INDEPENDENT REVIEW OF THE NSW REGULATORY POLICY FRAMEWORK

NSW MINERALS COUNCIL SUBMISSION

15 December 2016

NSW MINERALS COUNCIL

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Executive Summary

The NSW Minerals Council (**NSW Minerals Council**) welcomes the opportunity to provide a submission to the Regulation Policy Framework Review Panel in respect of the Independent Review of the NSW Regulatory Policy Framework, and supports the Government's review of the regulation making processes in NSW.

The NSW mining industry continues to be a significant contributor to the strong economy in NSW. Regulation plays an important role in maintaining a strong economy, however over-regulation or restrictive government policies have the potential to create an excessive burden and red tape for businesses.

There is a significant history of initiatives to improve the making of regulation at both the NSW and Commonwealth levels. While there are opportunities to make improvements, considerable benefits would be realised by a more disciplined application to those initiatives already in place.

This submission contains five detailed case studies of regulation making processes that the NSW Minerals Council and our members have been involved in in recent years. These case studies highlight a lack of consideration of the best practice in making regulatory policy. As illustrated by the case studies there is inconsistent practice both across and within agencies, and the level of best practice is not linked, as may be expected, to the significance and seriousness of impacts of the regulatory proposal.

While the reasons for departure from best practice are often a combination of factors, there are relatively simple improvements that could be made to provide greater rigour, transparency and responsiveness to the process. To implement these changes there will need to be adequate resourcing provided to agencies, and realistic timeframes allowed for the development of regulation.

The NSW Minerals Council members are pleased to see that the NSW Government recognises that there are opportunities for improving the regulatory policy framework and looks forward to working with the NSW Government under the reformed system.

About this submission

This submission makes 34 recommendations on the improvement of the regulatory policy making process in NSW.

In order to provide the best evidence based recommendations to the Independent Review, this submission focuses on a selection of cases studies of regulation making in NSW impacting on the mining industry.

In addition the submission provides a flow chart of the regulation making process and highlights where improvements, as evidenced by the case studies, could be made.

Finally the submission addresses the specific questions posed in the discussion paper and where relevant related these back to the case studies.

About New South Wales Minerals Council

The NSW Minerals Council is the peak industry association representing the State's $21 billion minerals industry. The NSW Minerals Council provides a single, united voice on behalf of our 85 members, ranging from junior exploration companies to international mining companies, as well as associated service providers. Mining has, and will continue to be, a key economic driver for NSW. The NSW Minerals Council works closely with government, industry groups, stakeholders and the community to foster a strong and sustainable minerals industry in NSW.

Regulatory Reform

Guiding principles for reform for the NSW regulatory policy framework

The NSW Minerals Council welcomes the recent introduction of the '*NSW Guide to Better Regulation'* (**Better Regulation Guide**) issued by the Department of Services & Innovation in October 2016. The primary purpose of the Better Regulation Guide is to assist Government agencies *'to develop regulation which is required, reasonable and responsive to the economic, social, and environmental needs of NSW.'*

In addition to the principles outlined on Page 6 of the Better Regulation Guide, the NSW Minerals Council recommends the following guiding principles to underpin the framework for regulatory reform in NSW:

- *effective stakeholder engagement and consultation is vital to help develop good regulation based on sound scientific and technical evidence, and avoid unintended consequences, as well as building support for outcomes;*
- *collaboration between Government agencies is essential to minimise inconsistencies between regulatory policies and to reduce overlapping regulatory requirements which can place an excessive and unnecessary burden on stakeholders;*
- *policy makers and legislative drafters should avoid the use of overly prescriptive regulation which may have the unintended consequence of impacting activities beyond the initial purpose or need for the regulation;*
- *regulatory reform should always follow a consistent regulatory cycle which can be segmented into four stages or phases, being (1) initial decision-making; (2) implementation; (3) administration and (4) review. Effective management of each of these stages has an important bearing on the overall performance of the existing body of regulation;*
- *wherever possible consistent definitions should be used across all legislation in NSW to avoid confusion and extra work for businesses than would otherwise be the case; and*
- *regulatory regimes should be subject to periodic reviews to ensure they remain current in terms of best practice regulation standards and emerging scientific, technology or other developments.*

It is fundamental that the NSW Government adopts guiding principles of this nature as the foundation for future regulatory reforms in NSW in order to promote regulatory transparency and administrative efficiency.

Recommendations

The NSW Minerals Council provides the following recommendations to the Regulation Policy Framework Review Panel to improve Government regulation in NSW.

General recommendations

1. There should be consideration of how resourcing and time constraints experienced by agencies impact on the capacity to meet current best practice and any proposed improvements. Adequate resourcing and time should be provided to agencies to undertake consultation on, and development of regulatory proposals.
2. The Better Regulation Principles should be considered and publicly addressed throughout the development of regulatory proposals and should be expressly addressed early in consultation materials.

Independent regulatory reviews

3. Before any significant regulatory reform is introduced, the NSW Government should establish an independent review panel to consult with relevant Government agencies, industry bodies, non-Government organisations and the broader community to identify areas requiring reform.
4. Third party reviews should be encouraged as an effective way for industry and the community to provide ideas for reform in an objective and independent process.
5. The terms of reference provided to all independent review panels should require a thorough consideration of the economic consequences of any reform for businesses operating in NSW, as well as the broader State's economy.
6. The mining industry should be targeted for an overarching regulatory review, similar in scope to the current review being conducted by the Productivity Commission of the 'Regulation of Agriculture'. The mining industry is the largest exporter in NSW and contributes significant revenue to NSW. The sector is highly complex and dynamic but currently embedded in a significant amount of excessive regulation and red tape.
7. To identify priority areas for regulatory reform on an ongoing basis, the NSW Minerals Council advocates for the use of public 'stock-takes' whereby business is invited to make suggestions (or complaints) about regulation that imposes excessive compliance costs or other problems. The suggestions can then be tested with the responsible agencies and draft findings and recommendations prepared in response to feedback received.

