties. Resource companies understand that their social license to operate is affected by inadequate community engagement. It should be up to individual companies to design their engagement policies and procedures.

9.1 Leading Practice

Guidance on the social impacts that should be considered in the approvals process, and how they should be considered, helps improve the quality of social impact assessments. For example, the New South Wales Government has issued guidance that outlines:

- what social impacts should be considered in the assessment
- how to engage with the community on social impacts
- how to scope the social impacts and prepare the assessment.

The effects identified in social impact assessments should not always be the domain of companies to address. Rather, leading practice suggests that social impact assessments should provide a framework for companies and governments to work together to address these effects, in line with the principles outlined in draft finding 9.1. The Commission has not identified a leading practice jurisdiction in this area.

Fortescue Metals Group response

Fortescue agrees that where mandated, social impact assessments should create a framework for industry and government to address effects.

9.2 Leading Practice

Local procurement requirements can be a relatively high cost way of meeting development objectives. In contrast, resources companies and governments providing businesses in local communities with the support needed to engage with resources companies, such as BHP's Local Buying Program, is likely to create more enduring benefits for communities.

Fortescue Metals Group response

We agree that governments and resource companies can provide support to assist businesses in local communities to engage with resource companies. We don't necessarily endorse the portal

model as these often create bottlenecks and don't allow local businesses to develop more meaningful, genuine relationships within a resource company's procurement team.

9.3 Leading Practice

Coordination between local communities and resources companies can improve the effectiveness of benefit sharing activities. Coordination can involve formal partnerships, such as that between Rio Tinto and the City of Karratha, or community consultation, such as that established by Hillgrove Resources in Kanmantoo and Callington.

Fortescue Metals Group response

We agree with this statement. Coordination helps prevent duplication and particular community groups receiving all the support.

9.1 Information Request

Is there scope for greater sharing of resources company infrastructure with communities? Are there any examples of where this has been done effectively?

Fortescue Metals Group response

Sharing of infrastructure is possible as long as it doesn't create unacceptable safety risks or impact or impede operations. Fortescue supports the Seafarers in Port Hedland with their mining tours by providing access for their tourist bus to enter our port terminal.

10. INDIGENOUS COMMUNITY ENGAGEMENT AND BENEFIT SHARING

10.1 Finding

Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people, particularly under native title legislation, can mean that only small groups of Indigenous people benefit from resources activity. Voluntary activities offer the potential for larger groups of Aboriginal and Torres Strait Islander people to benefit, including those who reside in the local community but are not native title holders.

Fortescue Metals Group response

This can be true. Fortescue implements a range of initiatives that are accessible to the broader Aboriginal community in addition to Native Title groups, e.g. training and employment programs, business development, school-based support programs etc.

10.2 Finding

Effective engagement with Aboriginal and Torres Strait Islander communities regarding the use of their traditional lands for resources development incorporates the principle of free, prior and informed consent (FPIC). FPIC is not a right of veto, but creates a process of genuine engagement where governments, resources proponents and communities aim to come to an agreement that all parties can accept.

Fortescue Metals Group response

Agreed. Genuine engagement is crucial in the development and operation of resources projects, and FPIC should be the goal to aspire to. It would be useful if government would promote the above definition of FPIC in order to build understanding among stakeholders.

10.3 Finding

The capacity of Prescribed Bodies Corporate to engage meaningfully with resources companies is critical to Aboriginal and Torres Strait Islander people being able to give their free, prior and informed consent to resources development on their traditional lands, and to negotiating effective agreements. However, many Prescribed Bodies Corporate lack this capacity.

Fortescue Metals Group response

Agreed. Some PBCs lack funds and the structures necessary to engage effectively. This deficit leaves them vulnerable to exploitation by unscrupulous advisors, or to administrative inefficiencies that inhibit constructive engagement over time. Resources designed to upskill PBC board members would assist in developing stronger organisations and leadership within PBCs.

