
6 Environment and heritage

Key points

- In general, environmental regulation seeks to reduce harm to social, economic and natural environmental values, which can arise when development activities affect the natural or built environment.
- In each jurisdiction, environmental regulation of petroleum activities can include petroleum-specific environmental approvals and environmental approvals that are required for all development activities. Petroleum activities are potentially subject to four key areas of regulation:
 - environmental regulation of offshore petroleum activities under *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cwlth) regulations
 - national environmental and heritage regulation under the *Environment Protection and Biodiversity Act 1999* (Cwlth) (EPBC Act)
 - State and Territory environmental, conservation and planning regulations
 - Commonwealth, and State and Territory Indigenous heritage Acts
- There have been significant efforts to streamline and enhance the operation of the EPBC Act. Some concerns about its operation remain, such as:
 - insufficient information on environmental risks prior to the release of new acreage
 - the interaction and overlap of the EPBC Act with other environmental approvals
 - potential uncertainty generated by strategic assessment processes
 - recent perceptions by industry of greater intervention in, and inconsistency in, decisions regarding seismic surveys.
- There appears to be scope to enhance State and Territory environmental approval processes, particularly with regard to coordination and referral arrangements, approval timelines and agency resourcing.
- Other sources of potential unnecessary regulatory burden include:
 - overlap between Commonwealth, and State and Territory Indigenous heritage legislation
 - the potential for inconsistent interpretation and decision making for offshore environmental approvals
 - environmental offsets used as a condition of approval for some projects can appear arbitrary, open-ended and lacking in transparency.
- There are several emerging issues, including greenhouse and energy consumption reporting, the Carbon Pollution Reduction Scheme and decommissioning of petroleum facilities.

Australian, State and Territory Governments require that petroleum businesses conduct their activities in a manner that meets a high standard of environmental protection. In general, environmental regulation seeks to reduce harm to social, economic and natural environmental values, which can arise when development activities affect the natural or built environment.

6.1 Overview of environmental regulation

In each jurisdiction, environmental regulation of petroleum activities can include petroleum-specific environmental regulation, and environmental and planning regulation that applies to all development activities. Environmental protection regulation in most jurisdictions has the objective of promoting the principles of ecologically sustainable development (ESD) (box 6.1). The principles of ESD essentially seek to balance economic, social and environmental considerations in approving proposed development activities.

Box 6.1 Principles of ecologically sustainable development

Most jurisdictions through their environmental protection legislation have adopted *ecologically sustainable development* (ESD) as their guiding framework for environmental regulation. The guiding principles of ESD — consistent with the 1992 COAG agreement — require the effective integration of economic, social and environmental considerations in decision-making processes. ESD principles commonly adopted in environmental protection legislation include the:

- precautionary principle
- principle of intergenerational equity
- principle of conservation of biological diversity and ecological integrity
- principle of improved valuation, pricing and incentive mechanisms.

Further details on ESD principles are provided in appendix D.

Sources: Environmental Protection Act 1986 (WA); Environment Protection Act 1970 (Vic); Environment Protection and Biodiversity Conservation Act 1999 (Cwlth); RET (2008c).

The key environmental and heritage regulatory requirements for petroleum activities are based on the following Commonwealth, State and Territory Acts and regulations:

- In Commonwealth waters, petroleum activities must comply with the Petroleum (Submerged Lands) (Management of Environment) Regulations 1999 (Cwlth) under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cwlth) (OPGGSA) (referred to as OPGGSA Environmental Regulations in this chapter).

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- National environmental and heritage regulation under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) and the *Historic Shipwrecks Act 1976* (Cwlth).
 - Petroleum-specific environmental regulatory requirements in some States and Territories.
 - State and Territory environmental, conservation and planning legislation applying to activities in areas under State and Territory jurisdiction — a list of specific Acts is provided in appendix B.
 - State and Territory heritage and Indigenous heritage Acts.

6.2 Key regulatory requirements and processes

Petroleum activities assessed for environmental impact can include the full range of activities that are undertaken as part of a petroleum project. As defined under the OPGGSA Environmental Regulations, these activities include:

- seismic and other surveys and drilling
- facility construction, installation, operation, modification or decommissioning
- pipeline design, construction, operation, modification or decommissioning
- petroleum storage, processing or transport.

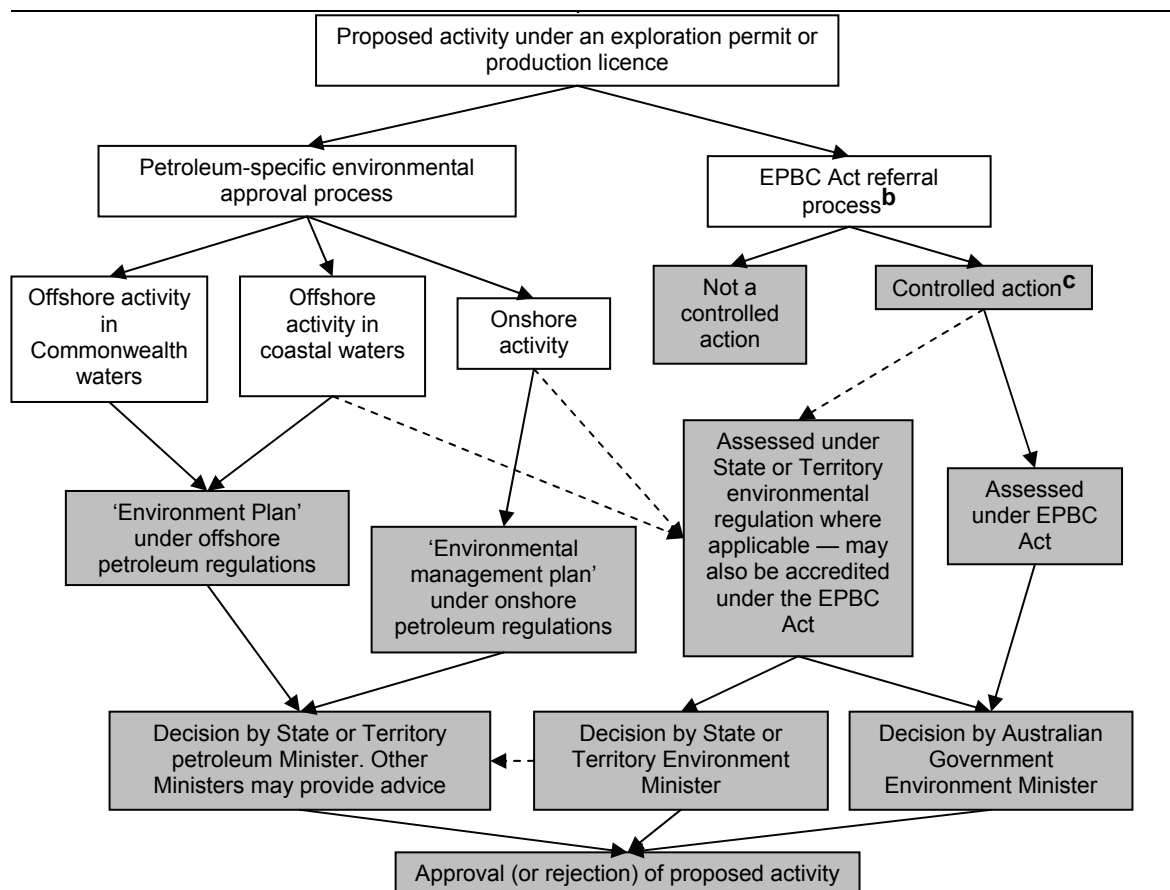
In all areas, environmental approvals for petroleum activities are required for ‘operational’ approvals — such as operational consents, planning and clearing permits, and works approvals. Further, onshore activities may also require environmental approvals for some ‘licence’ approvals, such as for onshore pipeline licences.

In general, petroleum projects that are likely to have a significant impact on the environment will be subject to an environmental impact assessment (EIA) in addition to petroleum-specific requirements. Depending on the nature and scope of the potential environmental impacts, EIAs will be conducted under State and Territory environmental (or planning) Acts, the EPBC Act, or in some cases both (see appendix D for further discussion of EIA processes and international comparisons).

There are several alternative or concurrent environmental and heritage approval processes that may be required for petroleum activities, including pipelines, depending on the magnitude of an activity’s potential impact and its location.

