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# “Re-thinking” the influence of regulatory capture in the development of government regulation

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*On 30 March 2015 the Australian Federal Government launched its “Re:think” initiative with the objective of achieving a better tax system which delivers taxes that are lower, simpler and fairer. The discussion paper released as part of the “Re:think” initiative is designed to start a national conversation on tax reform. However, inquiries into Australia’s future tax system, subsequent reforms and the introduction of new taxes are nothing new. Unfortunately, recent history also demonstrates that reform initiatives arising from reviews of the Australian tax system are often deemed a failure. The most prominent of these failures in recent times is the Minerals Resource Rent Tax (MRRT), which lasted a mere 16 months before its announced repeal. Using the established theoretic framework of regulatory capture to interpret publically observable data, the purpose of this article is to explain the failure of this arguably sound tax. It concludes that the MRRT legislation itself, through the capture by the mining companies, provided internal subsidisation in the form of reduced tax and minimal or no rents. In doing so, it offers an opportunity to understand and learn from past experiences to ensure that recommendations coming out of the Re:think initiative do not suffer the same fate.*

## INTRODUCTION

The influence and effect of industry power in the development of government regulation is a well-known phenomenon.<sup>1</sup> At times, the consequence of such power may be minimal but in the case of the Australian Minerals Resource Rent Tax (MRRT), which was a tax imposed on profits generated from the exploitation of non-renewable resources, anecdotal evidence suggests that the effect was catastrophic, ultimately leading to the repeal of the tax.<sup>2</sup> The theory of regulatory capture proposes that regulation is often “captured” and manipulated by those who are the subject of the regulation, in this case, the mining companies which were subject to the MRRT. The purpose of this article is to examine the nature and extent of regulatory capture in the design of the MRRT and its ultimate demise. In doing so, it offers an opportunity to understand and learn from past experiences to ensure

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We wish to thank Claire O’Faircheallaigh and William Battaglene for their research assistance and the an anonymous referee for their comments. We also thank the participants of the Tax Subject Section of the 2014 Society of Legal Scholars Conference. Finally, we are incredibly grateful to John Passant for the many hours of work he willingly put in to reading a draft and providing comprehensive feedback. We have no doubt that the quality of the article was significantly enhanced because of it.

<sup>1</sup> For a comprehensive discussion on the effects of lobbying globally see: Zetter L, *Lobbying: The Art of Political Persuasion* (Harriman House, United Kingdom 2011).

<sup>2</sup> See, eg. McKnight D and Hobbs M, “Public Contest through the Popular Media: The Mining Industry’s Advertising War against the Australian Labor Government” (2013) 48(3) *AusJPS* 307; Bell S and Hindmoor A, “The Structural Power of Business and Power of Idea: The Strange Case of the Australian Mining Tax” (2014) 19(3) *New Political Economy* 470; Marsh D and Lewis C, “The Political Power of Big Business: A Response to Bell and Hindmoor” (2014) 19(4) *New Political Economy* 628.

that recommendations coming out of the current Federal Government “Re:think” initiative,<sup>3</sup> aimed at achieving a “better tax system” that delivers taxes that are lower, simpler and fairer, do not suffer the same fate.

The background to the MRRT is generally well known due to media coverage.<sup>4</sup> On 1 July 2012 Australia introduced the MRRT, but a mere 16 months later, on 24 October 2013, the newly elected Federal Government announced in a press release that it was to be repealed.<sup>5</sup> The legislative repeal subsequently passed through Parliament with the abolition of the MRRT from 1 October 2014.<sup>6</sup> Both the introduction and repeal of the MRRT were not without controversy; most notably the opposition to its introduction and a lack of revenue raised. After a failed attempt by the Federal Government at a Resource Super Profit Tax (RSPT), the MRRT was developed in consultation with several of Australia’s largest mining companies, including BHP Billiton, Xstrata and Rio Tinto. At the date of introduction it was estimated that the tax would raise \$13.4 billion in the first three years. However, in the first six months after the introduction of the MRRT, only \$126 million was raised and none of Australia’s biggest miners had any liability to pay the tax. An estimate of revenue to be raised was revised downwards numerous times and in the 2012-2013 Mid-Year Economic Fiscal Outlook the figure for that year was estimated to be \$2 billion net.<sup>7</sup> Over the first two years it actually raised only \$300 million, or 3% of what was estimated.<sup>8</sup>

Despite the minimal revenue raised, a tax imposed on profits generated from the exploitation of non-renewable resources is generally perceived by many as appropriate and grounded in sound policy rationale. However, both the lack of revenue and the subsequent announcement to repeal the tax indicates that in the case of the MRRT there was arguably a failure in the design and implementation of regulation effectively executing that policy. The purpose of this article is to assess the reason/s for that failure. It does so using an established theoretical framework of regulatory capture which examines the process through which special interests affect State interventions. A longitudinal study is adopted to examine the development of the MRRT from the initial proposal to impose a uniform resource rent tax as part of the Review of Australia’s Future Tax System<sup>9</sup> through to its repeal. In doing so, evidence of the influence of the large mining companies is critically analysed to determine the effect that key stakeholders had in the development of the legislation. In particular, the article examines the influence (regulatory capture) the mining companies had in minimising the amount of tax likely to be due and whether they had a role in determining the methodology for calculating a miner’s liability. Ultimately, the purpose of this article is to determine whether regulatory capture theory adequately explains the failure of the MRRT. To do so, the article investigates whether the mining companies were opportunistic both in advice given to Federal Government and Treasury in the development of the MRRT and its subsequent application of the valuation rules,<sup>10</sup> and if so, the impact of that opportunism. The results from this article will inform current debate concerning the development of policy and regulation, particularly from a tax reform perspective.

<sup>3</sup> *Re:think – Better Tax System, Better Australia*, Tax Discussion Paper, (Commonwealth Government, Canberra, 2015) [http://bettertax.gov.au/files/2015/03/TWP\\_combined-online.pdf](http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf).

<sup>4</sup> See, eg, media coverage discussed in McKnight and Hobbs, n 2.

<sup>5</sup> For the Exposure Draft and related information see: Australian Government, The Treasury, *MRRT and Related Measures Repeal* (24 October 2013) <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2013/MRRT-and-related-measures-Repeal>.

<sup>6</sup> *Minerals Resource Rent Repeal and Other Measures Bill (2013) [No 2]*.

<sup>7</sup> Commonwealth Government, *Mid-Year Economic and Fiscal Outlook 2012-13*, <http://budget.gov.au/2012-13/content/myefo/html>.

<sup>8</sup> Cormann M (Minister for Finance) and Hockey JB (Treasurer), “Repeal of the Minerals Resource Rent Tax”, *Joint Media Release* (18 July 2014), <http://www.financeminister.gov.au/media/2014/0718-repeal-of-the-minerals-resource-rent-tax.html>.

<sup>9</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, December 2009, (2010).

<sup>10</sup> *Minerals Resource Rent Tax Act 2012* (Cth), s 85-5 contained the ability of mining companies to adopt market value as the starting base for their assets rather than historical cost. This allowed a greater adjustment for the cost of assets held.

The remainder of this article is structured as follows. Part two outlines the policy rationale for a resource rent tax highlighting the theoretical soundness of such a model. Part three considers existing literature which attempts to explain the failure of the MRRT. Part four discusses the concept of regulatory capture and explains the factors which contribute to the capture of the regulator by the regulated. Part five, through a longitudinal study, then considers the events leading to the introduction and ultimate demise of the MRRT legislation through the lens of regulatory capture theory. Finally, part six concludes that regulatory capture theory is a possible explanation for the failure of the MRRT. It concludes that the MRRT legislation itself, through the capture by the mining companies, provided internal subsidisation in the form of reduced tax and minimal or no rents. Further, it argues that to avoid such outcomes where sound legislative policy is proposed, future tax reform should be more “capture” proof.

## A CASE FOR TAXING ECONOMIC RENTS

A resource rent tax is a tax on the economic rent, or the profits in excess of normal market return, of mining companies. A mining company will earn rents where the proceeds from the sale of resources exceed the cost of exploration and extraction. This includes a rate of return to compensate factors of production (labour and capital).<sup>11</sup> As such, it must be stressed that a resource rent tax only applies to the excess over normal returns. Rent taxes can be contrasted with other forms of tax such as an income-based tax, normally in the form of corporate tax, or output-based tax, normally in the form of royalties. There are numerous successful examples of a resource rent tax globally. Australia introduced the Petroleum Resource Rent Tax in 1987<sup>12</sup> and many other jurisdictions impose a resource rent tax, including both developed and developing nations.<sup>13</sup> A tax imposed on profits generated from the exploitation of non-renewable resources is generally perceived as appropriate and grounded in sound policy rationale. Unfortunately, Australia’s recent MRRT is not an example of a success story. Ultimately, a crude measure of the success of a tax is revenue raised. To this end, the MRRT is measured as a failure. Both the lack of revenue raised and the subsequent repeal indicates that in the case of the MRRT there was a failure in the design and implementation of regulation effectively executing that policy.

Identifying the reasons for the failure of the MRRT is ultimately the purpose of this article. An investigation into the failure of the MRRT through a lens of regulatory capture theory is premised on the assumption that without such capture, a tax on economic rent is theoretically sound. That is, a theoretically sound tax, which should have been a success, failed because of the capturing of the regulator (in this case, the Federal Government) by the regulated. As such, it is necessary to demonstrate at the outset that the MRRT was theoretically sound. For reasons explained below, resource rent taxes are generally viewed as being more economically efficient and are better placed to maximise government return than other forms of tax despite potentially higher administrative costs.<sup>14</sup> For these reasons, there is, at least theoretically, a sound rationale for introducing a resource tax.

The fundamental concept of a resource rent tax is not new. The original resource rent tax model was formulated by Brown in 1948.<sup>15</sup> The “Brown” tax, as it became known, is a pure cash flow tax

<sup>11</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9.

