

# ‘Minimum effective regulation’ and the mining industry\*

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## Introduction

The history of the mining industry is intimately connected with government regulation. As in many other countries, this reflects the fact that the Crown has reserved almost all mineral rights to itself. In many cases regulation has had adverse consequences for the sector. A notorious example was the ban on exports of iron ore in the 1960s, which depressed exploration activity and postponed the development of a major contributor to Australia’s prosperity.

A more indirect, but pervasive impediment to the industry’s performance for most of its existence has been the import protection afforded the manufacturing sector, which translated into a sizeable tax on mining activity and mining exports in particular. The comparative disadvantage of the mining sector in attracting Government support has been documented over the years by the Productivity Commission and its predecessors. For example, in 1984-85, prior to the tariff reform program, the effective assistance to mining was negative, whereas (allowing for data differences) effective assistance to agriculture was 10 per cent and to manufacturing 22 per cent.

Unlike many other Australian industries, the mining sector has always operated in a competitive global market. Historically, the bulk of production has been exported and in most cases there have been strong competing sources of supply. The costs of regulation (including assistance afforded other industries) could not simply be passed on to users and, as we have seen, were not compensated for by government.

That has made the mining industry cost-conscious, innovative and self-reliant. It has also made it a strong advocate for reform — not only of the maze of regulation that applies specifically to mining (such as export controls, land access,

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\* An address to the Minerals Council of Australia’s *Annual Industry Seminar*, Old Parliament House, Canberra, 3 June 2003

development and environmental regulations) but also of the broader policy environment, including protection reform, already mentioned, as well as industrial relations, taxation and infrastructure reforms.

In this way, the industry has contributed to changes in the regulatory and policy environment in Australia which have brought benefits not just to itself but also to the wider economy and community. These benefits can be measured in various ways. At the most fundamental level, they are encapsulated in Australia's productivity surge through the 1990s, that has also delivered substantial gains in the average income of Australians.

### **The Industry Commission's 1991 inquiry**

As you know, a focal point for the review and reform of the regulatory and policy environment for the mining sector was the major public inquiry conducted by the Industry Commission in 1991. I recall that, at the time, sections of the mining industry had some reservations about supporting that inquiry, no doubt concerned about the possible downsides as well as upsides of the sort of thorough and independent scrutiny that would ensure.

In the event, the Commission found that the industry was significantly handicapped by a plethora of regulations at all levels of government. The independent pursuit of various economic, social and environmental objectives within each jurisdiction had resulted in a bewildering proliferation of regulation across the country.

Interaction between mining and other relevant state/territory (and even Commonwealth) legislation was characterised by duplication and lack of co-ordination. This was particularly evident for planning and environmental laws. The resulting regulatory regime imposed substantial costs, uncertainty and delays while rarely achieving apparent objectives (or doing so only at significant cost).

The Commission also found a lack of consistency between different jurisdictions (often for no apparent good reason), reliance on outmoded regulatory concepts, and excessive scope for the exercise of ministerial or administrative discretion.

The Commission concluded that, rather than pursuing ever greater regulation of the industry, governments should look to vacate some areas of intervention, rationalise their involvement in others and move to create an environment in which market-based processes could operate more effectively.

The Commission's prescriptions were wide-ranging, encompassing both specific and generic regulations affecting the industry. It saw an urgent need to reduce and

rationalise regulation, as well as bringing more certainty to the regulatory environment as a whole. In particular, it recommended that governments:

- clarify the rights of indigenous peoples and landholders, relative to those wishing to explore for and extract minerals;
- adopt more efficient means of allocating and charging for mineral rights;
- change taxation arrangements that unnecessarily distort decision-making (e.g. limited deductibility for exploration, rehabilitation and plant demolition expenditures);
- move from 'command and control' mechanisms for dealing with the environmental effects of mining and related processing activities, to approaches that create and enforce property rights and appropriate economic incentives; and
- reduce or eliminate controls or taxes on mineral exports (except those needed to comply with international treaty obligations).

On the broader regulatory and policy front, the Commission saw a need to:

- promote greater competition in transport services and electricity markets;
- accelerate award restructuring (in particular, to review all restrictive work practices specified in awards) and move to agreements based around particular enterprises or projects; and
- continue to reduce the penalties from tariff (and other) assistance to the manufacturing sector.

