



CORRUPTION RISKS: MINING APPROVALS IN AUSTRALIA

Mining for Sustainable Development Programme

OCTOBER 2017

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FOREWORD

For the past 15 years, I have been working in corporate accountability, good governance, and business and human rights. This has included the mining sector, with a focus on the policy and practice of Australian mining companies operating abroad – often in corruption and conflict-prone countries.

Understanding corruption risks in the mining approvals process is vital to ensuring mining contributes to sustainable development, and shared benefits.

If corruption risks are identified, and acted upon, before mining activities get underway, better outcomes for impacted communities, the natural environment and all citizens, can be achieved.

This important research, *Corruption Risks: Mining Approvals in Australia*, documents the existing system of checks and balances that require transparency and accountability in the exploration license, and mining lease, approvals regime in Australia.

The report identifies vulnerabilities in both the Western Australia and Queensland approvals process that could enable corruption to occur.

Corruption risks are not just a developing country paradigm. This research confirms even mature mining jurisdictions, such as Australia, have vulnerabilities in the mining approvals process that could result in corruption and compromised decision-making.

A key risk identified for large scale mining and coordinated projects (associated infrastructure), is inadequate due diligence investigation into the character and integrity of applicants for mining approvals. This includes a lack of investigation of beneficial ownership.

Without adequate due diligence—even basic research into the track record of mining applicants—there is a risk that permits will be awarded to companies with a history of non-compliance or corruption, including in their operations in other countries.

The risk assessment also identified a high potential for industry influence and state and policy capture in the awarding of mining approvals. Greater regulation of political donations, lobbyists and the movement of staff between government and industry, would help reduce risks that could enable corruption to occur.

While Australia has systems of transparency and accountability in place, more needs to be done to address transparency of negotiation processes and agreements, including native title parties.

This report is an essential resource for government, industry, civil society, and the public – those with an interest in ensuring mining contributes to economic, social, and environmental prosperity.

It shines a light on the corruption vulnerabilities in the mining approvals process, and provides a roadmap for better policy and practice.



A handwritten signature in white ink that reads "Seana Kilkenny".

Chief Executive Officer
Transparency International Australia

ABOUT THIS REPORT

This Report

Transparency International's Mining for Sustainable Development Programme (M4SD) seeks to enhance transparency and accountability in the awarding of mining-related permits, licences and contracts.

This report documents findings of research into the mining approvals process in Australia.

Acknowledgements

The BHP Billiton Foundation supports the participation of Transparency International Australia in Phase I of the M4SD Programme. Globally, the M4SD Programme is also funded by the Australian Department of Foreign Affairs and Trade.

The Australian M4SD research was undertaken by Helen Langley on behalf of Transparency International Australia. Helen Langley is the author of this report. Layout and design by Leapfrog International.



A summary report was prepared by Tim Grice on behalf of Transparency International Australia. The summary report is available at www.transparency.org.au

Title Picture: Panorama of Coober Pedy, South Australia.
Source: By edella/Shutterstock

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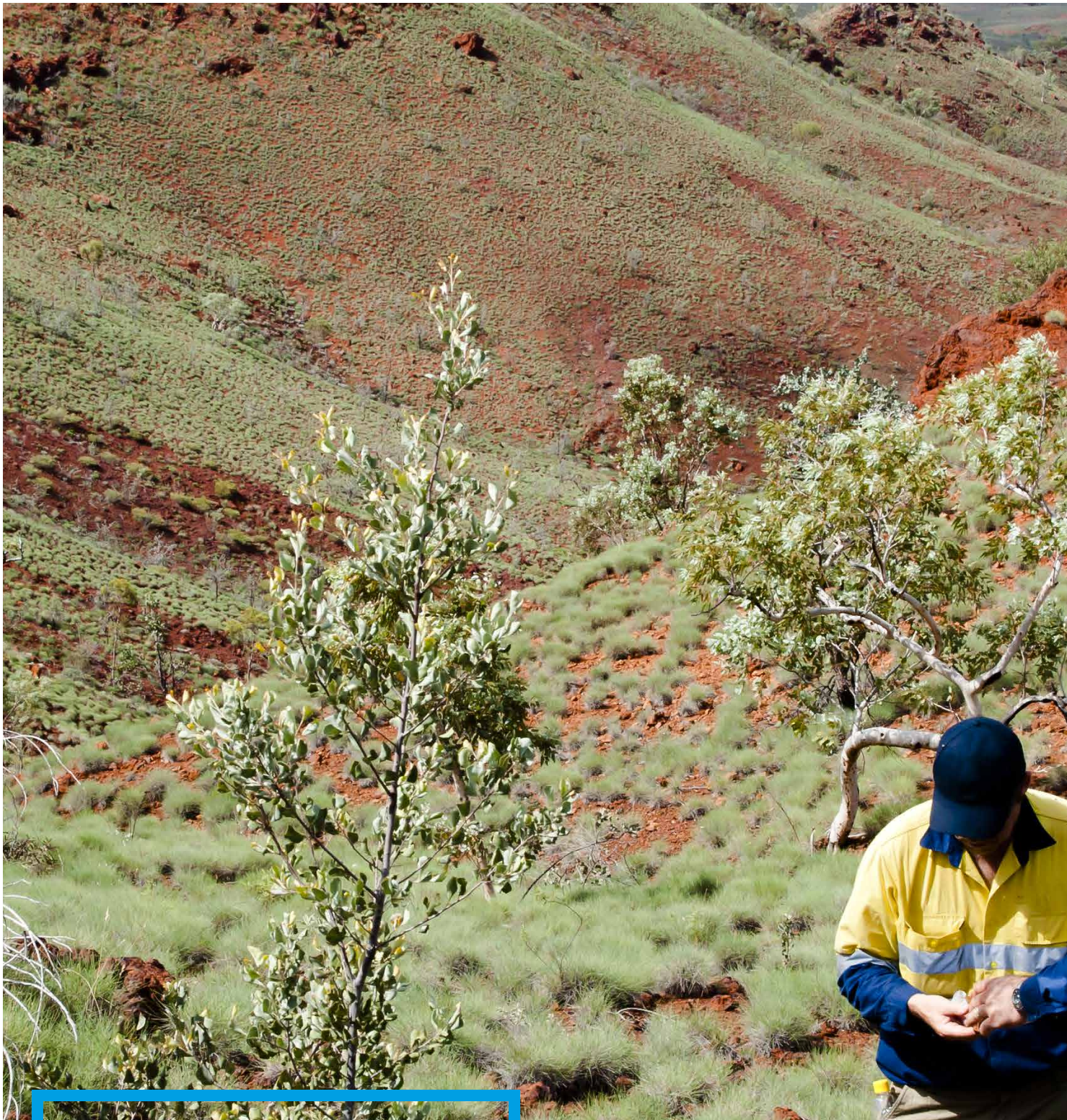
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EXECUTIVE SUMMARY

Description of activity

The Australian research for the Transparency International Mining for Sustainable Development Programme investigated mining approvals in Western Australia and Queensland using the Mining Awards Corruption Risk Assessment (MACRA) risk assessment tool. In Western Australia, the research focussed on the investigation of *exploration licences, mining leases, State Agreement Acts and Native Title mining agreements (expedited process and right to negotiate)*; and in Queensland, it focussed on *mining leases and environmental approvals* for large infrastructure mines under State and Commonwealth law.

The research involved an investigation into the context of mining in Australia and the process for approving the grant of mining leases or licences and associated approvals required before mining activities can commence.

The purpose of the research was to note where there are risks that could enable corruption to occur. Vulnerabilities identified in the mining approvals process led to a comprehensive analysis and assessment of risk. A number of risks ranging from low, through medium, high to very high risks were identified that could create an enabling environment for corruption to occur.



Geologists Sampling Rocks in the Pilbara, Australia
Source: By Adwo/Shutterstock.

Summary of risk assessment outcomes

The risk assessment identified seven risks for mining approvals in Western Australia and Queensland, and two risks for Native Title mining agreement making. The analysis showed risks that were distributed across approvals processes, and that the aggregation of risks can be a compounding factor and lead to an increase in the potential for corruption to occur.

1. The research found that the approvals systems for exploration licences and mining leases in Western Australia, and for mining leases in Queensland, have a high level of transparency and accountability that can act as a corruption deterrent for many of the vulnerabilities identified in the approval processes. Ministerial discretion was identified as a weakness in the exploration licences and mining lease approval process in Western Australia, which led to the assessment of the risk, **external influence** in the awarding of approvals. The risk was assessed as a low level risk as the assessment demonstrated that the checks and balances in the approvals system mitigate against the injudicious application of Ministerial discretion.
2. However, a high scoring risk was identified that applied for mining leases in each state and also relates across the other mining approvals assessed in each state for large mining projects, - State Agreement Acts and coordinated projects, **inadequate due diligence investigation of the character and integrity of applicants for mining approvals**. Inadequate due diligence, including the **lack of investigation of beneficial ownership** is a significant risk that has the potential for adverse impacts on government, the environment and communities if companies with a record of non-compliance or corruption are permitted to mine for resources.
3. The results of the risk assessment indicated a high potential for **industry influence** and **state and policy capture** in the awarding of approvals for large mining infrastructure projects in Western Australia and Queensland – State Agreements, and coordinated projects. The research noted that the inadequate regulation of political donations and lobbyists, the movement of staff between government and industry, and the culture of mateship are significant factors that could enable influence to occur in the approval of State Agreements in Western Australia, and coordinated projects in Queensland.
4. The inadequate protection of **whistle blowers** was assessed as a weakness in the broader State and Commonwealth regulatory framework for mining approvals. The research identified that comprehensive law reform is required to facilitate disclosure and protect whistle blowers in the mining industry.
5. **Large mining infrastructure project approvals** in each state were assessed as having lower levels of transparency and accountability than mining lease approvals. The research revealed that Ministers or senior government representatives have considerable discretionary powers to make approvals and recommendations. This raises considerable concern as when there is also a risk of industry influence, and opportunities for companies and their directors with a poor business record to operate in each state the risk of corruption is significantly increased.
6. The approvals process for large infrastructure projects evaluated and approved through the Coordinated projects process in Queensland was assessed as having elements of transparency and accountability for the assessment and evaluation of Environmental Impact Statements for State and Federal environmental approvals. Yet, the level of discretion available to the Coordinator-General, and the limited independent reviewing of the scientific modelling used in an EIS led to two risks being assessed as medium level risks: **risk of external influence** in the awarding of approvals, and of **inadequate verification of the accuracy of environmental impact statements**. The weakness of discretionary decision-making in combination with the risk of state and policy capture compounded the risks and has the potential to increase the capacity for influence, or corruption.
7. Large mining infrastructure projects approved in Western Australia under State Agreement Acts were assessed with a high level of risk due to the **lack of transparency of the negotiation process**. The lack of transparency of the negotiation process combined with the application of Ministerial discretion and state and policy capture can enable industry to influence the approval process. However, the limited contemporary use of State Agreement Acts for mining projects minimises the likelihood of the risk occurring.
8. The results also demonstrated that the **limited transparency of agreements** between native title parties and mining companies is a very high risk and the risk that **representatives negotiating with a mining company on behalf of a native title party will not represent community members' interests** is a high risk. Yet, the research noted that the context of Native Title agreement making is complex and the risk assessment may not be able to encapsulate all of the factors involved. It was further observed that the lack of transparency

in the agreement making process is compounded by the imbalance of power and resources between mining companies and native title parties, and by the risk of poor representation of native title parties in the agreement making process. The impact of these risks can have adverse outcomes for Indigenous communities who may not be able to achieve the benefits that mining agreements can bring.

9. **Significant risks** were assessed that had a **distribution across approvals processes and both jurisdictions**. This distribution suggests that there is an underlying regulatory, contextual and cultural risk for mining approvals in Western Australia and Queensland. The significant risks that were distributed across both jurisdictions were *inadequate due diligence investigation of the character and integrity of applicants for mining approvals* (all mining approvals); and *state and policy capture* (large infrastructure projects).
10. The **aggregation of significant risks** was found to compound cumulative impact and the likelihood of a risk occurring. For example, when inadequate due diligence is undertaken into mining companies and their principals, it can allow companies and directors with a corrupt record to mine for resources in Australia. This has the potential to increase the severity of the impact of the other risks assessed and increase the likelihood of corruption. For example, in the case of coordinated project approvals in Queensland, allowing companies with a poor business record to operate in the State can

increase the severity of the impacts of state and policy capture, external influence in the approvals process, and the lack of independent review of an EIS. It can also increase the likelihood of the occurrence of state and policy capture and external influence in the approvals process. Further, inadequate due diligence into a company when it is applying for a mining lease has the potential to increase negative impacts on native title parties; compound the risk of low transparency in agreement making and could lead to manipulation of native title groups, and have severe effects for Indigenous communities and their land.

11. The research revealed that the level of public interest in the approvals process for large mining projects, an active civil society, a robust media, and a competitive and entrepreneurial mining industry are powerful agents that work to expose and deter corruption, and increase the accountability of the approvals processes in Western Australia and Queensland.

In conclusion, whilst the mining approvals processes in Western Australia and Queensland have elements of transparency and accountability, significant risks were identified in the approvals systems that can lead to adverse impacts and enable corruption. Large infrastructure project approvals were assessed as having a high number of aggregated and compounded risks, which heightens the capacity for corruption to occur. And finally, the corruption risk of inadequate due diligence into mining companies, identified across both states and all of the mining approvals processes, has major implications for government, the environment and communities.



Iron ore Mining Operations Pilbara Region, Western Australia
Source: By STRINGER Image/Shutterstock.





Super Pit Kalgoorlie, Western Australia
Source: By imagevixen/Shutterstock.

INTRODUCTION

Transparency International Mining for Sustainable Development Programme

Transparency International Australia is one of 20 national chapters participating in the Transparency International (TI) global Mining for Sustainable Development (M4SD) Programme. The programme is coordinated by TI Australia. The M4SD Programme complements existing efforts to improve transparency and accountability in the extractive industries by focussing on the start of the mining decision chain: the point at which governments grant mining leases and licences, make assessments for approvals, negotiate contracts, and make agreements.

Phase I of the programme (2016-2017) involves the identification and assessment of corruption risks in the process and practice of awarding mining leases, licences and contracts. This report presents the main findings from the corruption risk assessment in Australia.

With an understanding of the nature and causes of corruption risk in the approvals chain, national chapters will develop and implement solutions to tackle priority corruption risks in Phase II (2018-2020). They will work with key stakeholders from government, the mining industry, civil society and affected communities to improve transparency, accountability and integrity in the decision-making process for approving mining projects.

The BHP Billiton Foundation supports the participation of Transparency International Australia in Phase I of the programme. Globally, the M4SD Programme is also funded by the Australian Department of Foreign Affairs and Trade.

The M4SD Programme study

The aim of the M4SD Programme study is to identify the systemic, regulatory and institutional vulnerabilities to corruption in awarding mining licences, leases and contracts and to assess the specific corruption risks created by these vulnerabilities. This report presents the main findings from the study and the results of the corruption risk assessment.

Glossary

| | |
|---------------------|--|
| Coordinated project | A project 'declared' by the Coordinator-General, Queensland that meets the criteria for a coordinated project: complex approval requirements, significant environmental effects; strategic significance; and significant infrastructure requirements. |
| Controlled action | An action that is deemed to be significant by the Department of Environment, Commonwealth, and that affects matters of national environmental significance. |
| Expedited process | Acts that attract the expedited process are defined as acts that are not likely to interfere with the native title holders' community or social activities, and areas or sites of significance in accordance with tradition; and do not involve major disturbance to any land or waters. |
| Future act | An act that affects native title in relation to the land and water to any extent. A future act may involve the granting of a right to conduct a proposed activity or development that affects native title rights. |
| Mining tenement | A prospecting licence, exploration licence, retention licence, mining lease, general purpose lease or, a miscellaneous licence granted under the <i>Mining Act 1978</i> (WA) including the specified piece of land in respect of which the mining tenement is granted. |
| Resource authority | A prospecting permit, mining claim, exploration permit, mineral development licence, or water monitoring authority, granted under the <i>Mineral Resources Act 1989</i> (Qld). |
| Right to negotiate | The right to negotiate allows the native title party and the proponent to negotiate with a view to reaching an agreement. Parties to the mining lease negotiations must negotiate in good faith to obtain an agreement that may be subject to conditions. |

Acronyms and abbreviations

| | |
|-------|---|
| AEC | Australian Electoral Commission |
| Cth | Commonwealth |
| CCC | Corruption and Crime Commission (WA) |
| DEHP | Department of Environment and Heritage Protection (Qld) |
| DMP | Department of Mines and Petroleum (WA) |
| DNRM | Department of Natural Resources and Mines (Qld) |
| DSD | Department of State Development (WA or Qld) |
| EIS | Environmental Impact Statement |
| FIRB | Foreign Investment Review Board |
| ILUA | Indigenous Land Use Agreement |
| M4SD | Mining for Sustainable Development Programme |
| MACRA | Mining Awards Corruption Risk Assessment |
| MNES | Matters of national environmental significance |
| NNTT | National Native Title Tribunal |
| NTRB | Native Title Representative Body |
| NTRBC | Native Title Registered Body Corporate |
| NTSP | Native Title Service Provider |
| PBC | Prescribed Body Corporate |
| Qld | Queensland |
| SDPWO | <i>State Development and Public Works Organisation Act 1971 (Qld)</i> |
| WA | Western Australia |

Background

Australian state and territory jurisdictions administer and regulate mining. Commonwealth government legislation that applies to mining, and which state legislation cannot override, is the *Native Title Act 1993* (Cth) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Because of the multiple jurisdictions regulating mining in Australia the research focussed on two key states: Western Australia and Queensland. These states were chosen for the focus of the research due to the significance of the resource sector in each state. Western Australia and Queensland are the largest mining states by revenue generated, the number of operating mines, and the state economies are closely linked to the resources sector. The states cover a broad spectrum of minerals and coal, and both have large amounts of land either under Native Title or undergoing Native Title determination.

Mining is complex and there are many different approvals processes determined by the type and scale of the mining activity. There are also other approvals, licences, permits and agreements that have to be obtained before mining activities can commence, for example environmental approvals and native title agreements.

The key focus of the research for both states was the approvals process for mining leases and for large infrastructure projects. In Western Australia, the research also examined the approvals process for exploration licences due to the significant amount of land under exploration. Western Australia has the largest tract of lands in Australia

either under Native Title or available to be claimed, so the state administration of the Commonwealth Native Title process was examined. In Queensland, the state and Commonwealth environmental approvals process was examined for large infrastructure mines due to the controversy and public interest in environmental approvals for coal mining managed by the Coordinator-General through the coordinated project process.

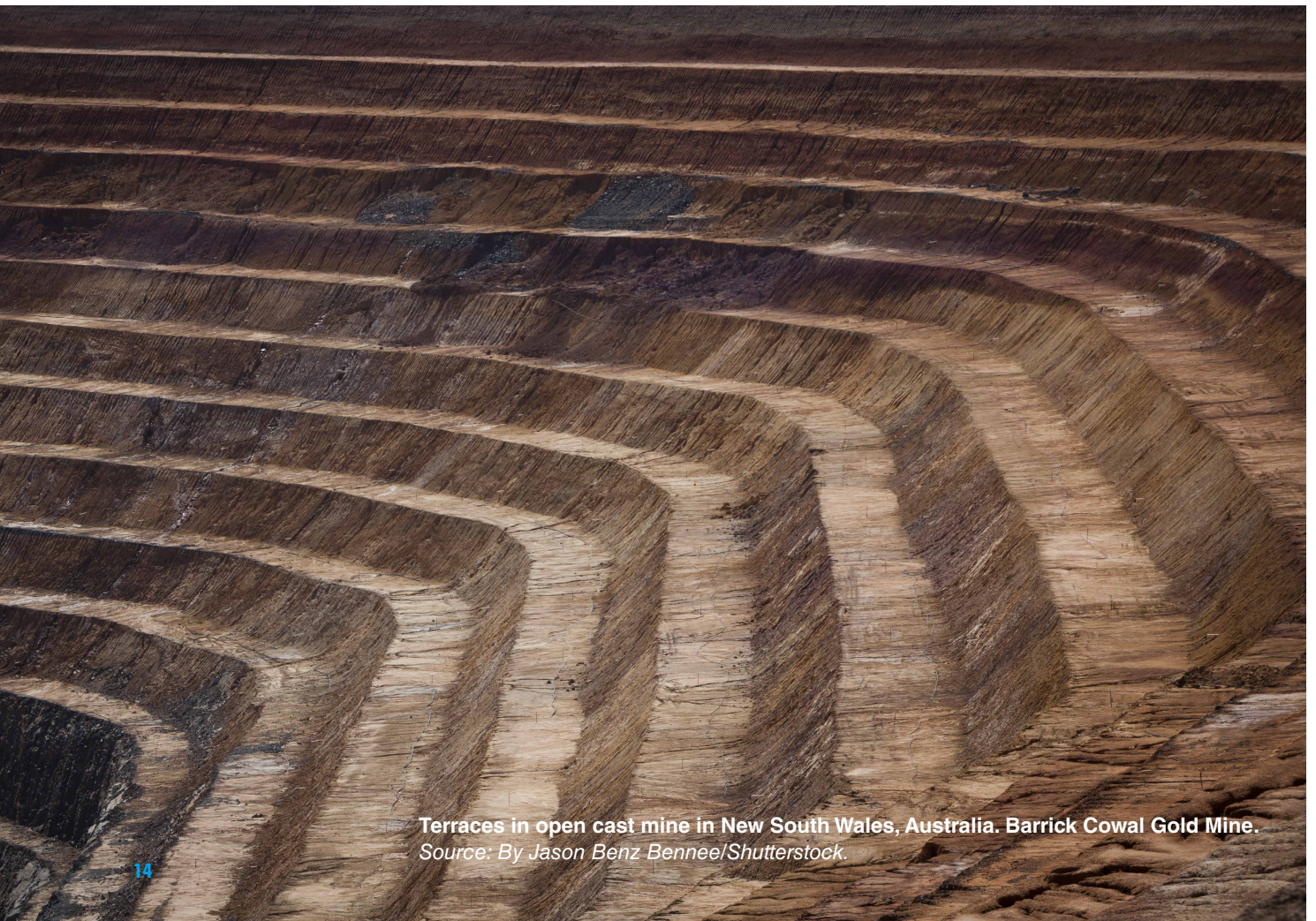
The research scope

- Western Australia: exploration licences, mining leases, State Agreement Acts and Native Title
- Queensland: mining leases, Commonwealth and state environmental approvals for large mines (coordinated projects).

The structure of the report

The body of the report is divided into four sections: *Western Australia*, *Queensland*, *Native Title*, and *Cross cutting issues*. Each state section and the section on Native Title briefly describes the approvals processes examined by the study, and provides an analysis of the vulnerabilities and risk for the processes. The section on *Cross cutting issues* provides a description and analysis of vulnerabilities and risks that have a broad scope across jurisdictions. These sections are followed by a discussion of results and the conclusions.

Appendix A contains detailed process maps for each type of approval examined and Appendix B contains the risk assessment worksheets as provided for in the MACRA Tool.



Terraces in open cast mine in New South Wales, Australia. Barrick Cowal Gold Mine.
Source: By Jason Benz Bennee/Shutterstock.

Methodology

MACRA Tool

The analysis in this report uses the research method contained in the *Mining Awards Corruption Risk Assessment (MACRA) Tool*. The MACRA Tool was created by an independent expert¹ engaged by Transparency International to provide a methodology for identifying and assessing corruption risks in the twenty countries participating in the M4SD Programme. The MACRA Tool built on Transparency International's experience with corruption risk assessment in other fields such as National Integrity Systems and other mining and extractive sector instruments, indices and resources. Experts from multilateral institutions, major international non-governmental organisations and industry bodies provided valuable feedback in the development of the MACRA Tool.

The first part of the risk assessment involves data collection and analysis. The MACRA Tool guided users to create a map of the approval process; collect information regarding how the process works in practice, and the context of the mining awards process. Users then analysed these three aspects of mining approvals – the process, practice and context – to identify vulnerabilities to corruption.

Vulnerabilities are systemic, regulatory, institutional or other weaknesses that create risks of corruption. These risks create opportunities for corrupt conduct to occur or to pass undetected and thus undermine the lawful, compliant and ethical awarding of licences, leases, and contracts.

The second part of the tool enables users to identify and assess the specific corruption risks created by these vulnerabilities. The tool contains a list of 89 common risks relating to five different corruption risk factor categories: 1) process design; 2) process practice, 3) contextual factors 4) accountability mechanisms; and 5) legal and judicial responses to corruption.

The Tool allows users to adopt or modify the common risks, or identify a new risk that is more appropriate for the context. Users then assess each corruption risk by analysing evidence of the **likelihood of it occurring and of its potential impact**.

The MACRA tool contains a list of 89 common risks for mining approvals. The assessment revealed that nine of these corruption risks are present in the examined mining and mining-related awards processes. This report assesses

these risks and the underlying vulnerabilities/sources using the MACRA Tool. Participating chapters were not required to assess all 89 risks. The analysis of the approvals processes revealed vulnerabilities for which corresponding risks were assessed.

Data collection and research methods

Data was collected for the risk analysis by conducting interviews with experts and by undertaking extensive desktop research.

Interviews

Forty-seven interviews were conducted with experts from government (13), industry (13), civil society (5), academics (6), Indigenous traditional owners (6), and consultants (4) in Perth, regional Western Australia and Brisbane who had specific information about the mining approvals process. Interviews were semi-structured and used to gather specific information or to obtain information regarding sources or areas for further research. Interviews were confidential and the names of interviewees are not identified in the report. Where reference is made to information provided in an interview, the information is attributed to 'expert interview' and the place and month of the interview is provided.

Desktop research

Desktop research involved the collection of data from relevant Acts and regulations, published government guidelines and policies to map the awards processes and collect information on integrity frameworks; Hansard, court cases, journal articles, books and other published research to understand the context of mining approvals, and to analyse risk; and news articles for evidence of risk. Comprehensive research was undertaken into the technical process of mining approvals but this research is noted but not documented in the report.

Validation of risks

The risks were scored according to a scale of whether or not a risk could or had occurred, the mechanisms in place to prevent the risk happening and the evidence available of the impact of the risk. Representatives of civil society, industry and academia, who were not involved in the interview process, validated the risks assessments, maps and specific sections of the reports. Government officials were involved in reviewing the process maps wherever possible.

¹ Michael Nest 2016

This section provides the context for mining approvals in Western Australia and describes the strengths and vulnerabilities of the approvals process in relation to corruption risk, and analyses the risk for exploration licences and mining leases and the negotiation process for State Agreements.

WESTERN AUSTRALIA

Western Australia is a resource rich state. It is the world's largest producer and exporter of iron ore.² In the year 2015 – 2016 the value of minerals mined in Western Australia was \$69.5 billion³ and the royalty revenue paid into the state's Consolidated Revenue Fund was \$4 billion.⁴ Iron ore is the state's highest value commodity and accounts for 71% (more than 48 billion) of total mineral sales.⁵ Gold, alumina and bauxite, and nickel are the next highest value commodities. Other commodities mined in the State are base metals (copper, lead, and zinc), coal, construction materials, diamonds, gems and semi precious stones, manganese, mineral sands (garnet, ilmenite, leucoxene, zircon), rare earths, salt, silver, spongolite, and vanadium.⁶

In the 2015 – 2016 year, 37.6 million hectares, slightly less than 15% of Western Australia's land area was covered by mining tenements, the majority, 83%, being exploration licences.⁷ The total number of mineral tenements in 2015 – 2016 was 19,276.⁸

The 2017 Fraser Institute Annual Survey of Mining Companies ranks Western Australia number three out of 104 countries for investment attractiveness.⁹ Western Australia is consistently the top ranked state in Australia in all three

2 Department of State Development, Government of Western Australia, *Iron ore profile* www.dsd.wa.gov.au/about-the-state/major-resource-producer/iron-ore-profile

3 Department of Mines and Petroleum, 2105 – 2016 *Major commodities resources data* www.dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx

4 Department of Mines and Petroleum, 2105 – 2016 *Economic indicators resources data* www.dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx

5 Department of Mines and Petroleum *Statistics Digest 2015 – 2016* (2016) www.dmp.wa.gov.au/Documents/About-Us-Careers/Stats_Digest_2015-16.pdf

6 Department of Mines and Petroleum, *Major commodities resource data*, above n 2.

7 Department of Mines and Petroleum, *Statistics Digest 2015 – 2016*, above n 4, 9.

8 Department of Mines and Petroleum, 2105 – 2016 *Spatial and regional data* www.dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx

9 Fraser Institute, *Annual Survey of Mining Companies 2016* (28 February 2017) www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2016.

Fraser Institute categories. Since 2012, Western Australia has annually ranked in the global top six, coming in at number one in 2015 and number two in 2013.

The Government of Western Australia regulates mining and the ownership of minerals resides with the Crown. The Minister for Mines and Petroleum administers the *Mining Act 1978* (WA) and the *Mining Regulations 1981* (WA).

Exploration Licence and Mining Lease Approvals Process Western Australia

The Department of Mines and Petroleum (**DMP**) is the administrative and regulatory body for the extractive industries. It manages the titles systems, provides geoscientific information, collects royalties, and ensures that safety, health and environmental standards are consistent with relevant State and Commonwealth legislation, regulation and policies.

