

## Company background

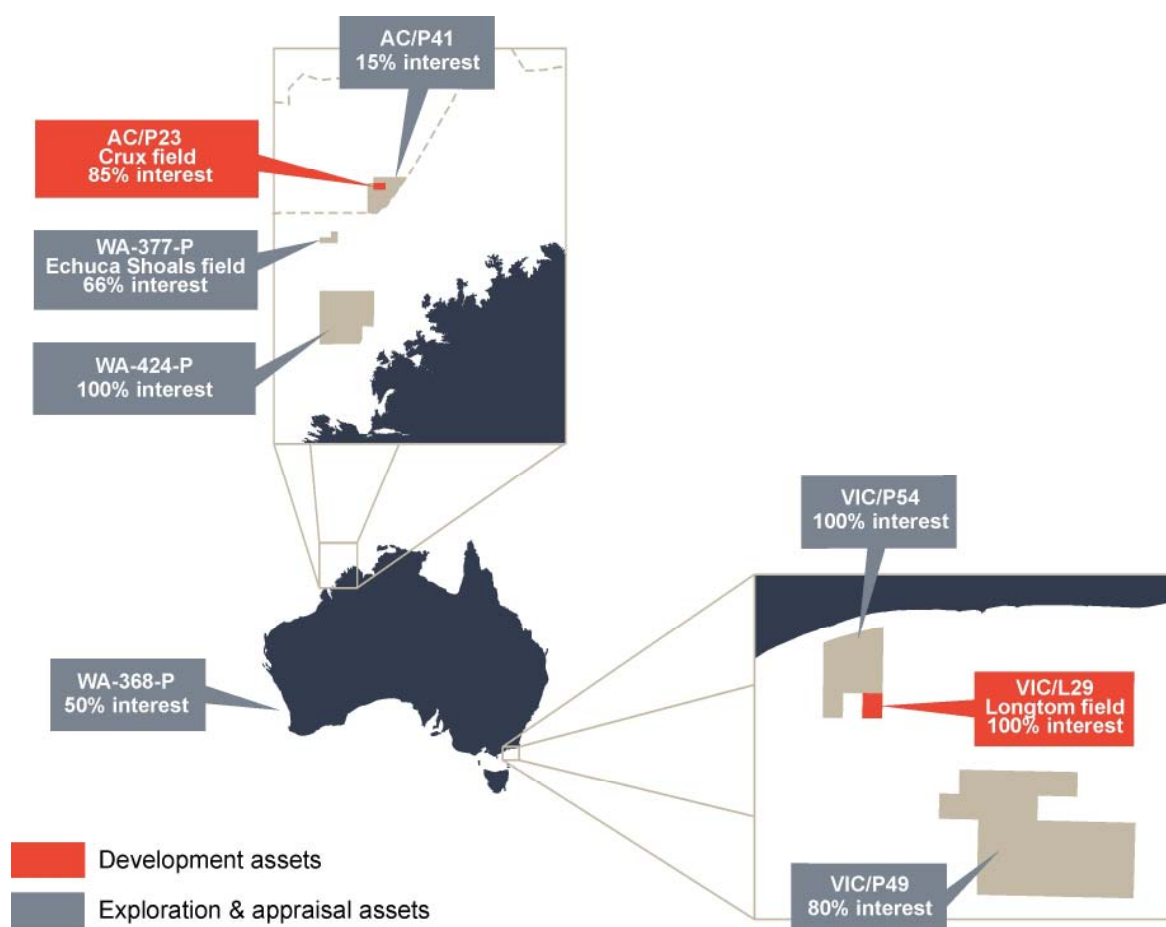
Nexus Energy Limited is a Melbourne-based, Australian Stock Exchange (ASX) listed oil and gas company (ASX:NXS). In 2007 Nexus entered the ASX200 following a period of strong growth driven by the company's value adding asset strategy. 2009 will be an important year in the company's history as it makes the transition from explorer to producer.

The company has assembled a portfolio of high quality assets, in two key regions:

- Gippsland Basin, offshore Victoria; and
- Browse Basin, off the north west coast of Western Australia.

