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Environmental and Other Approval Regimes

Introduction

8.1 Most resources exploration companies consider that sound natural resource conservation and environment protection practices are an integral part of industry operations. In meeting the needs of the Australian community, the industry generally recognises that it must operate safely and responsibly to protect and maintain the natural environment. Environmental compliance is now a fundamental aspect of exploration activities.

8.2 Access to land for exploration and development is critical to the present and future operations of the Australian minerals industry. Industry groups consider that while access to land and resources is critical, the timeframe within which any decisions are made, and ultimately access is granted, are also significant.

8.3 There is considerable concern over potential time delays, duplication of assessment requirements, largely the result of the overlap of Commonwealth and state legislation. While the introduction of the *Environment Protection and Biodiversity Conservation Act 1999* is welcomed by some sectors of the industry, others see it as contributing to the potential for duplication of environmental process, longer project approval timeframes and increased industry compliance costs.

8.4 The Committee examined three pieces of Commonwealth environmental and heritage legislation which have the greatest relevance to the exploration industry. These acts are:

- the *Environment Protection and Biodiversity Conservation Act 1999*;

- the *Australian Heritage Commission Act 1975*; and
- the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984.*

Environment Protection and Biodiversity Conservation Act 1999

8.5 The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the major environmental legislative mechanism available to the Commonwealth. Under the EPBC Act, the Commonwealth focuses on matters of national significance and no longer becomes involved in matters that are state responsibilities. The EPBC Act provides for up-front decisions on whether or not the Commonwealth will be involved in environmental assessment and approval of a project. It also provides legislated timeframes within which Commonwealth decisions must be made.[1]

8.6 The EPBC Act's objects are broad and include the protection of matters of national environmental significance, the promotion of ecologically sustainable development, the conservation of biodiversity and cooperative approaches to the protection and management of the environment. Under the EPBC Act, Commonwealth involvement in the environmental assessment and approval process is triggered only by projects or activities that are likely to have a significant impact on matters of national environmental significance. Such matters cover, among other things:

- the Commonwealth marine environment (generally outside 3 nautical miles from the coast);
- World Heritage properties;
- Ramsar wetlands of international importance; and
- nationally threatened species and ecological communities.

8.7 If an action such as exploration, or more likely production, is expected to have a significant impact on the environment, it must be referred to the Minister for the Environment and Heritage for a decision on whether it will require approval under the EPBC Act. An impact is defined broadly to include social, economic and cultural impacts on the environment. If the Minister decides that an action will require approval, an environmental assessment of the action must be carried out. After this step the Minister will decide whether to approve the action, and what conditions if any, to

1 Environment Australia, *Submission No. 74*, p. 1006.

impose. The Act similarly applies to actions by the Commonwealth, as well as actions in relation to Commonwealth land.

8.8 Environment Australia advised that in practice, few minerals or petroleum exploration projects require approval under the EPBC Act. In the EPBC Act's first two years of operation a total of 51 mineral and petroleum exploration projects have been considered. Forty-five of these were considered to have no significant impact so did not require assessment and approval. Fourteen did not require assessment or approval as they were conducted in a particular manner that avoided an adverse impact on the matters protected. Only one referral required assessment and approval.[2]

Bilateral Agreements with the States

8.9 A key objective of the EPBC Act is to promote a cooperative approach between the Commonwealth and state governments by using bilateral agreements to protect and manage the environment. Under the agreements, the Commonwealth accredits state environmental assessment processes and systems. This allows the Commonwealth to delegate to the states the responsibility for conducting environmental assessment and, in more limited circumstances, the responsibility for granting environmental approval under the EPBC Act.