Rights conferred by a mining lease and an exploration licence

A mining lease confers title to all minerals unless otherwise specified by the Minister. A Minister may grant a mining lease for only one or more minerals because of the locality of the mine, government policy, and in matters of the public interest.¹⁰ A mining lease authorises the lessee and their employees and contractors to work and mine the land; remove minerals; take and divert water, sink a bore and take the water for domestic and mining purposes, subject to the *Rights in Water and Irrigation Act 1914* (WA); and undertake acts necessary to carry out mining operations. The lessee is entitled to use, occupy and enjoy the land for mining purposes; and owns the minerals mined.¹¹

An exploration licence authorises the holder to enter the land with contractors, employees, vehicles, machinery and equipment; to explore and carry out operations including the digging of pits, trenches and holes, the sinking of bores and tunnels; to excavate, and remove earth, soil, rock, stone, fluid or mineral bearing substances not exceeding 1000 tonnes; and to take and divert water, sink a bore and take the water for domestic and exploration purposes subject to the *Rights in Water and Irrigation Act 1914*.¹²

For further information on the approvals process for exploration licences and mining leases refer to the Western Australian flow charts: Exploration licence, Mining lease with mineralisation report or resource report, and Mining lease with mining proposal in Appendix A.

10 *Mining Act 1978* (WA) s 110.

11 *Ibid* s 85

12 *Mining Act 1978* s 66; *Mining Regulations 1981* (WA) reg 20

Strengths of the approvals process – Exploration Licences and Mining Leases, Western Australia

The Department of Mines and Petroleum has robust systems in place, which promote transparency and accountability create a level playing field, and mitigate the risk of corruption including:

- Comprehensive information on the department's website regarding the approvals' process
- Online application system¹³
- Public access in real time to applications being lodged¹⁴
- Publicly available information on mining tenements¹⁵
- Comprehensive information on Western Australian geology, geophysics, and geochemistry available to the public¹⁶
- First in time system¹⁷
- Timelines tracked on Minerals Titles Online
- Applications assessed by Mining Registrar and by departmental officer
- The Warden's court will hear objections from any party, and decisions are published
- Criteria for assessments by Mining Registrars and departmental officials clearly defined¹⁸
- Public access to statistics on resources and approvals performance reports¹⁹

In addition, DMP has integrity systems in place and inducts, trains and mentors staff in the Code of Conduct. All staff that have a decision-making role are required to sign a declaration stipulating that resource shares or interests are not held.²⁰ DMP does not have a public register of financial interests though staff are required to register all gifts, hospitality and conflicts of interest with the department.

13 Department of Mines and Petroleum, *Minerals Titles Online* www.dmp.wa.gov.au/Mineral-Titles-online-MTO-1464.aspx

14 Ibid; it is possible to get an RSS feed for applications lodged; applications are also lodged on Mining Notices

15 Department of Mines and Petroleum, Government of Western Australia, *Online Systems*, www.dmp.wa.gov.au/Online-Systems-1527.aspx; see Mineral Titles Online, Tenagraph Online, and Minedex.

16 Ibid see GeoVIEW.WA and Data and Software Centre

17 The system is a first in time system except in the case of competing applications for a tenement. The Minerals Titles Division, DMP, deems that all applications for the same tenement received between 4:30pm and 8:30am are submitted at the same time. A ballot will then be held at the Regional Mining Registrar's office, and the first, second and third balloted applications will be prioritised. *Mining Regulations 1981* reg 59B(3); *Mining Act 1978* s 105A.

18 *Mining Act 1978* ss 59(3), 73(3), 74A, 75(3); *Mining Regulations 1981* reg 89C; Expert interviews (Perth, December 2016).

19 Department of Mines and Petroleum, *Latest Statistic Release* www.dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx; *DMP approval performance* www.dmp.wa.gov.au/Investors/Approvals-14055.aspx.

20 Department of Mines and Petroleum, *Code of Conduct* www.dmp.wa.gov.au/Documents/DMP_Code_of_conduct_2014.pdf.

DMP also has integrity strategies and policies to prevent corruption and promote transparency and engagement:

Fraud and Corruption Control plan, Transparency Policy, Stakeholder and Community Engagement Policy.²¹

Further, the Government of Western Australia has put in place integrity systems and Offices and/or Commissioners for oversight, education and corruption prevention for public authorities and Ministers and Members of Parliament:

- Corruption and Crime Commission (CCC), Public Sector Commission, Ombudsman, Information Commissioner, and the Auditor General.²²
- Ministerial Code of Conduct and Code of Conduct for Members of the Legislative Assembly; Lobbyist Code of Conduct and Register; Register of Members of the Legislative Assembly financial interests available online.²³

The competitive and entrepreneurial nature of the mining industry also mitigates against risk.²⁴ Industry expects consistency and a level playing field, and will litigate or lodge objections in the Warden's Court if they view decisions made as being inconsistent or creating an unfair advantage or disadvantage for a party.²⁵

21 Department of Mines and Petroleum, Government of Western Australia, *Fraud and Corruption Plan*, (6 July 2015), www.dmp.wa.gov.au/Documents/About-Us-Careers/Fraud_and_Corruption_Report.pdf; *Transparency Policy*, www.dmp.wa.gov.au/Documents/About-Us-Careers/Transparency-Policy.pdf; *Stakeholder Engagement Activities Report*, (January 2017), www.dmp.wa.gov.au/Documents/About-Us-Careers/DMP-StakeholderEngagement_ReportQ4_2016.pdf; *Consultation*, www.dmp.wa.gov.au/Consultation-16497.aspx

22 The Corruption and Crime Commission, Government of Western Australia www.ccc.wa.gov.au/; Public Sector Commission www.publicsector.wa.gov.au/; Ombudsman Western Australia, Government of Western Australia www.ombudsman.wa.gov.au/index.html; Office of the Information Commissioner, Government of Western Australia, www.foi.wa.gov.au/en-us/; Office of the Auditor General www.audit.wa.gov.au/.

23 Department of Premier and Cabinet, Government of Western Australia, *Ministerial Code of Conduct* www.dpc.wa.gov.au/RoleOfGovernment/Documents/Ministerial_Code_of_Conduct_April2013.pdf; Department of Premier and Cabinet, *Code of Conduct for Members of the Legislative Assembly* [www.parliament.wa.gov.au/webcms/webcms.nsf/resources/file-code-of-conduct-for-members/\\$file/Code+of+Conduct+for+Members.pdf](http://www.parliament.wa.gov.au/webcms/webcms.nsf/resources/file-code-of-conduct-for-members/$file/Code+of+Conduct+for+Members.pdf); Public Sector Commission, Register of Lobbyists, *Code of Conduct* www.lobbyists.wa.gov.au/code-conduc; *Members of Parliament (Financial Interests) Act 1992* (WA).

24 Expert interviews (Perth, December 2016, January, March 2017).

25 See Warden's Court Listings and Warden's Court decisions at Department of Mines and Petroleum, *Warden's Court* www.dmp.wa.gov.au/Minerals/Warden-s-Court-1533.aspx.

Vulnerabilities and risk – Exploration Licences and Mining Leases, Western Australia

Three areas have been identified where there are vulnerabilities in the approvals process – **Ministerial discretion; leaking of confidential information; and inadequate due diligence undertaken by DMP of an applicant's company and principals, and of its beneficial ownership.** These areas are described in detail below and the risk in the process is analysed.

1. Ministerial discretion

The discretion of the Minister to grant or refuse an exploration licence or mining lease has been identified as a vulnerability in the approvals process. The Minister may grant or refuse an application irrespective of the recommendation of the Warden after a hearing in the Warden's Court.

Ministerial discretion in the Mining Act 1978

Section 76(6) of the *Mining Act 1978* states in regard to the recommendations that the Warden makes in a report to the Minister:

On receipt of a report under subsection (2) or (5), the Minister **may**, subject to subsection (7), grant or refuse the mining lease as the Minister **thinks fit**, and **irrespective** of whether

- a. the report recommends the grant or refusal of the mining lease; and
- b. the applicant has or has not complied in all respects with the provisions of this Act.

In practice the noncompliance of the applicant with provisions of the Act as described in section 75(6)(b) does not contribute significantly to a process vulnerability. Noncompliance refers to irregularities in the application or proceedings. For example, a grant of tenement remedies any deficiencies in the marking out of the tenement, or in the application documents. This precludes challenges in the courts after grant regarding the legality of the grant on administrative details and stops other mining companies appealing the awarding of a licence or lease on minor administrative procedural grounds.

The stipulation in the Act is similar in section 59(6) regarding the recommendation of the Warden to grant or refuse an exploration licence. The Minister has the discretion to grant or refuse the exploration licence as the Minister thinks fit.

The Minister may terminate an application before the Mining Registrar or Warden has made a determination or recommendation in respect of the application, or refuse an application for a mining tenement if the Minister is satisfied on reasonable grounds in the public interest that the ground should not be disturbed or the application granted.²⁶ 'Public interest' is not defined in the Mining Act, but the judiciary has made comments in the courts to define public interest. As defined by the courts public interest can include environmental considerations, and matters of government policy and principle, which could include the promotion of

investment.²⁷ The Warden also has the discretion to make a recommendation to the Minister based on public interest considerations.²⁸

There is no appeal to a Minister's decision to grant or refuse a mining lease except for a judicial review of the administrative procedures.²⁹

The application of ministerial discretion, and the vulnerability in the approvals process, is illustrated in the two case studies described below.

CASE STUDY: CAZALY IRON³⁰

The Rhodes Ridge Joint Venture, a Rio Tinto JV, was granted an exploration licence over the Shovelanna iron ore deposit on 27 August 1989. The licence was due to expire at midnight, 26 August 2005. Rio Tinto (Rio) had been granted exemptions to surrender twice, partial exemptions from expenditure on ten occasions, and had been granted 11 extensions for a period of one year. Rio dispatched forms to apply for another extension but the Marble Bar Mining Registrar did not receive the documentation before the deadline, and the licence expired. Cazaly Iron applied for an exploration licence on 29 August 2005. Rio subsequently lodged three mining lease applications over the Shovelanna deposit. Cazaly objected to the grants arguing that their application for an exploration licence was first in time. Rio wrote to the Minister requesting that he exercise the power to refuse the grant of Cazaly's application. The Minister terminated the Cazaly application in the public interest. Whilst not obliged under the Act to publish his decision the Minister did so citing his reasons: the State's iron ore policy, fairness, and promoting investment. Cazaly appealed to the Supreme Court who refused to overturn the Minister's decision arguing that the Minister is entitled to take into account matters of policy and principle.³¹ The decision was viewed as a judgment in favour of big business, and the Association of Mining and Exploration Companies commented that there were different sets of rules for different players.³²

²⁷ Michael Hunt, *Hunt on mining law of Western Australia*, (The Federation Press 5th ed, 2015), 233-234.

²⁸ Angela Petros, 'Challenging the Exercise of the Warden's Discretion in Western Australia' (1998) 164 *Australian Mining and Petroleum Law Journal*.

²⁹ LexisNexis, *Halsbury's Laws of Australia*, (12 April 2017) 70 Energy and Resources Law, 'I Minerals/(4) Mining Titles/(H) Mining Titles in Western Australia' [170-2405].

³⁰ *Re Minister for Resources Ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175.

³¹ Hunt, above n 27, 233; Kylie Boston, *Ministerial Discretion and the Mining Act 1978* (WA) (LLM Hons, The University of Western Australia, 2006).

³² Julie-Anne Sprague, 'Cazaly loses Shovelanna, considers High Court Action', *Business News* (online), 28 August 2007 www.businessnews.com.au/article/Cazaly-loses-Shovelanna-considers-High-Court-action

²⁶ *Mining Act 1978* s 111A.

CASE STUDY: ELLENDALE DIAMOND MINE

Another example of ministerial discretion is the recent Ellendale diamond mine closure. The Kimberley Diamond Company who held the tenements entered into administration in July 2015. By disclaiming the tenements as onerous property under the *Corporations Act 2001* the liquidators managed to shift the lease and the responsibilities for care, maintenance, security, and rehabilitation back to the government instead of selling the lease. The Minister refused all subsequent applications for an exploration licence for the tenement, as it would have meant the licence holders weren't responsible for the rehabilitation costs of the mine site. As such only applicants for a mining lease are able to successfully apply for the tenement.³³ This case illustrates the importance of the application of Ministerial discretion in the public interest.

Ministerial discretion also applied in a case that the Corruption and Crime Commission (CCC) published in 2009, *A Ministerial Decision in Relation to Applications for a Mining Tenement at Yeelirrie* which involved the influence of lobbyists on the Minister's decision.³⁴ This investigation coupled with other investigations led to the Premier asking the Minister to resign from Cabinet and the Labor Party. The Minister was suspended from Parliament for seven weeks, and apologised to Parliament.³⁵

Analysis of vulnerability and risk

The vulnerability in the approval process of Ministerial discretion could lead to external interference in the awarding of licences and leases. This did occur in the Yeelirrie case

33 Ben Collins, 'Minister moves to reopen Ellendale diamond mine and avoid environmental costs,' *ABC News* (online), 27 January 2017 www.abc.net.au/news/2017-01-27/minister-moves-to-reopen-ellendale-diamond-mine-and-avoid-costs/8217874; Nick Evans, 'In a Kimberley Diamond Daze,' *The West Australian* 26 November 2015 www.thewest.com.au/business/finance/in-a-kimberley-diamond-daze-ng-ya-133058; Department of Mines and Petroleum, *Ellendale Information Sheet 1*, (December 2015) www.dmp.wa.gov.au/Documents/Environment/Ellendale_Information_Sheet.pdf.

34 Corruption and Crime Commission, Government of Western Australia, *Report on the Investigation of Alleged Public Sector Misconduct in Connection with the Activities of Lobbyists and Other Persons, A Ministerial Decision in Relation to Applications for a Mining Tenement at Yeelirrie* (14 September 2009) www.ccc.wa.gov.au/reports/2009.

35 Procedures and Privileges Committee, Parliament of Western Australia, *Inquiry into the Member for Murchison-Eyre's Unauthorised Release of Committee Documents and Related Matters* (2007) 26; Parliamentary Library, Parliament of Western Australia, *Western Australian Government Ministerial and Cabinet Resignations, Retirements and Lost Cabinet Positions 1901 – 2016* (August 2016) [www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/Publications+Ministerial+Resignations/\\$FILE/Ministerial+Resignation+and+Sackings+2016.pdf](http://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/Publications+Ministerial+Resignations/$FILE/Ministerial+Resignation+and+Sackings+2016.pdf). Sacked Bowler Farewells Parliament, *ABC News* (online) 28 February 2007 www.abc.net.au/news/2007-02-28/sacked-bowler-farewells-parliament/2205538.

discussed above, but subsequent safeguards were put in place to prevent the ability of lobbyists to influence the decision-making process. Whilst the interpretation of public interest provisions in the Mining Act falls to the Minister, there are checks and balances in the system to prevent self-interested decision-making.

These checks and balances include:

- The opportunity to challenge decisions on procedural grounds in the Supreme Court
- Mining Registrars and departmental officers assessing applications class systems would take note of any perceived or actual corrupt decision
- Comprehensive integrity systems have a role in the education of staff and the prevention of corruption
- Mining companies are competitive, entrepreneurial, and expect a level playing field
- A robust media reports on inconsistencies in resource sector decisions
- Civil society monitors the sector and will protest against decisions that it perceives are unjust.

Where there are potential problems is the **culture of mateship** that can exist in political parties and the pressure that mateship and friendship can bring on a Minister. Revolving doors can lead to ex politicians working as lobbyists, and in the resources industry. These issues are discussed in more detail in the section *Cross cutting issues*.

The vulnerability in the approvals process of Ministerial discretion can lead to a process design risk categorised in the MACRA Tool as *What is the risk of external interference in the cadastre agency's awarding of licences and leases?* The risk was scored as a minor risk due to the accountability in the system and the integrity systems in place to prevent corruption.

Summary

In summary, the power of the Minister to grant or not grant a mining tenement has the potential to lead to corrupt behaviour and undue direct influence by lobbyists and the mining industry. However, the level of scrutiny of decisions by public officials, other mining companies, the media, and the presence of integrity bodies, and public reporting, acts as both a deterrent and a safeguard.

2. Leaking of confidential information by Ministers and departmental officials

The possibility that information could be leaked is another vulnerability in the practice of the mining approvals practice. Most of the information regarding a mining tenement application is available online to the public. However, there is certain confidential information that is open only to the applicant for reasons of commercial confidentiality and because the effect that information in a mineralisation report relating to unconfirmed data, could have on the market.³⁶

36 Expert interview (March, 2017); Robyn Phillips, *Liability of Company Directors and Competent Persons for Resource/Reserve Disclosure* (2000) JORC Library www.jorc.org/library.asp.

Leaking of information about other applicants and about impending decisions could give an advantage to a mining company. However, because of the checks and balances in the approvals process, leaking of information does not have the potential to significantly affect the approvals process, but it could have an impact for companies and shareholders.

The CCC reports a rise in the number of reports of unlawful use of computer in public authorities in WA, which is partly attributable to a rise in audit activity.³⁷ 28% of allegations in 2016-2017 Q1, and Q2 were for unlawful computer use. Section 440A, of the *Criminal Code Act Compilation Act 1913 (WA)* states that it is a criminal act to use a restricted-access computer system for a benefit. Of 2,474 overall reports and notifications to the CCC, there were no listed allegations against the DMP.³⁸ Whilst the reports and notifications weren't for DMP, it does show the general risk for accessing confidential online information and in a sense the inherent risk in human behaviour. A culture of probity and honesty in a department and office can go some way to preventing the risk. DMP's Code of Conduct and induction and training provide guidance on confidentiality and release of official information, and document management.³⁹

There is a risk that a Minister and his advisor, or a government official can leak information to lobbyists and companies, and this did occur in some of the cases investigated by the CCC, and in one case subsequently prosecuted in the courts.⁴⁰

Analysis of vulnerability and risk

The vulnerability in the approvals process to leaking confidential information is a process practice risk in the MACRA Tool, *What is the risk that confidential information regarding applications for mining leases and exploration licences will be leaked?* The risk has been scored as a **low risk** due to the transparency of information lodged with DMP, and the particular culture of DMP to provide publicly accessible information.⁴¹ There have been no reported cases of leaking of confidential information by the department or the Minister in the last thirteen years.

The impact of leaking of information has the potential to create an unequal and inconsistent application process,

37 Corruption and Crime Commission, *Overview of Serious Misconduct*, (April 2017) www.ccc.wa.gov.au/news/408 3.

38 Ibid 2

39 Department of Mines and Petroleum, *Code of Conduct* www.dmp.wa.gov.au/Documents/DMP_Code_of_conduct_2014.pdf

40 'State loses appeal over public servant Gary Stokes' spent conviction' *ABC News* (online) 31 July 2013 www.abc.net.au/news/2013-07-31/state-loses-appeal-over-public-servant27s-spent-conviction/4856048. Corruption and Crime Commission, *Report on the Investigation of Alleged Misconduct Concerning Rezoning of Land at Whitby* (3 October 2008) www.ccc.wa.gov.au/reports/2008; Corruption and Crime Commission, Government of Western Australia, *Report on the Investigation of Alleged Public Sector Misconduct in Connection with the Activities of Lobbyists and Other Persons, Fortescue Metals Group LTD* (14 September 2009) www.ccc.wa.gov.au/reports/2009;

41 On the department's website it states 'DMP's guiding principle is that if there is no legal reason to protect information, it should be open to public access' Department of Mines and Petroleum, *About DMP*, www.dmp.wa.gov.au/About-Us-Careers/About-DMP-1422.aspx.

can empower mining companies and lobbyists, and could affect a company's share price. However, the likelihood of it occurring is low. It should be noted that this risk has only been documented for mining leases in Western Australia, but that the risk could apply across other processes in Western Australia and Queensland, especially as the risk applies to human behaviour and its management.

Summary

The leaking of confidential information can allow interested parties to have access to information regarding the approvals process, which they could use to put pressure on Ministers. Leaked information may have an impact on a company's share price and could lead to financial gain for an individual or company. The culture of the Department of Mines and Petroleum and the practices it has put in place mitigate against the disclosure of confidential information and the affect that it can have on the approvals process. However, the number of reports of unlawful computer use to the CCC suggests the importance of monitoring and of continued awareness by senior management in the DMP of the possibility that it could occur in the future.

3. Inadequate due diligence undertaken by DMP into the applicant's company and principals and of its beneficial ownership

Due diligence is the investigation of a company, which can take many forms depending on the context the investigation is applied in. Government mining departments commonly undertake investigations to confirm the resource to be mined, and the company's technical capacity to mine. However, they do not perform adequate due diligence into the character and integrity of a company and its principals creating financial, legal, environmental and social integrity risks. Due diligence into character and integrity can cover civil litigation and criminal history, financial history, regulatory records, and corporate affiliations, and it can also cover an investigation into the social record of a company.

The *OECD Due Diligence Guideline for Meaningful Stakeholder Engagement in the Extractives Sector* describes responsible business conduct for community engagement.⁴² The *United Nations Guiding Principles on Business and Human Rights* sets out the obligations of states and businesses to respect, protect and fulfil human rights and fundamental freedoms.⁴³ These guidelines provide the framework for government due diligence into a company's stakeholder engagement and human rights record.

Whilst it is common for mining companies to investigate the background of partners, contractors and agents to minimise risk, DMP undertakes limited due diligence investigation of applicants for mining leases. This can leave the government exposed to future liabilities, if the company fails or does not fulfil its obligations for compliance with the terms of its lease. It can also create a risk that companies or principles with a

42 OECD, *OECD Due Diligence Guideline for Meaningful Stakeholder Engagement in the Extractives Sector*, (2017) www.oecd.org/daf/inv/mne/stakeholder-engagement-extractive-industries.htm.

43 United Nations, *Guiding Principles on Business and Human Rights* www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

history of noncompliance, criminal or corrupt behaviour will try and bring corrupt behaviour and ‘work arounds’ to the resource sector in WA.

Mining companies will also, when working in high risk environments, undertake an investigation into partners and agents to determine the ultimate beneficial ownership of a company. DMP does not investigate the beneficial ownership of companies leaving it exposed to the risk of not knowing who controls a company applying for a mining lease.

Whilst previously the ownership of companies investing in mining in Western Australia were predominately Australian, American, and Japanese with BHP and Rio Tinto being the largest players in iron ore, the landscape has changed with the entry of companies from China and other countries that have low scores on the Transparency International Corruption Perceptions Index.⁴⁴ This may create an opportunity for companies with a record of corruption or noncompliance to mine for resources in Australia.

Summary

Inadequate due diligence into the character and integrity of an applicant company and its principles can leave DMP exposed to liabilities if an applicant does not comply with the terms of its lease. Non-compliance could include failure to pay royalties, meet environmental obligations, manage the land, and comply with the requirements for mine closure, leaving DMP with care and maintenance, rehabilitation and mine closure liabilities. It also has the potential to impact Native Title parties if a company does not comply with terms of its agreement to provide compensation, and other benefits.

A further discussion of the vulnerability and the risk can be found in the section *Cross cutting issues*.

Vulnerabilities and risks Exploration Licences Western Australia



Exploration Drilling
Source: By Adwo/Shutterstock.

| Vulnerability | Risk | Score |
|---|--|-------|
| Minister has discretion to grant or refuse an exploration licence or mining lease application and may override the recommendation of the Warden’s Court | What is the risk of external interference in the cadastre agency’s awarding of licences and leases? | Low |
| Department officials have access to confidential information in online systems not available to the public | What is the risk that confidential information in applications for mining leases and exploration licences will be leaked? | Low |
| Inadequate due diligence into character of company and principals | What is the risk that there is inadequate due diligence on applicants’ integrity such as past lawful conduct and compliance? | High |

⁴⁴ Expert interview (Perth, December 2016); Transparency International, *Corruption Perceptions Index 2016* (25 January 2017) www.transparency.org/news/feature/corruption_perceptions_index_2016.

This section discusses the use of State Agreement Acts in Western Australian and analyses the approvals process for vulnerability and risk. A flow chart for the approvals process for State Agreements is available in Appendix A.

State Agreements Western Australia

Definition of a State Agreement Act

A State Agreement Act is a contract between the State and a developer that is ratified by a statute of the Western Australian Parliament. State agreements set out the rights and obligations of the State and the proponent, and can only be changed by mutual consent.

The agreements set out the obligations of the company and of the State in relation to the provision of infrastructure and services. A State Agreement can contain provisions on the nature, size and timing of projects; finance, tax, incentives, and royalties; provision of infrastructure such as transport, electricity, water, housing and social facilities; obligations of the state and the miner; termination rights, and dispute resolution procedures.⁴⁵

Background

Up until 2000, many major mining projects in Western Australia for minerals other than gold were established under State Agreements Acts. Mining projects in the Goldfields regions did not operate under ratified agreements because there was already established infrastructure and towns. Iron ore projects were developed in remote regions in the north of the state, where there was no infrastructure.⁴⁶ Ports, roads, railways, towns, facilities for water, electricity and the community had to be built from scratch. State Agreements were a powerful mechanism that enabled the State and mining companies to develop remote regions. In the Pilbara, railways had to be built for the transport of iron ore. Under Western Australia law, the tenure and authority to build a railway can only be obtained under a special act (i.e. State Agreement) as specified in the *Public Works Act 1902 (WA)*.

Administration and approval of State Agreements

State Agreements are currently negotiated, administered and facilitated by the Department of State Development (DSD). The department acts as a facilitator and coordinates the approvals and consultations required for a large infrastructure project.

Before negotiations for a State Agreement commence

45 Malcolm Hollick, 'Industry agreement acts and environmental management in Australia' (1983) 7 (3) *Environmental Management*, 253, 256; Robin Chambers, *An overview of the Australian legal framework for mining projects in Australia* www.chamberslawyers.com/wp-content/uploads/downloads/2013/10/060518-Presentation-Eng.pdf.

46 Natalie Brown, 'Still waters run deep; the 1963-64 Pilbara iron ore state agreements and rights to mine dewatering' (2016) 35(1) *Australian Resources and Energy Law Journal*.

the relevant Minister will approve the project and present to Cabinet for approval. Cabinet also approves the final agreement between the state and the proponent before the Premier and the proponent sign the agreement. Parliament ratifies the agreement once it is signed.

Proponents are still required to obtain a mining lease, environmental approvals, native title agreements, heritage agreements, planning permits and any other approvals or permits required for the project.

Relationship with other legislation

State Agreements can override any other inconsistent legislation or Act except for the *Environment Protection Act 1986 (WA)*, the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, and the *Native Title Act 1993 (Cth)*.⁴⁷ For example, they can modify provisions in the *Mining Act 1978 (WA)* relating to relinquishment, expenditure, expiration periods for exploration licences, contribution to the mining rehabilitation fund, concessional rates of rent for mining leases and override the farmers veto.⁴⁸

The use of State Agreements and State Development Agreements in Western Australia

Over 60 State Agreements have been ratified. The most recent mining related State Agreements are the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002*, *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*, *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006*, *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010*, and in January 2017 a State Agreement was signed for Balla Balla Infrastructure, an integrated iron ore development.⁴⁹ Of these five agreements, two relate to the development of a mine and three are specifically for mining transport infrastructure – rail and port.

By contrast, State Development Agreements are a commercial contract between the State and the proponent. They are not ratified by parliament and the agreements are not available to public scrutiny. In the last 15 years, the State has used State Development Agreements to facilitate approvals for some large LNG projects – and Ashburton Nth (Wheatstone and Macedon). There is the potential for State Development Agreements to be used to facilitate approvals for mining projects.

State Agreements raise significant issues relating to accountability and transparency. However, given that State Agreements are now rarely used for mining projects except where a railway is being built, the issues are not as pertinent as they once were. Yet, State Agreements and State Development Agreements are still an available mechanism that the government can utilise to further development goals, and as such have been analysed in this risk assessment.

47 Hunt above n 27 12, 13.

48 Private landowner using their property for agricultural purposes can withhold consent.

49 Department of State Development, Government of Western Australia, *List of State Agreements* www.dsd.wa.gov.au/what-we-do/manage-state-agreements/list-of-state-agreements; Ben Creagh, 'Balla Balla iron ore project moves to next stage with state agreement' *Australian Mining* 24 January 2017 www.australianmining.com.au/news/balla-balla-iron-ore-project-moves-to-next-stage-with-state-agreement/.

It should also be noted that a State Agreement was implemented for a recent oil and gas project, *Natural Gas (Canning Basin Joint Venture) Agreement Act 2013*.

Vulnerabilities and risk – State Agreements

Two vulnerabilities have been identified in the State Agreement Act approval process: **lack of transparency in the negotiation and approval process**; and the **capacity for industry influence**, which is discussed in more detail in the section *Cross cutting issues*.

1. Lack of transparency in the agreement making process

A significant vulnerability identified in the negotiation process for State Agreements is that there is no public notification of the terms of the negotiation or transparency of the negotiation prior to signing of the agreement. The agreement is only publicly available once Parliament has ratified it and the State Law Publisher has published it. Once Premier and the mining company sign an agreement, it is a binding agreement that operates for the life of the projects.⁵⁰ There is no opportunity for public interest groups to have input into the terms of reference or negotiations or challenge the agreement in the courts.

Parliament can ratify agreements in a relatively short time, which provides little opportunity for parliamentary debate. Richard Hillman notes that controversy 'arises concerning the role of Parliament and the perception that it can be a 'rubber stamp' for the executive's will.⁵¹

The lack of transparency of the process can lead to accusations that preferential treatment has occurred, as in the case 'following the expedited negotiation and ratification of the [FMG] Railway and Port Agreement together with the significantly positive impact on the FMG share price'.⁵²

Hillman also notes that the lack of transparency can create considerable public unease.⁵³ The lack of transparency creates the potential for government to be unduly influenced by a mining company, and can allow Ministerial discretion to be exercised without public oversight.

The culture of secrecy extends to the DSD website. The website contains a list of agreements but no links to the agreement, and no guidelines to State Agreements or process charts. In 2004, the Auditor General recommended that procedural guidelines should be developed for State Agreements. If they were developed they have not been made available to the public.⁵⁴

The State Agreement process also involves considerable Ministerial discretion. When combined with a lack of

transparency, and the ability of industry to negotiate directly with politicians regarding projects, considerable risk is created of state and policy capture, and the potential for corruption is increased.