The current key focus for Nexus is the development of the Longtom gas project (Nexus 100%) in the Gippsland Basin with first production scheduled for mid 2009, followed by the Crux liquids project (Nexus 85%) in the Browse Basin which is scheduled to commence production by the first half of 2011.

Nexus is also looking at further gas development potential in the greater Crux area and/or Echuca Shoals which may potentially result in opportunities to export LNG. These assets have provided Nexus with regulatory experience in the three jurisdictions of Victoria, Western Australia and the Northern Territory.



**Location of Nexus' assets**

## Introduction

Nexus Energy welcomes the opportunity to provide a submission to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Since 2004, Nexus has made 14 referrals to the Department of Environment, Water, Heritage and the Arts (DEWHA) and its predecessors, on petroleum exploration and development projects conducted by Nexus, primarily in offshore Commonwealth waters. Nexus does not seek to lower the standards that protect the environment, but rather seeks improvement in the efficiency and co-ordination of legislation within and between jurisdictions.

Nexus has limited its comments to those areas where it has expertise and can add value.

## Key Issues

### Under resourced agencies

The regulatory system needs to be operated by government agencies that are adequately resourced with appropriate numbers of skilled and professional staff with relevant industry experience. All government agencies that Nexus deals with are currently suffering to some degree from a lack of resources due to significantly larger volume of activities. Nexus recommends increased funding for DEWHA for the administration of the EPBC Act as the Act's responsibilities continue to expand as more entities are listed and more referrals are made.

Skilled staff is the key to the realistic administration of the legislation and a balanced approvals process. In the end, the best legislative/approvals process framework can be in place, but without skilled government staff to make key decisions, the full benefit of the process will not be realised. Like all organisations, resource limitations within DEWHA leads to high staff turnover, delayed or poor decisions and inefficiencies. This places an increasing onus and cost on industry to repeatedly introduce operations to new regulatory staff on the EPBC Act process for a site.

Government also needs to implement policies that encourage retention of skilled staff to address this resourcing issue. In addition, a wider use of accredited consultants, such as the Victorian Environment Protection Agency (EPA) use for environmental auditing, may need to be investigated to ensure appropriate resourcing and timely delivery of regulatory approvals. The Auditor General for Western Australia has suggested similar actions in addressing staff shortage pressures in Western Australia agencies involved in approving resource projects<sup>1</sup>.

In 2006, the Australian Petroleum Production & Exploration Association (APPEA) estimated that tax and royalty payments from the oil and gas industry, to the Australian, State and Territory governments amounted to more than \$8.1 billion. It would be reasonable to expect that part of this considerable sum of Government income from the petroleum industry is reinvested to support implementing Government policy in dealing with the significant number of EPBC referrals derived from the petroleum industry.

1 [www.audit.wa.gov.au/reports/report2008\\_05.pdf](http://www.audit.wa.gov.au/reports/report2008_05.pdf)

Best practice administration of government legislation has a substantial set of public benefits (including environmental benefits and reliability of energy supplies) and it is appropriate public funding is available to cover the cost of an administrative system reflecting this community public benefit.

### **Consistent lack of consistency**

A consistent lack of consistency is a common theme when dealing with a variety of regulatory staff across the country. In many cases, this appears to be due to a personal interpretation of the legislation/regulation rather than an organisation/Australia-wide policy decision. This needs to be redressed via development of clear policy guidelines, staff training, education and strong management.

Consistent decisions on the same issue throughout Australia would help to achieve certainty of process. APPEA provided a clear example of this issue in their recent submission to the Productivity Commission's review of the Regulatory Burden on the Upstream Petroleum Sector<sup>2</sup>. In the case of seismic exploration activities referred for assessment under the EPBC Act, there are a number of examples of very similar proposals experiencing very different regulatory treatment. The petroleum industry has referred over 50 seismic surveys under the EPBC Act in full accordance with the *Seismic interaction guidelines* with, until recently, the only controlled action determination applying to a proposal for a seismic survey 100 km to the east of the Great Barrier Reef Marine Park.

