



Australian Government  
Productivity Commission

# Resources Sector Regulation

## Productivity Commission Issues Paper

September 2019

The Commission has released this issues paper to assist individuals and organisations to prepare submissions.

It contains and outlines:

- the scope of the study
- the Commission's procedures
- matters about which the Commission is seeking comment and information
- how to make a submission.

## The Issues Paper

The Commission has released this issues paper to assist individuals and organisations to prepare submissions to the Resources Sector Regulation study. It contains and outlines:

- the scope of the study
- the Commission's procedures
- matters about which the Commission is seeking comment and information
- how to make a submission.

Participants should not feel that they are restricted to comment only on matters raised in the issues paper. The Commission wishes to receive information and comment on issues which participants consider relevant to the study's terms of reference.

## Key study dates

Receipt of terms of reference	6 August 2019
Due date for submissions	31 October 2019
Release of draft report	March 2020
Draft report public hearings	To be determined
Final report to Government	August 2020

## Submissions can be lodged

Online:	<a href="http://www.pc.gov.au/resources">www.pc.gov.au/resources</a>
By post:	Resources Sector Regulation Productivity Commission Locked Bag 2, Collins Street East Melbourne VIC 8003

## Contacts

Administrative matters:	Karen Carmichael	Ph: 03 9653 2356
Other matters:	Lou Will	Ph: 03 9653 2224
Freecall number for regional areas:	1800 020 083	
Website:	<a href="http://www.pc.gov.au">www.pc.gov.au</a>	

## The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website ([www.pc.gov.au](http://www.pc.gov.au)).

---

## Terms of reference

I, the Hon Josh Frydenberg MP, Treasurer, pursuant to Parts 2 and 4 of the Productivity Commission Act 1998 hereby request the Productivity Commission to examine regulation affecting the resources sector and highlight best practice.

## Background

Commonwealth, state and territory governments are responsible for managing resources in their jurisdictions and are all involved in the regulation of the sector. For example, states and territories regulate health and safety, employment, community engagement and environmental management, while the Commonwealth has constitutional powers over many of these aspects of law, and in some instances overrides any legislative inconsistencies. Additionally, States negotiate contractual agreements with individual operators that are subsequently ratified by state parliaments.

Regulation plays a critical role in ensuring that resources projects across Australia meet community and environmental management expectations. However, regulations may pose unnecessary burdens or impediments on resources companies operating, or seeking to operate and invest, in Australia.

## Scope

This study will focus on regulation with a material impact on business investment in the resources sector. The Commission is asked to identify effective regulatory approaches to the resources sector and highlight examples of best-practice regulation across the Australian resources sector and internationally, taking into account the unique regulatory challenges facing individual jurisdictions.

This will provide opportunities for individual jurisdictions to assess their own regulatory environments, and to draw on leading practice.

In undertaking this study, the Commission should:

1. Assess best-practice project approval processes across Australia and internationally and identify any broader impediments to the timing, nature and extent of business investment in the Australian resources sector.
2. Identify regulatory practices that have achieved evidence-based goals without imposing additional costs or regulatory burdens on industry, as well identifying jurisdictions' successful efforts to streamline or augment processes to reduce complexity and duplication and improve transparency for current and future investors.

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

## **Process**

The Commission is to consult with key interest groups and affected parties, invite public submissions and release a draft report to the public.

The Commission is to consult with COAG Energy Council working groups on existing studies related to land access, community engagement and regulatory benchmarking.

The final report should be provided within 12 months of the receipt of these Terms of Reference.

**The Hon Josh Frydenberg MP**  
**Treasurer**

[Received 6 August 2019]

---

## Contents

Terms of reference	iii
1 What the Commission has been asked to do	1
2 Scoping the study and defining key concepts	2
3 Identifying best-practice regulatory approaches	7
4 To what extent are current regulatory processes consistent with best practice?	9
5 What are broader impediments materially affecting investment?	16
6 Best-practice community engagement and benefit sharing	18
References	21
Attachment A: How to make a submission	23



---

# 1 What the Commission has been asked to do

## Background to the study

Australia's resources sector makes a significant contribution to economic activity, accounting for nearly 250 000 jobs at May 2019 (ABS 2019a) and about three quarters of the value of goods exports in 2018 (DIIS 2019). The sector has also been a major destination for investment, attracting more than \$600 billion over the past decade (ABS 2019b).

Alongside the economic benefits, however, resources activities often have potentially significant social and environmental impacts.

As a consequence, the sector is heavily regulated. All levels of government are involved in this process, with multiple agencies in each jurisdiction playing a role in administering and enforcing resources sector regulation. While this regulatory activity is essential, there is a risk that, if not done well, it imposes burdens on industry beyond those necessary to maximise the net benefits accruing to the Australian community.

The Australian Government has recently developed a reform agenda for the sector. Recommendations from the Resources 2030 Taskforce informed a National Resources Statement, released in February 2019. Among the Statement's goals are that Australia is an attractive destination for investment in resource projects, and that local communities — including Indigenous communities — benefit from the sector's activities. Unnecessary regulatory burden was identified as a key sectoral challenge.

Alongside the development of the Statement, and reflecting the work of the Taskforce, COAG Resources Ministers met for the first time in December 2018 and agreed to an action plan that included work to:

- highlight best-practice regulation of resources projects
- evaluate community engagement and benefit-sharing practices by industry.

## The Commission's task and approach

The Australian Government has asked the Commission to identify effective regulatory approaches to the resources sector, highlighting examples of best practice both in Australia and internationally. The study is to focus on regulations with a material impact on investment.

More specifically, the Commission is to examine:

- ways in which governments can simplify regulations and reduce costs for business without compromising environmental standards or community expectations. Areas for examination include:
  - project approval processes and government involvement to expedite them

- environmental management and compliance arrangements
- regulatory processes more generally
- any broader impediments to business investment.

The Commission has also been asked to examine resource companies’ engagement and sharing of benefits with local communities, including Indigenous communities.

The Commission is to complete the study by August 2020 and to consult with key interest groups and affected parties. The Commission is also to consult with COAG Energy Council working groups on existing studies related to land access, community engagement and regulatory benchmarking.