Legislation Review Committee process

8. The Legislation Review Committee (**Committee**) process under the *Legislation Review Act 1987 (NSW)* requires amendment so that:
    a. an express obligation exists for recommendations of the Committee to be considered by either Cabinet or both Houses of Parliament in considering proposed legislation or regulation. If concerns are expressed by the Committee and the legislation or regulation is passed or allowed, the decision-makers should be required to publish grounds as to why it has made that decision;
    b. a Bill may not be passed unless the Committee has reported on the Bill;
    c. the review of regulation by the Committee occurs prior to consideration by Cabinet; and
    d. the functions of the Committee in respect of Bills are expanded to consider whether Bill may have an adverse impact on the business community.

Stakeholder consultation

9. Industry and the community should be given at least three months notice of the scheduled staged repeal of regulation and this information, as well as consultation processes, should be available on a publically accessible centralised website.

10. Currently consultation efforts are often inadequate and there is in many cases a lack of consultation at critical stages, including when different regulatory reform options are initially considered. More in-depth and focused consultation is needed when developing or reviewing specific regulation.
11. To ensure adequate opportunity is provided to industry to engage in the policy and regulation making process and so Government's decision making can be guided by input from stakeholders, Government agencies should meet with stakeholders prior to a policy position being finalised and being converted into draft legislation. The relevant Government agency should consider the use of working groups, or other similar forums, to engage with industry regularly and thoroughly in respect of government regulatory objectives.
12. Draft reports with preliminary findings or recommendation should be made public and tested so that stakeholders can have input and regulators can receive the benefit of technical and industry knowledge and experience.
13. All significant regulatory reforms should be placed on public exhibition for a minimum period of one month so that industry has sufficient time to provide considered responses.

Regulatory reform teams and inter-agency communications

14. Specific teams should be in place within the relevant Government agency for the purposes of regulation preparation and review and inter-agency communications should be encouraged to minimise the regulatory burden and duplication on those impacted by regulation. Regulatory review and implementation should be overseen by a central Government body (ideally Treasury) to ensure consistency in quality and processes across various NSW Government Departments.
15. The NSW government through a central oversight body (ideally Treasury) should create online platforms whereby business and the community can provide feedback to Government on current regulation. Feedback may be gathered through mechanisms such as electronic surveys and 'blogs' where issues or questions regarding regulation can be raised and considered as they arise. The feedback from industry should also be used to test whether regulations reflect best practice methods and reflect the most up-to-date technological and scientific methods. The outcomes of this consultation should then drive further development and review of regulation where significant costs and impacts are identified.

Release of reform packages

16. For legislation reform packages (comprised of for example a Bill, regulations and other supporting instruments) the full package of proposed reforms should be released for consultation at the same time so that industry and the community can assess the full extent of the implications of the package as whole.
17. When significant proposed legislation is released, a clear and plain English note should be provided explaining the intent and impact of each provision of the legislation. Without an explanation being provided, industry must undertake this exercise themselves at a substantial cost.

Robust Regulatory Impact Statement

18. A detailed cost benefit analysis should be carried out by the relevant Government agency in respect of each new provision that is proposed as part of any significant regulatory reform. Many new regulations can have significant cost implications for industry, which are often not fully considered and may be unnecessary to achieve the Government's desired outcome.
19. The exemptions from the need for a Regulatory Impact Statement (**RIS**) should be revised to ensure that matters that may have significant impacts on industry do not 'fall through the cracks'.
20. A short form impact assessment tool should accompany a RIS. This should be changed to a table format which addresses the following:
    a. intent of regulation;
    b. impact on business (costs and benefits);
    c. impact on the community (costs and benefits).

21. This document should be in plain English and designed to assist business and the community understand the impacts of the regulation presented in a clear and concise manner.

Periodic regulatory reviews

22. For any new regulations (e.g. the Biodiversity Conservation Regulation once made) the review period should be 12 months or at the latest 2 years as inherently there are 'teething issues' associated with new regulation that need to be properly addressed as soon as possible (and well before 5 years).
23. The 'good design principles of sunset programs' identified in the Productivity Commission report entitled '*Identifying and Evaluating Regulatory Reforms'* dated December 2011 (**Regulation Reforms Report**)) should be adhered to in NSW in respect of the staged repeal process.
24. Where possible, sequencing of reviews and reforms should be considered so that related regulations are considered in a complementary and efficient way.
25. For regulation where the impacts on business or the community are likely to be significant, post implementation monitoring and reviews should be undertaken within 2 years in addition to (and not instead of) the RIS that is prepared prior to implementation. These reviews should focus on the impacts of regulation on industry and community, the effectiveness of regulation in achieving its objectives and feedback from industry on administration, compliance and enforcement of regulation.

