

John Southalan, 27 November 2018  
 AMPLA WA Branch Twilight Seminar

## Government Resources Policies: Approaches and Implications



### Three government resources 'policies'

- Feb 2018 *Leading practice principles for a sustainable resources sector: A Western Australian perspective*  
 WA Minister Mines & Petroleum, African Mining INDABA
- Apr 2018 *Supporting the Western Australian resources sector*  
 WA Dept Mines, Industry Regulation & Safety (**DMIRS**)
- Sep 2018 *Resources 2030 Taskforce, Australian resources — providing prosperity for future generations*  
 Cwth Minister for Resources & Northern Australia
- Sep 2018 *Leading practice principles*  
 DMIRS

# 1. The Government Statements

3


Guidance Note

**Supporting the Western Australian resources sector**  
February 2018

**Background**

Western Australia's resources sector comprises a diverse range of mineral and petroleum products and an ongoing stream of mineral and petroleum projects. The continuous nature of the sector's activity in development and production activities is a highly competitive environment with a range of industry participants.

The resources sector plays the vital role supported through wide range of government programs, regulatory instruments and activities at both the State and Commonwealth level. This support is integral to ensuring the sector's development with government, and a largely neutral or active engagement of Commonwealth departments.

Over the last, successive State Governments, have focused on the development of the resources sector through an industry government, by working closely with industry and other key government. This means ongoing regulatory support, and their associated activities in a transparent and unbiased through and better coordination.

The State Government's commitment of resource development is evidenced by a strategic supply system that supports a diverse range of mining, hydrocarbon, metals and petroleum activities. The State Government is committed to supporting the resource sector through its various activities, including the provision of a full range of services to the resources sector. This approach is designed to ensure that the government is a leading global industry partner.

**Purpose**

In order to assist the government of Western Australia to continue to support the resources sector, the Department of Energy, Mines and Petroleum has developed this Guidance Note. The purpose of this Guidance Note is to provide a high level overview of the resources sector and the government's role in supporting the sector. This document is intended to provide a high level overview of the resources sector and the government's role in supporting the sector.

The guidance note does not intend to provide a detailed overview of the resources sector, but rather to provide a high level overview of the resources sector and the government's role in supporting the sector.

**Why participate**

The resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government. The resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government. The resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government.

**Industry structure**

Western Australia's resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government. The resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government.

**Product Western Australia's resources**

Western Australia's resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government. The resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government.

**Government's role in supporting the resources sector**

Western Australia's resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government. The resources sector is a key sector for the State Government and is a key sector for the Commonwealth Government.

4

4

## 'Supporting the Western Australian resources sector'

April 2018

'how the State Government may support the Western Australia resource sector ... [the Government] considers each request on a case-by-case basis and in the context of the following principles'

1. Maintain an efficient and highly competitive industry structure
2. Protect Western Australia's interests
3. Ensure effective stewardship of the State's finite resources
4. Promote equitable treatment, consistency and fiscal responsibility
5. Support community wellbeing and advancement



Resources**Law**Network

5



Resources**Law**Network

6

## Commonwealth 2030 Taskforce Sep 2018

- 10 person 'Resources 2030 Taskforce', coordinated by Cwth Dept Industry, Innovation & Science
- TOR *'to create a policy framework that will increase the international competitiveness of the resources sector, improve the sustainability of resources activities and strengthen community support for the sector'*
- Taskforce incl. politicians, mining co. execs, regulators, academics
- Submissions & public consultations throughout 2018, report released by Cwth Minister for Resources & Northern Australia
- 21 recommendations, to government (both national and state/territory) and industry

## 2030 Taskforce six main areas

### **1. Promote the Australian resources sector as the best place to invest**

Better promote the sector's capabilities, capacities and strengths to both domestic communities and the rest of the world ...

### **2. Establish a stronger base to guide and drive innovation**

Ensure Australia has a sector-wide innovation system and institutions that position it at the global forefront ...

### **3. Build stronger communities and stronger regions**

Work more closely with communities to make those relationships more collaborative and effective, and enable better planning ...