8.10 Bilateral agreements are now in place with Tasmania, Western Australia and the Northern Territory and pending with the other jurisdictions (other than South Australia). South Australia is currently monitoring impacts of the legislation on industry, particularly costs associated with the preparation of referrals and any delays to project schedules.[3]

8.11 Environment Australia considers that bilateral agreements make the assessment processes easier because they ensure that:

> where there is a controlled action under the EPBC Act and it is done under the bilateral agreement, there will only be one assessment process. Companies will go to a state or territory environment agency, run through the assessment process, and then at the end of the day that report will go to the state or [T]erritory minister and to the Commonwealth minister for consideration. There is no duplication of activity at all.[4]

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2 Environment Australia, *Submission No. 74,* p. 1006.

3 Government of South Australia, *Submission No. 70,* p. 944.

4 Environment Australia, *Transcript, 11 November 2002*, p. 261.

8.12 The EPBC Act was originally viewed by the resources industry as an unnecessary overlay on existing state environmental management processes.[5] The Committee believes that much of the initial criticism of the Act arose before the bilateral agreements had been entered into with the states.

8.13 While the industry still has reservations concerning the operation of the EPBC Act, they have accepted that some Commonwealth involvement is now part of the approval processes. A survey of petroleum exploration and development companies showed that, in 2000, 100 per cent of small companies and 92 per cent of large companies saw the EPBC Act as a cause of operational uncertainty. The Australian Petroleum Production and Exploration Association (APPEA), which conducted the survey, advised that this situation has improved as more administrative and regulatory arrangements for the Act have been disseminated.[6]

8.14 Some change in attitude to the EPBC Act is illustrated by the comments of a representative of AMEC, who stated that initially there had been difficulties with administrative arrangements and procedures in Western Australia but that the signing of a bilateral agreement:

> is welcome as it provides some framework now for the Commonwealth and the state to try and streamline the processes; instead of an explorer or a mineral developer having to satisfy two processes, there will be greater cooperation between the two.[7]

8.15 While the EPBC Act has only been in operation for a relatively short time, the Committee is satisfied that proponents will no longer be subject to more than one assessment process.

Issues of "Significant Impact"

8.16 Different guidelines have been prepared to assist different industry sectors determine whether actions by them are likely to have a "significant impact" on a matter of national environmental significance and so require referral to the Commonwealth Environment Minister. Those guidelines for the exploration industry provide detailed guidance on whether and in what circumstances exploration – both terrestrial and offshore - is likely to

5 Association of Mining and Exploration Companies, *Submission No. 30,* p. 365; Government of South Australia, *Submission No. 70,* p. 964.

6 Australian Petroleum Production and Exploration Association Ltd, *Submission No. 39,* p. 496.

7 Australian Petroleum Production and Exploration Association Ltd, *Transcript, 30 October 2002,* p. 137.

have a significant impact on a matter of national environmental significance.[8] More detailed guidelines are also available to cover the impact on cetaceans of offshore seismic exploration.[9]

8.17 AMEC notes that the term "significant impact", although used extensively in relation to matters of national environmental significance, is not defined in the EPBC Act. AMEC is concerned that the lack of a definition, potentially allows the Commonwealth to expand its involvement in state environmental approval processes. The concomitant danger is increased investor sovereign risk levels, promote developer uncertainty, increase compliance costs and lengthen project timeframes.[10]

8.18 In April 2003, the Australian National Audit Office (ANAO) conducted a performance audit of the operation of the EPBC Act, including compliance. The ANAO noted that a number of "stakeholders" were confused to a degree about the concept of "significance" and had commented that the guidelines were not specific enough to industry sectors or particular circumstances to allow a decision to be made on whether an action was likely to have a "significant impact". The ANAO concluded that the large number of projects which were referred, but were determined not to be environmentally significant, combined with the concerns of "stakeholders", suggests that more specific guidance to assist proponents was needed.[11]

8.19 AMEC's experience supports these findings. The Association observed that while some projects would be large offshore exploration programs, which may require referral:

> A lot of advice given to smaller explorers is: when in doubt, refer it. Many of these have been for very small exploration programs which have involved very low levels of ground surface disturbance; therefore, the point of referral having to go through

8 Environment Australia web site, *EPBC Administrative Guidelines on Significance*, http://www.ea.gov.au/epbc/assessmentsapprovals/guidelines/index.html, accessed 2 September 2003.

