

COMMENT

WA AND NATIONAL POLICY GUIDANCE ON EXTRACTIVES REGULATION

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Three publications were issued in 2018 about the regulation and future of the extractives sector, by the Western Australian and Commonwealth Governments. This article summarises the contents of these documents and examines implications. These include the advances made in WA policy frameworks, but also the divergence of Australian State and national approaches from international direction in extractives regulation and governance.

1 Introduction

“Policy” – a government’s public indication of or commitment to how it intends to approach certain matters – is important in effective regulation. As indicated by the Full Federal Court in 2014:

Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an 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.¹

In one of Western Australia’s prominent cases about government regulation of mining – *Re Minister for Resources; ex p Cazaly Iron* – the Court of Appeal indicated the significance of policy: “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”.² The High Court refused leave to appeal that decision,³ leaving this as relevant law, and court decisions in other States also indicate the importance of government policy.⁴ This emphasises the significance – to all parties interested in the regulation and use of minerals and petroleum – of governments’ policies and approaches to resources regulation.

2 Government Guidance on Resources Regulation

2.1 First of the Three Australian Documents

In April 2018, WA’s Department of Mines, Industry Regulation and Safety (DMIRS) published *Supporting the Western Australian Resources Sector*.⁵ This two-page document explains: “the purpose of this guidance note is to outline how the State Government may support the Western Australia resource sector in a range of economic and market conditions”.⁶ DMIRS states, in the document, that it seeks to provide “greater transparency” and identify the “key principles which guide the State Government in its decision making”⁷ in balancing the broader benefits of a proposal against the costs to the State. This involves company requests for government assistance being considered against the following five principles described in the document.

Maintain an efficient and highly competitive industry structure ...

Protect Western Australia’s interests ... [involving] a thorough risk assessment ... to consider the potential cost to government against the benefits to the economy and community, ensuring that any decision is in the public interest.

Ensure effective stewardship of the State's finite resources ... Resource developers are expected to demonstrate best practice in planning and managing all aspects of the mining process.... In some cases, it may be preferable for resources to be left undeveloped until they are able to be extracted economically and efficiently to generate a fair return to the community.

Promote equitable treatment, consistency and fiscal responsibility ...

Support community wellbeing and advancement ... [in relation to which DMIRS states] Projects which are not commercially viable (or not designed to be sustainable in the long term) will cause ongoing community disruption and uncertainty. Intervention by the State Government has the potential to exacerbate these problems.⁸

2.2 Second of the Three Australian Documents

In September 2018, *Australian Resources — Providing Prosperity for Future Generations*, a report to the Commonwealth Minister for Resources and Northern Australia by the ten people on the Resources 2030 Taskforce,⁹ was published, following submissions and public consultations throughout 2018, coordinated by the Commonwealth Department of Industry, Innovation and Science. The Taskforce's terms of reference were "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".¹⁰ Taskforce members were appointed by the Department, in their individual capacity but because of their relevant experience, and included politicians, mining company executives, regulators, and academics. The report presented 21 recommendations, to government (national and State/Territory) and industry, covering 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 ...¹¹

2.3 Third of the Three Australian Documents

September 2018 also saw the publication of *Leading Practice Principles for a Sustainable Resources Sector: A Western Australian Perspective* by DMIRS. The document states its purpose is "to provide an overview of the leading practice principles underpinning the regulatory framework for the resources sector in Western Australia".¹² It identifies five principles, which are extracted below, followed by the key points which DMIRS summarised regarding each principle.

Principle 1: Attract investment by minimising commercial risks for explorers and investors

Encourage exploration through the provision of pre-competitive geoscience information and other exploration incentives.

Key points:

- The provision of pre-competitive geoscience information to industry is essential to attracting investment.
- Industry should contribute to the sharing of knowledge.
- Complex approval processes can hinder investment if they are not appropriately managed.¹³

Principle 2: Provide the industry with certainty regarding its rights to resources

Key points:

- The legislative framework must be clear on rights to land with respect to development of mineral and petroleum resources.
- A secure and equitable titles system is crucial in enabling industry to provide the significant investment required to find and develop resources.
- The titles system also needs to encourage exploration activity by requiring minimum levels of exploration expenditure and discouraging land banking.¹⁴

Principle 3: Provide a clear and consistent regulatory framework

Key points:

- A clear and consistent regulatory framework provides both industry and the community with confidence that the resources sector is being appropriately regulated.
- A comprehensive and transparent approvals process, that takes into account the impact on the environment, occupational health and safety and other land users, is critical for ensuring sustainable development.
- The regulatory framework should be subject to ongoing review and improvement.¹⁵

Principle 4: Ensure the community receives appropriate royalty returns

Key points:

- To be effective, a royalty system must provide the community with adequate compensation for the loss of its resources while not adversely impacting investment.
- The system must also be fairly and equitabl[y] applied, so that companies can accurately predict costs.¹⁶

Principle 5: Foster public trust and confidence

Key point:

- Fostering public trust and confidence require[s] the regulatory framework to promote a culture of integrity that minimises corruption.¹⁷

None of these three publications refers to, or appears to be informed by, the others. Nevertheless, by outlining respective governments' practices in regulating the extractives sector, these three documents have significance to resources operations, their stakeholders and advisers, which are examined below.

