3

Managing interactions

3.1 Managing interactions between various stakeholders in Commonwealth offshore areas is the cornerstone of the proposed legislation. Creating a balance between the needs of the petroleum industry and the GHG storage industry is critical to the success of the legislation and the future viability of both industries. The legislation attempts to strike this balance in a range of ways, including:

- Protecting the pre-commencement rights of petroleum operators;
- Applying a 'no significant impact' test to interactions between pre-commencement petroleum title holders and GHG operators;
- Giving equal standing to the post-commencement rights of petroleum and GHG operators;
- Applying a 'public interest' test to interactions between post-commencement title holders;
- Imposing obligations under 'key operations' where titles overlap in a post-commencement world; and
- Regulating for the discovery of petroleum during GHG operations.

Protection of pre-existing rights

3.2 The Committee notes that the protection of pre-existing rights is one of the fundamental, and most contentious, aspects of the Bill. The provisions of the Bill go to great lengths to protect the rights of existing petroleum title holders, an aspect of the bill considered essential by those title holders.

Where petroleum and GHG titles overlap, pre-commencement petroleum title holders are protected from potential impacts of GHG operations where GHG operators cannot demonstrate 'no significant risk of no significant impact', unless the respective title holders come to an agreement.

3.3 The rationale behind giving this level of protection to pre-commencement title holders is avoidance of sovereign risk. In evidence before the Committee, the Department of Resources, Energy and Tourism explained:

> The application of the public interest test on pre-commencement petroleum titles—and I will start with that—is an area that would cause us concern, mainly because of the introduction of sovereign risk. These petroleum companies have taken up tenure, invested money, knowing a certain business environment. To suddenly overlay that with a requirement that to now proceed to a production licence you are required to pass a public interest test, which you were not aware of when you took up your exploration tenure, not only would be of concern for petroleum investors looking at investing in Australia but may even be of concern for wider foreign investment. They would be concerned that suddenly their pre-existing rights can be subject to such tests. In a post-commencement world all entities that go in, be they GHG or petroleum proponents, are aware that there will be public interest assessments right up to the point of their licence, and that gives us a lot more comfort. The companies will come in knowing that that is a hurdle that they have to jump.[1]

3.4 This position was endorsed by APPEA:

> A fundamental starting point for the industry in assessing any ghg injection and storage legislative and regulatory framework is the preservation of the rights of pre-existing title holders (referred to in the Bill as pre-commencement title holders). APPEA is of the very strong view that any ghg injection and storage-related legislation and regulation should protect the rights of pre-existing title holders and provide for the future growth and development of the Australian upstream oil and gas industry. APPEA has long recommended that any legislation should provide a framework where ghg injection and storage or other activities in an area only proceed if they do not impact on existing oil and gas operations or they permit an existing titleholder and a ghg injection and storage

1 Mr John Miller, DRET, *Transcript of Evidence*, 15 July 2008, p. 8.

> proponent to enter into commercial negotiation so that agreements between pre-existing title holders and ghg injection and storage proponents can be struck.[2]

3.5 On the other hand, potential GHG storage proponents regard this protection given to pre-commencement title holders as excessive and a significant hindrance to the take up of GHG storage in Australia. In evidence before the Committee, Mr Bounds of Monash Energy, a potential GHG storage proponent, explained:

> You would be aware that the bill defines pre-imposed commencement titles, and we would like to focus all of our comments upon pre-commencement titles because, in the area in which we are dealing—that is, the Commonwealth borders that are adjacent to Victoria—all the appropriate areas that we believe are suitable for carbon capture and storage are in fact covered by pre-commencement titles. As a consequence, there are no relevant areas that we consider to have high priority in the short term that would be covered by the post-commencement areas.[3]

3.6 Likewise, in its submission the Victorian Government argued that the position set out in the bill created a power of veto over GHG operations in key potential GHG storage areas:

> Where a CCS assessment permit and a pre-commencement petroleum title, or post-commencement production licence coexist, and if the responsible Minister determines that there is a 'significant risk' that the 'key' activities of a CCS proponent may have a 'significant adverse impact' on current or future petroleum operations in that area, in the absence of any agreement by the petroleum title holder to the conduct of those CCS activities, then the Minister must not approve the conduct of those CCS activities.
>
> Similar considerations apply to a CCS proponent wishing to convert its CCS assessment permit to a CCS injection licence, where the CCS assessment permit and a pre-commencement petroleum title or a production licence coexist.
>
> In these circumstances:
>
> - An incumbent petroleum operator is under no obligation to negotiate with, and can refuse to negotiate with, a CCS proponent, regarding the proposed CCS activity. Accordingly,

2 APPEA, Submission no. 29, p. 3.

3 Mr Roger Bounds, Monash Energy, *Transcript of Evidence*, 15 July 2008, p. 51.

access to suitable storage reservoirs in the Gippsland Basin is effectively subject to a 'veto' by incumbent petroleum operators.

