Sustainable development and the regulation of WA's extractives sector

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John Southalan

Abstract

Western Australia has long experience with extractives (mining, petroleum) and their regulation. WA has many commendable laws, balancing the benefits and impacts of extracting these resources. But changes - social and technological - mean regulation from an earlier time and context can become unfit for purpose. Additionally, contemporary guidance (from international standards and leading industry practise) emphasise increased attention to sustainable development. This involves focus on more than just the physical and financial ability to extract resources.

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[1] Australia, and particularly Western Australia, have long experience with extractive operations and their regulation. *Some* laws and procedures are good examples of effective regulation, in enabling mining and broader economic development while also addressing the financial, environmental and social implications from extractives operations. But WA, like other jurisdictions with long-standing extractives regulation, often overlooks or ignores international developments and improvements.

[2] In a submission (with a colleague) to a recent Australian study on mining regulation,[1] we noted the following.

> *<u>Australia does not have some innate aptitude in resources regulation and development. What occurred previously could not occur now because of technological and social changes</u>.[2] The technological changes have meant what used to be necessary development of local capacity (jobs, businesses, communities) has decreased or disappeared with the increased mechanisation and better transport, enabling most goods or services being flown in. The social changes involve increased awareness and regulation of resources operations and their impacts – as compared to historically where there were fewer expectations or controls around environment, labour relations, workplace safety, international investment, or social impacts (to name just a few).*
>
> *This means that, <u>if</u> Australia's <u>contemporary resource regulation is to best contribute to the long-term interest of the Australian community</u>, then <u>there must be close examination of the developments and guidance globally rather than simply continuing</u> Australian <u>regulatory forms and practices which originated in a different time and context</u>.[3]*

[3] This paper focusses on recent developments and standards relevant to extractives regulation and sustainable development. These have implications for extractives operations ought be regulated, or conducted, in Western Australia. The paper seeks to briefly summarise and reference some of the key materials and issues.

1 Overview and international standards

[4] There is no, all-encompassing, international standard on extractives and sustainable development. The 2022 *Handbook of the Extractive Industries and Sustainable Development* observed that 'So far, no international convention exists that covers (for natural resources generally or minerals specifically) the globally sustainable use of natural resources, including sustainable production and consumption'.[4] In relation to mining/petroleum, there *are* laws and mechanisms which address particular areas (eg. deep-sea mining[5]) or processes (eg. the use of mercury,[6] tailings dams[7]). There are many international standards on environment or human rights, which prohibit certain outcomes or events regardless of their source (ie.

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[1] AUS Gov 2020.
[2] eg. UNCTAD 2007, 92-93; Crowson 2008, 82-83.
[3] Southalan & Fardin 2019, [6]-[7] (emphasis added).
[4] Bastida 2022, 197.
[5] Part XI of *UNCLOS* (1982).
[6] *Minamata Convention* (2013).
[7] Global Industry Standard 2020..

they are not extractives-specific), and these can inform the conduct and regulation of extractives operations. Of particular relevance to extractives include standards about:

(a) human rights – such as protections regarding health/life,[8] culture,[9] housing/shelter/family,[10] and land/property[11];

(b) environmental impact - which restrict or exclude developments (including mining) in some areas (eg. Antarctica,[12] wetlands and other heritage areas[13]); require action *for* biodiversity;[14] require action *against* transboundary movements of hazardous substances,[15] and using certain products (eg. asbestos,[16] ozone-depleting substances[17] - thus reducing financial incentive to extract related minerals); and

(c) some integration between these – particularly about the importance of public information and participation regarding environmental impacts.[18]

[5] The increased global attention to sustainable development, and what that entails (most recently in the 2015 Sustainable Development Goals[19] or **SDG**s), can help inform the focus, and analysis, of the regulation and operation of the extractives sector.[20] There is also specific UN urging in the implications of sustainable development for 'mineral resource governance' in both domestic regulation *and* international cooperation.[21]

[6] In addition to these legal obligations on nation states, there are many standards from inter-governmental, investment, and sector-specific initiatives identifying expectations of business and financiers (with varying degrees of 'enforceability').[22] Particularly, over the last decade, there has been attention to supply-chain and this has seen many initiatives specific to the extractives and associated products. This includes aluminium,[23] minerals from high-risk/conflict areas,[24] extractives stakeholder engagement,[25] jewellery,[26] and steel[27].