3 Western Australia and Extractives Policy

Many nations with large extractives sectors have a government policy about resource management and development.¹⁸ Western Australia has been an anomaly as it has not had a general mining policy¹⁹ and, unlike other jurisdictions,²⁰ WA's *Mining Act* does not specify its objectives. WA courts have divined what they consider is parliament's intentions around mining,²¹ but these statements are neither comprehensive nor contemporary. Instead, judicial statements of "objectives" are at such a general level, that they may support that particular decision but provide limited guidance for future resolution of disputes.²²

The Cazaly decision, noted above, saw the Court of Appeal confirming a role for government policy, but also identifying the sometimes differing aims which arise:

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.²³

It is exactly because of these potential conflicts, that there is great value in the WA Government's formal consideration and publication of the principles "underpinning the regulatory framework for the resources sector in Western Australia".²⁴ This provides a broad explanation of resources policy in WA, which will assist more cohesive decisions and planning across government agencies.

The statements by DMIRS (2.1 and 2.3 above) contain much summary and explanation of current law and practice and so, to that extent, presage little change in those areas. Additionally, policy statements have limited application where statutes enumerate the criteria for government decision,²⁵ which is the case in various WA resources laws. But there are many areas outside those two categories which are covered in these 2018 documents, such as: leaving resources undeveloped "until they are able to be extracted economically and efficiently to generate a fair return to the community",²⁶ not providing state assistance for "projects which are not commercially viable (or not designed to be sustainable in the long term)",²⁷ "Private landholders generally have a right of veto over the granting of mining tenements, unless the land is unused or unimproved",²⁸ and "ensuring that all information that can legally be requested by the community is made publicly accessible".²⁹

The application of the 2018 policy outlines of the WA Government is broad, and could potentially arise in:

- informing Departmental and Ministerial decisions, such as conditions on tenements,³⁰ the scope of "public interest" in application objections, and many other statutory discretions;
- being used by Parliamentary inquiries and other parties in reviewing government decisions;
- potentially invalidating future decisions or actions which are inconsistent with these policy statements (although that would first depend on the relevant policy being within legal remit, because government policy which exceeds statutory bounds is invalid³¹); and/or
- Ministerial consideration and decisions on company proposals submitted under State Agreements.

It will be interesting to see the use of the 2018 WA policy documents – by Government agencies³² and other parties.

The third bullet point above is probably the area of most interest to litigators – being the potential (in)validity of regulator's decisions made by reference to these policies. That could arise through administrative law concepts concerning procedural fairness, divergence from practice, or relevancy of considerations;³³ although there is a complexity and differing judicial views on the necessity to follow policy and its implications for decisions.³⁴

4 International Developments and Australian Approaches

Recent years have seen considerable international guidance and reports about extractives operations and regulation – from governments, international bodies, and industry. Almost none of these are referenced in the Australian materials³⁵ (and the Commonwealth's 2030 Taskforce Report is copiously footnoted, suggesting most international materials were unknown or ignored). Many of the issues and recommendations identified in international materials are *also* found in these Australian policy statements, such as: legal certainty, harmonisation of laws and regulatory decisions across government(s), community engagement, and international competitiveness. But there are also significant divergences, summarised below, which demand attention in Australian governments' policies if those governments do aspire to regulate and assist the extractives sector consistently with best contemporary practice. Alternatively, if there is some reason or explanation why Australia should follow outdated approaches, then that should be explained.

4.1 Technological Advances – and Their Potential for Reducing Australian Benefits – Are Overlooked

The three Australian documents all emphasise the resources sector's creation of jobs³⁶ and envisage past practices continuing in the future.³⁷ Technological advances are presented as creating job opportunities and increasing company productivity.³⁸ The 2030 Taskforce referred to "public concern about the impact [of new technologies] on jobs"³⁹ and recommended government

and industry should “map the skills needs of the resources sector for 2030”.⁴⁰ International materials and reports indicate this is significantly understated and underprepared.

A 2016 report from the Columbia Center on Sustainable Development examined technological advances in mining, warning these will reduce the “traditional” mining benefits to society through jobs, multipliers and associated industries (*particularly in advanced mining economies like Australia and Canada*), potential outcomes which call for significantly different approaches from host governments and societies.⁴¹ This caution is reinforced by a more recent report from the Intergovernmental Forum on Mining, which describes these impacts and how nations ought to adjust.⁴²

All these materials describe significant implications for “social licence to operate” as automation removes jobs and decisions from local communities. None of this is reflected in the Australian policy documents of 2018, and it is something Australian governments ought promptly to consider and address in regulating the impacts and benefits from extractives.