However, two seismic surveys planned off the west coast of Victoria were recently assessed as having, or likely to have a significant impact on matters of national environmental significance, and designated a "controlled action", requiring formal assessment under the EPBC Act. While one of these proposals was resubmitted with substantial revisions, the other survey was cancelled and it is unlikely that another seismic vessel will be in this area for another 12-18 months, imposing significant additional costs on the proponent. In neither instance was there any indication that the regulator was acting on any new science becoming available or what factors in this survey made it any different to the 55 other surveys the industry has run in the region since 2001 with no known environmental incidents (APPEA submission to the Productivity Commission's review of the Regulatory Burden on the Upstream Petroleum<sup>2</sup>).

### **Industry expert**

Having the right, skilled, trained and professional people in place in government is an essential ingredient for an efficient and effective approval process. An industry expert within DEWHA for each industry that consistently refers projects for EPBC Act consideration, such as the petroleum industry, should be considered. They would be able to provide better advice to DEWHA and industry on whether a referral is required and better target impact assessment efforts. This should help to provide a more consistent approach to regulation.

### **Specified timeframes to make a decision – delays lead to increased costs**

Certainty of process and timeframes are important aspects of any approvals system, especially for small to medium companies like Nexus that need to raise finance. Such companies do not have the financial resources of larger companies to afford lengthy government deliberations.

2 [http://www.appea.com.au/index.php?option=com\\_content&task=view&id=176 &Itemid=162](http://www.appea.com.au/index.php?option=com_content&task=view&id=176&Itemid=162)

Nexus strongly supports the inclusion of statutory time frames within the EPBC Act to make specific decisions. This allows companies to make reasonable project scheduling estimates that incorporate financing, purchasing and contractor requirements together with government approvals. Nexus applauds the efforts of DEWHA to abide by these time frames, with DEWHA decisions for Nexus referrals on a variety of scale of projects largely being met within these time frames.

One area where timeframes are not set within the EPBC Act is when DEWHA approves the draft PER/EIS report suitable for publication under Chapter 4, Part 8, Division 5, Reg 98 (2) and Reg 103 (2). A timeframe of say 30 days should be sufficient to ensure a report is suitable for publication. Government should not use this aspect of the process as a quasi-project assessment; that should be left to the actual assessment under Chapter 4, Part 9, Division 1 of the EPBC Act.

Nexus recommends that approval by DEWHA is not required at this stage, but rather DEWHA should just provide advice to the proponent within a specified time frame, say 30 days. DEWHA certainly has a role in providing advice to the proponent on the technical veracity of the draft report, but the proponent should decide on the risk associated with accepting or not accepting that advice rather than it being a matter of DEWHA approval before progressing to the next step of the process. Lack of certainty of timing at this point also makes the next public consultation step in the process difficult to organise (i.e. arranging follow-up stakeholder meetings within a limited time frame).

The importance of approval agencies setting timeframes with overall coordination and streamlining of processes is highlighted in the Auditor General for Western Australia's October 2008 report *Improving Resource Project Approvals*<sup>3</sup>.

The following is an example of the importance of time frames in the approvals process, even though this example is not directly related to the EPBC Act. Nexus has been exposed to delays in the approvals process when a Planning Permit Application and EPA Works Approval for a gas plant upgrade in Gippsland were appealed to the Victorian Civil and Administrative Tribunal (VCAT). By the time VCAT handed down its decision, the start of construction of the plant upgrade was delayed by about six months. Six months production from the upgraded plant is expected to be worth about A\$35 million. This combined with the increased cost of capital of about A\$50 million over the period results in a significant impact on a small to medium company that is raising debt and equity finance to develop the project.

It is the time taken to wade through the process and the implications for project financing and loss of production revenue that is the real cost to a small to medium company, rather than the actual dollars expended in ensuring compliance.

3 [www.audit.wa.gov.au/reports/report2008\\_05.pdf](http://www.audit.wa.gov.au/reports/report2008_05.pdf)

## **Regulatory Creep – Seismic and whales**

The use of guidelines are increasingly being used by regulators to provide greater clarity of the requirements of the legislation in simple language as well as to further increase the degree of control over the activities of industry.

Whilst some of these guidelines may have been prepared in consultation with advisory boards or industry, few have been benchmarked against the clear standards put in place by the Australian Government's Office of Best Practice Regulation. Such benchmarking would hopefully reduce regulatory duplication and ensure the development of practical guidelines.