- The responsible Minister has no underlying power to determine that the CCS activity is, in fact, in the 'public interest', and should be allowed to be carried out on that basis.

The effect of this regime is to limit a CCS proponent's ability to obtain access to, and property rights in, key CCS storage areas.[4]

Post-commencement titles

3.7 The obligations placed upon both petroleum and GHG operators in a post-commencement environment were also the subject of much comment by proponents of both industries. In its submission, APPEA expressed concern about the impact on the petroleum industry of the uncertainties invested in post-commencement titles:

> As APPEA understands it, approval of key petroleum operations are required where any "key petroleum operation" in respect of a post-commencement petroleum title will have a "significant adverse impact" on ghg injection and storage operations that are being, or could be, carried on under an existing ghg title. When approving key petroleum operations the responsible Commonwealth Minister may impose further conditions on the title.
>
> Even if petroleum operations are approved and no conditions are imposed on the title, the applicant will be required to go through a dual regulatory process - the existing Joint Authority/Designated Authority process for petroleum operations and the responsible Commonwealth Minister for any interactions with ghg operations.
>
> APPEA is concerned that this section of the Bill will provide an on-going disincentive to future upstream oil and gas activity through a dilution of legal certainty for oil and gas producers compared to the level of legal certainty associated with pre-commencement activities.[5]

3.8 Similarly, in its submission, ExxonMobil argued that:

> When approving key petroleum operations the Minister may impose further conditions on the title, for example, that wells are

4 Victorian Government, Submission no. 16, p. 6.

5 APPEA, Submission no. 29, p. 26.

> constructed to a standard that facilitates plugging of the wells in a way that will ensure suitability of the geological formation for storage of GHG. The "impacts" that these operations may have on GHG operations include, not only impacts at the level of geological formations but also physical interference on the surface with a GHG titleholder's operations.
>
> ExxonMobil holds significant concerns around this section of the Bill as it provides a disincentive to future petroleum activity and potentially makes petroleum companies underwrite a portion of the commercial costs of CCS proponents. In addition this provision also raises the need for clarity around the responsibility accruing to pre-commencement title holders in scenarios where already properly abandoned wells are not deemed suitable for the storage of GHG. The Bill remains silent on this matter.[6]

3.9 On the other hand, in their submission to the inquiry, the Australian Coal Association and Minerals Council of Australia highlighted the disabilities GHG proponents would operate under in a post-commencement world:

> The **process in relation to the declaration of a post-commencement petroleum tenement is not clear.** Similarly unclear are the processes to be put in place for the proactive assessment of SROSAI [significant risk of significant adverse impact] on GHGS operations arising from key petroleum operations, before a declaration is made. There is a level of redundancy in the current drafting in that, the Minister must first determine whether there is a SROSAI in relation to GHGS operations, then declare the petroleum tenement, then go through the process of considering SROSAI again together with agreements and public interest as applicable.
>
> Based on the existing provisions of the **Bill,** a post-commencement PEP, PRL or PPL holder can go about key petroleum operations without regard to any impact upon the operations of any GHGS titleholder (subject to the requirements of the Bill in relation to work practices), unless and until the petroleum tenement is declared by the Minister. This is **unlike key GHG operations where these automatically require Ministerial approval.**
>
> The ACA and MCA submit that the Bill should be amended to clarify the process by which the Minister declares post-commencement PEPs, PRLs and PPLs. One remedy would be

6 ExxonMobil, Submission no. 6, p. 17.

> provision for automatic deeming of such tenements as declared upon grant if they are within the proximity (the exact nature of which should be determined on a case by case basis) of a GHGS tenement, or the later deeming of such PEPs, PRLs and PPLs upon the grant of a GHGS title within a proximity (again to be determined on a case by case basis) of such petroleum titles. However this would not account for the fact that PEPs, PRLs and PPLs are also to be declared with reference to the SROSAI on operations under future GHGS titles. Accordingly the Minister should also have regard to whether the petroleum titles are granted over areas suitable to be accessed by emissions sources, or where there is the best suitability of GHGS storage formations.
>
> These provisions of the Bill require significant reconsideration, with **potentially the only workable solution being the application of requirements for approval of key petroleum operations to all post-commencement petroleum titles.**[7]

No significant impact test/Public interest test

3.10 The no significant impact test and the public interest test are the defining mechanisms for deciding the outcome of conflicts in the pre-commencement and post-commencement situations respectively. In evidence before the Committee, the Department of Resources, Energy and Tourism explained:

> Where there are pre-existing rights, the no-significant-impact test is the primary specific test. Where there are no pre-existing rights post commencement, and there are two activities that are at the same level of development and that wish to proceed to the next step, the public interest test would be applied if they could not both go together as they are configured or could be configured. It was the only way to separate two activities where only one could go ahead.[8]

The no significant impact test

3.11 The 'no significant impact test has raised concerns on two levels, the first being that until the criteria for what will constitute 'significant risk of a