4.2 The International Emphasis on Transparency Is Missing in Australian Policy

Repeated international recommendations are made that governments need to “improve transparency across the entire process by which they award [extractive] rights ... [including] all stages of ... planning, the allocation and award process, as well as information about contract terms and their implementation”⁴³ – that from a 2018 report of the Natural Resource Governance Initiative with similar emphasis found in another report from various UN agencies. The latter, *Managing Mining for Sustainable Development: A Sourcebook*,⁴⁴ was published in March 2018 after considerable input from government, industry and academic expertise and peer-review. Relevant to transparency, this report explains the need and processes for “[f]ostering a culture of transparency in the government and in the mining industry”⁴⁵ and “[e]nsuring transparency of the fiscal regime (in the flows of resource revenues and in mining contracts) and access to information, by drawing on international transparency initiatives such as the EITI [Extractive Industries Transparency Initiative]; ensuring a relatively straightforward fiscal regime that does not obscure transparency; and fostering an overall culture of transparency”.⁴⁶ Transparency is a growing issue of attention regarding Australian resources regulation.⁴⁷

EITI is something Australia supports, and encourages other countries to adopt as important for resource revenue management. In 2016, the Commonwealth said:

The sustainable development of natural resources (oil, gas and minerals) requires transparent and accountable management of revenue received from these industries, including taxes, royalties and other payments.

The EITI is a global standard to promote the open and accountable management of natural resources.... Our commitment to the EITI Standard will help to build the public trust necessary for an enduring and sustainable industry.⁴⁸

But Australia does not practise what it preaches.

The Commonwealth committed to formally apply for EITI candidacy by June 2017, and produce its first EITI report in 2018.⁴⁹ But, as at September 2018, neither have occurred and the Department of Prime Minister and Cabinet explains the matter is “delayed”.⁵⁰

The WA Mining Minister attended African Mining Indaba in February 2018 and presented various African governments⁵¹ with the *Principles for a Sustainable Resource Sector* as a “reference document for ... [those governments] to use as a resource for policy, capacity and governance enhancement for the resources sector in member African nations”.⁵² The version provided to African Governments, on how to regulate resources, had some intriguing differences from the version made publicly available on the DMIRS website half a year later. In particular, the African Governments were told of the importance of EITI to enable “the full publication and verification of company payments and government revenues from the oil, gas, and mining industry”.⁵³ That statement, and anything about EITI, was completely absent from what DMIRS now promotes as how resources are regulated within WA.

Despite the anomaly around EITI, the WA policy *does* have constructive and useful guidance on accountability and transparency which should inform resource regulation in that state.⁵⁴

4.3 Australian Management of Resources Revenue Is Not “Best Practice”

Revenue management is an area where Australia has been considerably out-of-step with good practice. The royalties and income created by Australian extractives operations essentially go to the consolidated revenue of the government of the day to spend as it likes and can politically endure. This motivates short-term thinking and spending, and is neither good nor recommended practice.

The 2018 UN sourcebook *Managing Mining for Sustainable Development* has relevant guidance including: “Managing the volatility of resource revenues by using tools such as structural budget rules developed by the International Monetary Fund, and designing and instituting natural resource funds”.⁵⁵ Resource funds, to ensure resource revenues also provide future benefits, are a common feature in other countries and commentary.⁵⁶

Western Australia has, only recently, established a “future fund” for “redistributing a portion of the State’s royalty revenue and investing those funds in order to provide a revenue reserve to facilitate the future infrastructure requirements of the State”.⁵⁷ This has been set to take 1% of annual royalty incomes from 2016.⁵⁸ Australian policy should take significantly more from international guidance on dealing with resource revenues.

4.4 Australian Divergence Continues from International Emphasis on Community Consent

While the 2030 Taskforce Report has considerable discussion and recommendations about community engagement,⁵⁹ this falls short of international developments and direction in the resources area. This concerns “consent” – a word absent from the Taskforce Report.

The 2018 UN sourcebook urges nations to “Incorporat[e] ... or strengthen ... the principles of consultation with local communities and free, prior and informed consent in domestic laws and regulations; and establishing or strengthening state remedy mechanisms for people affected by mining”.⁶⁰ That is reflected in industry guidance, with the International Council of Mining and Metals explaining that standards for “consent apply to new projects and changes to existing projects that are likely to have significant impacts on indigenous communities”.⁶¹ Consent also features in the 2015 *Chinese Due Diligence Guidelines*, which indicate that Chinese companies in the minerals supply chain will be discouraged from sourcing minerals extracted without the “free, prior and informed consent of local communities ... including those for which the extractor holds a legal title, lease, concession or licence”.⁶² This attention to supply chains is found in recent OECD guidance on resources extraction and use⁶³ and (more broadly) the proposed Australian law about modern slavery.