While over half the recommendations required actions by the states and territories, or joint action with the Commonwealth, the Commonwealth implemented a number of recommendations within twelve months of receiving the Commission's report. For example, it introduced measures to broaden the definition of exploration expenditure for the purpose of tax deductibility and to enable the depreciation of the cost of environmental impact studies over the life of successful projects. It also abolished the coal export duty from 1 July 1992.

In a subsequent policy statement, the Commonwealth Government announced that proposals for new national or marine parks and reserves would henceforth be subject to prior assessment of their economic potential. Among other reforms, remaining export controls over iron ore were removed and regulations affecting foreign investment in mining were to be brought into line with those applying generally.

## Have things changed *enough*?

At this point I must confess that I am not in a position to provide a more detailed or up-to-date report card on progress. That would almost take another inquiry! Nevertheless a partial assessment was made possible in the Commission's *Black Coal* inquiry, back in 1998. At that time, it was apparent that, while some progress had been made, there were still excessive levels of prescriptive (principally state-based) regulations. Many restrictive work practices, for example, were enshrined in state awards. The Commission, once again, made a number of recommendations to reduce the costs of regulation and promote efficiency. For example, we recommended that:

- Governments leave the management of mine operations to the managers, rather than prescribing their functions, structure and qualifications (a radical idea!);
- a range of matters, including past 'custom and practice', should not be included as allowable award matters;
- the role of employees in carrying out safety inspections should not be restricted to union nominees, and employers should be legally responsible for mine safety through their duty of care;
- Governments should facilitate the early establishment of comprehensive rail access regimes; and
- underground coal mines should be regulated separately from open cut mining, which should be covered by occupational health and safety legislation governing metalliferous mining or the general legislation governing OH&S in other industries.

As you know, the Commonwealth supported all of the Commission's recommendations and undertook to work with the New South Wales and Queensland Governments to secure their implementation.

Once again, it is difficult to assess how much has actually been achieved. For example, Queensland's *Coal Mining Safety and Health Act* in 1999 picked up some recommendations, but not others. NSW appears to have made few regulatory changes, although some are currently under consideration, in part directed towards achieving greater harmonisation with Queensland.

There does appear to have been more general progress since the earlier (1991) inquiry in reducing interjurisdictional inconsistencies and duplication, with the Commonwealth withdrawing from areas of regulation that were clearly the prerogative of the States (for example, heritage protection legislation), and a greater move to improve regulatory coherence *across* states through mutual recognition arrangements and harmonisation of some regulatory requirements. For example,

under the Mutual Recognition Agreement, mine managers (a ‘partially registered occupation’ – one that is required to register in some states and not in others) can seek registration allowing them to undertake similar tasks at mine sites in all states and territories.

It seems clear even from this selective review, that significant advances have been made. However, Australia has not been the only country to recognise that regulation was impeding mineral production, trade and investment and that reform was needed. For such an internationally exposed industry, the important question is how well Australia has done on the regulatory front compared to our competitors. Such comparisons are not easy, but some insights can be gained from the perspectives of industry representatives themselves.

### **International perspectives on Australia’s regulatory performance**

The Fraser Institute, a Canadian based economic think-tank (with free-market inclinations) has, since 1997, conducted annual surveys of metal mining company executives, seeking their assessments of how mineral endowments and public policy factors affect exploration investment in various parts of the world. The Institute uses the information obtained in its surveys to compile an *Investment Attractiveness Index*, made up of separate indexes concerned with *Mineral Potential* and *Policy Potential*.

In 2002-03, executives in 972 companies were surveyed regarding their assessments of 47 jurisdictions (including countries, states of the U.S., and provinces of Canada). While responses were only received from 158 companies, they remain suggestive if not definitive.

It will come as no surprise that Australia ranked very highly (third overall) on mineral potential! Importantly, in terms of the *Policy Potential Index*, Australia also did pretty well, being ranked sixth, after Alberta, Nevada, Chile, Manitoba and New Brunswick (four of which are sub-jurisdictions).

Those surveyed who considered Australia a favourable place in which to conduct mining exploration noted its political stability, relatively low levels of regulatory duplication and uncertainty, and the high quality of its infrastructure.