<sup>12</sup> *Petroleum Resource Rent Tax Assessment Act 1987* (Cth). The Act was passed by Parliament and made effective on 15 January 1988. At that time, PRRT applied to all offshore areas except Bass Strait and the North West Shelf. In addition, the legislation applied retrospectively to exploration permits awarded on or after 1 July 1984, and recognised expenditures incurred on or after 1 July 1979: Australian Government, Department of Industry, Innovation and Resources, *The History of Petroleum Resources Rent Tax*, <http://www.industry.gov.au/resource/Enhancing/ResourcesTaxation/PetroleumResourceRentTax/Pages/PRRTHistory.aspx>.

<sup>13</sup> For a summary of these nations and the taxes imposed see: McLaren J and Chabal P, “Given the Fact that Australia Has Had a ‘Petroleum Resource Rent Tax’ Since 1987, Why Should There Be Any Opposition to a ‘Mineral Resource Rent Tax’?” (2011) 6(1) *JATTA* 20 at 24-26. As they explain, this includes resource rent tax on petroleum and/or mineral extraction.

<sup>14</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9.

<sup>15</sup> Brown EC, “Business-income Taxation and Investment Incentives”, *Income, Employment and Public Policy: Essay in Honour of Alvin H Hansen* (Norton, New York, 1948) pp 300-316.

which effectively involves the sharing of the profits and costs of mining projects, between government and industry, in proportion to the tax.<sup>16</sup> Variations of the original form have developed and the second, better known, resource rent tax model is known as the Garnaut – Clunies-Ross resource rent tax.<sup>17</sup> This model replicates the effects of the Brown tax but without a refund where entities incur losses. Garnaut and Clunies-Ross first championed their resource rent tax in their 1975 article entitled, “Uncertainty, Risk Aversion and the Taxing of Natural Resource Projects”,<sup>18</sup> and then in their seminal 1983 book entitled, *Taxation of Mineral Rents*.<sup>19</sup> As Garnaut and Clunies-Ross explained more than 30 years ago, such a tax is theoretically sound for three reasons; its neutrality, its ability to attain a return on State-owned resources, and its contribution to the promotion of distributional equity.<sup>20</sup>

The first and most obvious reason for the imposition of a resource rent tax is its neutrality. A tax regime which is neutral is one which does not interfere with the decision-making processes of any business. For example, an economically neutral tax would be one where the decision to invest is not based on the cost of taxes imposed on either income derived or capital returned. The most compelling reason for imposing a resource rent tax is arguably its neutrality and the fact that it will not affect decisions of mining companies. This is because a tax on pure economic rent, or profits above a normal return for that type of investment, does not distort production or investment choices. The mining industry, because of the unique exploitation of non-renewable resources, enables mining company owners to earn above normal profits (economic rents).<sup>21</sup> Under ordinary circumstances and generally where businesses are making above normal returns, economic rents attract new investment resulting in an increase in supply and decrease in demand. In that case, there would be nothing to tax. However, in the mining industry economic rents are maintained due to the finite nature of the resources.<sup>22</sup> As such, as already stated, neither production, nor investment decisions are (in theory) affected by a resource rent tax and a well drafted tax should yield significant revenue.

The second reason for imposing a resource rent tax is its ability to attain a return on State-owned resources. Mining companies are extracting and making profits from resources which belong to the State and Territories and therefore citizens of those States and Territories.<sup>23</sup> As such, a resource rent tax is also seen as a reasonable way to charge a price or impose a cost on that private business for the use of what many consider public property. Arguably, when permission is given by a government to mine public resources, an asset which is owned by the people of the State is effectively sold. It is therefore logical for the community in general to expect an appropriate return on government-owned property where that government allows private firms to exploit Australia’s non-renewable resources. While there are various means of charging for the use of public property, a resource rent tax is an efficient way to ensure such a return. Prior to the MRRT, this had been achieved in Australia via the less efficient State and Territory royalty payment regimes.

Associated with a resource tax being neutral, as well as being an efficient way of charging private business for the use of public property, is the third reason for imposing a resource rent tax; the fact that it may also be applied to promote distributional equity.<sup>24</sup> Taxes are essentially a way for governments to earn income and redistribute that income according to need. Individual income is generally made up of both market income (earnings) and transfers from government with inequality in

<sup>16</sup> Explanatory Memorandum to the *Minerals Resource Rent Bill 2011* (Cth), paras 1.10-1.11.

<sup>17</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9.

<sup>18</sup> Garnaut R and Clunies-Ross A, “Uncertainty, Risk Aversion and the Taxing of Natural Resource Projects” (1975) 85 *Economic Journal* 272.

<sup>19</sup> Garnaut R and Clunies-Ross A, *Taxation of Mineral Rents* (Clarendon Press, Oxford, 1983).

<sup>20</sup> Garnaut and Clunies-Ross, n 19.

<sup>21</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9.

<sup>22</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9.

<sup>23</sup> It is however recognised that there is debate as to whether State and Territory ownership justifies a Commonwealth tax.

<sup>24</sup> Garnaut R, “The New Australian Resource Rent Tax: The Resources Super Profits Tax” (2010) 8(4) *Insights* 2.

total income in Australia generally growing in recent years.<sup>25</sup> However, redistribution to minimise inequality is often achieved via the tax and benefits system and a recent example of falling inequality occurred with the household stimulus packages that we saw after the global financial crisis.<sup>26</sup> A resource rent tax is often viewed as a low cost means of collecting revenue from entities to be redistributed via government spending programs.<sup>27</sup> Not only is this a theoretically sound reason for introducing a resource rent tax, but it is often seen as one of the practical implications of introducing such a tax. For example, when the MRRT was introduced in Australia it was packaged with the government’s policy to generate more superannuation savings for working families, lower tax for all companies, especially small businesses, and investing in our future infrastructure needs, particularly in the mining States.<sup>28</sup>

Despite the sound policy rationale for a resource rent tax being acknowledged for many years, as well as the existence of the narrower but highly successful and accepted Petroleum Resource Rent Tax, the origins and rationale for the implementation of a broad-based resource rent tax in Australia only really began with the release of a 2010 Report known as *Australia’s Future Tax System Review* (AFTSR).<sup>29</sup> Until the MRRT, Australia had not seen the introduction of a specific tax regime aimed at capturing the economic rents of mining companies.<sup>30</sup> Instead of such a regime, State and Territory Governments imposed royalty schemes which simply involved a charge on production. However, as the AFTSR was a comprehensive review with an aim to improve the equity and efficiency of the Australian tax system, and address future challenges, the review panel was able to consider a resource rent tax which it defined in their final report as “a tax that applies to the super normal profits, or economic rent of a resource project”.<sup>31</sup> The Report specifically said:

The current resource charging arrangements imposed on non-renewable resources by the Australian and State Governments should be replaced by a uniform resource rent tax imposed and administered by the Australian Government that:

- (a) is levied at a rate of 40 per cent, with that rate adjusted to offset any future change in the company income tax rate from 25 per cent, to achieve a combined statutory tax rate of 55 per cent;
- (b) applies to non-renewable resource (oil, gas and minerals) projects, except for lower value minerals for which it can be expected to generate no net benefits. Excepted minerals could continue to be subject to existing arrangements if appropriate;
- (c) measures rents as net income less an allowance for corporate capital, with the allowance rate set at the long-term Australian Government bond rate;
- (d) requires a rent calculation for projects;
- (e) allows losses to be carried forward with interest or transferred to other commonly owned projects, with the tax value of residual losses refunded when a project is closed; and
- (f) is allowed as a deductible expense in the calculation of income tax, with loss refunds treated as assessable income.<sup>32</sup>

As part of the recommendations, it was also suggested that the Australian and State and Territory Governments should negotiate an appropriate allocation of the revenues and risks from the resource

<sup>25</sup> GINI Growing Inequalities Impacts, *Research*, <http://www.gini-research.org/articles/research>. These findings are supported globally: OECD, *Divided We Stand: Why Inequality Keeps Rising* (2011) <http://www.oecd.org/els/soc/dividedwestandwhyinequalitykeepsrising.htm>.

<sup>26</sup> GINI, n 25.

<sup>27</sup> This does however need to be weighed against potentially higher administrative and compliance costs associated with resource rent taxes.

<sup>28</sup> Rudd K, “Stronger, Fairer, Simpler: A Tax Plan for Our Future”, *Media Release* (2 May 2010) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FKSQW6%22>.

<sup>29</sup> Commonwealth Government, n 9.

<sup>30</sup> The Petroleum Resource Rent Tax, on offshore oil and gas deposits, has been in place since 1987 and has raised in excess of \$1 billion in revenue per year: McLaren J and Chabal P, n 13, at 20.

<sup>31</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9, p 743.

<sup>32</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9, Recommendation 46.

rent tax.<sup>33</sup> Ultimately, as Goodman and Worth say, the recommendations of the AFTSR were not only consistent with sound policy thinking but also reflected the views of many that members of Australia's mining industry were positioning themselves to retain "much of its windfall gains under the resources boom"<sup>34</sup> and were ensuring that rents accrued to private entities rather than government.<sup>35</sup> It was apparent that the Australian public believed that private mining companies were not paying a suitable fee for the use of finite public resources. It seems that it can also be assumed that the Australian public viewed the charging of a resource rent tax as a suitable way to collect revenue for the purposes of income redistribution.

In response to the AFTSR, the Labor Government under the leadership of Kevin Rudd announced the introduction of the Resource Super Profits Tax (RSPT). This announcement was made in a joint Press Release by Prime Minister Rudd and Treasurer Swann, on 2 May 2010 and, with minor modifications, reflected the review's recommendations, including a rate of 40% on the "super" profits made from "the exploitation of Australia's non-renewable resources".<sup>36</sup> The RSPT was to replace crude oil excise and provide a refundable credit for royalties mining entities paid to the States and Territories.<sup>37</sup> This was one of the few, of the 138 tax reform recommendations, adopted from the AFTSR.<sup>38</sup> At this time, it seemed that, with the introduction of the RSPT, sound policy would prevail. However, ultimately the RSPT failed to come to fruition.