Analysis of vulnerability and risk

The lack of transparency and the secrecy of the process is a process design risk equating to the risk, *What is the risk that the negotiation process and the components of the negotiations, including what is negotiable and non-negotiable, will not be publicly knowable?* The likelihood of the risk occurring is high due to the lack of transparency of the negotiating process. The impact is medium only because of the lack of evidence of corruption occurring, and the historical nature of mining agreements precluding against the availability of evidence. The overall score for the risk registered as a high risk.

A lack of evidence, given the historical nature of the use of State Agreements, made it difficult to assess risk as academic articles, court cases, and news articles were not contemporary. The Auditor General's recommendations in 2004 that criteria and guidelines for State Agreements be developed⁵⁵, may have brought about changes, but as information is not available on the DSD website it is difficult to assess what changes have occurred.

Summary

The lack of transparency of State Agreement negotiations can lead to preferential treatment of mining companies and the perception of undue influence of industry on the approvals. It can create public unease and allows for ministerial discretion to be exercised without mechanisms of accountability. Whilst there have been no reported cases of corruption, lack of transparency can enable corrupt decision making to occur. The secretive nature of State Agreements and State Development Agreements can raise concern if they are used by the Western Australian government for future large mining infrastructure development.

2. Industry influence and policy capture

The capacity for industry influence in the negotiations for a State Agreement has been identified as a vulnerability in the negotiation process. The rationale for the negotiation of a State Agreement can be driven by the expediencies of State policy. The decision to negotiate a State Agreement is made by the Minister and then approved by Cabinet. Both Labor and Liberal administrations have enthusiastically embraced State Agreements as a means to drive economic development. Proponents can negotiate directly with the government understanding that the government's policy is to seek investment, encourage development of natural resources, maximise economic rent, and also that the terms agreed to in a State Agreement are not rigorously enforced.⁵⁶

The case study below illustrates some of the issues that can arise with State Agreements, the influence of industry, the culture of government and the difficulties that government can have enforcing the terms of State Agreements.

50 Richard Hillman 'The Future Role for State Agreements in Western Australia,' (2006) *Australian Resources & Energy Law Journal*, 293, 318.

51 Ibid 308.

52 Ibid 307.

53 Ibid.

54 Auditor General for Western Australia, *Developing the State: The Management of State Agreement Acts*, Report 5 June 2004 www.audit.wa.gov.au/reports-and-publications/reports/developing-the-management-of-state-agreement-acts-52004/ 20.

55 Ibid.

56 Hillman above n 50 295.

CASE STUDY: THE PILBARA INFRASTRUCTURE AGREEMENT

FMG sold the government a vision of a multi access railway that would promote investment opportunities for iron ore in the Pilbara, boost exports and create employment.⁵⁷ Parliament quickly ratified the agreement and then FMG reneged on its agreement to provide multi access infrastructure through the use of crippling application provisions for other companies.⁵⁸

The 1960s Iron Ore State Agreements with BHP and Rio Tinto contained clauses stipulating that third parties could apply to access the rail. During the mining boom in the Pilbara, mining companies looking to develop iron ore mines in the Pilbara sought access to BHP's and Rio Tinto's lines. Commencing in 2004 Fortescue Metals Group (FMG) applied to access part or whole of these rail lines. The government supported the application as it wanted to open up the Pilbara to further mining development.⁵⁹ Rulings by the Australian Competition Tribunal allowed FMG access to some of the rail but not the busier networks. Rio Tinto and BHP opposed the decision in the courts. At this date subsequent challenges in the courts by Rio Tinto, BHP and FMG have led to access been denied to FMG.

In 2004, FMG frustrated at not being able to have third party access to rail in the Pilbara entered into negotiations with the State Government of Western Australia for a State Agreement and sold a vision of a multi access railway to transport iron ore in the Pilbara.⁶⁰

Cabinet gave approval to the State Government to negotiate the State Agreement and the agreement was signed in record time in November 2004.⁶¹ During the second reading of The Pilbara Infrastructure Agreement (TPI) Bill in Parliament the Hon Robin Chapple stated:

The agreement will require the company to actively promote access and to attract new customers. That is again another provision that has not been contained in past agreements. That is another reason that this agreement will be very good for the State.⁶²

In 2013 Brockman Mining applied to FMG to run trains on the TPI rail and FMG refused. Court decisions ruled in favour of Brockman; FMG subsequently appealed to the Federal Court and lost. FMG argued that Brockman did not have the financial and management capability to conduct rail operations and had refused its application for third party access on those grounds.⁶³ The High Court rejected an application by FMG for special leave to appeal in September 2016. Brockman will still have to demonstrate in an application to FMG that its management and staff have the required experience and that Brockman has the financial resources to carry out the operation. FMG's CEO commented in regards to Brockman capacity to demonstrate financial capability, 'we consider it highly unlikely they will be able to do so'.⁶⁴

FMG after negotiating an agreement with the government for a multiuser railway has effectively managed to operate a single user railway.

57 Expert interview (Perth, January 2017); Western Australia, *Parliamentary Debates*, Council, 26 November 2004, 8575-8579 (Robin Chapple); Geoff Gallop, 'State Agreement to facilitate new multi-user rail and port infrastructure in Pilbara' (Media Statement 11 November 2014) www.mediastatements.wa.gov.au/Pages/Gallop/2004/11/State-Agreement-to-facilitate-new-multi-user-rail-and-port-infrastructure-in-Pilbara.aspx.

58 Brockman Mining in new bid to railroad Fortescue' *The Australian* (online) 1 August 2016 www.theaustralian.com.au/business/mining-energy/brockman-mining-in-new-bid-to-railroad-fortescue-metals-group/news-story/aab2eb2282a6cfbb599a7711c4d1103d; Tess Ingham, Fortescue Metals Group loses bid to block Brockman from rail' *The Financial Review* 2 September 2016 www.afr.com/business/mining/iron-ore/fortescue-metals-group-loses-bid-to-block-brockman-from-rail-20160902-gr7lnl.

59 Eric Ripper to National Competition Council, *The Pilbara Infrastructures application for declaration of Pilbara iron ore railways*

60 Expert interview (January 2017).

Summary

The application of Ministerial discretion, the ability for proponents to negotiate directly with the government, the lack of transparency and public accountability in the negotiation of State Agreement Acts can enable industry to influence the approval process.

For an analysis of the vulnerability and risk of large mining infrastructure projects being exposed to industry influence, see the section *Cross cutting issues*.

61 *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* (WA).

62 Western Australia, *Parliamentary Debates*, Council, 26 November 2004, 8575-8579 (Robin Chapple)

63 'Brockman Mining in new bid to railroad Fortescue' *The Australian* (online) 1 August 2016 www.theaustralian.com.au/business/mining-energy/brockman-mining-in-new-bid-to-railroad-fortescue-metals-group/news-story/aab2eb2282a6cfbb599a7711c4d1103d.

64 *Ibid*.

**Vulnerabilities and risks State Agreements Western
Australia**

| Vulnerability | Risk | Score |
|---|---|-------|
| Lack of transparency of negotiation process | What is the risk that the negotiation process and the components of the negotiations, including what is negotiable and non-negotiable, will not be publicly knowable? | High |
| Industry influence | What is the risk of policy capture, and state capture by mining companies? | High |
| Inadequate due diligence | What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance? | High |



Colorful Minerals Around Queenstown in Tasmania, Australia.
Source: By Benny Marty/Shutterstock.

This section describes the context of mining in Queensland and the approvals processes and analyses the risks in the approvals process for mining leases, and the assessment process for coordinated projects in Queensland.

QUEENSLAND

Queensland is rich in coal. It produces an eighth of global metallurgical coal for steel production. Thermal coal used in power generation accounts for 15% of internationally traded coal, and is also used for domestic power generation.⁶⁵ The majority of coal produced is exported to Asia and growth in demand from China has underpinned a rise in Queensland coal exports. However, a recent slump in coal prices has led to coal mines operating at a loss, mine closures, and mothballing of mines.⁶⁶

The State is also Australia's top producer of silver, lead, zinc and copper. Other minerals mined include bauxite, copper, gold, zinc, magnetite, titanium, tin, tungsten, nickel, apatite, ceramic and structural clays, bentonite, kaolin, diatomite, dimension stone, gemstones, gypsum, limestone, dolomite, magnesite, peat, perlite, phosphate rock, salt, silica and zircon.⁶⁷

The Queensland coal and minerals sector produced 286 million tonnes at a value of \$28 billion, and accounted for 1.4% of the workforce and 6.4% of GSP in 2015-2016.⁶⁸ The coal and minerals sector contribution to State exports was 59% in 2014-2015.⁶⁹

New coal mines approved or going through the approvals process, namely the Adani Carmichael Coal Mine and the New Hope New Acland Coal Mine, have recently been the focus of significant attention by community and environmental groups. Protest groups are concerned with the adverse impacts of proposed coal mine developments on climate change, groundwater, threatened species, Indigenous rights,

65 Department of Natural Resources and Mines, Queensland Government, *Queensland mining and petroleum industry overview* (July 2016) www.dnrm.qld.gov.au/__data/assets/pdf_file/0004/238072/queensland-mining-petroleum-overview.pdf.

66 John Durie, *The Australian* (online), *Coal price slump dents Treasury* 11 January 2017 www.theaustralian.com.au/business/opinion/john-durie/coal-price-slump-dents-treasury-wesfarmers-hopes/news-story/1e8cf7166a1afb5f2b94c2f160f170c6; Sky News (online), *Mining slump may last until 2020* 9 February 2016 www.skynews.com.au/business/business/market/2016/02/09/mining-slump-may-last-until-2020.html.

67 Above n 65 5.

68 Queensland Government Data, Queensland Government, *Quantity and value of minerals produced 2015-2016* www.data.qld.gov.au/dataset/annual-mineral-metal-and-petroleum-statistics; Queensland Resources Council, *Economic Impact of the Minerals and Energy Sector on the Queensland Economy 2015/2016* www.qrc.org.au/wp-content/uploads/2016/10/FinalReport_compressed.pdf.

69 Above n 65 5.

and the Great Barrier Reef. There have been a number of court challenges to both Commonwealth and State environmental approvals.⁷⁰ In response, the previous State administration legislated to take away community objection rights to coordinated projects in the Land Court. However, the current administration has reinstated the community right to object.⁷¹

The Fraser Institute Annual Survey of Mining Companies ranks Queensland number 10 out of 104 countries for investment attractiveness.⁷² Since 2012, Queensland has annually ranked in the top 22 countries.

The Crown in Queensland has property in gold above or below the surface of the land; coal above or below the surface except where alienated by fee simple before 1 March 1910; and all other minerals (including dissolved or suspended in water) on or below the surface of the land except where alienated by fee simple pursuant to various stipulated Acts in the mid 1800's.⁷³

Mining Leases Queensland

The Department of Natural Resources and Mines (DNRM) manages Queensland's natural resources – water, land, minerals and energy, and administers systems and procedures for land and property, water management, mining and exploration, and mapping and data. The Department of Environment and Heritage Protection (DEHP) manages the process for the issuing of environmental authorities required for a mining lease.

The Minister for Natural Resources and Mines administers the *Mineral Resources Act 1989* (Qld), the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld), the *Mineral Resources Regulation 2013* (Qld), and the *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld).

Rights conferred by a mining lease

A mining lease confers the right to mine the mineral(s) specified in the lease, to undertake mining, and other purposes specified in the lease; the holder of the lease and any contractor or employee for the purpose of mining may enter the area of the lease, and may do all things permitted or required under the lease.⁷⁴ Coal seam gas cannot be specified in the lease. The holder is entitled to take or interfere with underground water if it occurs as a result of, or during authorised mining activities.⁷⁵

70 *Adani Mining Pty Ltd v Land Services of Coast and Country* [2015] QLC 48.

71 Darren Fooks, 'Reinstatement of community objection rights for coordinated projects', (2015) 34(3) *Australian Resources and Energy Law Journal* 181

72 Fraser Institute, *Annual Survey of Mining Companies 2016* (28 February 2017) www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2016.

73 *Mineral Resources Act 1989* (Qld) ss 8(1)(2)(3).

74 *Ibid* ss 234, 235.

75 *Ibid* s 334ZP

A mining lease application can be for coal, minerals, and/or infrastructure for mining or coal. Between April 2016 to April 2017, 40 mining leases were granted in Queensland for minerals, coal, or mining infrastructure.⁷⁶

Further information on the approvals process for mining leases can be found in Appendix A.

Strengths in the approvals process – Mining leases Queensland

The DNRM has some systems in place to promote transparency and accountability and that could mitigate against corruption as described below:

- Information on the department's website about the approvals process
- Online application system⁷⁷
- Public access to applications lodged once a mining notice is issued⁷⁸
- Publicly available information on mining tenements and resource authorities⁷⁹ However, conditions attached to resource authorities are not publicly available.
- Comprehensive information on Queensland geoscience available to the public⁸⁰
- First in time system⁸¹
- The Land Court will hear objections from any party unless it is outside the jurisdiction of the court or frivolous or vexatious⁸²
- Criteria for assessment clearly defined⁸³
- More than one department officer assesses the applications⁸⁴
- Criteria for recommendations by the Land Court and grant by Minister clearly defined⁸⁵

76 Business Queensland, *Recently granted resource authorities* (monthly reports) www.business.qld.gov.au/industries/mining-energy-water/resources/public-notice-tenders/recent.

77 See MyMinesOnline at Business Queensland, *Mining online services* www.business.qld.gov.au/industries/mining-energy-water/resources/online-services; Business Queensland, *Mining lease application notices* www.business.qld.gov.au/industries/mining-energy-water/resources/public-notice-tenders/mining-lease-application.

78 See Mining Lease Notices and Public Notices and Tenders, and Mines Online Maps at *ibid*.

79 See Public Search for Resource Authorities, Mines Online Maps at *ibid*.

80 QSpatial, QDex Data, Geoscience Portal at *ibid*.

81 Expert interviews (Brisbane, March 2017); *Mineral Resources Act 1989* s 251.

82 *Mineral Resources Act 1989* s 267A; Queensland Courts, *Land Court Objecting to mining projects* www.courts.qld.gov.au/courts/land-court/land-disputes/objecting-to-mining-projects.

83 *Mineral Resources Act 1989* ss 245, 250, 252(1), 266.

84 Expert interviews (Brisbane, March 2017).

85 *Mineral Resources Act 1989* ss 269(4), 271, 271A.

There is limited ministerial discretion in the Act. The Minister has discretion to refuse grant in the public interest but does not have discretion to grant in public interest.⁸⁶

Further, the Government of Queensland has put in place integrity systems and Offices and/or Commissioners for oversight, education and corruption prevention for public authorities and Ministers and Members of Parliament:

- Code of Conduct for the Queensland Public Service, declaration of interests register for chief executives, and a gifts and benefits register⁸⁷
- Crime and Corruption Commission, Integrity Commissioner, Information Commissioner, Ombudsman, and Audit Office⁸⁸
- Code of Conduct for Ministerial Staff Members, Ministerial Code of Conduct, Code of Ethical Standards for Members of Parliament, Lobbyist Register, and a Register of Member's Interests.⁸⁹

86 *Ibid* s 267(b).

87 Public Service Commission, Queensland Government, *Code of Conduct for the Queensland Public Service* (1 January 2011) www.forgov.qld.gov.au/code-conduct-queensland-public-service; *Declarations of interest register* (2017) www.qld.gov.au/about/how-government-works/government-structure/public-service-commission/declarations-of-interest-register/index.html; *Gifts and benefits register* (2016) www.qld.gov.au/about/how-government-works/government-structure/public-service-commission/information/index.html.

88 The Crime and Corruption Commission Queensland www.ccc.qld.gov.au/about-the-ccc/accountability-and-leadership; Queensland Integrity Commissioner, *What we do* www.integrity.qld.gov.au/about-us/what-we-do.aspx; Office of the Information Commissioner www.oic.qld.gov.au/; Queensland Ombudsman, *Role of the Ombudsman* www.ombudsman.qld.gov.au/what-we-do/role-of-the-ombudsman; Queensland Audit Office www.qao.qld.gov.au/.

89 Department of Premier and Cabinet, Queensland Government, *Code of Conduct Ministerial Staff Members* www.premiers.qld.gov.au/right-to-info/published-info/assets/code-of-conduct-ministerial-staff.pdf; *Ministerial Code of Conduct* www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/ministerial-handbook/ethics/min-code.aspx; Queensland Parliament, *Code of Ethical Standards, Legislative Assembly of Queensland* (11 May 2009) www.parliament.qld.gov.au/documents/assembly/procedures/CodeOfEthicalStandards.pdf; Queensland Integrity Commissioner, *Who is on the register?* www.lobbyists.integrity.qld.gov.au/who-is-on-the-register.aspx; Queensland Parliament, *Register of Members' Interests* www.parliament.qld.gov.au/members/current/register-members-interests.

Vulnerabilities and risk – Mining Leases Queensland

Some minor vulnerabilities have been identified in the approvals process: the **difficulty of accessing information**, the **absence of localised departmental integrity frameworks**, and the **lack of community engagement**. A vulnerability with greater impact was also identified **inadequate due diligence investigation**.

Accessing information

Information can be difficult to find on the DNRM department website due to the fact that the department's scope of responsibilities is broad. When searching for mining or department specific information the search is often directed to other websites: Business Queensland and Queensland Government data. Whilst there is a large amount of information available, the difficulty navigating the site and the information does reduce transparency and the capacity to access comprehensive information.

Absence of localised integrity frameworks

Integrity frameworks and policies are not localised. Whilst the Queensland government has comprehensive integrity frameworks, these frameworks are not listed as department specific policies on the DNRM website. DNRM has a link to a departmental gifts and benefits register and a page detailing information rights, but there are no departmental specific codes of conduct, transparency, fraud or corruption policies listed on the DNRM website. Localised departmental integrity policies, mentoring and induction contribute to corruption deterrence in a department.

Lack of community engagement

Community engagement is not specified as a component to be addressed in mining proposals nor is it mentioned in the department's policies. This can raise concern that the department is not meeting internationally recognised stakeholder engagement and human rights obligations.

Whilst these vulnerabilities were noted as factors that could enable corruption a full risk assessment was not undertaken due to the amount of time available for this study. The decision was taken to assess those vulnerabilities where there was evidence of significant impact.

Due diligence and beneficial ownership

A vulnerability associated with the process is the inadequate due diligence investigation of mining companies applying for a mining lease including the lack of investigation into the beneficial owners of a company operating in the resources sector in Queensland by DNRM and DEHP.⁹⁰

DNRM investigates applicant's past resource authority performance in Queensland. However, they do not investigate the applicant's past performance in other Australian states or offshore.⁹¹ Applicants for a mining lease with less than five year's history in Queensland of a good compliance record must provide supporting evidence with their financial capability statement.

Applicants for a mining lease, who are not already registered as suitable operators with the DEHP, will need to apply for registration. Applicants are asked to declare any convictions for environmental offences, cancellation or suspension of environmental authorities, licences or permits, and any cancellation or suspension of suitable operator or similar registration under the *Environmental Protection Act 1994* or a corresponding law in Queensland, the Commonwealth or another state. The applicant will also be asked if they have been issued any environmental notices or orders.⁹² If the applicant answers 'yes' to any of the questions they must self-report provide full details of the event. The chief executive may disclose that information to an administering authority in another state, or to the commissioner of the police service to obtain a suitability report.⁹³ Further research for the purposes would have to be undertaken to discover how much investigation the government does into an applicant's history, or if self-reporting is deemed to be sufficient evidence.

As discussed in the section on Mining Leases Western Australia, due diligence should cover the financial, legal, environmental and social aspects of an applicants record and the ultimate beneficial ownership of a company.

Summary

The lack of investigation into mining lease applicant's past resource authority performance in jurisdictions outside Queensland; and the lack of self-reporting of environmental offences in jurisdictions outside Australia for suitable operator registration for an environmental authority creates a risk that mining leases will be granted to operators with a history of non compliance.

Further discussion of this vulnerability and an analysis of the risk, can be found in the section *Cross cutting issues*.

90 Expert interviews (Brisbane, March, May 2017).

91 Ibid.

92 Ibid s 318F; Department of Environment and Heritage Protection, *Application for Suitable Operator Registration* www.ehp.qld.gov.au/licences-permits/suitable-operators.

93 Ibid 2.



View of Gold Mining Processing Plant in the Desert of Australia
Source: By Steve Lovegrove/Shutterstock

Vulnerabilities and risks mining leases Queensland

| Vulnerability | Risk | Score |
|---|--|-------|
| Inadequate due diligence into character of company and principals | What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance? | High |

This section describes the environmental assessment process in Queensland for large infrastructure projects. It provides an overview of the how both the State and Commonwealth processes are managed by the Coordinator-General. In addition, the processes are analysed for vulnerability and risk.

Coordinated projects

The Coordinator-General's office, in the Department of State Development, coordinates the environmental assessment process, referrals to other agencies, and reporting for large mining infrastructure projects. Proponents are still required to obtain a mining lease, environmental authority and any other approvals or permits required.

Coordinated projects

The Coordinator-General administers the *State Development and Public Works Organisation Act 1971* (Qld), which sets out the responsibilities of the Coordinator-General and the requirements for **coordinated projects**.

The Coordinator-General may declare a project to be a **coordinated project** for which an **Environmental Impact Statement** (EIS) is required.⁹⁴ An EIS is required for high risk and/or large-scale projects that have the potential to cause environmental, social or economic impacts. An EIS includes an environmental impact assessment, an economic impact assessment, and a social impact assessment.⁹⁵

The coordinated projects assessment process involves four stages:

- Declaration of a coordinated project by the Coordinator-General
- Project terms of reference
- Environmental Impact Statement (EIS)
- Coordinator-General's report, which imposes conditions and makes recommendations.

⁹⁴ *State Development and Public Works Organisation Act 1971* (Qld) s 26(1).

⁹⁵ An Impact Assessment Report is required for well-defined and low-to-medium risk projects.

The conditions of approval in the Coordinator-General's report only have legal effect when they are attached to an approval given under other State legislation, for example, a mining lease or an environmental authority.

Matters of national environmental significance (MNES)

A proponent will have to obtain Commonwealth approval for projects that may have an impact on **matters of national environmental significance** (MNES). Matters of national environmental significance protected under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) are world heritage properties; national heritage places; wetlands of international importance; listed threatened species and ecological communities; migratory species protected under international agreements; Commonwealth marine areas; the Great Barrier Reef Marine Park; nuclear actions; and a water resource in relation to coal seam gas development and large coal mining development.⁹⁶

Environmental assessments and approvals under the Bilateral Agreement between the Commonwealth and the State of Queensland

The Commonwealth and the State of Queensland have a bilateral agreement relating to environmental assessment for MNES.⁹⁷ Mining projects that will have a significant potential impact on a MNES may be declared a controlled action by the Commonwealth Department of Environment. Projects declared **controlled actions** by the Commonwealth Minister for the Environment may be assessed by the Queensland government EIS process under the terms of the *Agreement between the Commonwealth and the State of Queensland for Environmental Assessment under section 45 of the Environment Protection and Biodiversity Conservation Act 1999* (Bilateral Agreement).

The Bilateral Agreement between the Commonwealth and the State minimises duplication in the environmental assessment and approvals process by Commonwealth accreditation of the State of Queensland's environmental management processes. The State of Queensland is accredited to conduct the assessment and reporting

⁹⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12-24E

⁹⁷ Department of Environment and Energy, Government of Australia, *Agreement between the Commonwealth and the State of Queensland relating to Environmental Assessment* (18 December 2014)

phases of the environmental approval process for declared coordinated projects that impact on MNES.

The Coordinator-General consults with the Commonwealth Department of Environment regarding the sections of the terms of reference, environmental impact statement (EIS), and the final report where there is likely to be a significant impact on a MNES. The Commonwealth Minister for the Environment after reviewing the final report, and consulting with other Commonwealth Ministers has the power to approve the controlled action with conditions.

Flow charts detailing the approvals process for coordinated projects and for bilateral agreements are available in Appendix A.

Strengths of the assessment process – coordinated projects

The Coordinator-General's coordinated projects assessment process and the process under the bilateral agreement have some elements that promote transparency and accountability, and mitigate the risk of corruption occurring as described below:

Coordinated Projects

- Comprehensive information publicly available information on the Coordinator-General's website regarding the assessment process and project documentation⁹⁸
- Public notification and invitation to comment on draft EIS and revised EIS, and the terms of reference for large projects.⁹⁹

Projects managed under the Bilateral Agreement

- Comprehensive information on approvals on Commonwealth EPBC Notice portal¹⁰⁰
- Public notification and invitation to comment on referral, terms of reference, and draft EIS and revised EIS.¹⁰¹
- Clearly defined decision-making and assessment criteria under the EPBC Act.¹⁰²
- Ministerial decisions are open to judicial review.¹⁰³

Vulnerabilities identified in the process that have the potential to create an enabling environment for corruption are described below.

98 Coordinator-General, *Current Projects* www.statedevelopment.qld.gov.au/assessments-and-approvals/current-eis-projects.html.

99 *State Development and Public Works Organisation Act 1971*(Qld) s 33; Expert interview (Brisbane, June 2016).

100 Department of Environment and Energy, *EPBC Act Public Notices* www.epbcnotices.environment.gov.au.

101 *Environment Protection and Biodiversity Conservation Act 1999* ss 74(3); *Agreement between the Commonwealth and the State of Queensland under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 relating to environmental assessment* sch 1 cl 2 cls 4.

102 *State Development and Public Works Organisation Act 1971*(Qld) s 33 ss 67-105.

103 *Ibid* s 487.

Vulnerabilities and risk – coordinated projects

Three vulnerabilities have been identified in the coordinated projects assessment process: **inadequate due diligence**; the **discretion of the Coordinator-General** to make evaluations and recommendations; and **limited independent review of modelling systems used in the environmental impact statement**.

1. Due diligence

The level of due diligence investigation into the character and integrity of proponents by the Coordinator-General's office has been identified as a vulnerability in the process that could enable proponents with a record of non compliance to mine for resources in Australia.

The *State Development and Public Works Organisation Regulations 2010* stipulates that the proponent must provide in the EIS details of any proceedings under a law of the Commonwealth or State.¹⁰⁴ This reporting requirement does not extend to proceedings in jurisdictions outside Australia.

Under the *Environment Protection and Biodiversity Conservation Act 1999*, in making referral and approval decisions, the Minister must have regard to a person's environmental record. This can include regard to the executive officers of a body corporate. The Commonwealth Department checks the accuracy of any information provided against publicly available sources.¹⁰⁵ Schedule 4 of the *Environment Protection and Biodiversity Conservation Regulations 2000* states that a person must provide details of any proceedings under a Commonwealth, State or Territory Law, but like the SDPWO Act does not require reporting of proceedings outside Australia. Proponents also require registration as a 'suitable operator' when they apply for an environmental authority for a mining lease under the *Environmental Protection Act 1994* and must declare their environmental record in Australia, as discussed in the section *Mining Leases Queensland*.

104 *State Development and Public Works Organisation Regulation 2010* reg 35, sch 1 item 6.

105 Department of Environment and Energy, Australian Government, Policy Statement – *Consideration of a Person's Environmental History when making Decisions under the EPBC Act* www.environment.gov.au/resource/epbc-act-policy-statement-consideration-persons-environmental-history-when-making-decisions.

CASE STUDY: ADANI MINING

The gap in both State and Commonwealth law regarding the investigation of the record of proponents in jurisdictions outside Australia is potentially significant as the case of Adani Mining shows. In the *EIS for the Carmichael Coal Mine, February 2013*, the proponent Adani Mining, an Indian multinational corporation, stated that it 'has not been subject to any proceedings under a Commonwealth, State or Territory law for the protection of the environment or the conservation and sustainable use of natural resources'.¹⁰⁶ Yet there is evidence that Adani has failed to comply with laws and environmental permits in India.¹⁰⁷ An investigation in December 2010 by officials from the Indian Ministry of Environment Protection and Forests into the Mundra Port and Special Economic Zone (Mundra SEZ) operated by Adani Ports found destruction of mangroves, creek systems and natural seawater flow by reclamation, and development of a township, airport and hospital without the proper environmental approvals.¹⁰⁸ In April 2013, an independent committee established by the Indian Ministry found 'incontrovertible evidence' of Adani's violations of its environmental approvals in the Mundra SEZ including failure to protect mangroves, allowing changes to water courses, attempting to bypass statutory procedures; allowing construction of an airstrip without environmental approval, failing to use lining in storage ponds and intake/outlet channel to protect groundwater against salinity intrusion; and failing to comply with its environmental approval requirements for monitoring and auditing.¹⁰⁹

Adani obtained its first environmental authority in Australia in 2010.¹¹⁰ The *EPA Act 1994* (Qld) was amended to require a proponent to be a registered operator in 2013, but existing holders of environmental authorities were automatically awarded 'suitable operator' status.¹¹¹ Environmental Justice Australia reports that Adani failed to disclose that one of its directors and the CEO of the Adani Group's operation in Australia was previously an executive officer of a company that pleaded guilty to criminal charges of serious water pollution of the Kafue River, Zambia and of failure to report environmental pollution.¹¹²

Summary

Lack of investigation of a proponent's environmental record by the Commonwealth and by the State in jurisdictions outside Australia can lead to proponents with a record of environmental offences operating large mining projects in Australia. This can be of significant concern when large mining projects are operating in areas where there are risks of impacts to ecology, biodiversity or water resource.

Further discussion of the vulnerability and risk of inadequate due diligence and an analysis of risk can be found in the section *Cross cutting issues*.

2. Coordinator-General's discretion

Discretion under the Act

The level of discretion available to the Coordinator-General has been identified as a vulnerability in the assessment process for environmental approvals for large mines. The *State Development and Public Works Organisation Act 1971* confers on the Coordinator-General discretion to make declarations, evaluations, recommendations and impose conditions. It does not stipulate the criteria for decision-making, except in relation to what the Coordinator-General must have **regard** to:

- The Coordinator-General **may** declare a project to be a coordinated project for which an EIS is required s 26
- In **considering** whether to declare a project to be a coordinated project, the Coordinator-General must have **regard**, and may give the weight the Coordinator-General **considers** appropriate s 27(1)
- The Coordinator-General **may** publicly notify that an EIS is required for the project s 29(1)(a)
- The Coordinator-General **may** seek information to assist in the preparation of EIS (s 31)

106 Coordinator General, Carmichael Coal Mine and Rail Project, Environmental Impact Statement, *Introduction* (15 December 2012) www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-environmental-impact-statement.html 1-1.