#### *Some regulatory issues remain important*

Of the issues of most concern, the standout was uncertainty over land claims (where Australia ranked equal 37<sup>th</sup>). This was well ahead of concerns about access to

wilderness/protected areas (where we ranked equal 9<sup>th</sup>), and the growth of environmental regulations (equal 14<sup>th</sup>).

International concerns about native title regulation mirror those within the industry in Australia. A couple of years ago, a senior Minerals Council representative, in acknowledging that the legislative amendments of 1998 represented a significant improvement, declared:

“they still leave the minerals industry with a legislative framework that is cumbersome, inflexible, time-consuming and costly.” (p. 2)

I am not in a position to make an informed assessment of the impacts, or of what may be needed to get better outcomes in this complex and politically contentious domain. However, I can offer a few observations:

- First, it is clear that indigenous people too are unhappy with the regulatory processes. This has partly to do with their disappointment at some of the outcomes, but indigenous people share miners’ concerns about delays and ongoing uncertainty. (Some leaders have also raised more fundamental concerns about whether grants of native title can serve the basic economic developmental needs of indigenous people — given the disincentives for production and investment created by common property and inalienable title).
- Second, in practice some progress is being made through direct dealings among the parties, often outside the constraints of the Act.
- A third point, is that while there are ongoing concerns about the regulatory framework, the broad objectives of native title legislation now appear to be generally accepted by the mining community.

### **A more ‘positive’ industry attitude**

Indeed, while an image of ‘rapacious miners’ is still held by some sections of the community, a sense of wanting to be good corporate citizens is palpable within the mining industry in Australia. Indeed this industry has probably had to come to terms with the social and environmental context of its activities earlier than most. In this sense, the mining industry is probably the pioneer in ‘triple bottom line’ corporate thinking.

This again reflects the special circumstances of the industry. The potential environmental and other impacts of mining activity are obvious considerations when exploration and production licences are to be issued. In this respect it might be contrasted with much agricultural activity, which has taken place on freehold and long-term leasehold, arguably allowing that industry more latitude.

One window on these issues is the Commission's recent report on the *Great Barrier Reef*, in which it found that the main threats to water quality in that iconic region came not from (concentrated) mining-related activities, but from the cumulative effect of diffuse pollutants, especially sediments, nutrients and chemicals, from cropping and grazing lands in relatively small areas of the adjacent catchments.

The main cause of water quality concern in relation to mining operations has to do with the leaching of chemicals from disused mine sites, sometimes going back many years. In particular, mercury concentrations were found to have been attributable to gold mining in the area in the late 1800s. Otherwise, the potential impacts are confined to the shipping of mineral commodities through waters adjacent to the Reef.

The pro-active stance of today's industry in addressing such issues has been evident in its response to the Sustainable Development trend in public policy, crystallised internationally in the Brundtland Report of 1987. Again I have observed a shift in the industry's attitude from initial resistance, to acknowledging sustainability principles and seeking to influence their sensible interpretation and implementation by Australian governments, and then ensuring that the industry takes them on board.

### **A key goal: 'minimum effective regulation'**

At the same time, it is apparent that the industry has a legitimate concern that regulation in this and other areas is appropriate and not unnecessarily costly in its effects, including the costs of compliance. Among several "principles" of sustainable development identified at the Minerals Council of Australia's Sustainable Development Conference in October 2002 is "minimum effective regulation", an expression that highlights a need for regulation that can both meet its objectives and do so at least cost. This objective is of course shared by the business community generally (and not least by the *small* business community, which is arguably least well placed to cope with regulatory burdens).

#### *Some necessary attributes*

For regulation to meet the tests of "minimum effective regulation", it needs to satisfy a variety of criteria, which the Commission has emphasised in successive reports over the years:

*Regulation should not be unduly prescriptive.* Where possible, it should be specified in terms of performance goals or outcomes. It should be flexible enough to accommodate different or changing circumstances, and to enable businesses and households to choose the most cost effective ways of complying.

*Regulation should be clear and concise.* It should also be communicated effectively and be readily accessible to those affected by it. Not only should people be able to find out what regulations apply to them, the regulations themselves must be capable of being readily understood.