In the place of the RSPT, and under the leadership of Julia Gillard, the MRRT was introduced. However, there were significant differences between the originally proposed tax and the ultimately introduced tax. The MRRT reduced the resource rent tax rate of tax from 40% to 30% and allowed a major uplift in offsetting costs by permitting use of market value of mining assets, as well as reducing the tax base to include only iron ore and coal. As previously noted, after a short period of operation, the MRRT was deemed a failure and less than two years later a third Prime Minister, Tony Abbott, repealed it. Very little revenue was raised from the MRRT<sup>39</sup> and, while market conditions played a role in this, most of the blame lies with the design of the tax itself. In particular, the ability of mining companies to adopt market value as the starting base for their assets rather than historical cost constituted a major design flaw in the legislation.<sup>40</sup> Essentially, this increased the allowances to mining companies and so reduced the base upon which the tax was calculated. Australia's three largest mining companies, BHP Billiton, Xstrata and Rio Tinto all played a part in the design of the legislation. The question remains as to how the mining companies were able to influence the legislators to ensure this outcome. Previous studies offer some insight.

## UNDERSTANDING THE FAILURE OF THE MRRT

Several original approaches to understanding the design, implementation and/or failure of the MRRT have been undertaken and need to be examined prior to a discussion on the thesis of this article and the regulatory capture aspects of the MRRT. These earlier studies, to some degree, all focus on the political aspects of the tax and the response of the Federal Government throughout the process.

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<sup>33</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, n 9, Recommendation 48.

<sup>34</sup> Goodman J and Worth D, "The Minerals Boom and Australia's 'Resource Curse'" (2008) 61 *Journal of Australian Political Economy* 201 at 212.

<sup>35</sup> Goodman and Worth, n 34 at 212.

<sup>36</sup> Sanyal K and Darby P, "Resource Super Profits Tax", *Australian Parliamentary Research Papers: Budget Review 2010-11* (2010) [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201011/TaxationRSPTax#\\_edn1](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201011/TaxationRSPTax#_edn1).

<sup>37</sup> Sanyal and Darby, n 36.

<sup>38</sup> Different figures have been reported. For example, Hockey stated 3 were accepted, <http://www.joehockey.com/media/media-releases/details.aspx?r=48>; while Abbott and Robb stated 2.5: <http://www.andrewrobb.com.au/Media/BrowseCategories/tabid/81/articleType/ArticleView/articleId/1071/Join-Pres-Conference-with-The-Hon-Tony-Abbott-MP-and-The-Hon-Joe-Hockey-MP.aspx>.

<sup>39</sup> Cormann and Hockey, *Joint Media Release*, n 8.

<sup>40</sup> *Minerals Resource Rent Tax Act 2012* (Cth), s 85-5.

However, at the outset, it should be noted that their focus is either on the strong political flavour of the process of introduction or on the regulator as the investigated entity.

The most politically focussed articles offering insight into the failure of the MRRT are those by Passant. Passant, in his article entitled, “Lessons from the Recent Resource Rent Tax Experience in Australia”,<sup>41</sup> argues that tax policy and tax law are a reflection of the balance of class forces and their combativeness at any time in any given society. Without explicitly stating so, his thesis touches on many of the aspects of regulatory capture theory discussed below. This is particularly apparent in his discussion on the advertising misinformation campaign run by the mining industry. In a second article entitled, “The Mineral Resource Rent Tax: The Australian Labor Party and the Continuity of Change”,<sup>42</sup> Passant argues that the “poor health” of the MRRT was due to the nature of the Labor Party as a capitalist workers’ party and the shifts in power and influence within its material constitution.<sup>43</sup> Commenting on the negotiation required to adopt the recommendation of the AFTSR that the State and Territory royalty systems be replaced with a uniform resource rent tax, Passant states that “neither the Rudd Labor Government with its proposed RSPT nor the Gillard Labor Government with its MRRT had the strength of working class or other political support to negotiate this outcome or impose it on the States and Territories”.<sup>44</sup> The significance of Passant’s contribution is his explanation as to how the mining companies were able to so effectively capture the government of the day. He concludes that “the shift in the balance of class forces to capital societally and in the ALP means that one of Labor’s traditional roles of imposing solutions on sections of capital for the benefit of all capital is being undermined”.<sup>45</sup> Essentially, Passant is arguing that the MRRT, because of the failings of the government of the day, also failed to meet the theoretical objectives of imposing a charge on private business for the use of public resources. In turn, this led to a failure of distributional equity.

Kraal and Yapa also consider the political aspects of the resource rent tax but claim to adopt stakeholder theory with a grounded theory methodology to address the question of whether the Australian Government was effective in the law reform consultation process for the proposed MRRT in relation to the valuation approach for starting base assets.<sup>46</sup> In their article, entitled, “Resource Rent Taxes: The Politics of Legislation”,<sup>47</sup> they conclude that the Australian Government lacked effectiveness in the consultation process. They then provide recommendations centred around ways to improve the law reform consultation process including: all submissions being made public; terms of reference that require adequate support for positions taken in submissions tendered; and a genuine invitation to consult.<sup>48</sup> Interestingly, the article adopts a non-traditional view of stakeholder theory treating the Australian Government as the “firm” with only those entities which made submissions to the Policy Transition Group regarded as stakeholders. Arguably, theorists of traditional stakeholder theory would find flaws in such an approach.

Stakeholder theory traditionally argues that anyone with the capacity to affect or be affected by the “firm” is a stakeholder. Consequently, those parties would also be considered part of the investigation. Unfortunately, by limiting the stakeholder group to one particular stakeholder, as Kraal and Yapa do, there is an underlying assumption that this is the only group that “really counts”<sup>49</sup> and therefore it is that group for which value should be created. By this logic, the MRRT should be

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<sup>41</sup> Passant J, “Lessons from the Recent Resource Rent Tax Experience in Australia” (2011) 10 *Canberra Law Review* 159.

<sup>42</sup> Passant J, “The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change” (2014) 27(1) *ARJ* 19.

<sup>43</sup> Passant, “The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change”, n 42.

<sup>44</sup> Passant, “The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change”, n 42 at 22.

<sup>45</sup> Passant, “The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change”, n 42 at 31.

<sup>46</sup> Krall D and Yapa P, “Resource Rent Taxes: The Politics of Legislation” (2012) 27(3) *ATF* 485.

<sup>47</sup> Krall and Yapa, n 46.

<sup>48</sup> Krall and Yapa, n 46 at 512.

<sup>49</sup> Freeman R, *Strategic Management: A Stakeholder Approach* (Cambridge University Press, Cambridge 2010) pp 52-63.

regarded a success if those parties which made submissions to the Policy Transition Group<sup>50</sup> managed to influence the “firm” and value was created for them. This is exactly what happened, yet many commentators, academics, economists and ordinary citizens, for a range of reasons, regard the MRRT as a failure. The reason for this is the fact that the stakeholders were actually a much broader group than those who made submissions and in fact extended to all citizens of Australia. Applying traditional stakeholder theory to the MRRT suggests that a thesis would propose that the tax should create value for all Australians and in this sense the MRRT was, in fact, a failure.

In a second article, entitled, “A Grounded Theory Approach to the Minerals Resource Rent Tax”,<sup>51</sup> Kraal states that she generates theories to provide explanations from contextual elements, conditions, and events, which have an effect on the success of a new tax. Kraal argues that her research “contributed to an understanding of the politics of tax policy and the practical implementation issues, which apply to the introduction of a new tax. It also adds to the literature on the institutional and social factors that affect tax reform”.<sup>52</sup> As with most literature which adopts a grounded theory approach, it is difficult to distinguish between the claim of four separate theories and what are actually observations,<sup>53</sup> the fourth of which is most relevant to this article. Kraal’s fourth *theory* is as follows: “Unexpected pressures from deliberately staged intervening events and/or conditions can interrupt the acceptance or perception about the benefits of a new tax with powerful effects. The consequences of unfunded projects from a failed tax can be fatal for a Government.”<sup>54</sup> Arguably, this *theory* is more in the form of a proposition which can be tested. Applying regulatory capture theory to a longitudinal study of the introduction process of the MRRT, as this article does, allows such a proposition to be examined through an established explanatory lens. In this sense, it arguably tests Krall’s proposition.

Finally, Ergas and Robson have also commented on the failure of the MRRT. Their approach and explanation is broader than a merely political explanation as they tend to focus on why the MRRT, in the form introduced, failed to satisfy any economic rationale and distorted investment decisions. Ergas and Robson, in their article entitled, “Revenue Allocation under the MRRT: Economic Aspects”,<sup>55</sup> conclude that “for reasons that are now well known, this has been a poor quality policy process; it has led to a tax that is substantially distorting, both in itself and through its lack of sensible integration with the tax system of the resource States”.<sup>56</sup> Much of their argument centres around the failure of the policy process in relation to cooperation with the States which, in turn, meant that the MRRT was not sound on a long term basis.<sup>57</sup> Their study provides useful insight into the ultimate failure of the legislation itself but does not, in any detail, address the factors which led to what they consider a flawed tax. It is this gap that the current article seeks to address.

In contrast to the studies discussed above, which either have a strong political focus or assess the failure of the MRRT by investigating the legislator, the current study focuses on the behaviour of both the regulated and the regulator with an attempted explanation as to how the regulated, that is the mining companies, were able to “capture” the regulators (in this case, at first instance the Federal Government) to ensure a favourable outcome. It does so using an existing theoretical paradigm, that of

<sup>50</sup> The Policy Transition Group received 88 submissions which were predominantly from mining companies and their representative bodies. A list of stakeholders who made submissions can be found in: Australian Government Policy Transition Group, *Issues Paper: Technical Design of the Minerals Resource Rent Tax, Transitioning Existing Petroleum Projects to the Petroleum Resource Rent Tax and Policies to Promote Exploration Expenditure* (2010) [http://www.afr.com/rw/2009-2014/AFR/2011/03/29/Photos/63db24fe-59b2-11e0-97d4-8027ac18ece0\\_PTG\\_issues\\_paper.pdf](http://www.afr.com/rw/2009-2014/AFR/2011/03/29/Photos/63db24fe-59b2-11e0-97d4-8027ac18ece0_PTG_issues_paper.pdf).