Figure 6.1 provides an overview of the key Australian Government, and State and Territory Government environmental approval processes.

Figure 6.1 **Key environmental approval processes^a**
Under petroleum and environmental regulation



^a Shaded boxes indicate a specific regulatory requirement or decision stage and a dashed arrow indicates a decision stage that may not always be required. ^b The EPBC Act refers to the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth). ^c A controlled action is one that is likely to have a significant impact on a matter of National Environmental Significance under the EPBC Act.

The potential environment and heritage approvals for petroleum activities include:

- an approved Environment Plan for activities in Commonwealth waters under the OPGGSA Environmental Regulations — required to gain ‘consents’ for all offshore petroleum activities
- referral, assessment and approval requirements under the EPBC Act to undertake an activity that may potentially affect a matter of National Environmental Significance (NES). The EPBC Act applies to any upstream petroleum activity, regardless of jurisdiction
- approval of an ‘environment plan’ for activities in coastal waters under State and Territory offshore petroleum (‘OPGGSA mirror’) regulations or guidelines, or

alternatively, approval of an ‘environmental management plan’ for onshore activities under State or Territory onshore petroleum regulations or guidelines

- an environmental impact statement and approval under ‘environment protection’ legislation for those activities that are likely to have a significant environmental impact. Depending on the jurisdiction, the applicable assessment process defined under ‘environmental protection’ legislation can be defined by various forms of environmental related legislation (for example, environmental protection Acts, environmental assessment Acts, or planning Acts)
- relevant State and Territory or local government planning permits, planning scheme amendments and building approvals for onshore areas
- where an activity is likely to affect Indigenous heritage values or sites, an approval under State and Territory or Commonwealth Indigenous heritage legislation
- where an activity may affect non-Indigenous heritage sites or values, approval under the EPBC Act — for World, National or Commonwealth heritage sites — or under State and Territory non-Indigenous heritage legislation.

Australian Government environmental and heritage regulation

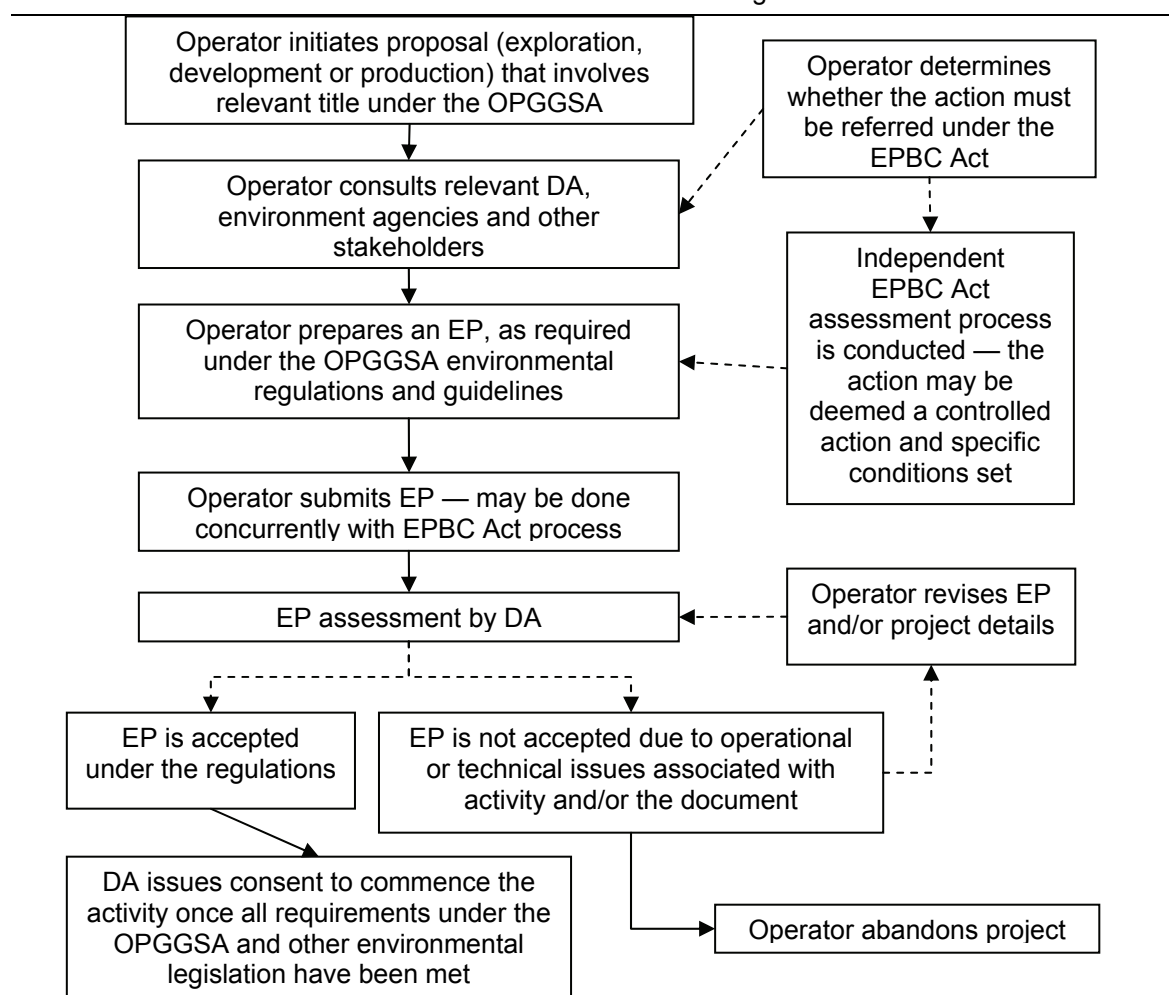
There are three main types of Australian Government environmental and heritage regulation applying to proposed petroleum activities: the requirements for Environment Plans under the OPGGSA’s Environmental Regulations (for activities in Commonwealth waters), regulation under the EPBC Act and Indigenous heritage legislation, and regulation of offshore decommissioning.

Environment Plans under OPGGSA regulation

In Commonwealth waters, title holders (holders of exploration permits, production and infrastructure licences) require an approved Environment Plan under the OPGGSA Environmental Regulations before an operator carries out an activity in a permit or licence area. This approval is termed a ‘consent’ under the regulations. Environment Plans are submitted to the relevant Designated Authority (DA) for processing and approval (figure 6.2 provides an overview of the process).

Figure 6.2 **Overview of Environment Plan approval process^a**

Process under the OPGGSA environmental regulations



^a Acronyms are as follows — DA: Designated Authority; EP: Environment Plan; EPBC Act: *Environment Protection and Biodiversity Conservation Act 1999* (Cwth); OPGGSA: *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cwth).

Source: RET (2008c).

The Environment Plan may be submitted for one or more stages of the activity if the operator and the DA agree. For example, separate plans are generally submitted for seismic activities, the construction and operation stages of a production facility or pipeline, and drilling and well construction and operation. The plan must include the matters set out in the regulations. These include:

- corporate environmental policy
- applicable environmental legislation applying to the activity
- description of the activity
- description of the environment in which the activity takes place

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- description and assessment of environmental risks
 - environmental performance objectives and standards
 - implementation strategy, including an emergency response plan and oil spill contingency plan
 - reporting and compliance arrangements
 - consultations with relevant stakeholders.

The DA has 28 days to accept or refuse the Environment Plan or request the operator to modify and resubmit it. An approved Environment Plan establishes the legally binding environmental management conditions that an operator of an offshore petroleum activity must meet (RET 2008c). An approved Environment Plan is required in addition to the submission of other statutory plans required for the same operating consents — specifically, the Well Operations Management Plan, Pipeline Management Plan and facility safety cases — and other relevant referrals and assessments under the EPBC Act.

The Plan must include details of consultation with relevant stakeholders, particularly those directly affected by proposed petroleum activities. For instance, some petroleum activities (such as seismic testing) can interfere with fisheries or fishing activities. The OPGGSA requires that the petroleum activities be carried out in a manner that does not interfere with fishing ‘to a greater extent than is necessary for the reasonable exercise of the rights and performance of the duties’ allowed under their permit or license (OPGGSA, s. 243).