107 Environmental Justice Australia, *A review of the Adani group environmental history in the context of the Carmichael coal mine approval* (27 January 2015) www.envirojustice.org.au/major-reports/a-review-of-the-adani-group%E2%80%99s-environmental-history-in-the-context-of-the-carmichael 5.

108 Ministry of Environment and Forests, Government of India, *Show Cause Notice under Section 5 of Environment (Protection) Act, 1986 for violation of the provisions of the Coastal Regulation Zone Notification, 1991 by M/s Mundra Port & SEZ Limite'* (15 December 2010) www.moef.nic.in/downloads/public-information/show-cause-mundra-opg.pdf. para 1 – 19.

109 Centre for Science and Environment, *Report of the Committee for Inspection of M/s Adani Port & SEZ LTD, Mundra, Gujarat* (April 2013) www.moef.nic.in/sites/default/files/adani-report-290413.pdf 76-81.

110 Environmental Justice Australia above n 107, 3.

111 *Environmental Protection Act 1994* (Qld) s 705.

112 Environmental Justice Australia, *The Adani Brief* (15 February 2017) www.envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/The_Adani_Brief_by_Environmental_Justice_Australia.pdf 29.

- The draft EIS prepared by the proponent must address, for the whole project, the terms of reference to the **satisfaction** of the Coordinator-General s 32(2)
- After the end of the submission period for a draft EIS, the Coordinator-General must **consider** the following— (i) the draft EIS; (ii) any properly made submissions for the draft EIS; (iii) any other material the Coordinator-General **considers is relevant** to the project s 34A
- In evaluating the EIS, the Coordinator-General **may** — evaluate the environmental effects of the project and any other related matters s 34D(3)(a).

McGrath observes:

From a legal perspective the striking feature of the SPDWO Act is there is effectively no enforceable deliberative obligation under it (i.e. there is no legal framework within which the decision must be made such as a stated object of the legislation and the factors that the decision-maker must consider).¹¹³

The Coordinator-General facilitates and manages approvals and assessments for large mining projects, which can bring economic development to the state and create jobs. Yet the central and critical part of the Coordinator-General's assessment process for coordinated projects and projects assessed under the bilateral agreement is the assessment of environmental impact and the recommendations and the imposition of conditions to protect the environment. Given the Department of State Development's key strategic objectives are all related to economic development, investment promotion, growth, and job creation, a conflict of interest can be perceived as inherent in the role of the Coordinator-General to manage environmental approvals. However, it should be noted that the Coordinator-General is an independent statutory officer under section 8 of the SPDWO Act.

Other factors for consideration

In order to understand the Coordinator-General's discretion in the Act, it has to be put into context and also assessed as to how the discretion works in practice. Significant projects (as coordinated projects were then known) were an important driver for economic development in Queensland. They facilitated the development of coal mining projects in the Bowen Basin in the 1960s, bauxite mining at Weipa and established Gladstone as an industrial hub.¹¹⁴

The discretion of the Coordinator-General allows for the facilitation of complex projects, which have elements both on and off lease, and particular and at times, contradictory economic, social and environmental effects. If projects were approved only under the other available Acts, it could allow for perverse consequences. Discretion allows for competing interests, and diverse impacts to be taken into account and managed through the project assessment and evaluation

process, and bespoke solutions to be applied.¹¹⁵ It allows the positive benefits of a project to mitigate and offset negative effects.

An expert indicated that the discretion is 'jealously guarded' by the Coordinator-General's Office as a powerful mechanism for project facilitation.¹¹⁶ The expert further suggested that if the discretion was applied inappropriately that there would be political consequences and the discretion could be taken from the Coordinator-General by the political administration. In this sense, it is in the interest of the Coordinator-General to apply the discretion judiciously.

It should be noted that there have been no investigations of the Coordinator-General or of the staff for corruption to date.

Public concern and coordinated projects

Ministerial discretion has been flagged for coordinated projects in this risk assessment because of the broad swell of public disquiet regarding coal mining approvals in Queensland. Whilst public comment and action has been characterised by some as the purview of the left green fringe, recent objections in the Queensland Land Court indicates that the objections in the courts are driven by landholders, and rural communities who are effected by mining in Queensland. Lawyers, academics, and the media across the eastern states are also rallying to oppose coal mining in Queensland. The interests of groups opposing coal mines, covers objecting to environmental effects relating to climate change, future Australian energy requirements, ecological and water resource protection, protection of biodiversity, and the financial probity of companies operating in Australia – effectively issues of national interest and concern. It seems there is a war going on in Queensland between the entrenched interests of 'business as usual' economic development, and the interests of communities, concerned individuals, and environmentalists. Coal mining companies working in Queensland have been the focus of significant media attention. However, mining companies are applying for approvals and being approved to mine under existing policy and law. Whilst the application of policy is not a focus of this study, the broad provisions in the SDPWO Act for the Coordinator-General's discretion and the vulnerability it creates for a corruption risk is the focus of the study. The Coordinator-General is a senior public servant who applies the policy directives of the political administration, and thus the discretion applied can be interpreted as political discretion.

Analysis of vulnerability and risk

The vulnerability, Coordinator-General's discretion, indicated the propensity for the occurrence of the process design risk *What is the risk of external interference in the Coordinator-General's recommendations, evaluations and imposition of conditions?*

Successive State administrations in Queensland have supported mining projects in Queensland to promote economic development despite challenges in the courts, and widespread vocal public opposition to the environmental and

¹¹³ Chris McGrath, *The Queensland Bilateral' 2002/2003* 8((33) *Queensland environmental reporter* 145, 150.

¹¹⁴ Expert interview (Brisbane, June 2017); Geoffrey Blainey, *The Rush That Never Ended* (Melbourne University Press 5th ed 2003) 277.

¹¹⁵ Expert interview (June, 2017).

¹¹⁶ *bid*.

community effects of specific mining projects. The severity of the impact and likelihood of the risk of external influence is potentially lessened by the role that other State agencies have in the process through the advice and consultation phase; the elements of transparency of the process; the capacity for subsequent project approvals to be objected to in the Land Court of Queensland; a vibrant and active civil society, and a robust media. Where a project is a controlled action the requirement for the Commonwealth Minister's approval under the EPBC Act also acts as a safeguard.

The vulnerability of the Coordinator-General's discretion can potentially lead to industry influence in the approvals process and the risk *What is the risk of policy capture, and state capture by mining companies?* This risk is discussed in the section on *Cross cutting issues*.

Summary

Whilst the Coordinator-General does have considerable discretion, the application of the discretion has an important role to play in the project assessment process. The injudicious application of the discretion is mitigated by the public accountability of the process and the political oversight of the office. Even though there are mitigating factors, the discretionary power of the Coordinator-General is still identified as a vulnerability because of the capacity for discretionary decision-making and that there can be a 'perception' of bias.

3. Environmental Impact Statement review

The research has indicated a vulnerability, in the EIS assessment process, of limited independent review of the scientific modelling used to make assessments.

The EIS contains complex modelling and data in order to assess the environmental, economic, social and cumulative impacts of a mining project. The decision-making department, State or Commonwealth, makes decisions, recommendations and imposes conditions based on the information contained in the EIS and relies on the expertise of government departments to assess the information provided. Whilst proposals for large coal mines are referred to the Independent Expert Scientific Committee (IESC) for advice, there is limited independent review of the modelling systems unless requested by the Commonwealth Minister or undertaken by, and funded by, civil society or community members.

Public review of the EIS

Civil society organisations and landowners depend on community legal organisations such as the Environmental Defender's Office (EDO) to provide review of the EIS to support objections in the Land Court or appeals to the courts. However, the Commonwealth funding cut to EDO in 2014 constrains the ability of the EDO to review, advise and provide legal support.¹¹⁷

The comprehensive size of the EIS can constrain public access to the documentation. For example, the Alpha Coal

¹¹⁷ 'Funding cuts to Environmental Defender's Offices described as barbaric' *ABC News* (online) 18 December 2015 www.abc.net.au/news/2013-12-18/funding-cut-to-environmental-defenders-offices/5164934.

EIS runs to six volumes and the supplementary EIS is two volumes, with each volume comprising up to 20 files.¹¹⁸ The amount and complexity of information provided makes it difficult for the public to access and assess the information provided in order to make a public submission.¹¹⁹ As Finanzio notes, 'the volume of material that needs to be analysed before constructive criticism can be made is such that a meaningful contribution to the decision maker's assessment is impeded.'¹²⁰

The economic and scientific modelling methods used in an EIS have been criticised by experts, and the results of the modelling methods utilised for large coal mining projects have been disputed in the courts.

Economic modelling

There has been some criticism of input-output analysis as an effective economic modelling method to demonstrate anticipated benefits as it can lead to the overstating of specific regional economic activities. The Productivity Commission states:

It is likely that if all such analyses were to be aggregated, they would sum to much more than the total for the Australian economy. Claims that jobs 'gained' directly from the cause being promoted will lead to cascading gains in the wider economy often fail to give any consideration to the restrictive nature of the assumptions required for input-output multiplier exercises to be valid. In particular, these applications fail to consider the opportunity cost of both spending measures and alternate uses of resources, and may misinform policy-makers.¹²¹

Economic modelling for the Adani Carmichael Coal Mine in North Queensland was disputed in the Land Court, with economists challenging the assumptions made regarding the number of jobs that would be created by the mine and the company itself acknowledging that the modelling was optimistic.¹²² The Land Court made the conclusion that the input output analysis in the EIS:

estimated the number of jobs to be over 10,000 fte (sic) jobs per annum from 2024. Dr Fahrer's evidence, which I have accepted, was that the Carmichael Coal and Rail Project will increase average annual employment by 1,206 fte jobs in Queensland and 1446 fte jobs in Australia.¹²³

Regional impact assessments have also been criticised

¹¹⁸ GVK Hancock Coal, Alpha, EIS, *Supplementary EIS* www.gvkhancockcoal.com/our-assets/alpha.

¹¹⁹ Expert interview (Brisbane, February 2017).

¹²⁰ Adrian Finanzio, 'Public participation, transparency and accountability – Essential ingredients for good decision making' (2015) *Australian Environmental Law Digest*.

¹²¹ Paul Gretton, Productivity Commission, Australian Government, *On input output tables uses and abuses* (September 2013) www.pc.gov.au/research/supporting/input-output-tables/input-output-tables.pdf 1.

¹²² Rod Campbell 'Fact check: Will Adani's coal mine really boost employment by 10,000 jobs' *The Australian Business Review* (online) 31 August 2015 www.theaustralian.com.au/business/business-spectator/fact-check-will-adanis-coal-mine-really-boost-employment-by-10000-jobs/news-story/903c1932738b1d1a1763c74e45f4d7c7.

¹²³ *Adani Mining Pty Ltd v Land Services of Coast and Country* (2015) QLC 48 at [575].

because of the difficulties of placing a monetary value on environmental goods and services and the inappropriateness of discounting to present the future value of environmental goods and services.¹²⁴

Modelling of impacts on water resources

Academics and other experts have also criticised the modelling used to analyse groundwater impacts for large coal mines.¹²⁵ There can be significant uncertainty in scientific models especially in regard to the future impacts of development of a project on water resources.

Conditions are attached to approvals relating to the adaptive management of future impacts. The conditions imposed on approvals can have the role of providing key performance indicators for monitoring, and reporting when an impact occurs. However, due to resourcing issues, monitoring and compliance may not be rigorous.¹²⁶ In the *Journal of Hydrology*, Currell recommends:

Monitoring criteria and proposed mitigation strategies should be available for public review and scrutiny prior to project approval, rather than being deferred to a post-approval process (Lee, 2014; Slattery, 2016). After approval, monitoring and management plans are generally overseen by mining companies and the relevant government department(s), but need not involve public consultation. Monitoring the compliance with environmental conditions in jurisdictions such as the State of Queensland, Australia is hampered by a lack of resources and expertise (e.g. Queensland Audit Office, 2014), and this is likely true in other jurisdictions also. A greater degree of transparency and upfront effort in the design of monitoring criteria and proposed mitigation plans would thus allow the public and technical experts to provide input, helping to ensure environmental objectives will be effectively monitored and met.¹²⁷

Independent Expert Scientific Committee (IESC)

Mining proposals for large coal mines that are likely to have a significant impact on water resources are referred to the Independent Expert Scientific Committee (IESC) for advice.¹²⁸ The IESC operates under the National Partnership Agreement on Coal Seam Gas and Large Coal Mining. The EIS must include a section addressing the requirements contained in the IESC guidelines.¹²⁹ However, Matthew Currell points out that the advice of the IESC is not binding and that proponents 'are not strictly required to resolve all

technical and scientific issues identified in the committee's advice prior to project approval'.¹³⁰

Though expert interviews have indicated the valuable advice provided by the IESC, a recent ruling by the Land Court noted that the evidence provided by experts and laymen in the court superseded the advice provided by the IESC.¹³¹ The ruling also made reference to the reliance of the Coordinator-General on modelling and data that contained errors.

CASE STUDY: NEW ACLAND COAL

The Oakley Coal Action Alliance Group, a group of 60 landowners and townspeople, were represented by the Environmental Defenders' Office in an objection to a coal mining lease application by New Hope for the New Acland Coal Mine in the Land Court.¹³² The project was initially assessed under the Bilateral Agreement between the Commonwealth and the State of Queensland and in December 2014 the Coordinator-General published an evaluation report for the project.¹³³ The recommendation of the Land Court pointed to deficiencies in the advice provided by the IESC and in the Coordinator-General's evaluation.

On the 31 May 2017, in *New Acland Coal Pty Ltd v Ashman* (No 4) [2017] QLC 24 the Court recommended that the New Acland Coal mining lease application not be granted citing the inadequacies in the modelling in the EIS and the advice provided by the IESC.

As regarding groundwater, a huge amount of evidence was before the Court. In key areas NAC's [New Acland Coal's] own experts agreed with major shortcomings of the current model. I was also highly concerned regarding the modelling of faulting and other aspects of the groundwater studies undertaken to date. These issues have not been answered by the 2016 IESC Advice for reasons including the unfortunate fact that the IESC did not have the advantage of the material before the Court on groundwater. Groundwater considerations are such that the revised Stage 3 project should not proceed given the risks to the surrounding landholders and the poor state of the current model.¹³⁴

124 Expert interview (May 2017)

125 Matthew Currell, 'Problems with the application of hydrogeological science to regulation of Australian mining projects: Carmichael Mine and Doongmabulla Spring' (2017) 548 *Journal of Hydrology* 674; Expert interviews (Brisbane, March 2017).

126 Expert interviews (Brisbane, April, June 2017).

127 Currell above n 125, 681.

128 *Environment Protection Biodiversity and Conservation Act 1999* s 131AB.

129 Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, *Information Guidelines for the Independent Expert Scientific Committee advice on coal seam gas and large coal mining development proposals* (2015) www.iesc.environment.gov.au/publications/information-guidelines-independent-expert-scientific-committee-advice-coal-seam-gas.

130 Currell above n 125, 674, 681.

131 *New Acland Coal Pty Ltd v Ashman* (No 4) [2017] QLC 24.

132 EDO Qld, *Case summary: New Acland Coal Mine Stage 3 objections* www.edoqld.org.au/case-update-acland/.

133 Coordinator-General, *New Acland Coal Mine Stage 3 Project* www.statedevelopment.qld.gov.au/assessments-and-approvals/new-acland-coal-mine-stage-3-expansion.html.

134 *New Acland Coal Pty Ltd v Ashman* (No 4) [2017] QLC 24 at [16].

An observation was made by the Court on the thoroughness of the Coordinator-General's evaluation of the EIS and the reliance of Coordinator-General on incorrect modeling.

CG evaluation of the EIS and AEIS was no doubt thorough but it was not as thorough as the evaluation of those documents in the court proceedings before me. Nor did the CG have the assistance of expert opinion tested by cross-examination. Consequently what I find to be errors in expert reports and modelling in many vital areas such as water, noise and dust were only ascertained as part of the Land Court proceedings and not discovered by the CG in his evaluation process.

The inconsistency requirement has an unwelcome hindering effect on the court in circumstances where the CG has relied upon incorrect modelling and the court is unable to correct conditions made by the CG in reliance on that incorrect modelling.¹³⁵

The court also made observations regarding the impact of economic input output modelling to overestimate economic benefits.¹³⁶

The findings in the New Acland Coal case in the Land Court demonstrate that modelling used for an EIS may not be correct. However, the case also illustrates the decisions that the proponent and the Coordinator-General have to take into regard to the extent and type of modelling they will do. Modelling can be comprehensive, time consuming and costly and a comprehensive approach may not be always warranted if the impacts are low.

There are some mechanisms for review that are built into the EIS process: the IESC provides advice on the impact on water resources by coal mines, the public can review the EIS and make submissions, and the Commonwealth Minister may order an independent review when it affects an MNES. However, these mechanisms can have limited effectiveness to ensure that there is adequate independent scientific verification of the accuracy of an EIS.

The legal system can provide opportunities to test scientific data. Whilst the Coordinator-General's decisions are not judicially reviewable, nor subject to a merits review¹³⁷, the subsequent application for a mining lease and environmental authority in the Land Court can be challenged on merit and any party can apply for judicial review.¹³⁸ Commonwealth decisions under the *Environment Protection and Biodiversity Conservation Act 1999* are open to judicial review, with broad provisions relating to what must be demonstrated in order to have standing to seek judicial review.¹³⁹ Whilst these opportunities for merit decisions and judicial review can provide further opportunities for independent examination of technical and scientific evidence, the costs involved are prohibitive.

Summary

Independent verification of the EIS and the modelling systems used would lead to greater accuracy and better decision making, and would restore public faith in the process.¹⁴⁰ Whilst independent review and verification would add to the cost of the approvals process, it may also lead to greater efficiencies, as objections in the Land Court over the adequacy of the scientific information presented in the EIS can significantly extend costs and approval timelines.¹⁴¹ Lack of independent verification of the EIS can create opportunities for mining companies to present data in a manner that minimises negative impacts, and improves the possibility of the project being expediently approved.

Analysis of vulnerability and risks

The vulnerability *Limited independent review of modelling systems for environmental impact statements*, pointed to a process practice risk *What is the risk there is inadequate verification of the accuracy or truthfulness of environmental impact statements?*

Inadequate review and verification of modelling systems, theories and data can lead to inaccuracies in the EIS, and subsequently have significant environmental effects. Whilst the transparency and accountability of the process does to some extent allow the public to review environmental assessments, independent scientific review and input built into the process would allow for greater integrity of the information, surety and scientific rigour, and would mitigate against proponents and their consultants providing information that does not adequately address negative effects and information that can exaggerate economic outcomes.

¹³⁵ Ibid at [190].

¹³⁶ Ibid at [899, 900].

¹³⁷ Ibid s 27AD.

¹³⁸ *Mineral Resources Act 1989* s 370

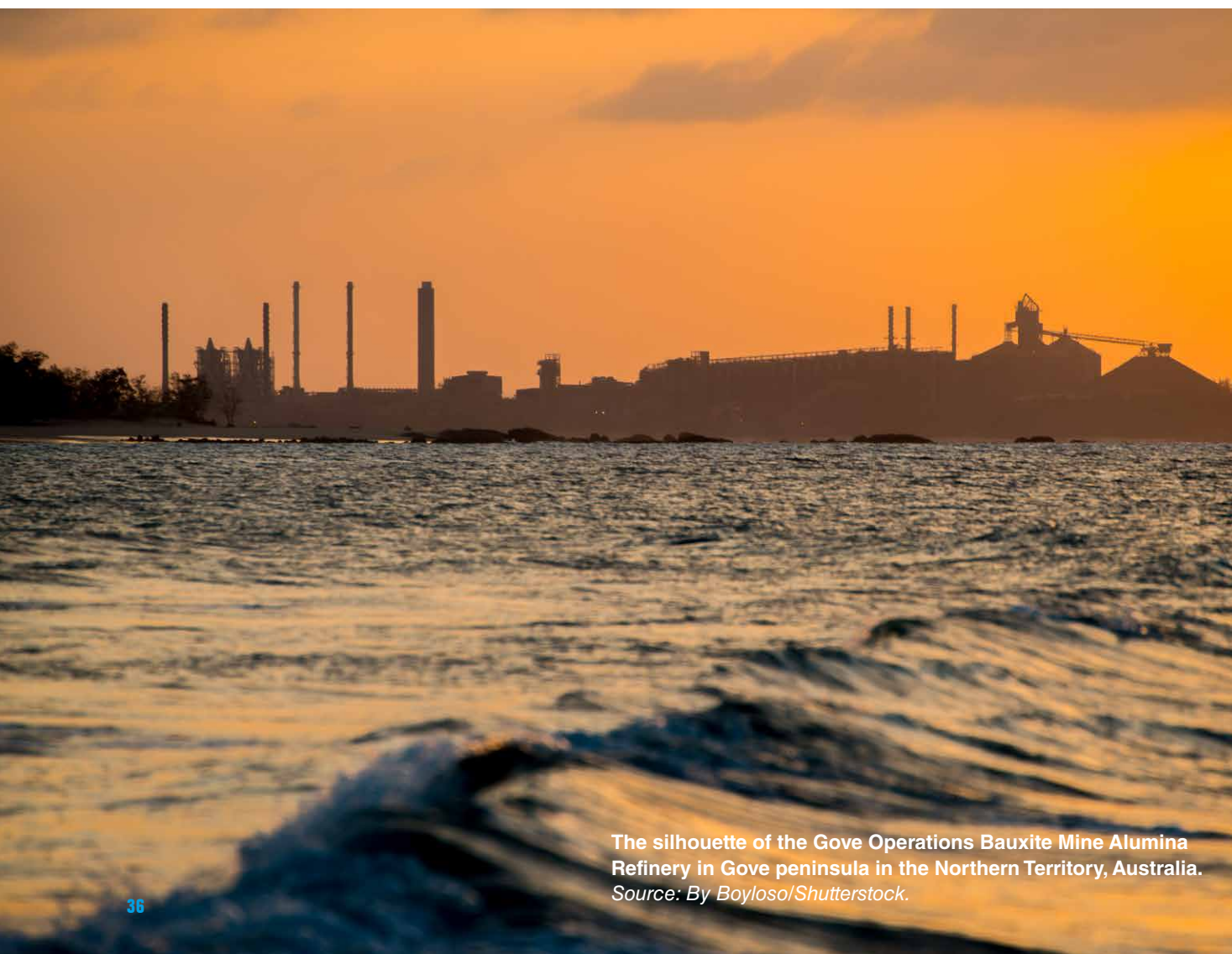
¹³⁹ *Environment Protection and Biodiversity Conservation Act 1999* s 487.

¹⁴⁰ Expert interviews (March, May, Brisbane 2017); Currell, above n 125, 681; Finanzio above n 120.

¹⁴¹ President of the Land Court, Queensland Courts, *Review of the Mining Objections and Related Jurisdiction of the Land Court of Queensland* (1 March 2017) www.courts.qld.gov.au/__data/assets/pdf_file/0007/511558/lc-rpt-review-of-mining-objections-and-related-jurisdiction.pdf 2.

**Vulnerabilities and risks – Coordinated projects
Queensland**

| Vulnerability | Risk | Score |
|--|---|--------|
| Inadequate due diligence investigations into character of company and principals | What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance? | High |
| Coordinator General's discretion in declaration, assessment and evaluation for EIS process | What is the risk of external interference in the Coordinator-General's recommendations, evaluations and imposition of conditions? What is the risk of policy capture, and state capture by mining companies? | Medium |
| Limited independent review of modelling systems for environmental impact statement. | What is the risk there is no verification of the accuracy or truthfulness of environmental impact statements | Medium |
| Industry influence | What is the risk of policy capture, and state capture by mining companies? | High |



The silhouette of the Gove Operations Bauxite Mine Alumina Refinery in Gove peninsula in the Northern Territory, Australia.
Source: By Boyloso/Shutterstock.

This section describes the Native Title process and its intersection with applications for exploration licences and mining leases in Western Australia and analyses the process for vulnerabilities and risk. Flow charts documenting the approvals process for Native Title and exploration licences and mining leases can be found in Appendix A.

NATIVE TITLE

In the 1992 Mabo decision, the High Court of Australia recognised that the Merriam People of the Torres Strait held native title over part of their traditional lands and rejected the notion of terra nullius.¹⁴² The *Native Title Act 1993* (Cth) was the legislative response following the Mabo decision. The Act established the Native Title Tribunal, set out the processes for determination of Native Title, and allowed for the recognition of Aboriginal and Torres Strait rights and interest in land and water according to traditional law.

The Act defines native title as the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land and water under traditional law and custom.¹⁴³

Determination of native title

The Federal Court hears Native title claims. The Court will determine that the Indigenous claimants have maintained a traditional connection with the land and have a right to Native Title, or conversely that Native Title has been extinguished by the state granting title or interest in land such as freehold or leasehold title.¹⁴⁴

A determination of Native Title recognises either exclusive or non-exclusive possession. Exclusive possession involves the right to possess and occupy an area to the exclusion of all others but does not preclude the grant of mineral rights in an area. It can only be recognised across areas such as

unallocated Crown land and areas that were previously held or owned by Indigenous people. Non-exclusive possession is where native title holders have the right to coexist and exercise their rights alongside non-Indigenous property rights such as pastoral leases. Non-exclusive native title does not involve a right to control access and use of the area.

Between 1994 and June 2017, the National Native Title Tribunal has filed 2,227 Native Title claims with 292 claims still active. Native Title has been recognised in 318 cases, either over the whole of the determination area or part of the area.¹⁴⁵

Western Australia has the most land under native title with 1,149,603 sq km being determined as exclusive or non-exclusive possession.¹⁴⁶ Approximately 92% of the Western Australian land mass is claimable under native title.¹⁴⁷

Future acts

A **future act** is an act that affects native title in relation to the land and water in any extent.¹⁴⁸ A future act may involve the granting of a right to conduct a proposed activity or development that affects native title rights. Native title holders or registered claimants have procedural rights to be informed and consulted if a proposed activity is likely to impact on their native title rights. The grant of exploration licences and mining leases over areas where native title may exist, are considered to be future acts. The expedited process, the right to negotiate process and Indigenous Land Use Agreements (**ILUAs**) are the agreement-making processes under the *Native Title Act 1993* whereby native title parties negotiate with mining companies regarding the impact of mining activities on their rights and interests.

Whilst state governments administer the application for a mining tenement and ensures that the Native Title process proceeds, the National Native Title Tribunal (**NNTT**) hears objections, manages negotiations, facilitates mediation, and makes determinations.

The Native Title Act 1993 specifies that state governments are party to Native Title future act negotiations. However, in practice the Western Australian government views their role as administrative and is generally not involved in the substance of negotiations between mining companies and native title parties.¹⁴⁹

¹⁴⁵ National Native Title Tribunal, *Search Native Title Applications, Registration Decisions and Determinations* www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx.

¹⁴⁶ *Ibid*, *Maps* www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx.

¹⁴⁷ *Ibid*, *25 years of Native Title Recognition* www.nativetitle25.gov.au/home/states-and-territories/western-australia/.

¹⁴⁸ *Native Title Act 1993* s 233.

¹⁴⁹ Expert interviews (Perth, December 2016, February, March, 2017) (Brisbane, March 2017).

¹⁴² *Mabo v Queensland (No 2)* (1992) 175 CLR.

¹⁴³ *Native Title Act 1993* (Cth) ss 223(1)(2).

¹⁴⁴ *Ibid* ss 23B

The expedited process – exploration licences, Western Australia

The expedited process is governed by the *Native Title Act 1993* (Cth), and the process intersects with provisions under the *Aboriginal Heritage Act 1972* (WA) and the *Mining Act 1978* (WA).

Acts that attract the expedited process are defined as acts that are not likely to interfere with the native title holders' community or social activities, and areas or sites of significance in accordance with tradition; and do not involve major disturbance to any land or waters.¹⁵⁰ Exploration is considered to be an act that arguably does not involve major disturbance to the land and will attract the expedited process. Native title parties may object to the expedited process and if it is determined by the Native Title Tribunal that the expedited process does not apply, the full right to negotiate process will commence.

The expedited process is a fast track process that does not provide for negotiation rights, but does include the obligations of the proponent to conduct a heritage survey under the *Aboriginal Heritage Act 1972*. Aboriginal heritage surveys are conducted to 'identify places in the landscape which contain or embody Aboriginal heritage values, not just sites'.¹⁵¹ Indigenous people are the primary sources of information and are engaged in the identification, assessment and management of Aboriginal heritage. Site surveys can be archaeological, ethnographic or anthropological.

After an application for an exploration licence has gone through the assessment and referral stage and the department recommends grant, the delegated officer in the Department of Mines and Petroleum will assert, where native title is not extinguished, that the expedited process under section 237 of the *Native Title Act 1993* applies and, section 29 of the Act will be triggered.

Right to negotiate and ILUAs, Mining Leases – Western Australia

The native title process for a mining lease allows for the parties to commence the right to negotiate process; or establish, sign into, or create a variation of an Indigenous Land Use Agreement (ILUA). In Western Australia the right to negotiate process is more commonly used for mining agreements than ILUAs. As of 29 June 2017, for Western Australia 31 ILUAs relating to mining were registered with the NNTT compared to 89 in Queensland.¹⁵²

150 *Native Title Act 1993* s 237.

151 Yamatji Marpa Aboriginal Corporation, *Aboriginal Heritage Management Guidelines* April 2015 www.ymac.org.au/wp-content/uploads/2013/07/YMAC-Heritage-Guidelines-Apr-15-2.pdf 6.