<sup>51</sup> Krall D, “A Grounded Theory Approach to the Minerals Resource Rent Tax” (2013) 28 ATF 841.

<sup>52</sup> Krall, n 51 at 844.

<sup>53</sup> McKerchar explains that grounded theory requires a researcher to build a theory derived or “grounded” in the views and observations of the participants: McKerchar M, *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Sydney, 2010) pp 96-97.

<sup>54</sup> Krall, n 51 at 866.

<sup>55</sup> Ergas H and Robson A, “Revenue Allocation under the MRRT: Economic Aspects” (2012) 14(2) JAT 183.

<sup>56</sup> Ergas and Robson, n 55 at 200.

<sup>57</sup> Contrary to current economic thinking, Ergas and Robson also believe that taxing super profits are of themselves distorting.



regulatory capture theory, to attempt to explain the failure of the MRRT. Currently, there is a gap in the literature explaining the failure of the MRRT from any existing theoretical paradigm and while there may be other theories which can account for the failure, for the reasons explained below, regulatory capture theory would seem the most suitable. As such, using publically available information, such as government reviews, discussion papers, public submissions, government department documents and newspaper commentaries, the failure of the MRRT is re-examined through a regulatory capture lens. Prior to this re-examination, the theory of regulatory capture is explained.

## REGULATORY CAPTURE AND THE MINING INDUSTRY

Economists, lawyers and political scientists have developed several theories which attempt to explain government economic regulation. Capture theory, or regulatory capture as it is more commonly known, is one theory that attempts to do this. Often, this is described as the Stigler-Peltzman approach to the economics of regulation.<sup>58</sup> In its narrow form, capture theory attempts to explain why government economic regulation exists, arguing that regulation is initiated by participants in a particular market who are seeking the protection of government. The theory then postulates that once regulation is in place, various government bodies are created to administer the regime with the running of the administrative bodies undertaken by existing participants. As such, over time the interests of the industry are served rather than the general public. In essence, this narrow interpretation describes regulatory capture specifically as “the process through which regulated monopolies end up manipulating the state agencies that are supposed to control them”.<sup>59</sup>

In its broader form, capture theory is seen as a type of government failure, as it describes the behaviour of private interests in exerting considerable influence over government to advance their own agenda, that is, the regulator (in this case, the Federal Government as ultimate controller of the tax system) is captured by the regulated.<sup>60</sup> The lobbying system is arguably one of the most obvious ways in which regulatory capture occurs.<sup>61</sup> This is because lobbying parties, through exposure to regulators, are able to present their perspective of the situation and develop a level of sympathy from the regulators.<sup>62</sup> The regulated are also usually powerful market players who have, over the years, developed sophisticated strategies for dealing with regulators. Dal Bo states that “according to the broad interpretation, regulatory capture is the process through which special interest affect State intervention in any of its forms, which can include areas as diverse as the setting of taxes, the choice of foreign or monetary policy, or the legislation affecting R&D”.<sup>63</sup> It is capture theory, in this broad sense, which is used in this article to attempt to explain the reason for the Federal Government retreat from the RSPT to a “watered down” and ultimately unsuccessful MRRT.

Stigler first discussed the modern conception of the theory of economic regulation in 1971.<sup>64</sup> His theory was designed around the concept that “the central tasks of the theory of economic regulation are to explain who will receive the benefits or burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources”.<sup>65</sup> While the central thesis to his article is that regulation is generally acquired by the industry and is designed and operated primarily for its benefit, the same theory can explain regulation which imposes obligations on industry such as taxes.<sup>66</sup>

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<sup>58</sup> See, eg, Dal Bo E, “Regulatory Capture: A Review” (2006) 22(2) *Oxford Review of Economic Policy* 203.

<sup>59</sup> Dal Bo, n 58.

<sup>60</sup> Dal Bo, n 58.

<sup>61</sup> Zetter L, *Lobbying: The Art of Political Persuasion* (Harriman House, United Kingdom, 2011).

<sup>62</sup> Zetter, n 61.

<sup>63</sup> Dal Bo, n 58 at 203.

<sup>64</sup> Stigler G, “Economic Theory of Regulation” (1971) 3 *Bell J Econ* 3.

<sup>65</sup> Stigler, n 64 at 3.

<sup>66</sup> Stigler, n 64 at 3.

His theory ultimately integrates political behaviour with economic analysis.<sup>67</sup> Interest groups are able to influence regulatory outcomes through their support offered to the regulators (politicians).<sup>68</sup>

At the same time that Stigler published his theory, Posner also published his article entitled, "Taxation by Regulation",<sup>69</sup> which explored the regulatory process through a distributive and allocative lens arguing that "one of the functions of regulation is to perform distributive and allocative chores usually associated with the taxing or financial branch of Government".<sup>70</sup> He was not discussing taxation as we generally think of it, but rather the fact that regulation often involves internal subsidisation.<sup>71</sup> It may be argued that the MRRT legislation itself, through the capture by the mining companies, provided internal subsidisation in the form of reduced tax and minimal or no rents.

Posner subsequently published his article on "Theories of Economic Regulation"<sup>72</sup> in which he discusses both public interest theory and capture theory as explanations for government intervention in the market.<sup>73</sup> Public interest theory cannot be dismissed in this article, as taxation regulation is, at least theoretically, one of the purest forms of legislation introduced for the public interest.<sup>74</sup> Taxation is one of the most powerful means of redistribution. However, as Posner points out, "a serious problem with any version of public interest theory is that the theory contains no linkage or mechanism by which a perception of the public interest is translated into legislative action".<sup>75</sup> To that end, he places greater emphasis on capture theory concluding that "the general assumption of economics that human behaviour can best be understood as the response of rational self-interested beings to their environment must have extensive application to the political process".<sup>76</sup>

Peltzman's historical narrative on the economic theory of regulation highlights the main points of capture theory which are relied on for the purposes of this article.<sup>77</sup> In particular, the fact that political actors are presumed to be self-interested maximisers<sup>78</sup> and the distributional aspects of regulatory decisions are fundamental features of the theory.<sup>79</sup> He states that a "self-interested politician and constituents exchange objects of utility – a price or entry certificate for votes and money – and what matters to each actor is their wealth or utility, not the aggregate social wealth".<sup>80</sup> Also of relevance is his observation as to group size by stating that "more generally, in any similar political contest between groups of disparate size, the compact organised interest will usually win at the expense of the diffuse group".<sup>81</sup> Collective action tends to occur by small groups which can make significant gains.<sup>82</sup>

Both media and academic literature have documented prior regulatory capture by the mining industry. In the United States, media has raised questions about "tax breaks" given to the mining industry which, since the 1980s, have seen increased deductions passed into Federal law despite being

<sup>67</sup> Peltzman S (ed), *Political Participation and Government Regulation* (University of Chicago Press, Chicago 1989) p 1.

<sup>68</sup> Peltzman, n 67, p 1.

<sup>69</sup> Posner R, "Taxation by Regulation" (1971) 2 Bell J Econ 22.

<sup>70</sup> Posner, n 69 at 23.

<sup>71</sup> The process by which an enterprise does not pay its own way and another party pays the cost of the activities. In the case of mining companies, by not paying tax on the extracted resources, society as a whole pays.

<sup>72</sup> Posner R, "Theories of Economic Regulation" (1974) 5 Bell J Econ 335.

<sup>73</sup> Posner, n 72.

<sup>74</sup> Posner, n 72.

<sup>75</sup> Posner, n 72 at 340.

<sup>76</sup> Posner, n 72 at 356.

<sup>77</sup> Peltzman, n 67.

<sup>78</sup> Peltzman, n 67 at 6.

<sup>79</sup> Peltzman, n 67 at 7.

<sup>80</sup> Peltzman, n 67 at 7.

<sup>81</sup> Peltzman, n 67 at 8.

<sup>82</sup> Peltzman, n 67 at 8.

potentially in conflict with State law.<sup>83</sup> Regulatory capture within the extractive industries has also been observed in the financial accounting setting both in Australia and internationally and offers the closest approximation to the type of capture observed with the MRRT. Australia was the first jurisdiction to develop an accounting standard specific to the extractive industry. The standard was developed in response to a survey<sup>84</sup> of the accounting practices of companies in the extractive industries which revealed considerable divergence in those practices.<sup>85</sup> The subsequent standard was developed specifically to reduce this divergence. The mining industry reacted by expressing its dissatisfaction with the standard, particularly with respect to the requirements to expense preproduction costs and engaged in an extensive lobbying campaign that saw these requirements removed.<sup>86</sup> Such a response is supported by international studies investigating similar regulation. For example, Cortese in her investigation of the standardising of oil and gas accounting in the United States through a regulatory capture theory lens concludes that the standard setting efforts failed because industry constituents influenced (captured) the regulators.<sup>87</sup> Also in an international accounting standard setting, the influence of powerful players has been investigated to further reveal regulatory capture by influential extractive industries constituents so that new standards simply codified existing industry practice.<sup>88</sup>

Domestically, broader regulatory capture of the Australian mining industry, through the influence of the participants in the industry, has also been observed. As Goodman and Worth note, government policy for nearly two decades has been to deliberately facilitate expansion of the industry.<sup>89</sup> They refer to the Federal Government’s 1998 Resources Policy Statement<sup>90</sup> as indicative of the type of regulatory capture that occurred in the industry. In particular, this document provided a strategic framework for Australia’s minerals and petroleum market emphasising high levels of certainty to investors and other stakeholders, a highly competitive operating environment in an economic sense, and support for the industry’s efforts to achieve sustained wealth generation through growth, innovation and enhancement of the value of its output before export.<sup>91</sup> While, this may be considered “good” policy by some, it does not detract from the fact that it was the mining industry which influenced, or captured, the government (the regulator) resulting in a favourable outcome for industry participants. Goodman and Worth provide the example of the consequent deregulation of indigenous land rights and voluntary environmental codes as confirmation of the capture of Australian Federal policy by the mining industry.<sup>92</sup> Of particular relevance to this article is their insight into the resources policy which existed in terms of the distribution of mining rents. As they note, other jurisdictions had already established savings funds for mining rents to ensure revenues were used in the long-term interest of a nation, prevent the wastage of windfall rents and insulate against volatility.<sup>93</sup> Australia failed to do so.