An example of regulatory creep is provided by comparing the *EPBC Act Administrative Guidelines on Significance, July 2000* with *EPBC Act Policy Statement 2.1 – Interaction between offshore seismic exploration and whales September 2008*. Under the Offshore Exploration section, the 2000 guidelines indicate that seismic exploration is not likely to have a significant impact on a matter of national environmental significance, except under certain circumstances. The 2008 Policy Statement provides 14 pages of guidelines on how to manage seismic surveys with many restrictive practices, based on the precautionary principle.

During this period, significant scientific research by the petroleum industry, governments and other institutions has been undertaken to understand the effects of seismic exploration activities on the marine environment. It could be argued that the 2008 Policy Statement does not appropriately reflect the results of this recent research and places an over reliance on the precautionary principle. There appears to be no additional scientific rationale for these additional requirements compared to the 2000 guidelines. For example, observations of the whale population (humpbacks) indicate an anecdotal estimated increase of 10% per annum at the same time as the number of seismic surveys has increased. There would appear to be little evidence that seismic surveys have a significant impact on the whale population.

Such an unsubstantiated regulatory approach provides a significant sovereign risk to petroleum explorers and is a real impediment in a global market that is already highly competitive. This is also the perspective of the South Australian Government, as evidenced by their submission to the recent Senate Inquiry into the operation of the EPBC Act<sup>4</sup> and the opinion of APPEA in their submission to the Productivity Commission review of the upstream petroleum industry<sup>5</sup>.

Seismic and offshore drilling are the major referrals conducted by the petroleum industry. One way of reducing the regulatory burden on industry and DEWHA would be to ensure seismic surveys are conducted according to the *EPBC Act Policy Statement 2.1 – Interaction between offshore seismic exploration and whales September 2008* and drilling to be conducted according to the *APPEA Code of Environmental Practice 2008*. Whilst these guidelines may not be universally accepted by all stakeholders, they have been developed from extensive consultation and hence have a degree of legitimacy. The routine activities

4 [http://www.aph.gov.au/Senate/committee/eca\\_ctte/epbc\\_act/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sublist.htm)

5 [http://www.appea.com.au/index.php?option=com\\_content &task=view&id=176&Itemid=162](http://www.appea.com.au/index.php?option=com_content &task=view&id=176&Itemid=162)

operating according to these guidelines would then be exempt from having to be referred to DEWHA under the EPBC Act. Referrals would only then be necessary if actions occur in defined sensitive areas or at key times in the cetacean life cycle. Appropriate auditing of industry activity would ensure compliance. This would have the impact of focusing industry effort on ensuring operational compliance rather than on producing thick reports at great expense that are time consuming for DEWHA staff to process. It would also allow DEWHA to focus attention on more environmentally risky projects.

### **Sovereign risk**

The government currently releases petroleum exploration acreage in the annual gazettal process that has only had a high level scrutiny from DEWHA. Consequently, there is a reasonably high risk that a company could be granted exploration permits and spend a considerable amount on exploration only to find that they can never obtain environmental approval to develop any discovered hydrocarbons. This could be the case even with an operator meeting all required regulations and following best international practices for their operations.

DEWHA needs to screen the acreage for potential environmental issues under the EPBC Act before it is released for gazettal. Currently, only high level information regarding potential matters of National Environmental Significance is made available at the time of gazettal. More detailed information is required at this time. There is quite a reasonable expectation by industry that if the government releases an area for exploration, industry should ultimately be able to obtain approvals to explore and produce from the acreage as long as the operator complies with the required regulations. This is currently not the case in Australia, and poses a risk to Australia being seen as a politically stable and fair place to explore and produce oil and gas.

### **Productivity Commission Review**

Recommendations arising from the current Productivity Commission's *Review of Regulatory Burden on the Upstream Petroleum Sector* should be considered in all relevant aspects of this review. Nexus has also made a submission to this review.