While there are no specific requirements relating to fisheries, the guidelines for preparing an Environmental Plan recommend consultation with fisheries groups. The Australian Fisheries Management Authority also provides comment to the Department of Resources, Energy and Tourism (RET) on the proposed areas to be released for offshore petroleum exploration. Information is provided about the fisheries that will potentially be affected by exploration activity, and the times during the year when the effects would be greatest.

Environmental assessments under the EPBC Act

Proponents intending to undertake petroleum activities are obliged under the EPBC Act to consider whether those activities are likely to have a ‘significant impact’ on a matter of NES (appendix D) or on Commonwealth Heritage listed places. The EPBC Act places the onus on the proponent for ensuring an activity does not have significant impact on a matter of NES or on Commonwealth Heritage listed places — that is, it is not a ‘controlled action’ under the Act. If an action is a controlled

action it will not be able to proceed without the approval of the Commonwealth Environment Minister (RET 2008b).

Matters of NES include:

- World Heritage properties and National Heritage places
- wetlands of international importance
- listed threatened species and migratory species, and ecological communities
- Commonwealth marine areas
- nuclear actions (including uranium mining) (EPBC Act, chapter 2).

A proponent should ‘refer’ the proposed activity to the Environment Minister through the Department of Environment, Water, Heritage and the Arts (DEWHA) if they are unsure as to whether an approval is required. If a project is not referred but is considered likely to impact on matters of NES, the Environment Minister (or an ‘interested person’) may apply to the Federal Court for an injunction to stop a party from engaging in conduct that constitutes an offence or other contravention of the EPBC Act or regulations.

If an action referred by the proponent is classified as a ‘controlled action’, the action will go through the following two stages:

- Assessment of the proposed action — the proponent will be required to submit an environmental assessment in accordance with the particular assessment approach selected by the Commonwealth Environment Minister (there are five alternative forms of assessment available under the Act).
- Approval decision — the Commonwealth Environment Minister will consider the assessment and decide whether the controlled action can be approved, with or without conditions, under the EPBC Act (EPBC Act, chapter 4).

Several other environmental processes related to the EPBC Act might be relevant to proponents undertaking petroleum activities:

- Commonwealth marine reserves — there are currently 13 Marine Protected Areas in Commonwealth waters. In general, Marine Protected Areas restrict or exclude activities that extract resources at industrial scales. In addition, the South-East Commonwealth Marine Reserve Network, comprising 13 individual reserves, was established in September 2007 (DEWHA 2008b).
- Marine bioregional planning program — under this program, Marine Bioregional Plans will be developed in each of five marine regions in Commonwealth waters by 2012. The five marine regions are the South-East (predominantly offshore Victoria, Tasmania and eastern South Australia),

South-West and North-West (offshore western South Australia and offshore Western Australia respectively), North (offshore Northern Territory and western Queensland) and East (offshore eastern Queensland and New South Wales) (DEWHA 2008d).

- Strategic assessments — under the EPBC Act (Chapter 4, Part 10) the Commonwealth Environment Minister may agree to conduct a strategic assessment of potential actions under a policy, program or plan. These may include, but not be limited to, regional-scale development plans and policies, large-scale industrial development, infrastructure plans and policies (DEWHA 2008e).

Offshore decommissioning

Two Acts primarily govern decommissioning of petroleum offshore production facilities in Australia: the OPGGSA and the *Environment Protection (Sea Dumping) Act 1981* (Cwlth). Depending on the nature of the environment that the production facility is located in, decommissioning may also be subject to the EPBC Act (RET 2008b). The same is true of decommissioning of production facilities in coastal waters. State or Territory OPGGSA mirror legislation and the EPBC Act primarily govern these facilities.

Under the OPGGSA, decommissioning is subject to the OPGGSA Environmental Regulations and the Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996 (Cwlth). There is also a decommissioning guideline that describes the process for seeking approval for decommissioning production facilities based on international protocols and treaties. Under the OPGGSA regulations, production license holders are required to decommission a facility to the satisfaction of the DA.

State and Territory environmental regulation

State and Territory environmental regulation of petroleum activities includes petroleum-specific regulation applying to both offshore and onshore activities, and requirements under general State and Territory environmental and planning legislation — especially impact assessment requirements under environmental protection or planning Acts (appendix D).

Requirements for offshore petroleum activities

For petroleum activities (including pipelines) in coastal waters, the proponent is required to submit an Environment Plan (or ‘Environmental Management Plan’) for approval under the State and Territory Petroleum (Submerged Lands) Act. The department with responsibility for petroleum regulation in coastal waters in each jurisdiction is the same department as the DA under the OPGGSA.

In most States and Territories the scope of the Environment Plan or Environmental Management Plan for offshore activities is generally similar to the requirements under the OPGGSA for projects in Commonwealth waters. This includes Victoria, Western Australia, South Australia, Tasmania and the Northern Territory. However, only Victoria, Tasmania and the Northern Territory have adopted environmental regulations that directly mirror those under the OPGGSA. The other States implement their regulatory requirements by departmental direction and guidelines. In Queensland, the Environmental Protection Agency has responsibility for granting ‘environmental authorities’ for offshore (and onshore) petroleum activities under the *Environmental Protection Act 1994* (Qld).

Requirements for onshore petroleum activities

A range of petroleum-specific environmental requirements exist for activities regulated under onshore petroleum Acts, subordinate regulations and departmental guidelines. In all jurisdictions, the approval of petroleum activities for ‘medium or high risk’ projects will generally require a detailed EIA to be conducted in accordance with environmental protection, environmental assessment, or development legislation. However, these processes vary significantly across States — reflecting differences in each jurisdiction’s environmental regulation and use of memorandums of understanding (MoUs) and administrative agreements between State and Territory agencies.

Pipelines share most of the environmental approval requirements with other petroleum activities. While several States have separate onshore pipeline Acts, only Victoria has pipeline regulations that contain pipeline-specific environmental requirements. As with other petroleum activities, pipelines are also subject to the environmental legislation applying to all development activities within a State or Territory’s jurisdiction.

Heritage regulation

The EPBC Act protects three types of listed values — World, National and Commonwealth List places (chapter 4). Emergency procedures, at the Minister’s discretion, are also available where the heritage values of a site are ‘under threat’. A referral must be made under the EPBC Act for actions that are likely to have a significant impact on heritage sites.

Further, there are two other Commonwealth heritage Acts that can affect petroleum activities:

- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) allows for the responsible Minister to make an emergency declaration to preserve or protect an area from injury or desecration if satisfied that ‘the area is a significant Aboriginal area’ and there is a ‘serious and immediate threat’.
- Under the *Historic Shipwrecks Act 1976* (Cwlth), the Heritage Minister can make a declaration to protect any historically significant wrecks or articles and relics that are more than 75 years old. The Act applies in Commonwealth waters and State and Territory waters to the low water mark. Currently 19 historic shipwrecks lie within protected or no-entry zones (DEWHA, sub. DR35, p. 3).

The Historic Shipwrecks Act is mirrored in State legislation in New South Wales, Victoria, Western Australia and South Australia (DEWHA, sub. DR35, p. 3).

Most States and Territories have both non-Indigenous and Indigenous heritage Acts. These Acts protect sites of non-Indigenous and Indigenous cultural significance, including archaeological, anthropological and historical sites. In general, it is an offence to alter a site in any way without the consent of the responsible Minister. As a result, each State and Territory Act will also contain ‘emergency declaration’ procedures to prevent proposed activities causing damage or interference with potential sites.

Environmental offsets

Although all jurisdictions may require proponents to undertake environmental offsets, there is no standard definition of an environmental offset across jurisdictions (appendix D). The Australian Government, for example, defines environmental offsets as actions taken outside a development site that compensate for the impacts of that development, including direct, indirect or consequential offsets (DEWHA 2007b).

In Western Australia, the Environmental Protection Authority expects proponents to put forward commitments for environmental offsets where a development is

predicted to have significant adverse residual impacts to the environment. For example, the Pluto liquefied natural gas (LNG) project on the Burrup Peninsula is subject to an offset package covering native vegetation, heritage and carbon dioxide emissions (EPA WA 2007). Environmental offsets can be imposed as conditions of regulatory approval or by legislative requirement. For example, the Pluto LNG project's offset package was negotiated between the WA Government and Woodside as part of the approval conditions, while the Gorgon project's offsets are outlined in the *Barrow Island Act 2003* (WA).

