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INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

APPEA COMMENTS

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1 EXECUTIVE SUMMARY

APPEA welcomes the opportunity to comment on the Independent Review of the Environment Protection and Biodiversity Conservation (EPBC) Act 1999 discussion paper. Given the importance of the legislation and past efforts to improve its operation APPEA considers the EPBC Act a critical element of the regulatory framework that applies to Australia's oil and gas industry and welcomes further effort to improve its operation.

A significant proportion of Australia's known oil and gas resources are found within Commonwealth waters. As a result, the EPBC Act, with the inclusion of a Commonwealth marine environment National Environmental Significant (NES) trigger, influences the operations of a significant proportion of Australia's oil and gas production.

The oil and gas sector appreciates the efforts to increase the operational certainty, flexibility and efficiency of the EPBC Act. APPEA considers that previous reforms did not lead to lower environmental outcomes in the oil and gas sector, but did significantly improve certainty and operation under the Act.

The industry understands the importance of government oversight of its activities and the policy intent behind the regulatory framework. But unnecessary and/or duplicative regulations can have a significant impact upon the oil and gas industry and can hinder investment in Australia, confirming an international perception that Australia is a difficult place to invest.

While there are significant administrative costs in complying with regulation, it is delays in the approval process that create the highest regulatory costs. Given the highly capital intensive nature of the upstream oil and gas industry, where projects currently under consideration total some \$197 billion, these delays should be minimised.

Every step in the exploration, development and production of crude oil and natural gas is highly regulated by governments and regulatory agencies. In every jurisdiction of Australia the industry must potentially meet hundreds of requirements relating to timing, location, environment protection, worker and public safety, and management and extraction of the resources in a manner that best serves Australia's national interest.

Prior amendments to the EPBC Act allowed for a more workable, flexible and certain business environment. It is APPEA strong view these outcomes were achieved without sacrificing the objectives or the integrity of the EPBC Act. Prior to the amendments the EPBC Act had been in effect for more than six years, and the amendments reflected the operational experience and knowledge gained by regulators, industry and the community in implementing and enforcing the provisions of this Act.

In the time since the Act came into effect, hundreds of oil and gas exploration and production projects have been assessed, ensuring an appropriate oversight and assurance that the industry is following sound, responsible operating practices in accessing oil and gas reserves on behalf of all Australians.

APPEA would be concerned if these reforms were wound back on principles of what an environmental regulation should look like rather than due consideration of the effectiveness of the Act. It is the effectiveness of the Act and how to measure outcomes appropriately and methodically that should be of central focus.

While APPEA supports the retention of previous reforms that significantly enhanced the operation and certainty of the processes under the EPBC Act, there are areas of the Act that still do not adhere to best practice regulation. It is not the goal of APPEA to suggest any dilution of environmental outcomes, but to instead suggest areas where further streamlining and clarification would be beneficial to all stakeholders.

APPEA supports the current EPBC Act framework but would make the following points:

- The EPBC Act requires adequate resources to properly assess its effectiveness;
- The upstream oil and gas industry is already highly regulated;
- Overlapping requirements between the Offshore Petroleum Act (OPA) and the EPBC Act reduce the administrative efficiency of the Act;
- Seismic exploration remains an area of uncertainty in its pathway through the decision making process;
- Information flows between the Department of the Environment, Water, Heritage and the Arts (DEWHA) and the Department of Resources, Energy and Tourism (DRET) should be enhanced particularly regarding acreage releases;
- Broadening the scope of the Act must be carefully considered within the whole of government framework;
- Previous amendments to the EPBC Act have increased business certainty and operational flexibility and reduced unnecessary red tape; and
- Bilateral agreements should be extended to include recognition of environmental assessments undertaken on behalf of the Commonwealth by the Minister for Resources and Energy;

APPEA notes that this submission does not represent the sum of concerns its members have with the EPBC Act and we look forward to further engaging throughout the review process to bring these issues to your attention.

2 INTRODUCTION

The Australian Petroleum Production & Exploration Association (AAPPEA) represents the upstream oil and gas industry in Australia. APPEA member companies produce around 98 per cent of Australia's oil and gas. More than 70 members explore for and/or produce Australia's oil and gas resources and a further 140 companies supply a vast range of goods and services to these explorers and producers.

Reliable, secure and competitively priced energy is crucial to industry, our communities and our households. It underpins Australia's economy and industrial structure. Within this framework, oil and gas plays a key role. At present, petroleum (oil and gas) accounts for more than 50 per cent of Australia's primary energy needs and is expected to increase.

Economic Significance

Oil and gas currently accounts for 33 per cent and 21 per cent respectively of Australia's primary energy consumption (ABARE 2006). In 2006 the estimated value of Australian oil and gas production was \$22.7 billion, while tax and royalty payments to the Commonwealth, State and Territory governments amounted to more than \$8.1 billion (Wood Mackenzie Global Economic Model).