In the current article, the question remains as to the form of regulatory capture utilised by the mining companies. It is suggested that there were two primary forms of influence which are

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<sup>83</sup> Damon A, “Steven Horsford Calls on Nevada Regulators to Close Mining Tax Loopholes” *Las Vegas Sun* (21 March 2011) <http://www.lasvegassun.com/news/2011/mar/21/steven-horsford-calls-nevada-regulators-close-mini>.

<sup>84</sup> The survey was initiated by the Research and Technical Committee of the Australian Society Accountants.

<sup>85</sup> Luther R, “The Development of Accounting Regulation in the Extractive Industries” (1996) 31(1) *The International Journal of Accounting* 67.

<sup>86</sup> Luther, n 85.

<sup>87</sup> Cortese C, “Standardising Oil and Gas Accounting in the US in the 1970s: Insights from the Perspective of Regulatory Capture” (2011) 16(4) *Accounting History* 403.

<sup>88</sup> Cortese C, Irvine H and Kaidonis M, “Powerful Players: How Constituents Captured the Settling of IFRS 6, an Accounting Standard for the Extractive Industries” (2010) 34(2) *Accounting Forum* 76.

<sup>89</sup> Goodman and Worth, n 34 at 211.

<sup>90</sup> Howard J (Prime Minister) and Parer W (Minister for Resources and Energy), *Minerals & Petroleum: Resources Policy Statement: A Framework for Sustainable Growth* (Australian Government, Canberra, 1998).

<sup>91</sup> Howard and Parer, n 90.

<sup>92</sup> Goodman and Worth, n 34 at 211.

<sup>93</sup> Goodman and Worth, n 34 at 211.

demonstrated throughout the discussion below. First, the relationships formed between the mining companies and various politicians leading to a sympathetic response and second, the extension of that influence through a campaign to appeal to a broader societal group aimed at convincing the general public that the MRRT was a detrimental tax despite the obvious fiscal benefits. In light of both the regulatory capture theory model and prior studies supporting its application to the mining industry to explain regulatory outcomes, this article now turns to the specific application of regulatory capture theory to the MRRT. In doing so, it is argued that the fundamental reason for the failure of the MRRT was the ability of the influential mining companies to “capture” the regulators because of political instability, relationships formed and the public perception of the MRRT which was created. These factors were achieved by the behaviour of Australia’s three largest mining companies: BHP Billiton, Xstrata and Rio Tinto.

## THE MRRT AND REGULATORY CAPTURE

As evidenced from the above discussion, for regulatory capture to take place, that is, for the regulated to capture the regulators, certain factors must be present. Previous studies indicate that numerous factors contribute to regulatory capture. Cortese<sup>94</sup> summarises the factors as follows. From an industry perspective, there will generally be complexity within the industry operating environment, along with resources available for lobbying and employment opportunities for the regulator. From a regulator perspective, there will generally be a reliance on industry information and expertise, a reliance on industry resources and employment opportunities in industry. When these factors are combined with information impactedness,<sup>95</sup> lobbying pressure and revolving doors, we are likely to observe regulatory capture manifested as the development of shared perceptions of industry problems and solutions, development of regulatory predisposition to make decisions consistent with industry preferences and regulatory actions that favour the relevant industry.<sup>96</sup> By considering the implementation and ultimate repeal of the MRRT in four distinct stages, this article demonstrates that many of the factors needed to be present for regulatory capture to occur were in fact present in this case. Also observed is the presence of a further factor, that of political instability. The four distinct longitudinal stages of the overall resource rent tax regulatory capture process were: (1) *Australia’s Future Tax System Review* and a call for broad tax reform; (2) the proposed resource super profits tax; (3) the design and introduction of the MRRT, and; (4) failure and repeal of the MRRT. Each is considered in turn.

### Stage 1: Australia’s Future Tax System Review and broad reform

Much like the current Federal Government’s “Re:think” initiative designed to start a national conversation on broad tax reform, AFTSR was also designed to be a comprehensive review of Australia’s tax regime.<sup>97</sup> This process of review commenced when the AFTSR Panel released their first discussion paper entitled, “Architecture of Australia’s Tax and Transfer System” in August 2008.<sup>98</sup> The discussion paper provided a comprehensive overview of the tax system as it then was, with the findings supporting the need for tax reform. Broadly, the discussion paper indicated that there were 125 taxes paid by Australians each year, with 90% of the tax revenue collected in 2006-2007 being derived from 10 taxes. The breakdown between Federal, State and Territory, and Local Government was 99, 25 and 1 tax respectively. Following the release of the first discussion paper, the AFTSR Panel called for public submissions, allowing two months for the first round and indicating

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<sup>94</sup> Cortese, n 87.

<sup>95</sup> The phenomena of decision makers acting opportunistically when there is uncertainty or complexity and one group has more information than another group.

<sup>96</sup> Cortese, n 87 at 407. Cortese provides this information in diagrammatical form. As such, the information stated is a summary of that diagram.

<sup>97</sup> Commonwealth Government, *Australia’s Future Tax System Review* (AFTSR), Terms of Reference (Canberra, released 13 May 2008) <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/reference.htm>.

<sup>98</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, Architecture of Australia’s Tax and Transfer System (Canberra, released 6 August 2008) <http://taxreview.treasury.gov.au/content/Paper.aspx?doc=html/Publications/papers/report/index.htm>.

that this would form the basis for a consultation paper which would be released before year end. To aid in the submission process, framing questions were released centered around the major challenges facing Australia that needed to be addressed through the tax-transfer system, the features that the system should have in order to respond to these challenges, problems with the current system and reforms needed to address these problems.<sup>99</sup>

Approximately 500 submissions on various matters were received during this first round of consultation.<sup>100</sup> At this stage, the main party that had connections to the mining industry to make a submission was the Minerals Council of Australia, which made a submission containing both broad and specific suggestions.<sup>101</sup> The Council’s broad suggestions included reducing the number of tax bases used in the tax and transfer system, making the remaining tax bases as comprehensive as possible and removing taxes on business inputs.<sup>102</sup> The Council also argued that there should be uniformity in tax rate structures and an allocation of tax revenue via an Intergovernmental Agreement between Commonwealth, State and Territory, and Local Government levels in a way that more closely reflected the spending responsibilities of each level of government.<sup>103</sup> Relevant specific suggestions related to the need for changes to mining royalties to be prospective in nature, lowering of the corporate tax rate and a 20-year cap on the tax depreciation of assets with a long life.<sup>104</sup> Of note is the fact that the three major mining companies did not make public submissions in this initial round of consultation. However, the subsequent consultation document, discussed below, indicates that discussions were held with the mining industry.<sup>105</sup>

Following the submissions and discussions held with industry, professional and community groups, the AFTSR Panel released their first consultation paper in December 2008.<sup>106</sup> The consultation paper identified what were considered key issues raised during the submission process. These included globalisation, changing demographics, climate change and technological progress.<sup>107</sup> Design principles called for in the consultation paper included equity, efficiency, sustainability and policy consistency. In terms of taxation of natural resources, the consultation paper identified the following key messages from the submission process.<sup>108</sup> First, there was a potential to increase revenue from natural resources in the overall tax mix. Secondly, changes needed to apply on a prospective basis to ensure stability in the industry and should only be made after a thorough consultation process with the mining sector. Thirdly, profit-based arrangements may be preferable over ad valorem arrangements. Fourthly, submissions from the mining sector also proposed more generous tax depreciation

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<sup>99</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, (Canberra, released 10 December 2008) [http://taxreview.treasury.gov.au/content/ConsultationPaper.aspx?doc=html/Publications/Papers/Consultation\\_Paper/index.htm](http://taxreview.treasury.gov.au/content/ConsultationPaper.aspx?doc=html/Publications/Papers/Consultation_Paper/index.htm).

<sup>100</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR)*, Submissions up to 14 November 2008 (Canberra, released 14 November 2008) <http://www.taxreview.treasury.gov.au/content/submission.aspx?round=1>.

<sup>101</sup> Minerals Council of Australia (MCA), *Submission to the AFTSR* (2008). [http://www.taxreview.treasury.gov.au/content/submissions/pre\\_14\\_november\\_2008/Minerals\\_Council\\_Australia.pdf](http://www.taxreview.treasury.gov.au/content/submissions/pre_14_november_2008/Minerals_Council_Australia.pdf).

<sup>102</sup> Minerals Council of Australia, n 101.

<sup>103</sup> Minerals Council of Australia, n 101.

<sup>104</sup> Minerals Council of Australia, n 101.

<sup>105</sup> This is made clear in the summary of key messages from submissions in *Australia’s Future Tax System Review*: Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 255.

<sup>106</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99.

<sup>107</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 17.

<sup>108</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 255.

arrangements.<sup>109</sup> As stated above, to the best of the authors' knowledge, none of the publically available submissions came from mining companies. However, this summary provided in the consultation paper indicates that discussions did occur. As a result of input from submissions, three consultation questions were formulated by the AFTSR Panel:

- 1) When considering the appropriate return to the Australian community for the use of its non-renewable resources, what relative weight should be given to the determinants of that return?
- 2) What is the most appropriate method of charging for Australia's non-renewable resources, given they are immobile but that Australia needs to compete globally for mining investment?
- 3) What is the role of the tax system in ensuring that renewable resources are used both sustainably and efficiently?<sup>110</sup>

Consistent with the discussion in part two of this article, outlining the case for taxing economic rents, the consultation paper specifically listed what it referred to as two significant justifications for taxing natural resources differently from other factors of production. First, it highlighted the fact that natural resources are assets that are taken to be owned by the community and the taxation by government reflects one way of achieving a return for the community on its assets.<sup>111</sup> Secondly, it stated that natural resources can be sources of location-specific economic rent and taxing such rents is efficient and avoids the economic distortions arising from taxing other factors of production.<sup>112</sup> The consultation paper went on to discuss perceived flaws in the existing royalty system, naming the rate of increase not appearing to have been proportional to the growth in the operating profits of the mining sector, as a significant problem.<sup>113</sup>

Subsequent to the release of the consultation paper a second round of submissions ensued. The AFTSR Panel received over 900 submissions during this second round, which occurred between December 2008 and April 2009.<sup>114</sup> In March 2009, public meetings were also undertaken in each major city and two regional centres, followed in April 2009 by focus groups in five capital cities and three regional centres. In this round it appears that there were no public submissions made by either the Minerals Council of Australia or the three major mining companies.