A recent article mused that “sustainable mining and resource management [is] transitioning from the life cycle of the mine to the life cycle of the mineral”.⁶⁴ This focus on the supply chain reinforces that questions and consideration of the arrangements for resources extraction are no longer the exclusive province of company and government. Attention regarding – and decisions affecting – a project’s feasibility or duration often now involve financiers, customers, and others. Thus, resources regulation which does not involve community consent can be expected to attract international scrutiny and wariness.

4.5 The Commonwealth’s Policy Position Is Confused and Confusing

The national policy direction for extractives, if that is an accurate characterisation of the Resources 2030 Taskforce Report, has some ambiguities. An obvious conundrum is that, under Australia’s federal arrangement, the Commonwealth neither owns nor regulates the land and minerals comprising the majority of Australian resources. While that was noted in the report, the Taskforce nonetheless issued many “recommendations” for governments about resources regulation. The life expectancy of those recommendations is now in the hands of domestic politics and federal relations.

The Taskforce’s terms of reference were broad – encompassing “the resources sector”⁶⁵ – but in launching the Taskforce the Minister highlighted coal,⁶⁶ the Taskforce Chair considered “energy was not within the taskforce’s scope”,⁶⁷ and the Taskforce made no examination of Australia’s renewable resources. Their report emphasises future Australian coal mining and export⁶⁸ within

Australia's resources. There may be some difficulty reconciling this with Australia's international agreements and efforts around carbon emissions, and broader international emphasis to reduce fossil-fuel usage.⁶⁹ Of course, this is a contested and current debate,⁷⁰ most recently evidenced in responses to the October 2018 report of the Intergovernmental Panel on Climate Change. That should reinforce, however, that government decisions and actions on resources are best taken after broad consultation and informed by economic, social and environmental considerations. This is especially the case for extractives projects – which frequently endure for many generations – meaning that permission from the government of the day but absent broader political or public input and support, is of limited value to a resources company.⁷¹

The Taskforce approach (similar to the WA policies) prioritises company approvals and rights over considerations of broader public benefit. The documents present the grant and security of extractive rights as an end in itself, and public acceptance as something to be managed around that.⁷² This is the reverse of international guidance and recommendations, for example:

- the 2014 Natural Resources Charter⁷³ contains 12 precepts, commencing with “Resource management should secure the greatest benefit for citizens through an inclusive and comprehensive national strategy, clear legal framework and competent institutions”,⁷⁴
- the 2018 UN report explains: “The premise of this sourcebook is that it is within the power of governments of resource-rich countries to protect people and the environment and to realize the benefits from mining, working alongside the mining industry and local communities”,⁷⁵ and
- recent analysis by Professor Chandler indicates Australia's offshore petroleum regulation as lagging in comparison to Norway and the UK because they better incorporate national interest in their regulation and expectations of industry.⁷⁶

The Taskforce's first recommendation identifies its “2030 ambition of [Australia] being the most advanced and successful resources sector in the world”.⁷⁷ The Report then describes Canada as a “traditional competitor”⁷⁸ and summarises a range of developments there.

In 2017, the federal, provincial and territorial ministers responsible for mining called for a Canadian Minerals and Metals Plan ... [which] 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.⁷⁹

The phrases “climate change” and “sustainable development” each only appear once in the Taskforce Report – in this description of Canadian initiatives. The Report characterises Canada's initiatives as: “actively repositioning and rebranding themselves”.⁸⁰ A more objective reading of Canada's developments, and contemporary international direction in resources, suggests that revising regulation for climate change and sustainable development is not “rebranding”, and the Taskforce's proposals for Australia's resources future may be short-sighted.

5 Where to Now?

A 2018 collation of articles and analysis by resources experts – through Oxford University Press – was summarised with ten main messages regarding national development from (and of) extractives, the third most important of which was that “strategies should be guided by realism: neither euphoria nor despair is helpful”.⁸¹ This suggests that euphoric and jingoistic parts of government policy statements are best ignored. Equally, it cautions against a critique of despair. Resources regulation is better advanced by objective, evidence-based analysis and by broad consultation.

There *are* many useful and important initiatives which Australia's resource industry and regulation have developed or practise. But Australia has the random luck of being a large, resource-rich country with relatively little population,⁸² and that should not be confused with some notion that Australia has innate skill at extracting and using the nation's resources. The lack of international reference, or guidance, in how Australian governments approach resources policy is perplexing

given the fourth recommendation of the 2030 Taskforce was: “Governments should undertake regular benchmarking of domestic and international policies and regulatory frameworks affecting the resources sector to identify opportunities for improvement”.⁸³

The 2017 *Resource Governance Index* from the Natural Resource Governance Institute (NRGI) did not rank any Australian jurisdiction in its “good” cohort – which comprised only Norway, Chile, UK and Alberta. WA came in eighth at “satisfactory” and assessed as: “... has some strong governance procedures and practices, but some areas need improvement. It is reasonably likely that extractive resource wealth benefits citizens, but there may be costs to society”.⁸⁴ The NRGI’s work merits consideration. It is an organisation involving industry, government, academic and community experts in extractives and development, who work “in the belief that natural resource wealth can be a powerful tool for social and economic advancement, but only if countries are able to tackle the challenges”.⁸⁵ The NRGI’s resource governance index is not a tabulation of random company responses about “perceptions”, but an objective, peer-reviewed, analysis of 81 jurisdictions’ resources governance. The factors considered within that assessment are shown in the NRGI’s diagram, replicated below.