152 National Native Title Tribunal, Search register of Indigenous Land Use Agreements www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx.

Negotiate in good faith

The right to negotiate does not give native title parties the right to veto a mining lease but allows the native title party and the proponent to negotiate with a view to reaching an agreement. Parties to mining lease negotiations must **negotiate in good faith** to obtain an agreement that may be subject to conditions.¹⁵³

The second reading of the Native Title Bill discusses the right to negotiate in relation to the Act.

Where native title has been established, or where there is a registered claimant in the federal or state systems, the bill provides a process of negotiation and, if necessary, determination by the tribunal on whether a proposed grant should proceed. This emphasis on Aboriginal people having a right to be asked about actions affecting their land accords with their deeply felt attachment to land. But it is also squarely in line with any principle of fair play. It is not a veto.¹⁵⁴

The *Native Title Act 1993* in section 31(1)(b) specifically states that 'the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to: i) the doing of the act; or ii) the doing of the act subject to conditions to be complied with by any of the parties.'

The Native Title Tribunal categorises the considerations that it will take into account when assessing if a negotiation has been conducted in good faith. Parties are obliged to:

- Communicate and respond with other parties within a reasonable time
- Make proposals to other parties and respond to those propositions (by making counter-proposals or by way of comment or suggestion about the original proposal) with a view to achieving agreement
- Make inquiry of other parties if there is insufficient information to proceed in negotiations and a reciprocal expectation that relevant information be provided by those parties within a reasonable time
- Seek from other parties appropriate commitments to the process of negotiation or subject matter of negotiation, and a reciprocal obligation to make either commitments, or concessions
- Act honestly and reasonably in the circumstances with a view to reaching agreement.¹⁵⁵

Once an application for a mining lease has gone through the assessment stage and a recommendation to grant is made, DMP will make public notification of intention to grant a mining lease and section 29 of the *Native Title Act 1993* is triggered – the notification of native title parties.

153 *Native Title Act 1993* s 31(1)(b).

154 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2880 Paul Keating.

155 *Western Australia v Dimer* [2000] 290 NNTT 31.

Negotiating an agreement

The parties have six months from notification that the right to negotiate process applies to come to an agreement before they can apply to the NNTT for a future act determination.¹⁵⁶

When the parties come to an agreement it is lodged with the NNTT and the mining lease will be authorised. If agreement cannot be reached, any party can request that the NNTT assist by mediating an outcome.¹⁵⁷ A Tribunal Member or a staff member will conduct mediation conferences to attempt to resolve disputes and assist with obtaining an agreement.¹⁵⁸

If negotiations have failed, either party can make an application to the NNTT for a future act determination, and the NNTT is required to establish that negotiations have occurred in good faith.¹⁵⁹

In Australia the principle of free, prior and informed consent does not apply to mining agreements with Indigenous people. Native title parties have no right of veto or consent, only the right to be consulted regarding a mining agreement. If the parties cannot come to an agreement and the native title party cannot prove that the mining company did not negotiate in good faith, the NNTT will determine under the provisions of the *Native Title Act 1993* that the future act may proceed. Article 32.2 of the United Nations Declaration of the Rights of Indigenous People states:

States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institution in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.¹⁶⁰

Indigenous Land Use Agreements (ILUA)

Native Title parties can choose to either commence the expedited process or the right to negotiate process or negotiate an ILUA with a mining company. ILUAs have the advantage of being a more flexible agreement and can cover a range of activities including both exploration and mining. An ILUA is a binding agreement for all future acts.¹⁶¹ A recent court case has ruled that an ILUA is only valid if all the native title claimants who are named applicants in the area are signatories.¹⁶²

There is no authorised process for negotiating an ILUA, and the state is usually not a party to an ILUA between a mining company and a native title party.¹⁶³ An ILUA can cover compensation, protection of significant sites, future and previous acts, and native title rights and interests.¹⁶⁴

ILUAs are placed on the NNTT Register of Indigenous Land Use Agreements.¹⁶⁵ The content of ILUAs between mining companies and native title parties are generally not made public. However the State has made some of the content of ILUAs it has signed with native title parties publicly available.¹⁶⁶

Vulnerabilities and risk – Native Title

Three vulnerabilities have been identified for future act negotiations: the **representation of native title parties in negotiations**, the **low level of transparency of the agreement making process** and the **imbalance of resources between parties**.

1. Representation of native title parties in negotiations

The negotiation of agreements with mining companies involves the mining company and their consultants, representatives of the native title parties, and the native title party. Native title representatives can be Native Title Representative Bodies (NTRBS), Prescribed Body Corporates (PBCs), other Aboriginal Corporations, service providers, or private agents. A vulnerability has been identified where Native title parties appoint a negotiator who then fails to represent their interests.

The *Report to Government* by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group noted that it 'is aware of instances where individuals have diverted for their own benefit the proceeds (or significant portions of them) from native title-related 'future act' agreements that were intended by the *Native Title Act* or the terms of an agreement to be enjoyed by an entire community'.¹⁶⁷

The Working Group also raised two issues of concern in relation to governance and protecting Indigenous community benefits. One issue relates to the distribution of funds, and the other issue relates to the representation of native title parties:

156 *Native Title Act 1993* s 35(1)(a).

157 *Native Title Act 1993* s 31(3).

158 National Native Title Tribunal, *Future Act Mediation* www.nntt.gov.au/futureacts/Pages/Future-act-mediation.aspx.

159 *Native Title Act 1993* s 31(1)(b).

160 United Nations, *United Nations Declaration on the Rights of Indigenous People* www.iwgia.org/publications/search-pubs?publication_id=27.

161 Hunt above n 27, 345.

162 *McGlade v Native Title Registrar* [2017] FCAFC 10. The Commonwealth Government may change the law so that other ILUAs signed for resource projects are not invalidated.

163 Department of Premier and Cabinet, Government of Western Australia, Guide for Third Party Indigenous Land Use Agreements (10 March 2015) www.dpc.wa.gov.au/lantu/MediaPublications/Pages/Publications.aspx 2.

164 *Native Title Act 1993* ss 24BB, 24CB, 24DB.

165 Ibid ss 24BI, 24CK, 24CL 24DL.

166 Land approvals and Native Title unit, Government of Western Australia, *Agreements* www.dpc.wa.gov.au/lantu/Agreements/Pages/Default.aspx

167 Treasury, Australian Government, Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government 2013*, 1 July 2013, 17.

First, is the uncertain status of funds generated by native title agreements. Second, is the uncertainty regarding a named applicant's duties to the native title group (comprising both the native title claim group and the determined native title holders) and the representation of some, but not all, members of a native title group, by private agents who have dubious authorisation to act on behalf of all members of the native title group. It might be thought that, under the Act, the proceeds of native title agreements would belong to the native title group and that the named applicant is in a fiduciary relationship with the group.¹⁶⁸

While there are many reports of benefits accruing to native title parties from mining agreements, and the responsible administration of native title parties' interests by representatives and service providers, the issue has been raised that native title parties' interests may not be represented in the agreement making process. Some of the different groups that can represent native title bodies to negotiate agreements are described below.

Native Title Representative Bodies and Service Providers

The Department of Prime Minister and Cabinet funds fourteen Native Title Representative Bodies (NTRBs) or Native Title Service Providers (NTSPs) in Australia:¹⁶⁹ NTRBs provide facilitation and assistance functions to research and prepare native title applications; and to assist, on request, native title bodies corporate, and holders in consultation, mediations, negotiations and proceedings for native title applications, future acts, ILUAS and rights of access.¹⁷⁰ NTRBs are funded by the government to facilitate native title claims but are not funded for assistance with future act negotiations. O'Faircheallaigh notes that NTRBs are under resourced to carry out their obligations under the *Native Title Act 1993*.¹⁷¹

NTRBs administer native title claims through the courts. Once native title is determined, NTRBs assist native title holders to set up Prescribed Bodies Corporates (PBCs) under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). It is expected that after a PBC has been set up, the role of the NTRB in managing native title holders' affairs will be diminished, especially when the PBC has funding from future act agreements, and can fund its own representation and administration.

It has been reported that there can be a conflict of interest between the NTRB's role in assisting native title claims and the devolving of responsibilities to bodies corporate once the determination has been made.¹⁷² A conflict of interest can also arise between the NTRB's aim to generate funding to support its activities, and its role in assisting native title

parties, creating a risk that NTRBs may be self interested whilst representing native title parties during negotiations with mining companies.¹⁷³

Prescribed body corporates

Prescribed Body Corporates (PBCs) hold the rights and interest of the common law holders (i.e. the native title claim group). After a native title determination, PBCs are nominated by the native title group to manage or hold in trust native title.¹⁷⁴ Once PBCs are entered into the National Native Title Register they become a Registered Native Title Body Corporate (RNTBC). Tensions can arise relating to the competing interests of different family or sub groups, and the PBCs distribution of benefits to the wider claim group.¹⁷⁵ Poor governance and oversight of aboriginal corporations has led to some publicised cases of corruption.¹⁷⁶

Other agents and service providers

Private agents commonly provide consultant legal services, anthropological services, mediation and negotiation skills and commercial advice to NTRBs, PBCs and other Aboriginal Corporations for the purpose of future act agreements. In recent reports to government, concerns have been raised regarding private agents representation of native title parties and provision of services to the parties, and the absence of mechanisms in the *Native Title Act 1993* to regulate the sector.¹⁷⁷ Whilst the vast majority of private agents and service providers provide essential and professional services to native title parties, it has also been reported that service providers and private agents can, in certain instances, be self interested, and negotiate a mining agreement according to their own pecuniary or ideological goals.¹⁷⁸

Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, reports that he has received reports that consultants are acting unprofessionally in future act negotiations:

¹⁷³ Ibid.

¹⁷⁴ *Native Title Act 1993* ss 55 - 57

¹⁷⁵ Toni Bauman 'Navigating Complexity,' in *Living with Native Title* (AIATSIS Research Publications, 2013) 10.

¹⁷⁶ Paul Cleary, 'Dreamtime turns to dust' *The Australian* (online), 28 May 2015 www.theaustralian.com.au/national-affairs/indigenous/dreamtime-turns-to-dust/news-story/0dab329d6bb57bac15730ebb7f1c0f1e; The sorry tale of Lake Disappointment ,the missing mining millions', *The Sydney Morning Herald* (online) 27 July 2015 www.smh.com.au/national/the-sorry-tale-of-lake-disappointment-the-missing-mining-millions-20150724-gjiv8h.html; Robert Burton-Bradley, 'Mining giant suspends negotiations with land council amid corruption probe' *NITV News* 9 July 2015 www.sbs.com.au/nitv/article/2015/07/09/mining-giant-suspends-negotiations-land-council-amid-corruption-probe.

¹⁷⁷ Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* Department of Prime Minister and Cabinet (March 2014) 27; Treasury, Australian Government, Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government 2013*, 1 July 2013, 17.

¹⁷⁸ Expert interviews (Perth, December 2016, January, February, April 2017) (Brisbane, March 2017); Yamatji Marlpa, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations*, 27 September 2013, 2; Native Title Services Victoria, Submission No 4 to Senate Standing Committee on Legal and Constitutional Affairs, *Native Title Amendment Bill 2012*, 29 January 2013, 15 -19;

¹⁶⁸ Ibid.

¹⁶⁹ Department of Prime Minister and Cabinet, Australian Government, *Native Title Representative Bodies and Service Providers* www.dpmc.gov.au/indigenous-affairs/land/native-title-representative-bodies-and-service-providers.

¹⁷⁰ *Native Title Act 1993* s 203BB(1)(2).

¹⁷¹ Ciaran O'Faircheallaigh, 'Aborigines, mining companies and the state in contemporary Australia: A new political economy or 'business as usual'?' 41(1) *Australian Journal of Political Science* (2006) 1, 5.

¹⁷² Expert Interviews (Perth, February, March, April 2017) (Regional Western Australia, January 2017) (Brisbane, March 2017).

I have been advised that these consultants are taking advantage of native title groups by promising quick and financially rewarding future act negotiations with mining companies, and charging exorbitant fees for their services. It appears these individuals are also exacerbating lateral violence in our communities by assuming a 'divide and conquer' approach to native title groups.¹⁷⁹

Pre determination applicants and future act negotiations

Predetermination of native title, the 'applicant' is authorised to make a native title claim with the authority of the group.¹⁸⁰ The applicant can be a group of traditional owners elected by the native title claim group, and represented by an Aboriginal Corporation of which they are members.

The *Native Title Act 1993* gives the applicant powers to receive funds for the native title group to the native title claim but does not regulate how that funding is managed or regulated. The uncertainty regarding a named applicant's representation of the native title group and the low level of transparency of agreements can create a risk that the applicant may not discharge their fiduciary obligation to the wider group.¹⁸¹

Native title parties can apply to the Federal court to replace the applicant for a native title claim if an applicant is no longer authorised by the claim group, incapacitated or dead, or the applicant has exceeded their authority.¹⁸² There is a risk that because of tensions within a native title group one native title sub group will attempt to replace the applicant to native title with another sub group for political reasons.¹⁸³ The stakes can be high as the applicant can represent the native title claim group in future act agreements and manage the compensation received.

There is also a risk that mining companies will actively support replacing the applicant for a native title claim that they have been unable to reach a negotiated agreement with, as occurred with the Yindjibarndi and FMG.¹⁸⁴ The case study below illustrates the tensions that can exist between sub groups in a native title claim group, and the capacity for mining companies to interfere in Indigenous politics with the aim of creating a beneficial outcome for the company.

179 Australian Human Rights Commission, *Native Title Report 2012*, (26 October 2012) www.humanrights.gov.au/sites/default/files/document/publication/native_title_report_2012.pdf 46;

180 *Native Title Act 1993* s 62A.

181 Annie Guest, 'Traditional owners locked in bitter stoush over Cape York mining royalty deal' *ABC News* 14 December 2015 www.abc.net.au/news/2015-12-14/traditional-owners-bitter-stoush-cape-york-mining-royalty/7025110.

182 *Native Title Act 1993* s 66B.

183 *Burragubba v State of Queensland* [2017] FCA 373; *TJ v State of Western Australian* [2015] FCA 818; *Weribone v State of Queensland* (2013) FCA 255; Marcus Priest, 'Court raises native title rort concerns' *Australian Financial Review* (online) 27 May 2013 www.afr.com/business/energy/gas/court-raises-aboriginal-native-title-rort-concerns-20130326-j5xyv.

184 *TJ v State of Western Australian* [2015] FCA 818, 10, 93, 115, 116, 122.



Hamersley Gorge
Source: By Tim Pryce/Shutterstock.

CASE STUDY: YINDJIBARNDI ABORIGINAL CORPORATION

The Yindjibarndi Aboriginal Corporation (YAC) is the authorised applicant for the Yindjibarndi native title claim in the Pilbara region being determined by the Federal Court. The native title claim is for exclusive possession of the land in the Yindjibarndi # 1 Claim Area. YAC and the Ngarluma Aboriginal Corporation are the registered PBCs that manage the native title rights from an earlier determination for non-exclusive possession of the Ngarluma Yindjibarndi Native Title Area.¹⁸⁵

FMG entered into negotiations with YAC for the Solomon Hub iron ore project, which covers both the # 1 Claim Area and the Native Title Area. YAC did not accept FMG's offer of capped compensation, a signing fee, and employment and training, arguing the compensation paid should match the royalty percentages paid by BHP and Rio Tinto.¹⁸⁶ A breakaway group of elders set up the Wiru-Murra Yindjibarndi Aboriginal Corporation (WMYAC) and entered into an agreement with FMG. WMYAC were also contracted by FMG to undertake Aboriginal Heritage Surveys, and entered into lucrative joint ventures with FMG contractors for provision of services to the Solomon Hub.¹⁸⁷

In June 2015 WMYAC held an authorisation meeting in Roebourne in June 2015 for which FMG provided considerable support including assistance with promotion, convening and conducting the meeting, and arranging the voting procedure.¹⁸⁸ Resolution 5 of the meeting asked the attendees to vote to apply to change the applicant to the native title claim; and to **consent to a determination of native title like the Ngarluma Yindjibarndi determination**, which meant they would be voting to consent to **non exclusive native title**.¹⁸⁹ The Federal Court dismissed the application

to change the applicant to the Yindjibarndi #1 Claim. The Court found that none of the Yindjibarndi elders 'had any understanding whatsoever of the nature of the authorisation and direction that resolution 5 would have required her to carry out'.¹⁹⁰ And further 'it is a matter of very serious concern that these three trusting elders were asked to affirm, in affidavits, that they would support the Court making a consent determination that would deprive the claim group, in whose interests they thought they were acting, of the critical right to control access'.¹⁹¹

The compensation that native title parties can negotiate with mining companies is significantly reduced where there is non-exclusive native title. A determination of non-exclusive possession for the Yindjibarndi #1 Claim Area would have been of benefit to FMG.

Analysis of risk

The vulnerability in the representation of native title parties lead to the risk *What is the risk that those negotiating with a mining company on behalf of a Native Title Party will not represent community members interests?*

Research has shown that in the agreement-making space there are representatives who act professionally and make agreements with mining companies that can bring benefits to Indigenous people and that many negotiations have been conducted to the satisfaction of native title parties. However, there are reports of incidences where this has not occurred.

Native title parties' interests may not be represented in negotiations with mining companies because of poor representation or because of the politics of representation within different groups. Poor representation may occur due to unprofessional behaviour, self-interest or corruption. The sometimes divisive nature of group representation and the tensions that can occur between family groups and sub groups, creates an opportunity for manipulation by either mining companies or representatives.

The lack of transparency of agreements means that there is no opportunity to monitor agreements and ensure that benefits generated from agreements are distributed to the wider group and are not being used to benefit individuals, agents, or representative organisations.

Summary

Native title parties entering into agreements with mining companies require representation and assistance to negotiate agreements. NTRBs, PBCs, applicants, and private agents have an important role to play in the facilitation of negotiations. Native titles parties place trust in their representatives to represent them professionally, fairly, and equitably. If this trust is broken by unprofessional and corrupt

¹⁸⁵ Sarah Prout, *Aboriginal Assesses, The Impact of Major Agreements Associated with Native Title in Western Australia*, The University of Western Australia, Curtin University Research Project (2017)

¹⁸⁶ Paul Cleary 'Native Title Contestation in Western Australia's Pilbara Region,' 3 (3) *International Journal for Crime, Justice and Social Democracy* 2014 132,142,.

¹⁸⁷ *TJ v State of Western Australian* [2015] FCA 818, 38; Wiru-murra, *Our Projects* www.wmyac.com/our-projects/.

¹⁸⁸ *TJ v State of Western Australian* [2015] FCA 818, 115,

¹⁸⁹ Ibid 32.

¹⁹⁰ Ibid 101

¹⁹¹ Ibid 102 – 103 as per Rares J.

behaviour the impacts on disadvantaged communities can be severe. Communities may not receive the benefits that mining agreements can bring.

2. Transparency of agreement making

The low level of transparency of agreements between native title parties and mining companies has been identified as a vulnerability that could enable corruption in the future acts negotiation process.

Registered agreement

A native title agreement is a commercial agreement between the native title party and the mining company. The agreement is usually confidential and the Western Australian government is not party to the agreement. This agreement is often described as an ancillary agreement.

To comply with the *Native Title Act 1993* requirement for a statutory agreement, the government requires a section 31 agreement, also called a State Deed, to be signed by all three parties: the native title party, the applicant, and the Minister for Mines and Petroleum or delegated official.¹⁹² The State Deed is lodged with the NNTT and the Department of Mines and Petroleum can then grant the tenement. The State Deed contains limited information pertaining to the signatories.

Transparency of agreements

There is no requirement to report the commercial, ancillary, agreement between a native title party and a resource company. Due to the contractual nature of ancillary agreements, the parties can agree to disclose or not disclose the contents of the agreement. In practice, parties choose not to do disclose payments and the other components of the agreement though it has been reported that Rio Tinto and also the Kimberley Land Council have made some elements of agreements public.¹⁹³

In the ATNS working paper, *Transparency in Resource Agreements with Indigenous People in Australia* the reasons for the low level of transparency are attributed to a range of factors including:

- Low legal requirement for disclosure
- The viewing by some or all of the parties to agreements as well as regulators, as private or commercial contracts similar to agreements with private land-holders, especially where the State is not a party
- The availability of (and preference for) more informal, more flexible and less resource-intensive (and hence less burdensome in terms of disclosure) types of agreements over more formal, and marginally more transparent alternatives such as ILUAs; and
- A widespread tendency by parties to agreements to

¹⁹² Department of Mines and Petroleum, *Native Title Process, Guidelines for completion of State Deed* www.dmp.wa.gov.au/Minerals/Native-Title-Act-Process-5548.aspx.

¹⁹³ Miranda Stewart, Maureen Tehan and Emille Boulot, 'Transparency in Resource Agreements with Indigenous People in Australia' (Working Paper No 4, Agreements, Treaties and Negotiated Settlements Project, 2015) 9.

regard the entirety of agreements as 'confidential'.¹⁹⁴

Pre-negotiation agreements signed between representatives of native title parties and resource companies are also commercial, contractual agreements that do not require disclosure. These agreements can include negotiating protocols and confidentiality provisions.¹⁹⁵

There is considerable public debate regarding the level of transparency that agreements between native title parties and resource companies should have.

Stewart, Tehan, and Boulot argue that agreements should have a low level of transparency for the following reasons:

- Native title is an interest in land and a form of land ownership and equates to the same stipulations as to the rights accorded to freehold landowners regarding the transparency of agreements for resource sector payments for mining tenements
- The right of native title parties to protect sacred, significant and personal information
- The right of resource sector companies and native title parties to hold commercially sensitive information in confidence.¹⁹⁶

Arguably there would be benefit to native title parties if agreements were made transparent and the following clauses were applied to the agreement-making process:

- Benchmarking of payments. Some payments to native title parties are well known, especially those paid by BHP and Rio Tinto in the Pilbara due to information leaked from agreements. The benchmarking of payments often rests with economic advisors, some who have negotiated agreements for many years. Increased benchmarking would allow native title parties to understand what is appropriate, resource sector companies of what the expectation is, and reduce negotiating times because of unrealistic expectations of both native title parties and resource sector companies.¹⁹⁷
- Access to information on payments, and other components of the agreement would provide information for the wider Indigenous community in the agreement area, regarding negotiated benefits and the future impacts of the mining projects. Cases have been reported where the access to agreements by members of the Indigenous community has been impeded by formalistic approaches of representative bodies or by agents.¹⁹⁸ Native title parties would also then have the information to form an understanding of what payments and benefits were distributed to agents and service providers.

¹⁹⁴ Ibid 8.

¹⁹⁵ Expert interviews (Perth, February, March 2017).

¹⁹⁶ Stewart above n 193, 8-11; Expert interviews Regional Western Australia (January 2017), Perth (February, May 2017) Brisbane (March 2017). Industry reports that native title parties request that agreements be kept confidential, Expert interviews (Perth, February, June 2017).

¹⁹⁷ Expert interview (Perth, December 2016)

¹⁹⁸ Expert interviews (Perth, February, March, May 2017)

Stewart, Tehan and Boulot argue that increased transparency would provide models and templates for parties to future agreements; enable more comprehensive analysis of outcomes of agreement making for Indigenous people; address complexities in power balances; address the frustrations of government; enable analysis of the equity of agreement making processes; and increase accountability in the implementation of agreements.¹⁹⁹

Confidentiality need not apply to all the elements of mining agreements. Partial disclosure would allow for the protection of culturally significant information, and sensitive commercial information.

Analysis of risk

The lack of transparency involved in agreement making coupled with the imbalance of power and resources between the parties, together with the potential for self-interested representation of native title parties, creates an enabling environment for corruption.

Lack of transparency in agreement making led to the risk – *What is the risk that the content of final agreements between mining companies and Indigenous parties will be kept secret?* This risk scored very highly because agreements are not transparent except for the minimal information obtained in a Section 31 notice. This risk can lead to adverse impacts for Indigenous communities and enable corruption. It should be taken into account that native title parties should have the same rights to keep a commercial agreement confidential as freehold landowners rights for compensation for mining leases. The risk assessment does not provide allowances for the complexity of the agreement-making process, the policy environment, and the historical and cultural factors that contribute to future act negotiations.

The lack of transparency of agreements and monitoring of the implementation of the terms of an agreement could lead to the lack of distribution and implementation of benefits, environmental damage, and destruction of sites of significance by mining activities.

Summary

Low levels of transparency can enable corrupt practices by service providers, private agents, and applicants leading to significant adverse impact on communities. Compensation negotiated by native title parties with mining companies may not be distributed to the wider native title group in whose name the agreement was negotiated. Mining companies have the opportunity to negotiate agreements that may not distribute benefits to native title parties in accordance with native title rights, and the lack of accountability means that implementation of agreement terms are not monitored. However, native title and future act negotiations are contested and complex, and this should be taken into account when viewing the risk assessment.

3. Imbalance of resources and power

It is widely recognised that there is an imbalance of resources between mining companies and native title parties at the negotiating table.²⁰⁰ The imbalance of resources can be categorised as an imbalance of knowledge and skills, an imbalance of financial capacity, and an imbalance of power.

Indigenous people in remote communities where mining occurs often do not have the skills to negotiate a mining agreement nor the financial resources to hire the expertise required. The costs of negotiation can be high for native title parties. Costs that need to be covered include travel costs for Indigenous people and their advisers, and the costs of legal, economic, and environmental expertise.²⁰¹

Mining companies have the human and financial resources to effectively negotiate a position of advantage. The larger mining companies in Australia recognise the imbalance in resources and will fund the cost of negotiations for native title parties. However, it has been reported that smaller companies may not provide the resources for Native Title parties to engage effectively in negotiations. The WA Chamber of Minerals and Energy notes that 'some proponents are unable to provide such funding in addition to paying benefits under the agreements negotiated, including for economic reasons or due to compliance with national and international anti-corruption legislation'; and that 'proponents being required to directly fund native title parties distorts the negotiation process.'²⁰²

PBCs also have to find the financial and human resources to manage the legal proceedings that either they, other native title groups or the mining company instigate. The number of proceedings can be considerable. The Yindjibarndi Aboriginal Corporation has of June 2017 managed 50 legal cases in the courts; and since 2010, 29 mining company applications under section 16 and 18 of the *Aboriginal Heritage Act 1978* (WA) for the excavation or destruction of sites of significance.²⁰³

The future act process can also create an imbalance of power between mining companies and native title parties. Native title parties can be disadvantaged in the right to negotiate phase and in NNTT arbitration. Where negotiations have gone to arbitration, as of June 2017, the NNTT has refused three future act applications.²⁰⁴ The NNTT does not rule on the content of an agreement but only whether an act may or may not proceed. Knowing that arbitration will be in their favour, the extent to which mining companies will

200 Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act; A critical analysis' in Cynthia Ganesharajah ed *Land, Rights, Laws: Issues of Native Title* (Native Title Research Unit, 2009) 1, 6.

201 O'Faircheallaigh, above n 146, 1, 4- 5.

202 Chamber of Minerals and Energy WA, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations 14 October 2013* 9.

203 Search function Austlii www.austlii.edu.au/; Expert interview (Perth, February 2017)

204 National Native Title Tribunal, *Search Future Act Applications and Determinations* www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx.

199 Stewart above n 193, 11, 12.

negotiate in good faith can be questioned. O’Faircheallaigh observes that ‘Aboriginal parties are under considerable pressure to settle during the Right to Negotiate period, while mining companies are under no such pressure knowing that if they do not achieve an agreement that suits them, they can go to the Tribunal and obtain the interests that they need to proceed with their project.’²⁰⁵

Indigenous parties can also come from a position of what Prout describes as ‘entrenched disadvantage.’²⁰⁶ The legacy of historical dispossession through colonisation, settlement and pastoral development, alienation from the legal system and the ‘exclusion from mainstream education, and health systems has direct implications for contemporary capacity, confidence and alacrity in entering into negotiations.’²⁰⁷

Summary

Native title parties enter negotiations from a considerable position of disadvantage. They can often lack the skills, knowledge and financial resources to enter into negotiations on an equitable basis. The inequity is further compounded by the imbalance of power built into the future act negotiation process, and by the systematic and historical disadvantage of Indigenous people in Australia.

Vulnerabilities and risks – native title

| Vulnerability | Risk | Score |
|---|--|-----------|
| Representation of native title parties | What is the risk that those negotiating with a mining company on behalf of a Native Title Party will not represent community members’ interests? | High |
| Lack of transparency in agreement-making and negotiations | What is the risk that the content of final agreements between mining companies and Indigenous parties will be kept secret? | Very High |

²⁰⁵ Ciaran O’Faircheallaigh *Negotiation in the indigenous world: Aboriginal peoples and the extractives industry in Australia and Canada* (Routledge 2016) 112.

²⁰⁶ Prout above n 185, 21.

²⁰⁷ Ibid

This section looks at the issues, vulnerabilities and risks that have been identified as applying across jurisdictions and approvals processes. Some of these issues have been identified in the preceding sections on the approvals processes assessed in each State. The section also looks at risks that have a broad impact in the context of mining in Australia and issues that are relevant to both the Commonwealth and the States.

CROSS CUTTING ISSUES

The research has shown that vulnerabilities and risks can apply across jurisdictions and approvals processes. These vulnerabilities are **inadequate due diligence by government into the character and integrity of proponents** and **protection of whistle blowers**. Further, a vulnerability has been identified that applies to the approvals process for large infrastructure projects in both Western Australia and Queensland, the capacity for **industry to influence** decision-making.

Industry influence

Industry influence in resource sector development has been identified as a corruption risk relating to the governance of mining, particularly in regard to large infrastructure projects in Western Australia and Queensland. The risk relates to the capacity of industry to influence both the policy and the political agenda of government in regard to the development of major resource projects.