6.3 Sources of unnecessary regulatory burden

The potential for unnecessary regulatory burden arising from environmental regulation is not confined to the petroleum sector. As the Regulation Taskforce (2006) noted, there has been a proliferation of environmental and building regulations in recent years. Specifically, the Regulation Taskforce identified a number of other priority areas for reform of potential relevance to the petroleum sector:

- improving arrangements under the EPBC Act
- rationalising greenhouse gas and energy reporting
- enhancing native vegetation management
- promoting national consistency of building regulation and reducing local government variations.

In addition to the broad regulatory review of the Regulation Taskforce, a range of Australian, and State and Territory Government reviews have been completed or are currently in progress, which address environmental, planning or heritage issues of relevance to petroleum activities. Many of these reviews consider ways to streamline environmental and heritage regulation. Chapter 4 provides an overview of relevant completed and current reviews.

Further, the Commission's 2004 review of native vegetation and biodiversity regulations concluded that there was a heavy reliance on regulation that imposed substantial costs on many landholders who had native vegetation on their properties (PC 2004a). The Australian Government submitted their recommendations arising from this report at the June 2005 COAG meeting.

At its April 2007 meeting, COAG also identified environmental and assessment processes as one of the ten regulatory 'hotspots'. COAG agreed that the Commonwealth Environment Minister would develop a proposal with the States

and Territories for a more harmonised and efficient system of environmental assessment and approval as soon as possible (COAG 2007).

Although, progress has been made in some areas of environmental regulation as a result of these reviews, there are a number of outstanding issues. Industry and other stakeholders have raised a number of ongoing concerns regarding the design and administration of environment-related regulations required for the approval of petroleum activities. The Australian Petroleum Production and Exploration Association (APPEA) argued:

While the review of the EPBC Act resulted in real and substantial changes to Commonwealth environment regulation and associated procedures, other reviews have been slower to progress. Reviews in WA in particular have been running into delays and funding problems. (sub. 16, p. 21)

In contrast, Woodside argued that while environmental approval processes may have some deficiencies, many of these can be managed, particularly by relatively larger companies, which have significant resources and experience with such processes:

While environmental approvals are often the focus of concern by industry because of their potential for duplication, schedule risk and complexity, it is our experience that these can often be managed, albeit with an application of resource effort which would not be viable for smaller companies. (sub. 11, p. 2)

Key issues raised in this study include the operation of the EPBC Act, clarity and consistency of offshore approval processes, efficiency of State and Territory processes, duplication of Indigenous heritage requirements, and clarity and transparency of environmental offsets. These issues are discussed in the following subsections, with the Commission's findings and recommendations consolidated at the end of each subsection.

Operation of the EPBC Act

A number of initiatives designed to streamline and enhance the operation of the EPBC Act have been introduced in recent years. These include amendments to the Act in 2006 aimed at making it more efficient and effective through the use of, in part, strategic approaches to environmental issues, reducing the time and cost of processing, and stronger enforcement provisions (Parliament of Australia 2006). According to DEWHA (sub. 8), specific mechanisms to enhance the operation of the EPBC Act include:

- bilateral assessment agreements

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- development of specific policy guidelines to clarify requirements under the EPBC Act
 - introduction of strategic assessment processes
 - development of marine bioregional plans.

On 31 October 2008 the Minister for the Environment, Water, Heritage and the Arts commissioned an independent review of the EPBC Act (chapter 4). The review will assess the operation of the EPBC Act and the extent to which its objects have been achieved. The review will be guided by key Australian Government policy objectives, including the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards.

Potential issues identified in this chapter regarding the operation of the EPBC Act include efficiency of assessment processes, approval timelines, overlap with other environmental approval processes, and industry's concerns about a perceived lack of consistency of seismic approvals. The Commission's report on the primary industry sector also recently considered the efficiency of assessment processes under the EPBC Act (PC 2007a).

Assessment processes under the EPBC Act

The Regulation Taskforce (2006) noted that there appears to be considerable scope to streamline and improve the way the EPBC Act operates. A specific matter that concerned the Taskforce was the trigger for referral. Under the EPBC Act, a 'significant impact' on a matter of NES is not clearly defined in the Act itself or guidance material.

DEWHA (sub. 8) acknowledged that determining whether an action is likely to trigger the EPBC Act — because it is likely to have a significant impact on a matter of NES — requires judgment and consideration of the particular circumstances of each case. For this purpose DEWHA has developed a number of policy statements to assist proponents in understanding when an action is likely to have a significant impact on a matter of NES:

EPBC Act Policy Statement 1.1 Significant Impact Guidelines provides generic guidance about what constitutes a significant impact for each matter of NES. These guidelines also include additional guidance on offshore exploration. Guidelines are also available for proponents working on or adjacent to Commonwealth land. (sub. 8, p. 7)

The House of Representatives inquiry report, *Exploring: Australia's Future*, also recommended that detailed sector-specific guidance should be developed and included in the existing guidelines on significant impact. This recommendation

endorsed the 2003 Australian National Audit Office's performance audit of the EPBC Act, which found that the current guidelines were not specific enough to particular sectors to allow proponents to make a decision on whether an action was likely to have a significant impact (HORSCIR 2003).

There are, however, specific guidelines on the conduct of seismic activities. In addition, DEWHA (sub. 8) believes there is potential to develop policy guidelines and statements for other offshore activities, such as laying pipelines and moving vessels.

Some in the sector have argued that there is also lack of information on environmental issues associated with new acreage releases to allow proponents to assess the likelihood of receiving Australian Government environmental approvals. Nexus stated:

The government currently releases acreage in the annual gazettal process that has had very little scrutiny or checking from the Government's own environmental departments. Consequently, there is a reasonably high risk that a company could take on acreage and spend a considerable amount on exploration only to find that they can never obtain environmental approval to develop the field. (sub. 3, p. 5)

However, to provide information on potential triggers for referral, DEWHA provides advice to RET for incorporation into the annual release of acreage for petroleum exploration and development. According to DEWHA:

This advice is included in the acreage information and highlights environmental sensitivities, if any, associated with specific acreage areas and informs the industry that activities in those areas may be subject to further assessment. Petroleum companies can factor environmental issues into their decision-making (whether to bid for acreage) and planning. (sub. 8, p. 2)

DEWHA further observed that information is available on its website on projects referred under the EPBC Act:

All projects referred under the EPBC Act are publicly accessible by our website and all assessment documentation is publicly available. The Department's website also houses tools that allow anyone to search any area for the presence of matters of NES. In our experience, most proponents utilise these tools effectively in preparing their referral and assessment documentation. (sub. DR35, p. 4)

DEWHA identified strategic assessments as one way of streamlining environmental approvals. Under the EPBC Act a strategic assessment of a policy, plan or program allows the Environment Minister to 'pre-approve' classes of actions taken in accordance with these. These assessments are intended to provide greater certainty and efficiency where a number of people are planning to take similar actions within one region.

DEWHA suggested:

Strategic assessments also encourage people to consider and address matters of NES early in the planning process and therefore avoid the need for project approvals late in the process. (sub. 8, p. 5)

In February 2008, the Australian and WA Governments signed an agreement to undertake a strategic assessment process to assist in the selection and management of a suitable site for a common-user LNG processing hub to service the Browse Basin gas reserves (box 6.2).

Box 6.2 Strategic assessment of the Browse Basin

The Northern Development Taskforce has worked with the Department of Environment, Water, Heritage and the Arts and the WA Department of Industry and Resources to coordinate the issues relating to the development of Browse Basin gas in the Kimberley, and the National Heritage Listing of the Burrup Peninsula. On 6 February 2008, the Commonwealth and the WA Government signed the Strategic Assessment Agreement, recognising the environmental and heritage values of the Kimberley, as well as the significant economic potential of the development of Browse Basin gas reserves. The agreement commits both Governments to undertake an assessment in two parts:

- A strategic assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) for the potential hub site identified in the Plan for a Common User Liquefied Natural Gas Hub Precinct (the LNG Hub Plan) and its associated activities. To ensure the best sustainable and timely outcome, assessment of the Hub Plan aims to produce a set of reports that meet the requirements of both the EPBC Act and *Environmental Protection Act 1986* (WA).
- A strategic assessment of the broader regional land use issues and potential national heritage values in the West Kimberley.

The assessment will also consider issues such as social and community effects.