Innovation and best practice in regulatory reforms

26. Benchmarking of regulatory best practice is critical in ensuring that NSW remains competitive and continues to attract both domestic and foreign investment. Appropriate tools for benchmarking include surveys and business focus groups. Government decision making should also be guided by NSW's performance in comparative publications including the Fraser Institute Survey of Mining Companies 2015.
27. The NSW Government should invest in ongoing training to ensure that decision-makers have the knowledge and experience to work with industry in preparing and implementing best practice regulation. Regular consultation and cooperation between regulation reform and compliance teams should be encouraged to avoid duplication and improve effective regulation.
28. To promote regulatory transparency and administrative efficiency the NSW Government should move to a system of online lodgment of mining tenement applications and tracking of applications.
29. The NSW Government should introduce a regulatory review register where the community can find out in a centralised location proposed review dates for regulation, draft recommendations, final recommendations, government response and resulting regulatory changes.
30. For significant regulatory reviews and reforms the relevant NSW Government agency should use a digital platform where a plain English explanation is provided of each provision of a proposed regulation and the platform provides an ability for industry or the community to ask questions prior to a submission being lodged.
31. Where possible, proposed regulatory review actions, including technical documents such as draft methodologies or calculators, should be tested with stakeholders before being finalised and implemented.
32. Regulators should report clearly on a centralised online platform on the outcomes (both positive and negative) that are being achieved by regulation after it is implemented, including performance against regulatory timeframes such as approval timeframes.
33. Streamlining of reporting and auditing requirements should be encouraged so that less reports are required and all reports are collected through a central online portal administered by one central agency.
34. Overlapping legislation between levels of Government should be addressed, including through inter-jurisdictional agreements such as Bilateral Agreements.

Case Studies

The NSW Minerals Council has prepared a number of case studies to illustrate examples of recent regulatory reform processes implemented by various NSW Government agencies over the last two years. These case studies highlight the stakeholder consultation that has been undertaken as well as practices that worked well and areas for improvement.

Case Study 1: Biodiversity Conservation Bill 2016 (NSW)

What was the purpose of the regulatory reform?

The Biodiversity Conservation Reform Package (**Biodiversity Package**) was released by the NSW Government in May 2016 to overhaul the existing legislative framework for biodiversity conservation and native vegetation management in NSW. The Biodiversity Package is made up of the following key components:

- *Biodiversity Conservation Bill 2016 (NSW)* (**BC Bill**);
- the *Local Land Services Amendment Bill 2016 (NSW)* (**LLS Amendment Bill**); and
- Biodiversity Assessment Method (**BAM**).

According to the explanatory note, the purpose of the BC Bill is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future.

The Biodiversity Package is significant because of the proposed replacement of a number of long-standing pieces of environmental legislation, including the Threatened Species Conservation Act 1995 (NSW) (**TSC Act**) and the Native Vegetation Act 2003 (NSW) (**NV Act**) as well as the animal and plant provisions of the National Parks and Wildlife Act 1974 (NSW) (**NP&W Act**).

What process was followed to introduce the reforms?

The following process preceded the introduction of the Biodiversity Package:

Date	Event
June 2014	The establishment of the NSW Independent Biodiversity Legislation Review Panel (**Review Panel**) to undertake a comprehensive review of the TSC Act, NV Act and related biodiversity legislation due to the fact that the current legislative framework has become fragmented, overly complex and process driven.
18 December 2014	The release of 'A review of biodiversity legislation in NSW – final report' (Final Report) prepared by the Review Panel which recommended wide spread reforms to biodiversity and conservation legislation in NSW.
3 May 2016	The Biodiversity Package was placed on public exhibition with submissions due by 28 June 2016 (a period of 8 weeks).
May 2016 - October 2016	Ongoing consultation between the Office of Environment and Heritage (**OEH**), the Department of Planning and Environment (**DPE**) and stakeholders.
9 November 2016	The BC Bill and LLS Amendment Bill were introduced into Parliament on 9 November 2016 and declared to be urgent. The Bills were passed on 17 November 2016.
23 November 2016	The BC Act and LLS Amendment Act were assented to.

What consultation was undertaken with stakeholders and the broader community?

The Terms of Reference for the Review Panel stipulated that the Review Panel was to ensure thorough engagement with all interested stakeholders, including landholders, industry, developers, councils, non-government organisations and members of Parliament. The Final Report indicates that the Review Panel received 1069 submissions, which includes 395 submissions and 674 form letters. Of the 395 submissions received, 288 were from individuals, 59 from non-government organisations, 36 from government agencies, local councils, and advisory bodies, and 12 from industry groups. The NSW Minerals Council prepared a submission as part of this process. The Review Panel then met with a number of key stakeholders following the formal submission period. The NSW Minerals Council met with the Review Panel at this time and was provided an opportunity to discuss their concerns and recommendations in more detail. Based on these submissions a detailed report was prepared to summarise and analyse the submissions received. This Submissions Report formed an annexure to the Review Panel's Final Report.

Following the release of the Biodiversity Package for public exhibition, the OEH conducted a number of community information sessions, technical workshops and webinars across NSW during the consultation period engaging over 1,000 participants, including a workshop specifically for the mining industry conducted at the offices of the NSW Minerals Council. The community were invited to make submissions online or by post. A total of 7166 submissions were received in relation to the Biodiversity Package, including approximately 6000 form submissions.

The OEH website indicates that consultation 'will continue as the enabling Regulation, tools and products to support the legislation are developed during 2017'.

What was done well?

From the outset, a thorough process was established for the review of the existing biodiversity related legislation including:

- The Review Panel being supported by an interagency Senior Officers Group (SOG). The SOG was established to provide whole-of-government input to the review and identify interactions with related policy and legislative frameworks;
- The OEH provided secretariat support to the operations of the Review Panel and the SOG to ensure that appropriate resources were allocated for this initial exercise;
- The NSW Government has maintained and regularly updated a website which provides specific information and documents in relation to the biodiversity reforms and how the community can get involved in the process;
- The NSW Government also released a number of 'submission guides' to provide stakeholders with plain English summaries of key aspects of the Biodiversity Package on issues such as native vegetation regulatory mapping, private conservation land and simplifying land management; and
- The OEH provided adequate time for consultation on the Reforms Package, and met with key stakeholders and industry and community groups to give those groups an opportunity to discuss their specific views and concerns in detail. In meeting with industry groups, the OEH ensured that all key members of the legislative reform team were present as well as representatives from other key government agencies, for example the Department of Planning and Environment (**DPE**).

