AUSTRALIAN PRODUCTIVITY COMMISSION RELEASES FINAL REPORT INTO REGULATION OF THE RESOURCES SECTOR

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IN BRIEF

- The Productivity Commission (Commission) recently released its final report on resources sector regulation. The report examines the regulation of minerals and petroleum in Australia, and identifies issues and leading practices approaches to addressing these issues.
- The Commission has made a number of recommendations aimed at improving the current regulatory arrangements in the sector and reducing unnecessary costs for businesses.
- The Commission was also tasked with considering potential impediments to the timing, nature and extent of business investment in the Australian resources sector.
- The recommendations from the report have the potential to significantly affect the mining and petroleum sectors if implemented. Relevantly, the Commission has noted that improving the foundations of the regulatory system are particularly relevant in the current climate, as jurisdictions seek to develop reform agendas to boost economic activity as part of the COVID-19 recovery. The Morrison Government's Deregulation Agenda, aimed at improving regulator culture and minimising compliance costs for businesses, suggests that the Commonwealth Government may have a greater appetite to implement the recommendations from the report.

ADDRESSING REGULATORY BURDENS

Minimising Unnecessary Regulatory Costs or Delays

The Commission noted that unpredictable and lengthy delays are a key frustration for project proponents, and that costs associated with delays typically dwarf other regulatory costs. Both industry participants and regulators reported that assessment requirements, including requirements for environmental impact assessments, are increasingly lengthy and complex and often created increased costs for proponents with little beneficial impact on outcomes.

The Commission recommended a revised approach towards regulation which involves:

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- 'risk-based regulation', requiring regulators to begin by identifying risks that need to be managed rather than the specific rules that they have to enforce
- 'outcomes-based regulation' which would set out the outcomes that regulated entities must achieve without specifying what steps must be taken to comply.

The report highlights leading practice examples of risk or outcomes-based regulation, including early identification of risks through scoping, including community consultation, and aligning the level and focus of investigations with the size and likelihood of environmental risks that the project creates.

Reducing Commonwealth-State Duplication

The Commission noted that delays and duplication are major issues for projects that trigger the *Environmental Protection Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and require environmental approval at both the Commonwealth and State or Territory level.

The Commission has recommended that the EPBC Act be amended to facilitate negotiation of bilateral agreements, which would streamline the approvals process by allowing State or Territory decision makers to approve or reject projects under the EPBC Act by acting as the authorised Commonwealth decision maker. Notably, the most recent independent review of the EPBC Act has also recommended the EPBC Act be amended to support the devolution of EPBC Act approval functions to the States and Territories.

MANAGING RESOURCES DEVELOPMENT

The Commission noted that while no significant issues had been raised by industry participants with the approaches taken to the allocation of mining and petroleum licences, the licence holder's historical behaviour ought to be considered in the decision to issue a licence. It has recommended that decisions to grant or renew a licence should examine issues including whether the applicant has complied with its licence conditions, and broader grounds such as past criminal conduct, technical competency and past insolvency.

In respect of managing resources development specific to the gas sector, the Commission found that:

- bans and moratoria on certain types or resources activity such as onshore gas can prohibit activity of potential value to the community, and that governments should weigh the evidence on the costs of a particular project on the environment, other land users and communities against the benefits on a project-by-project (or regional) basis
- domestic gas reservations schemes that remove the link between domestic and export prices reduce returns to investors and discourage investment in gas exploration and extraction, leading to higher prices in the longer run and imposing net costs on the community.

OTHER ISSUES

The Commission has made other general findings and recommendations, including:

- the need to put Indigenous Australians at the centre of decision making on heritage, and provide a process for both traditional owners and proponents to seek dispute resolution or appeal of project assessments

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- the need for early public consultation of new policy proposals including clear articulation of the policy rationale to avoid policy surprises
- the need to improve regulatory processes to reduce unnecessary burdens for businesses while not simultaneously diluting the requirements to mitigate impacts on the environment, heritage, worker safety, landowners and communities.

REGULATION OF THE SECTOR IN THE WAKE OF COVID-19

The Commission has noted that the proposed changes to improve the foundations of the regulatory system are particularly relevant in the current climate, as governments seek to develop reform agendas to boost economic activity as part of the COVID-19 recovery. Relevantly, the Morrison Government has emphasised the importance of deregulation as part of its Deregulation Agenda, including improving regulatory outcomes and minimising compliance costs for businesses in response to the economic crisis brought on by COVID-19.

The Commonwealth Government will likely use this review to drive regulatory reform in the sector as part of COVID-19 economic recovery.

The full text of the report can be found here.

Please let us know if you would like any more information about how the findings and recommendations may impact your business.

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