The LNG Hub Plan provides for the co-location facility with other operators on the Kimberley coastline based on a common-user LNG hub. The Browse Joint Venture are seeking a collocated hub at a site identified as acceptable to all key stakeholders. Should this option not eventuate then the joint venture would seek a stand-alone site. The Kimberley LNG hub would allow cost savings through the sharing of common pipeline corridors and LNG processing infrastructure.

Source: DSD (2008a).

DEWHA argued that the use of a strategic assessment in this case provides a more efficient approach to assessing environmental and heritage values:

This process proactively addresses what would otherwise be the negative cumulative impacts and economic inefficiencies associated with piecemeal LNG-related

developments and provide greater certainty to industry, government, and the community and secure long-term protection of the heritage and environmental values of the West Kimberley region. For this reason, the petroleum and LNG industry with an interest in the Browse Basin reserves are supportive of the approach. (sub. 8, p. 6)

The Commission understands that some participants consider that not all jurisdictions are sufficiently proactive in ensuring suitable land is available for major infrastructure projects. For example, in comparing Western Australia and the Northern Territory, Apache stated:

It is evident that ... [Western Australia] has not planned adequately for major resource projects and that it has not set aside industrial land for critical infrastructure projects such as Devil Creek. Land that has been set aside for industrial development ... carry development risks that considered and appropriate strategic planning might have avoided ... Suitable alternative development areas invariably require all of the heavy lifting on [native title] and Aboriginal heritage matters to be done by the project proponents ... with the State only participating once the [native title] and heritage issues have been resolved ... [Western Australia] could reduce the regulatory and administrative burden on project proponents markedly by better strategic planning, by taking on issues of sovereign risk ... and by taking a more proactive approach to infrastructure projects. It has been pointed out that the Northern Territory has a more proactive approach in respect of securing land for industrial purposes. (sub. 14, pp. 4–5)

In July 2008, a meeting of the COAG Business Regulation and Competition Working Group agreed to identify further opportunities for strategic assessments under the EPBC Act to avoid unnecessary delays in development approval processes (sub. 8, p. 5).

In its draft report, the Commission recommended that State and Territory Governments should undertake strategic assessment processes early, in particularly sensitive areas to identify suitable land to develop major resource projects. APPEA supported this view:

Industry has expressed its frustration at a perception that sensitive environments are very frequently identified following exploration and the identification of energy resources, and particularly once proposals for developing these resources in a region are put to governments.

An alternative to identifying suitable land for development, as per the Commission's recommendation, would be the identification of any additional areas to be incorporated into the already extensive protected area network. These areas would then be off limits to incompatible developments and send a signal to project proponents that a much stronger case for compatibility of any proposed development would need to be mounted in these identified areas.

Finally, the industry is of the very strong view that any State based strategic assessment must be recognised and operate in parallel with Commonwealth strategic assessment processes, and vice versa. (sub. DR29, p. 8)

The use of strategic assessments under the EPBC Act has potentially caused delays and uncertainties for some in the sector, and led some businesses to consider a range of costly alternatives for development sites and technological solutions to overcome regulatory uncertainties. For example, APPEA stated that the strategic assessment process being undertaken in the Kimberley is one example of a process leading to unnecessary regulatory costs for some operators:

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. (sub. 16, p. 22)

In addition, APPEA also indicated that the strategic assessment process has been perceived as creating a level of industry uncertainty:

This new process has put aside guidelines and scoping that had previously been established and placed the project in limbo for an indefinite period of time. (sub. 16, p. 22)

Although strategic assessments potentially offer a valuable mechanism to streamline approvals for activities in particular regions, it is paramount that such assessments are conducted early and in a timely manner to avoid unnecessary uncertainty. To improve the environmental information that DEWHA provides for new acreage release areas, proponents should have access to previous assessment information and information on specific ‘high risk’ locations, where approval of activities is unlikely to be obtained, or likely to have onerous approval conditions associated with it. It is also important when DEWHA provide environmental information about offshore exploration locations, that where possible it also provides environmental information about potential onshore locations that might be relevant to a future processing location for an offshore resource discovery.

In its draft report, the Commission recommended that where strategic assessments are proposed, these should be conducted early and according to clear time frames and they should not prevent proponents from pursuing approvals for existing projects. APPEA supported this recommendation (sub. DR29). DEWHA noted:

The EPBC Act strategic assessments have the capacity to provide a significant degree of certainty to industry and other stakeholders and can result in substantial economic and efficiency dividends by streamlining environmental assessment processes and removing the need for proponents to undertake lengthy and expensive individual assessment processes.

For example, under the Browse Basin strategic assessment agreement, the Western Australia and Australian governments have agreed to conduct a strategic environmental assessment of a plan for a common-user liquefied natural gas (LNG) precinct that will satisfy the requirements of both the EPBC Act and WA *Environmental Protection Act 1986*. ...

Under the EPBC Act, the strategic assessment provisions do not affect the Australian Government Environment Minister's ability to make approval decisions for individual projects and proposals referred during the strategic assessment process. Individual projects referred under the EPBC Act are assessed on their own merits. (sub. DR35, p. 4)

Another matter of NES relevant to those undertaking offshore petroleum activities is the Commonwealth marine environment. DEWHA (sub. 8) has cited the current marine bioregional planning program as another mechanism designed to streamline assessment and approval processes under the EPBC Act. DEWHA argued that these plans are intended to provide, among other things, strategic guidance for industry operations by:

... assisting proponents and decision makers to determine whether or not proposals are likely to trigger the EPBC Act in terms of potential impacts on the Commonwealth marine environment ... [and] provision of a regional context for national guidelines to help proponents consider whether their proposed action might result in a significant impact on matters of national environmental significance or conditions under which an activity might be conducted without necessitating a referral. (sub. 8, p. 6)

Clarifying what activities are likely to result in a significant impact on a matter of NES can be inherently difficult. Each project has its own specific characteristics that need to be taken into account, and ultimately this requires judgment of projects on a case-by-case basis. However, guidelines can assist in managing expectations by providing proponents with specific criteria that can be used to make an initial 'self-assessment' of proposed activities. It appears that there remains further scope to extend and enhance current guidelines, while also ensuring that such guidelines are not overly prescriptive in their approach.

Approval timelines

The statutory timeframes in the EPBC Act are relatively short. A decision on whether a referred action requires further assessment must be made within 20 business days of the referral being made. Depending on the type of assessment, the approval decision must be made within 20 or 40 business days of receipt of the final assessment report. According to DEWHA, approximately 90 per cent of these decisions were made within these timeframes for the 2007-08 financial year (sub. 8).

DEWHA argued that the time taken for environmental assessments varies and depends on the specific characteristics of the project and the need to gather information on environmental risks:

The time taken for environmental assessments is generally commensurate to the complexity of the issues, the need to gather information on the environment and potential impacts and to develop the measures needed to protect the environment. Much of the time for environmental assessments is devoted to gathering this information. Much of this information gathering is the responsibility of the proponent and therefore any associated delays are outside the control of DEWHA. (sub. 8, p. 2)

In most cases the statutory time lines for decision making under the EPBC Act are met. In addition, most petroleum activities are not classified as controlled actions and so only require a referral decision rather than an approval by the Environment Minister. However, the main source of delays would appear to be when proponents are preparing referral information and — for those projects requiring assessment of a controlled action — assessment documentation. This part of the process under the EPBC Act is not subject to statutory timelines, as such, and DEWHA is able to make requests to proponents for further information without any time restriction.

Overlap between the EPBC Act, and State and Territory assessments

As discussed above, under the EPBC Act, a petroleum activity may require assessment and approval as a controlled action. In addition, all petroleum activities are potentially subject to State and Territory offshore and onshore petroleum-specific environmental requirements, and general requirements under environmental protection or development legislation.

Industry participants and some governments highlighted the potential for inefficiency and duplication in environmental assessments to arise from this regime. For example, the Victorian Government considered:

... there is significant scope to improve the operational efficiency of the Environment Protection and Biodiversity Conservation Act and its interaction with State environment and planning approvals. (sub. 7, p. 6)

As previously discussed, the EPBC Act provides the ability to reduce duplication in environmental assessments and approvals via bilateral agreements between the Australian Government, and State or Territory Governments. Under these agreements, the Australian Government can effectively delegate assessment and approval powers to State and Territory Governments so that business has to undertake only one assessment and approval process, even where projects are likely to trigger the need for approvals under the EPBC Act.