*Regulation should be consistent* with other laws, agreements and international obligations. Inconsistency can create division, confusion and waste.

*Regulation must be enforceable.* But it should embody incentives or disciplines no greater than are needed for reasonable enforcement, and involve adequate resources for the purpose.

Finally, regulation needs to be *administered by accountable bodies* in a fair and consistent manner, and it should be *monitored and periodically reviewed* to ensure that it continues to achieve its aims.

Regulation which is deficient in one or more of these respects may not achieve its objectives and can impose unnecessary costs, impede innovation, or create barriers to productivity and efficiency.

## **Benefits from more light-handed approaches**

The first of the above design rules for minimum effective regulation — the need to avoid undue prescription — presents a continuing challenge for governments.

Where standards are needed, the temptation is for a regulator to lay down prescriptive, process-based rules to provide certainty and minimise political risk. However, such specific rules can preclude firms from searching for the lowest cost means of achieving the regulator's goals, especially as conditions change over time. Indeed firms may soon find themselves unable to meet the regulator's objectives, but as the only indicator of success is how well the rules are followed, managers will continue to focus on them to the neglect of the desired objectives.

For such reasons, performance based rules are generally preferable, particularly in circumstances where policy objectives are easily identified or quantifiable.

In its inquiry into black coal, the Commission found a number of cases, mostly at the state government level, where prescriptive regulation could be replaced with performance-based regulation. For example, in the occupational health and safety area, regulators could place greater reliance on parties satisfying their duty of care and thereby devote resources to monitoring outcomes, rather than prescribing which staff should perform which tasks at what intervals. Since this review there has been a move by states and territories towards greater use of performance based standards.

However, differences in standards and how they are applied continue to be issues for the mining sector. These issues are currently being considered as part of the Commission's inquiry into workers' compensation and OH&S.

### *Self-regulatory approaches*

In many cases, the nature of the problem and the potential costs of dealing with it may not warrant explicit Government regulation at all. The most efficient and effective approach (taking benefits into account) may be *self*-regulation — especially where the downside risks are not high and there are adequate incentives and scope for self-monitoring within the industry.

In other cases, it may be appropriate to combine (performance-based) regulation with self-regulatory codes, to ensure effective implementation and enforcement.

The Australian mining industry has seen benefits in employing self-regulation as a means of achieving community objectives, while also limiting the need for, and scope of, explicit government regulation. For example, in 1996 the Industry launched its *Code for Environmental Management*. Within three years, 44 minerals companies, representing over 300 operations (approximately 85 per cent of Australian production) had become signatories.

Signatories to the Code committed to go beyond simply complying with statutory requirements, to continuously improve their environmental performance — including through decision-making approaches in which environmental (and social) dimensions are integrated with economic or financial assessment — and improved transparency and public accountability.

The Minerals Council of Australia has subsequently begun the consultative development of a *Minerals Industry Code for Sustainable Development*. Based on the International Council on Mining and Metals (ICMM) Sustainable Development Framework, the Code will provide a framework for companies to put into practice sustainable development principles. A Code Assessment Protocol will measure each signatory's performance across a range of areas including health and safety, environmental, social and economic management.

### *A role for quasi-regulation?*

In some cases, self-regulation may be actively encouraged by government through mechanisms short of explicit regulation. Such 'quasi-regulation' can include government-endorsed industry codes of practice or standards, government agency guidance notes, industry-government agreements and national accreditation schemes.

Quasi-regulation should be considered where a tailored industry-specific solution is required and a collaborative approach between governments and business can generate more positive results. It brings cost advantages from flexible, tailor-made solutions and less formal mechanisms such as access to a speedy, low cost complaints handling and redress mechanism; and, while engaging governments in a collaborative way, leaves industry with substantial ownership of the scheme.

However, one of the problems with quasi-regulation is measuring the nature and extent of the Government's involvement. Such arrangements can lack transparency and generate uncertainty, or leave business carrying all the costs. In some cases, explicit government regulation will be preferable, because the scope for decision-making by regulators or administrators is more clearly defined.

