Submission to the

Productivity Commission Inquiry into

Resources Sector Regulation

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CFMEU Mining & Energy **t:** +61 2 9267 1035 **f:** +61 2 9267 3198 **e:** info@cfmeu.com.au
www.me.cfmeu.org.au PO Box Q1641, Sydney NSW 1230, Australia

Introduction

The union has noted the Commission's call for submissions and takes this opportunity to make brief comments and to draw various sources to the Commission's attention.

CFMEU Mining and Energy Division is part of the Construction, Forestry, Maritime, Mining and Energy Union, the major trade union in the industries of its title. The Division represents approximately 20,000 workers in mining – mostly in coal mining but also some in metal ore mining.

The union is not in a position to comment on all aspects of regulation in the resources sector. Responses will be limited to specific issues.

The union notes that the Issues Paper barely mentions occupational health and safety (OHS) regulation. This is a subject of major interest to the union but it is not appropriate for the Commission to examine it in this broad-brush review of mining regulation. Mining OHS is a highly specialised area that generally requires specific legislation in addition to general OHS law because of the particularly severe and catastrophic risks that must be managed.

The relative difficulty of approval processes

Mining approval processes are undoubtedly onerous and, given the nature of the significant impacts (environmental, economic and social), they need to be. The situation in Australia is made more difficult because the division of responsibilities arising from the Australian Constitution, with the States primarily responsible for land management but the federal jurisdiction continuing to protrude into more areas each decade, including with respect to mining.

In coming to grips with how much of an issue the complexity of approval processes are, it is worth considering the amount of investment that has occurred in Australian mining (especially in the Resources Boom) and whether mining companies currently consider Australia a risky or difficult proposition due to onerous regulation surrounding approvals.

During the Resources Boom investment approached $100 billion per annum - a simply enormous amount relative to the size of the Australian economy. Most of it was from foreign sources that can choose from many jurisdictions in which

to invest. The level of Australian regulation did not appear to be a barrier to that investment.

Pointing in the same direction is the annual Fraser Institute (of Canada) survey of mining executives re the investment attractiveness of various nations and, for the major mining nations of Canada, the USA and Australia, individual States. The 2018 survey had Western Australia ranked second in the world and Queensland 13th. Only one nation other than the top three already mentioned made it into the Top 10 destinations – Chile.

NSW ranked well down the list, but still ahead of most western developed nations.

The Fraser Institute survey is of the subjective views of mining executives so it is not an objective assessment, but it does indicate that high levels of regulation are an expected feature of the industry, and that investment considerations place considerable weight on political stability, good governance, good infrastructure and a skilled workforce.

It is worth noting that many large western world mining companies continue to invest heavily in higher-cost developed countries like Australia and Canada – often a majority of their investments, and despite the ability to pay lower wages and taxes in other jurisdictions - because of the premium attached to the factors just mentioned.

Complexity of approvals

It is arguable that current processes in approvals are complex at that stage, but less so in mining operations and closure.

There is a fascinating chart of the NSW mine approvals process at http://www.commonground.nsw.gov.au/#!/process
It shows five stages before the actual production phase. Each of which has a public consultation phase. Conversely the chart shows few processes for the mine operations and closure stages.

It is difficult to see how the first five stages could not take many years. At the Mining / Production Application stage it gives an indicative time frame of “2+ years”. Two years is the minimum; it can take many more than that if the

impact assessment issues are complex / uncertain or there is significant public / community concern.

The Environmental Impact Statement mechanisms / requirements are extensive. In the limited experience of this union, the physical EIS documentation can reach a metre of shelf space. The documents are compiled by a range of commissioned specialists and professionals and it has become beyond the capacity of any individual (such as a concerned member of the public) to properly comprehend or respond to the EIS documents of even a medium-sized resources project.

There are summary document(s) but given that the EIS is commanded by the project proponent rather than an independent source, summaries can direct attention away from weaknesses or shortcomings in the full documentation.

Monitoring and compliance during operations and closure

There appears to have been a significant increase in recent years in monitoring and enforcement of environmental conditions of approval.[1] While this is appropriate, it sharpens the observation that mine approval conditions, and monitoring of operations, rarely require companies to comply with the promises made about the economic and employment benefits of the mine. Given that the economic and employment benefits are a key reason for approval given the inevitable environmental impacts, there needs to be greater care taken by regulators that mining proponents do achieve the social and economic benefits they claimed the project would bring.