What could have been done better?

Whilst the NSW Government's biodiversity reforms have been the subject of extensive review and consultation, there are nevertheless a number of area for improvement, namely:

- The Biodiversity Package was placed on public exhibition in May 2016 without a number of key components of the regulatory reforms, in particular the Regulations associated with the BC Act and LLS Amendment Bill and the tested BAM. Without these products/completed products, it was very difficult to assess the package in totality and to undertake case studies to identify whether assessment and offsetting under the reforms would be appropriate and how it would compare to the status quo. This is equally the case for the Government, in road testing the proposed legislation before it commences;
- Very limited information was provided as part of the Biodiversity Package in relation to the proposed Biodiversity Conservation Fund (**BCF**) and the calculator that is being developed to convert a credit to a cash amount that will be paid to BCF. The NSW mining industry has long been a supporter of the concept of a fund that developers can pay into met their offset obligations. A sustainable fund is a win-win for business and the environment. However, on the limited information available during the exhibition period for the BC Bill, it was difficult to comment on this important element of the package. Subsequent consultation on the fund calculator confirmed fears that it would be prohibitively expensive for most mining projects;
- Following the consultation period, industry groups, including the NSW Minerals Council, were not provided with information as to how their concerns and recommendations provided in their respective submissions had been addressed by OEH in the final Bill that went before Parliament. The result is that many of the key recommendations made by the NSW Minerals Council have not been adequately addressed in the final legislation (as passed);
- The BC Bill has been passed by the NSW Parliament with very few transitional provisions. It is vital that the Government consults on these provisions before the Biodiversity Package is finalised and implemented. In addition, given that the BAM and BAM calculator will be new and introduce many new concepts that are not contained in the FBA, there should be a period of administrative application of the BAM and its tools and this needs to be provided for in the transitional provisions;
- The OEH has had limited resources to undertake a very significant reform process. The allocation of sufficient Government resources to the process is essential for ensuring that legislative reforms are effective and adequate consideration is given to stakeholder feedback.

Case Study 2 - Resources Legislation Package - Reforms to the Mining Act 1992 (NSW) and the Mining Regulations 2010 (NSW)

What was the purpose of the regulatory reform?

During 2015, there was a significant overhaul of many aspects of the mining and petroleum legislation in NSW (**Resources Legislation Package**), through the introduction of the following Acts:

- The *Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Act 2015 (NSW)* (**Titles Act**);
- The *Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015 (NSW)* (**Harmonisation Act**); and
- The *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015 (NSW)* (**Land Access Act**).

Major changes introduced through these Acts included:

- How and when coal mining and petroleum tenements will be allocated, granted, renewed, transferred and cancelled;
- The negotiation, mediation and arbitration process for access arrangements to enable prospecting operations to be carried out; and
- Compliance and enforcement requirements for mining and petroleum tenements.

The above Acts were supported by the following new regulations which have now commenced:

- The *Mining Legislation Amendment (Harmonisation) Regulation 2016 (NSW)* (**Harmonisation Regulation**); and
- The *Mining Legislation Amendment (Licences for Operational Allocation Purposes) Regulation 2015 (NSW)* (**Operational Licence Allocation Regulation**).

The Mining Legislation Amendment (Arbitration) Regulation 2016 (NSW) (**Arbitration Regulation**) was the subject of further consultation between the Department of Resources and Energy (**DRE**), the NSW Minerals Council and the NSW Farmers Federation during 2016.

The following policy documents were also released by the NSW Government to supplement the Resources Legislation Package, although some of these documents remain in draft form:

- Draft NSW Strategic Release Framework for Coal and Petroleum Exploration;
- Resource Assessment for Potential Coal and Petroleum Exploration Release Areas Policy;
- Guidelines for Applying for a Coal Exploration Licence for Operational Purposes; and
- Draft Land Access Arbitration Procedures.

Subsequent to the above regulations being made, the previous *Mining Regulation 2010 (NSW)* (**Previous Mining Regulation**) was wholly repealed and replaced with the current *Mining Regulation 2016 (NSW)* (**Current Mining Regulation**).

What process was followed to introduce the reforms?

The following process preceded the introduction of the Resources Legislation Package:

Date	Event
15 April 2014	Bret Walker SC was engaged by the NSW Government to undertake a review of the land access arbitration process and issue.
May 2014 – June 2014	Consultation was undertaken with various stakeholders in relation to the review of the Land Access Arbitration Framework.
20 June 2014	Bret Walker SC issued his report titled '*Examination of the Land Access Arbitration Framework – Mining Act 1992 and Petroleum (Onshore) Act 1991'* in which he made 31 recommendations to improve the arbitration land access framework (**Walker Review**).
August 2014	The Government response to the Walker Report was released in which the NSW Government stated that it '*endorsed all the recommendations in the Walker Report … and committed to a process of implementation commencing immediately where possible.'*
August 2014	The Coal Exploration Steering Group (**CESG**) was established by the NSW Government in response to the Independent Commission against Corruption's (**ICAC's**) recommendations to reduce opportunities and incentives for corruption in the state's management of coal resources.
11 September 2015	DRE conducted invitation only briefings to select stakeholders in relation to the draft Titles Bill, Harmonisation Bill and Land Access Bill.
14 September 2015 and 15 September 2015	Consultation drafts of the Titles Bill, Harmonisation Bill and Land Access Bill were released to select stakeholders on a confidential basis. The NSW Minerals Council and the NSW Farmers Federation, together with their legal advisors received copies of these bills from DRE but they were not permitted to provide copies of the draft legislation to their members for review.
24 September 2015	Submissions on the Titles Bill, Harmonisation Bill and Land Access Bill were required to be provided to DRE by 24 September 2015 (i.e. only 10 days after the Bills were selectively released).
15 October 2015	The Titles Bill, Harmonisation Bill and Land Access Bill were introduced into the NSW Government.
2 November 2015	The Titles Bill, Harmonisation Bill and Land Access Bill were assented to by the NSW Government.
25 November 2015	DRE conducted invitation only briefings to select stakeholders in relation to the Harmonisation and Arbitration Regulation and the Operational Licence Allocation Regulation.
18 December 2015	Substantial parts of the Titles Act commenced, together with the Operational Licence Allocation Regulation.
January 2016	Ongoing consultation in relation to the Arbitration Regulation and the draft Land Access Arbitration Procedures.
1 March 2016	Substantial parts of the Harmonisation Act and Land Access Act commenced, together with the Harmonisation Regulation.
12 August 2016	The Previous Mining Regulation was repealed and replaced with the Current Mining Regulation.
1 December 2016	The Land Access Act commenced (the NSW Minerals Council was provided 1 days notice prior to the commencement of this Act).