7 ACA/MCA, Submission no. 27, p. 21.

8 Mr John Miller, DRET, *Transcript of Evidence*, 15 July 2008, p. 8.

significant impact' are released, industry cannot gauge their potential impact and therefore the probable outcome of the legislation. In its submission, BP stated:

> Pre-commencement petroleum titles and post-commencement petroleum production licenses are adequately protected only to the extent that the Significant Risk of a Significant Adverse Impact test applies. Therefore, it is essential that Parliament provides clarity on the definition of Significant Risk of a Significant Adverse Impact during the legislative process, by the publication of Regulations and the publication of policy guidelines.[9]

3.12 The submission recommended that the Government:

> Publish a definition of Significant Risk of a Significant Adverse Impact during the parliamentary process so that the impact of the Bill on petroleum rights can be fully considered.[10]

3.13 Similarly, from the perspective of GHG storage proponents, the lack of clarity in what constitutes significant risk and significant impact have been a cause for concern. In its submission, Monash Energy noted;

> It has already been observed above that the expressions 'significant risk' (S.6 and S.15F) and 'no significant adverse impact' are, respectively, poorly defined and not defined at all. The adverse impact test is applied for approval to carry on key greenhouse gas operations and approval for an injection and storage licence and relate to having no significant adverse impact on pre existing petroleum titles or a production licence (whenever issued). The test is a central feature of the greenhouse gas legislative regime.
>
> Significant risk has been 'defined' in S.15F as being applicable where a particular operation will have a 'large adverse impact' on other operations. It is not clear if this 'large' adverse impact is intended to be the same as a 'significant' adverse impact otherwise employed in the Bill or whether the use of 'large' was unintended. Where there is the risk of a large adverse impact, a significant risk arises, even if the probability of the large adverse impact is low.
>
> Again referring to Example A, where the probability of a significant adverse impact occurring would be low, in the context of the exemplar petroleum operation, it seems strange that even in such a situation the Minister would refuse approval for conduct of

9 BP, Submission no. 12, p. 5.

10 BP, Submission no. 12, p. 5.

> key greenhouse operations or the issue of a greenhouse injection licence.[11]

3.14 The submission recommended that:

> It is essential that the impact test be better defined. Consideration should be given to reducing the potentially harsh effect of defining an impact as a significant even where the probability is low.[12]

3.15 Concerns about significant risk and significant impact go beyond the question of definition, however. In its submission, the Victorian Government expressed concern that the impact tests would, in effect, give the petroleum industry a right of veto over GHG operations. The submission stated:

> The Bill would provide existing petroleum rights holders with unwarranted monopoly rights, effectively delaying the development of a viable commercial CCS industry for Victoria.
>
> The proposed 'impact test' does not operate in a manner which promotes investment in CCS. Put differently, a CCS proponent is always to be measured against a petroleum operator, in determining whether a CCS activity can be approved, and how such test is to be applied is not clear.[13]

3.16 The result would be a damaging delay to the development of GHG storage capacity:

> To encourage commercial investment in geological storage of carbon dioxide, the Commonwealth must provide a 'level playing field' with the petroleum industry, in particular regarding access and property rights. It must also recognise that there may be circumstances where it is in the national interest to progress a CCS operation, and to manage any resulting impact on petroleum operations.
>
> Pre-existing petroleum operators in the Gippsland Basin may be incentivised to delay CCS activities, as this will drive the use of gas in power stations over the use of coal. Providing equal opportunities for access to CCS storage areas will deliver a fairer outcome, consistent with the intent of the proposed CCS legislation.[14]

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11 Monash Energy, Submission no. 13, pp. 21–2.

12 Monash Energy, Submission no. 13, p. 22.

13 Victorian Government, Submission no. 16, p. 12.

14 Victorian Government, Submission no. 16, p. 4.

3.17 To remedy this imbalance between pre-commencement title holders and GHG storage proponents, the Victorian Government recommends extending the principle of 'public interest' to pre-commencement titles:

> Where a CCS assessment permit and a pre-commencement petroleum title, or post-commencement production licence coexist, and if the responsible Minister determines that there is a 'significant risk' that the 'key' activities of a CCS proponent may have a 'significant adverse impact' on current or future petroleum operations in that area, in the absence of any agreement by the petroleum title holder to the conduct of those CCS activities, then the Minister must not approve the conduct of those CCS activities.
>
> Similar considerations apply to a CCS proponent wishing to convert its CCS assessment permit to a CCS injection licence, where the CCS assessment permit and a pre-commencement petroleum title or a production licence coexist.
>
> In these circumstances:
>
> - An incumbent petroleum operator is under no obligation to negotiate with, and can refuse to negotiate with, a CCS proponent, regarding the proposed CCS activity. Accordingly, access to suitable storage reservoirs in the Gippsland Basin is effectively subject to a 'veto' by incumbent petroleum operators.
> - The responsible Minister has no underlying power to determine that the CCS activity is, in fact, in the 'public interest', and should be allowed to be carried out on that basis.
>
> The effect of this regime is to limit a CCS proponent's ability to obtain access to, and property rights in, key CCS storage areas.[15]