The Labor Government, led by Kevin Rudd, received the final report of the AFTSR Panel in December 2009. However, it was not released to the public until 2 May 2010.<sup>115</sup> The report recommended that State royalties should be abolished and replaced with a uniform resource rent tax at a rate of 40%.<sup>116</sup> While admitting that this would provide a less stable revenue stream, the report claimed that it would give back to the community a more appropriate portion of the profits from non-renewable resources over time and would be less likely to distort investment decisions.<sup>117</sup>

As the previous discussion indicates, up to this stage there had been little input from the regulated (taxed) group, meaning that there were no observable instances of regulatory capture. This arguably meant that the broad recommendations met the criteria for sound economic policy. However, conditions were ripe for regulatory capture – we had a complex industry operating environment,

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<sup>109</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 253.

<sup>110</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 253.

<sup>111</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 254.

<sup>112</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 254.

<sup>113</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, Consultation Paper, n 99, p 256.

<sup>114</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR)*, Submissions after 14 November 2008 (Canberra, released 1 May 2009) <http://www.taxreview.treasury.gov.au/content/submission.aspx?round=2>.

<sup>115</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, n 9.

<sup>116</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, n 9, pp 47-48.

<sup>117</sup> Commonwealth Government, *Australia's Future Tax System Review (AFTSR) Report to the Treasurer*, n 9, pp 47-48.

extensive resources available for lobbying and a reliance on the industry for information and expertise. In particular, Australia was in the middle of a mining boom and had not entered into a recession after the global financial crisis largely due to this boom. By mid-2009, there was substantial disaffection with the Labor Party as a result of a number of policy issues, the most significant of which was the delay to the planned emissions trading scheme. There was also significant disaffection with Kevin Rudd’s autocratic leadership style within the government.

At this stage, we saw the beginning of a process of regulatory capture with increased media reports flagging what were considered concerns of the mining industry. Interestingly, media reports about the uniform resource rent tax began at the time the government received the report, meaning this was happening several months before the report was publically available. The initial response to the proposed uniform resource rent tax by society as a whole, and the mining industry in particular, was reported in the media. Media reports soon suggested that a switch from State royalties to a resource rent tax had the support of the majority of the Australian population.<sup>118</sup> However, at the same time reports also indicated that the mining industry did not think that their tax burden should be increased.<sup>119</sup> Mining companies voiced concerns that State royalties would not be removed and therefore they would be paying tax twice. They warned that this would affect Australia’s competitiveness.<sup>120</sup> Specifically, it was reported that Mitch Hooke, Chief Executive of the Mineral Council of Australia, indicated a concern that there would be a tax grab under the guise of tax reform.<sup>121</sup> The closer the time came for the report to be officially released, the greater the number of media reports which indicated unrest in the mining community.<sup>122</sup> As well as the mining companies, the West Australian Premier, Colin Barnett showed his dissatisfaction with the Rudd Government by further holding out on signing the health reform plan, with many linking the two.<sup>123</sup> Arguably, the mining industry, through the media, had begun a campaign to discredit the proposed uniform resource rent tax even before it had been officially announced.

## Stage 2: The official announcement of the Resource Super Profits Tax

The official announcement about the introduction of a RSPT came on 2 May 2010, when the then Prime Minister, Kevin Rudd and Treasurer, Wayne Swan, released a joint press statement stating the government’s long-term plan to apply a RSPT to the profits earned from non-renewable resources.<sup>124</sup> In the same press release, it was stated that the revenue raised from the tax would be used to increase superannuation, decrease the company tax rate and invest in infrastructure.<sup>125</sup> State royalties were also to be rebated as part of the tax package. Prime Minister Rudd and Treasurer Swan indicated that over the following months’ consultations with industry, State Governments and the wider community would continue in relation to tax policy.<sup>126</sup> Treasurer Swan also established a Resource Tax Consultation Panel which was chartered to undertake targeted consultation with industry and other stakeholders. One of its specific objectives was to liaise with industry to “find the best way of

<sup>118</sup> See, eg, Durie J, “Rent Charge on Miners a Good Work in Progress”, *The Australian* (3 May 2010).

<sup>119</sup> Uren D, “Business Lobby Hits Tax-cut Priorities”, *The Australian* (23 December 2009) p 6; Mitchell A, “Resources, Going Cheap”, *The Financial Review* (16 December 2009) p 54.

<sup>120</sup> Stevens M, “Decision Threatens Investment”, *The Australian* (17 December 2009) p 19.

<sup>121</sup> Tasker S, “Review Raises Fears of Double Tax Grab”, *The Australian* (18 December 2009) p 23.

<sup>122</sup> Shanahan D, “Miners Face Billions in New Taxes – Rudd to Tap Resources States”, *The Australian* (24 April 2010) p 1; Franklin M, “Mining Tax ‘will Kill Industry’”, *The Australian* (26 April 2010) p 2; Tasker S, “Mining Sector Warns on Rent Tax”, *The Australian* (26 April 2010) p 19.

<sup>123</sup> Burrell A, “The Raw Deal is a Rich Resource in the West”, *The Australian* (24 April 2010) p 13.

<sup>124</sup> Swan W (Deputy prime Minister and Treasurer) and Rudd K (Prime Minister), “Stronger, Fairer, Simpler: A Tax Plan for Our Future”, *Joint Media Release* (2 May 2010) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/028.htm&pageID=003&min=wms&Year>.

<sup>125</sup> Swan and Rudd, n 124.

<sup>126</sup> Swan and Rudd, n 124.

achieving the Government's policy outcomes and delivering a system that is both simple and minimises compliance costs".<sup>127</sup> Tony Abbott, the then leader of the opposition, indicated that the opposition would vote against the RSPT.

Following the announcement by the then Federal Government, lobbying on a large scale ensued. From the very beginning, the Minerals Council of Australia claimed that the double taxation of mining (State and Northern Territory royalties and the RSPT) would threaten both jobs and shareholder wealth. At this stage, the large mining companies also entered into the discussion. Marius Kloppers, Chief Executive Officer of BHP Billiton, claimed that the RSPT would threaten the country's competitiveness and jeopardise future investments.<sup>128</sup> Sam Walsh, Chief Executive Officer of Rio Tinto, announced that their expansion plans were on hold because of the proposed tax.<sup>129</sup> In May 2010, BHP Billiton spearheaded a multifaceted and multi-million dollar advertising campaign denouncing the RSPT. The campaign included media statements, public denouncements, and starting on 7 May, full page advertisements in national newspapers. The advertisements specifically depicted two graphs, the first showing the royalties paid by the mining companies over previous years, and the second showing the "real" amount paid in tax, with the difference being that the second graph included company tax paid.<sup>130</sup> The message, which was meant to be delivered by these advertisements, was that BHP Billiton was already paying its *fair share* of tax.

The Federal Government responded with its own advertising campaign. However, it was unable to expend the same resources as the major mining companies.<sup>131</sup> The government's advertising campaign was also seen as a "back flip" by the then Prime Minister Kevin Rudd as he had pledged prior to being elected to reduce spending on government advertising if he became Prime Minister.<sup>132</sup> In fact, Rudd revised the rules governing publicly funded advertising campaigns seven weeks before he utilised the exceptional circumstances clause to allow him to fund his rebuttal to the mining companies.<sup>133</sup> Ultimately, he was able to do so under the clause regarding national emergency, extreme urgency or some other compelling reason.<sup>134</sup> There is also speculation that this was the cause for the delay between the government receiving the AFTSR report and then releasing it on the same day as it made the RSPT announcement, the suggestion being that the government expected backlash from the miners and wanted to be able to retaliate immediately.

While the signs of regulatory capture were appearing in the media, the beginning of direct consultation with the largest of the mining companies occurred on 4 June 2010. Documents released by Treasury under freedom of information and subsequently posted on the Treasury website,<sup>135</sup> reveal

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<sup>127</sup> Swan W, "Resource Tax Consultation Panel", *Media Release* (2 May 2010) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/029.htm&pageID=003&min=wms&Year=&DocType=>

<sup>128</sup> Kloppers M, "BHP Billiton Disappointed with New Australian Mining Tax", *Media Release* (2 May 2010) <http://www.bhpbilliton.com/home/investors/news/Pages/Articles/BHP%20Billiton%20Disappointed%20With%20New%20Australian%20Mining%20Tax.aspx>.

<sup>129</sup> Stuchbury M, "Battlelines Drawn Over Chinese Mining Bounty – the Henry Review 2010", *The Australian* (3 May 2010) p 8; Franklin M, "Resistance to Tax Reform Strategy Growing", *The Australian* (4 May 2010) p 1; Stuchbury M, "Mine the Boom, Share the Loot", *The Australian* (8 May 2010) p 12.

<sup>130</sup> McKnight D and Hobbs M, "Public Contest through the Popular Media: The Mining Industry's Advertising War against the Australian Labor Government" (2013) 48(3) *Australian Journal of Political Science* 307 at 313.

<sup>131</sup> Carbonell R, "Mining Industry Wins the Advertising War" (Australian Broadcasting Corporation, 2 July 2010) <http://www.abc.net.au/worldtoday/content/2010/s2943169.htm>; Franklin M, "PM Fails to Make Tax Case with Ads, Despite \$38m War Chest: Poll", *The Australian* (8 June 2010) p 4; Lee J, "How a \$7m Advertising Campaign Saved a Fortune", *Sydney Morning Herald* (2 July 2010) p 1; Shoebridge N, "Canberra Gets the Message", *Australian Financial Review* (3 July 2010) p 9; West M, "Resource Tax Deal Shows Power of Advertising and Public Relations", *The Age* (2 July 2010) p 8.