10.4 Finding

Proposed amendments to the *Native Title Act 1993* (Cth) (NTA) will allow applicants to enter into future act agreements as a majority by default. This could increase the risk of a majority of the applicant entering into a future act agreement that is not consistent with the wishes of the claim group. However, other proposed amendments to the NTA protect claim groups against this risk. They include allowing claim groups to impose limits on the authority of applicants, and clarifying that applicants owe fiduciary duties towards the claim group.

Fortescue Metals Group response

We agree that the proposed amendments are positive.

10.2 Information Request

In principle, it appears appropriate for private agents to have obligations towards all those who hold or may hold native title (as native title representative bodies do). Should the *Native Title Act 1993* (Cth) be amended to impose statutory obligations on private agents that are equivalent to those imposed on native title representative bodies? Why or why not?

Fortescue Metals Group response

Agree that this is worth further discussion.

10.3 Information Request

What are some potential reasons to allow native title funds to be removed from charitable trusts? What are some mechanisms through which funds may be removed from charitable trusts, and What might the tax implications be? How would these proposals affect non-Indigenous charitable trusts?

Fortescue Metals Group response

Native title groups should be able to use native title funds to invest in commercial ventures for the benefit of the community. We have no comments on mechanisms or tax implications.

10.1 Recommendation

The Australian Government should review the question of whether native title claim groups or holders are the beneficial owners of funds arising from native title agreements made before a native title determination, and, if native title holders are considered to be the beneficial owners of funds, whether applicants and/or claim groups have any duties towards them in receiving and managing funds for their benefit.

Fortescue Metals Group response

No comments other than industry would also benefit from certainty on this point if there are implications for the payment of native title compensation.

10.2 Recommendation

The Australian Charities and Not-for-profit Commission should publish plain English guidelines on activities that are likely to be consistent with a charity's charitable purposes and for the public benefit, and those which are likely to be outside this scope. This would reduce the risks associated with any for-profit long-term development or commercial activities that Indigenous charities may wish to undertake.

Fortescue Metals Group response

We agree.

11. IMPROVING REGULATOR GOVERNANCE, CONDUCT AND PERFORMANCE

11.1 Finding

Many of the regulatory issues presented to the Commission through the course of this study have been examined previously. Implementing enduring improvement requires that governments ensure the pre-conditions for leading-practice regulatory systems are in place, particularly clear regulatory objectives, adequately resourced institutions and effective governance and accountability arrangements.

Fortescue Metals Group response

We agree.

11.2 Finding

The ability for regulators to operate effectively and efficiently is constrained by capability challenges, including limited technical expertise and inadequate use of data and technology. In addition, a lack of clarity and regulator transparency inhibits accountability, leads to unnecessary costs for industry and risks a loss of public confidence in the regulatory system. Not least, regulators collect a wealth of data but relatively little is made available to the public.

Fortescue Metals Group response

We agree.

11.1 Leading Practice

Statements of Expectations from Ministers to regulators are one effective way for Governments to clearly set out their objectives for the regulatory system. Examples include the Statements to Earth Resources Regulation in Victoria and to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) at the Commonwealth level.

Fortescue Metals Group response

We agree.

11.2 **Leading Practice**

Regular independent review and evaluation of regulatory frameworks and objectives drives continuous improvement and ensures they remain fit for purpose. Victoria, for example, following an inquiry into its Environmental Protection Authority, is clarifying the Authority's objectives, principles and functions and developing a legislative framework that embeds a risk-based regulatory approach. The Independent Review of the New South Wales Regulatory Policy Framework has highlighted that a 'lifecycle' approach for managing regulation over time ensures that frameworks remain fit for purpose.

Fortescue Metals Group response

We agree. We are not aware of a regular review of the implementation of the WA EP Act (with the exception of the Quinlan et al review following the Roe 8 decision – that however was hardly planned or voluntary). The review did result in the update and publishing of the EPA/ DWER environmental administrative procedures, and an update and publishing of numerous guidance documents. A scheduled review would ensure relevance.