[7] The World Bank estimates over 3 billion tons of minerals and metals are needed for the proposed development necessary to maintain warming below 2°C (in the construction and operation or wind, solar and geothermal power, as well as energy storage).[28] On present technologies, that will entail large increases in mineral extraction and production (eg.

[8] eg. Gen Com 24 CESCR 2017, [18]
[9] eg. Indigenous cases summarised in Tarras-Wahlberg & Southalan 2021.
[10] eg. *SERAC -v- NGA* Communication 155/96; *Hopu -v- FRA* UN doc CCPR/C/60/D/549/1993/Rev.1.
[11] eg. UN 2015b; and at a domestic level *Statnett SF -v- Sør-Fosen sijte* HR-2021-1975-S.
[12] *Madrid Protocol* (1991), art 7.
[13] eg. *Ramsar Convention* (1971); *World Heritage Convention* (1972), art 6; UNESCO 2013, para 7.
[14] *CBD* (1992).
[15] *Basel Convention* (1989).
[16] *Asbestos Convention* (1986).
[17] *Montreal Protocol* (1987).
[18] eg. Principle 10 of *Rio Declaration* (1992); *Aarhus Convention* (1998); *Escazu Agreement* (2018).
[19] UN 2015c.
[20] eg. see application in 'Mining and the SDGs': RMF 2020.
[21] eg. UN 2019.
[22] Prominent examples include IFC 2021, EP4 2019, UN 2011, OECD 2011, OECD 2018, PRI 2013.
[23] ASI 2022
[24] International examples include OECD 2016b, *UNGA Res 55/56* (2000) and Kimberley 2006. Aspects of these are also replicated in national or regional measures, eg LME 2018, CCCMC 2015, USA Gov 2018.
[25] OECD 2017
[26] RJC 2019
[27] ResponsibleSteel 2022.
[28] Hund & o'rs 2020.

graphite, lithium and cobalt and others). The UN Environment Program's *International Resources Panel* summarised the situation thus, in their 2020 report.

> *The future demand outlook for metals and minerals presents notable opportunities for countries endowed with these resources to harness their extractive wealth to advance economic development and human well-being. Nonetheless, for a majority of resource-rich developing countries, mining, oil or gas exploitation has not translated into broad-based economic, human and social development. … The report thereby calls for moving beyond the established paradigm of the 'Social License to Operate', towards a new governance reference point that enables public, private and other relevant actors in the extractive sector to make decisions compatible with the 2030 Agenda's vision of sustainable development.*
>
> *The new governance framework put forward in the report is referred to as the 'Sustainable Development License to Operate' which extends the Social License to Operate in several important ways. It is relevant to all actors in the extractive sector, and its implementation is a shared responsibility by 'host' and 'home' countries along the extractive value chain. Importantly, it addresses a broader subject matter integrating all pillars – people, planet, prosperity, peace and partnership – of sustainable development, and sets out principles, policy options and good practices for enhancing the extractive sector's contribution to achieving the Sustainable Development Goals.*[29]

[8] Which all raises an important question. How ought any of this feature in Australian regulation, and operation, in the extractives sector?[30]

2 OECD Principles for Extractive Contracts

[9] In February 2020, the OECD endorsed a framework, aimed at governments and investors, for the content and negotiation of contracts about extractives' exploration and production. The principles are expressed as relevant to all systems of granting petroleum and mineral rights - whether by contractual regimes or legal systems of non-negotiable provisions.

[10] The OECD Principles seek to promote long-term sustainable development, while attracting and sustaining investment; provide mechanisms for changes in circumstances; and ensure 'a fair share for all parties to the contract and optimise the value from resource development through equitable, sustainable and mutually beneficial contracts and operations'.[31] These principles can help inform analysis and advice by resources academics and practitioners – of matters in Australia, but also regarding the involvement of Australian parties internationally.