What consultation was undertaken with stakeholders and the broader community?

In relation to the review of the Land Access Arbitration Framework in early 2014, consultation with the following groups or individuals was facilitated by Mr Jock Laurie, the NSW Land and Water Commissioner, and was undertaken over 20, 26 and 30 May and on 2 June 2014:

- Exploration companies and representatives presently involved in arbitration processes;
- The members of the Arbitration Panel, Ms Patricia Lane, Mr Michael J Lawrence, Mr Phillip Watson and Ms Brydget Barker-Hudson;
- Division of Resources and Energy;
- NSW Law Society;
- The Institute for Arbitrators and Mediators;
- NSW Farmers Association;
- NSW Irrigators Association;
- Rice Growers Australia;
- Cotton Australia;
- NSW Wine Industry Association;
- NSW Minerals Council;
- Australian Petroleum Production and Exploration Association;
- Association of Mining Exploration Companies;
- Southern Highlands Coal Action Group;
- Lock the Gate.

The Minister also invited public submissions to be provided by 23 May 2014. This period was extended to 30 May 2014, with late submissions accepted after this date. A total of 31 submissions were received. Mr Bret Walker took into account all of the submissions and the issues raised in the targeted consultation meetings, in preparing his review.

In contrast to the community engagement that occurred as part of the Walker Review, in relation to the draft legislation, DRE undertook very limited and selective consultation. For example, 'consultation draft' versions of the Titles Bill, Harmonisation Bill and Land Access Bill were provided to select stakeholders such as the NSW Minerals Council and the NSW Farmers Federation on a confidential basis. This meant that these industry bodies were not permitted to distribute copies of the draft legislation to their members for review prior to the legislation being tabled in the NSW Parliament. Furthermore, DRE provided only a period of 10 days for the stakeholders to review and make submissions on draft legislation which was proposed extensive changes to the existing regulatory framework.

What was done well?

The engagement during the Walker Review stage of the process was extensive and transparent. Sufficient time was provided for all parties to provide submissions and additional time was provided.

The Review provided a detailed report and identified generally how submissions made with respect to the Terms of Reference had been considered in the making of recommendations.

What could have been done better?

Overall, the introduction of the Resources Legislation Package provides a number of important examples of deficiencies in a regulatory reform process such as:

- Consultation drafts of the Titles Bill, Harmonisation Bill and Land Access Bill were released to select stakeholders on a confidential basis. As such, the broader community (including individual mining companies) did not have an opportunity to make submissions on the draft legislation at any stage prior to its introduction into the NSW Parliament and consequently there was little transparency in the reform process;
- DRE did not allocate sufficient time between providing draft legislation to stakeholders for review and the Bills being tabled in in the NSW Parliament. A select number of stakeholders were given a period of 10 days to review and understand the implications three new Bills. In total, there was less than one month between the Bills being released for consultation and the legislation being tabled in the NSW Parliament. This is insufficient time for the NSW Government to undertake meaningful consultation and amend the legislation (where appropriate) to address the submissions made;
- DRE failed to give proper consideration to the vast majority of submissions that were made by the NSW Minerals Council. The NSW Minerals Council represents a significant portion of the NSW mining industry and has a very detailed understanding of industry concerns and the impacts of the reforms on businesses in the sector;
- Forms prepared by DRE to supplement the Resources Legislation Package following its commencement, such as new exploration licence application forms, have not reflected the legislative changes that have been introduced. As a result, many of the forms have had to be revised several times, and proponents have been required to lodge additional documents (after lodging their initial applications) due to the constant changes in the forms. This has had significant cost and time delay consequences for proponents.
- A RIS was prepared for the purposes of the review of the Previous Mining Regulation. The RIS is a considerably long document and appears, at first glance, to be a very detailed analysis of the proposed reforms. However, on closer review, it seems that the RIS only considers three options at a high level, being:
    - remake the Previous Mining Regulation as it was;
    - let the Previous Mining Regulation lapse; or
    - make minor amendments to the Previous Mining Regulation.
- The Subordinate Legislation Act 1989 (NSW) provides a process whereby subordinate legislation is reviewed periodically to ensure that it meets current requirements. As such, this process should involve individual consideration of each provision in the Previous Mining Regulation, including a cost benefit analysis of each clause as opposed to only considering the Regulation as a whole. DRE's justification for a lack of a proper review of the Previous Mining Regulation was based on earlier changes that had been made through the introduction of the Harmonisation Regulation and the Operational Licence Allocation Regulation.

Case Study 3 - Review of Mine Subsidence Compensation Act 1961 (NSW)

What was the purpose of the regulatory reform?