9 Environment Australia web site, *Guidelines on the Application of the Environment Protection and Biodiversity Conservation Act to Interactions Between Offshore Seismic Operations and Larger Cetaceans*, http://www.ea.gov.au/epbc/assessmentsapprovals/guidelines/seismic/index.html, accessed 2 September 2003.

10 Association of Mining and Exploration Companies, *Submission No. 30,* p. 309.

11 Australian National Audit Office (ANAO), *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No 38, 2002-2003, p. 39.

that extra red tape, with delays being caused while there has been a response on those referrals, can be seen as being unwarranted.[12]

8.20 In order to improve the consistency and quality of referrals made under the EPBC Act, the ANAO recommended, among other things, that the sector guidelines provide more specific information so as to allow an initial decision on whether or not a project is "environmentally significant".[13] Environment Australia agreed to this recommendation.[14] The Committee is also pleased to note that Environment Australia is conducting a formal review of the guidelines. The Committee sees this as an important commitment by Environment Australia and, accordingly, makes the following recommendation.

Recommendation 24

8.21 **Environment Australia consult with the resources industry as a matter of urgency to finalise sufficiently detailed sectoral guidelines for mineral exploration activity – both terrestrial and offshore - contained in the *EPBC Act Administrative Guidelines on Significance.***

8.22 The Committee also notes that Environment Australia has set up an "Industry Link" page on its website to bring together information sources, references and contacts at all levels of government for industry sectors dealing with environmental approval processes. At the time of printing, this website was a pilot study and only providing advice for the farming industry.[15] The Committee hopes that "Industry Links" will also be extended for the resources exploration industry.

Offshore Exploration

8.23 Exploration activities in Commonwealth waters are controlled by the *Petroleum (Submerged Lands) Act 1967* (P(SL)A). The associated Petroleum (Submerged Lands) (Management of Environment) Regulations 1999 require an approved environmental plan to be in place before a petroleum activity, including exploration, can commence.[16] This environmental plan is required whether or not the Environment Minister also needs to give approval under the EPBC Act.

12 Association of Mining and Exploration Companies, *Transcript, 30 October 2002,* p 137.

13 ANAO, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* pp 36-40, 46.

14 ANAO, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* p. 24.

15 Environment Australia web site, *Industry and the EPBC Act - Information and relevant links,* http://www.ea.gov.au/epbc/industrylinks/, accessed 2 September 2003.

16 *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999,* Division 2.1.

8.24 Environment Australia and the Department of Industry, Tourism and Resources endeavour to harmonise the environmental approval processes required by the P(SL)A and EPBC Act. However, both Woodside Energy and ExxonMobil comment on the duplication of effort caused by meeting the requirements of the two Acts and urged that a single assessment process for environmental approvals be implemented.[17]

8.25 Aside from the duplication, Woodside Energy also comments on the delays in gaining approval for actions under the EPBC (including gaining a cetacean interference permit). The company notes that environmental approvals can be gained in "a significantly shorter time frame" under the P(SL)A than they can under the EPBC Act.[18] The time delays can be critical for companies trying to plan exploration activities and make use of windows of opportunity provided by the availability of rigs and vessels:

> Because of the long lead time for granting formal environmental approvals, proponents are often required to submit documentation before a detailed basis of design has been prepared, drill targets known, (seismic) survey design finalised and before the preferred concept, vessel or drilling rig has been selected. Once approvals have then [been] granted, it is then very difficult for the proponent to change aspects of the scope or design, without risking further assessment and schedule or financial risk.[19]

8.26 The Committee considers that there should be a single assessment process, or at least complementary process for achieving environmental approvals under both the EPBC and P(SL)A. Accordingly, the Committee makes the following recommendation.