Petroleum (oil and gas) is Australia's 3rd largest mineral and energy export, currently valued at \$17 billion (March Quarter 2008 – ABARE). Local production of oil and gas is also a source of highly skilled employment, education, training and research.

Structure of the Australian Industry

There is a diverse spectrum of participants in the upstream oil and gas industry, ranging from small and medium-sized companies to super majors. In some of the smaller companies, a minor amount of production is undertaken but most are reliant on the equity market to fund exploration in Australia and, increasingly, in the United States and other parts of the world.

A number of medium to large-sized Australian companies typically have producing assets that fund further onshore and offshore exploration. Many of these are also expanding overseas in pursuit of more attractive opportunities in terms of prospectivity, product prices and time to first revenue.

The super-majors, whose Australian interests represent a very small part of their global portfolios, are predominantly focused on offshore exploration for large gas opportunities underpinned by LNG exports. Global competition for investment capital is increasing and Australian companies of all sizes must constantly monitor their overall competitive position for investment.

Benefits of Environmental Regulation

Over and above environmental regulation, there are significant commercial drivers for companies to consider environmental impacts in decision making and to act to improve environmental performance. In Australia there is a significant community focus on environmental outcomes and high expectations for environmental performance. As such, a significant number of APPEA members report publicly on their environmental performance and are open with the community when discussing their progress on

environmental initiatives. The industry developed an environmental code of practice in 1977 and this document has regularly been updated, most recent in 2008.

There are also significant commercial drivers for environmental performance improvement, particularly in regard to the use of resources such as water and energy where companies can reduce operating expenses by using these resources more efficiently. APPEA members have been particularly active in assessing and improving their efficiency in the use of these resources in the past 5-10 years and have not required additional regulatory motivation to initiate action.

3 CURRENT REVIEWS

The operation of the EPBC Act is currently under consideration as part of an independent review, by the Productivity Commission (PC) in its review of all regulation on the upstream oil and gas industry, and the subject of a Senate Inquiry.

APPEA has made submissions to the PC Review of Regulatory Burden on the Upstream Petroleum (oil and gas) Sector
http://www.appea.com.au/content/pdfs_docs_xls/PolicyIndustryIssues/environment/appea_submission_to_pc_review_issues_paper_sept_2008.pdf.

Productivity Commission Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector

Background

The Productivity Commission was requested to undertake a research study on the regulation of crude oil and natural gas projects that involve more than one jurisdiction (but not the regulation of subsequent refining, distribution and wholesaling/retailing activities, coal seam methane or any other mineral resource). In undertaking the study, the Commission is to:

- assess the impact of the current regulatory framework on the international competitiveness and economic performance of Australia's petroleum sector and on the performance of the economy as a whole;
- report on regulatory impediments to improved performance, including inconsistencies and duplication across jurisdictions, and ways in which governments in Australia could address them; and
- consider options for a national regulatory authority (for example, along the lines of the National Offshore Petroleum Safety Authority model) to manage all regulatory approvals for the upstream petroleum industry as a means of addressing issues of regulatory duplication and inconsistencies.

Environment and Heritage Legislation Amendment Bill (no.1) 2006

APPEA strongly supports previous amendments to the EPBC Act including:

- restricting the scope of enquiry (ie Nathan Dams situation) so that proposed actions need to be a **substantial cause** of indirect impacts for indirect impacts to be relevant and assessed;
- ensuring new listings (such as species or national heritage) do not affect assessment and approval decisions already made and do not provide grounds for reconsideration or variation to conditions of approval;

- eliminating third party nominations for emergency heritage listing – but still ensuring that emergency listing is still available to the Minister;
- courts can now seek undertakings as to damages for interim injunctions;
- seeking proponents views on proposed conditions before the conditions are formally finalised;
- providing for quick decisions on straight forward proposals;
- providing more flexibility for industry to respond to environmental concerns raised during the environment assessment process and allow proponents amend the project activities, mitigation measures, locations or even timings specified in a referral to result in better environmental outcomes;
- incorporating wildlife permits (including whale permits) into the assessment of whether the action is a controlled action;
- allowing the Minister to rely on conditions that will be imposed by other Ministers (Commonwealth and State);
- Establishing a strategic process to listing heritage places and species to allow the Minister to focus on the areas of greatest need and allow the Minister to set priorities;
- providing for mining in a Commonwealth reserve without the need for individual approval by the Governor-General (APPEA proposal);
- establishing **strict liability** for a number of offences, but prosecution would still need to demonstrate that a person caused a significant impact, that they knew there was a risk of a significant impact and that they were reckless as to that risk; and
- **extending the scope of liability** to make employers liable for the actions of their employees and contractors, and make landholders liable for what happens on their land.