There are similar concerns about closure processes. It appears that many (probably most) former mines are left on "care and maintenance" rather than the site being fully rehabilitated and the mining lease relinquished. The current NSW Government has been examining this problem with a view to stronger requirements around rehabilitation.

The union sees good rehabilitation processes as not only good environmental management but as a key way (given the significant expenditure and employment involved) of managing the transition away from mining in a local area.

[1] See for example https://www.planning.nsw.gov.au/Assess-and-Regulate/About-compliance/Inspections-and-enforcements

The Scope 3 issue

In the last year the Land and Environment Court in NSW and the Independent Planning Commission process – also in NSW – have sought to impose or require accountability for so-called Scope 3 emissions from coal projects.

This is effectively requiring that coal projects in NSW take on responsibility for the greenhouse gas emissions that occur in other countries from the burning of NSW coal by purchasers.

This approach is inconsistent with the UN Framework Convention on Climate Change and the consequent Paris Agreement on the same subject, which require that nations party to the instruments accept responsibility for emissions within their borders. So Australia is responsible for all emissions from power generation in Australia, even though a significant proportion of that power is for manufacturing products such as aluminium which are largely exported. In the same way, the nations (or businesses within those nations) that buy Australian coal are responsible for the emissions they produce from the coal.

Requiring Australian coal mines to shoulder responsibility for emissions in other countries is akin to car companies in Japan being made responsible for the emissions of the petrol-driven vehicles they sell to Australia. But under international carbon accounting and mitigation frameworks, transport emissions within Australia's borders are its responsibility, not that of car-makers or oil producers overseas.

The union is supporting proposed NSW Government legislation to address the problems that the NSW Land and Environment Court and the IPC have created.

The use of "lawfare"

The Commission's Issues Paper has noted the extensive use of litigation by various parties in an attempt to prevent the approval and development of Adani's Carmichael coal mine.

While the concept of lawfare is popularly attributed to actions by companies and rich individuals to silence opposition to their actions[2] it clearly applies to

[2] Such as the lawsuit by forestry and woodchip company Gunns Ltd against Bob Brown and other environmentalists in 2004-10: http://classic.austlii.edu.au/au/journals/NatEnvLawRw/2010/18.pdf

the measures undertaken by a number of anti-coal organisations against the Adani project.

This lawfare against the Adani project arises from a strategic campaign as evidenced by the fundraising document leaked back in 2012 – "Stopping the Australian Coal Export Boom".[3] Although this document was never publicly released, the Australian experience since then has been that this strategy was funded and implemented.

The campaign included up to a million dollars for strategic litigation. In retrospect it appears that much more than that has been spent – in some cases by entities that have few resources or other activities and appear to be special purpose vehicles funded for the litigation.

It is also useful to note the targeting involved. Before the very large (and still current) campaign against the Adani project, there were similar efforts against the Maules Creek project of Whitehaven Coal and, before that, the Anvil Hill project of Austral Coal Ltd.

In each case, the campaign targeted either a relatively small company[4] or, in the case of Adani, a company that until that point had little presence in Australia and little experience negotiating Australian legal and public relations / consultation processes.

The campaign against Anvil Hill ceased when the project was taken over by Xstrata – now Glencore – a major mining company. This, and the targeting of the other two companies, suggest a deliberate strategy to pursue targets that, due to their lesser scale and capacity relative to large mining companies, were/are seen as more vulnerable to the anti-coal campaign. This in turn suggests that it is not the actual individual projects that are the primary target – they are simply interim goals in a strategic campaign.

Workforce issues

The Commission briefly mentions calls for a relaxation of temporary visa requirements by mining industry.

[3] https://www.abc.net.au/mediawatch/transcripts/1206_greenpeace.pdf
[4] No coal mining company is actually a small business; here it means small relative to other mining companies.

This union endorses the 2018 ACTU Congress policy in this area, which provides data and commentary on many aspects of this issue.[5]

With some 1.5 million foreign citizens with work rights already in Australia, 718,000 unemployed and a further 1.1 million underemployed it is difficult to see why the Australian mining industry, with less than a quarter of a million workers, needs more temporary foreign workers.