The Regulation Taskforce (2006) recommended that the Australian Government seek to expedite the signing of bilateral ‘assessment agreements’ with all remaining States and Territories and that all bilateral agreements be extended to include the approval process. Since the Regulation Taskforce report, assessment bilateral agreements have been signed between DEWHA and the NSW, Queensland, WA, SA, Tasmanian and NT Governments. A draft Victorian assessment bilateral agreement has also been finalised.

The Commission’s Review of Regulatory Burdens on the Primary Sector also recommended that DEWHA should, in consultation with the State and Territory Governments and other stakeholders:

... identify specific aspects of the EPBC Act and State and Territory processes that are amenable to a bilateral agreement for approvals and set a timeframe for agreement. (PC 2007a, p. 202)

The Australian Government accepted this recommendation and noted COAG has agreed that the Commonwealth and State and Territory governments will work expeditiously and constructively to develop bilateral agreements where efficiencies can be achieved in meeting the requirements of the EPBC Act (Australian Government 2008b). DEWHA has worked with Western Australia to develop an approval bilateral agreement for the National Heritage-listed Dampier Archipelago and surrounding areas. However, DEWHA argued that in general the standards for approval bilateral agreements would need to be high:

Given that approvals bilateral agreements effectively delegate all aspects of the approvals process under the EPBC Act to States and Territories for actions likely to have a significant impact on matters of national environmental significance, the standards to be met are necessarily rigorous. (sub. 8, p. 5)

While the scope to use approval bilateral agreements may be limited — especially given that the intent of the EPBC Act was to provide a final ‘check and balance’ on activities that may affect matters of NES — there would appear to be value in progressing such agreements for regions with well defined or limited environmental risks.

Overlap between EPBC Act and OPGGSA requirements

An issue of specific concern is the overlap in responsibilities between the environmental assessment requirements under the EPBC Act and those required under the Australian Government’s OPGGSA Environmental Regulations. This overlap in responsibilities can result in duplication of regulatory requirements.

If a proponent is intending to undertake petroleum activity in Commonwealth waters, they are required to obtain approval of an Environment Plan prepared and submitted under the OPGGSA Environmental Regulations. In addition, there is an onus on proponents to ensure that their petroleum activities are not in breach of the provisions of the EPBC Act. If an activity is likely to affect a matter of NES, proponents can ‘refer’ the activity to DEWHA for a decision as to whether it is a controlled action under the EPBC Act.

Some study participants have argued that this is an unnecessary burden for two reasons. First, very few referrals to DEWHA in relation to offshore drilling or seismic survey activities have required further assessment or approval by the Minister as ‘controlled actions’ under the EPBC Act. For example, in relation to seismic surveys, APPEA indicated:

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. (sub. 16, p. 23)

Further, in relation to offshore drilling activities, APPEA stated:

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 [EPBC] Act, has received a ‘not controlled’ determination. (sub. 16, p. 23)

APPEA suggested that in relation to the EPBC Act, there should be improved clarity on the trigger for referral, and stated that its support for retaining the current arrangements associated with the EPBC Act is contingent on:

... on a clearer expression of matters of national environmental significance, significant impacts on these matters, and the activities that are likely to cause significant impacts on these matters of national environmental significance.

With the broadness of the Commonwealth Marine Environment Trigger, each and every activity by the industry in offshore waters potentially triggers the Act. The experience however is that of the several hundred referrals relating to oil and gas operations, only approximately a dozen have actually been deemed to be controlled actions under the Act. (sub. DR29, p. 9)

It would appear that many proponents refer activities for a determination under the EPBC Act — even if these activities are unlikely to be controlled actions — to minimise the risk that they are subsequently found to have breached the Act. However, as most referrals do not require additional assessment this may support the case for using Environment Plans as referral documents for EPBC Act purposes, rather than requiring proponents to submit additional documentation.

Second, industry participants agreed that an approved Environment Plan prepared under OPGGSA regulations for seismic survey or drilling activity in offshore areas should be sufficient for the DA to assess potential environmental impacts — both because of the level of detail required for these plans and the technical expertise of DA officials. For this reason, they considered it an unnecessary requirement that DEWHA requires additional referral information for the same activities for potential assessment under the EPBC Act. Specifically, APPEA noted that when a referral application is made to DEWHA:

The industry is also required to prepare extensive and detailed Environment Plans under the [OPGGSA's] Management of Environment Regulations, for assessment by a team of dedicated, experienced and highly specialised regulators. (sub. 16, p. 23)

The WA Department of Industry and Resources, now the Department of Mines and Petroleum (DMP), also identified the potential for duplication in requirements under the EPBC Act and the Environment Plan under the OPGGSA:

Once a proposal is referred, DEWHA, as part of its assessment, sets conditions which require the operator to submit detailed Environment Plans for ministerial approval prior to construction and operations. The conditions also require an Oil Spill Contingency Plan to be approved by the Commonwealth Minister. These conditions (referred to in the issues paper as 'quasi-regulation') are a direct duplication of the requirements under the petroleum environment regulations. (sub. 18, p. 5)

In addition, Woodside raised concerns with the duplication of information requests, sometimes in situations where there is no formal requirement under OPGGSA regulations. For example, it claimed that DEWHA sometimes requested information not formally required under the EPBC Act:

We have received a number of requests from DEWHA in recent times for copies of reports submitted to the Western Australian Department of Industry and Resources in their role as Designated Authority. Under that system we are not required to submit reports to both agencies and would normally only submit to DEWHA if there was a matter of national environmental significance. (sub. 11, p. 2)

The EPBC Act contains specific provisions that allow for the accreditation of environmental assessment processes required under other legislation. However, currently there is no bilateral assessment agreement under the EPBC Act between State and Territory DAs (the approval authority under the OPGGSA Environmental Regulations) and DEWHA. Amendments to the EPBC Act, which came into effect in February 2007, allow the Environment Minister to take into account the decisions made by other Commonwealth Ministers (PC 2007a). As a result there may also be potential for an 'approval' agreement between the Environment Minister and the DA (exercising the delegated powers of the Commonwealth Resources Minister under the OPGGSA).

APPEA argued:

... the Commonwealth could consider 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. (sub. 16, p. 23)

In addition, to avoid duplication of environmental submissions under both the OPGGSA and EPBC Act, the WA Department of Industry and Resources endorsed an approach based on bilateral agreements:

This situation could be addressed through a bilateral agreement between DEWHA and the individual designated authorities around Australia. (sub. 18, p. 6)

Further, currently if an activity is deemed to be a ‘controlled action’ and so requires formal assessment under the EPBC Act this does not eliminate the need for a proponent to submit an Environmental Plan under the OPGGSA regulations. However, RET have argued that this is unavoidable for two reasons:

... there is not necessarily a neat link between the requirements in an environmental plan and the requirements in an [Environmental Impact Statement] or [Public Environment Report] nor in the timing between when an environment plan is due and when an activity needs to be considered under the EPBC Act. (DITR 2007b, p. 22)

The Commission concluded in its draft report that there would appear to be scope to streamline environmental approval arrangements under the OPGGSA and EPBC Act. Specifically, there appears to be significant duplication of information requirements and decision making for most petroleum proposals that are referred to DEWHA for a decision under the EPBC Act. The possible delegation of approval authority to the DA for some specific (relatively routine) offshore activities might further streamline approvals. In addition, the DA could act as a one-stop-shop for such referral decisions, with a single Environment Plan submitted to meet the regulatory requirements under both the OPGGSA and the EPBC Act.

The NT Government noted that there are already some bilateral arrangements between the NT Government and the Australian Government.