The states' stated goal for economic development, investment promotion, and job creation through large infrastructure projects can drive the policy agenda. There is a fine line between the public good of economic development and 'bad' decisions where the affects on the environment and community are not taken into account. Policy needs to take into account legitimate interest groups like the mining industry, whilst ensuring there is not undue influence or interference in the business of government. Notably, there have been documented Corruption and Crime investigations in Australia that have involved the investigation of politicians with close ties to industry, for corruptly influencing the mining approvals process, which in some cases has led to convictions and imprisonment.²⁰⁸

208 Independent Commission Against Corruption New South Wales, *NSW public officials and members of Parliament - allegations concerning soliciting, receiving and concealing payments (Operation Spicer)* 30 August 2016 www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/220; Nicole Chettle 'Ian McDonald jailed for 10 years for misconduct in public office, John Maitland also imprisoned', *ABC* (online) 2 June 2017 www.abc.net.au/news/2017-06-02/macdonald-and-maitland-jailed-over-mining-licence-deal/8580914.

There are three interlinked theoretical concepts that analyse how influence and corruption work: regulatory capture, policy capture, and state capture.

Regulatory capture, policy capture, and state capture

Regulatory capture

Regulatory capture can be defined as the close identification of a government official with the industry that s/he is regulating. It can involve sympathy with the problems that industry confronts in meeting standards, identification with the interests of industry, and favourable bias toward particular companies and the problems they face.²⁰⁹ Whilst regulatory capture can be an issue for mines department staff involved in the *monitoring and auditing* of mines, the checks and balances in place for the approvals process for exploration licences and mining leases can prevent regulatory capture affecting the *approvals process*.

Policy and state capture

The OECD defines **policy capture** as the result or process by which public decisions over laws, regulations or policies are consistently or repeatedly directed away from the public interest and towards the interests of a narrow interest group or person.²¹⁰

Transparency International notes that **state capture** can broadly be understood as the 'disproportionate and unregulated influence of interest groups on decision-making processes where special interest groups manage to bend state laws, policies and regulations through practices.'²¹¹

Integrity systems have an important role to play in reducing the capacity of industry to influence government.

Commonwealth integrity frameworks

Integrity systems are 'the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life.'²¹² The state based integrity systems are described in the Western Australia and the Queensland sections of the report. The Commonwealth has established some integrity systems and offices including:

- Lobbyist Code of Conduct and Lobbyists Register, Statement of Ministerial Standards, Register of Members'

209 See the ICAC investigation Mine Subsidence Board – allegations concerning former district manager (Operation Tunic) 23 March 2016 www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/210

210 OECD, 'Preventing Policy Capture', 30 March 2017 OECD *Public Governance Reviews* www.oecd.org/corruption/preventing-policy-capture-9789264065239-en.htm

211 Transparency International, *State Capture: an Overview* (11 March 2014) www.transparency.org/files/content/corruptionqas/State_capture_an_overview_2014.pdf.

212 Transparency International cited in Accountability Round Table, *Corruption our Policy* www.accountabilityrt.org/wp-content/uploads/2010/08/Corruption-Our-Policy.pdf

Interests and Register of Senators' Interests²¹³

- Australian Commission for Law Enforcement Integrity, Commonwealth Ombudsman, Australian National Audit Office, Office of the Australian Information Commissioner.²¹⁴

Whilst anti-corruption bodies operate in Western Australia and Queensland, the Commonwealth has not established an anti-corruption agency. If corruption does occur there is no defined mechanisms for reporting and investigation. The lack of an anti-corruption body also means that there is an absence at Commonwealth level of anti corruption training of government representatives, and of anti corruption research and policy development. In addition, there have been calls for the Commonwealth to establish a Parliamentary Integrity Commissioner and develop Codes of Conduct for the House of Representatives, the Senate and Ministers.²¹⁵

Whilst in Australia, where there are some systems in place to prevent 'disproportionate and unregulated' influence, there are still avenues by which industry can influence politicians, and capture the policy agenda. These avenues include 'revolving doors', lobbying, political donations and the culture of mateship.

Avenues of influence

Revolving doors and lobbyists

Revolving doors involves the movement of personnel between government and industry. The revolving doors can be between lobbyists and government representatives and officials, and industry and government representatives and officials. As of September 2016, of 538 lobbyists registered by the Department of the Prime Minister and Cabinet, 191 are former government representatives.²¹⁶ Lobbyists who have worked in government have the advantage of having knowledge of the system and portfolios, but also have the connections and networks in government to effectively lobby for industry.²¹⁷ The practice of ex politicians and senior government staffers

213 Department of Prime Minister and Cabinet, About the Register, www.lobbyists.pmc.gov.au/index.cfm; Department of Prime Minister and Cabinet, *Statement of Ministerial Standards* www.pmc.gov.au/resource-centre/government/statement-ministerial-standards; Parliament of Australia, *Register of Members Interests* www.aph.gov.au/Senators_and_Members/Members/Register and Register of Senators' Interests www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/CurrentRegister

214 Australian Commission for Law Enforcement Integrity www.aclei.gov.au/; Commonwealth Ombudsman www.ombudsman.gov.au/; Australian National Audit Office www.anao.gov.au/; Office of the Australian Information Commissioner www.oaic.gov.au/

215 The Australian Collaboration, *Democracy in Australia – Ministerial and parliamentary codes of conduct*, www.australiancollaboration.com.au/pdf/Democracy/Ministerial-codes-of-conduct.pdf; Parliament of Australia, *Establishment of a National Integrity Commission* www.aph.gov.au/Parliamentary_Business/Committees/Senate/Establishment_of_a_National_Integrity_Commission/NIC;

216 George Rennie, 'The revolving door; why politicians become lobbyists and lobbyists become politicians', *The Conversation* 26 September 2016 www.theconversation.com/the-revolving-door-why-politicians-become-lobbyists-and-lobbyists-become-politicians-64237.

217 Graham Readfearn, 'Get to know your lobby groups' ABC News (online) 22 March 2012 www.abc.net.au/news/2012-03-22/readfearn-get-to-know-your-lobby-groups/3906036.

moving to well-paid positions post politics is common.²¹⁸ For example Martin Ferguson, who was the Labor administration's Minister for Resources, became a lobbyist for the resources industry.²¹⁹ Likewise, the Liberal party Minister for Resources, Ian McFarlane, became the chief executive of the Queensland Resources Council in 2016.²²⁰ Conflicts of interests involved in ministerial project approvals may not be immediate and apparent, but they are implicit in the fact that politicians may potentially receive benefit at a time in the future for the doing of an act.

The Lobbyists Code of Conduct states that retired Ministers and Parliamentary Secretaries must wait 18 months before lobbying on matters with which they have had official dealings.²²¹ This does not apply to Ministers moving to industry associations. Whilst industry associations are not classified as lobbyists for the purpose of the lobbyist register, they play a significant role in lobbying government and trying to influence policy.²²² Several commentators have raised concerns about the role of industry associations and think tanks in influencing government policy on climate change, coal mining, and on resource taxes.²²³ Industry associations have also utilised well-resourced advertising campaigns to influence government. During the 2010 Federal and 2017 Western Australian elections, industry associations campaigned against mining taxation through regular and targeted advertising in

218 Lisa Cox, 'Indian miner Adani hires Labor and Liberal staffers to make its case' *The Conversation* 4 July 2014 www.smh.com.au/business/mining-and-resources/indian-miner-adani-hires-labor-and-liberal-staffers-to-make-its-case-20150702-gi3yg8.html; Max Philips, 'The revolving doors between miners and government' on *Jeremy Buckingham* (27 March 2015) www.jeremybuckingham.org/2015/03/27/the-revolving-door-between-miners-and-government/; David Holmes, 'The fossil-fuelled political economy of Australian elections' *The Conversation* 22 June 2016 www.theconversation.com/the-fossil-fuelled-political-economy-of-australian-elections-61394.

219 Rennie, above n 216.

220 Anna Henderson, 'Former resources minister Ian MacFarlane says new mining job complies with code of conduct', *The ABC* 26 September 2016 www.abc.net.au/news/2016-09-26/ian-macfarlane-appointed-to-run-queensland-mining-lobby/7876942.

221 Department of Prime Minister and Cabinet, *Lobbyist Code of Conduct*, cl 7 www.lobbyists.pmc.gov.au/conduct_code.cfm#register.

222 Inga Ting, 'Political donations: Mining hits back at Labor' *The Sydney Morning Herald* (online) www.smh.com.au/federal-politics/political-news/political-donations-mining-hits-back-at-labor-20150205-1372gf.html; Department of Prime Minister and Cabinet, *Lobbyist Code of Conduct*, cl 3.5.

223 Guy Pearce, 'Quarry Vision: Coal, climate change and the end of the resources boom,' (2009) 33 *Quarterly Essay*; Wayne Swan, 'The 0.01 per cent, the rising influence of vested interests in Australia,' *The Monthly* (online) March 2012 www.themonthly.com.au/rising-influence-vested-interests-australia-001-wayne-swan-4670 177; Mike Secombe, 'How the Minerals Council of Australia has gov't's ear on coal,' *The Saturday Paper* (online) 24-30 October 2015 www.thesaturdaypaper.com.au/news/politics/2015/10/24/how-the-minerals-council-australia-has-govts-ear-coal/14456052002539; George Rennie, 'Lobbying 101: How interest groups influence politicians and the public to get what they want' *The Conversation* 9 June 2016 www.theconversation.com/lobbying-101-how-interest-groups-influence-politicians-and-the-public-to-get-what-they-want-60569;

an attempt to influence election results.²²⁴ Unions also play a significant role in lobbying political parties and providing support through political donations.²²⁵

In-house lobbyists are not required to register as lobbyists. Government relations staff, or other staff of a corporation do not need to register if they are lobbying on behalf of the company that employs them or on behalf of the group holding company.²²⁶ In 2012, it was noted that there were 4,000 lobbyists employed by corporations and industry groups that are not captured on the register.²²⁷

The lobbying register contains information on the company, the name of lobbyists, whether they previously were a government representative and who their clients are.²²⁸ Information is not made available, unless applied for under FOI, on the lobbyists Ministers meet with, and how often they meet.

The close relationship of industry and government and the capacity for influence can extend to board members of agencies responsible for approving loans for large mining projects. The Department of Industry, Innovation and Science, the Australian Government administers the Northern Australia Infrastructure Facility (NAIF) under the *Northern Australia Infrastructure Facility Act 2016*. NAIF offers concessional finance of up to \$5 billion over five years to encourage private sector investment in infrastructure that benefits Northern Australia.²²⁹



224 Mark Davis, 'A snip at \$22m to get rid of PM' *Sydney Morning Herald* (online) February 2011 www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1acgj.html; Jacob Kagi, 'WA mining tax: Colin Barnett blasts industry over offensive against Brendon Grylls' *ABC News 2* February 2017 www.abc.net.au/news/2017-02-02/wa-premier-slams-mining-lobby-campaign-against-grylls-tax/8236114.

225 Ibid Rennie.

226 Department of Prime Minister and Cabinet, *Frequently Asked Questions* www.lobbyists.pmc.gov.au/faq.cfm#q11 7.

227 Readfearn above n 217.

228 Department of Prime Minister and Cabinet, *Who is on the Register* www.lobbyists.pmc.gov.au/who_register.cfm

229 Department of Industry, Innovation and Science, the Australian Government, *Northern Australia Infrastructure Facility* www.industry.gov.au/industry/Northern-Australia-Infrastructure-Facility/Pages/default.aspx.

CASE STUDY: ADANI CARMICHAEL MINE LOAN APPLICATION AND ROYALTY HOLIDAY

Adani has applied to NAIF for a billion-dollar loan for a rail line to link the proposed Carmichael Coal Mine and the Port at Abbot Point. Environmental Justice Australia lawyers have written to the NAIF to raise concerns about the conflict of interest of two NAIF board members with connections to Queensland mining companies that could benefit financially if the Adani mine is approved.²³⁰ The Australia Institute has reported that there is a lack of internal guidance documents for investment decisions and raised the concern that political pressure is being applied to the NAIF Board to approve the Adani loan.²³¹

Political donations

The under-regulated system of political donations in Australia can allow special interest groups to attempt to influence policy and decision-making.

Candidates, registered political parties and their state or territory branches are required to make an annual disclosure of donations received that are more than the disclosure threshold to the Australian Electoral Commission (AEC). From 1 July 2017 to 30 June 2018 the disclosure threshold is more than \$13,500.²³² The states have different rules. For example in Western Australia annual disclosure is required for donations over \$2,300. In Queensland donations above \$1,000 must be disclosed and disclosure is required twice a year.²³³

The political donation system has been criticised due to systemic loopholes, the inconsistency across jurisdictions, and the lack of transparency.²³⁴ Political donations can be made through 'associated entities' to hide the source of

230 Environmental Justice Australia, 'Loan bodies Adani conflict: answers needed' (Media Release, 29 May 2017) www.envirojustice.org.au/media/loan-bodies%E2%80%99-adani-conflicts-answers-needed.

231 Tony Swann, 'Don't be so Naif: Adani and Governance of the Northern Australia Infrastructure Facility (NAIF)' *Australia Institute* (March 2017) www.tai.org.au/content/adani-and-governance-northern-australia-infrastructure-facility

232 Australian Electoral Commission, *Financial disclosure overview* www.aec.gov.au/parties_and_representatives/financial_disclosure/Overview.htm

233 Yee Fui-Ng, 'Explainer; how does our political donations system work and is it any good?' *The Conversation* 30 May 2016 www.theconversation.com/explainer-how-does-our-political-donations-system-work-and-is-it-any-good-60159.

234 Joo Cheong-Tam, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010).

funds.²³⁵ Associated entities are groups with connections to a political party such as unions, think tanks, and fundraising groups. In a situation akin to money laundering, donations can be split into amounts under the disclosure level, and given to multiple different branches – and it is not illegal.²³⁶ There is no real-time disclosure and there can be a considerable time lag of up to 20 months between the donation and public reporting by the AEC.²³⁷

Unlike other democracies, Australia does not limit political donations, or ban political donations from foreign interests.²³⁸ In contrast, the US, UK, and Canada all ban foreign donations.²³⁹ The ultimate source of foreign donations can be difficult to trace. In 2016 the ABC investigated Chinese businesses and found that they are the largest foreign linked donors to both political parties.²⁴⁰ Four Corners reported that ASIO has warned the major political parties against taking donations from billionaires linked to the Chinese Communist Party as some of these Australian-Chinese donors have been charged by the FBI with bribery.²⁴¹

It can be easy to draw the connections between donating funds to a political party and gaining a *quid pro quo* advantage. The advantage can be ideological, *I give because I believe* in this cause, or it can be pecuniary, *I give because I expect to gain* a reciprocal benefit. As reported in the *Conversation* ‘the managing director of Transfield Services, Luca Belgioro-Nettis, recently likened political donations to the Latin saying *do ut des*: “You give in order to have given back.”²⁴²

Academic institutions and research centres whose funding is dependent on industry can also be captured by the industry they are investigating. Industry funded research can be outcome based and has the potential to produce biased reports providing results that meet the expectation

235 Nick Evershed, ‘Political donations: where Australia’s political parties get their money’, *The Guardian* (online) 10 February 2017 www.theguardian.com/news/datablog/ng-interactive/2017/feb/10/political-donations-where-australias-political-parties-get-their-money.

236 Ashlynn McGhee, ‘The missing millions: Political donations likened to money laundering’, *ABC News* 1 February 2017 www.abc.net.au/news/2017-02-01/political-donations-likened-to-money-laundering/8227952

237 Adam Gartell, ‘Loophole will allow donations made in dying days of federal election to stay secret’, *Sydney Morning Herald* (online) 31 January 2017 www.smh.com.au/federal-politics/political-news/loophole-will-allow-donations-made-in-dying-days-of-federal-election-to-stay-secret-20170131-gu2533.html

238 Marian Sawyer, ‘Australia trails way behind other nations’ *The Conversation* 2 June 2016 www.theconversation.com/australia-trails-way-behind-other-nations-in-regulating-political-donations-59597.

239 ‘FactCheck Q&A: Is Australia one of the few countries worldwide to accept foreign donations?’ *The Conversation* 19 September 2016 www.theconversation.com/factcheck-qanda-is-australia-one-of-the-few-countries-worldwide-to-accept-foreign-political-donations-65343.

240 Chris Uhlmann, ‘Chinese donors to Australian political parties: who gave how much?’ *ABC News* 21 August 2016 www.abc.net.au/news/2016-08-21/china-australia-political-donations/7766654.

241 Nick McKenzie, ‘ASIO warns political parties over foreign donations’ *Four Corners ABC* 6 June 2017 www.abc.net.au/news/2017-06-05/asio-warns-political-parties-over-foreign-donations/8590162.

242 Yee above n 233.

of the funder, and that can be utilised as an evidence based resource for assessment, lobbying or advocacy.²⁴³

Culture of mateship

Australia takes considerable pride in the ethos of mateship as a defining national characteristic.²⁴⁴ Yet, this lauded attribute can create a corruption vulnerability in the mining approvals process when the relationships, and revolving doors between government, industry and lobbyists are examined.

In investigations into mining corruption and misconduct in Queensland, Western Australia and NSW, and subsequent convictions in Queensland and NSW, the friendship or the lack of it between politicians and miners or their lobbyists was raised as a defence. The Minister in Western Australia stated to the CCC, ‘I regret how our friendship, my friendship may have been used but I don’t change my friends.’²⁴⁵ In Queensland, Gordon Nuttall claimed the payments mining executives made to him were a ‘personal transaction between friends.’²⁴⁶ In NSW, Ian McDonald’s lawyer’s argued that the Minister granted a mining tenement to Doyle’s Creek Mining because of the merits of the proposal, and not because they were ‘mates.’²⁴⁷

These cases illustrate the value put on the concept of friendship and mateship and that it can be construed as a justification for misconduct or corrupt acts.

Transparency and commercial agreements

The capacity for industry to influence mining approvals process can be exacerbated by the lack of transparency of commercial agreements between the state and a corporation. This lack of transparency is illustrated by the deferred payments being considered by the Queensland Government for the Adani Carmichael Coal Mine.²⁴⁸

Analysis of risk

Revolving doors, lobbying and donations to political parties enable industry influence; and the provision of

243 Sheldon Krinsky, ‘Do Financial Conflicts of Interests Bias Research?’ (2013) 38(4) *Science, Technology & Human Values*

244 James Page, ‘Is Mateship a Virtue?’ (2002) 37(2) *Australian Journal of Social Issues*, 193, 194 ; Nick Dryenfurth ‘John Howard’s Hegemony of Mateship: The Politics of ‘Mateship’ in the Howard Decade’ (2007) 42(2) *Journal of Political Science* 211, 212-214.

245 Rebecca Carmody, ABC Stasteline, *The corruption inquiry that has the government on its knees* 2 March 2007, www.abc.net.au/stasteline/wa/content/2006/s1863286.htm

246 ‘Corrupt ex-minister Nuttall arrives for sentencing’ *Sydney Morning Herald* (online) 16 July 2009 www.smh.com.au/national/corrupt-exminister-nuttall-arrives-for-sentencing-20090716-dm54.html?deviceType=text; Michael West, ‘Mateship, it is obvious can come at a high price’, *Sydney Morning Herald* (online) 11 May 2013 www.smh.com.au/business/mateship-it-is-obvious-can-come-at-a-high-price-20130510-2jdk0.html.

247 Chettle above n 208.

248 ‘Adani and Queensland Government reach agreement over royalties for Carmichael coal mine’ *ABC News* (online) 30 May 2017 www.abc.net.au/news/2017-05-30/adani-coal-mine-back-on-track-after-royalties-agreement/8573558.

loans, legislative amendments²⁴⁹, and policy directives to enable a mining project can reasonably be interpreted as a consequence of industry influence.

The vulnerability of industry influence led to the contextual risk, *What is the risk of policy capture, and state capture by mining companies?* The **inconsistency of integrity frameworks** in Australia, especially in regard to the Commonwealth, the considerable **ministerial or senior government official discretion** involved in decision-making for large infrastructure projects together with the **culture of mateship**, can enable influence in the approvals process. The opportunity for influence and the impact it can have on democratic processes and institutions led to a score of significant for the risk assessment.

Australia's adversarial parliamentary democracy assists in the exposure of state and policy capture. Opposition parties question government decisions and policy in the house and in the media, and will provide the media with information if there is a suggestion of corruption or injudicious decision-making.

Summary

Policy and state capture have the potential to impact the approvals process for large infrastructure projects in diverse ways by causing governments to rush through legislative amendments to enable mining approvals; and to adapt assessment and decision-making for industry benefit. It also has the potential to enable the corruption of politicians and senior government representatives. State capture is of particular concern when approvals processes allow the exercise of discretion either by a Minister or senior government representative. Under-regulated practices including revolving doors, lobbying, and political donations as well as an entrenched culture of mateship are the vehicles that can allow policy and state capture to occur for large infrastructure mining projects in Western Australia and Queensland.

Whistle blowing

The Whistling While They Work 2 research reports that the protection and support of whistle blowers in Australia requires comprehensive law reform.²⁵⁰ Brown states that the 'few protections proposed or enacted for the private and not-for-profit sectors are piecemeal and potentially inconsistent.'²⁵¹

The existing regulatory frameworks for the private sector provide inadequate protection: victimisation is not prohibited, there are no provisions for compensation, and there is limited

privacy protection.²⁵² *The Corporations Act 2001* (Cth) only covers disclosure made in 'respect of contraventions of corporate law, rather than tax or other law.'²⁵³ The Senate Economics Reference Committee Issues Paper found:

Specific concerns raised by the Joint Committee included the limited scope of the definition of protected disclosures, the lack of any requirement for companies to establish internal processes to facilitate whistleblowing, and the fact the proposed protections did not clarify what role, if any, ASIC had in preventing reprisals against whistle blowers, or acting to protect whistle blowers when reprisals took place. The Joint Committee also criticised the fact that the whistle blower protections did not extend to cover anonymous disclosures.²⁵⁴

Because of the common career trajectory between government and industry, whistle blowers in government or the private sector can lose their right to a career because both industry and government can effectively blackball them.

Whilst inadequate protection of whistle blowers has been identified as a vulnerability, a full risk assessment has not been undertaken due to the existing Australian research and advocacy for improved whistle blower protection.²⁵⁵

Due Diligence

The corruption vulnerability of inadequate due diligence investigation into the character and integrity of the applicant and the principals of a company applies in both Western Australia and Queensland for all the approvals processes examined except for Native Title where it is not applicable.

Whilst it is common for mining companies to investigate the background of partners, contractors and agents to minimise risk, government departments involved in the mining approvals process do not undertake adequate due diligence into the character and integrity of applicants, or the track record for responsible business conduct of the company and its directors in either Australia or overseas for mining leases.

The due diligence that is currently undertaken relates to financial capacity and environmental records. Whilst approvals for large infrastructure projects in Western Australia and Queensland require financial investigation into the capacity of the proponent, the financial investigation does not involve an examination of beneficial ownership to understand who the real owners are.

In Queensland, proponents are required to provide details of their environmental record when applying for suitable operator status for an environmental authority; or

249 *Mineral and other Legislation Amendment Bill 2016* (Qld); Chris McGrath, 'The Queensland Bilateral' 2002/2003 8(33) *Queensland environmental reporter* 145, 150.

250 Whistling While They Work 2 www.whistlingwhiletheywork.edu.au/.

251 AJ Brown, 'Despite businesses best efforts whistleblowers still lack protection under Australian law: new research', *The Conversation* 8 November 2016 www.theconversation.com/despite-business-best-efforts-whistleblowers-still-lack-protection-under-australian-law-new-research-66910.

252 Fiona McLeod, 'Strengthening Australia's National Integrity System: Opportunities and Imperatives,' (Paper presented at National Integrity Conference 2017, Brisbane, 16 March 2017) 7.

253 Ibid.

254 Senate Economics Reference Committee, Parliament of Australia, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*, (2016) 20.

255 See Transparency International www.transparency.org.au/index.php/our-work/whistleblowing/; and Whistling While They Work 2 www.whistlingwhiletheywork.edu.au/?page_id=5

when submitting an Environment Impact Statement for a coordinated project or a controlled action.²⁵⁶ The proponent must also provide in the EIS details of any proceedings under a law of the Commonwealth or State.²⁵⁷ This self-reporting requirement does not extend to proceedings in jurisdictions outside Australia.

Whilst previously the ownership of companies investing in mining in Australia were predominately Australian, American, and Japanese the landscape has changed significantly with the entry of companies from China and other countries that have low scores on the Transparency International Corruption Perceptions Index.²⁵⁸ The investigation of companies operating offshore can be difficult given the opacity of different countries' systems of reporting and enforcement. Engagement with civil society in the country where the company is headquartered can provide useful information on the reputation and day-to-day practice of a mining company.

Foreign companies and individuals have the same rights as local companies to apply for mining tenements. However, foreign companies have to abide by the guidelines of the Foreign Investment Review Board (FIRB) and if necessary apply for approval. Exploration tenements are not generally considered to be an interest in the land and may not be notifiable to the FIRB. Mining tenements are considered to be a type of Australian land, and an acquisition and interest that requires examination under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).²⁵⁹ Investors from countries (e.g. USA, Singapore, Malaysia, Chile, China, Japan and South Korea) with Free Trade Agreements with Australia do not need prior approval for investments up to \$1.1 billion.²⁶⁰

The Foreign Investment Review Board assesses the character of the investor for notifications for approval. However, character assessments only rely on self-disclosure of transparent commercial operations, corporate governance, and compliance with Australian laws.²⁶¹

²⁵⁶ *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) sch 4; *Environmental Protection Act 1994* (Qld); Department of Natural Resources and Mines, *Queensland Government, Queensland mining and petroleum industry overview* (July 2016) www.dnrm.qld.gov.au/__data/assets/pdf_file/0004/238072/queensland-mining-petroleum-overview.pdf 1.

²⁵⁷ *State Development and Public Works Organisation Regulation 2010* reg 35, sch 1 item 6

²⁵⁸ Expert interview (Perth, December 2016); Transparency International, *Corruption Perceptions Index 2016* (25 January 2017) www.transparency.org/news/feature/corruption_perceptions_index_2016.

²⁵⁹ Foreign Investment Review Board, Australian Government, *Foreign Investment in Mining* www.cdn.tspace.gov.au/uploads/sites/79/2015/11/24_GN_FIRB_2016.pdf.

²⁶⁰ Department of Mines and Petroleum, Government of Western Australia, *Secure Investment Location* www.dmp.wa.gov.au/Investors/Secure-investment-location-18318.aspx.

²⁶¹ Foreign Investment Review Board, *Australia's Foreign Investment Policy* (December 2015) www.firb.gov.au/resources/policy-documents/

CASE STUDY: ADANI GROUP

Adani's track record of poor environmental compliance has been described in the section *Coordinated Projects* but Adani companies are also under investigation in India for financial crimes relating to the importation of coal and capital equipment and the illegal export of iron ore.²⁶²

Environmental Justice reported in the *Adani Brief* that five Adani companies in India are under investigation for inflating the quality and value of coal imported from Indonesia.²⁶³ The Directorate-General of Revenue Intelligence stated that the objective of the overvaluation was 'siphoning off money abroad; and to avail higher power tariff compensation based on artificially inflated cost of the imported Coal!'²⁶⁴

An Adani Group company has also been investigated for transfer pricing by the Directorate of Revenue Intelligence for the over valuation of imported power and infrastructure equipment to allow the difference in value to be sent to another Adani company in Mauritius.²⁶⁵

It has also been reported that Adani Enterprises illegally exported 7.7 million tonnes of iron ore from the port of Belekeri, Karnataka, between 2006 and 2010. To facilitate the illegal exports it is alleged Adani paid bribes to port and customs officials, the police, and local politicians. The fraud involved Adani overloading trucks and receiving iron ore from suppliers who did not have permits. Adani Enterprises is the parent company of the company developing the Carmichael Coal Mine in Australia.²⁶⁶

Questions can be raised regarding whether Adani's record in India was disclosed to the FIRB and the Queensland and Commonwealth governments. If the record was disclosed what further investigations did the Australian and State government take and was the Adani's record taken into account when approving the Carmichael Coal Mine and Adani Abbot Point port terminal?

²⁶² Stephen Long, 'Adani facing multiple financial crime, corruption probes,' *ABC News* (Online) 22 December 2016 www.abc.net.au/news/2016-12-22/adani-companies-facing-multiple-corruption-probes/8140100.

²⁶³ Environmental Justice, *The Adani Brief* (15 February 2017) www.envirojustice.org.au/major-reports/the-adani-brief, 10-11.

²⁶⁴ Directorate of Revenue Intelligence, Government of India, *Coal Alert* www.epw.in/system/files/pdf/2016_51/14/Coal%20Alert_1%20PGT.pdf.

²⁶⁵ Environmental Justice above n 261, 12-13.

²⁶⁶ Environmental Justice above n 26, 14- 15

Analysis of risk

The vulnerability of inadequate due diligence led to the process practice risk *What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance?* The transparency and accountability of the approvals processes (with the exception of State Agreements) to some extent ameliorates the risk and a robust media exposes instances of the impact of the risk.

Inadequate due diligence into applicants has the potential to have significant adverse impacts. It creates a risk that companies or principals with a history of noncompliance, criminal or corrupt behaviour or with a record of environmental damage, and other poor business conduct, including human rights violations, can operate in Australia; and it has the potential to allow mineral rights to fall into the hands of companies that may not practice responsible business conduct, which creates the potential for significant adverse environmental and social impacts. Further, if proponents do not comply with the terms of their lease, or abandon the mine whilst in production, governments can be left with liabilities that include non-payment of royalties; management of stabilisation and subsidence issues and other care and maintenance issues. Likewise, post mine closure, government can be left with considerable clean up and rehabilitation issues. Non-compliance can result in native title parties not receiving compensation or the benefits agreed to, and there is also the potential that cultural heritage sites can be destroyed or damaged.