The union has always acknowledged some need for genuinely specialised workers from overseas where new technologies are being introduced. For example, when the "top caving" technique was introduced into Australian coal mining by Yancoal there was agreement around a temporary workforce with specific experience to train up locals to do the work.[6] But this is not usually the case sought by mining companies.

In the downturn after the end of the Resources Boom in 2011-12, the industry shed around 50,000 workers and has yet to return to its Boom level. The industry experiences considerable labour turnover in certain sectors due to the heavy use of harsh rosters (eg 14 days on – of 12 or 12.5 hour shifts – and 7 days off) and use of casual labour that is paid substantially less than the permanent workforce despite foregoing all entitlements to paid leave.

There are plenty of workers who used to be in the mining industry but will not return to it given the harshness of the rosters and the declining pay.

As the ACTU policy notes, many employer respondents to a survey that complained about labour shortages had steadfastly refused to consider increasing their pay offers. In the mining industry there has been considerable pay reductions through the use of casuals via third party contractors (notably labour hire firms).

The union's examination of particular cases across a number of companies shows casual labour workers being paid 30% less than the permanent workforce. Once the impact of annual leave is taken into account (casual workers are given no paid annual leave, so if they take unpaid leave to equal the leave of their permanent counterparts) the pay difference reaches 40%.

[5] https://www.actu.org.au/media/1034003/temporary-migration.pdf
[6] https://www.yancoal.com.au/page/en/assets/technology/longwall-top-coal-caving-ltcc-technology/

It is a shortcoming of current federal employment law that non-union enterprise agreements may be approved by the Fair Work Commission provided they pay above the minimum Award rates even though they are substantially below union collective agreements that cover the same work and the same site. It is now a common situation to have workers doing the same job in the same crew and with the same qualifications but being paid vastly differently depending on whether they are directly employed (and permanent) or indirectly and casually employed via labour hire.

Mining employers might usefully look to their harsh employment practices and poor wages (for the long hours and difficult working conditions) if they wish to address alleged labour shortages. There is never a shortage of appropriately-skilled applicants for jobs that pay wages under a union collective agreement.

Community engagement and benefit sharing

In the scenario regarding casual employment and wage cutting described above, mining companies are substantially reducing their contributions to the communities – both local and distant from which the workforce is drawn.

The wage cutting dwarfs any community contributions that are made. It is not difficult to come up with calculations that show hundreds of millions of dollars being withdrawn from particular regions.

The industry has a poor record of engagement with the unions that represent, or seek to represent, mineworkers on their sites. As well as the deployment of non-union collective agreements on sites to weaken union representation and collective bargaining, we see the full use of federal employment law that seeks to restrict union organising and bargaining.

Not all companies do this, but we are a long way from an industry that routinely partners with unions to mutually advance the interests of all parties.

Royalties and taxes

With respect to “royalties for regions” programs the union is supportive of mining communities getting a substantial benefit – via public expenditures – from the taxes and royalties derived from the industry.

With respect to the issue of resource rent taxes versus royalties, the disastrous experience of the Minerals Resource Rent Tax, and the shortcomings of the Petroleum Resources Rent Tax shows that the industry lacks the necessary sense of corporate responsibility required for governments to rely on resource rent taxation. In both cases, the industry effectively gamed the federal government and gained a system that produced very little revenue despite large profits being made.[7] (Notably, and among other things, because of distortions around the starting value of assets and too-high uplift rates for unused deductions.)

State-based royalties may be a relatively crude instrument but their simplicity is a virtue; they are less subject to gaming or arcane calculations. Though there have been disputes around the "market pricing" of minerals exported via related-party marketing hubs in Singapore[8], with the result that State Governments are now less willing to rely on the prices given by companies as the market price at which the product left the country.

Ultimately there is a need to achieve at least minimum rate of return to the public (for the resources they own) from a resources operation that is given access to that resource. The ideal royalty and taxation framework will therefore be a mixture of revenue-per-tonne and profits-based taxation.

The failure of successive federal governments to obtain and retain profits from the Resources Boom has been a monumental public policy failure. While Norway now has a trillion dollar sovereign wealth fund based on revenues from its oil industry and no net debt, the Australian Government has significant net debt and little to show from the Resources Boom apart from avoidance of recession.

[7] See for example: http://www.taxjustice.org.au/prrt

[8] https://www.theguardian.com/business/2018/may/28/bhp-and-queensland-reach-in-principle-agreement-over-288m-coal-royalties