2.1 Background

[11] The Organisation for Economic Co-operation & Development focusses on many areas, one of which is its *Policy Dialogue on Natural Resource-based Development*. This is described as 'an intergovernmental platform for peer learning and knowledge sharing where OECD and non-OECD producing countries, in consultation with extractive industries, civil society

[29] IRP 2020, 4.
[30] A recent useful paper on how to use/apply sustainable development *at a project level* is Caven & Johnson 2022.
[31] OECD 2020, Preamble.

organisations, and think tanks, can craft innovative and collaborative solutions for resource-based development'.[32]

[12] The Policy Dialogue operates through regular meetings and publications. From 2015, it has been working – with governments, industry and civil society – on contracts in the extractives sector. A set of draft principles was circulated in 2016 and had extensive consultation and stakeholder review over the next three years. The final iteration was presented and agreed at the June 2019 meeting of the Policy Dialogue. The document then worked its way up the OECD chain and, on 10 February 2020, the Governing Board of the OECD Development Centre endorsed the *Guiding Principles for Durable Extractive Contracts*[33] (**Principles**) which are extracted and explained below.

[13] The document contains a preamble, the Principles, and then explanatory commentary. The implication and applications of the Principles are discussed in the following sections, but the Principles are short, and most can be extracted below.

> *These Guiding Principles are not presented in hierarchical order. They interact with each other and should be considered together. They are high-level in nature and should be read in conjunction with relevant detailed international guidance on specific topics. They can serve as a common reference for extractive contract negotiations, in accordance with applicable international and/or national laws and international commitments, and taking into account national, and broader, sustainable development objectives and priorities.*
>
> *I. Durable extractive contracts are aligned with the long-term vision and strategy, defined by the host government on how the extractive sector can fit into and contribute to broader sustainable development objectives.*
>
> *II. Durable extractive contracts are anchored in a transparent, constructive long-term commercial relationship and operational partnership between host governments, investors and communities, to fulfil agreed and understood objectives based on shared and realistic expectations that are managed throughout the life-cycle of the project.*
>
> *III. Durable extractive contracts balance the legitimate interests of host governments, investors, and communities, with due account taken, where relevant, of the specific rights of affected indigenous peoples recognised under applicable international and/or national law.*
>
> *IV. Durable extractive contracts seek to optimise the value from resource development for all stakeholders, including economic, social and environmental outcomes.*
>
> *To the extent not covered by applicable international and/or national law, durable extractive contracts provide for the identification and management of potential adverse environmental, health, safety and social impacts of the extractive project and establish clear roles and responsibilities for the host government and the investor for the prevention, mitigation and remediation of those impacts, in consultation with affected communities.*
>
> *V. Durable extractive contracts are negotiated and based on the continued sharing, in good faith, of key financial and technical data to build a common understanding of the performance, main risks and opportunities of the project throughout its life-cycle.*

[32] http://www.oecd.org/dev/natural-resources.htm (accessed 31 Jul 2020)
[33] OECD 2020.

VI. *Durable extractive contracts operate in a sound investment and business climate and should be underpinned by a fair, transparent and clear legal and regulatory framework and enforced in a non-discriminatory manner.*

VII. *Durable extractive contracts are consistent with applicable laws, applicable international and regional treaties, and anticipate that host governments may introduce bona fide, non-arbitrary, and non-discriminatory changes in law and applicable regulations, covering non-fiscal regulatory areas to pursue legitimate public interest objectives. The costs attributable to compliance with such changes in law and regulations, and wholly, necessarily and exclusively related to project specific operations, should be treated as any other project costs for purposes of tax deductibility, and cost recovery in production sharing contracts.*

If such changes in law and/or applicable regulations result in the investor's inability to perform its material obligations under the contract or if they lead to a material adverse change that undermines the economic viability of the project, durable extractive contracts require the parties to engage in good faith discussions which might eventually lead the parties to agree to renegotiate the terms of the contract.

VIII. *Durable extractive contracts are underpinned by a fiscal system that is consistent with the governments' overall economic and fiscal objectives and provides a fair sharing of financial benefits between the investor and the host government, taking into consideration the potential risks, rewards, and country circumstances. As there is no one ideal fiscal regime, each host government needs to identify the optimal mix of fiscal instruments and terms to meet its objectives.*

A predictable fiscal regime that includes responsive terms defined in legislation and/or the contract to adjust the allocation of overall financial benefits between host governments and investors to variables that affect project profitability (such as variance in commodity prices, costs, production volume, or resource quality) contributes to the long-term sustainability of extractive contracts and reduces the incentives for either party to seek renegotiation of terms.