Factors Relevant to Resources Governance⁸⁶



Examination of these factors, and consideration of Australian resources regulation (at State/Territory level *and* with Commonwealth interaction) is informative. There are areas we do well, with general acceptance of the situation by industry, communities, politicians and other stakeholders. These are issues such as licensing, political stability, rule of law, and government effectiveness. However, we can also see areas where recent public policy and initiatives have been fraught and unsettled: taxation (recall the resources rent tax), subnational resource revenue sharing (GST, “royalties for regions”) and local impact (consider the on-again, off-again situation with fracking), regulatory quality and government effectiveness (energy and emission policies). The Commonwealth and the States and Territories each have detailed processes for how to consider and structure regulation – through the objective steps of “regulatory impact assessment”.⁸⁷ Those processes, combined with guidance from international material and the NRGI factors identified above, should feature far more in future resources planning and policy in Australia.

Postscript

Since this article was submitted, in October 2018, there have been developments regarding the Commonwealth Resources 2030 Taskforce Report. In December 2018 a roundtable of all resources Ministers in Australia issued a Communique entitled “A New Strategic Reform Agenda for Resources”,⁸⁸ and in February 2019 the national Government issued a *National Resources Statement*.⁸⁹ Both these documents progress many of the recommendations of the Resources 2030 Taskforce Report and are encouraging given the concern in this article about the implementation of the Report’s recommendations being dependent on domestic politics and federal relations. Also noteworthy was the Ministers’ commitment, in the 2018 Communique, to “establish a framework for the regular benchmarking of policies and regulation which will assess current settings and highlight best practice across Australia and internationally”.⁹⁰

The *National Resources Statement* identifies as “A National Resources Policy Framework ...[with the] Vision To have the world’s most advanced, innovative and successful resources sector which delivers sustained prosperity and social development for all Australians”.⁹¹ It then details priorities under these five goals:

- 1 Deliver the most globally attractive and competitive investment destination for resources projects
- 2 Develop new resources, industries and markets
- 3 Invest in new technologies and approaches, especially to deliver better environmental outcomes
- 4 Create well paid, secure jobs
- 5 Support communities to ensure they receive benefits from the development of Australian resources⁹²

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- 1 In *Quintano v Finance Minister* [2014] FCAFC 159 [57], Edmonds, McKerracher & Katzmann JJ, citing Brennan J in *Re Drake (No 2)* [1979] AATA 179; 2 ALD 634, 640.
 - 2 Re *Minister for Resources; ex p Cazaly Iron* [2007] WASCA 175; 34 WAR 403, [72], Buss JA (Wheeler & Pullin JJA agreeing), see also [136].
 - 3 *Cazaly Iron v Resources Minister* [2008] HCATrans 155, Kirby, Hayne & Kiefel JJ.
 - 4 For example, *Gold and Copper Resources v Minister for Resources (No 2)* [2014] NSWLEC 30, [196], Pain J; *Waratah Coal v Mitchell* [2010] QSC 42, [26]-[27], [39], Jones J, and *Lower Our Tracks v Minister for Planning* [2016] VSC 803, [210,] [213], Ginnane J.
 - 5 WA Government, Department of Mines Industry Regulation and Safety, *Supporting the Western Australian Resources Sector*, April 2018, 1.
 - 6 Above n 5, 1.
 - 7 Above n 5, 1.
 - 8 Above n 5, 1-2.
 - 9 Commonwealth of Australia, Minister for Resources and Northern Australia, Resources 2030 Taskforce, *Australian Resources — Providing Prosperity for Future Generations* (21 September 2018).
 - 10 Above n 9, 74.
 - 11 Above n 9, 11-13.
 - 12 Government of Western Australia, Department of Mines Industry Regulation and Safety, *Leading Practice Principles for a Sustainable Resources Sector: A Western Australian Perspective* (September 2018), 1.
 - 13 Above n 12, 5-7.
 - 14 Above n 12, 7-10.
 - 15 Above n 12, 10-13.
 - 16 Above n 12, 13-16.
 - 17 Above n 12, 16-17.
 - 18 Cameron, PD & Stanley, MC *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries (2017)*, World Bank, 61-63.
 - 19 DMIRS, and its forebears, have policies on specific areas, e.g., Abandoned Mines (January 2016); Enforcement (June 0251), Programme of Work [for] Prospecting Policy (June 2015); [environmental performance] Bonds (July 2008). As WA governments change, there have also been changing policies in relation to fracking, mining in national parks, and uranium mining.
 - 20 Some enumerate various “objects” (e.g., NSW’s *Mining Act 1992*, s3A and the NT’s *Mining Management Act 2001*, s3); while others specify a general statement of “purpose” (e.g., Ontario’s *Mining Act 1990*, s 2).