Submissions are encouraged from interested parties. This issues paper provides guidance to submitters. However, it is not designed to be exhaustive — submissions on relevant matters outside those raised in the paper are welcome. Nor do participants have to answer all of the questions posed in the paper. Submissions may be of any length.

Attachment A details how to make a submission. Initial submissions should be provided to the Commission by 31 October 2019. There will be another opportunity to make a submission following the public release of the draft report in March 2020 (figure 1).

**Figure 1 Key steps in the Commission’s study process**



## 2 Scoping the study and defining key concepts

### What resources are in scope?

The terms of reference do not specify which resources are in or out of this study’s scope. The resources sector is often defined to include minerals, oil and gas — aligning with the definition of the mining industry in the Australian and New Zealand Standard Industrial Classification (box 1). This classification covers coal, oil and gas (conventional and unconventional), iron ore, other metal ores including gold, silver, bauxite, uranium and mineral sands and construction material mining. The Commission proposes to focus on these resources. Regulation of large-scale renewables, such as wind and solar farms or hydrogen power plants, fall outside this scope, but might be useful as a comparator for some elements of the work.



---

**Box 1                      Activities classified as ‘mining’ in ABS data**

Division B — ‘Mining’ — of the Australian and New Zealand Standard Industrial Classification includes businesses involved in the exploration and extraction of naturally occurring minerals and resources. Activities undertaken to prepare ore for smelting, such as crushing, screening, washing and flotation, as well as other preparation work usually performed at the mine site or as a part of mining activity, are also included. The classification excludes:

- businesses that mainly produce products that require complex processing, such as refining or smelting minerals or ores (except the preliminary smelting of gold)
- businesses that manufacture products of mineral origin, such as coke or cement
- businesses mainly engaged on a contract or fee basis in geological and geophysical surveying, laboratory-type services and mine site preparation
- incidental services such as transport.

*Source: ABS (Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006 (Revision 2.0), Cat. no. 1292.0).*

## **What activities are within scope?**

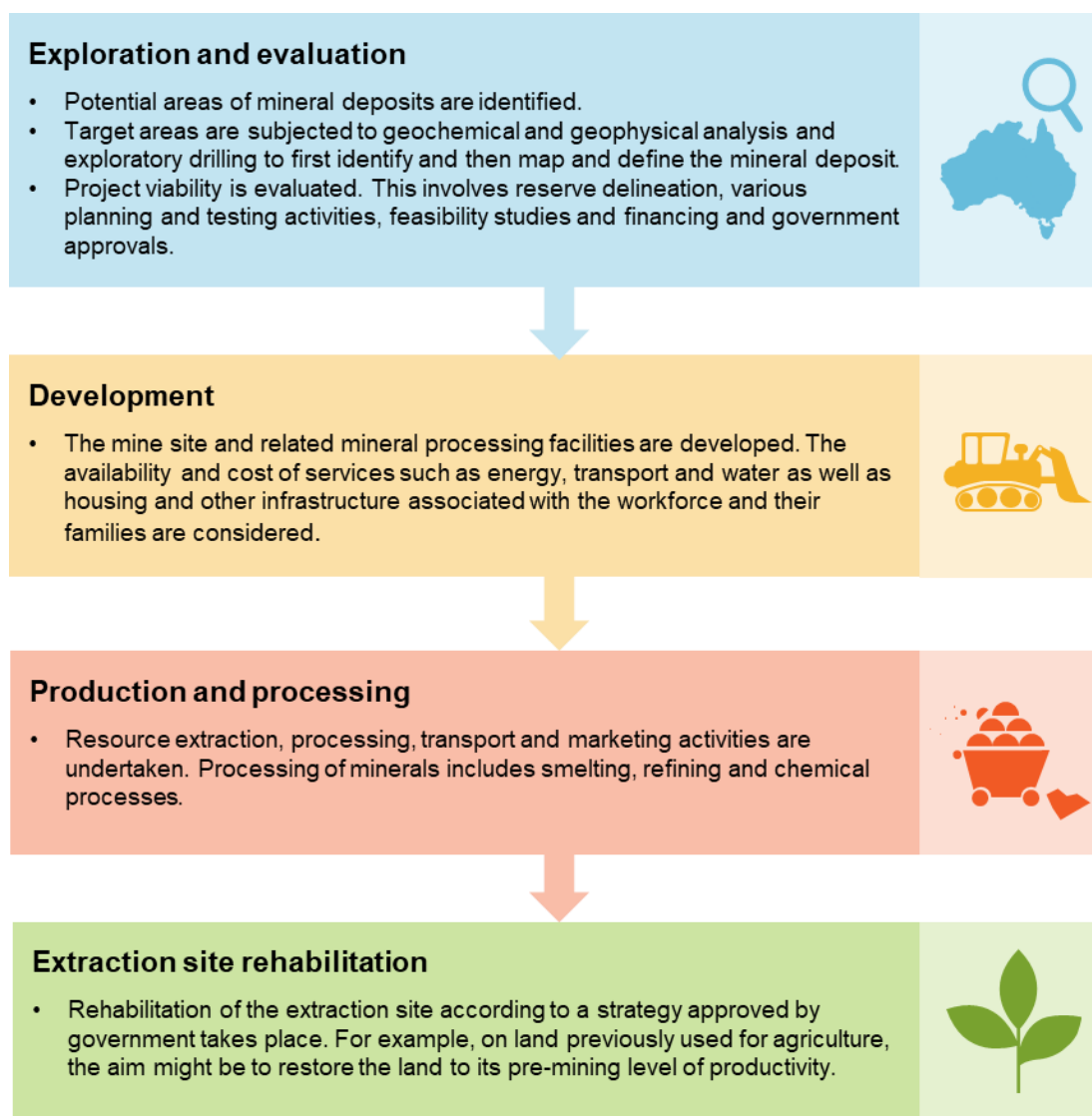
Broadly speaking, the Commission proposes to focus on the regulations relevant to the four stages in the life cycle of a resources project: exploration and evaluation, development, production and processing, and site rehabilitation (figure 2). The specific activities undertaken at each stage depend on the resource in question and the characteristics of the particular project. For example, iron ore extraction is likely to involve digging, crushing and screening, while petroleum extraction involves drilling wells.