Public interest test

3.18 The public interest test is intended to mediate the interests of the petroleum and GHG storage industries under post-commencement titles. As explained by the Department of Resources, Energy and Tourism, the test is designed for those situations where agreement between parties cannot be reached and co-existence is not possible:

> Maybe I will begin my answer by saying that the public interest test applying in the post-commencement stage can almost be described as a last resort. We would hope that there would be means by which the need to apply this test would not occur—in other words, there would be some agreement between the parties

15 Victorian Government, Submission no. 16, p. 6.

> involved and so forth. It really only applies when there is some view that two activities—that is, petroleum exploitation and gas storage—cannot exist together, and then we would need to have a set of criteria that would be taken into account for what is the public interest. I am grappling towards saying to you that this is something where you will have to try and imagine situations which we hope do not occur and that this can all be worked out in a sensible fashion. But when it can not, then we just need a process that has to be gone through.[16]

3.19 As with the impact test, a pressing concern about the public interest test is the lack of information currently available as to what criteria will be exercised in determining the 'public interest'. In its submission, the Victorian Government stated:

> The Bill seeks to introduce a number of 'public interest' tests.
>
> There are currently relatively few circumstances in the *Offshore Petroleum Act 2006* which require 'public interest' or 'national interest' considerations to be taken into account. The Bill will significantly increase the number of circumstances in which consideration of the 'public interest' must be made by the responsible Minister.
>
> As a threshold issue, the Bill does not seek to provide guidance on what constitutes 'the public', or indeed, what should be taken into account when considering what may be, and what may not be, in the 'public interest'.[17]

3.20 In its submission, Monash Energy recommended:

> A clear definition of what constitutes public interest is required and should be inserted into the Bill, not subordinate legislation or guidelines. Consistent with the need to achieve proper balance, the Bill should provide that, when considering the public interest, the Minister should have regard to the public's interest in the development and management of offshore natural resources and the public's interest in achieving mitigation of greenhouse gas emissions through cost effective development and management of offshore storage. This definition recognises that the public interest is twofold.[18]

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16 Mr John Hartwell, DRET, *Transcript of Evidence*, 15 July 2008, p. 8.

17 Victorian Government, Submission no. 16, p. 6.

18 Monash Energy, Submission no. 13, p. 7.

3.21 In their submission, the Australian Coal Association and Minerals Council of Australia argued strongly for a variety of factors to be taken into account in defining the public interest test, including global leadership in CCS technology and energy security:

> The ACA and MCA submit that regulations or guidelines in relation to the meaning of public interest should explicitly address the importance of GHGS operations. In considering the relative weight of GHGS operations, the ACA and MCA submit that key factors are:
>
> (a) the desire of the Australian Government and the Australian community that Australia be a global leader in advancing the demonstration and deployment of CCS technologies, and in promoting the uptake of these technologies internationally;
>
> (b) the imminent introduction of an AETS;
>
> (c) the ongoing commercial operations of emissions-intensive generation and industrial processes, both in relation to sovereign risk for existing operations and the viability of future operations which provide for the most optimal use of fuel sources;
>
> (d) assuring a viable future for Australia's emissions intensive industries, in particular those which are large point sources of emissions capable of capture; and
>
> (e) the importance of a secure, reliable source of base load energy for the production of electricity for Australian homes and businesses.[19]

3.22 Aside from the need to define 'public interest', further consideration was also argued for extending the public interest test to management of interactions with pre-commencement titles. In evidence before the Committee, Mr Bounds stated:

> First of all, there is a regime for public interest already identified in the bill. We think that that probably needs to be strengthened, and the minister needs to be capable of applying it in a wider range of circumstances, including taking into account the release of acreage and, we suggested, as a deadlock-breaking mechanism. We suggest that he bring a public interest test into that forum when exercising that deadlock-breaking mechanism in a situation where a CCS proponent seeks access to acreage, seeks to undertake any one of the greenhouse gas assessment activities, applies for the

19 ACA/MCA, Submission no. 27, p. 20.

> retention lease or in fact moves all the way through to the injection licence.
>
> One of the questions put forward in the bill that the minister needs to ask is: do you have agreement from the existing petroleum licence holder? In the absence of that agreement, the minister should then be empowered to essentially break that deadlock. At the moment, one could envisage a situation where an existing petroleum licence holder refuses to come to the table and does not undertake such a commercial negotiation or such an approach and, as a consequence, it is difficult to resolve that without the minister compelling the parties to come together and then break the deadlock, if you like. So, what we would then say is that public interest, better defined, would bring into account things like the enabling of coal extraction onshore for the purposes of low-cost electricity generation, addressing issues of energy security and addressing ancillary benefits of developing CCS activities in manners which, potentially, are yet immature.[20]