### **4. Provide a high-quality resources base for future generations**

Work strategically to discover and develop new resources regions

### **5. Develop the future workforce**

Attract and support a skilled workforce, which is the foundation and future of the industry...

### **6. Improve the sector's environmental performance**

Renew the focus on promoting the sector's positive environmental performance and developing more efficient and effective environmental regulations ...'

## Leading practice principles

Sep 2018

Feb 2018 (Indaba)



Leading practice principles for a sustainable resources sector

A Western Australian perspective

1 February 2018

Sep 2018 (WA)



Leading practice principles for a sustainable resources sector

A Western Australian perspective

## Leading practice principles

Sep 2018

‘to provide an overview of the leading practice principles underpinning the regulatory framework for the resources sector in Western Australia’

- Principle 1: Attract investment by minimising commercial risks for explorers and investors
- Principle 2: Provide the industry with certainty regarding its rights to resources
- Principle 3: Provide a clear and consistent regulatory framework
- Principle 4: Ensure the community receives appropriate royalty returns
- Principle 5: Foster public trust and confidence’

## 2. Implications in WA law

11

### Content of WA statements

- Much summarises current law/practice ∴ little change
- But some interesting extracts:
  - leaving resources undeveloped 'until they are able to be extracted economically and efficiently to generate a fair return to the community'
  - not providing state assistance for 'projects which are not commercially viable (or not designed to be sustainable in the long term)'
  - 'ensuring that all information that can legally be requested by the community is made publicly accessible'

## WA and 'mining policy'

- No general mining/resources policy (cf specifics: Abandoned Mines, Enforcement, Bonds etc)
- WA's *Mining Act 1978* does not specify its objectives (cf other jurisdictions)
- Courts have divined parliamentary intentions around mining
- Not comprehensive nor contemporary
- eg. *Re: Minister; ex p. Cazaly* (2007)
  - 'the "subject matter and scope and purpose" of the Mining Act ...can be identified at various levels of generality...
  - Rowland J in *Nova Resources* ... the "primary" object and aim of the legislation is "to ensure as far as practicable that land ... will be made available for mining or exploration" ...
  - the adjective "primary" ...acknowledges that there are other objects and aims. Another object reflected in the Act is, in one sense, contrary to the primary object...
  - ... provisions have been added more recently, perhaps to reflect the fact that the mining industry in Western Australia has increasingly matured...

## Relevance of policy statements

- Recent decisions caused some reservations about policy:  
*Forrest -v- Wilson* 2017, *Save Beeliar* 2016, *Robinson -v- Fielding* 2015
- Where statute dictates, that must be followed
- But where statute has discretion, or is silent, policy is important
  - 'Decision-making is facilitated by the guidance given by an adopted policy ... [A]n adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process': *Quintano -v- Finance Minister* (2014)

## Tenure grant and policies

- *Mining Act, s57(1)*  
 'Subject to this Act **the Minister may** on the application of any person ... **grant to that person a licence** to be known as an exploration licence **on such terms and conditions as the Minister may determine**'.
- *Re: Minister; ex p. Cazaly (2007), [72]*  
 '...**the Minister, in deciding whether to grant or refuse an application for an exploration licence, is entitled to take into account matters of policy** and principle governing the exploration of mineral deposits in this State. Relevant matters of policy and principle include:  
 (a) the promotion of a strong and stable mining industry and economy generally;  
 (b) the reconciliation of exploration of mineral deposits with the protection and encouragement of competing land uses;  
 (c) environmental considerations; and  
 (d) any other matters that are in the public interest.  
 No doubt, in a particular case, **some issues of policy and principle may conflict. It may be necessary for the Minister to reconcile competing issues or to accord precedence to one factor over another**'.