4 GENERAL COMMENTS

There are significant government regulatory controls that require the petroleum industry to conduct their activities in a manner that meets the highest standard of environmental protection. In Commonwealth waters **all** petroleum activities are required to have environmental management plans approved by a government regulator (typically administered by State and Commonwealth Industry Department regulators), to ensure that the environmental impacts of the operation are as minimal as reasonably practicable. These plans allow companies the flexibility to determine how best to meet environmental protection requirements and conservation objectives in each specific situation.

Petroleum activities with the potential to have a significant impact on the Commonwealth marine environment and other matters of national environmental significance are subject to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Company commitments under the “manner specified” provisions and Ministerial conditions arising from the assessment processes of controlled actions also become legally binding conditions on the activity. Those activities that may interfere with a cetacean may also be subject to cetacean permit requirements under the EPBC Act, providing for a further opportunity for regulatory control of these

activities. However, with operations under Policy Statement 2.1, seismic operations are unlikely to cause any interference.

APPEA supports regulations that produce effective environmental outcomes. APPEA does not seek to lower them. Good regulatory policy, however, as noted in the Banks Review¹ should operate under the following framework:

- Governments should not act to address ‘problems’ through regulation unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue.
- A range of feasible policy options — including self-regulatory and co-regulatory approaches — need to be assessed within a cost-benefit framework (including analysis of compliance costs and, where relevant, risk).
- Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.
- Effective guidance should be provided to regulators and regulated parties to ensure that the policy intent of the regulation is clear, as well as what is needed to be compliant.
- Mechanisms such as sunset clauses or periodic reviews need to be built in to legislation to ensure that regulation remains relevant and effective over time.
- There needs to be effective consultation with regulated parties at the key stages of regulation-making and administration.

As noted in Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 background paper, the exploration of oil, mineral and gas attracts the third largest number of referrals (see figure 1 below). Of these referrals, however, only 4.7 per cent required further assessment under the Act in 2007-08.

Figure 1: Referrals and referral decisions in the exploration industry

	Referrals received in 2007–08	Decisions made in 2007–08			Total decisions
		Approval required CA	Approval not required PM	Approval not required NCA	
Exploration (mineral, oil and gas – marine)	64	3	45	9	57
Exploration (mineral, oil and gas – non-marine)	4	0	0	4	4

The review of the EPBC Act is, in part, tasked with answering the question ‘*the extent to which the objects of the Act have been achieved*’. APPEA supports an outcomes based approach to measurement rather than process driven analysis. For example, are threatened species being driven to extinction? How many species have become extinct since the Act was introduced? Have species recovered since the Act was introduced? These outcomes would signify whether the Act is working inline with its objectives. It is not the administrative volume of referrals, listings or approvals that measure how well the objectives of the Act are being achieved.

¹ Regulation Taskforce 2006, Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, Report to the Prime Minister and the Treasurer, Canberra, January.

It is robust scientific evidence that will identify the effectiveness of the Act in achieving its objective while the processes outlined in the Act, will identify its efficiency. APPEA recommends that the Review carefully consider the metric with which it gauges the success of the EPBC Act. The upstream oil and gas sector contains many exemplary examples of leading edge environmental practice and a history of achieving world's best environmental outcomes through a combination of research and technology.

Prior amendments to the EPBC Act allowed for a more workable, flexible and certain business environment. It is APPEA's strong view that these outcomes were achieved without sacrificing the objectives or the integrity of the EPBC Act. The EPBC Act had been in effect for more than six years, and the amendments reflected the operational experience and knowledge gained by regulators, industry and the community in implementing and enforcing the provisions of this Act.

In the time since the Act came into effect, hundreds of oil and gas exploration and production projects have been assessed, ensuring an appropriate oversight and assurance that the industry is following sound, responsible operating practices in accessing oil and gas reserves on behalf of all Australians. APPEA would be concerned if these effective reforms were wound back on principles of what an environmental regulation should look like rather than due consideration of the effectiveness of the Act. It is the effectiveness of the Act and how to measure outcomes appropriately and methodically that should be of central focus.

5 THE BENEFITS OF ENVIRONMENT REGULATION

Prior reforms to the EPBC Act have greatly enhanced the operational certainty, reduced complexity and improved timeliness of decisions while maintaining a high level of environmental integrity.

Given the interaction of the upstream oil and gas sector with the EPBC Act and the operational structure of the industry, unnecessary delays and administrative impediments on can be very costly.

Industry was particularly concerned with claims of spurious environmental benefits being used to delay projects, overlapping and duplicative reporting between various agencies and inconsistency between decisions.