Host governments need to generate financial benefits from the extraction of their resources. Durable extractive contracts avoid sustained periods of commercial production with little or no revenue flows to the government.

2.2 Significance and application of Principles

[14] In many places, the Principles' wording just reports, collates or reflects common dynamics and occurrences in the resources sector, and thus provides limited *additional* guidance. However other parts of the document have more normative import, in identifying what governments and companies *should* do.

[15] The scope of the Principles is wide. While the Principles' name specifies contracts, the OECD makes clear the Principles apply more broadly. The preamble states the Principles 'are without prejudice to the choice of the preferred allocation mechanism [of oil, gas, and mineral exploration and production rights] nor do they imply a preference for contractual regimes versus legal systems providing for non-negotiable provisions'.[34] Accordingly, the Principles hold relevance even where extractive rights are allocated under legislative systems and criteria. This is the case in Western Australia.

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[34] OECD 2020, Preamble, 1.

[16] There is an expectation that governments and companies should apply the Principles where possible. The Preamble includes that the OECD 'calls upon States, investors, [and] negotiation support providers... to consider the following principles, and actively promote their application...'.[35] That application can be direct or through what the document terms 'negotiation support providers'. Whether that term includes legal advisers is unclear, but resources academics and lawyers ought be aware of the Principles because these may be raised by various parties regarding the allocation and management of rights for exploration and extraction.

[17] Many parts in the Principles emphasise the legitimacy and importance of companies' commercial interests. Where a company is encountering difficulties with uncommercial or uncooperative government officials and decisions, these parts of the Principles may assist.[36] But, often, domestic law already identifies company rights (in contract, legislation, constitution, or international investment treaty) which can be enforced through courts or arbitration. As such, the Principles may provide limited additional significance here.

[18] Where the Principles do have greater implication is their refining and reinforcing the expectations of extractives companies - and their contracts - and *how these expectations may best be navigated*. Recent events in Australia, where Rio Tinto mine-works destroyed Indigenous sites *within* the terms of legal procedures and contracts,[37] are a case in point. The attention and response to those events illustrate that relying only on contracts and the host country's law can be insufficient to avoid significant problems and harm for communities and the extractive company. The concepts of 'stakeholder engagement' and 'social licence to operate' can sometimes be too amorphous to provide guidance.[38] By contrast, these Principles can help identify issues and answers where current extractives rights may be insufficient.

[19] The OECD document contains additional 'commentary' on each of the above eight Principles. Key aspects from this commentary are summarised and collated under the sub-headings below.

(a) Government should, <u>first</u>, determine sustainable development goals to <u>then</u> inform whether and how extractives rights are allocated and managed

[20] The Principles (and the OECD more broadly) recognise resource extraction benefits economic and human development: their products are indispensable for human life, and their revenue contribution is vitally important for some countries.[39] However there are also many instances where host countries and communities have received little benefit, and have

[35] OECD 2020, Preamble, 2.
[36] Issues covered include (with following references all to OECD 2020):
- investment and business climate needing fairness, transparency and non-discriminatory enforcement: Principle VI & Commentary, [6];
- discouraging unrealistic expectations at exploration stage: Commentary, [7];
- accommodation of uncertainties in geology and future markets: Commentary, [18], [24] & [30];
- capital intensity and long payback periods: Commentary, [30];
- government institutions should have transparency and integrity; and provide fair and clear regulations without unnecessarily high cost of compliance: Commentary, [32]; and
- need for assurance on contract enforcement and property rights: Commentary, [32].

[37] eg. AUS Plmnt 2021.
[38] eg. Owen & Kemp 2013, 30-31 and Robinson & o'rs 2020.
[39] eg. OECD 2020, Preamble, 1; see also p14 of OECD 2017, and p9 of OECD 2016a.

suffered many impacts, from resources extraction. The Principles do not envisage that government should just enable private sector extractives operations and hope for the best. Instead, the Principles emphasise a priority,[40] evident in Principle I and detailed in further commentary:

- 'governments need first to determine what strategies and national and local development objectives they want to achieve with their natural resource endowments (the vision) and how they wish to achieve such goals (the strategy)';[41] and then
- that vision and strategy should inform the government's objectives in negotiations,[42] (or, presumably, the government's discretion and administration where extractive rights arise through 'legal systems with non-negotiable provisions' rather than contract) and the government also having a coherent, comprehensive approach across its agencies.[43]

(b) *Community interests are not determined autonomously by Government, and also involve separate engagement by company*

[21] The document includes several differing references to community interests, reflecting the complexities here, for both government and extractive companies.