3.23 Likewise, in evidence before the Committee, representatives of the Victorian Government argued for equal consideration on public interest grounds for GHG operators and petroleum operators under pre-commencement titles:

> The last proposal is the application of the public interest test. An equitable and competitive market for access to CCS storage formations is absolutely essential. The rights of CCS proponents should not be treated as subordinate. Accordingly, the Victorian government proposes that, where there is a significant risk of a significant adverse impact, the responsible Commonwealth minister should be empowered to make a determination on public interest grounds irrespective of whether the overlapping title was granted. Pre-existing petroleum titleholders should not be protected from the application of the public interest test. Where a decision is made on public interest grounds and the rights of the titleholders are in fact impacted upon as a result of that decision, the legislation should acquire the CCS proponent to compensate the other party either in accordance with the compensation agreement or, if there is no agreement, by a dispute resolution mechanism. This arrangement could be modelled on the

20 Mr Roger Bounds, Monash Energy, *Transcript of Evidence*, 15 July 2008, pp. 55–6.

> arrangements which apply on onshore Victoria for land access by a petroleum operator under the Petroleum Act 1998.[21]

3.24 On the other hand, in its submission ExxonMobil urged caution in the definition and application of any tests lest they have a negative impact on Australia's finite petroleum production capacity:

> Effectively, the Bill does not give precedence to either GHG or petroleum applications but provides for a "public interest test" to enable the Minister to prioritise activities where they cannot co-exist. ExxonMobil recommends that, at minimum, the Bill include a definition of "significant adverse impact" or guidance as to what might be considered "significant adverse impact" for use in developing regulations. We respectfully reserve our right to comment on this section in more detail when we have seen how the "public interest test" will be defined in future regulations.
>
> Keeping in mind the importance of energy to the Australian economy, this Bill should consider energy supply when evaluating CCS activities with petroleum activities. Petroleum operations have a relatively finite timeframe of activity and, if wisely executed, they will not affect the viability of future CCS operations. The reverse is not true of CCS operations, which can permanently preclude petroleum operations in an area.[22]

Enforcing agreements

3.25 One method identified for dealing with potential deadlocks between parties in dealing with overlapping petroleum and greenhouse gas title was granting the RCM power to enforce negotiation and agreement between the parties. In evidence before the Committee, Mr Bradley Page, CEO of ESAA, explained:

> I think that the underlying theme in our submission and our concern with the draft bill is that in fact pre-eminent rights sit with the petroleum industry and are much more greatly protected under this amendment than we think is warranted. Our point about much of this is that there are many opportunities for potential commercial arrangements to be struck between the petroleum industry and those who in the future may be seeking to

21 Mr Dale Seymour, DPI Victoria, *Transcript of Evidence*, 15 July 2008, p. 20.

22 ExxonMobil, Submission no. 6, p. 18.

> actually sequester carbon dioxide in adjacent fields or indeed in areas where the petroleum industry already holds leases. But much of the bill is structured in such a way that that sort of negotiation is not possible. The minister's hands are tied in certain circumstances because if there is 'a risk of'—and some of those other ill-defined terms—then the answer is no; there is no opportunity to actually negotiate between parties.
>
> So, really, our point is not that we think we should have pre-eminence in this issue. We think that the storage of carbon dioxide in offshore waters adjacent to some of these petroleum deposits needs, as far as possible, to be done on an equitable basis to enable commercial negotiation to go on and where ministers have discretion that the basis on which they exercise that is clearly defined, including the key terms. We have listed some of those already that lack definition and frankly, therefore, leave risk for both sides.[23]

3.26 A similar stance was taken by Anglo Coal in its submission. It highlighted the success of the agreement process used to mediate the interests of the coal and coal seam gas industries in Queensland:

> …the Draft Bill is scrupulous in its protection of existing petroleum rights, but is weak in its delivery of the other key ingredients for success. It has very limited scope for recognition of the national interest in reducing CO2 emissions, and clearly does not provide a level playing field for CCS developers and petroleum producers.
>
> While there appears to be recognition that co-development agreements between overlapping tenement holders will be required for the regime to function successfully, there is no process prescribed in the Draft Bill for the development of those arrangements, nor is there provision for Ministerial determination in the event that over-lapping tenement holders do not agree on voluntary arrangements.
>
> The Draft Bill fails to provide a clear basis for determination of conflicts arising in the event of competing petroleum and CCS priorities. As experience in Australia and elsewhere suggests, this is not a matter that should be left to Regulation.[24]

23 Mr Bradley Page, ESAA, *Transcript of Evidence*, 16 July 2008, p. 27.

24 Anglo Coal, Submission no. 24, p. 4.

3.27 In their submission, the Australian Coal Association and Minerals Council of Australia also argued for agreement making powers modelled on legislation in Queensland and New South Wales:

> The key features of the Queensland CSG regime are that parties with competing natural resource interests are required, firstly, to exchange relevant information and secondly, consult or negotiate with each other with a view to achieving the best resource management outcome, including safety management arrangements.
>
> Whilst the ACA and the MCA support an agreement-making facilitation scheme such as that included in the Qld P&G Act, it does not consider that this scheme is optimum in its entirety, given that this scheme does not make any provision for a circuit breaker where the holder of an ML refuses to enter into an agreement with the PL applicant.
>
> The model under the NSW Petroleum Act is not by itself sufficient for managing the complex interactions between offshore petroleum and GHG title holders. However it is submitted that one useful aspect of this model is that it provides an express deadlock-breaking mechanisms where private parties are unable to resolve their differences by themselves.
>
> The ACA and MCA submit that **a mandatory process for parties with competing GHGS and petroleum interests to seek to reach agreement is likely to facilitate a more effective coordination arrangement.** It would also **better form the basis of resource allocation decisions by the Minister or the JA** (as the case may be) where agreements are not achieved (in those circumstances where the Minister or JA retains a discretion). The ACA and the MCA submit that the Bill be amended to include a process to facilitate agreement making.[25]

Data sharing

3.28 The issue of data sharing is a difficult and controversial one. Exploration and production data play an important role in identifying areas suitable for GHG storage. More importantly, such data will play an important role in resolving conflict between GHG storage proponents and petroleum

25 ACA/MCA, Submission no. 27, p. 35.

operators in areas with overlapping tenure. A considerable amount of exploration and production data is available on the public record.

3.29 According to petroleum operators, the publicly available data is sufficient to meet the needs of both GHG and petroleum operators in identifying potential GHG storage sites. In evidence before the Committee, Mr John Torkington, Senior Advisor, Climate Change Policy with Chevron Australia, stated:

> I know there has been a lot of discussion in the last few days about access to data and the oil and gas industry having some sort of inherent competitive advantage in terms of bidding for acreage. I think those comments are misguided and do not seem to recognise that all exploration data in the offshore region becomes publicly available in a period of time—the only data that does not is production data. But, if you are looking at bidding on acreage for greenhouse storage, the data sets that will be available for either the oil and gas industry or the greenhouse storage industry should be much the same.[26]

3.30 Mr Mark Nolan, Chairman of ExxonMobil Australia, also highlighted the public release of data:

> The geotechnical data that we gather, recognising that we have drilled over 600 wells in Gippsland, is shared and has been shared with Geoscience Australia from the very start of the operations. So as we drill wells today and obtain logs and reservoir information that is all shared with Geoscience Australia.[27]

3.31 He continued:

> If you take a couple of examples, well data is public access within one year of that data being submitted to the government. Seismic data in the licence areas is available two years after it has been acquired. So within the Gippsland Basin, for example, we have spent over $80 million in the last five or so years on 3D seismic, and that having gone past, in the licence areas, that two-year period, that is in the public domain.[28]

3.32 However, the 'data imbalance' between existing petroleum operators and potential GHG storage proponents remains a significant issue for GHG

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26 Mr John Torkington, Chevron, *Transcript of Evidence*, 17 July 2008, p. 51.

27 Mr Mark Nolan, ExxonMobil, *Transcript of Evidence*, 15 July 2008, p. 44.

28 Mr Mark Nolan, ExxonMobil, *Transcript of Evidence*, 15 July 2008, p. 44.

storage proponents, and has been identified as a major obstacle to potential GHG initiatives. In its submission, the CO2CRC noted:

> An existing holder of an Exploration & Production (E&P) licence who has undertaken an extensive program of data collection, perhaps including production data, will always be in the position of having more technical information available than an incoming storage proponent is likely to have. Petroleum exploration requires the spending of large amounts of money—perhaps hundreds of millions of dollars—in order to identify and exploit petroleum resources. It is difficult to imagine that a storage proponent would be willing to spend equally large sums of money acquiring the same (or comparable) data sets without a prior guarantee that the lease area would be available for storage. Therefore the level of technical understanding that the "sitting" petroleum company will have, is likely to be better than that of a storage proponent that does not have access to the same level of technical data.
>
> If a storage permit is granted, the proponent will need to obtain and interpret sufficient data to ensure that a storage site is adequately characterized and its useable storage capacity confidently predicted. It would obviously be more cost effective if this could be done in collaboration with (or by) existing E&P data holders. This would also serve to greatly accelerate assessment of storage prospectivity. Indeed, lack of access to data could greatly impede the use of CCS as a mitigation option, with negative effects on the attaining of national emission targets and/or the development of new business opportunities that rely on CCS.
>
> Access to good geological and geophysical data in a timely and cost effective manner will be crucial to the success of offshore storage. The draft legislation offers no specific incentive for existing data holders (usually E&P companies) to make their data available. There is a "public interest' clause in the legislation but it is doubtful that this could be used to make existing commercial-in-confidence data available to a third party. Access to data could represent a significant hurdle to the development of offshore storage. This hurdle will be exacerbated by the fact that world wide there is a shortage of people with the necessary skills to assess areas for their storage potential, as well as considerable delays in drilling wells or undertaking seismic surveys.[29]