## **What regulations are within scope?**

As for many previous inquiries and studies into regulatory burdens, the Commission proposes to adopt a broad definition of regulation, including any laws, government policies and rules that are intended to control or influence specific aspects of resources activity. Such regulation encompasses a range of legal instruments including statutes, subordinate legislation (regulations) and ministerial orders, as well as less formal instruments, such as standards, guidelines and codes of conduct, for which there is a reasonable expectation of compliance on the part of resources companies.

Powers for regulating the sector are split across the Commonwealth, State and Territory, and local levels of government. The institutional arrangements, legislative instruments and regulatory agencies involved in the regulatory framework are both extensive and complex.

Figure 2 The life cycle of a minerals mining project<sup>a,b</sup>



<sup>a</sup> Excludes petroleum. <sup>b</sup> Certain activities in the life cycle are not in scope, such as marketing.

Sources: Hogan et al. (2002), NSW Minerals Council (nd).

While the precise division of responsibilities between levels of government varies between jurisdictions, broadly speaking:

- the Australian Government regulates matters of national environmental significance and certain heritage matters under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) (box 2). It also regulates developments on Commonwealth land (such as some airports and defence facilities) and waters beyond the three nautical mile limit. In addition, the Commonwealth Attorney-General administers the *Native Title Act 1993* (Cth)

- 
- State and Territory Governments are responsible for the framework through which the right to explore for and extract minerals can be obtained by private operators. All minerals underneath land are formally owned by State and Territory governments, and landowners can be required to allow mineral exploration and extraction on their property (though some areas are protected from exploration activity). State and Territory Governments also legislate on a broad range of matters, including the environment and cultural and natural heritage
  - local governments normally implement and enforce much of state planning and development legislation. While resources projects are usually assessed and approved at the state level, local governments often have a range of other responsibilities, such as granting permits (including ‘secondary approvals’) within their jurisdiction.

#### Box 2                    **Matters of national environmental significance**

The Australian Government only has the power to regulate environmental aspects of projects that are within its legislative powers under the Constitution. As a result, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) only applies to actions with impacts on matters of national environmental significance. The matters protected by Part 3 of the Act are:

- World Heritage and National Heritage places
- the ecological character of wetlands of international significance
- listed threatened species and ecological communities
- listed migratory species
- nuclear actions (including the mining of uranium)
- Commonwealth marine areas (waters more than 3 nautical miles from the coast, as well as Commonwealth marine reserves)
- the Great Barrier Reef Marine Park
- water resources impacted by a coal seam gas development or a large coal mining development
- actions on Commonwealth land
- actions by Commonwealth agencies (no matter which land they take place on).

### **What steps are involved in approval processes?**

The Commission proposes to focus on four stages within the approvals process:

- **Application:** governments and regulators provide information and guidance to a project proponent on the policy and regulatory framework, and make decisions about which regulatory pathway(s) the project will be assessed and approved under and the types of consultation required.
- **Assessment:** the regulator identifies and assesses the nature and significance of the risks and impacts of the project, and conducts consultation with the community on the project’s broader implications.

- 
- **Approval:** the decision maker decides whether or not to approve the project and, if so, with what conditions.
  - **Monitoring of compliance:** the regulator assesses the proponent's compliance with the conditions over the life of the project.

Henceforth, the term 'development assessment and approvals', or DAA, will be used in referring to the four stages of the process to distinguish it from the approvals stage alone.

### **What might broader impediments to investment include?**

In addition to DAA processes, businesses in the resources sector are subject to a host of other regulations, such as requirements relating to employment and to safety. While such regulations often apply to businesses outside the resources sector, the activities of resources companies could give rise to sector-specific issues or regulation (such as for oil and gas).

Non-regulatory issues can also affect investment. For example, government-provided goods (such as infrastructure), taxation and the availability of skills can all affect the profitability of resources projects (section 5).

While the Commission does not propose to rule out any matters that participants may raise, our focus will be on impediments that have a material impact on investment, as required by the terms of reference.

### **What are community engagement and benefit sharing?**

Community engagement and benefit sharing can describe a range of interactions and arrangements that involve and deliver benefits to communities affected by resources activities.

Community engagement can include land access negotiations, public forums and workshops. The purposes of these activities may be to seek the community's views on an issue, explore solutions to concerns or reach an agreement. Resources companies may be required to consult with communities as a condition of their mining licence or Native Title requirements, or may do so voluntarily to gain a community's acceptance of their operations (often referred to as a 'social licence').

Benefits can be shared with communities through investment in economic and social development, either directly by companies or indirectly via allocation of resource royalties levied by governments (such as 'royalties for regions' programs).

Benefit sharing by companies can include direct contributions to charitable trust funds, recruitment and training programs, or investment in local infrastructure and social services. Again, resources companies may engage in these practices as a legal requirement or on a voluntary basis.

---

## Concurrent reviews

In undertaking the study, the Commission will be mindful of relevant work being undertaken concurrently by other agencies, including the:

- forthcoming review of the EPBC Act (due to commence in October 2019)
- Deregulation Taskforce
- Australian National Audit Office's audit of referrals, assessments and approvals of actions under the EPBC Act
- Chief Scientist's audit of the National Offshore Petroleum Safety and Environmental Management Authority's consideration of exploration in the Great Australian Bight
- review of the Offshore Oil and Gas Decommissioning Framework.

---

### *INFORMATION REQUEST*

*Is the Commission's proposed scope for this study appropriate? Is it too broad or too narrow? How should the proposed scope be adjusted?*

*Should the Commission's definitions of the concepts of broader impediments and community engagement and benefit sharing be refined? If so, how?*

*Are there other relevant reviews that the Commission should be aware of, including ones being conducted overseas?*

---

## 3 Identifying best-practice regulatory approaches

As noted above, while regulation seeks to ensure that resources sector activities reflect the potential for social and environmental impacts, there is a risk that some of the costs (including delays) imposed on resources companies are higher than necessary (box 3). Best-practice regulatory approaches require governments and regulators to take the course of action that imposes the least burden on businesses, subject to achieving policy goals. The resulting regulatory framework is one that delivers the greatest possible net benefit for the community.