> *It is the responsibility of the host government to ensure that community interests are protected.*[44]
>
> *…[C]ommunity engagement is crucial to ensuring the contract's long-term durability. ... The contract should provide a mechanism to ensure that the views and concerns of affected communities are taken into account, especially in relation to planning and decision making for projects that may significantly impact them.*[45]

[22] These reinforce responsibilities for governments but also that there must be effective mechanisms directly between the extractives operation and local communities who could be affected by it.

(c) *Increase transparency*

[23] There should be public disclosure of extractives rights and arrangements, apart from those limited parts where there is *legitimate* proprietary or commercial sensitivity requiring privacy.[46] The Principles suggest that, even during negotiation, the parties 'should anticipate the public disclosure of their future signed contracts'.[47]

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[40] Further guidance on the actions *and sequencing* which can assist government, industry and civil society progress sustainable development and extractives are provided in OECD 2016a.
[41] Commentary [1]-[2] which emphasises the importance of all stakeholders (including industry and community) in the development and implementation of these strategies.
[42] Commentary, [5].
[43] Commentary, [5].
[44] Commentary, [6].
[45] Commentary, [9] & [11].
[46] Preamble, 2. See, more generally MAC 2021, Pitman & o'rs 2018, Prayitno & o'rs 2017, Hughes & Pendred 2014. In the Australian context, see AUS Gov ud and p11-12 of WA Gov 2018 ('The Department of Mines, Industry Regulation and Safety ... is committed to ongoing improvements in the accessibility of information and ensuring that all information that can legally be requested by the community is made publicly accessible.').
[47] Preamble, 2

(d) Stabilisation arrangements should not restrict legitimate, public-interest objectives

[24] The Principles reinforce that extractives operations should comply with bona-fide, non-arbitrary and non-discriminatory changes in law about non-fiscal areas which pursue legitimate objectives in the public interest.[48] The cost of such compliance should be treated 'as any other project cost'.[49] The commentary details further implications of this, including the corollary: that fiscal stabilisation *is* appropriate where there may be high fiscal or political instability.[50] The document also reinforces the international standards against expropriation.[51] There is, however, contribution to the growing attention and emphasis against tax avoidance and profit shifting.

> *The adoption of bona fide anti-avoidance measures or the interpretation of existing laws by host governments to protect the revenue base against tax base erosion and profit-shifting (e.g. on interest deduction limitations and transfer pricing) and consistent with internationally recognised tax practices should not be considered a change in law constrained by stabilisation clauses.*[52]

(e) Environmental and social impact systems should meet international standards

[25] The commentary indicates that each operation's impacts should be specifically considered and addressed, and that sometimes these assessments will mean a project should not proceed.

> *[A]ctual and potential direct adverse impacts need to be identified, prevented and, if they cannot be totally prevented, mitigated across the full life-cycle of the project (including decommissioning, abandonment or rehabilitation of the site). It is understood that some negative impacts may make proposed projects non-viable.*[53]

[26] Where the laws of a host nation do not meet the relevant international standards in this regard, then companies are expected to comply with the latter.[54] The commentary reinforces the importance of these aspects having meticulous and ongoing attention.

> *To the extent not covered by national laws, the extractive contract should delineate responsibility for:*
>
> *(a) periodically assessing actual and potential adverse impact;*
>
> *(b) devising and carrying out a prevention and mitigation plan for potential negative impact; and*
>
> *(c) ensuring appropriate and transparent financial arrangements are in place to ensure that sufficient funds are available for the execution of prevention, mitigation plans and remediation responses (e.g. use of escrow accounts, special funds for decommissioning, bank or company guarantees).*[55]

[48] Principle VII, Commentary [35].
[49] Principle VII, Commentary [42].
[50] Commentary, [54].
[51] 'Foreign property cannot be expropriated except: (i) for public purposes, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law, and (iv) against adequate compensation': Commentary, [41].
[52] Commentary, [54].
[53] Commentary, [22].
[54] Commentary, [22]-[23].
[55] Commentary, [22].