The Commonwealth and Northern Territory Governments have arrangements in place to organise ‘joint’ assessments for projects which traverse Commonwealth and Territory waters. ... For onshore projects, the Environmental Protection Biodiversity Conservation bilateral agreement between the Commonwealth and the Territory applies, which means that business and the public deal with a single impact assessment process. (sub. DR32, p. 5)

In its submission in response to the draft report, Nexus strongly supported reducing the duplication between the EPBC and the OPGGSA. It also noted:

The industry is also required to prepare extensive and detailed Environment Plans under the OPGGSA Management of Environment Regulations ... Recognition under the EPBC Act of the approval of these plans, as well as ongoing monitoring and reporting requirements by the Delegated Authority under the OPGGSA will reduce regulatory duplication. (sub, DR25, p. 3)

Seismic survey permit approvals

The EPBC Act places the onus on operators to refer a proposed action to undertake petroleum activities where there is a likelihood of encountering or interfering with whales — in particular, seismic surveys. Some see the approval process for referral to undertake seismic surveys as a potential source of unnecessary regulatory burden, particularly as it relates to claims by industry participants of inconsistency in decision making, which can generate uncertainty and additional compliance costs. APPEA considered:

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 very different regulatory treatment. (sub. 16, p. 38)

Consistent with best practice regulation, DEWHA has published guidance material — *EPBC Act Policy Statement 2.1 Interaction between offshore seismic exploration and whales* — for operators planning to undertake seismic exploration.

Specifically, DEWHA indicated that the policy statement:

... was developed in consultation with industry and other stakeholders and provides guidance to people planning to undertake seismic exploration about their obligations under the EPBC Act. It also provides practical advice about best practice mitigation measures that can be used to ensure the seismic activity is not likely to cause a significant impact on a matter of NES. (sub. 8, p. 7)

In its draft report the Commission noted that there have been occasions where the regulations applying to seismic surveys have caused businesses difficulty in meeting the conditions of their permits. Specifically, APPEA noted that on two recent occasions seismic surveys have been assessed as likely to have a significant impact on a matter of NES, and therefore, were controlled actions requiring formal assessment under the EPBC Act.

APPEA regarded this decision as being inconsistent when compared with other similar surveys in the same region:

In neither instance was there any indication that the regulator was acting on any new science becoming available or what factors in this survey, made it any different to the 55 other surveys the industry has run in the region since 2001 with no known environmental incidents. (sub. 16, p. 38)

In response to the draft report, DEWHA stated it:

...disagrees that decision-making on seismic surveys has been inconsistent and asserts that the seismic guidelines provide good guidance to proponents on actions that are likely to require further assessment ... most seismic operations are conducted in accordance with the guidelines and do not encounter approval delays. (sub. DR35, p. 3)

In practice, very few applications for permits to undertake offshore seismic activity would appear to have required further assessment under the EPBC Act. DEWHA (sub. 8) indicated that of the 124 offshore seismic surveys referred under the EPBC Act, 120 have operated in accordance with the measures detailed in the guidelines, with only four surveys planned for highly sensitive marine environments requiring any further assessment. One was re-referred for a period when whales were less likely to be present, and two were withdrawn. Detail on the approval of seismic surveys for offshore areas of south-eastern Australia is presented in box 6.3.

In the overwhelming majority of cases it appears that seismic survey applications are approved in a timely way where proponents undertake activities in a manner that is consistent with the guidelines. However, there is the potential for costly delays for proponents in situations where they schedule seismic operations in the expectation of receiving approval but find that approval is not provided.

The costs are significant on some occasions due to scheduling of seismic vessels — when demand for these vessels is high, so are their leasing costs. On occasions proponents might have difficulty balancing the potentially conflicting requirements of meeting their exploration work program commitments, gaining access to a suitable seismic vessel and satisfactory weather to undertake seismic work, against the need to avoid times when whales are present in an area.

To minimise the potential for costly delays it would appear prudent that where possible, proponents should seek approval for seismic surveys well in advance of the scheduled activity. Government officials, on the other hand, should ensure that decisions are being made in a timely and consistent manner.

Box 6.3 **Seismic surveys in south-eastern Australia**

The waters off Victoria and eastern South Australia contain critical feeding habitat for the endangered Blue Whale, and migration and calving habitat for the endangered Southern Right Whale. The area is also one of Australia's most prospective oil and gas provinces.

The *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) places the onus on petroleum companies to determine whether their exploration activities may have a significant impact on these (and other listed threatened and migratory species) and the Commonwealth marine environment. They are required to gain approval under the EPBC Act if this is likely to be the case.

Of the 15 seismic surveys planned to take place in this area between September 2007 and June 2008, and referred under the EPBC Act, over 90 per cent proceeded as planned by the individual companies. Of the 15 proposed surveys:

- 11 proceeded in accordance with the mitigation measures proposed by the proponents
- two proceeded in accordance with additional measures, agreed between the company and Department of Environment, Water, Heritage and the Arts
- one was determined to be a controlled action and required further assessment — the survey timing and location overlapped with Blue Whale feeding and Southern Right Whale calving
- one was withdrawn by the proponent.

Source: DEWHA (sub. 8).

FINDING 6.1

Many environmental and heritage issues associated with upstream petroleum projects will invariably be complex and sensitive. While effectively consolidating environmental and heritage approval processes would streamline those approval processes, there would also appear to be merit in retaining an independent decision maker of last resort, particularly in relation to matters of potential national environmental significance. This is consistent with the underlying rationale of the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (Cwlth) and the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cwlth).

FINDING 6.2

There has already been significant effort to improve the operation of the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth) through use of bilateral assessment agreements, improved guidelines, early referral arrangements and the use of strategic assessment processes. However, some concerns about the operation of the Act remain:

- While the Department of Environment, Water, Heritage and the Arts appears successful in meeting statutory timelines where they exist under the Act, not all elements of the approval process are subject to such timelines.*
- In some cases limited information appears to be provided to bidders on relevant environmental risks related to new acreage for exploration and related potential production facilities.*
- The interaction and overlap of the Act with other environmental approvals continues to cause some uncertainty and delays.*
- Strategic assessment processes have been put forward as a mechanism to streamline some complex approvals, however, such assessments may also result in lengthy time delays and potential uncertainty while they are being completed. This emphasises the need for such approvals to be conducted early if they are to assist in reducing regulatory burdens.*
- Recent perceived inconsistency by some industry proponents in decisions regarding seismic surveys.*

Consequently, there may be further scope, albeit limited, to further enhance the efficiency of the Act and its administration.

RECOMMENDATION 6.1

Specific measures to improve the operation of the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth) include:

- ensuring the Department of the 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) and in regard to potential processing facilities***
- developing bilateral assessment agreements between the Department of Environment, Water, Heritage and the Arts and the relevant State and Territory 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 and that jurisdiction has appropriate legislation in place

- *State and Territory Governments should, at an early stage, undertake strategic assessment processes in particularly sensitive areas to identify suitable land to allow the development of probable major resource projects. All strategic assessments should be conducted early and according to clear timeframes.*

Clarity and consistency of offshore approval processes

A potential source of regulatory inefficiency arises from environmental approval processes for offshore petroleum activities. While environmental objectives and requirements for offshore petroleum activities in Commonwealth waters are consistent — and are broadly similar to requirements in coastal waters — there is the potential for inconsistent interpretation and decision making by different DAs. The Environmental Assessors Forum (EAF) appears to have made a positive contribution towards addressing issues of inconsistency in decision making in particular. Participants considered the flexibility and responsiveness of the EAF as significant to its success. Woodside stated:

Under strong leadership from RET the EAF has focussed on standardisation across the State jurisdictions. This has been valuable for companies that operate across multiple States. In particular we have seen a movement to a single approach in assessing environment plans for activities in the offshore environment. (sub. 11, p. 2)

However, APPEA also noted that the problem of inconsistent application of the law remains:

In spite of the regular bi-annual meetings of the EAF, there remains a degree of inconsistency in interpretation and application of the regulations, which in many cases, appears to be due to a personal interpretation of the legislation/regulation rather than an organisation/Australian wide policy decision. Such inconsistencies between Designated Authorities may be resolved through discussion at the EAF or the Upstream Petroleum & Geothermal Sub-Committee. (sub. 16, p. 24)

There is an important role for greater communication and coordination by regulatory officials to enhance the clarity of approval processes, but there also appears to be scope to improve the use of guidelines and flowcharts. These should provide clear outlines of the approval processes and detail on specific requirements for proponents. For instance, while APPEA regards the assistance provided by officials within a DA as being particularly important, clear guidelines would also be useful:

Certain key individuals, especially within the Designated Authorities, actively facilitate industry through the approvals process, reducing time and stress for all parties. However, the approvals process should not have to rely on the good will of key

individuals to achieve the desired outcomes. A simplified process with clear process flow charts and guidelines would help to reduce the need for government facilitators. (sub. 16, p. 24)

In October 2008, national guidelines on preparing and submitting environment plans were released. DMP developed these guidelines in consultation with the EAF and other DAs. At the same time, the EAF announced national guidelines would be prepared for managing drilling fluids and decommissioning (DMP, sub. DR22, p. 13).