The Mine Subsidence Compensation Act 1961 (NSW) (**MSC Act**) aims to mitigate the effects of mine subsidence on the community and to provide property owners with restoration of improvements where damage occurs due to mine subsidence. The MSC Act creates the legal and administrative arrangements for the operation of the Mine Subsidence Board (**MSB**), establishes the Mine Subsidence Compensation Fund, establishes the obligation for payment of levies, provides development control powers for the Board, and defines the nature of work and compensation that the Board can fund.

In early 2016, the NSW Government initiated a review of the MSC Act and its operations, noting there are stakeholder concerns and recognising the MSC Act has not been reviewed for over twenty years (**MSC Act Review**).

The objectives of the MSC Act Review are to ensure that the regulatory framework for mine subsidence in NSW is fair, timely, sustainable and is efficiently administered, both in the approach to mitigation as well as restoration of improvements.

No formal report has been published following the MSC Act Review, however a brief Q&A document was produced describing the proposed changes to the mine subsidence system in NSW (**Q&A Note**). The Q&A Note indicated that given technological advancements and changes in industry practice, a review of the MSC Act and its administration was necessary to ascertain whether it still meets the needs of the community, developers, coal industry and Government.

The Q&A Note indicates that *'these reforms require legislative change. Stakeholder engagement will occur over the coming months to inform the legislative drafting process. It is intended that an amending Bill be provided to Government for further consideration in early 2017. Subject to the Bill being passed in Parliament, the major changes to the levy framework will take effect in 2018'.*

What process was followed to introduce the reforms?

The following process has been followed in relation to the MSC Act Review:

Date	Event
October 2013	ICAC commenced an investigation into a MSB Manager who allegedly received corrupt payments or other benefits as an inducement or reward for showing favourable treatment to building contractors.
9 February 2016	The NSW Department of Finance, Services and Innovation issued the '*Terms of Reference for the Review of the Mine Subsidence Compensation Act 1961 (NSW)'.*
18 March 2016	Submissions were due from industry stakeholders in relation to the MSC Act Review.
23 March 2016	ICAC publishes its findings in relation to the above corruption allegations and made seven corruption prevention recommendations to the MSB to help prevent the recurrence of the conduct exposed in this investigation.
September 2016	A brief Q&A Note was produced describing the proposed changes to the mine subsidence system in NSW as a result of the MSC Act Review. No formal report has been published detailing outcomes of the MSC Act Review.

What consultation was undertaken with stakeholders and the broader community?

The Terms of Reference for the MSC Act Review provided that:

- The Review would be led by a Steering Committee chaired by the Department of Finance, Services and Innovation, with representation from DPE, Department of Department of Premier and Cabinet, Department of Industry and Treasury;
- Stakeholder engagement would be central to the review process and include industry stakeholders such as the Property Council of Australia, local developers and mining companies. The Review would invite submissions from all interested stakeholders including community groups and local councils; and
- Relevant departments such as the DPE and the Department of Industry would be consulted during the MSC Act Review for the purpose of ensuring that regulation across government is consistent.

The Q&A Note indicates that the MSC Act Review Steering Committee received submissions from a broad range of stakeholders, which has informed the proposed change the system. No formal report has been published analysing the submissions that were received.

Going forward, the Subsidence Advisory NSW website indicates that:

- Targeted consultation with industry and local government will occur over the following months;
- Community information sessions are being held across NSW in February 2017 to provide community members with the opportunity to meet with officers from Subsidence Advisory NSW and understand the proposals in detail; and
- Whilst Subsidence Advisory NSW is not asking for submissions on the proposed changes to the MSC Act, they welcome feedback which can be provided via Subsidence Advisory NSW's website.

What was done well?

The reforms to the MSC Act are ongoing, however to date there have been a few positive aspects of the MSC Review:

- The Terms of Reference required cross agency consultation to ensure a consistent regulatory approach from all of Government. Too often regulatory reform results in duplication of obligations as multiple agencies seek to regulate to same issues;
- A period of 5 weeks was provided for submissions in relation to the MSC Act Review. Given that the MSC Act is a relatively concise piece of legislation (when compared for example to the Mining Act or Biodiversity Conservation Bill), this period of time was sufficient; and
- The NSW Government has indicated that stakeholder engagement will occur over the coming months to inform the legislative drafting process.

What could have been done better?

The following improvements to the regulatory reform process have been identified as a result of the recent MSC Act Review:

- No formal report has been published detailing the outcomes of the MSC Act Review or summarising the submissions that were made. As a result the community is unable to scrutinise the stakeholder submissions that were received and to determine whether the proposed legislative reforms reflect the stakeholder feedback or simply a Government initiated change in policy. There has been a lack of transparency around the different options considered; the pros and cons of each option; and why the final proposal was

considered the best; and

- The Q&A Note announces the NSW Government's intention to introduce a number of significant changes to the mine subsidence compensation process. These proposed changes have been announced before draft legislation has been prepared for consultation and before any consultation was undertaken with industry and other stakeholders about the proposed reforms. Once the NSW Government announces a policy change of this nature, it is then extremely difficult to move away from this policy position (irrespective of submissions that may be made by stakeholders).
- Whilst the legislation has not been drafted Subsidence Advisory has begun to implement the changes in practice. Subsidence Advisory's submission on the Wallarah 2 project requested a condition be imposed that *"requires the Colliery to accept responsibility for any damage to existing surface improvements by mine subsidence and the associated cost to repair, due to its extractive works."* This submission was made before the outcomes of the review were even announced.

Case Study 4 - State Environmental Planning Policy (Mining, Petroleum Production and Extractive Activities) 2007

What was the purpose of the regulatory reform?

Clause 12AA of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Activities) 2007 (**Mining SEPP**) was introduced in September 2013 by the NSW Government to ensure that the significance of a mineral resource is given explicit and appropriate consideration in decision-making on mining-related Development Applications. The clause was introduced because the NSW Government believed that this needed to be explicitly considered to restore balance to the assessment process.