- 21 Above n 2, [70]: “The primary object of the Mining Act is to encourage and promote the prospecting and exploration for, and mining of, mineral deposits in the State”; *St Barbara Ltd v Energy Minister* [2008] WASCA 248, [22] Steytler P (Buss JA & Newnes AJA agreeing): “The principal object of the Act is that of regulating access to and exploitation of the State’s mining resources”.
- 22 Above n 2, as noted by Pullin JA:
- [20] What then is the “subject matter and scope and purpose” of the *Mining Act 1978 (WA)*? The subject matter and scope and purpose of an Act of Parliament can be identified at various levels of generality. Thus, at an unhelpfully general level, this legislation, as its long title suggests, is legislation “relating to mining”. At a more particular level the scope and purpose of the legislation is concerned with the regulation of mining.... The legislation also has the purpose of defining circumstances in which mining tenements and applications for tenements may be processed, granted, terminated or forfeited.
- [21] Rowland J in *Nova Resources NL v French* (1995) ... said that the “primary” object and aim of the legislation is “**to ensure as far as practicable that land** which has either known potential for mining or is worthy of exploration **will be made available for mining or exploration**”. It is true that this **is one of the primary objects of the Act. However, the adjective “primary”** used by Rowland J **acknowledges that there are other objects and aims**. Another object reflected in the Act is, in one sense, **contrary to the primary object**. This object is found in provisions in the Act which excuse tenement holders in certain circumstances from making land with known potential for mining, or which is worthy of exploration, available for mining or exploration. **Some of these provisions have been in the Mining Act 1975 or its predecessor for a long time, and other provisions have been added more recently, perhaps to reflect the fact that the mining industry in Western Australia has increasingly matured** and now involves the investment of billions of dollars. [Emphasis added.]
- 23 Above n 2, [72].
- 24 Above n 12, 1.
- 25 See, e.g., *Ballantyne v NSW Workcover* [2007] NSWCA 239, [113], Basten JA; *Barreto v Attorney General WA* [2016] WASC 116, [83], Pritchard J.
- 26 Above n 5, 1.
- 27 Above n 5, 1.
- 28 Above n 12, 9.
- 29 Above n 12, 12.
- 30 See, e.g., *Wetzel v NSW District Court* [1998] NSWSC 313; 43 NSWLR 687.
- 31 See, e.g., *Forrest & Forrest P/L v Wilson* [2017] HCA 30 (disallowing DMIRS’s practice of accepting late paperwork for tenement applications); *Robinson v Fielding* [2015] WASC 108 (ruling government heritage guidelines were inconsistent with the relevant legislation).
- 32 Government of Western Australia, Department of Mines Industry Regulation and Safety, *Review of Policy and Regulation in WA*, a 14 September 2018 presentation by DMIRS’s Acting Executive Director (Resource and Environmental Compliance), made no reference to either of the 2018 WA publications nor to the Taskforce report.
- 33 *Ingram v WA Planning Commission* [2003] WASCA 77, [15]-[16], Barker J, and *Minister for Immigration v Gray* [1994] FCA 1052; 50 FCR 189, [25], French and Drummond JJ.
- 34 See, e.g., the difference between the first instance and appeal decisions of *Save Beelihar Wetlands v Jacob* [2015] WASC 482 and *Jacob v Save Beelihar Wetlands* [2016] WASCA 126. The latter (and relevant law around policy) is summarised in Sharpe, A, “Policy as a Mandatory Relevant Consideration: A Reflection on *Jacob v Save Beelihar Wetlands (Inc)* (2016) 50 WAR 313” (2018) 45(1) Brief 27.
- 35 The three publications each profess to document or guide their respective government’s “leading” role in regulating the extractives sector: e.g., “Australia’s resources sector is ... widely regarded as a model of excellence” (above n 9, 5); “Western Australia is one of the world’s leading diversified mineral and petroleum provinces.... [T]his document ... provide[s] an overview of the leading practice principles underpinning the regulatory framework for the resources sector in Western Australia” (above n 12, 1). However, the documents have scant reference to, or reflection of, contemporary international practice or developments.
- 36 See, e.g., above n 5, 1; above n 9, 22 & 66. In above n 12, 1, DMIRS claims: “The resources sector is also the single largest employer in the State, directly employing more than 110,000 people”. That contradicts official statistics and categories which record Health Care and Social Assistance as WA’s largest employing sector (at 135,898), followed by Construction (113,457), Retail Trade (110,404), Education and Training (100,952), Accommodation and Food Services (74,624), Professional, Scientific and Technical Services (74,144), and then Mining (72,542): .id, “Western Australia, Industry sector of employment” (2016), using Australian Bureau of Statistics Census of Population and Housing.
- 37 See, e.g., above n 9, 21.
- 38 See, e.g., above n 9, 21.
- 39 See, e.g., above n 9, 28.
- 40 See, e.g., above n 9, 67.