---

### Box 3      **Potential sources of unnecessary regulatory costs**

- **Problems with the regulations themselves.** For example, regulations can be overly complex or excessively prescriptive or redundant, or can have unclear, questionable or conflicting objectives. Regulatory creep, where regulations extend over or influence more areas and activities than were originally intended, can also be an issue.
- **Regulatory duplication.** Industry participants may be required to provide information to multiple regulators or go through multiple processes, or comply with inconsistent regulations within or across jurisdictions. There can also be variations in practices between regulators within and across jurisdictions.
- **Poor enforcement and administration.** This can include excessive reporting or recording requirements, inadequate resourcing of regulators, overzealous regulation and regulatory bias or capture.

## **How should best-practice regulation be assessed?**

Drawing on a large body of previous work, along with the COAG principles of best-practice regulation, the Commission has developed assessment criteria (table 1) for determining whether current regulatory approaches are effective and constitute best practice. There are three components to the criteria.

- **Regulatory design** — or the processes involved in the development and maintenance of regulation, along with regulatory change. Elements of good regulatory design include consultation and community engagement, clearly defined objectives that are consistent across different regulations and ensuring regulation is simple and not overly prescriptive. In addition, regular monitoring and review is necessary to determine whether regulation is having its intended effects and is continuing to deliver the largest possible net benefits for the community.
- **Regulator governance** — governance frameworks provide a structure through which the roles, responsibilities and objectives of regulators are set and the means of achieving these objectives are determined. Best-practice governance attributes — such as clear objectives, accountable and independent decision makers and adequate resourcing and capabilities — provide the foundation for regulators to produce outcomes that produce community benefits and build confidence in the operation of the regulatory system.
- **Regulator conduct** — governance frameworks and the regulation itself can often leave considerable discretion as to how a regulator administers its regulation. Best-practice processes involve clear and predictable, and open and transparent processes, minimising unnecessary administrative costs, and ensuring outcomes are consistent with the objectives of the regulation.

---

**Table 1 Assessment criteria for best-practice regulation**

<i>Regulatory design</i>	<i>Regulator governance</i>	<i>Regulator conduct</i>
<ul style="list-style-type: none"><li>• Consultation during regulation-making is sufficient</li><li>• Objectives of regulation are clearly defined and consistent across different regulations</li><li>• Regulation is not overly complex or excessively prescriptive</li><li>• Regulation is regularly reviewed</li></ul>	<ul style="list-style-type: none"><li>• Roles, responsibilities and requirements of different regulatory agencies are clear and duplication is avoided</li><li>• Decision makers are accountable</li><li>• Regulators are independent</li><li>• Regulators are adequately resourced and have necessary capabilities</li></ul>	<ul style="list-style-type: none"><li>• Regulators' processes are clear, predictable, open and transparent</li><li>• Regulatory outcomes are consistent with objectives</li><li>• Administrative costs are no higher than necessary</li></ul>

*Sources:* COAG (2007); OECD (2014); PC (2009, 2013a, 2013b).

---

*INFORMATION REQUEST*

*The Commission is seeking feedback on whether the criteria outlined in table 1 are appropriate for assessing whether regulation is best practice.*

---

## **4 To what extent are current regulatory processes consistent with best practice?**

The Commission is seeking information and examples, including case studies, on regulatory approaches in the sector, highlighting those that are effective and best practice and those that are not. Evidence on the effect of poor regulation and regulatory processes would inform the issue of materiality. Specific information requests are outlined at the end of each section below.

### **Issues with regulatory design**

Poorly designed regulation in the resources sector can lead to uncertainty and impose unnecessary costs for businesses and the community.

Many jurisdictions inform the development of, or changes to, resources regulation through public consultation processes — for example, the Northern Territory Government has recently completed a consultation process on a draft Environment Protection Bill and draft Environment Protection Regulations. Consultation provides an opportunity for members of the community to express how any proposed regulation will affect them. Consultation processes can be conducted in different ways, with some approaches potentially more effective than others.

---

Consultation processes contribute to clear definition of regulatory objectives — the foundation of any regulatory effort. However, even with extensive consultation, regulatory objectives may not be clearly defined or efficiently delivered.

- There may be inadequate articulation of the problem and assessment of how the regulation addresses it. The Western Australian Government recently removed a ban on unconventional gas activities following an inquiry that found that environmental and community risks could be sufficiently managed through infrastructure and regulatory design (Independent Scientific Panel 2018; McGowan, Johnston and Dawson 2018).
- There may be ambiguity in the intent of regulation, with implications for the way it is executed. One outcome of this is the potential for judicial decisions on areas of the law where policy guidance and intent is unclear. For example, development consent for the Rocky Hill coal mine was recently rejected by the NSW Land and Environment Court, due, in part, to potential downstream (or scope 3) greenhouse gas emissions. The Federal Court rejected similar arguments about the Carmichael coal mine in Queensland, suggesting that any demand not met by that mine would be met by other coal producers, and that greenhouse gas emissions would be the same whether the mine proceeded or not (Bell-James 2016, 2019).
- There may be differences in objectives across different legislation.

A further design consideration is the extent to which project proponents must contend with overly complex or excessively prescriptive regulation. This can add to costs without necessarily effectively addressing the negative externalities associated with resources sector activities.

Increasing complexity, along with regulatory ‘creep’ (that is, gradual increases in the scope of regulated activities), run the risk of creating uncertainty and sovereign risk for companies.

Regular reviews of regulation help ensure that regulation remains fit for purpose. The Commission understands that many jurisdictions have recently completed or are in the process of assessing a range of different aspects of their regulatory systems. For example, in Queensland, a review of the efficiency of the approvals process is underway, while South Australia’s Mining Act has recently been under review. As noted above, a review of the EPBC Act is due to commence in October 2019.



---

#### INFORMATION REQUEST

*The Commission is seeking feedback on how jurisdictions design regulation that affects the resources sector. Information and examples, including case studies, of effective and best-practice approaches and those that are problematic would be appreciated.*

*In particular, the Commission is interested in whether:*

- approaches to consultation are amenable to best-practice community engagement*
- regulatory objectives are clearly defined and articulated, and conflicting objectives are minimised or managed across different regulations*
- regulatory 'creep' occurs*
- regulation is overly complex or prescriptive*
- regulations are subject to rigorous assessment and effective review processes.*

*What are the consequences of identified instances of poor regulatory design for regulatory outcomes, investment in the sector and broader community outcomes?*

*How could identified shortcomings be remedied?*

---

## **Efficiency, transparency and accountability of decision-making**

Navigating and complying with approval processes is often complex. It can take many years and use up substantial resources. The issue is how existing processes can be streamlined, simplified and resourced to expedite timelines and reduce costs without undermining regulatory efficacy.