### **Coordination of Commonwealth/State environmental regulations**

Currently, Commonwealth and State/Territory legislation requires compliance on a range of environmental issues, but often with differing assessment and approval processes and requirements. For example, the requirements under the Victorian Native Vegetation Framework can be quite different to that required under the EPBC Act. Obligations under the Victorian Native Vegetation Framework should be merged with EPBC Act obligations when establishing offsets. In some cases, Victorian regulatory processes associated with the Native Vegetation Framework have been hindered by EPBC Act compliance requirements, and potentially vice versa.

Commonwealth and State/Territory environmental requirements need greater coordination and alignment of processes in the future to increase certainty of process and decrease the regulatory burden. It is also suggested that obligations under the EPBC Act should be delegated to State-based regulators wherever possible. In most cases, State-based staff will

be undertaking similar monitoring and compliance functions to meet State requirements, and generally have a greater understanding of the ecological intricacies of the system being managed.

### **EPBC Act – OPA interaction**

The Commonwealth should consider utilizing provisions in the EPBC Act that allows the Commonwealth Environment Minister to recognise the environmental assessments undertaken on behalf of the Commonwealth by the Minister for Resources and Energy.

As APPEA has recognised in its submission to the Productivity Commission, this should particularly be the case for exploration activities. Since the commencement of the EPBC Act, there have only been three decisions that a seismic exploration activity was a controlled action and required further assessment under the EPBC Act. The case for mutual recognition is even stronger for offshore exploration drilling activities. Each year the industry drills, on average, around 60 new exploration wells, refers a majority of these for assessment under the EPBC Act and for all but a few since the commencement of the Act, has received a “not controlled” determination.

The industry is also required to prepare extensive and detailed Environment Plans under the OPA’s Management of Environment Regulations, for assessment by a team of dedicated, experienced and highly specialised regulators. Recognition under the EPBC Act of the approval of these plans, as well as ongoing monitoring and reporting requirements by the Delegated Authority under the OPA will reduce regulatory duplication.

## **Answers to specific questions**

**Question 1c** *Are the existing matters of national environmental significance (NES) appropriate?*

The inclusion of the Commonwealth marine environment in matters of NES is a very broad, catch-all definition. Most offshore petroleum exploration and development activity is captured by this definition and hence, results in a large number of often unnecessary referrals, as indicated elsewhere in this submission. Significant habitats and species that are the focus of much of the assessment of petroleum activity is mentioned elsewhere in the definition, so the exclusion of ‘Commonwealth marine environment’ from the NES definition would not make any practical difference to environmental outcomes.

It is understood that extraction of groundwater (>10,000 ML) and land clearing (100 ha over two years) have also been advocated for inclusion as triggers of matters of NES for the EPBC Act. These triggers are slightly different to other matters of NES in that they could result in flow on effects if they occur in or near areas already deemed NES, such as Ramsar wetlands, threatened ecological communities or heritage sites, but the activities themselves are not immediately of NES. Any definition of groundwater in this context that may include formation water extracted as part of normal oil and gas production would be of concern to the petroleum industry.

**Question 1e** *What kind of impacts should be considered under the Act? Does the Act adequately encompass not just direct but also indirect impacts?*

Nexus suggests that a tighter definition of “indirect impacts” is required to avoid capturing downstream impacts outside of the proponent’s control. For example, greenhouse gas emissions of industries that use the product of the project are increasingly being incorporated into the project’s environmental assessment.

There has been considerable debate on the value of a greenhouse trigger within the EPBC Act in recent times. Nexus notes the recent efforts in this area with the private senator’s bill, the *Environment Protection and Biodiversity Conservation Amendment (Control of Power Station Emissions) Bill 2008*, currently before Parliament.

In the near future, it is expected that impacts from greenhouse gas emissions will be accommodated in an Emissions Trading Scheme (ETS). Such regulatory requirements are redundant in the face of a market-based ETS and should be removed from the approval process when such a scheme is implemented.

**Question 1f** *Does the test of significance, in the context of actions having a ‘significant’ impact on a matter of NES, operate effectively in practice?*

DEWHA operates under the assumption that all actions will influence all matters of NES until proven otherwise with the mere presence of a species in the marine environment where an action is proposed equating to a significant impact. An alternative approach is to use a risk assessment process and assess likelihood and consequence of outcomes to develop a more practical outcome. There is now decades of documentation from previous similar actions to support the refinement of this current ‘shotgun’ approach. Such a risk based approach may also have the benefit to DEWHA of reducing the number of unnecessary referrals.