- 41 Cosbey, A, et al., *Mining a Mirage? Reassessing the Shared-Value Paradigm in Light of the Technological Advances in the Mining Sector*, (International Institute for Sustainable Development, 2016).
- 42 Cosbey, A, Ramdoo, I, *IGF Guidance for Governments: Local Content Policies* (International Institute for Sustainable Development, 2018), 82-83.
- 43 Pitman, R, et al., *Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice* (Natural Resource Governance Institute, 2018), 3.
- 44 Gankhuyag, U, Gregoire, F, *Managing Mining for Sustainable Development: A Sourcebook* (United Nations Development Programme, 2018).
- 45 Above n 44, 17.
- 46 Above n 44, 20.
- 47 One example of attention is the Transparency International project, and ongoing work: Langley, H., *Corruption Risks: Mining Approvals in Australia* (Transparency International Australia, 2017).
- 48 Department of Prime Minister and Cabinet, *Australia's First Open Government National Action Plan 2016-18* (Australian Government, 7 December 2016), 18; which also added "The Australian Government has been a major supporter of the EITI, committing more than A\$20 million since 2007. **Australia announced its intention to seek EITI compliance on 6 May 2016**, following a pilot to test the applicability of EITI rules and principles to Australian conditions between 2011 and 2014. **State and territory governments support the Australian EITI** and will participate directly in the implementation process." [Emphasis added.]
- 49 Department of Prime Minister and Cabinet, *National Action Plan Commitment Dashboard 1.3 Extractive Industries Transparency* (Australian Government, 20 September 2018).
- 50 Above n 49. At the time of writing, the Current Status was described as the Government procuring "an independent gap analysis of the requirements for EITI membership against the 2016 Standard".
- 51 Represented through COMESA, the "Common Market for Eastern and Southern Africa", which has 21 member states from Tunisia to Swaziland.
- 52 WA Minister for Mines and Petroleum, *African Mining Indaba 2018* (WA Parliament, 22 March 2018), 4; describing the document as "provid[ing] an overview of the key leading practice principles upon which the regulatory framework for the resources sector in Western Australia has been developed".
- 53 Department of Mines Industry Regulation and Safety, *Leading Practice Principles for a Sustainable Resources Sector* (WA Government, 5 February 2018), presentation to COMESA Governments, 5 February 2018 (Cape Town), 24 (copy on file with author).
- 54 Above n 12, 12, 17. Including: "The department is committed to ongoing improvements in the accessibility of information and ensuring that all information that can legally be requested by the community is made publicly accessible" and "All significant legislative and policy amendments are also open to a public consultation process, and public inquiries may be held into contentious development issues".
- 55 Above n 44, 20.
- 56 See, e.g., Hamilton, K, Ley, E, "Sustainable Fiscal Policy for Mineral Based Economies" in Arezki, R, et al., (Eds), *Beyond the Curse: Policies to Harness the Power of Natural Resources* (International Monetary Fund, 2012), 138-139; Otto, J, "The Taxation of Extractive Industries" in Addison, T, Roe, A (Eds), *Extractive Industries: The Management of Resources as a Driver of Sustainable Development* (Oxford University Press, 2018), 284.
- 57 Department of Treasury, *Future Fund Investment Framework* (Government of Western Australia, August 2016), 1.
- 58 *Western Australian Future Fund Act 2012 (WA)*, s 7. Ad hoc contributions were also made from 2012, totalling \$932.6 million to 2016: Treasury (above n 57, 1).
- 59 Above n 9, 52-55. In particular, the Taskforce recommends development of national "best-practice guidelines and standards for community engagement and Indigenous agreements", 52.
- 60 Above n 44, 4; see also 62-67).
- 61 See, e.g., ICMM, *Position Statement on Indigenous Peoples and Mining* (2013), 2-3; ICMM, *Indigenous Peoples and Mining: Good Practice Guide* (International Council on Mining & Metals, 2015), 10-11.
- 62 CCCMC, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters, 2015), 5.2.1.4 (emphasis added).
- 63 See, e.g., OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Organisation for Economic Co-Operation and Development, 2017); OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD Publishing, 3rd edn, 2016). The importance of Indigenous consent - even where domestic law did not require it - is reinforced in NOR NCP, *Complaint from The Future In Our Hands (FIOH) against Intex Resources Asa and the Mindoro Nickel Project* (Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 2011), 25, 28.
- 64 Gorman, M & Dzombak, D, "A review of sustainable mining and resource management: Transitioning from the life cycle of the mine to the life cycle of the mineral" (2018) 137 *Resources, Conservation and Recycling* 281.
- 65 Above n 9, 74.
- 66 Minister for Resources and Northern Australia, "The Long Mining Boom" (Australian Government, 28 March 2018). "Coal" was the most-mentioned resource in the Minister's speech, at 31 times, with the next-most frequent being

“gas” (27 times), then “iron” (6 times) and everything else far below. The Minister also said “our coal sector, and thousands of Australians who work in it, [are] in the pole position to benefit from the increased demand for energy resources”.