Jurisdictions take a range of approaches to regulator governance, with arrangements being driven, in part, by the specific DAA requirements of a jurisdiction. These differences encompass coordination approaches, decision-making structures and resourcing arrangements.

### *Regulatory duplication*

As noted above, regulatory frameworks in all jurisdictions are characterised by the involvement of multiple agencies. Further, the role of both the Commonwealth and State governments in some DAA processes means that project proponents often have to engage with regulators at both levels, fulfil complex application processes and meet overlapping compliance obligations. The Resources 2030 Taskforce, for example, noted the potential for duplication in the DAA process, with some applicants required to undertake an environmental assessment for both the jurisdiction in which the project is located and the Australian Government (Cripps 2018).

Because of the scope for regulatory duplication, many jurisdictions have put in place processes aimed at streamlining the DAA process and coordinating inputs across

---

government agencies (box 4). For example, the National Offshore Petroleum Safety and Environmental Management Authority coordinates aspects of the regulatory approvals process, including health and safety, structural and well integrity, and the environmental requirements of the EPBC Act.

Another approach to streamlining regulatory processes is strategic assessment, which involves assessments of the potential impacts of plans, policies and programs across an entire region, catchment area, activity or industry.

#### **Box 4      Approaches to coordinating DAA processes**

Jurisdictions take a range of approaches to coordinating DAA processes across agencies.

- A one-stop shop model involves a number of (otherwise separate) statutory assessment and approval functions being undertaken by a single agency or Minister.
- A lead agency model involves a single agency being responsible for coordinating the major project regulatory processes across government, as well as providing guidance to proponents. Lead agencies have some responsibility for assessment and approval but cannot override the responsibilities of other agencies.
- A coordination office can coordinate and facilitate approvals processes. This approach is similar to a lead agency approach, however, coordination offices are independent of the regulatory system and do not have assessment or approval responsibilities.

#### *Regulatory accountability and independence*

Jurisdictions' decision-making structures can also vary, including the mechanisms for ensuring regulatory accountability and independence.

Central to an accountable regulatory system is the opportunity for reviewing decisions (termed 'objection' in some jurisdictions). Review mechanisms can foster participation and establish clarity around ambiguous issues (even where a review is not successful). But review mechanisms can also be a potential source of uncertainty and cost for project proponents — multiple review processes on complex legal matters can take time to resolve (box 5). The resources sector has previously raised a number of issues related to review processes, including:

- the use of review mechanisms by those opposed to a project in order to delay its approval, rather than to resolve a legal issue (sometimes referred to as 'lawfare')
- who is permitted to bring a review (merits or judicial) application before the tribunal or court (referred to as 'standing').

---

## Box 5      **Legal challenges to the Carmichael mine site**

Legal challenges can emerge in relation to government or industry decisions relating to a resources project. For example, legal challenges to the development of the Carmichael mine site by Adani have included:

- a challenge to environmental approvals in the Queensland Land Court
- a further judicial review application in the Queensland Supreme Court concerning environmental approvals
- a challenge to the initial Australian Government environmental approval of the mine, for having failed to consider the conservation requirements of two threatened species
- a challenge by the Wangan and Jagalingou people, who have a registered native title claim in the area
- a Federal Court challenge to the Australian Government environmental approvals, suggesting that the Minister had not considered the possible impact on the Great Barrier Reef from overseas emissions during the combustion of coal from the Carmichael site
- a challenge to Australian Government environmental approvals for the water scheme associated with the project, including that the ‘water trigger’ in the *Environment Protection and Biodiversity Conservation Act 1999* should have been used to require a more significant assessment process, and that not all of the comments collected during consultation were considered by government.

Administrative challenges were also made to Adani’s proposed expansion of the Abbot Point Coal Terminal.

*Sources: Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors [2015] QLC 48; Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor [2016] QSC 272; ABC News (2015), Robertson and Siganto (2018), Australian Conservation Foundation Incorporated v Minister for the Environment and Energy [2017] FCAFC 134; Cox (2019), Environmental Law Australia (2019).*

In many cases, the final outcome of the DAA process is determined by a government minister. However, in practice, many decisions during the DAA process are made by regulators.

Several jurisdictions have independent agencies in place to conduct some aspects of the DAA process, while in others, the regulator is part of a government department. For example, in New South Wales, the Environmental Protection Authority (an independent environmental regulator) provides input into the Department of Planning, Industry and Environment’s assessment of resources proposals and issuing of development consents. In Queensland, the Department of Environment and Science performs environmental protection regulatory functions, including the provision of input to project assessment and approvals and managing a compliance and enforcement program.

### *Regulator resourcing and capability*

Finally, different agencies take different approaches to the resourcing of the DAA process. Some agencies recover costs from project proponents. For example, the Commonwealth Department of the Environment and Energy recovers some of its costs through charges for

---

environmental assessments and some strategic assessments under the EPBC Act. The National Offshore Petroleum Safety and Environmental Management Authority operates entirely on a cost recovery basis — collecting levies and fees from duty holders who are planning and undertaking offshore oil and gas operations. The rationale for cost recovery is that assessments and approvals generate a private benefit for project proponents, and therefore the associated costs should not be borne by the wider community.

---

#### *INFORMATION REQUEST*

*The Commission is seeking feedback on approaches to regulator governance in jurisdictions in Australia and overseas. Information and examples, including case studies, of both effective and best practice approaches as well as those that are problematic would be appreciated.*

*For example, the Commission is interested in whether:*

- *the roles, responsibilities and requirements of different regulatory agencies are clear and duplication is avoided, including through*
  - *models for coordination, or aspects thereof, and strategic assessments (in particular, their feasibility and how they can best be used to improve efficiency)*
- *decision makers are accountable, including through*
  - *review processes that avoid unnecessarily long delays in approval processes*
- *regulators are independent, for example:*
  - *decision-making models (in particular, whether (and why) resources approvals are best determined by an independent body or at Ministerial level)*
- *regulators are adequately resourced and have necessary capabilities (in particular, the extent to which any under-resourcing of regulatory agencies is contributing to approval delays).*

*What have been the consequences of identified instances of poor regulatory governance, including unnecessary duplication, for regulatory efficacy and efficiency and for investment in the sector?*

*How could identified shortcomings be remedied?*

*The Commission is also interested in the different approaches agencies have taken to recover costs. Should 'user pays' be applied more broadly?*

---

## **Issues with regulator conduct**

Achievement of regulatory objectives is highly dependent on the conduct of a regulator. The Commission understands that a number of agencies have recently sought to make their processes clearer, and more predictable, open and transparent. For example, regulators have been working with project proponents and community groups to provide better information and guidance on regulatory processes. Jurisdictions have also endeavoured to improve transparency by running consultation processes and publishing decisions online.