29 CO2CRC, Submission no. 1, pp. 4–5.

3.33 In their submission, the Australian Coal Association and the Minerals Council of Australia also highlighted the need for access to data, while acknowledging the commercial-in-confidence nature of much of the data required. They urged commercial agreements as a solution to this issue:

> It is imperative that GHGS title holders and applicants have reasonable access to the data of petroleum title holders that may be impacted upon by GHGS operations. A lack of access to data not only poses the potential for the procedural rights of GHGS holders and applicants to be diminished in the various processes involving an assessment of SROSAI and the site plan process, but could also leave the GHGS titleholder exposed to losses and liabilities in the future in the event the issue of a site-closing certificate is deferred.
>
> The ACA and MCA acknowledge the commercial value and sensitivity of data held by petroleum title holders. However it is possible to safeguard the commercial value and sensitivity of the data as well as allow GHGS title holders and applicants access necessary for their purposes. The ACA and MCA recommend the Bill make **provision to allow the** GHGS **party** access **to the petroleum data for the limited purposes of assessing and making submissions on SROSAI and the preparation of site plans.** This should also be made subject **to the** GHGS **party having signed a** strict **confidentiality** agreement in relation to the petroleum data.[30]

3.34 In evidence before the Committee, the Department of Resources, Energy and Tourism indicated that they would be reluctant to compel the release of commercially sensitive data, stating:

> We are a bit reluctant to insert any clauses associated with data access by one proponent or another proponent, mainly because the data is commercial data—a lot of money is being spent to obtain it. Also, it might be a bit of a remote concern but what would stop a GHG proponent putting in some form of slightly silly or unusual proposal in an effort to obtain this commercially sensitive data and therefore go away and refine their project based on the data they have obtained? In essence they might have got tens of millions of dollars worth of leg-up. So it would be the role of the technical regulator to confidentially assess the data in order to make a determination on the most significant impact. I know that is difficult for a new operator in an established operator's realm but the alternatives seem less palatable.[31]

30 ACA/MCA, Submission no. 27, p. 19.

31 Mr John Miller, DRET, *Transcript of Evidence*, 15 July 2008, p. 5.

3.35 One solution identified was to leave access to data subject to commercial arrangements by agreement between interested parties, a practice already widespread in the resources sector. Mr Bob Davies, CEO of the Australian Energy Company, told the Committee:

> I think another area that is important—and I think we focused on it in our submission as well—is the whole issue of access to data. I would just make the point that I have been a signatory to a number of confidentiality agreements, some of them reciprocal, around exploration properties. It seems to me that if a non-petroleum company is going to go and poke a hole in a reservoir someplace and they have signed a confidentiality agreement with a petroleum company to provide that information, under the parameters of the confidentiality agreement it does not need to go into the public domain. The two businesses can agree together to have a confidentiality agreement. There is no reason why the information cannot be reciprocal and the rights to the information exchanged before holes are poked in the reservoir. I think those are perfectly logical solutions to the problems of information and data.[32]

3.36 Similarly, Mr Torkington observed that:

> I think there is a balance in how much data that is commercially sensitive to oil and gas producers you should allow to go forward. We see the existing open-file arrangements being applicable to both the oil and gas and the greenhouse storage industries going forward and we think that should remain. Where we get to more site specific issues, I think we would look towards the various industries working together. The experience we have had on Barrow Island is that very early on we started to engage with the oil operations there. We have had a number of agreements over the last few years dealing with things like exchange of data, access to existing facilities and those sorts of arrangements. Clearly those negotiations can be a bit one-sided. The oil and gas industry might have the data, but the way we have structured it is that, if you show us your data that you have now, we will agree to disclose our data to you as we acquire it. That can have an advantage for the oil and gas industry. For example, if we go out and drill appraisal wells for geological storage, oil and gas proprietors are very keen to find if there is any oil and gas in that well. An early agreement on the exchange of data can address both those concerns. We think that those sorts of arrangements can be

32 Mr Bob Davies, AEC, *Transcript of Evidence*, 15 July 2008, p. 40.

> relatively easily accommodated around the more commercial negotiations that the two parties should look to undertake.[33]

GHG and the discovery of petroleum

3.37 Another contentious issue, one affecting both the GHG storage industry and the petroleum industry is the discovery of petroleum during GHG operations overlapping pre-commencement titles. While the bill, as drafted, protects such discoveries for future exploitation, the petroleum industry is concerned that it gives no direction to the minister to make these findings available to the affected petroleum operator.