### **Good regulation requires good process**

Deciding whether regulation is needed and the most appropriate *form* of regulation is a core function of government. Nevertheless, governments have traditionally not done it very well. The regulatory morass illuminated by the Industry Commission's 1991 inquiry provided ample evidence of that in the mining context.

As the experience since that inquiry has shown, bad regulation can be reformed, but the task can be a challenging one. Once regulations are in place, expectations and interests settle around them. Change can be disruptive and it can be strongly resisted by interested parties – including regulators themselves.

Notwithstanding those difficulties, Australia has undergone a remarkable period of microeconomic reform over the past decade and a half, which has involved losses for some, but yielded substantial gains to the wider community. More such reform will be needed if Australia is to meet the economic and social challenges ahead.

However, it is clearly preferable to avoid introducing in the first place the kind of regulation that will subsequently need to be reformed (as opposed to other modifications that may be needed to meet changing circumstances). This points to the critical importance of having policy development systems in place that can yield the right kind of regulatory solutions to perceived economic, social and environmental problems; in short, that can produce minimum effective regulation.

#### *The role of regulation impact statements*

Almost all OECD countries have now adopted explicit policies to improve regulatory quality. An important mechanism for providing greater discipline on regulation-making in Australia, as well as an increasing number of other countries,

has been the requirement to prepare a Regulation Impact Statement (RIS). While there were earlier provisions in place, since 1997 — in response to a report by the Small Business Regulation Taskforce — Commonwealth departments and agencies have been required under a Cabinet directive to prepare RISs for all regulation that has a significant effect on business.

The RIS process requires policy makers to consult with those affected, and to work through a sequential process of articulating the problem potentially requiring regulation, to assess a range of options, recommend the best option and explain why other options — including non-regulatory ones — are not as good. Taken together, these elements constitute a best-practice process which, if followed, should produce ‘minimum effective’ regulation. In particular, it seeks to move agencies away from the traditional ‘regulate-first’ approach.

A critical feature of this process is that RISs are required to be presented to political decision-makers in time to inform their decisions. The RIS must also accompany bills and subordinate legislation into Parliament, enhancing the scope for a well-informed political debate, and providing greater public accountability.

The Office of Regulation Review (ORR), which is part of the Productivity Commission and shares its statutory independence, is the Commonwealth government’s watchdog over this regulation review process.

There are also RIS requirements for any regulatory actions originating in Ministerial Councils and national standard-setting bodies. These must comply with COAG’s Framework for National Standard Setting and Regulatory Action.

An important difference between the Commonwealth and COAG RIS requirements is the need, in the latter, for policy analysts to prepare a RIS for consultation with stakeholders. (This has sometimes led to significant revisions of the preferred option to more closely resemble minimum effective regulation.)

The ORR’s role in the COAG process is to provide advice and assistance to Ministerial Councils and national standard-setting bodies on the preparation of RISs. The ORR also monitors compliance with the COAG RIS requirements and reports to the Commonwealth-State Committee on Regulatory Reform where decisions are made that are inconsistent with the COAG Guidelines.

Most state and territory governments also have RIS processes in place. A current exception is the Northern Territory. RISs are required only for subordinate legislation in NSW, Victoria and Queensland, whereas in the ACT, Tasmania and South Australia RIS requirements also apply to primary legislation.

States could be expected to have a particular interest in ensuring that they remove any undue regulatory impediments to mining, given the competition among them to attract investment. Unlike *budgetary* inducements for investment, however, reducing red tape can be a win-win strategy for industry and the wider community

The Commonwealth's RIS requirements differ from the various state and territory requirements in a number of respects. Most states and territories have specific legislation underpinning the RIS requirements, whereas the Commonwealth's provisions derive from a Cabinet decision. Many states and territories (like COAG bodies) have a requirement for the preparation of a RIS at the consultation stage of the policy development process. By contrast, preparation of a RIS for consultation is not mandatory at the Commonwealth level. On the other hand, Commonwealth RISs are independently monitored, and are tabled in Parliament or otherwise made public to ensure transparency in the decision-making process. There is scope, therefore, for the different jurisdictions to learn from each other.

### *The compliance record*

The Productivity Commission provides an annual report on Commonwealth government agencies' compliance with RIS requirements, based on information collected by the ORR (*Regulation and its Review*). It has found a distinct trend improvement. But there are also some worrying developments.