11.3 **Leading Practice**

Approaches to improving staff capability and technical expertise include:

- secondments — as have been established in the officer exchange program between the Northern Territory Environment Protection Agency and Western Australia's Department of Water and Environmental Regulation
- training programs — akin to those offered in Tasmania for senior management and in the National Offshore Petroleum Safety and Environmental Management Authority for all staff regarding regulatory practices
- development of strategies to target particular skills gaps, including technical expertise — as has been the case in the Victorian Environment Protection Authority
- communities of practice — as in the case of the Australasian Environmental Law Enforcement and Regulators Network's Better Regulation Working Group, which enables members to share experiences and ideas related to regulatory practice
- site visits — as offered by the Victorian Earth Resources Regulator.

Fortescue Metals Group response

We agree. In addition, inter industry/agency secondments would also provide significant opportunities to enhance working relationships and understandings of internal and external processes from both sides.

11.4 Leading Practice

Senior management have a key role in fostering a culture that supports ongoing capability development and adoption of modern regulatory practices. Approaches to promoting this type of culture include:

- appointment of a regulatory champion, akin to that established at the then Australian Department of Agriculture
- recognising and incentivising good staff performance, as occurs in Queensland's Department of Natural Resources, Mines and Energy
- working groups to assess and promote cultural change, both internally as occurs at the National Offshore Petroleum Safety and Environmental Management Authority, and externally as with the Australasian Environmental Law Enforcement and Regulators Network's Better Regulation Working Group
- reporting on successes and learnings from failures, as occurs in South Australia's Department for Energy and Mining and Western Australia's Department of Mines, Industry Regulation and Safety.

Fortescue Metals Group response

We agree.

11.7 Leading Practice

The provision of publicly accessible information and data by regulators can promote community confidence in the regulatory system and the sector. There are a number of instructive examples, including the National Offshore Petroleum Safety and Environmental Management Authority's website and Western Australia's offsets register. Regulators can be supported by the data and information published by other independent bodies, such as Queensland's Gas Fields Commission and the Gas Industry Social and Environmental Research Alliance.

Fortescue Metals Group response

We agree to a degree. There obviously is the need for the protection of both commercially, environmentally, and culturally sensitive information from general public and competing interests. There are already numerous examples as mentioned, as well as the requirement for a majority of State and Commonwealth assessed project to be made publicly available (including post assessment information). Other obvious WA Government initiatives include IBSA and IMSA.

11.1 Recommendation

Governments in each jurisdiction should assess:

- whether regulators of resources-sector activity are appropriately funded to enable timely processing of applications and effective adoption of a risk-based regulatory system
- opportunities for enhancing regulators' cost recovery processes.

Fortescue Metals Group response

We agree with this recommendation. Poor regulation is not advantageous to companies, society generally or governments. It is very important that regulators are able to competently perform their crucial work. Companies should not carry the risk of regulatory failure. An instructive example of the importance of investment in regulator capacity can be seen in the response of governments to a spate of well blowout events in the offshore oil and gas industry. The Deepwater Horizon oil spill in the Gulf of Mexico and the Montara oil and gas leak brought huge international attention to the risk of well blowout. This led to the Australian and state governments reforming regulation and regulator management in Australia, the establishment of NOPSEMA and NOPTA and recruitment of the industry's best and brightest to roles in regulation. This was accomplished through matching regulator salaries to those offered within industry.

11.2 Recommendation

Regulators in each jurisdiction should consult with industry, including peak bodies (such as the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association), on developing a program of site visits in order to enhance technical expertise. The program should be ongoing, and part of induction training provided to new staff.

Fortescue Metals Group response

We agree this would be useful to a point.

11.3 Recommendation

Ministers, through the Council of Australian Governments, should establish a forum for regulators to share leading-practice initiatives from their jurisdictions, including those implemented to develop the capabilities and expertise of their agencies.

Fortescue Metals Group response

On principle, this sounds as though it is a good initiative.