3.38 In its submission, APPEA noted:

> In addition, APPEA notes the Bill requires a ghg injection and storage proponent to advise the Minister of any hydrocarbon discovery but is not clear as to the Minister's obligation to advise the petroleum title holder with respect to any find. APPEA recommends the requirements of the Minister in such a scenario be clarified, as petroleum 'discovered' within an existing petroleum title clearly falls within the ownership of the petroleum title holder(s). Given that a ghg injection and storage proponent has no legal right to explore for petroleum, the intellectual property in the discovery should not reside with the proponent and should be made available to the holder of any existing petroleum title over the acreage. Should no petroleum title holder exist, intellectual property rights should reside with the Commonwealth. These data submission and release provisions should mirror the requirements that currently exist under the OPA for the petroleum industry.[34]

3.39 From the point of view of potential GHG storage operators, this provision creates a great deal of uncertainty. In its submission, BP Australia noted:

> In areas with pre-commencement hydrocarbon titles, the Minister can cancel or suspend injection for all or part of the injection license indefinitely if there is a new discovery of petroleum which the Minister considers is commercially viable or likely to become commercially viable in the GHGS assessment area.
>
> In post-commencement areas, the Minister has power to decide whether or not any accidental hydrocarbon discovery takes

33 Mr John Torkington, Chevron, *Transcript of Evidence*, 17 July 2008, p. 52.

34 APPEA, Submission no. 29, p. 4.

> precedence over existing GHGS activity i.e. our understanding is that the Minister could stop GHGS activity and subsequently release the area for hydrocarbon exploration and production. This introduces an unreasonable level of uncertainty for the GHGS operator. The GHGS may have been operating for many years and have made a substantial investment (underpinned by an agreed Site Plan), only to be instructed to cease because of the unexpected discovery of hydrocarbons.[35]

3.40 BP recommended that:

> There should be a Statute of Limitations after which an operating GHGS project is no longer vulnerable to being directed to cease work. Consideration should be given to whether the approval of a site plan is the appropriate time for this Statute to be enforced.[36]

3.41 In their submission, the Australian Coal Association and Minerals Council of Australia held similar concerns. They argued that:

> The Bill should be amended to make provision for the holder of a GHGS IL to be able to apply for a special GHGS HL in circumstances where there is a temporary lack of supply of GHGS to inject and store, or where the Minister gives a direction where there has been a discovery of commercially viable petroleum in an area of overlap between a GHGS IL and a pre-commencement petroleum title.[37]

Committee conclusions

3.42 The Committee believes that the draft Bill largely succeeds in attempting to strike a balance between the entitlements of petroleum operators and GHG storage operators. Protection of pre-commencement rights is essential, as is the legal balance struck between GHG storage and petroleum production in post-commencement titles. However, there is an argument for achieving an even finer balance between the industries as a matter of national interest.

3.43 While the maintenance of Australia's oil and gas exploration and production capacity is essential, so too is the capacity to capture and store greenhouse gases. Australia's energy security depends on both.

35 BP, Submission no. 12, p. 10.

36 BP, Submission no. 12, p. 11.

37 ACA/MCA, Submission no. 27, p. 29.

3.44 With this in mind, the Committee believes it is essential to find a mechanism which will allow both industries to co-exist and overlap. This mechanism could be found in the commercial agreements between different industries within the resources sector in the management of competing interests, and the power to facilitate and direct such agreements found in legislation.

3.45 The Committee believes that the responsible Commonwealth Minister should be able to direct petroleum and GHG operators to negotiate in good faith where titles potentially or actually overlap, and direct agreement where this is otherwise unobtainable. While this will represent some encroachment upon the pre-commencement rights of petroleum title holders in the limited sense that they will be required to negotiate in circumstances where previously they were free of any obligation, it will still enable them to control their own destiny. They will not be obliged to surrender any entitlement. Any potential or actual loss of amenity may be dealt with by commercial agreement. Moreover, this mechanism will overcome the problems associated with data sharing and the accidental discovery of petroleum. They too will be the subject of commercial agreement between he parties.

3.46 The Committee also notes the concern from virtually all sectors about the lack of definition of 'significant risk', 'significant impact' and 'public interest'. While believing that the proper place to define these terms is in the subordinate legislation, the Committee accepts that these issues are of such importance that stakeholders and the public should be able to see how these terms will be defined before the Bill itself passes into law. With this in view, the Committee recommends that the regulations and guidelines attending the legislation be made available for public and industry consultation before the passage of the Bill through the House of Representatives.

Recommendation 9

3.47 **The Committee recommends that the Bill be amended to provide for the responsible Commonwealth Minister to direct the parties to negotiate in good faith where there are potential or actual overlapping GHG storage and petroleum titles, under both pre-commencement and post-commencement petroleum titles; and that the responsible Commonwealth Minister be empowered to direct an outcome.**

Recommendation 10

3.48 **The Committee recommends that the regulations and guidelines attendant upon the legislation are released for stakeholder and public comment as a matter of urgency.**