## Potential application of WA resources statements

1. informing Departmental and Ministerial decisions  
 eg. conditions on tenements, scope of 'public interest' in application objections
2. use by Parliamentary inquiries and others examining government action  
 eg. Cleveland–Cliffs and Mineral Resources — Public Accounts Committee Referral (Leg Assem, Sep 2018)
3. potentially invalidating future decisions inconsistent with these policy statements  
 eg. procedural fairness, divergence from practice, relevancy of considerations
4. Ministerial consideration and decisions on proposals submitted under State Agreements

## eg. Railway (BBI Rail) Agreement 2017

### 11. Company to submit proposals

- (1) The Company shall ... submit to the Minister ... its detailed proposals ... with respect to the undertaking of the Project, which proposals shall include the location, area, layout, design, materials and time program for the commencement and completion of construction or the provision (as the case may be) of each of the following matters...

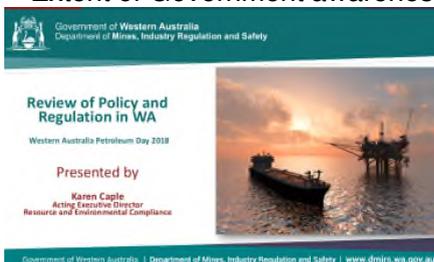
### 12. Consideration of proposals

- (1) In respect of each proposal ... the Minister shall:
- approve of the proposal without qualification or reservation; or ...
  - require as a condition precedent to the giving of his approval to the said proposal, that the Company make such alteration thereto or comply with such conditions in respect thereto as he (having regard to the circumstances, including the overall development of and the use by others as well as the Company of all or any of the facilities proposed to be provided) thinks reasonable and in such a case the Minister shall disclose his reasons for such conditions

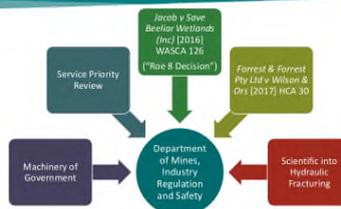
## ? extent of Govt use

14 Sep 2018

- Two 'resources' statements address oil/gas and mining
- Extent of Government awareness/use unclear



### Overview – Operational context



## 3. Commonwealth

19

### Commonwealth's 'policy' position: confused & confusing

- Cwth neither owns nor regulates the land/minerals comprising majority of Australian resources
- The Taskforce issued many 'recommendations' for governments about resources regulation
- Taskforce's TOR broad: 'the resources sector'
  - Launching the taskforce: Minister focussed on coal
  - Taskforce Chair statement: 'energy was not within the taskforce's scope'
  - Taskforce ignored Australia's renewable resources
  - Report emphasises future Australian coal mining and export





## Community engagement

(p52)

- '...the **taskforce recommends governments, industry and community** experts collaborate to **produce one consolidated set of credible best-practice guidelines and standards for community engagement and Indigenous agreements**. This would help to level the playing field across all communities impacted by the resources sector. ...
- **The new consolidated guidelines would be a minimum benchmark** for industry when initiating negotiations and developing mutually beneficial outcomes for all stakeholders. ...
- Specific areas of **focus could include:**
  - **guidance on how the Native Title regulatory framework is best applied** to Indigenous agreements
  - guidance on periodic reviews to consider changes in a project and commitments over its entire life cycle
  - ...
  - guidance on consistent reporting of social impact data, employment, regional content and procurement statistics.
- The guidelines would need to be credible and workable, endorsed by the broader resources sector and kept up to date'.

## 4. International context

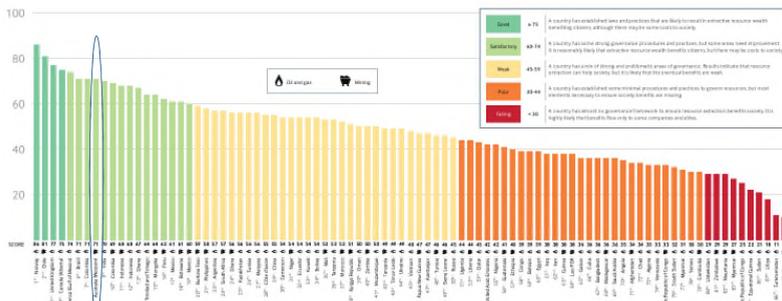
## International and national context

- Taskforce stated ‘2030 ambition of [Australia] being the most advanced and successful resources sector in the world’
- Canada is a ‘traditional competitor’
- Taskforce recommendation: ‘Governments should undertake regular benchmarking of domestic and international policies and regulatory frameworks affecting the resources sector to identify opportunities for improvement’.
- Contemporary international guidance & reports about extractives operations and regulation
  - from governments, international bodies, and industry
  - almost absent from Australian statements