<sup>132</sup> Australian Broadcasting Corporation, *The 7.30 Report: Labor Leader Kevin Rudd in the Hot Seat*, Interview Transcript (9 October 2007) <http://www.abc.net.au/7.30/content/2007/s2054855.htm>.

<sup>133</sup> McKnight and Hobbs, n 130 at 311.

<sup>134</sup> McKnight and Hobbs, n 130 at 311.

<sup>135</sup> Australian Government, The Treasury, *FOI Disclosure Log: Resource Super Profits Tax and the Minerals Resource Rent Tax* (2011) <http://www.treasury.gov.au/Access-to-Information/DisclosureLog/2011/RSPT-and-the-MRRT>.



an accurate picture of the capture. On that date, an email was sent by Gerard Bond, Project Director of BHP Billiton, to Graeme Davis, Commonwealth Treasury, and copied to Xstrata, Rio Tinto and Anglo American. It specifically discussed a meeting with the consultation panel set for 7 June 2010. Mr Bond discussed his understanding of the purpose of the meeting. That is, that it would be a new type of consultation, not limited by the same terms of reference as previous RSPT consultations. Specifically, he asked that the following items be up for discussion: retrospectivity/sovereign risk, competitiveness and practical difficulties of applying resource rent taxation to a diverse minerals sector. The email also indicated that the mining companies were concerned that the consultation should not be perceived as being private or secret and indicated that the panel should be aware that the mining companies involved may choose to make the existence and content of the meetings public at any time. Bond indicated that unless the above conditions were met the meeting should not go ahead.<sup>136</sup>

While meetings were being held between the Consultation Panel and Australia’s largest mining companies, the negative advertising campaign continued. In May 2010, Prime Minister Rudd declared the campaign by the mining companies to be “a scare campaign funded by some very, very big vested interests”.<sup>137</sup> It was revealed that in a six-week period, the mining industry spent over \$22 million advertising against Rudd’s plan for an RSPT.<sup>138</sup> Ultimately, the campaign contributed to the slump in Labor’s electoral standing and the prompting of the party to replace Rudd with Gillard.<sup>139</sup> On 23 June 2010, Kevin Rudd announced that a leadership election would be held the following day at the request of Julia Gillard. Rudd had indicated that he would run however a few hours prior to the election he resigned from his position and Gillard was elected Prime Minister unchallenged.

The newly elected Prime Minister, Julia Gillard, said that resolving the RSPT dispute with the mining industry would be her first priority after being elected.<sup>140</sup> She called for a truce with the mining companies, promising to cancel the government’s mining tax advertising campaign and asking the mining companies to do the same.<sup>141</sup> The Minerals Council of Australia, Rio Tinto and BHP Billiton suspended their advertising campaign.<sup>142</sup> The media reported that the business community were relieved with the change in Prime Minister as they believed Gillard was more likely to undertake consultation with business groups.<sup>143</sup> The mining companies also said that they were looking forward to working with Gillard to find a solution to the RSPT, although there was skepticism that Treasurer Wayne Swan would be willing to negotiate given the hardline he had taken previously.<sup>144</sup>

Passant summarises the demise of the RSPT and the consequence of the regulatory capture as follows:

The mining companies’ backlash against the RSPT, as well as destroying a Prime Minister, destroyed the grand expenditure dreams of one-third each of the estimated ten billion on company tax cuts, one-third on infrastructure for the mining industry and one-third to cover the loss of revenue from superannuation tax concession through superannuation guarantee increases. ... The \$22 million advertising campaign by the Minerals Council of Australia was having an effect. [Gillard] introduced a

<sup>136</sup> Australian Government, The Treasury, Released Document 66 (June 2010), <http://www.treasury.gov.au/Access-to-Information/DisclosureLog/2011/RSPT-and-the-MRRT>.

<sup>137</sup> News.com.au, Kevin Rudd Defends Mining Ads (29 May 2010) <http://www.news.com.au/national/kevin-rudd-defends-mining-ads/story-e6frfkvr-1225872937660>.

<sup>138</sup> Davis M, “A Snip at \$22m to Get Rid of PM” (2 February 2011) <http://www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1acgj.html>.

<sup>139</sup> Davis, n 138.

<sup>140</sup> Australian Associated Press, “Mining Tax Faces One More Hurdle” (6 February 2012) <http://www.brisbanetimes.com.au/breaking-news-national/mining-tax-faces-one-more-hurdle-20120206-1r1r3.html>.

<sup>141</sup> Australian Associated Press, n 140.

<sup>142</sup> Uren, n 119.

<sup>143</sup> Hewett J, “Open War is Over, But How Business and Labor Make Peace Remains a Mystery”, *The Australian* (26 June 2010) p 5.

<sup>144</sup> Hewett J, “PM Opens Door to Miners as Swan Ducks Out of Town”, *The Australian* (26 June 2010) p 12.

much watered-down tax, the MRRT'. ... This process of retreat was mediated through a troika of politicians – new Prime Minister Julia Gillard, Treasurer Wayne Swan and Minister for Resources Martin Ferguson – and a troika of the big mining companies – BHP Billiton, Rio Tinto and Xstrata. The double troika agreed to the MRRT.<sup>145</sup>

While the RSPT had been abandoned, the third stage in the regulatory capture narrative involved the introduction of a much watered down version.

### Stage 3: The Mineral Resource Rents Tax

Gillard set a 1 July 2010 deadline for an agreement to be made with the mining companies. Adding to the pressure was the fact that the mining industry had a new advertising campaign ready to go if negotiations fell through.<sup>146</sup> Negotiations were undertaken with the three largest mining companies Rio Tinto, Xstrata and BHP Billiton.<sup>147</sup> On the 30 June 2010 the BHP Billiton's Gerard Bond sent an email to Treasury confirming the design of the MRRT.<sup>148</sup>

Less than two weeks after becoming Prime Minister, Julia Gillard, together with Treasurer Wayne Swan and Minister for Resources Martin Ferguson, released a press statement announcing that a breakthrough agreement had been reached with the mining industry.<sup>149</sup> This breakthrough was the change from the previous RSPT to the MRRT. The major changes from the RSPT to the MRRT included a reduction of the rate of tax from 40% to 30% and a reduction of the tax base to include only iron ore and coal.<sup>150</sup> Significantly, it was proposed that mining companies would be able to choose book value or market value for the starting base allowance for the MRRT. These changes were all proposed in the email of 30 June sent by BHP Billiton.<sup>151</sup> The press release conceded that the new tax was more generous to the industry in some respects but stated that the industry had given ground in other areas. The number of companies to be affected by the tax dropped significantly from 2,500 to 320.<sup>152</sup> The changes were thought to result in a decrease in revenue of \$1.5 billion which meant cuts in the associated income tax concession package had to be made. The company tax rate would be cut to 29% but no further and the resource exploration rebate was scrapped.<sup>153</sup> In the same press release, it was announced that a Policy Transition Group, to be led by Minister for Resources and Energy Martin Ferguson and Don Argus, (Former Chairman of BHP Billiton), would spearhead the implementation of the MRRT.

While the MRRT did not generate the same negative media as the RSPT, there were still reports that small to mid-size mining companies were displeased with the final result and felt that it heavily favoured the big three.<sup>154</sup> Andrew Forrest, Founder and Chairman of Fortescue Metals Group, stated that the tax was "finalised in a shroud of secrecy and exclusiveness with the world's biggest mining companies".<sup>155</sup> The Minerals Council of Australia rejected claims that the tax favoured the larger

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<sup>145</sup> Passant, "The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change", n 42 at 27.

<sup>146</sup> Shanahan D, "Julia Gillard Sets Deadline to Ending Mining Tax War", *The Australian* (29 June 2010) <http://www.theaustralian.com.au/archive/politics/julia-gillard-sets-deadline-to-end-mining-tax-war/story-e6frgczf-1225885426002>.

<sup>147</sup> All correspondence indicating the negotiation process and released under Freedom of Information is available at: <http://www.treasury.gov.au/Access-to-Information/DisclosureLog/2011/RSPT-and-the-MRRT>.

<sup>148</sup> Kelly P, "Rescue Arrived Too Late", *The Australian* (18 April 2012) <http://www.theaustralian.com.au/news/features/rescue-arrived-too-late/story-e6frg6z6-1226330734284>.

<sup>149</sup> Swan W, Gillard J and Ferguson M, "Breakthrough Agreement with Industry on Improvements to Resources Taxation" *Press Release* (2 July 2010) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/055.htm&pageID=003&min=wms&Year=2010&DocType=0>.

<sup>150</sup> Swan, Gillard and Ferguson, n 149.

<sup>151</sup> All correspondence released under Freedom of Information is available at: <http://www.treasury.gov.au/Access-to-Information/DisclosureLog/2011/RSPT-and-the-MRRT>.

<sup>152</sup> Swan, Gillard and Ferguson, n 149.

<sup>153</sup> Swan, Gillard and Ferguson, n 149.

<sup>154</sup> Gluyas R, "Smaller Miners to Seek Exemption from New Tax", *The Australian* (5 July 2010) p 1.