Finally, the lack of investigation into beneficial ownership means that the ultimate ownership of companies operating mines in Australia is unknown, and opens the possibility for corrupt players to be mining for resources in Australia.

As stated by Transparency International Australia:

It is important to lift the veil of secrecy over those who ultimately own or control companies to ensure that wrongdoing is exposed and any illicit financial benefits flowing into or through the company (including those from corruption) are disrupted. This could prevent the misuse of companies for illicit activities such as tax evasion, money laundering, bribery, corruption and terrorism financing. There is often a web of corporate structures or other arrangements, often quite complex, which the Australian government currently cannot penetrate.²⁶⁷

Summary

Inadequate due diligence into the character and integrity of applicants for mining rights is a significant risk for mining approvals in both Western Australia and Queensland. This risk is flagged for mining approvals due to the adverse impacts the risk can have for government, the environment, and community; and the lack of investigation into the ultimate beneficial ownership of mining companies applying for mining rights can allow for those with a record of corruption and/or noncompliance to mine for resources in Australia.

²⁶⁷ See TIA submission to Australian Government consultation www.transparency.org.au/wp-content/uploads/2017/03/2017-03-20-TIA-Submission-on-consultation-paper-to-increase-transparency-of-beneficial-ownership-of-companies1.pdf.



Goldmine at Kalgoorlie, Western Australia.
Source: By Gilles Paire/Shutterstock.

Vulnerabilities and risks – Cross cutting issues

| Vulnerability | Risk | Score |
|--|--|-------|
| Industry influence | What is the risk of policy capture, and state capture by mining companies? | High |
| Inadequate due diligence investigation | What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance? | High |



DISCUSSION OF RESULTS

Distribution of results

The tables below show the distribution of results of the risk assessment by risk, and by approvals process.

Distribution of results by risk

| Risk | Approvals process and location | Score |
|---|---|-----------|
| What is the risk of external interference in the cadastre agency's awarding of licences and leases? | Mining leases and exploration licences, WA | Low |
| What is the risk that confidential information regarding applications for mining leases and exploration licences will be leaked? | Mining leases and exploration licences, WA | Low |
| What is the risk there is no verification of the accuracy of environmental impact statements? | Coordinated Projects Qld | Medium |
| What is the risk of external interference in the Coordinator-General's recommendations, evaluations and imposition of conditions? | Coordinated Projects Qld | Medium |
| What is the risk that there is inadequate due diligence on applicants' integrity such as past unlawful conduct and compliance? | Mining leases and exploration licences WA Mining leases Qld State Agreements WA Coordinated Projects Qld | High |
| What is the risk of policy capture, and state capture by mining companies? | State Agreements WA Coordinated Projects Qld | High |
| What is the risk that the negotiation process and the components of the negotiations, including what is negotiable and non-negotiable, will not be publicly knowable? | State Agreements WA | High |
| What is the risk that those negotiating with a mining company on behalf of a Native Title Party will not represent community members' interests? | Native Title | High |
| What is the risk that the content of final agreements between mining companies and Indigenous parties will be kept secret? | Native Title | Very high |

Distribution of results by approvals process

| Approval process | Risks | Number and score of risks |
|--|--|---------------------------|
| Mining leases Qld | What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance? | 1 High |
| Mining leases and exploration licences, WA | <p>What is the risk of external interference in the cadastre agency's awarding of licences and leases?</p> <p>What is the risk that confidential information regarding applications for mining leases and exploration licences will be leaked?</p> | 2 Low |
| | What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance? | 1 High |
| State Agreements WA | <p>What is the risk that the negotiation process and the components of the negotiations, including what is negotiable and non-negotiable, will not be publicly knowable?</p> <p>What is the risk of policy capture, and state capture by mining companies?</p> <p>What is the risk that there is inadequate due diligence on applicants' integrity such as past unlawful conduct and compliance?</p> | 3 High |
| Coordinated Projects Qld | <p>What is the risk of external interference in the Coordinator-General's recommendations, evaluations and imposition of conditions?</p> <p>What is the risk there is no verification of the accuracy of environmental impact statements?</p> | 2 Medium |
| | <p>What is the risk of policy capture, and state capture by mining companies?</p> <p>What is the risk that there is inadequate due diligence on applicants' integrity such as past unlawful conduct and compliance?</p> | 2 High |
| Native Title | What is the risk that those negotiating with a mining company on behalf of a Native Title Party will not represent community members' interests? | 1 High |
| | What is the risk that the content of final agreements between mining companies and Indigenous parties will be kept secret? | 1 Very high |

Nine risks were assessed in total with six risks applying to approvals processes in Western Australia, five applying in Queensland, and two to Native Title mining agreement making. The risk assessment scores ranged from low to very high with a cluster of scores in the mid to high range. The greater number of risks for WA can be attributed to the decision to undertake a full risk assessment for a larger number of identified vulnerabilities for exploration licences and mining in Western Australia than for other processes assessed.

The distribution of results and the analysis in the report show the relationship of different risks with each other, how particular risks can be distributed across approvals processes, and how the aggregation of risks can compound a risk and potentially lead to an increase in its significance.

The risk scores can reflect how robust an approvals process is to corruption. For example, exploration licences and mining leases in WA had two low scoring risks and one high scoring risk. The checks and balances in the approvals system, and government integrity systems prevented the low scoring risks from having a high likelihood of occurrence and impact.

Risks distributed across approvals processes

Particular risks were distributed across jurisdictions and approvals processes. Whilst the scores for these risks were low, medium or high, the fact that certain risks occurred across approval processes in Western Australia and Queensland is significant.

What is the risk that there is inadequate due diligence on applicants' integrity such as past lawful conduct and compliance? Score: High

This risk was reported in the all approvals processes assessed except for Native Title where it was not applicable. The risk had a high likelihood of occurrence because of the limited due diligence undertaken by mining departments, and the potential impacts if the risk occurred were high. The occurrence of this risk across both jurisdictions and all processes, except for native title, suggests a significant and pertinent risk for the mining approvals processes in Western Australia and Queensland.

What is the risk of external interference in the 'agencies approvals'? Score: Low, Medium

This process practice risk relates to the identified vulnerability of ministerial or senior government representatives' discretion in decision-making and it occurred for mining leases in Western Australia and for the coordinated projects approval process in Queensland. In the case of mining leases in Western Australia the risk was scored as minor because the risk assessment demonstrated that the checks and balances in the approvals system acts as a corruption deterrent.

Discretionary decision making for coordinated projects had a medium score, which reflects the fact that the system has some elements of transparency and accountability, but the system is not as rigorous as the approvals systems for mining leases in Queensland or Western Australia. There

is the potential for considerable impact on the environment and communities if the discretion is injudiciously applied.

The risk of external influence and the vulnerability of Ministerial discretion also applies to State Agreements in Western Australia. The risk was not assessed as there is a lack of evidence of impact due to the decreasing use of State Agreements as an approval mechanism for large mining infrastructure projects in Western Australia, but it should also be noted as a factor especially given that State Agreements were assessed as having a lack of transparency and the capacity for industry to influence approvals.

Large mining infrastructure projects

There was a significant distribution of risks for large infrastructure projects in each state. The risk of inadequate due diligence applied to both coordinated projects in Queensland and State Agreements in Western Australia and the vulnerability of industry influence in the approvals process applied to large infrastructure projects in each state.

The risk of external interference in the approvals process can create a significant vulnerability for industry influence in the approvals process for large mining infrastructure projects. Discretionary decision-making creates a higher potential for industry influence in the process, and industry influence can lead to the risk of policy and state capture by mining companies.

What is the risk of policy capture, and state capture by mining companies? Score: High

This contextual risk occurs for large infrastructure projects in WA (State Agreements), and Qld (coordinated projects). The likelihood of this risk occurring was high because of under regulated practices such as political donations, lobbying, and revolving doors. These practices provided evidence of a high level of impact for the influence of industry.

The capacity for industry influence is further enhanced when there is no transparency in the approvals system as occurs for State Agreements Acts in Western Australia.

State Agreements Western Australia: What is the risk that the negotiation process and the components of the negotiations, including what is negotiable and non-negotiable, will not be publicly knowable? Score: High

This risk is significant because of its score and because of the sum of the affects of low transparency, policy and state capture and discretionary decision-making. Whilst State Agreement Acts have not had extensive use for mining projects in recent years, State Agreement Acts, and the more secretive State Development Acts, are still available for use in mining infrastructure development. If a decision is made to use these agreements in the future, there will be significant risks.

Another risk was identified for large infrastructure mining projects in Qld.

What is the risk there is no verification of the accuracy or truthfulness of environmental impact statements? Score: Medium

The risk that there is no verification of the accuracy of an EIS scored as medium because there is some accountability built into the coordinated projects assessment and evaluation process including public review, the capacity for evidence to be tested in the Land Court when mining leases are applied for, and Commonwealth oversight (for Federal approvals). These accountability factors were weighed against the discretion of the Coordinator-General to make evaluations and the lack of a formalised process of independent review.

This risk has the potential to be compounded when combined with the capacity for industry to influence the approvals process. In Queensland there is a public perception that the management of the EIS process has been driven by the needs of the mining industry, and in turn, the influence of the mining industry has been questioned.

Native Title

What is the risk that the content of final agreements between mining companies and Indigenous parties will be kept secret? Score: Very High

This risk had a very high score because mining agreements with native title parties have limited transparency and there is evidence of negative impacts on the distribution of benefits to Indigenous people. The focus of the risk is on disclosure, and could not take into account the complex factors that should be taken into account when arguing for and against transparency in Indigenous agreement-making in Australia.

What is the risk that those negotiating with a mining company on behalf of a Native Title Party will not represent community members' interests? Score: High

Evidence of representatives negotiating agreements on behalf of native title parties engaging in self-interested behaviour and corruption, and of mining companies manipulating native title representatives led to a high score for this risk. The lack of transparency and accountability in agreement-making increased the likelihood of the risk occurring.

Aggregated risks

The aggregation of significant of risks can compound the cumulative impact and the likelihood of a risk occurring. For example, when inadequate due diligence is undertaken into mining companies and their principals it can allow companies and directors with a corrupt record to mine for resources in Australia. This has the potential to increase the severity of the impact of the other risks assessed and increase the likelihood of corruption. For example, in the case of coordinated projects approvals in Queensland, inadequate due diligence can increase the severity of the impacts of state and policy capture, external influence in the approvals process, and the lack of independent review of an EIS. Inadequate due diligence can increase the likelihood of the occurrence of state and policy capture and external influence in the approvals process. Likewise, for State

Agreements in Western Australia, inadequate due diligence has the potential to compound the impact of state and policy capture, low transparency of negotiations and increase the likelihood of state and policy capture.

Further inadequate due diligence has the potential to increase negative impacts on native title parties and compound the risk of low transparency in agreement-making and could lead to manipulation of agreement-making, of native title groups and have severe effects for Indigenous communities and their land.

Other minor risks

What is the risk that confidential information regarding applications for mining leases and exploration licences will be leaked? Score: Low

This risk was assessed for exploration licences and mining leases in Western Australia and it was noted that this risk could have been assessed for other jurisdictions and approvals processes. The risk was assessed as a low level risk due to the limited evidence of impact and the safeguards in the system to prevent its occurrence.

Limitations of results

It was necessary to be selective in the choice of jurisdictions and approvals processes for assessment due to the time allocated for the research. The results would benefit from further research into other jurisdictions to assess how the risks apply in other state contexts. For example, it would be useful to assess if there is inadequate due diligence undertaken by mining companies in other states and territories to assess whether the risk applies for mining across Australia.

The results would benefit from a comparative risk analysis of approvals in WA and Qld. Further research could be undertaken into environmental approvals for mining leases and large infrastructure projects in WA, and for mining leases in Qld to compare the systems and the States' approach to environmental approvals. Likewise, the results would be enhanced by further research into the administration of native title in Queensland.

In addition, the analysis of state and policy capture would be strengthened if research was undertaken into the amount and number of mining company donations to political parties.

Further research into the cultural acceptance of mining in each state and of public sector officials attitudes to mining and integrity would allow for a deeper analysis of the context of mining and would strengthen the results.

When discussing a risk it should be noted that the risk is an outcome, and what may be significant are the factors that could enable a risk to happen. For example the risk of policy and state capture is enabled by the system of political donations. Therefore, if action is to be taken to prevent the risk it should be directed at the systems that support its occurrence, namely, amongst other factors, political donations.

CONCLUSION

Mining approvals are complex processes with many variables and approvals pathways. Mining legislation intersects with other Acts, state and Commonwealth, and approvals can involve administration across multiple departments. Complex contextual and cultural factors are also significant factors that influence the approvals processes.

The research and the results of the risk assessment demonstrated that the approvals processes and the systems in place for exploration licences, and mining leases in Western Australia, and mining leases in Queensland have high levels of transparency and accountability that acts as a corruption deterrent for many of the vulnerabilities identified. However, a significant risk was identified for mining leases and exploration licences that also applies to mining approvals for large infrastructure projects – *inadequate due diligence into an applicant's integrity*. This is a significant corruption risk for government departments administering mining approvals in Western Australia and Queensland as it has the potential for future impacts, especially given the changing nature of the ownership of mining in Australia.

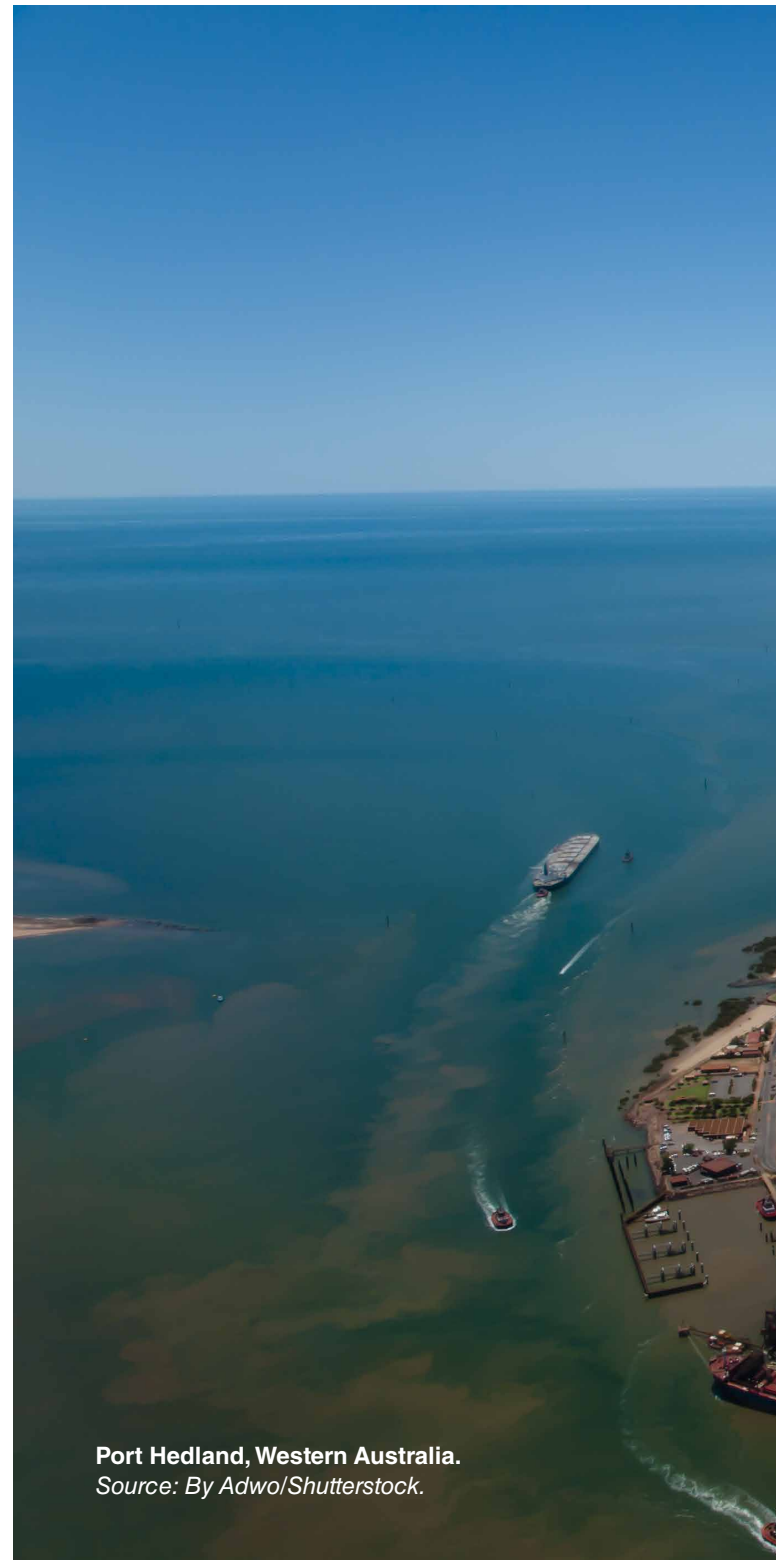
State Agreements and coordinated projects, large mining infrastructure project approvals processes in each State, were assessed as having a high number of interrelated and compounded risks. The risk assessment indicated the potential for industry influence in the awarding of approvals for large mining projects. The research noted that the inadequate regulation of political donations and lobbyists is a significant factor that could enable the influence to occur. The risk of industry influence for large infrastructure projects was compounded by the assessed vulnerability of Ministerial or senior civil servant's discretion in the awarding of approvals.

The coordinated projects process for evaluation and assessment of an EIS under State and Federal law was assessed as having elements of transparency and accountability. Yet the level of discretion available to the Coordinator-General, specifically in relation to the evaluation of environmental impact statements, led to two medium level risks being assessed: *risk of external influence in the awarding of approvals, and another risk regarding the inadequate verification of the accuracy of environmental impact assessments*.

Large mining infrastructure projects approved in Western Australia under State Agreement Acts were assessed with a high level of risk due to the *lack of transparency* of the negotiation process, but the limited contemporary use of State Agreement Acts was noted. The lack of transparency, and the capacity of industry to influence the process through the application of Ministerial discretion compound the significance of the risk.

The level of public interest in the approvals process for large mining projects, an active civil society, robust media, and a competitive and entrepreneurial mining industry work as powerful corruption deterrents and increases the accountability of the approvals processes in Western Australia and Queensland.

The results also demonstrated that the *limited transparency of native title mining agreements* is a very high risk and there is a high risk that *representatives negotiating with a mining company will not represent the interests of native title parties*. However, as noted in the Native Title section, there are complex issues to be taken into account when assessing Native Title risks.



Port Hedland, Western Australia.
Source: By Adwo/Shutterstock.

Summary

The mining approvals processes investigated in Western Australia and Queensland have elements of transparency and accountability, and the robust nature of public interrogation of mining approvals helps to hold government and the systems to account. However, risks ranging from minor, through to very high have been identified in the mining approvals system, which creates an enabling environment for corruption. The vulnerabilities and the risks identified by the study can provide a guide to future action for combatting corruption in the mining approvals processes in Western Australia and Queensland.



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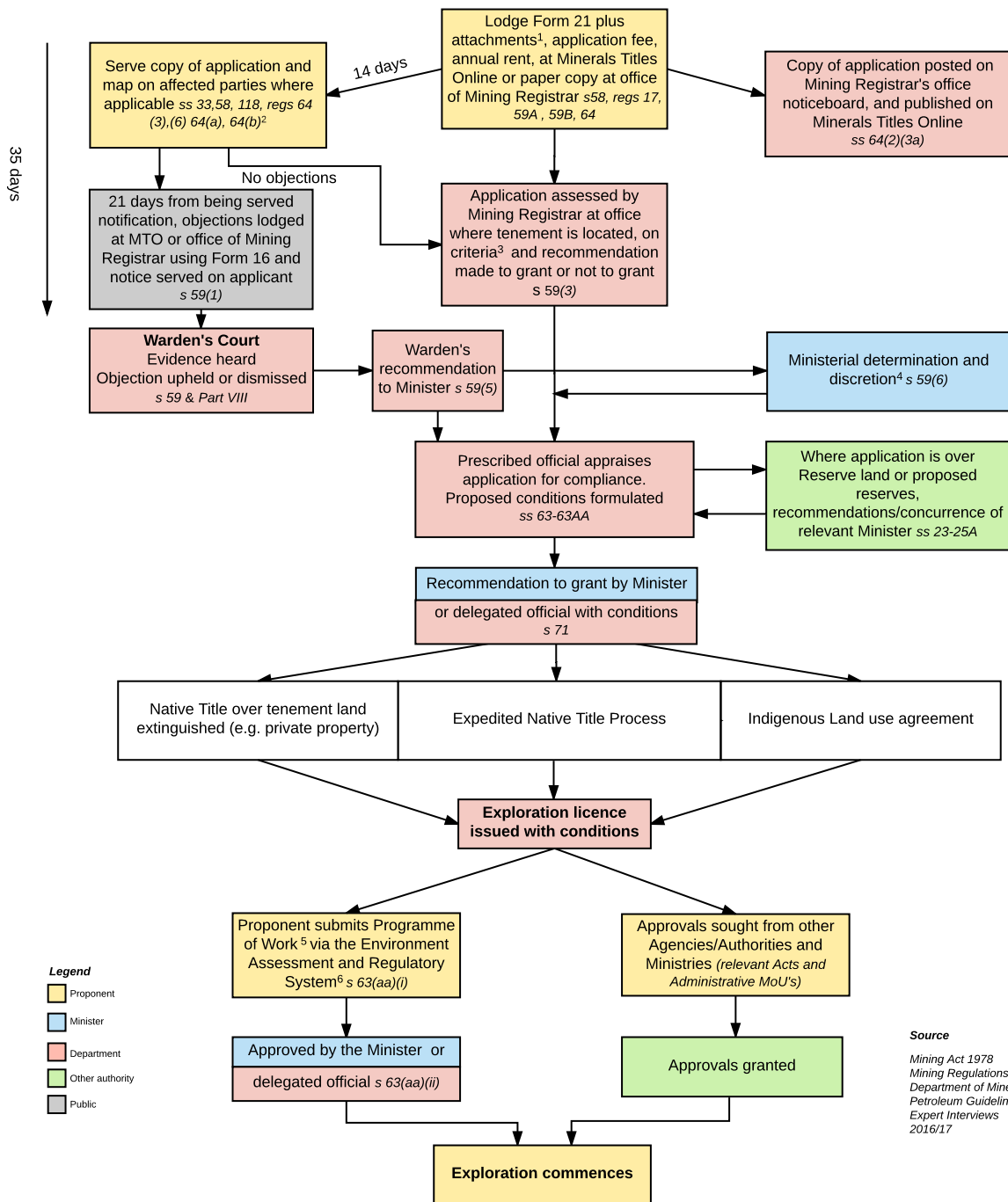
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APPENDIX A

The appendix contains detailed flow charts mapping the approvals process.

Exploration Licence Mining Act 1978 (WA)



1. To submit with Form 21 Application for a Mining Tenement:

- Form 21 Attachment 1 and 2
- Statement specifying method of exploration, details of work programme, estimated cost of exploration, technical and financial resources available to the applicant
- Amount of prescribed rent for the first year
- Application fee

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2. Where over private property s 33, applicant is served on

- Local authority
- Owner/occupier for surface rights
- Any mortgagee for surface rights

Where over Crown land s 118

- Pastoral lessee
- Other lessee

3. Criteria for assessing an application for an Exploration Licence:

- Technical ability
- Financial capacity
- Compliance with all requirements

4. Controversial or complex cases are sent to the Minister for assessment and determination. Simple case s are sent to a prescribed departmental official

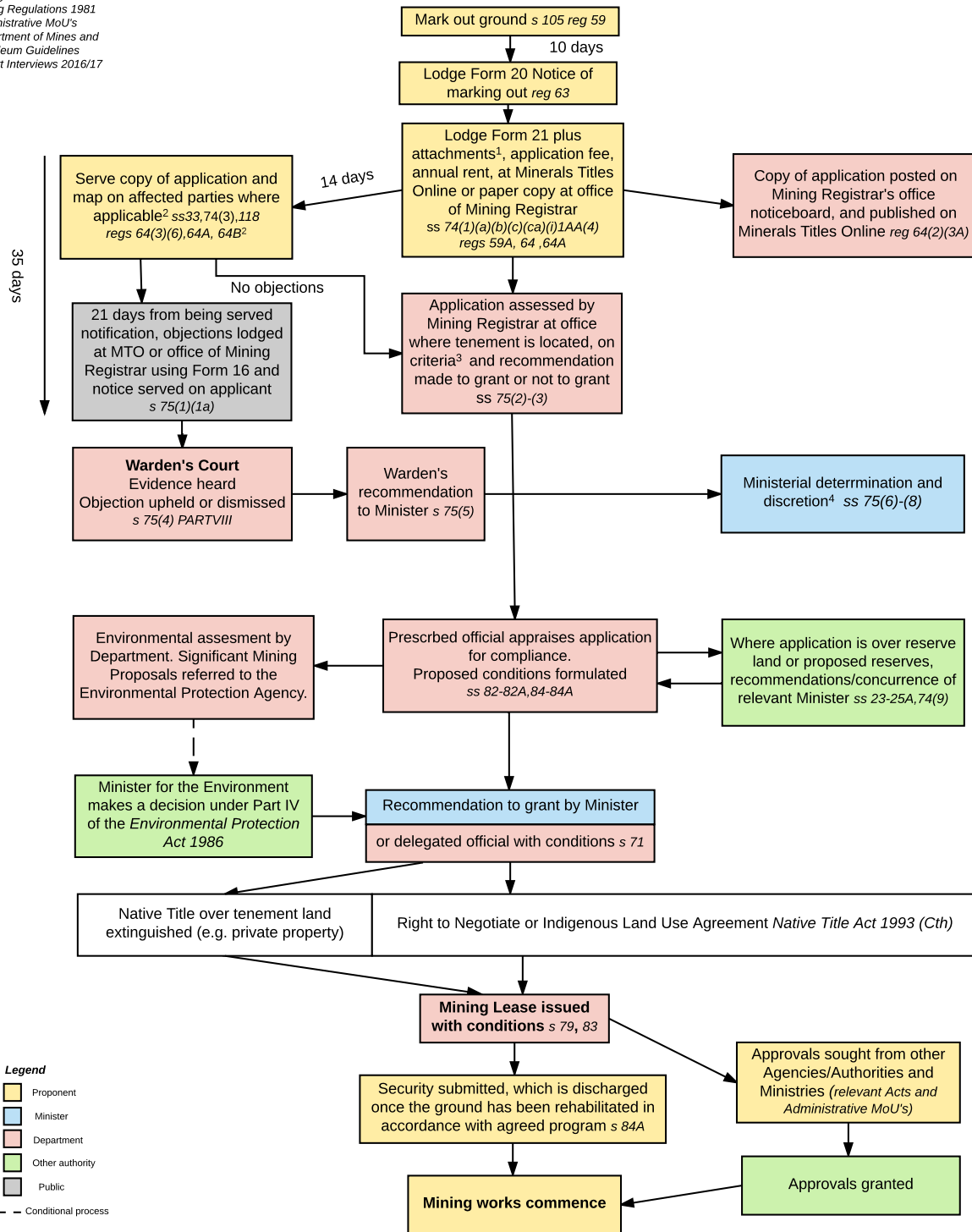
5. Prior to any ground disturbing work proponent must submit detailed programme of work which includes progress in obtaining other approvals and/or agreements

6. Online system for submitting and tracking environmental applications, and compliance reporting

Mining Lease Mining Act 1978 (WA) variation - application lodged with Mining Proposal

Source

Mining Act 1978
Mining Regulations 1981
Administrative MoU's
Department of Mines and Petroleum Guidelines
Expert Interviews 2016/17



1. To submit with Form 21 Application for a Mining Tenement:
• Map on which are clearly delineated the boundaries of the area applied
Fourteen days to submit Mining Proposal after the day on which Form 21 is lodged via the Environment Assessment and Regulatory System

2. Where over private property, application is served on:
• Local authority
• Owner/occupier for surface rights
• Any mortgagee for surface rights
Where over Crown land:
• Pastoral lessee
• Other lessee

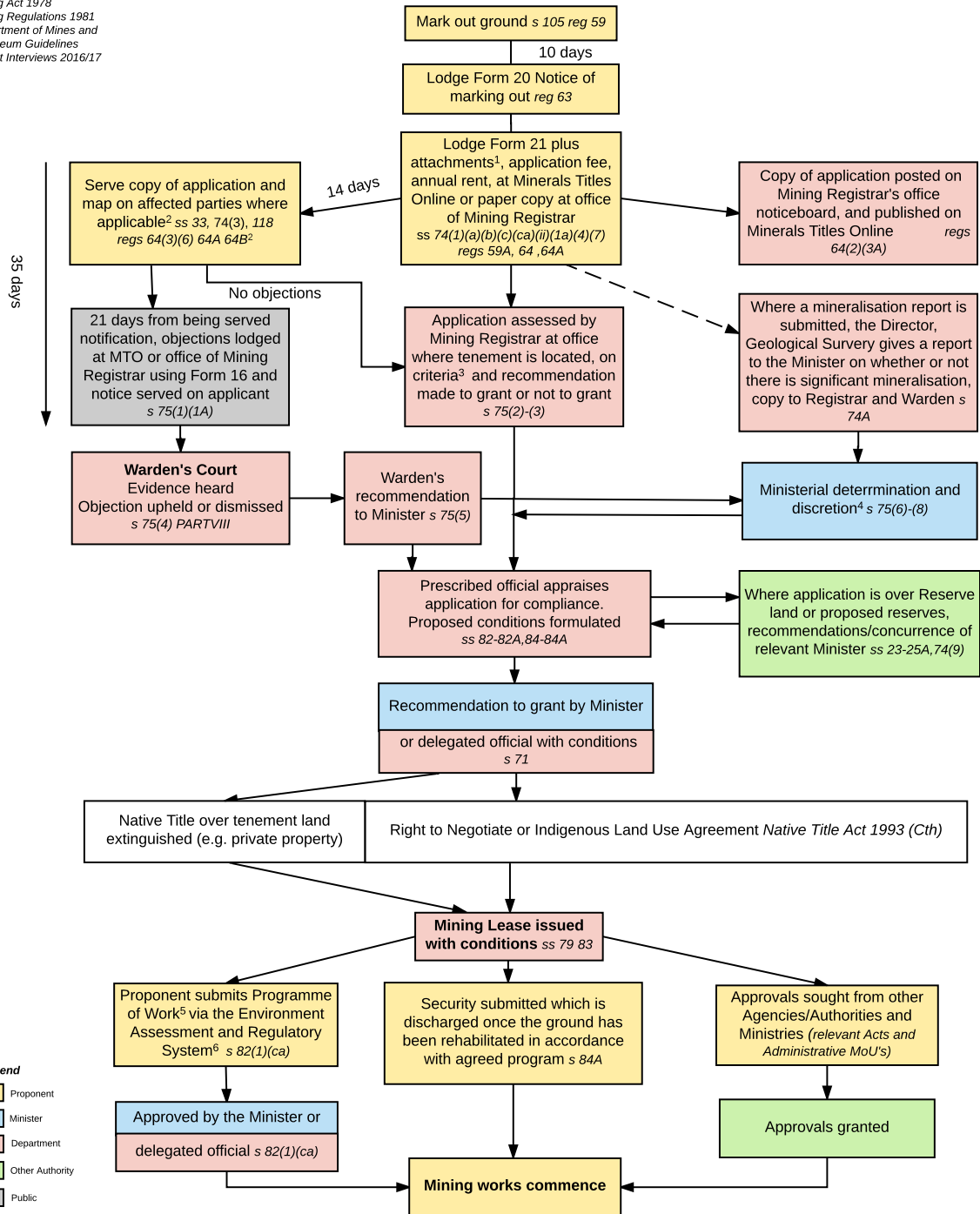
3. Criteria for assessing an application for a Mining Lease:
• Compliance with all requirements

4. Controversial or complex cases sent to the Minister for assessment and determination
Simple cases are determined by prescribed departmental official.