3 Implications / reflections for Australian resource regulation

3.1 Learn from guidance and examples beyond your borders

[27] Greater use can, and should, be made of international materials informing contemporary extractives regulation. In addition to the OECD's 2020 Principles (above) other notable recent materials include the following.

- the OECD's *Collaborative Strategies for In-Country Shared Value Creation;*[56]
- materials from the *Intergovernmental Forum on Mining Minerals Metals and Sustainable Development* and particularly its framework *Mining and Sustainable Development: managing one to advance the other*,[57]
- materials from the *Natural Resource Governance Institute*, which are explicitly aimed at countries with extensive resources, to help 'achieve sustainable, inclusive development, and that people receive lasting benefits from the extractive sector and experience reduced harms', and particularly relevant are the *Natural Resource Charter*[58] which indicates areas of importance for regulators;
- the UNEP's 2018 sourcebook *Managing mining for sustainable development*;[59] and
- the 2020 reports of the International Resource Panel: *Mineral Resource Governance in the 21st Century*[60] and the Responsible Mining Foundation: *Mining and the SDGs.*[61]

[28] In relation to human rights about land use and impacts, there is a useful 2015 collation of the relevant standards and jurisprudence prepared by the UN's Office of the High Commissioner for Human Rights.[62]

[29] This international guidance on extractives regulation further emphasises the approach should be *first* what is required for national development *and only then* whether and what role extractives have in that.

3.2 Increase regulator due diligence before granting extractive rights

[30] The traditional (and continuing) approach to granting mineral rights, in many mining jurisdictions, has been 'first come, first served'. That is: the first party to request government permission to explore/mine in an area, is able to obtain those rights. Even where the regulation may involve greater procedures (for example, where mineral rights are granted through a negotiated/standard contract), the government focus is usually only on the applicant's technical and financial capacity to extract resources.

[56] OECD 2016a
[57] IGF 2013.
[58] NRGI 2014 which can be further applied with the framework assessment tool: NRGI 2017.
[59] UNEP 2018.
[60] IRP 2020.
[61] RMF 2020.
[62] UN 2015b.

[31] Numerous conflicts and disputes about mining impacts have caused industry reflections that there is a 'gap between legal requirements and community expectations'.[63] One way to address that gap is for regulators to obtain greater assurance about benefits (and avoidance of impacts) <u>before</u> granting rights.

[32] Consider, for example, the Minerals Council of Australia (**MCA**)'s 'Enduring Value' principles, which the MCA explain thus.

> *Central to Enduring Value is the relationship between the mining industry and its many stakeholders – employees, shareholders, communities and governments. The Enduring Value principles recognise that these groups have rights and interests that need to be reflected in the ways that companies carry out their business.*
>
> *… The principles include the fundamentals of ethical governance, sound risk management and transparent engagement as well as individual principles relating to health and safety, employee rights, community development and environmental management.*[64]

[33] That is a statement, from the Australian mining industry, of their understanding of how contemporary mining should occur. Similar emphasis can be found in the approach of the Canadian industry[65] the International Council on Mining and Metals,[66] Inter-governmental frameworks,[67] and non-government and academic guidance.[68]

[34] Drawing from this, a more contemporary approach considers sustainable development. Increased due diligence of the applicant is also of benefit to the state. Much commentary focusses on risk faced by extractives' companies. That is, of course, quite appropriate to consider, and address in regulatory regimes. It is, however, important to also bear in mind government risks arising from *insufficient* regulatory control. The Western Australian Auditor-General summarised this well in a 2004 report.

> *As well as providing significant opportunities, mining can be a high risk activity for both the private sector and the State. The State faces a wide range of risks including: economic development risk, environmental risk, revenue risk, resource risk, regulatory risk and political risk.*[69]

3.3 Is 'social licence to operate' now obsolete?

[35] The phrase 'social licence to operate' has been a (somewhat ambiguous) term about what a company ought do in addition to its legal permitting. It has been used, by many, as a touchstone for what is necessary to legitimise mining operations. That ought be re-examined in light of the observations and recommendations of the International Resources Panel observations and recommendations, extracted below.