<sup>155</sup> Daley G and Dodson L, "Big Miners to Pay Lion's Share", *The Financial Review* (3 November 2011) p 3.

miners.<sup>156</sup> There was also backlash when the government attempted to put a cap on State royalties that would be rebated, keeping the rebate at the current level with no future increases.<sup>157</sup> The Minerals Council of Australia and major mining companies threatened to restart their advertising campaign and the government backed down.<sup>158</sup>

The Policy Transition Group released a consultation paper in October 2010,<sup>159</sup> and received 80 formal submissions in response before issuing their recommendations. However, as Passant explains:

The campaign of the mining industry saw the biggest three miners in Australia set the terms of the design of the proposed MRRT. Their power and dominance over Labor was such that the industry not only forced Labor to remove a Prime Minister and set the design parameters of a new tax. They were able to set those parameters so restrictively that they and the rest of the mining industry will pay little tax under the MRRT.<sup>160</sup>

Through these submissions, the mining companies were able to influence the design of the legislation to minimise the amount of tax likely to be due via determining the methodology for calculating a miner’s liability. This liability was calculated on the basis of mining profit less MRRT allowances. One of those allowances is what is known as a starting base allowance, which allows a miner to take into account investments in assets and certain expenditure on assets. There are two valuation approaches to determining this allowance – the book value approach and the market value approach – and the miner is able to choose which valuation approach to apply. However, a Treasury Executive Minute sent to the Deputy Prime Minister and Treasurer on 2 July 2010 (the day of the press release announcing the agreement between the government and the mining companies) warned that:

There will be a significant risk for the integrity of the MRRT under the market value approach:

- The approach will create strong incentives for mining companies to inflate the recorded value of the assets to be included in the starting base; and
- Strong incentives will also exist to push the value implicit in the resources towards assets with shorter effective lives (like earthworks) rather than to those with longer effective lives (like mining rights).<sup>161</sup>

This was a significant difference between the RSPT and the MRRT and a significant concession by the Gillard Government. It also explains why the estimated tax to be raised varied considerably from actual tax raised.

In December 2010, the Policy Transition Group delivered its report to the Australian Government.<sup>162</sup> By mid-March 2011, the Gillard Government announced that they would accept all 94 recommendations and these recommendations would inform the exposure draft to be released mid-way through the year.<sup>163</sup> The Minerals Council of Australia made the same submission to both the first and second exposure drafts focusing on areas where they felt that the exposure draft did not align with the Policy Transition Group recommendations that the government had agreed to.<sup>164</sup> They did not challenge the core concepts of the tax. By the end of the year, the MRRT was introduced into Parliament and passed the House of Representatives on 22 November 2011 and the Senate on 19 March 2012.

<sup>156</sup> Walsh K. and Dodson L, “Minerals Council Rejects Tax Bias”, *The Financial Review* (10 November 2011) p 3.

<sup>157</sup> Essentially, the Minerals Council of Australia and major mining companies threatened to restart their advertising campaign.

<sup>158</sup> Hewett J, “Barnett Calls Swan’s Bluff Over Royalties”, *The Australian* (25 March 2011) p 20.

<sup>159</sup> Australian Government Policy Transition Group, n 50.

<sup>160</sup> Passant, “The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change”, n 42 at 27.

<sup>161</sup> Australian Government, The Treasury, *FOI Disclosure Log: Resource Super Profits Tax and the Minerals Resource Rent Tax*, n 135.

<sup>162</sup> Policy Transition Group, *Report to the Australian Government: New Resource Tax Arrangements* (December 2010) [http://taxwatch.org.au/ssl/CMS/files/cms/186\\_MRRT%20Report.pdf](http://taxwatch.org.au/ssl/CMS/files/cms/186_MRRT%20Report.pdf).

<sup>163</sup> Swan, Gillard and Ferguson, n 149.

<sup>164</sup> Minerals Council of Australia, *MCA Submission – Minerals Resource Rent Tax: Submission on Preliminary Exposure Draft Legislation and Explanatory Memorandum* (2011) <http://archive.treasury.gov.au/documents/2113/PDF/MCA.pdf>.

## Stage 4: Failure

The MRRT was implemented from 1 July 2012 but failed to bring in the expected revenues. At the date of introduction it was estimated that the tax would raise \$13.4 billion in the first three years.<sup>165</sup> However, in the first six months after the introduction of the MRRT only \$126 million was raised and none of Australia's biggest miners had any liability to pay the tax. An estimate of revenue to be raised was revised downwards numerous times and in the 2012-2013 Mid-Year Economic Fiscal Outlook the figure for that year was estimated to be \$2 billion net. Over the first two years, it actually raised a mere \$300 million, or 3% of what was estimated.<sup>166</sup> In 2013, a change in government saw Tony Abbott become Prime Minister of Australia and he declared his intention to repeal the MRRT with draft legislation for its repeal being released in October of the same year. The *Mineral Resource Rent Tax Repeal and Other Measures Bill (2013)* was introduced to Parliament in June 2014.

It has been suggested that Treasury's underestimation of the market value of the assets resulted in a lower depreciation being factored into the revenue estimates.<sup>167</sup> However, interestingly the market value of the assets was provided to Treasury by the mining companies<sup>168</sup> with the Secretary of Treasury noting that the mining companies were under no obligation to advise Treasury of any change in their original estimates.<sup>169</sup> A mining executive noted that "estimates 'naturally' change over time".<sup>170</sup> It would seem then that Treasury's reliance on the mining industry to provide accurate and current data which it had no obligation to do and which it failed to do was the cause of the overestimation by Treasury as to the amount of revenue that would be raised. This overestimation compared to the actual amount received contributed to the tax being viewed as a failure.<sup>171</sup> This, along with an election promise to repeal the tax, made it relatively easy politically for the new Abbot Government to do so. The consequence was that, in effect, the mining companies, through constant pressure, and by convincing the Gillard Government to allow market value to be used to value their assets, followed by their reluctance to supply up to date information on that value, resulted in them getting what they wanted – the repeal of the tax.

Politically, this was achieved because of the relative power of the mining industry. The Minerals Council of Australia claims that the industry accounts for up to 8% of Australia's GDP directly, upwards of 20% of business investment and around 50% of national exports.<sup>172</sup> In 2013, direct employment in the minerals industry was 249,000 with indirect employment increasing those numbers significantly. The Australian Bureau of Statistics indicates that the mining industry contribution to GDP from 2005 to 2010 ranged from 7.2% to 9.8%, with its share of exports from 2006 to 2011 ranging from 36.8% to 55.4% and its contribution to the total value of Australia's exports being more than 50%.<sup>173</sup> As Passant points out "The economic power that the mining industry has, and its potential future profits from the massive reserves, translates into political power".<sup>174</sup>

<sup>165</sup> Commonwealth Government, *Mid-Year Economic and Fiscal Outlook 2012-13*, n 7.

<sup>166</sup> Commonwealth Government, *Mid-Year Economic and Fiscal Outlook 2012-13*, n 7.

<sup>167</sup> Uren D and Wilson L, "Flaw to Blame for Tax Shortfall as Treasury Miscalculates Write Downs", *The Australian* (11 Feb 2013) <http://www.theaustralian.com.au/national-affairs/treasury/flaw-to-blame-for-tax-shortfall-as-treasury-miscalculates-write-downs/story-fn59nsif-1226574976212>.

<sup>168</sup> Treasury Costing and Quantitative Analysis Unit, *Minerals Resource Rent Tax Costing Brief* (Department of Treasury, Canberra, 20 October 2011) [http://archive.treasury.gov.au/documents/2247/PDF/FOI\\_2247.pdf](http://archive.treasury.gov.au/documents/2247/PDF/FOI_2247.pdf).

<sup>169</sup> Greber J, "Mining Tax Flaws to be Investigated", *The Financial Review* (12 February 2013) <http://www.afr.com/news/politics/national/mining-tax-flaws-to-be-investigated-20130214-j14t8>.

<sup>170</sup> Greber, n 169.

<sup>171</sup> See, eg, Passant, "The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change", n 42.

<sup>172</sup> Minerals Council of Australia, *The Minerals Industry*, [http://www.minerals.org.au/corporate/about\\_the\\_minerals\\_industry](http://www.minerals.org.au/corporate/about_the_minerals_industry).

<sup>173</sup> Australian Bureau of Statistics, "The Mining Industry", *Yearbook Australia 2012* (2012) Ch 18 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Mining%20Industry~150> Note: these figures include oil and gas extraction.

<sup>174</sup> Passant, "The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change", n 42 at 29.

## CONCLUSION

Ultimately the MRRT was deemed a failure because it did not generate the forecast revenues. This article has demonstrated that regulatory capture by the mining companies of the legislative process was a possible cause of that failure. It would seem that the capture was most able to proceed because of the haste with which the Gillard Government sought to mend relations with the mining industry. Indeed, a senior Treasury advisor in correspondence with the Chiefs of Staff of both the Treasurer and the Minister for Resources advised:

It is clearly in the national interest to conclude this matter quickly given the negative effect on economic confidence caused by the miners public campaign against the RSPT. Accordingly my personal view is conclude negotiations quickly even if that requires concessions providing that those concessions are largely temporary.<sup>175</sup>

This research has identified that most of the factors for regulatory capture identified by Cortese, complexity within the industry operating environment, resources available for lobbying reliance on industry information and expertise and industry resources were present in the design of the MRRT. There was however a further significant factor that came into play – the political instability both within the Labor Party and the electorate. Completing the negotiations with respect to the original RSPT and the introduction of the MRRT was a political imperative for the Labor Government. It was facing an election within five months and at a time when it was suffering a public backlash. The Labor Government had come into power in 2007. However, by mid-2009 there was substantial disaffection with the Labor Party as a result of a number of policy issues, the most significant of which was the delay to the planed emissions trading scheme. There was also significant disaffection with Kevin Rudd’s autocratic leadership style within the government. By 2010 the opinion polls were routinely suggesting that the Labor Party would not win the election due later in that year with Kevin Rudd as Prime Minister. As a consequence it is fair to say that by early 2010 the Labor Government was in trouble.

The outcome of this regulatory capture is that despite the AFTS Review being correct when the final report stated that “given the size and value of Australia’s non-renewable resource stock and the expected strength of commodity prices, it is important that the community receives an appropriate return from the exploitation of its resources by private business”<sup>176</sup> ultimately the political strength of the large mining companies in Australia and the political instability both within the Labor Government and the wider electorate meant that this has not occurred. This article has provided a fresh insight into understanding the failure of the MRRT. Australia’s mining boom, while potentially slowing, has been a success in terms of ensuring economic growth but Australian has not seen the benefits through the tax system.

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<sup>175</sup> Australian Government, The Treasury, *FOI Disclosure Log: Resource Super Profits Tax and the Minerals Resource Rent Tax*, n 161.

<sup>176</sup> Commonwealth Government, *Australia’s Future Tax System Review (AFTSR) Report to the Treasurer*, n 9.