Industry clearly accepts that operating with a strong environmental objective isn't just a cost burden but an intrinsic part of businesses 'license-to-operate'. The industry takes its environmental obligations very seriously. Maintaining and operating with care and responsibility in Australia's ecosystems builds confidence in the community that the oil and gas sector can be trusted to responsibly contribute to Australia's wellbeing.

Duplication

Recent amendments to the EPBC Act allow the Commonwealth to consider using new provisions whereby the Commonwealth Environment Minister could recognise the environmental assessments undertaken on behalf of the Commonwealth by the Minister for Resources and Energy.

It is APPEA's view that there is a strong case for these provisions to be used, especially for exploration and drilling activities particularly in the light of the very low percentage of referrals by the industry requiring further assessment under the Act.

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.

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.

Referring drilling activities under the EPBC Act has become a risk mitigation policy rather than producing any environmental outcome. The Act has become more of an administration burden than effective environmental legislation for drilling operations.

Seismic Exploration

In the case of seismic exploration activities referred for assessment under the Environment Protection and Biodiversity Conservation Act 1999, there are a number of examples of very similar proposals experiencing quite different regulatory treatment. The industry has referred dozens of 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 seismic survey 100 km to the east of the Great Barrier Reef Marine Park.

In the past twelve months, two seismic surveys planned off the west coast of Victoria were also 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.

Acreage

Industry understands the need to strike a balance between timely release of acreage and the potential environmental risks and uncertainties in some acreage. It would perhaps be impractical in most cases for DEWHA to know the details of all potential environmental issues under the EPBC Act prior to release. It is however possible to gather such information over time and record it in an "atlas", that may provide easier guidance to both DEWHA and the industry in what the potential environmental values are in certain acreages. For example (and this is not a environment specific issue), there is now sufficient information on the golden band snapper fishery in the Arafura Basin, so any future release of acreage in that part of Australia could highlight such occurrences.

To this end, APPEA particularly supports PC Review of Regulatory Burden on the Upstream Petroleum (oil and gas) Sector Draft Recommendation 6.1

'ensuring the Department of Environment, Water, Heritage and the Arts provides available information (such as information from previous assessments and relevant scientific studies) on significant environmental risks to the Department of Resources, Energy and Tourism to report with new acreage releases and to proponents seeking approval for a new project (such as pipelines)'.

Resourcing

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 advice to DEWHA and industry on whether a referral is required and target impact assessment efforts. This should help to provide a consistent approach to regulation.

6 SCOPE OF THE ACT

6.1 Are the existing matters of national environmental significance (NES) appropriate? Do you think that there should be any additional matters of NES, and if so, how should such matters be framed?

National Environmental Significance

The upstream oil and gas industry is covered by the broad Commonwealth marine environment NES trigger. In this environment, business will manage risk by engaging extensively in the referrals process.

Other matters of NES such as World Heritage properties, National Heritage places, wetlands and listed threatened species, ecological communities and migratory species capture much of the environmental impacts in the Commonwealth marine environment.

As it is so broad and all encompassing, the inclusion of the Commonwealth marine environment as an NES, at the margin, does not necessarily enhance environmental outcomes. It does however create a large degree of administrative overlap between other regulatory requirements such as the Offshore Petroleum Act 2006 (Cwth).

Broadening Scope to include Greenhouse Trigger

APPEA does not support broadening the scope of the EPBC beyond the existing national environmental significance matters and considers the introduction of a greenhouse trigger into the EPBC Act as highly duplicative.

Policies designed to address climate change, since the previous amendments to the EPBC Act and the 2007 Federal election, have eliminated the need for such additional measures.

The rationale for capturing projects that emit a threshold amount of CO₂-e per a year or during the life of a project cannot be sustained in today's climate change landscape. The introduction of a greenhouse trigger into the EPBC Act only duplicates, inefficiently at that, the raft of current and future greenhouse policy measures such as the Carbon Pollution Reduction Scheme (CPRS) that are designed to significantly reduce Australia's CO₂-e emissions.

The Government has clearly demonstrated the best policy option for addressing climate change:

'Fundamental to the Government's climate change strategy is a Carbon Pollution Reduction Scheme. It is the best way to reduce

carbon pollution while minimising the impact on business and households'².

In 2006, the Government endorsed six principles, highlighted previously in our submission, of good regulatory process identified by the Taskforce on Reducing Regulatory Burdens on Business in its report *Rethinking Regulation*³. Key to achieving good regulatory process is outlined below:

'Governments should not act to address 'problems' until a case for action has been clearly established. This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all 'problems' will justify (additional) government action'.

More recently the Garnaut Report noted the role of complementary measures is to *lower the cost of meeting emissions reduction trajectories, as well as adapting to the impacts of climate change by correcting market failures*.⁴ It is clearly the case that implementing a greenhouse trigger does not translate into addressing a market failure above and beyond current greenhouse policies.