Mining Lease Mining Act 1978 (WA) application lodged with mineralisation report or resource report

Source

Mining Act 1978
Mining Regulations 1981
Department of Mines and Petroleum Guidelines
Expert Interviews 2016/17



Legend

- Proponent
- Minister
- Department
- Other Authority
- Public

← - - - Conditional process

1. To submit with Form 21 Application for a Mining Tenement:

- Map on which are clearly delineated the boundaries of the area applied for
- Mineralisation report, or
- Resource report under JORC Code 2012
- A supporting statement about likely mining operations

2. Where over private property, application is served on

- Local authority
 - Owner/occupier for surface rights
 - Any mortgagee for surface rights
- Where over Crown land
- Pastoral lessee
 - Other lessee

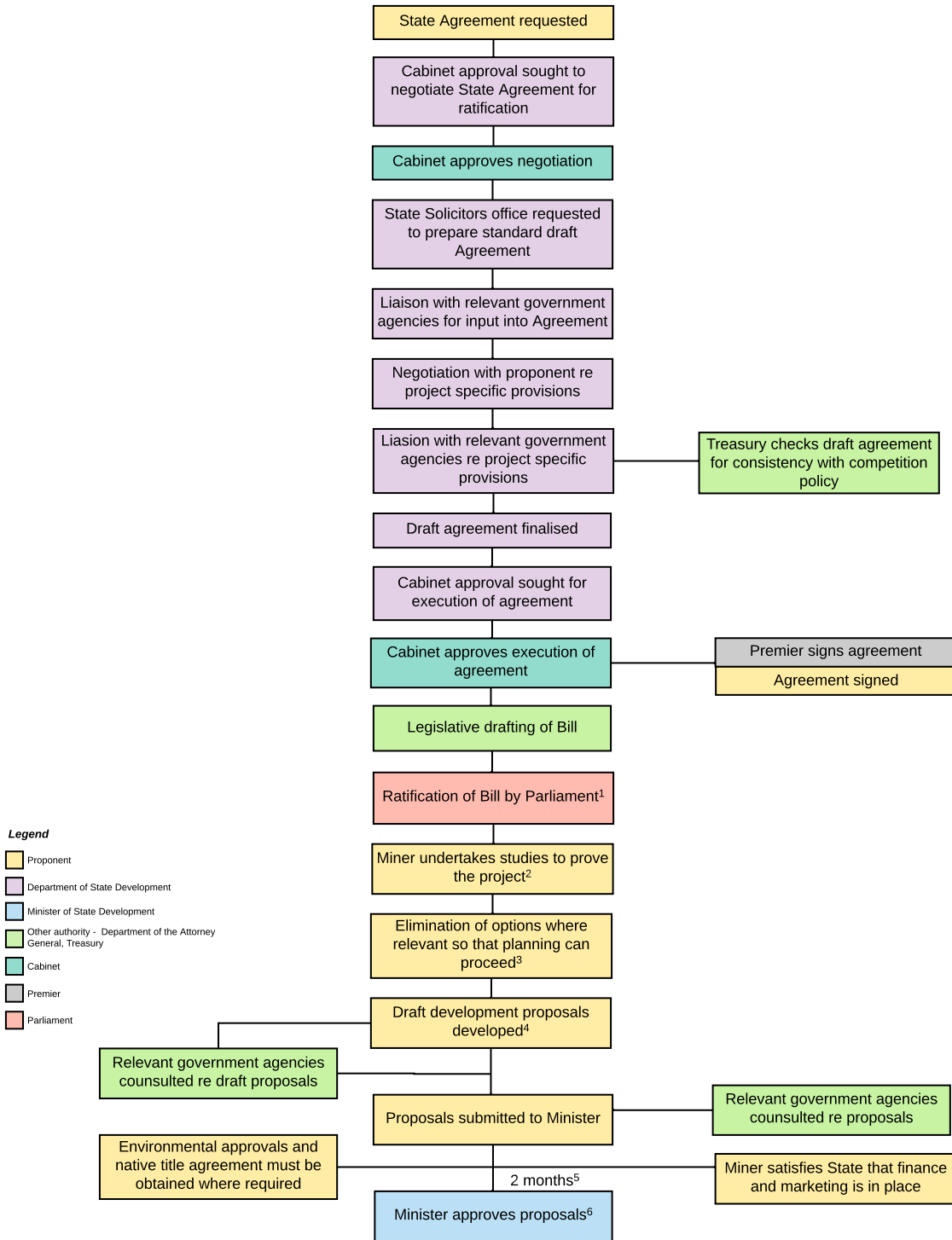
3. Criteria for assessing an application for a Mining Lease

- JORC compliance, or
 - Evidence of significant mineralisation
 - Compliance with all requirements
4. Controversial or complex cases sent to the Minister for assessment and determination
Simple cases are determined by prescribed departmental official.

5. Prior to commencement of mining, proponent must submit a Mining Proposal containing detailed information on identification, evaluation and management of significant environmental impacts.

6. Online system for submitting and tracking environmental applications, and compliance reporting

State Agreement Acts approval process Western Australia



1. The timeline from request for agreement and ratification by Parliament can be as little as two weeks.

2. Miner keeps State fully informed at all times as to the progress and results of studies

3. This step is only applicable in some agreements. e.g. determination of port

4. Description of the mine, processing, train load facilities, railway and facilities in the port area

5. Minister has two months after the receipt of proposals and the completion of native title and authorisation under the *Environmental Protection Act 1986* to inform the miner that the proposals are accepted or changes are required and the reasons for the changes.

6. Construction phase can commence Under the agreement leases, tenure, licences, easements and rights of way granted required for the operation. Miner is required to implement project within a specified timeline.

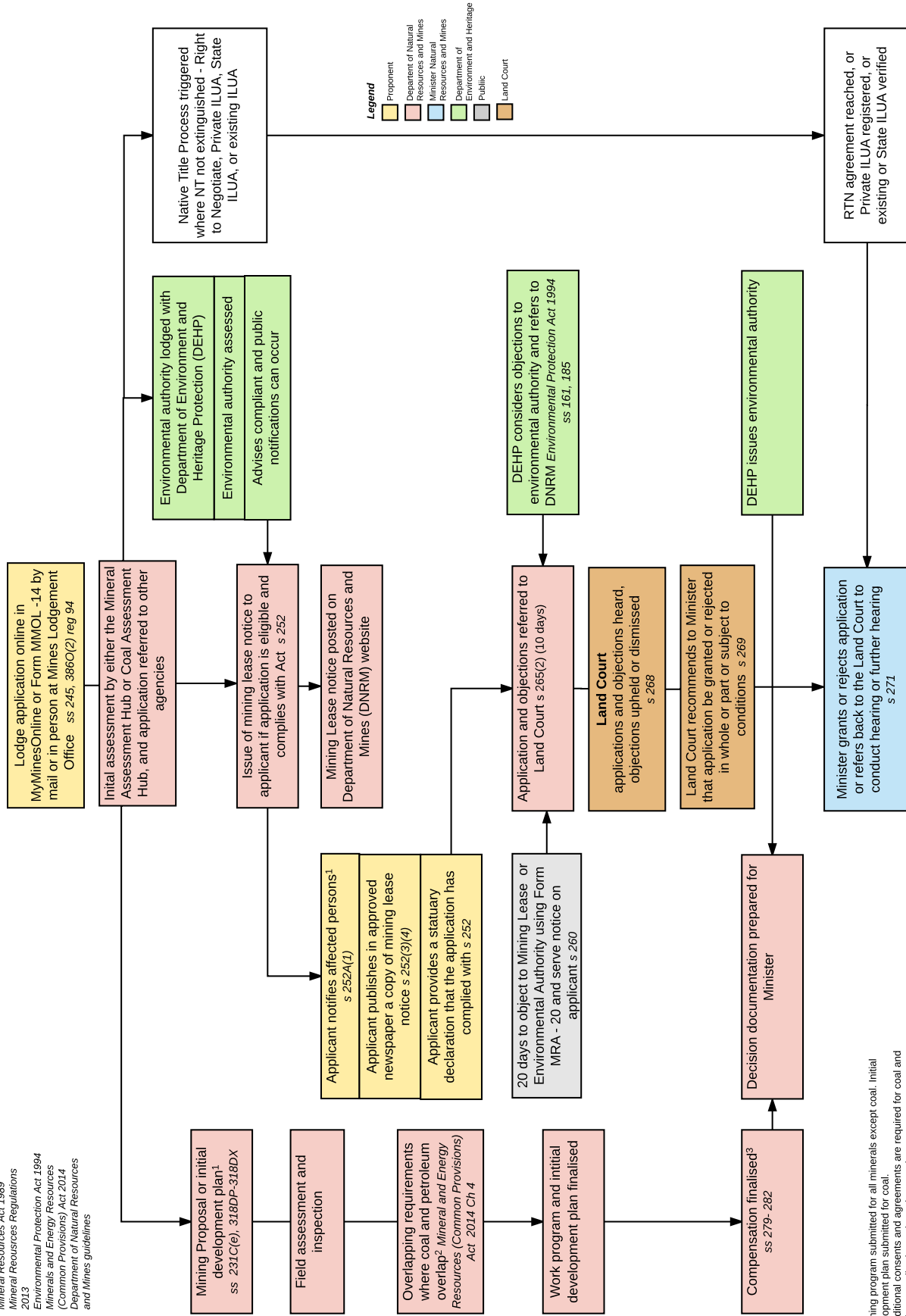
Source

- Expert interviews Jan 2017
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Mining Lease Mineral Resources Act 1989 (Qld)

Source

Mineral Resources Act 1989
Mineral Resources Regulations 2013
Environmental Protection Act 1994
Minerals and Energy Resources (Common Provisions) Act 2014
Department of Natural Resources and Mines guidelines

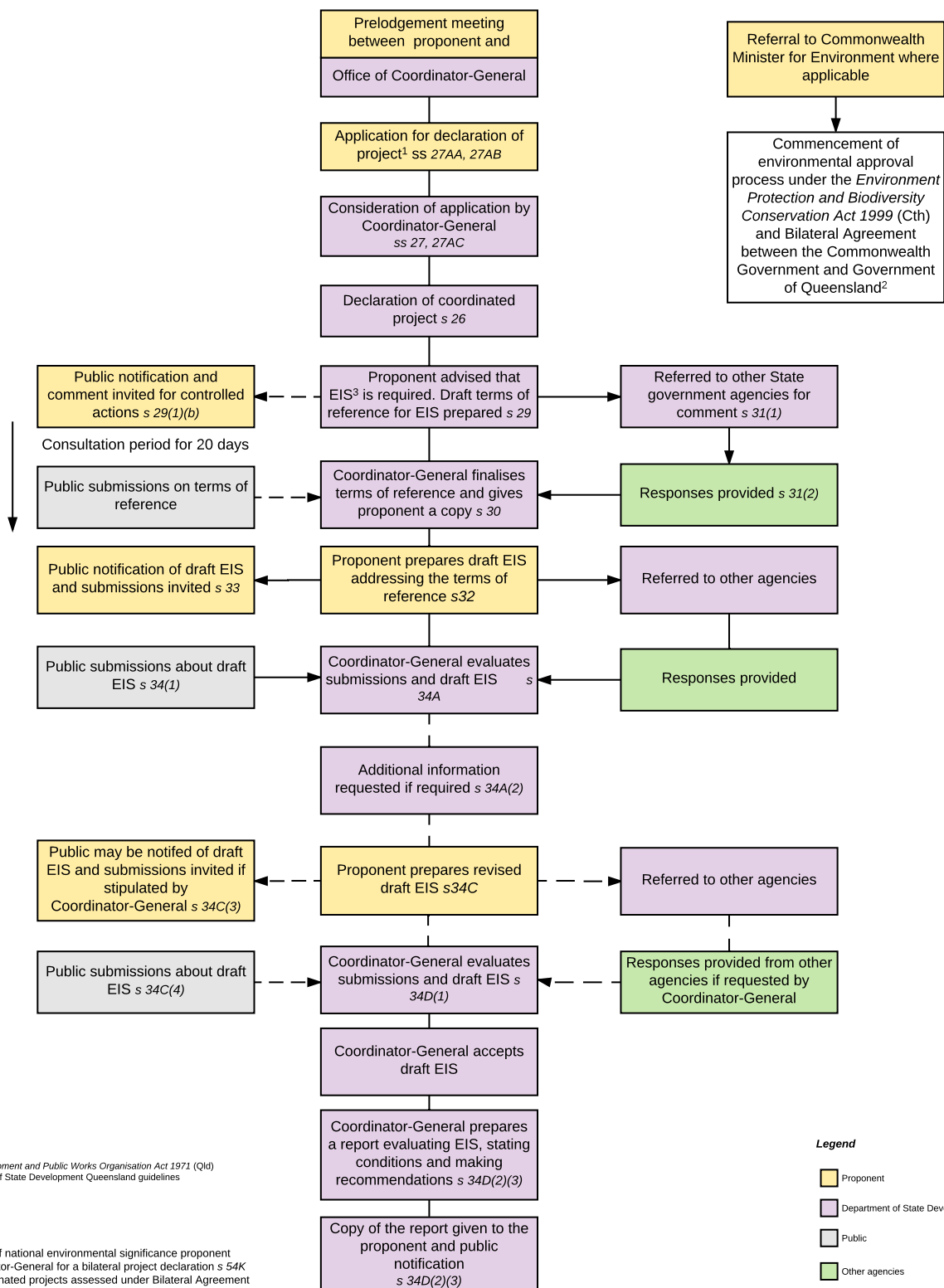


Legend

- Proponent
- Department of Natural Resources and Mines
- Minister Natural Resources and Mines
- Department of Environment and Heritage
- Public
- Land Court

1. Mining program submitted for all minerals except coal. Initial development plan submitted for coal.
2. Additional consents and agreements are required for coal and petroleum applications where they overlap.
3. Compensation finalised by lodging signed agreement between the affected landowners and the applicant or a Land Court decision.
DEHP - Department of Environment and Heritage Protection
DNRM - Department of Natural Resources and Mines

**Coordinated Projects Queensland - State Development and Public Works
Organisation Act 1971 (Environmental Impact Statement Process)**



Source
 • State Development and Public Works Organisation Act 1971 (Qld)
 • Department of State Development Queensland guidelines

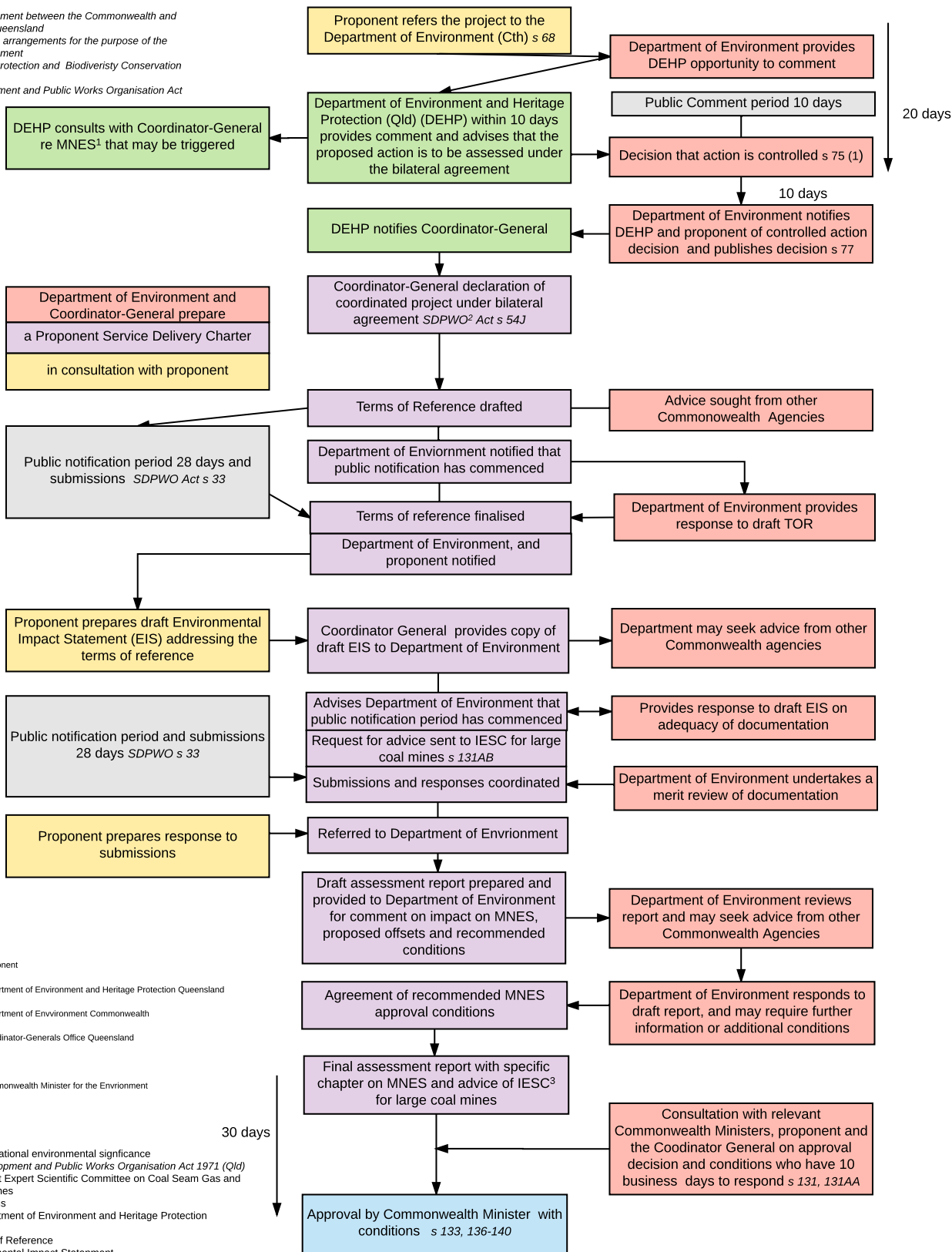
Legend
 ■ Proponent
 ■ Department of State Development
 ■ Public
 ■ Other agencies
 - - - - - Conditional process

1. If there are matters of national environmental significance proponent applies to the Coordinator-General for a bilateral project declaration s 54K
 2. See flow chart Coordinated projects assessed under Bilateral Agreement Between the Commonwealth and the State of Queensland and the Environment Protection and Biodiversity Conservation Act 1999 (Cth)
 3. Environmental Impact Statement
 4. Coordinator-General seeks advice from other agencies in particular the Department of Environment and Heritage Protection and the Department of Natural Resources and Mines

Coodinated projects assessed under the Bilateral Agreement Between the Commonwealth and the State of Queensland under section 45 of the *Environment Protection and Biodiveristy Conservation Act 1999 (Cth)*

Source

*Bilateral Agreement between the Commonwealth and the State of Queensland
Administrative arrangements for the purpose of the Bilateral Agreement
Environment Protection and Biodiveristy Conservation Act 1999 (Cth)
State Development and Public Works Organisation Act 1971 (Qld)*

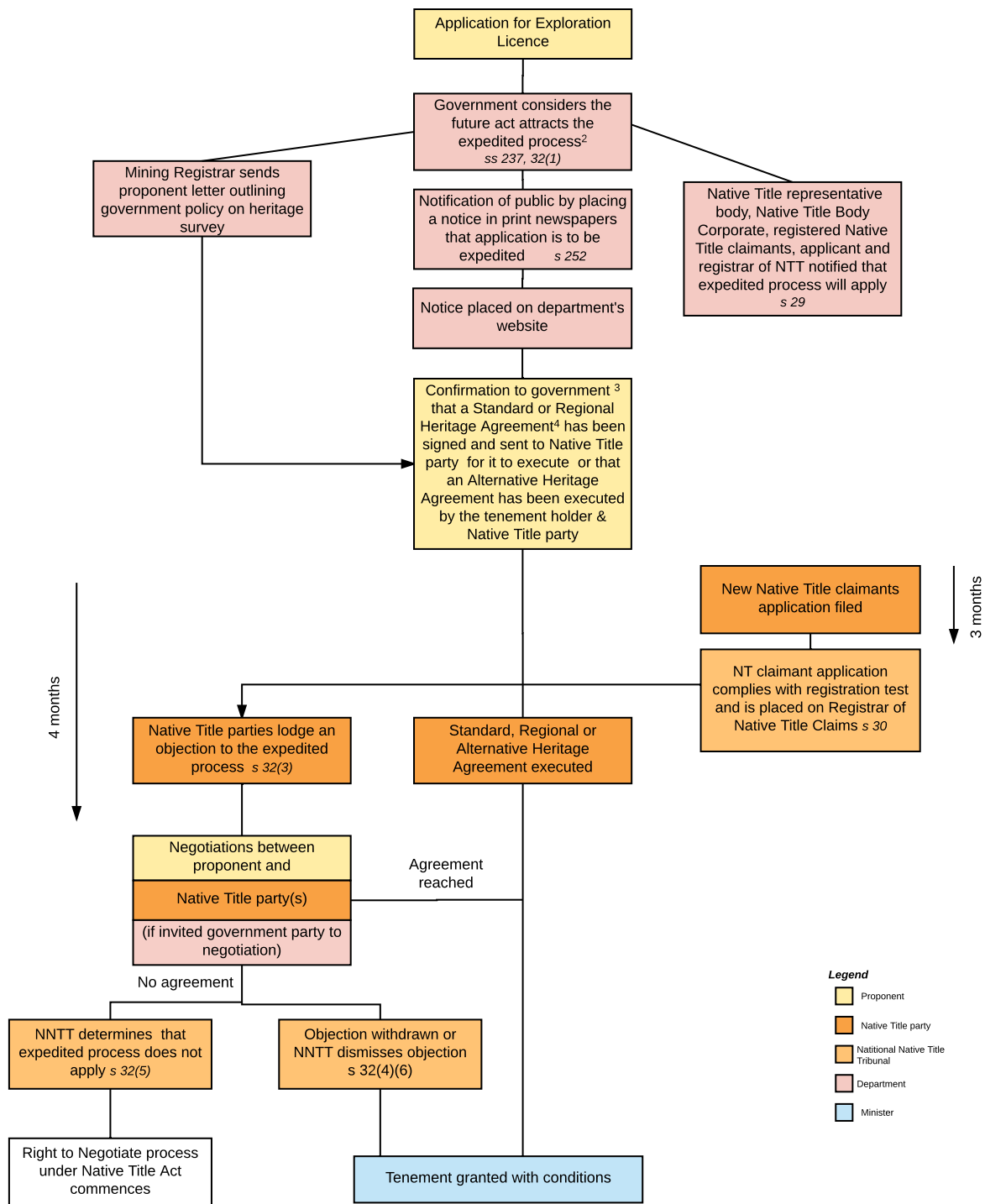


Legend

- Proponent
- Department of Environment and Heritage Protection Queensland
- Department of Environment Commonwealth
- Coordinator-Generals Office Queensland
- Public
- Commonwealth Minister for the Environment

1. Matters of national environmental significance
2. *State Development and Public Works Organisation Act 1971 (Qld)*
3. Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mines
Other acronyms
DEHP - Department of Environment and Heritage Protection Queensland
TOR - Terms of Reference
EIS - Environmental Impact Statement

Expedited Native Title Process *Native Title Act 1993 (Cth)* ¹ Western Australia



1., The *Mining Act 1978 (WA)* and the *Aboriginal Heritage Act 1972 (WA)* also apply.

2. A future act will attract the expedited process if it is

- not likely to interfere with community or social activities of the native title holders
- not likely to interfere with areas or sites of particular significance in accordance with the native title holders traditions
- not likely to involve major disturbance to any land or waters concerned

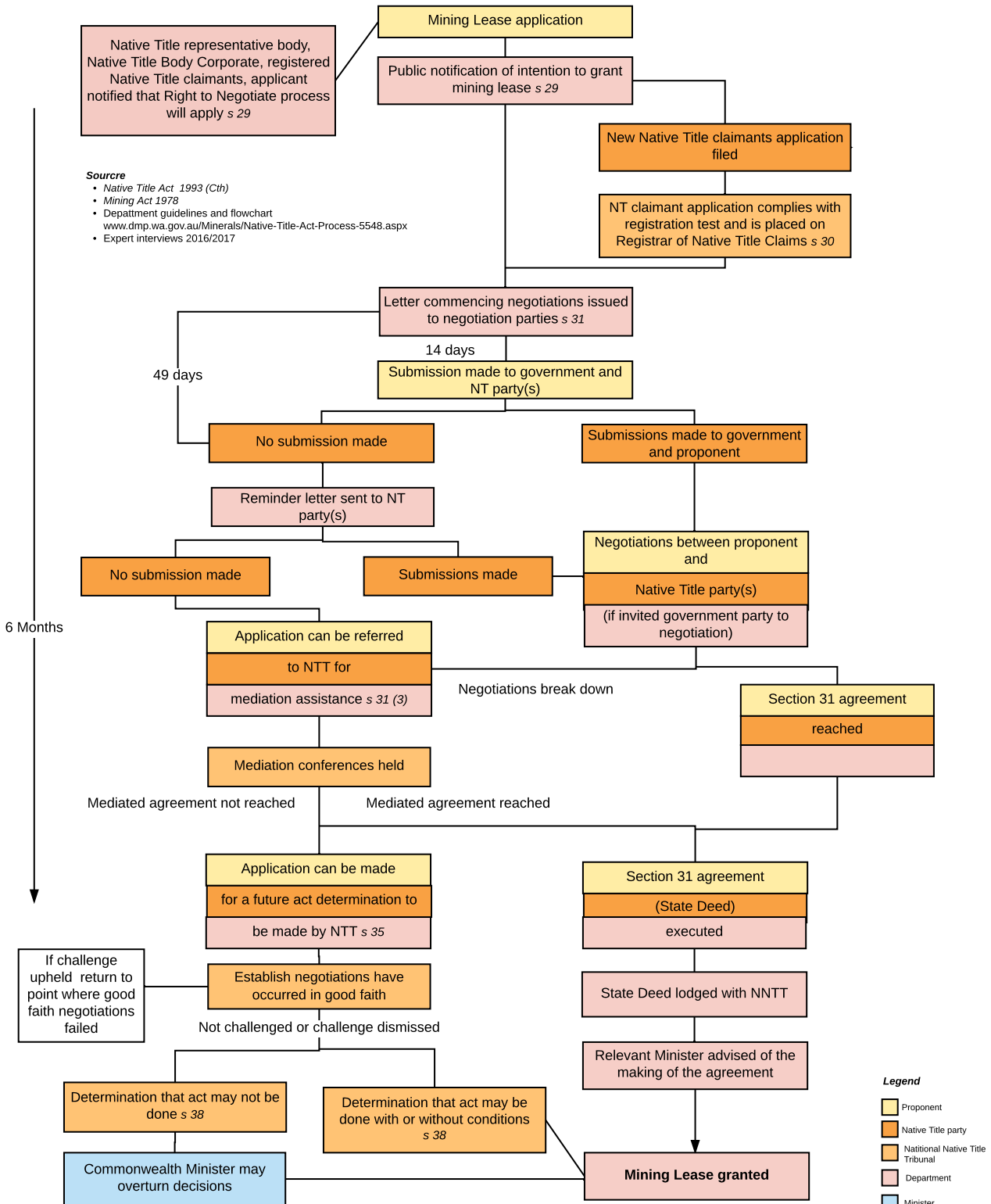
3. Confirmation in the form of a Mining Act affidavit or statutory declaration

4. Standard Heritage Agreement or a Regional Heritage Agreement available on the department's website
www.dmp.wa.gov.au/Minerals/Native-Title-Act-Process-5548.aspx

Source

- Native Title Act 1993 (Cth)*
- Mining Act 1978*
- Aboriginal Heritage Act 1972 (WA)*
- Department guidelines
www.dmp.wa.gov.au/Minerals/Native-Title-Act-Process-5548.aspx
- Expert interviews December 2016

Right to Negotiate *Native Title Act 1993 (Cth)* Western Australia



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