Less than two years after Clause 12AA was introduced into the Mining SEPP, the NSW Government repealed the provision through the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Significance of Resource) 2015 (**Mining SEPP Amendment**). The intention of the Mining SEPP Amendment, as stated on the DPE website, was to remove the provisions to ensure that "social, environmental and economic considerations would all have equal footing under the rules."

Separately, pursuant to clause 20A of the Mining SEPP the Minister for Planning was required to arrange for a review of the Mining SEPP (and a report of the review to be made public) before the end of September 2015 (**Mining SEPP Review**). In May 2015, the Minister announced that as part the Mining SEPP Review:

- There would be an overhaul of the way large mining and coal seam gas projects secure approval;
- The community would be given a greater chance to test the planning decisions;
- Society and the environment would get a more equal weighting with the economy in decision making; and
- There would be a focus on monitoring and compliance so that the consent doesn't sit on a shelf after it is granted.

What process was followed to introduce the reforms?

The following process was followed in relation to the Mining SEPP Amendment:

Date	Event
September 2013	Clause 12AA was introduced into the Mining SEPP.
May 2015	Planning Minister Rob Stokes announced that a review of the Mining SEPP would be undertaken in accordance with clause 20A of the SEPP.
7 July 2015	Submissions on the proposed repeal of clause 12AA could be made between 7 July 2015 and 21 July 2015.
28 July 2015	NSW Minerals Council met with the Planning Minister and representatives from DPE in relation to the proposed repeal of the Mining SEPP.
31 August 2015	Planning Minister Rob Stokes announced the State's mining policy would be changed to provide a more balanced framework for decision making. This announcement was in respect of the repeal of clause 12AA only.
2 September 2015	Clause 12AA was repealed from the Mining SEPP.

What consultation was undertaken with stakeholders and the broader community?

Consultation was undertaken by DPE in relation to the Mining SEPP Amendment (i.e. the repeal of clause 12AA). This consultation including an opportunity for public submissions to be made, together with further engagement with the following peak stakeholder groups:

- NSW Farmers Association;
- NSW Minerals Council;
- Australian Petroleum Production & Exploration Association;
- Cements Concretes and Aggregates Australia;
- Nature Conservation Council;
- Total Environment Centre;
- Lock the Gate;
- Environment Defenders Office.

With regards to consultation, the Mining SEPP Review Report states that *'in conducting its review, DPE has taken into consideration a number of issues raised by stakeholders. These views were gathered through submissions and consultation with key representative bodies for industry, community and environmental interests. The discussion held with peak bodies were broad and focused on the policy aims and operation of the SEPP.'*

However, the consultation undertaken by DPE only related to the Mining SEPP Amendment and did not extend to issues that would be relevant to the broader Mining SEPP Review.

What was done well?

With respect to the complete repeal of clause 12AA from the Mining SEPP, it was positive to see that all public and government agency submissions made in relation to the repeal of clause 12AA are publicly available on the DPE website. The publication of submissions is important for promoting an open and transparent planning system.

What could have been done better?

The following deficiencies arose with respect to the Mining SEPP Review as required pursuant to clause 20A of the Mining SEPP:

- Despite the statutory requirement for the formal Mining SEPP Review by the end of September 2015, no proper review or consultation was conducted by DPE in relation to the whole SEPP. Instead, the only consultation and ultimate change that was made to the Mining SEPP as a result of the Mining SEPP Review was the repeal of clause 12AA. DPE's reason for not making further changes to the SEPP at this time was that 'feedback from the community in relation to the Mining SEPP has called for broader reform of mining policy and regulation that goes beyond the scope of the SEPP'; and
- The Mining SEPP Review Report was issued supposedly as a result of the review of the whole Mining SEPP. However, this report does not reflect any consultation or review that was conducted by DPE in relation to the broader Mining SEPP. In fact, the report was released after the amendments to the clause 12AA of the Mining SEPP had already been made.

With respect to the complete repeal of clause 12AA from the Mining SEPP, the following deficiencies have been identified:

- A half page document was published on the DPE website to explain the intended effect of the proposed repeal of clause 12AA, together with a brief Q&A document. However, these documents did no more than restate the purpose of the clause and provided no real context for the proposed amendment;
- No transitional arrangements were provided which meant that the changes would effectively apply retrospectively to projects that were already under assessment.

Case Study 5 - Change in policy relating to non-road diesel emissions

What was the purpose of the regulatory reform?

Non-road diesel equipment at NSW coal mines are a source of particulate emissions in the NSW Greater Metropolitan and Hunter regions.

In recent years, the NSW Environment Protection Authority (**EPA**) has assessed practices used at EPA-licensed coal mines and considered the costs and benefits of options available to reduce non-road diesel emissions.

A report titled *'NSW Coal Mining Benchmarking Study – Best Practice Measures for reducing Non-Road Diesel Exhaust Emissions'* (**Non-Road Diesel Exhaust Emission Report**) was published by the EPA in August 2015, which among other matters:

- identifies cost-effective options to reduce non-road diesel emissions
- recommends that existing and proposed NSW coal mines conduct a best management practice (BMP) determination to identify the most practicable options for achieving exhaust emission performance standards for in-service, new and replacement non-road diesels (from <8 kW to ≥560 kW):
    - for existing EPA-licensed coal mines BMP should be implemented through a pollution-reduction program (PRP), which is enforced through environment protection licence conditions
    - for proposed NSW coal mine developments BMP should form part of the environmental assessment (EA), which is directly linked to the air quality impact assessment
- details the performance standards, implementation timeframes, certification and verification requirements for in-service, new and replacement non-road diesels.