The Government as part of its climate change agenda will introduce a Carbon Pollution Reduction Scheme (CPRS) which is acknowledged as being the lowest cost abatement policy to reduce carbon emissions. The government has also implemented or will implement a range of supplementary measures including the Renewable Energy Target (RET) and the Energy Efficiency Opportunities Act.

Implementing a greenhouse trigger in the EPBC Act potentially leads to a range of economically inefficient outcomes including having Government determine:

- ❖ technology;
- ❖ production processes; and
- ❖ energy inputs;

Current and planned policies bring greenhouse emissions into the business decision process more effectively and efficiently. As a result there is no reasonable regulatory justification for a 'complementary' greenhouse measure to be included in the EPBC Act.

Groundwater extraction

Industry is currently of the understanding that any definition of 'groundwater extraction' would not include produced formation water (PFW) which is a byproduct of oil and gas extraction. PFW is currently regulated and managed so that discharge to the sea is strictly controlled through legislation. To incorporate this definition of 'groundwater extraction' however would result in further duplication of existing regulatory requirements and be totally unacceptable to industry.

² Australian Government (2008), 'Carbon Pollution Reduction Scheme Green Paper', Forward, July, p IV.

³ See www.regulationtaskforce.gov.au for further information.

⁴ Garnaut Review (2008), 'The Garnaut Climate Change Review Final Report', An Australian Policy Framework, Chapter 13, p 299.

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

Indirect Impacts

Section 527E of the EPBC Act currently encompasses the indirect impact of a project in the referral process by noting that where the impacts of the primary action significantly facilitate a secondary action, the environmental impacts are taken to be the impacts of the primary action where both the secondary action and its associated impacts are reasonably foreseeable.

This section within the EPBC Act highlights that indirect impacts are material to the approvals process. Proponents have to consider the indirect impacts beyond their geographic or construction boundary when assessing the impacts of a project.

APPEA considers that current legislation adequately covers the indirect impacts in the referral process. Further expanding the scope of considerations by requiring businesses to self-assess all adverse impacts only increases business uncertainty when seeking approval. Furthermore, the scope of enquiry resulting from the findings in the Nathan Dam case is impractical and leaves approvals on multibillion dollar projects very much exposed to legal challenge.

The linkage between indirect impacts and greenhouse gas also needs to be carefully considered. Industry is particularly concerned that an over reliance on indirect impacts opens the prospect of a de facto carbon pollution reduction scheme being run through the courts.

7 ASSESSMENT AND APPROVALS

7.1 Does the public understand their responsibilities under the Act to refer proposed actions to the Minister?

Public Understanding

To the extent the public does not understand their responsibilities under the EPBC Act any remedies must be pursued through better communication.

The upstream oil and gas industry undertakes a wide variety of community consultations to inform the general public of operations. The industry does so in accordance with the APPEA Code of Environmental Practice and MCMPR Principles of Community Engagement. Consultations offer business the opportunity to discuss concerns with the community directly and help frame solutions beneficial to both parties. Environmental organisations are also generally well resourced with the appropriate personnel to disseminate relevant information.

APPEA considers the Department of the Environment, Water, Heritage, and the Arts (DEWHA) is the most appropriate source to communicate public responsibilities to the public.

7.2 Are appropriate projects being referred for approval? Does the referral process meet the objects of the Act?

Flexibility

Under 156A of the EPBC Act applications for approval can be varied where the Minister considers the application is substantially the same in character to the original proposal. Variations during the assessment and approval process and after approval, include⁵:

- changes to actions;
- changes to persons taking actions;
- changes to circumstances;
- assessment of actions for which there are a number of alternative options;
- variation of the time length of approvals;
- minor variations to accredited management plans and bilateral agreements;
- the impact of the listing of fish species on commercial fisheries; and
- activities in Commonwealth reserves when a management plan is not in operation.

A greater focus on flexibility allows industry to respond to environmental concerns raised during the environment assessment process. This flexibility enables industry to bring alternative proposals for better environmental outcomes to the assessment process without the associated delays, uncertainty and complexity of beginning another approvals process.

Certainty

Amendments to the EPBC Act (s478) have greatly enhanced operational certainty for business. This is particular the case for operators of capital intensive operations where unnecessary delays add significantly to project costs.

The APPEA membership fully supports public participation in, and oversight of, the EPBC Act. There must, however, be a balance between public environmental concerns and the legal operation of business. As it should, the right of appeal exists in the current EPBC Act but there isn't scope for spurious environmental claims.

Prior amendments providing court discretion to seek undertakings as to damages for interim injunctions are also supported and should remain as a necessary case-by-case counter balance to Ministerial process.