> *The fundamental critique of <u>the SLO [social licence to operate] framework</u> is that it <u>was developed as industry's pragmatic response to business risk. Its agenda is limited to accommodating community demands to the minimum extent necessary to avoid public opposition and social conflict,</u>*

[63] eg. MCA 2015, 4.
[64] MCA 2015, 4.
[65] MAC 2021.
[66] ICMM 2003.
[67] eg. IGF 2013, UNEP 2018, Readhead & o'rs 2020, Potts & o'rs 2018, OECD 2020, OECD 2017.
[68] eg. van Wassenaer 2022; Guven & o'rs 2020; Bastida 2020.
[69] WA Gov 2004, 23-24.

> *__and the associated costs of reputational damage and operations delays or disruptions__. It has been opportunistically used to serve the particular objectives and goals of companies, activists and governments. In essence, __SLO defines the minimum of what a mining project can get away with in a particular location__.*
>
> ...
>
> *The adoption of the SDGs [Sustainable Development Goals, in 2015[70]] signalled the need to move beyond the concept of the 'social license to operate', which dominated the development discourse in the extractive industry throughout the end of 1990s and mid-2000s.*
>
> ...
>
> *The new framework is the 'Sustainable Development Licence to Operate' (SDLO). The SDLO builds on the Social Licence to Operate (SLO). It is also designed to improve the net societal benefits of mining, and is not necessarily meant to function as a licence in the compulsory or regulatory sense. However, the proposed SDLO extends the SLO concept in several important ways. It addresses a broader subject matter covering the nexus of all environmental, social and economic concerns that fall within the remit of the SDGs and related targets; it is relevant to all actors in the extractive sector across the public, private and civil society sectors; its implementation is a shared responsibility across nations and different actors along the minerals value chain; and it sets out not only minimum standards of practice but also a set of internally consistent principles, policy options and good practices for enhancing the extractive sector's contribution to achieving the SDGs.*[71]

3.4 Australian broader moves relevant to sustainability in corporate governance

[36] Separate from extractives-specific measures, there are also broader developments about sustainability in corporate governance.[72] These can also have influence on analysis of a sustainability issue within the extractives sector.

[37] These are interesting developments. It remains to be seen what influence they have in relation to the extent and focus of future regulation and engagement in the extractives sector. A recent report by the UN's Environment Program frames a bleak picture.[73]

> *This report tracks the discrepancy between governments' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C. The report represents a collaboration of several research and academic institutions, including input from more than 40 experts. Key findings:*
>
> - *Governments plan to produce more than twice the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C. The production gap has remained largely unchanged since our first analysis in 2019.*
> - *Global fossil fuel production must start declining immediately and steeply to be consistent with limiting long-term warming to 1.5°C.*

[70] UN 2015a.
[71] IRP 2020, 262-266 (emphasis added).
[72] eg. AUS Gov 2022; Walker & Ng 2022.
[73] UNEP 2021.

- *Most major oil and gas producers are planning on increasing production out to 2030 or beyond, and several major coal producers are planning on continuing or increasing production.*
- *G20 countries have directed more new funding to fossil fuels than clean energy since the beginning of the COVID-19 pandemic.*
- *International public finance for the production of fossil fuels from G20 countries and multilateral development banks (MDBs) has significantly decreased in recent years.*
- *Governments have a primary role to play in closing the production gap and in ensuring that the transition away from fossil fuels is just and equitable.*

John Southalan
Barrister (WA Bar Association)
Mediator (NMAS)
Adjunct Academic (Dundee, UWA, Murdoch, Curtin)
(ABN 58 778 632 415)

118 Railway Street, West Perth
PO Box 3248, East Perth WA 6892
T: (+61 8) 9226 0358
john@southalan.net

Note - This paper is written in a personal capacity and does not represent the views of any organisation with which the author is associated. The paper draws significantly from four previous publications / submissions.[74]

[74] Southalan 2022; Southalan 2020; Southalan & Fardin 2020; and Southalan & Fardin 2020.

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