Recommendation 25

8.27 **The Minister for Environment and Heritage and the Minister for Industry, Tourism and Resources amend the environmental approval processes under the *Environmental Protection Biodiversity Conservation Act 1999* and the *Petroleum (Submerged Lands) Act 1967* (and associated regulations) to ensure the consistency and harmonisation of requirements.**

17 Woodside Energy, *Submission No. 44*, p. 547; ExxonMobil Australia, *Submission No. 18*, p. 136.

18 Woodside Energy, *Submission No. 44*, p. 547.

19 Woodside Energy, *Submission No. 44*, p. 547.

Australian Heritage Commission Act 1975

8.28 Under the *Australian Heritage Commission Act 1975*, (AHC Act) places of cultural significance, including sites, areas and buildings, are entered onto the Register of the National Estate.

8.29 Practice shows that exploration companies have been able to meet any heritage protection requirements on those rare occasions when exploration activity has been affected by the provisions of the AHC Act.[20]

8.30 At the time of this report's adoption there are two bills before Parliament to revoke the Australian Heritage Commission Act. These are the Australian Heritage Council Bill 2002 and the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002. The effect of these bills will be to establish a National Heritage List comprising places of outstanding value. Places on the list will be provided with protection under the EPBC Act as being of national environmental significance.

8.31 The Minerals Council of Australia noted that many Australian jurisdictions are currently reviewing their cultural heritage legislation. The Council asserts that it is critical that the State and Commonwealth Governments work together to ensure that there is no overlap or duplication of assessment requirement for exploration applications with regard to cultural heritage.[21] The Committee agrees and believes that this is a matter that might be included in discussions by the Ministerial Council on Mineral and Petroleum Resources, although matters will depend on the passage of the two bills through Parliament.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

8.32 The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Heritage Protection Act) aims to preserve and protect from injury or desecration areas and objects in Australia or in Australian waters that are of particular significance to Indigenous people. Since the Act was passed there have been a total of 38 resources exploration applications over 19 places (several applications can apply over one place). The Act is only invoked when an Indigenous person or someone representing an

20 Environment Australia, *Submission No. 74*, p. 1014.

21 Minerals Council Australia, *Submission No. 81*, p. 1183.

Indigenous person makes an application for protection where there is a place which is threatened.[22]

8.33 No Minister has made a declaration to stop or hinder resources exploration under the Heritage Protection Act.[23]

8.34 AMEC asserts that some individuals who have failed to prevent progress of a project using a state Act have resorted to using the Heritage Protection Act to create delays. While to date only isolated occasions have arisen, the Association believes there needs to be a review of the interfaces between the Commonwealth legislation and state Acts to ensure that duplication of process and conflict requirements are removed.[24]

8.35 At the time of its appearance before the Committee, Environment Australia was not aware of any of these duplicate assessments which involved Commonwealth agencies, but conceded some may be occurring under State processes. Environment Australia observed that:

> There is not a lot we can do in relation to state and territory legislation, but we can make our own legislation as transparent as possible…. If there is a Commonwealth involvement in an issue and the state is also involved, we can use a bilateral agreement to streamline that. But when the states are doing their own thing… under their own legislation, really there is nothing we can do about that.[25]

8.36 The *Aboriginal and Torres Strait Islander Heritage Protection Bill* 1998 was intended to amend the Aboriginal and Torres Strait Islander Heritage Protection Act. The Bill intended to provide for Commonwealth accreditation of state regimes for Indigenous heritage protection, according to a set of national standards. Where the Commonwealth accredits a state regime, access to the Commonwealth Act would be subject to a "national interest" test. The Bill failed to pass the Senate, but will be reintroduced into the Commonwealth Parliament. [26]

8.37 Should such an amendment be made to the Heritage Protection Act, it could clarify the respective roles of the Commonwealth and the states and ensure that duplication and overlap are diminished.

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22 Environment Australia, *Submission No. 74,* p. 1014.