---

However, there may be scope for further improvement. For example, the Commission is interested in whether there are inconsistencies in the way that similar applications are treated — perhaps due to different staff members dealing with different applications or because of small shifts to the way applications are handled by the regulator over time.

Regulators should also ensure that outcomes are consistent with objectives, including through monitoring and enforcing compliance. The Commission is interested in how different jurisdictions approach compliance, whether some approaches are more effective than others, and if the data to inform these processes are adequate. Further, is the design and monitoring of offsets appropriate for addressing the environmental impacts of projects? (Cripps 2018).

Related to this, inadequate site rehabilitation can leave significant legacy problems for governments, communities and companies (Australian Government 2016). The Commission understands that jurisdictions have been working to improve practices for managing site rehabilitation. For example, in Queensland, recent reforms require resources companies to develop Progressive Rehabilitation and Closure Plans and to contribute to an assurance fund to rehabilitate future sites where the burden would otherwise fall on the Queensland community. The Commission is interested in whether these new measures are effective and efficient.

As noted earlier, it can take many years for a resources project to gain approval, with delays imposing significant costs on project proponents. Some jurisdictions set statutory timelines for certain decisions in the DAA process, though the Commission understands that there is often scope for timelines to vary or to ‘stop the clock’. While the complex nature of many resources projects may mean that significant time is required to undertake the necessary assessments, unwarranted delays can substantially reduce net benefits, both to companies and the broader community.

---

#### INFORMATION REQUEST

*The Commission is seeking feedback on regulator conduct in jurisdictions in Australia and overseas. Information and examples, including case studies, of both effective and best-practice approaches, as well as those that are problematic, would be appreciated.*

*For example, the Commission is interested in whether:*

- *regulators' processes are clear, predictable, open and transparent*
- *regulatory outcomes are consistent with their intended objectives, including whether compliance and enforcement mechanisms have been effective, for example*
  - *with respect to: compliance effort; the use of information to test compliance with approval conditions; rehabilitation processes; and the design and monitoring of offsets*
- *unnecessary costs and delays have been minimised and how this has been achieved (for example, through statutory timelines)*

*What have been the consequences of identified instances of poor regulator conduct, including inconsistency, inadequate enforcement and unduly protracted processes, for investment in the sector?*

*How could identified shortcomings be remedied?*

---

## **5 What are broader impediments materially affecting investment?**

The Commission has been asked to identify any broader impediments to the timing, nature and extent of business investment in the Australian resources sector. Investment is influenced by many factors. Chief among these are expectations of future market conditions and the consequent profitability of a project. But factors beyond sector-specific regulation, including government activity, can also play a role (selected examples are discussed below). The Commission is seeking participants' insights on these and any other factors they consider relevant, particularly where they represent a major impediment to investment. Evidence on how significantly a factor impacts investment and suggestions for how any impediment might be addressed would also be appreciated.

### **Infrastructure and public goods**

The quality, level of access to and affordability of infrastructure can be major factors in the profitability of a resource project. Firms fund the building and maintenance of infrastructure specific to their own projects, but also often rely on large-scale, shared infrastructure, such as electricity distribution networks, railway lines and ports. Given that resources projects are typically energy intensive, remotely located and export oriented, such infrastructure can be key inputs to a project proponent's business.

---

Governments often directly provide infrastructure, but can also set rules around the development and operation of private markets for infrastructure. For example, the Australian Government regulates ‘third-party access’ to certain infrastructure services, with the objective of reducing overall costs and promoting competition by avoiding the need for competing firms to duplicate existing infrastructure.

Governments have also provided or coordinated funding for research that can benefit the sector as a whole, such as pre-competitive geoscience, or knowledge of how particular mining activities affect environmental systems.

### **Royalty and taxation arrangements**

Resources firms are subject to a range of federal and state taxes and royalties. Some of these, such as company tax, apply generally to business activities, while others, such as state royalties and the petroleum resource rent tax, are specific to particular sectors or jurisdictions.

The general level of taxes is an obvious factor in firms’ investment decisions, but the design of these taxes can also be important. For example, royalties based on revenues rather than profits can discourage investment in financially riskier projects (Henry et al. 2010). As with unstable regulatory policy, uncertainty over future changes to the tax regime can also deter investment.

### **Barriers to a productive workforce**

Within any resources project, the multiple phases — from early exploration through to site rehabilitation — require different amounts and mixes of skilled labour. Shortages can drive up wage costs as firms compete for a limited pool of workers, adding to project costs.

Skilled migration programs can help firms address these shortages. Temporary skill shortage visas allow employers to bring in skilled workers for up to four years, subject to having first attempted to hire in Australia. Resources sector representatives have previously sought a relaxation of temporary visa requirements in order to increase their ability to draw upon overseas workers.

In the longer term, tertiary courses and apprenticeships shape the supply of local skilled labour.

### **Barriers to foreign investment**

The rules and regulations around foreign investment can also affect whether a company will make an investment in the sector. The Australian Government maintains a foreign investment framework that encourages foreign investment flows while ensuring investments are not contrary to the national interest. Under the *Foreign Acquisitions and Takeovers Act*

---

1975 (Cth), the Treasurer can reject foreign investment proposals found to be contrary to the national interest, or can impose conditions on an investment to address national interest concerns. In 2017-18, there were 115 approvals in the mineral exploration and development sector, with a proposed investment value of \$17.4 billion (FIRB 2018). In addition, nearly 40 per cent of foreign direct investment flows were directed to mining (DFAT 2019).