**Question 4** *Do you think that the Act contains an effective hierarchy of environmental assessment approaches, ranging from assessment on referral information to assessment by public inquiry?*

The EPBC Act does have an effective assessment, with more rigorous public assessment for more complex projects with potentially greater environmental impact. One area that could be improved is by combining the PER/EIS process as there is little practical difference between the two. This lack of difference is acknowledged in the process flowchart on page 19 of the Review Discussion Paper where both processes are combined.

**Question 6** *Does the Act operate effectively in conjunction with State and Territory planning and environmental impact legislation?*

Put simply, no! There are significant overlaps with other Commonwealth legislation such as the *Offshore Petroleum Act 2006* (OPA) leading to duplication of process, approvals and the provision of reports. For instance, DEWHA has placed as a condition of approval for a project under the EPBC Act, the submission of reports and management plans that are also required for the project to be approved by the Designated Authority under the OPA. Whilst

we clearly acknowledge the role that DEWHA has, requests such as this duplicates regulatory processes. Such duplication adds unnecessary time to review documents which has the potential to unnecessarily delay project construction and significantly increase project costs.

*Are existing bilateral agreements achieving the objects of the Act?*

Nexus supports the establishment and full implementation of assessment bilateral agreements between all of the States and Territories and the Commonwealth to reduce regulatory duplication. Nexus recommends that these agreements also need to be extended to incorporate approval of actions. In 1997, the Commonwealth and State Governments, through COAG, agreed to work towards establishing bilateral agreements. Eleven years after the COAG agreement, governments are still working to develop bilateral agreements, and the full implementation of assessment bilateral agreements. There is precedent for the Commonwealth to delegate approval for many actions to State jurisdictions under the OPA, so this principle should be extended to the EPBC Act.

The implementation of bilateral agreements needs to be addressed as a matter of urgency to reduce duplication of assessment and approval processes.

## **Conclusion**

Nexus Energy welcomes the opportunity to provide a submission to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999*. In conclusion, the following key points are made:

- Government regulatory authorities, including DEWHA are generally under resourced, often resulting in delays and poor decisions. DEWHA should be adequately funded to ensure the EPBC Act is appropriately administered.
- There is a consistent lack of consistency in decision making.
- The EPBC approvals process would benefit from the advice of a petroleum industry expert.
- DEWHA should be applauded for striving to meet the timelines stipulated within the EPBC Act. A timeframe of 30 days should be stated for the period for DEWHA to provide comments on the suitability (not approval) of the draft PER/EIS report for publication.
- It is the additional time taken to gain approvals and the implications for project financing together with the opportunity cost of the value of lost production that is the real cost for small to medium companies.
- EPBC Act requirements should be aligned with State-based requirements such as the Victorian Native Vegetation Framework.

- Seismic surveys that are conducted according to the *EPBC Act Policy Statement 2.1 – Interaction between offshore seismic exploration and whales September 2008* and drilling that is conducted according to the *APPEA Code of Environmental Practice 2008* be exempt from having to be referred to DEWHA under the EPBC Act.
- DEWHA should review proposed petroleum exploration permit acreage prior to release to ensure that there is a reasonable expectation for environmental approvals to be obtained for exploration/production activities.
- Recommendations arising from the current Productivity Commission’s *Review of Regulatory Burden on the Upstream Petroleum Sector* should be considered in all relevant aspects of this review.
- There is significant potential for increased regulatory efficiency through rationalisation of environmental controls under the EPBC Act and Offshore Petroleum Act.
- The definition of Matters of National Environmental Significance should not include Commonwealth marine environment.
- A tighter definition of “indirect impacts” needs to be developed to limit capturing downstream activities in the assessment process that are outside the control of the proponents.
- Risk-based assessment of actions should be used to determine if an action will have, or is likely to have a significant impact on a Matter of National Environmental Significance.
- Bilateral agreements between the States/Territory and the Commonwealth to ensure standard accreditation of States/Territory processes in assessing and approving requirements under the EPBC Act should be implemented now.