## International comparisons

NRGI 2017

Resource Governance Index country scores and rankings



# International comparisons

McKinsey 2013

Countries performing well across the six areas of the resources value chain

	Develop resources		Capture value		Transform value into long-term development	
	Institutions and governance	Infrastructure	Fiscal policy and competitiveness <sup>1</sup>	Local content development	Spending the windfall	Economic development
1	Norway	Canada	Canada	Canada	Norway	Norway
2	Canada	Malaysia	Chile	Norway	Australia	Qatar
3	Australia	Norway	Norway	Qatar	Canada	Australia
4	UAE <sup>2</sup>	Australia	Botswana	UAE <sup>2</sup>	Bahrain	Iceland
5	Chile	Lithuania	Mexico	Australia	Brazil	Canada
6	Iceland	Saudi Arabia	Australia	Iceland	Kuwait	UAE <sup>2</sup>
7	Qatar	Namibia	Bulgaria	Malaysia	Botswana	Israel
8	Brunei Darussalam	UAE <sup>2</sup>	Peru	South Africa	Colombia	Bahrain
9	Oman	Iceland	Brazil	Lithuania	Chile	Brunei Darussalam
10	Brazil	Azerbaijan	Colombia	Guatemala	South Africa	Chile

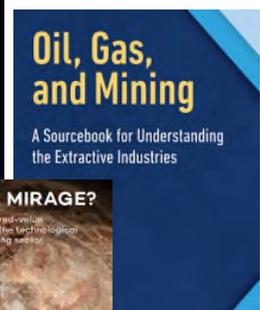
1. Analysis restricted to mining sectors due to data availability and comparability issues. The analysis is based on country risk, access to skills, regulatory duplication, and taxation. The assessment excludes other aspects of competitiveness, such as energy and wage costs, and other regulatory barriers.

2. United Arab Emirates.

NOTE: Based on a variety of publicly available sources of information. See the appendix for further details on the methodology.

SOURCE: Revenue Watch; World Economic Forum; World Bank; United Nations Educational, Scientific and Cultural Organization; UN Human Development Report; Yale Environmental Performance Index; Fraser Institute; Morningstar; International Monetary Fund; International Budget Partnership; McKinsey Global Institute analysis

# Contemporary international guidance

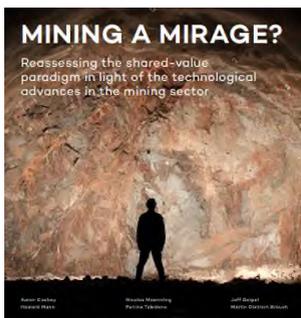


## Australian policy & international guidance

- Many issues & recommendations in international materials mirrored in Australian 2018 government statements
  - eg. legal certainty, harmonization of laws & regulatory decisions across government(s)
- But significant divergences, unexplained in Australian statements
  1. Technological advances – and their potential for reducing Australian benefits – are overlooked
  2. The international emphasis on transparency is missing in Australian 'policy'
  3. Australian management of resources revenue is not 'best practice'
  4. Australian divergence continues from international emphasis on community consent

## Affect of technology change

IISD, 2016

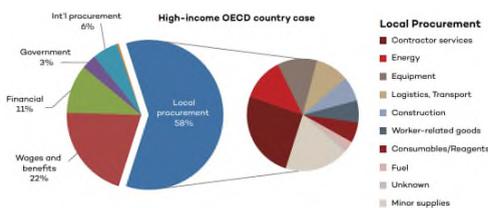


- 'host countries ... at risk of reduced socioeconomic benefits from mining as existing new technologies are further rolled out.
- ... primarily in terms of lost local employment and personal income tax revenue, but will also come from reduced employment-related local procurement'