23 Environment Australia, *Submission No. 74,* p. 1014.

24 Association of Mining and Exploration Companies, *Submission No. 30,* p. 317.

25 Environment Australia, *Transcript, 11 November 2002,* p. 266.

26 Australian Heritage Commission web site, *Annual Report 2001-02, Chapter 4, The Condition of the National Estate*, http://www.ahc.gov.au/infores/publications/generalpubs/annual-report2002/chapter4.html, accessed 2 September 2003.

8.38 The Committee is aware that there were a number of clauses in the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 that were controversial and beyond the scope of this inquiry. However, the Committee strongly encourages the Commonwealth and states to ensure that their legislative and administrative arrangements for protecting Indigenous heritage are consistent and harmonised.

Co-ordinated Environmental and Heritage Assessment Processes

8.39 In a competitive global economy, a commercial advantage may be gained by ensuring regulatory consistency between a country's national, state or local jurisdictions. Exploration companies, industry associations and various levels of government pointed to considerable disparity between state-based resources industry regulatory regimes within Australia.

8.40 Modern resources explorers claim they are environmentally responsible and that early stage exploration is largely a non-intrusive activity. Environmental compliance is now a fundamental aspect of companies' exploration activities and most have adopted processes and procedures that enable exploration to proceed relatively impact-free. APPEA argued that standard industry activities, carried out in accordance with appropriate guidelines, should be exempt from the requirement to seek specific approvals.[27]

8.41 In some jurisdictions, the bulk of the environmental assessments generally relate to production activities and only to a very minor extent to exploration activities, as in the Northern Territory for example:

> There is a standard set of environmental conditions which we place on an exploration licence to ensure that the company behaves in a sensible manner, does not pollute the ground and so on. Compared with [production] activity they are minor.[28]

8.42 However, the MCA saw environmental legislation as being increasingly used as *de facto* decision making processes that have the potential to significantly restrict or prohibit the granting of access to land.[29] The Victorian Minerals and Energy Council saw the industry exposed to a

27 Australian Petroleum Production and Exploration Association Ltd, *Submission No. 39,* p. 479.

28 Northern Territory Government, *Transcript, 9 October 2002,* p. 10.

29 Minerals Council Australia, *Submission No. 81,* p. 1146.

fragmented bureaucracy that pursued a wide variety of agendas including "outright anti-development behaviours".[30]

8.43 As the Committee has already indicated at several points in this chapter, it is sympathetic to calls for greater inter-agency cooperation and harmonised approvals processes. Potentially, arrangements could include:

- "one window into government" for petroleum and minerals explorers to deal with state agencies, local government, Commonwealth Government and community consultation;
- common approvals and regulation practices for all exploration (and production) industries; and
- approval processes that involve guaranteed time frames and deadlines.

8.44 The Queensland Government believes that the Ministerial Council on Mineral and Petroleum Resources is the appropriate body to address the need for reform. The Council's objectives include:

- progressing constructive and compatible changes to the basic legislative and policy framework for the sustainable development of minerals and petroleum resources; and
- improving co-ordination and, where appropriate, the consistency of policy regimes.[31]

8.45 It is clear to the Committee that the need for rigorous environmental performance is well accepted by the resources industry. Most resources companies have in place comprehensive environmental management systems and are well placed to meet legislative demands. Nonetheless, in a globally competitive environment, the costs in time and money of navigating inconsistent or duplicated environmental and cultural heritage regimes within a national jurisdiction may help tip the balance in favour of exploration investment in another country. Accordingly, the Committee concludes this chapter by making the following recommendation.

Recommendation 26

8.46 **The Minister for Environment and Heritage and the Minister for Industry, Tourism and Resources harmonise Commonwealth, state and Northern Territory environmental and cultural heritage regulatory regimes as they affect the resources exploration (and production) industry.**

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30 Victorian Minerals and Energy Council, *Submission No. 63*, p. 866.

31 Queensland Government, *Submission No. 77*, p. 1048.