- 67 Above n 9, 5.
- 68 See, e.g., above n 9, 24 & 33. The report’s section, “Positioning for future opportunities” outlines forecast growth in “selected commodities” and emphasises one paragraph of text in the entire page: **“while projected global demand growth for coal looks relatively flat over the coming years, India and a number of emerging Southeast Asian nations will continue to drive strong demand for Australia’s coal exports toward 2022. In Southeast Asia alone, coal demand is set to more than double to 390 metric tonnes carbon equivalent by 2040. By virtue of its geographic proximity, Australia is exceptionally well placed to meet this growing demand”**: 24 (emphasis in original).
- 69 Above 9, 22-24. the Taskforce Report cited various material envisaging ongoing future demand for coal. There are also significant and weighty cautions against expanding coal production and government subsidies of fossil fuel, e.g., IEA, *Energy Access Outlook: From Poverty to Prosperity* (International Energy Agency, 2017), 51 & 78; Heffron, R, et al., “The global future of energy law: 2017 review” (2017) *International Energy Law Review* (8) 291-302, 298-299; Coady, D, et al., *How Large Are Global Energy Subsidies?* (International Monetary Fund, 2015).
- 70 Even within industry there seems difficulty in forming a coherent view. The Minerals Council of Australia made a 60-page submission to the Taskforce in June 2018 (MCA, Submission to the Resources 2030 Taskforce 2018) but then followed that the next month with MCA, Coal Submission to the Resources 2030 Taskforce 2018).
- 71 Which the Taskforce seems to acknowledge (above n 9, 11), “Only a sector that has a high-quality resources base and the support of the community to operate will prosper”.
- 72 Of the 21 recommendations in the 2030 Taskforce, consideration of community engagement and impact does not feature until recommendation 16. In WA’s five principles (above n 12, 1), it arises in the fourth. Even where community role is addressed, it is often in the context of how to ensure local communities support private resources operations (not vice versa), e.g., above n 9, 38: “Australia will only be able to extend its global resources leadership if it improves public attitudes towards the sector.... It should also include constructive efforts to improve community sentiment, which is essential for increasing investor and community confidence in the sector”; above n 12, 13-14, “Balancing investment attraction while ensuring adequate compensation to the community for the loss of its resources is a challenge for governments.... Western Australia’s royalty system has been designed to strike an acceptable balance between giving a fair return to the community while not imposing an unacceptable economic burden on industry”.
- 73 NRGI, *Natural Resource Charter* (Natural Resource Governance Institute, 2014).
- 74 Above n 73, 7-9.
- 75 Above n 44, 4.
- 76 Chandler, J, “Australia’s Offshore Petroleum Resource Management System: how does it compare with Norway and the UK?” (2018) 36(3) ARELJ, noting that, by contrast “Australia is still working with a system that was designed in the 1960s for immature petroleum provinces”.
- 77 Above n 9, 16.
- 78 Above n 9, 38.
- 79 Above n 9, 39.
- 80 Above n 9, 38.
- 81 Addison, T, Roe, A, “Extractives for Development: Introduction and Ten Main Messages”, *Extractive Industries: the Management of Resources as a Driver of Sustainable Development* (Oxford University Press, 2018), Pt 1, 1.2.3, 10.
- 82 Above n 81, 8, Australia has the second highest value of resources per capita, of any nation in the world. So we should be sanguine in considering what “lessons” and “advice” Australia provides to nations with far greater populations and fewer resources.
- 83 Above n 9, 16.
- 84 NRGI, *2017 Resource Governance Index* (Natural Resource Governance Institute, 2017), 4-5.
- 85 Above n 73, 5.
- 86 Above n 84, 7.
- 87 Department of the Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (Australian Government, March 2014); Productivity Commission, *Regulatory Impact Analysis: Benchmarking* (Australian Government, 13 Dec 2012); WA Government, *Service Priority Review: Background Paper, Best Practice Regulation* (Government of Western Australia, 2018); Department of Treasury & Finance, Regulatory *Impact Assessment Guidelines for Western Australia* (Government of Western Australia, July 2010).
- 88 COAG Energy Council, “A New Strategic Reform Agenda for Resources” Meeting Communique – Resources Roundtable (Council of Australian Governments, 2018).
- 89 Commonwealth of Australia, *National Resources Statement* (2019).
- 90 Above n 88, 1.

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- 91 Above n 89, 19-20.
 - 92 Above n 89, 20.