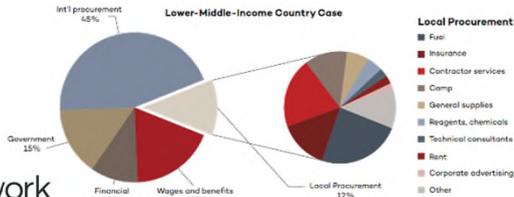
## Technology changes

- More (and cheaper) transport (↓ local presence: workers & suppliers)
- Autonomous transport & loaders (↓ workers, ↓ local servicing)
- Remotely operated equipment (↓ local presence: workers & experience)
- GIS and GPS (↓ technical survey)
- Automated tunnelling & drilling (↓ workers, ↓ local servicing)

## Economy relevance to local content



Operational spending in two different countries  
(from IISD 2016, p23)



## Resources regulation and integration

- 2018 statements prioritise extractives over public benefit
  - grant & security of extractive rights presented as end in itself, with public acceptance to be managed around that
- Reverse of international guidance and recommendations, eg:
  - 2014 *Natural Resources Charter* 'Resource management should secure the greatest benefit for citizens through an inclusive and comprehensive national strategy...'
  - 2018 UN report '...it is within the power of governments of resource-rich countries to protect people and the environment and to realize the benefits from mining'
  - Recent analysis Prof. Chandler indicates Australia's offshore petroleum regulation behind Norway and the UK re national interest.



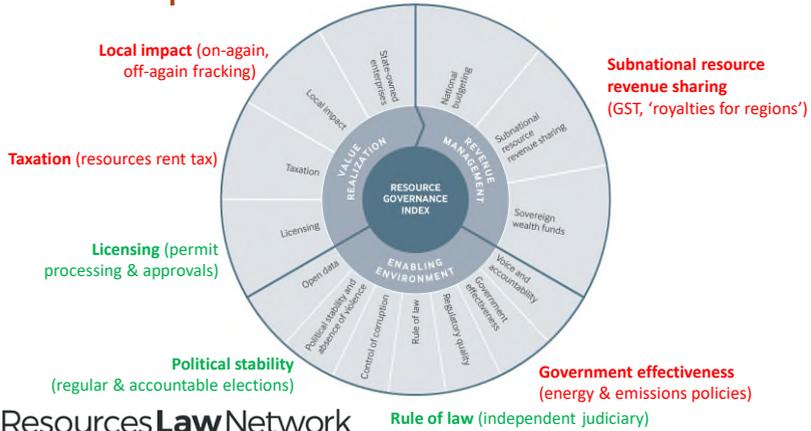
## The 'traditional competitor'

(p39)

- 'In 2017, the federal, provincial and territorial ministers responsible for mining called for a Canadian Minerals and Metals Plan ...
- The decision to develop the plan recognises that, to be a global resources leader, new vision, goals and actions are needed to foster growth and reflect the realities of climate change, Indigenous participation, sustainable development and social acceptability.
- The Canadian Minerals and Metals Plan will set a national goal to establish Canada as the world's premier mining nation. It will recognise that to achieve this goal Canada needs to improve in some areas, such as enabling infrastructure, adopting innovation and clean technologies, setting clear and predictable regulatory regimes, earning community acceptance, nurturing greater participation of Indigenous peoples, and developing better overall global reach and reputation'



## Factors per *Natural Resources Charter*



## 5. Summary

## Summary

- WA Govt 2018 statements on principles of resources regulation useful:
  1. informing Departmental and Ministerial decisions
  2. use by others examining government action
  3. reviewing decisions inconsistent with policy statements
  4. ? Informing consideration of State Agreement proposals
- Unclear extent to which these known/used within Government
- Commonwealth 2030 Taskforce report could inform future planning
- Areas of divergence with international direction and development

## Questions / discussion

[john@southalan.net](mailto:john@southalan.net)

Adj. Assoc Professor  
*Centre for Mining, Energy & Natural Resources Law (UWA) and Murdoch*

Global Faculty  
*Centre for Energy, Petroleum & Mineral Law & Policy (Dundee)*

Barrister  
*WA Bar Association*