Of the 145 Commonwealth RISs required in 2001-02, the compliance rate at the crucial decision-making stage was 88 per cent, representing a significant improvement over earlier years. (Preliminary data for 2002-03 suggests that compliance at the decision-making stage may have dropped.)

One point of concern is that compliance has tended to be poorest where it matters most. The ORR ranked RISs required in 2001-02 according to the perceived economic and/or social significance of the regulations concerned. It found that compliance at the decision-making stage was only 70 per cent for regulatory proposals with more significant impacts on the community.

The mining sector has been *directly* affected by only four Commonwealth regulatory initiatives over the past five years. Adequate RISs were prepared and cleared by the ORR at the decision-making stage in each of the four cases. Compliance for some 30 regulatory proposals that had an indirect impact on the mining sector was also higher than the average, at around 80 per cent.

For Ministerial Councils and national regulatory bodies, compliance over the period 1997-98 to 2002-03 at the decision-making stage averaged 70 per cent. In this period, the mining sector was potentially affected by four National Environment

Protection Measures (national pollutant inventory, movement of controlled wastes, ambient air quality and assessment of site contamination), as well as two Codes of Practice (for the Storage and Handling of Dangerous Goods, and for the Transport of Radioactive Materials), and a national water quality management strategy. In each case, the processes followed were found to be consistent with the COAG Principles and Guidelines.

### *The problem areas*

It emerges that while there has been improvement in recent years, we are still some way from best practice in regulation making. In too many cases, there has been no attempt to prepare a RIS. Among those which are prepared, common failings include:

- poor definition of regulatory problem and objectives;
- inadequate consideration of feasible regulatory and non-regulatory options;
- incomplete cost/benefit assessments; and
- inadequate consultation with relevant stakeholders and the community.

There is also scope for improvement in the *timing* of RISs. As noted, they need to be prepared early in the policy-development process if they are to assist decision-making. Instead, in some cases they are being treated as an ‘add-on’, and prepared after policy decisions have already been made. In those circumstances, the RIS can become little more than ex-post rationalisation. Its content may end up being adequate, but it is less able to make a useful contribution to policy development.

It might be added that not all regulation that impacts on business is necessarily required to undergo a RIS-type assessment. In some cases, enabling legislation may actually preclude a decision-maker from taking into account the economic or social impacts of a proposed course of action. For example, decisions about the process for assessing the listing of a threatened species or habitat under environment protection and biodiversity conservation laws, may confine the regulator to the scientific evidence alone.

Some of these issues will be examined in the Commission’s new inquiry into the impacts of native vegetation regulation. While having a particular focus on the agricultural sector, we would also value the views of any mining sector interests that may be affected.

## **In conclusion**

After nearly two decades of microeconomic reform, the regulatory and policy environment for mining activity is a less hostile and more facilitative one than it was. A succession of reforms has seen a reduction in some of the more costly regulation directed at the sector, as well as an improvement in the broader policy environment affecting all business activity in Australia.

That said, regulation is likely to remain a central fact of this industry's life. The very nature of mining activity, and its location, have inevitable social and environment implications which, if anything, are the subject of greater community interest over time.

The challenge for governments and the industry alike is to ensure that all such regulation not only meets legitimate objectives, but takes an appropriate form. In particular, there is a need to continue the move away from prescriptive, 'input-oriented' regulation, in favour of less costly performance-based approaches, in which industry itself can play a greater role in attaining desired outcomes.

Requirements on government departments and regulatory bodies to prepare Regulation Impact Statements is a relatively recent and potentially important mechanism for enforcing best practice processes in the making of regulation. The provisions at the Commonwealth level have already yielded some benefits, but their potential is yet to be fully realised. Equally, at the state and territory level, where much mining regulation originates, there is scope to strengthen and broaden the use of regulation impact statements.

The Productivity Commission and the Office of Regulation Review have been playing a central role at the Commonwealth level in promoting and vetting these processes. For its part, the mining industry needs to encourage regulators to follow the best practice processes and ensure in particular that there is effective consultation on matters that affect it. In my experience, that is often the critical ingredient in achieving the minimum effective regulation that best meets the needs of industry and the wider community.