Maintaining the appeals process while encouraging parties to use 'due regard' when considering injunctions before the court should remain a fundamental element of the EPBC Act.

⁵ The Parliament of the Commonwealth of Australia (2006), "Environment and Heritage Legislation Amendment Bill (No. 1) 2006, Explanatory Memorandum, House of Representatives,

7.3 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? Are the methods of assessment providing the required information for informed approval decisions?

Assessment Approaches

APPEA supports the current system of assessment approaches, however, as noted previously some overlap and duplication exists. Further amendments to the assessment approach should both seek to reduce overlap and duplication and ensure none further are introduced.

Offsets

Environmental offset requirements are largely a matter of policy, not regulation and therefore have not been subjected to the same parliamentary scrutiny as regulations and legislation. They could nonetheless have at least as onerous an impact on the industry. This issue aside, environmental offsets can provide a more flexible approach to ameliorating environmental impacts.

However, it is for the reasons of inconsistency and lack of clarity that APPEA has requested the Ministerial Council on Mineral and Petroleum Resources (MCMPPR) adopt a national approach across all jurisdictions on the issue of environmental offsets.

While some jurisdictions such as Victoria and New South Wales have defined a formula to determine appropriate levels of offsets, other jurisdictions rely on a negotiated outcome between the proponent and regulator and these have resulted in offset provisions worth tens of millions of dollars. Perversely, in this situation environmental offset packages can also provide a fiscal incentive for regulation. For example, in several jurisdictions, once all mitigation measures to reduce impacts to as low as reasonably practicable have been agreed, companies are then required to provide for a package of environmental and social programs to “offset” any residual impacts.

APPEA has worked with its member companies on establishing universal agreement as to when offsets would be considered acceptable to industry. These considerations agreed by members include:

- While there may be merit to biodiversity or habitat replacement offsets, they should not be mandatory for all activities, and in particular exploration activities, and must only be applied on a case by case basis;
- Offsets need a solid policy framework that removes the potential for horse trading. That is, having different offsets apply in different jurisdictions without reference to scientific merit. This will give both governments and industry certainty in the process;
- The requirement to consider environmental offsets should not be applied retrospectively to existing operations, especially with respect to any requirements for licence renewals or revisions to approved environment plans;
- Agreement must be reached by governments to ensure that, for projects operating under multiple jurisdictions, that environmental offsets applied to meet the requirements of one jurisdiction would be recognised as satisfying the requirements for all other jurisdictions; and

- Governments must establish an independent appeals process to allow for a test of reasonableness of an environmental offsets package.

7.4 Does the Act provide appropriate scope for public participation and transparency in the assessment and approval process under the Act?

Assessment Process

Public consultation is required in the preliminary documentation (49 per cent of assessments), Public Environment Report (5 per cent of assessments), Environmental Impact Statements (6 per cent of assessments), bilateral agreement (22 per cent of assessments), accredited assessment (16.7 per cent of assessments) and assessment on referral information (1 per cent of assessments).

Furthermore, under section 78, the Minister has the ability to revoke a decision and substitute a new decision if satisfied that it is warranted by the availability of 'substantial' new information about the impacts which the action is likely to have on a matter of national environmental significance⁶.

Interest parties are notified to comment within 10 business days before the Minister reconsiders the original decision. Given the complexity and time required to develop proposals industry will need a longer period of notification of the 'substantial' new information to enable an effective 'right of reply'.

A longer notification period can be granted through an extension to the 10 business days for the Minister to reconsider his decision or through a notification of intension to lodge 'substantial' new information. In the interest of reducing project approval times APPEA supports the inclusion of a notification period before any 'substantial' new information is provided.

The publication of variations to actions greatly improves public consultation and transparency.

7.5 Does the Act operate effectively in conjunction with State and Territory planning and environmental impact legislation? Are existing bilateral agreements achieving the objects of the Act?

See duplication section for further comments.

Bilateral Agreements

APPEA strongly supports bilateral agreements including the currents efforts of the Commonwealth to develop a bilateral agreement with the Victorian Government to accredit the environmental impact assessment processes.

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.

⁶ Ibid, p. 5

APPEA supports PC Review of Regulatory Burden on the Upstream Petroleum (oil and gas) Sector Draft Recommendation 6.1

- developing bilateral assessment and approval agreements between the Department of Environment, Water, Heritage and the Arts and the Designated Authorities to avoid the potential for duplication in environmental submissions and to streamline approvals for routine activities where a State or Territory has developed adequate local expertise and knowledge.

7.6 Are there further opportunities to harmonise the Act with other State and Territory legislation, planning and approval processes?

The use of bilateral agreements could be extended to include the Commonwealth utilising new provisions that allow the Commonwealth Environment Minister to recognise the environmental assessments undertaken on behalf of the Commonwealth by the Minister for Resources and Energy.