---

*INFORMATION REQUEST*

*The Commission is seeking examples of government activity beyond resources sector-specific regulation that influences investment, particularly where that activity represents a major impediment. How important for investment are these impediments? How could the impact of these impediments be reduced?*

---

## **6 Best-practice community engagement and benefit sharing**

The Commission is to examine both regulatory and non-regulatory approaches to community engagement and benefit-sharing practices, and identify best-practice examples of where mutually-agreeable relationships have been developed between the resources sector and the communities in which they operate, including with Indigenous communities.

Resources projects can affect a wide range of stakeholders. Landholders may be affected when companies access their land. Local communities may benefit from increased employment, but can also suffer from negative spillovers such as increased noise and air pollution. The broader Australian community may benefit from resources activity through greater taxation revenue, but may be concerned about environmental impacts.

Various legal and regulatory frameworks provide for the consideration of some of these stakeholders' interests. For example:

- each State and Territory has legislation that outlines requirements for resources companies wishing to access private land, which may include negotiating land access agreements or providing compensation for adverse impacts
- the *Native Title Act 1993* (Cth) provides processes for Indigenous communities to negotiate land access and benefit-sharing agreements with resources companies (box 6)
- some State and Territory laws require resources companies to consult with, or consider the impacts of their activities on, local communities. For example, in Victoria, mining licensees must prepare community engagement plans and consult with the community across the entire life cycle of a mining development (Victorian Department of Jobs, Precincts and Regions 2019a). In Queensland, proponents of large resource projects near a regional community must prioritise recruitment from the local area and prepare social impact statements (Queensland Co-ordinator General 2018).



---

## Box 6 Native title and the resources sector

Native title describes the interests and rights of Indigenous people in relation to land. It can include the right to the possession, use and occupation of land or the right to access land for particular purposes.

The *Native Title Act 1993* (Cth) allows for recognition of native title through various claims and mediation processes. Resources firms may encounter these processes when seeking to access land.

- Native title determination: A native title determination is a decision by the Federal Court of Australia that native title does or does not exist in relation to a particular area of land or waters.
- Future acts: Future acts are activities that can affect native title, and include the grant or renewal of resource exploration and extraction licences and permits. The future act regime specifies the procedures to be followed before the future act can be done, the effect that the act will have on native title, and whether compensation will be payable for interference with native title rights.
- Right to negotiate: The 'right to negotiate' process gives registered native title parties the opportunity to negotiate conditions or an agreement regarding the proposed action over native title land. If no agreement is reached, the matter is referred to the National Native Title Tribunal for arbitration.
- Expedited procedure: Native title rights and interests can be resolved through an 'expedited procedure' where exploration authorities and mineral development licences do not cause major ground disturbance.
- Indigenous land use agreements (ILUAs): An ILUA is a voluntary agreement between a native title group and others about the use and management of land and waters. An ILUA can be negotiated and registered whether or not there is a native title claim over the area. When registered, ILUAs bind all parties and all native title holders to the terms of the agreement.

Sources: Business Queensland (2017), PC (2016), Victorian Department of Jobs, Precincts and Regions (2019b).

Some jurisdictions also have (or have had) programs that direct royalties to regional projects. Western Australia, for example, has directed over \$8 billion of royalties since 2008 towards initiatives targeting regional development (WARDT 2018).

Further, beyond regulatory requirements, as noted above, many resources companies undertake community engagement and benefit sharing on a voluntary basis. Interest in voluntary engagement has increased in recent decades — a phenomenon which has been attributed to:

... heightened stakeholder and community expectations, the glare of global scrutiny, the demise of the traditional mining town, and the growing influence of concepts such as 'corporate social responsibility', 'sustainable development' and 'triple bottom line'. (Harvey and Brereton 2005, p. 2)

Notwithstanding increasing interest in community engagement and benefit sharing, the Resources 2030 Taskforce identified large variations in the quality of engagement between communities and resources firms, caused by:

---

... the varying knowledge, experience and needs of each community, and individuals' skills and capabilities. Also, while several guidelines, standards and industry policies exist — such as those produced by the Minerals Council of Australia (MCA) and the Department of Industry, Innovation and Science — they offer a range of varying and, at times, conflicting advice. There is no one credible standard source. (Cripps 2018, p. 52)

Complex and protracted negotiating processes may also act as an impediment to resources sector investment.

---

*INFORMATION REQUEST*

*The Commission is seeking examples of both effective and best-practice community engagement and benefit-sharing practices, including with Indigenous communities, in Australia and internationally, and examples that are problematic.*

*What are key drivers of good or poor outcomes? How could identified shortcomings be remedied?*

---

---

## References

- ABC News 2015, *\$16 billion Carmichael coal mine approval set aside over 'technical matter'*, Text, ABC News, <https://www.abc.net.au/news/2015-08-05/federal-court-overturns-approval-of-adanis-carmichael-coal-mine/6673734> (accessed 27 August 2019).
- ABS (Australian Bureau of Statistics) 2019a, *Labour Force, Australia, Detailed, Quarterly*, May, Cat. no. 6291.0.55.003.
- (Australian Bureau of Statistics) 2019b, *Private New Capital Expenditure and Expected Expenditure*, March, Cat. no. 5625.0.
- Australian Government 2016, *Mine rehabilitation: Leading practice sustainable development program for the mining industry*.
- Bell-James, J. 2016, *Carmichael mine jumps another legal hurdle, but litigants are making headway*, The Conversation, <http://theconversation.com/carmichael-mine-jumps-another-legal-hurdle-but-litigants-are-making-headway-69423> (accessed 3 September 2019).
- 2019, *Landmark Rocky Hill ruling could pave the way for more courts to choose climate over coal*, The Conversation, <http://theconversation.com/landmark-rocky-hill-ruling-could-pave-the-way-for-more-courts-to-choose-climate-over-coal-111533> (accessed 3 September 2019).
- Business Queensland 2017, *Expedited procedure*, <https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/native-title/expedited> (accessed 3 September 2019).
- COAG (Council of Australian Governments) 2007, *Best Practice Regulation*.
- Cox, L. 2019, *Adani coalmine: minister loses legal challenge on water pipeline assessment*, The Guardian, <https://www.theguardian.com/environment/2019/jun/12/adani-coalmine-federal-government-loses-legal-challenge-on-water-assessment> (accessed 27 August 2019).
- Cripps, A. nd, 'Resources 2030 Taskforce, Australian resources — providing prosperity for future generations', p. 70.
- DFAT (Department of Foreign Affairs and Trade) 2019, *Australian industries and foreign direct investment*, <http://dfat.gov.au/trade/resources/investment-statistics/Pages/australian-industries-and-foreign-investment.aspx> (accessed 3 September 2019).
- DIIS (Department of Industry, Innovation and Science) 2019, *Resources and Energy Quarterly*, June.
- Environmental Law Australia 2019, *Environmental Law Australia | Carmichael Coal ("Adani") Mine Cases in Queensland courts*, Environmental Law Australia, <http://envlaw.com.au/carmichael-coal-mine-case/> (accessed 27 August 2019).
- FIRB (Foreign Investment Review Board) 2018, *Foreign Investment Review Board Annual Report 2017-18*.