The EPA has indicated that it will be further engaging with stakeholders and seeking feedback on the proposed pollution reduction program for non-road diesels at EPA-licensed coal mines.

What process was followed to introduce the reforms?

The process was initiated several years ago with an industry survey to obtain data on non-road diesel equipment and use. The EPA then prepared a cost-benefit analysis assessing various options to reduce non-road diesel emissions using information about diesel equipment used at NSW coal mines obtained from the industry survey. The EPA held a workshop with industry and suppliers in June 2016 to discuss the proposals.

No final regulatory proposals have been presented to the industry at this stage so there continues to be uncertainty about what impact the proposals will have on the industry.

What consultation was undertaken with stakeholders and the broader community?

The EPA released the cost benefit analysis for public consultation; has held two workshops; and has responded to multiple submissions made by the industry on the proposals.

What was done well?

- The EPA gathered detailed information about the non-road diesel fleet at NSW coal mines, which enabled much more accurate estimations of the impact of non-road diesel emissions on air quality and gave a more accurate picture of the natural adoption of

better performing non-road diesel equipment by the industry.

What could have been done better?

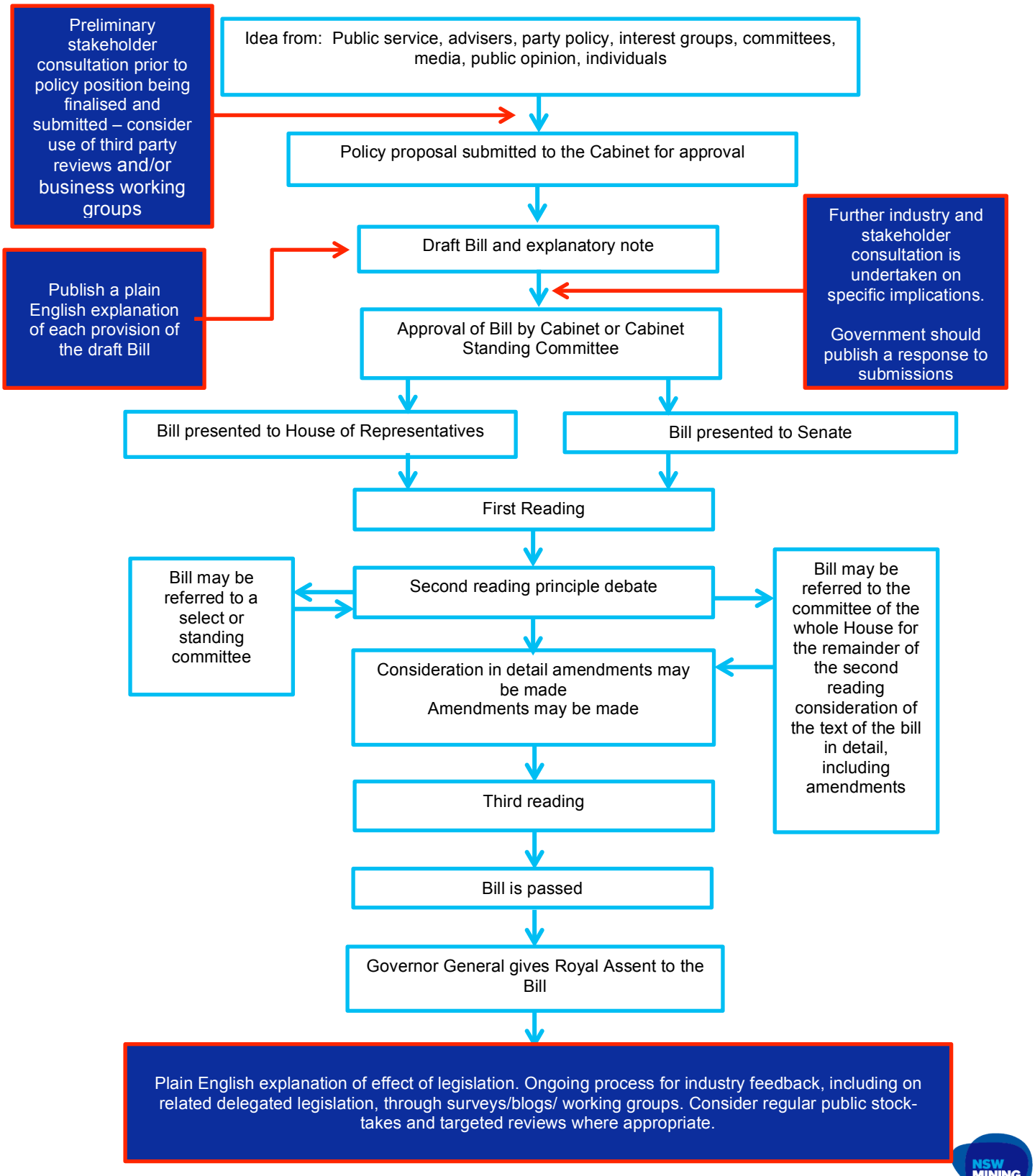
- Working much closer with the mine sites from the beginning of the process, including the selection of options for consideration in the cost benefit analysis and the assumptions used in the cost benefit analysis.

- The industry's reviews (including a report commissioned from an expert) identified several deficiencies in the EPA's cost benefit analysis, raising questions about the justification for the proposals. However, no significant changes were made a result of this input. Requiring an independent review of the cost benefit analysis that was prepared by the EPA could strengthen the analysis and improve stakeholder confidence in the results.

Flowcharts

The NSW Minerals Council has prepared a number of simplified flowcharts which show the current regulatory reform processes in NSW (blue boxes) as well as opportunities that have been identified for improvement in this process in terms of stakeholder consultation (red boxes).

Flowchart: legislation making process



Flowchart: delegated legislation process