7.7 Does the use of strategic approaches, such as strategic assessments and bioregional plans, provide opportunities for streamlining Commonwealth involvement in environmental issues? Do such approaches provide an appropriate means for dealing with cumulative impacts?

Strategic Assessments

The EPBC Act provides for offences for actions that have or are likely to have a significant impact on a matter of National Environmental Significance. Concerns have been raised that the cumulative impacts of unrelated projects are not adequately covered by the EPBC Act.

Under section 146 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the Minister may agree to undertake a strategic assessment on the impacts of actions under a policy, plan or program. Section 146 of the EPBC Act also provides for a public comment period for the draft terms of reference for a report on the impacts to which the agreement relates.⁷

Strategic assessments address regional-wide development pressures, high growth area with a large number of projects requiring assessment and approval, multiple stakeholders and cumulative impacts on matter of national environmental significance protected by the EPBC Act.

APPEA has previously stated that the strategic assessment process has led to additional regulatory costs for some operators. For example, the WA Northern Development Taskforce and the Commonwealth Strategic Environmental Assessment of the Kimberley commenced after companies had, in good faith, already undertaken detailed site selection, agreed guidelines and scoping for the Environment assessment and had spent significant amounts of time and millions of dollars on studies.

Furthermore, the Strategic Environmental Assessment has put aside guidelines and scoping that had previously been established and placed projects in limbo for an indefinite period of time.

⁷ <http://www.environment.gov.au/epbc/notices/assessments/kimberley.html>

There are opportunities for further streamlining of strategic assessments and bioregional plans. Where existing guidelines and scoping studies have been undertaken strategic assessments should not operate as an overlapping process.

APPEA supports the Productivity Commissions⁸ draft recommendation *where strategic assessments are proposed for particular regions, these should be conducted early and according to clear timeframes and should not prevent proponents from pursuing approvals for existing projects.*

Bioregional Plans

APPEA's ability to work proactively and confidently with all stakeholders has been premised on the commitment by the Commonwealth Government to ensure that the establishment of a nationally representative system of marine protected areas (NRSMPAs) would be a sensible staged and adaptive approach. APPEA has welcomed the commitment by the Government that in areas of oil and gas prospectivity, larger multiple use representative reserves would be identified that provide for oil and gas exploration and production, subject to the appropriate approvals, licences and permits.

Throughout the process of developing a national network of representative marine protected areas there has been a significant ongoing effort by Australia's oil and gas industry to work with all stakeholders to meet the government's conservation objectives, while limiting the economic and social impacts of the network. The oil and gas industry and the nation have a vital interest in accessing prospective offshore waters for exploration and, equally, APPEA recognises the great environmental values of some of the areas identified in the proposed network.

APPEA is concerned about arbitrary targets for protecting marine areas and supports the continued objectives-based approach to policy. This gives industry the capacity and flexibility to adopt innovative concepts or new technology to explore and develop potential resources without presenting a threat to conservation objectives.

APPEA believes that a staged and adaptive approach will ensure ongoing and appropriate protection of identified biodiversity values. Bioregional plans are a significant step in providing the long term certainty needed for the development of Australia's oil and gas resources and meeting Australia's significant energy needs.

Cumulative Impacts

Cumulative impacts are currently captured in the Strategic Assessment process (see question 8 for further comment on Strategic Assessments).

⁸ Productivity Commission 2008, Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector, Draft Recommendations 5.6, Draft Research Report, Melbourne, p XLIV.

8 BIODIVERSITY

8.1 Does the Act provide an effective regulatory framework for the conservation of Australia's biodiversity? If not, what improvements could be made?

Nominating

Nominating threatened species through approved conservation advice is highly desirable. High quality information leads to better environmental outcomes and improves businesses ability to target measures on appropriately researched species and ecological communities.

The oil and gas industry undertakes a considerable amount of research on environmental science. The community and government, rightly, expect reliable and robust data and advice, and correspondingly the industry expects the same from regulators.

The industry considers the current process of nominating threatened species as based on the best available information from considered environmental organisations. Diluting high quality environmental advice will likely result in lower environmental outcomes and higher compliance costs. It is not in the interests of either the community or business for spurious claims to erode confidence in the listing process.

Listing, Assessment and Approval Decisions

Under Division 3A, Section 158A, new listings (such as species or national heritage) do not affect assessment and approval decisions already made and do not provide grounds for reconsideration or variation to conditions of approval, enhances business certainty when acting on a Minister's decision to approve a project. Consequently APPEA strong supports this approach.

One of difficulties with removing this section, the application of the "approval exemptions", arises where a new matter of NES becomes relevant to an action once the assessment process has commenced and even completed. For example, if an area of national heritage area is declared or a species added to the threatened species list, and therefore becomes relevant to a particular action before it is constructed, the Minister has power to vary the controlled action decision under section 78 and require further assessment of that action with respect to that matter of NES.