- 
- Harvey, B. and Brereton, D. 2005, *Emerging Models of Community Engagement in the Australian Minerals Industry: paper presented at the International Conference on Engaging Communities, August 2005*, Brisbane.
- Henry, K., Harmer, J., Piggott, J., Ridout, H. and Smith, G. 2010, *Australia's Future Tax System — Final Report*, Australian Government, Canberra.
- Hogan, L., Harman, J., Maritz, A., Thorpe, S., Simms, A., Berry, P. and Copeland, A. 2002, *Mineral exploration in Australia: trends, economic impacts and policy issues*.
- Independent Scientific Panel 2018, *Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia*, September.
- McGowan, M., Johnston, B. and Dawson, S. 2018, *Government introduces strict new controls for hydraulic fracturing*, Government of Western Australia, <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/11/Government-introduces-strict-new-controls-for-hydraulic-fracturing.aspx> (accessed 3 September 2019).
- NSW Minerals Council nd, *Rehabilitation & mine closure*.
- OECD 2014, *The governance of regulators*, OECD best practice principles for regulatory policy, OECD, Paris.
- PC (Productivity Commission) 2009, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, Research Report, Canberra.
- (Productivity Commission) 2013a, *Major Project Development Assessment Processes*, Research report, Canberra.
- (Productivity Commission) 2013b, *Mineral and Energy Resource Exploration*, Report no. 65, Canberra.
- (Productivity Commission) 2016, *Regulation of Australian Agriculture*, Report no. 79, Canberra.
- Queensland Co-ordinator General 2018, *Strong and Sustainable Resource Communities Act 2017: Factsheet March 2018*.
- Robertson, J. and Siganto, T. 2018, *Indigenous challenge to Adani mine agreement dismissed by Federal Court*, Text, ABC News, <https://www.abc.net.au/news/2018-08-17/adani-federal-court-traditional-owners-native-title/10131920> (accessed 27 August 2019).
- Victorian Department of Jobs, Precincts and Regions 2019a, *Community Engagement Guidelines for Mining and Mineral Exploration*, <https://earthresources.vic.gov.au/legislation-and-regulations/guidelines-and-codes-of-practice/community-engagement-guidelines-for-mining-and-mineral-exploration> (accessed 9 March 2019).
- 2019b, *Mineral tenements and the Native Title Act 1993*, <https://earthresources.vic.gov.au/legislation-and-regulations/guidelines-and-codes-of-practice/mineral-tenements-and-the-native-title-act-1993> (accessed 3 September 2019).
- WARDT (Western Australian Regional Development Trust) 2018, *Western Australian Regional Development Trust 2017-18 Annual Report*, September.

---

## Attachment A: How to make a submission

### How to prepare a submission

Submissions may range from a short letter outlining your views on a particular topic to a much more substantial document covering a range of issues. Where possible, you should provide evidence, such as relevant data and documentation, to support your views.

#### Generally

- Each submission, except for any attachment supplied in confidence, will be published on the Commission's website shortly after receipt, and will remain there indefinitely as a public document.
- The Commission reserves the right to not publish material on its website that is offensive, potentially defamatory, or clearly out of scope for the inquiry or study in question.

#### Copyright

- Copyright in submissions sent to the Commission resides with the author(s), not with the Commission.
- Do not send us material for which you are not the copyright owner, such as newspaper articles. You should reference or provide a link to this material in your submission.

#### In confidence material

- This is a public study and all submissions should be provided as public documents that can be placed on the Commission's website for others to read and comment on. However, information which is of a confidential nature or which is submitted in confidence can be treated as such by the Commission, provided the cause for such treatment is shown.
- The Commission may also request a non-confidential summary of the confidential material it is given, or the reasons why a summary cannot be provided.
- Material supplied in confidence should be clearly marked 'IN CONFIDENCE' and be in a separate attachment to non-confidential material.
- You are encouraged to contact the Commission for further information and advice before submitting such material.

#### Privacy

- For privacy reasons, all **personal** details (e.g. home and email address, signatures, phone, mobile and fax numbers) will be removed before they are published on the website. Please do not provide a these details unless necessary.

- 
- You may wish to remain anonymous or use a pseudonym. Please note that, if you choose to remain anonymous or use a pseudonym, the Commission may place less weight on your submission.

### Technical tips

- The Commission prefers to receive submissions as a Microsoft Word (.docx) files. PDF files are acceptable if produced from a Word document or similar text-based software. You may wish to search the Internet for information about how you can make your documents more accessible. For the more technical, follow advice from Web Content Accessibility Guidelines (WCAG) 2.0 <<http://www.w3.org/TR/WCAG20/>>.
- Do not send password protected files.
- Tracked changes, editing marks, hidden text and internal links should be removed from submissions.
- To minimise linking problems, type the full web address (for example, <http://www.referred-website.com/folder/file-name.html>).

### How to lodge a submission

Submissions should be lodged using the online form on the Commission's website. Submissions lodged by post should be accompanied by a submission cover sheet.

Online\*      [www.pc.gov.au/inquiries/current/resources/make-submission#lodge](http://www.pc.gov.au/inquiries/current/resources/make-submission#lodge)

Post\*        Resources Sector Regulation  
Productivity Commission  
Locked Bag 2, 530 Collins St East  
Melbourne VIC 8003  
Australia

\* If you do not receive notification of receipt of your submission to the Commission, please contact the Administrative Officer.

### Due date for submissions

Please send submissions to the Commission by **31 October 2019**.