Further uncertainty arises if the Minister has not specified in the decision to approve the taking of the action, that a particular matter of NES is not relevant. That means if a new matter of NES becomes relevant to the action after it is approved, and the Minister's decision to approve the taking of the action does not specify that particular matter of NES is not relevant, the taking of the action that has, or is likely to have, a significant impact on the now relevant matter of NES is an offence.

8.2 What are your views on the process for nominating threatened species, ecological communities and key threatening processes?

Resources

The Act, if administered correctly, does provide an effective regulatory framework of conserving Australia's biodiversity, however, a lack of resources makes implementing the Act effectively very difficult.

An ANAO Audit Report⁹ concluded that resources and technical challenges contributed to the conservation of Australia's biodiversity as noted below:

'However, resource constraints and technical challenges (especially where data does not yet exist on threatened species) are major considerations and need to be taken into account. The department has estimated that it should be possible to bring the list substantially up to date (in terms of the backlog of species transferred from the earlier Act) for approximately \$3.5 million per annum over three years; subsequent maintenance of the list is estimated to cost approximately \$1million per annum. Additional resources of this magnitude would need to be considered in the budget context or allocated from other programs.'

For listing ecological communities the ANAO noted¹⁰:

'There have been specific issues that have constrained progress in the handling of nominations for the listing of ecological communities. The specific issues identified were:

- technical challenges in defining ecological communities;
- an expanded consultation process;
- changing priorities in processing nominations; and
- resource constraints.'

The listing of ecological communities is inherently more complex than species and this must be taken into consideration when judging process and appropriate regulation.

8.3 Given the length of time required for the assessment of nominations, should the Act allow for the emergency listing of species and ecological communities which may be threatened (similar to the provisions for the emergency listing of National Heritage places)? Would the advantages of this be outweighed by the financial and administrative costs?

Emergency Listings

The oil and gas industry is heavily reliant on large volumes of capital funding (up to \$20 billion or more for a 10 million tonne project with offshore infrastructure); experiences long periods before profits are generated and has high upfront exploration and development risk.

The financial structure of many oil and gas projects makes them highly sensitive to delays in approvals, more so than many other industries. Emergency listings that add to project delays can cost substantial sums of money. Consequently APPEA supports the retention of this discretion to be in the hands of the Minister. This would of course not preclude 3rd parties from making a case for listing to the Minister, but would preclude automatic triggering of the listing assessment process by the 3rd parties.

8.4 Does the Act provide an appropriate legislative framework for addressing climate change and other emerging pressures in the

⁹ ANAO Audit (2006), 'The Conservation and Protection of National Threatened Species and Ecological Communities', Report No.31, 2006-07

¹⁰ Ibid p 72.

context of environmental protection and biodiversity conservation? If not, how can such matters be considered when making decisions under the Act?

Climate Change and Emerging Pressures

While the Act does not provide an appropriate legislative framework for addressing climate change, the question of whether it should must firstly be answered.

APPEA believes that the EPBC Act does not and can not provide the appropriate legislative framework for addressing climate change. APPEA believe the CPRS will influence proponents into factoring in emissions and ensure abatement occurs in line with Government targets at the least cost to the community and industry.

9 PROTECTED AREAS

9.1 What are your views on the process for nominating and listing Commonwealth Heritage and National Heritage places?

Nominating and listing Commonwealth Heritage and National Heritage Places

APPEA had on several occasions, before the EPBC 2006 Amendments, expressed concerns about the relating to the national heritage provisions. APPEA sought improvements to the Act to ensure that national heritage was protected in a way that:

- reduced duplication of statutory processes;
- reduced uncertainty about Commonwealth assessment and approval processes; and
- increased efficiency of decision making by providing a simple, clear framework for approvals.

Natural Heritage Duplicates National Park and Species Protection Provisions

APPEA has previously expressed concerns regarding the nominations for Barrow Island and Ningaloo. While raising questions about the merits of the national heritage values of the entire area being nominated - (for instance Exmouth Gulf has been trawled for the last 100 years), APPEA sought to focus attention on the fact that a number of legislative controls already exist to protect environmental values of Ningaloo and Barrow Island through their respective protected area classifications and associated management plans.

APPEA support provisions to manage built or cultural heritage values with national significance, but have questioned whether provisions under the EPBC Act are necessary for environment heritage values as well in the face of existing management plans to protect these exact same values through the Director of National Parks and the control of the Minister. APPEA is not looking to water down industry's environmental commitments and already significant efforts to protect environmental and heritage values, nor seeking to stifle the ability to commence a listing of bona fide nominations where existing legislated protection provisions do not currently exist.