The EAF, with its cross-jurisdictional membership and objective to improve consistency of environmental processes and promote interaction across jurisdictions, would be well placed to develop consolidated and consistent environmental guidelines, including flowcharts and procedural information. Nonetheless, such a task should not compromise the flexibility of the forum. Governments should also ensure it is appropriately resourced to undertake this task.

The NT Government supported the EAF developing such guidelines, but cautioned ‘as legislation differs in each State and Territory, the level of consistency that may be achieved through those guidelines may be limited’ (sub. DR32, p. 5). DMP made a similar point (sub. DR22).

FINDING 6.3

The Environmental Assessors Forum is seen by stakeholders as a valuable, flexible and responsive approach to enhancing the consistency of environmental approvals for offshore areas. However, some concerns remain regarding the lack of consistency of decision making by officials within Designated Authorities, and the apparent complexity of current arrangements.

RECOMMENDATION 6.2

The Ministerial Council on Mineral and Petroleum Resources should explore ways of enhancing the effectiveness and transparency of the Environmental Assessors Forum to further improve the consistency of offshore environmental approvals and decision making, particularly in relation to differences in interpretation by individual officials, without compromising the flexibility of the forum. In particular, the Ministerial Council on Mineral and Petroleum Resources should resource the Environmental Assessors Forum to develop consolidated and consistent environmental guidelines (with flowcharts and procedural information) for petroleum activities that are cross-jurisdictional, such as offshore pipelines.

Efficiency of State and Territory processes

Within most States and Territories there has been a trend towards better defining and formalising administrative arrangements between agencies that administer different Acts requiring EIAs. The intention has been to reduce duplication of EIA processes. However, the EIA processes, particularly for large projects, can be complex and result in significant delays, particularly for projects such as pipelines.

Environmental and development approval processes

The WA Environmental Protection Authority is currently undertaking a review of their EIA process with a view to improving the efficiency of the system — eliminating unnecessary duplication and ensuring better use of agency resources. Woodside believe it is a valuable process and should benefit the industry:

The review of environmental approvals processes by the Western Australian Environmental Protection Authority has picked up on a number of initiatives to increase certainty, reduce timelines, and simplify the approvals process. We support the work they are undertaking and believe it will be of real benefit to industry in WA. (sub. 11, p. 2)

Stakeholder forums as part of this review identified a range of inefficiencies in the WA Government environmental approval arrangements operating at the time (EPA WA 2008a). Some of the key issues raised in the review included:

- the lack of a strategic approach — this includes inefficient one-stop-shop arrangements, and a lack of regional and biodiversity mapping
- uncertain timelines — there is a need for greater certainty and timelines to build into project timetables. Scoping processes are too long and of less benefit (often lagging behind survey work in most cases), ministerial and appeals processes lack clear timelines, and greater rigour is required around ‘stop the clock’ processes to know when the clock has stopped and restarted
- complexity and duplication of processes — improved cross-agency cooperation is required. There are often several licences and decision-making authorities for each project (including for approval stages and compliance). MoUs are currently applied with little transparency and consultation with proponents, and there is a lack of consistency of activities requiring referral
- inadequate resourcing and expertise within environment agencies — need for user-pays to improve agency resourcing. Excessive detail is required in EIAs due to a very risk averse approach, a high turnover and lack of corporate knowledge amongst staff dealing with EIAs

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- other issues — methodology and required quality of EIAs is rarely dealt with upfront. Assessments under EPBC Act bilateral agreements are resource intensive, offsets lack clarity, there is poor guidance provided on the EPA website, there is an unclear role for Office of Development Approvals Coordination (ODAC), appeals processes can be cumbersome, and there is a lack of consolidation of environmental information and data.

The WA Government's Independent Review Committee (the Keating review) undertook a significant review of the development approvals system in Western Australia in 2002 (Independent Review Committee 2002). Among other things, this review examined environmental approvals, including the *Environmental Protection Act 1986* (WA) (EP Act), integration of Commonwealth and State approvals, the linking of planning and environmental approvals, and petroleum legislation approvals. The Independent Review Committee found that the then current environmental assessment processes had a number of significant strengths:

The EP Act has been under constant scrutiny since its inception, and has been favourably compared to other environment Acts by Wood and Bailey in 1994 and Wood in 1996. They compared the EP Act and its processes with similar processes in the USA, California, UK, Netherlands, Canada, Australia and New Zealand against 14 criteria. The EP Act was the only one to meet all the review criteria. (Independent Review Committee 2002, p. 41)

However, the review also identified several potential unnecessary regulatory burdens in relation to environmental and development approvals within the WA development approvals system (Independent Review Committee 2002). Key findings of the Keating review included:

- a local government authority may look to impose conditions that are additional to those that have emerged from the WA EP Act processes, or revisit issues covered in those processes
- earlier environmental approvals do not constrain later approvals, especially those involving local government
- approval processes in WA are notable for the lack of timelines in legislation. In addition, a feature of the timelines that do exist is that the start dates are not specific
- a lack of agency resourcing can cause significant delays and cost issues for proponents with critical time paths
- there can be fundamental inconsistencies in perspectives between agencies. Some agencies can appear to be relatively unconcerned about the need for State development.

In response to this review the WA Government introduced a range of measures to address these potential unnecessary regulatory burdens — including improved timelines, the introduction of an integrated project approvals system and the establishment of ODAC. However, the Auditor General for Western Australia, in a recent performance examination of these measures, found that many of the weaknesses identified in the Keating review have not been adequately addressed (Auditor General for Western Australia 2008). Specifically, there remains a lack of compliance with timelines, inadequate resourcing and a lack of effective coordination of processes.

The lack of specific timelines or lack of adherence to timelines also applies to a broad range of other approval processes of relevance to upstream petroleum development. Potential mechanisms to enhance the timeliness of upstream petroleum related approval processes (and compliance with existing timelines) are discussed in chapter 10.

Administrative procedures and resourcing

Referrals between petroleum agencies and environmental agencies may be an additional source of unnecessary delays. Some jurisdictions actively seek to avoid unnecessary referrals. In South Australia, the MoU between the petroleum regulatory agency and environmental agencies limits the circumstances for referral of proposals to those activities that are likely to have a ‘high impact’ on the environment. Further, environmental assessment requirements under the *Petroleum Act 2000* (SA) mirror those under environmental legislation.

In contrast, in other jurisdictions, such as Queensland and Western Australia, some proposals may require formal referral to an environmental agency for their consideration even if there is a low likelihood of significant environmental impact. Further, in Western Australia there are several environmental agencies that may be involved in an assessment process. The Keating review identified referral and consultation arrangements between agencies in Western Australia as a potential source of unnecessary burdens. For this reason, ODAC was introduced to improve coordination between agencies. However, the ODAC approach does not appear to have directly addressed the underlying weaknesses in referral and consultation arrangements that the Keating review identified.

In South Australia, businesses which have a sound track record of environmental compliance, are given a ‘low supervision’ operator status, providing more streamlined assessment and reporting requirements. The threat of losing low supervision status means that suitable incentives remain for proponents to maintain high environmental standards despite reduced regulatory requirements.

The administration and assessment of environmental management plans and impact assessments can be a highly specialised and time intensive task. A lack of specialised and experienced staff undertaking environmental approval processes has been highlighted as an area of potential inefficiency. This can result in delays in obtaining environmental approvals for petroleum activities. For example, Woodside stated:

One underlying issue impacting on approvals processing in all environmental agencies is staff recruitment and retention. The availability of qualified and experienced decision makers significantly impacts a regulator's efficiency during peak workloads. (sub. 11, p. 2)

Appeal processes for environmental approvals can significantly extend approval process timelines. In some cases, issues that the regulator considered of minor importance at the beginning of an environmental assessment are then raised as a significant issue later in the assessment process. For example, APPEA argued that in some cases appeal processes can result in significant delays to a project:

In Western Australia [the appeal process] has resulted in some projects experiencing delays and inefficiencies when regulators add to the level of detail and information required during the assessment process. This is particularly the case if issues or impact agreed as being minor at the scoping phase are not dismissed later when they come for public review or appeal. (sub. 16, p. 22)

A lead agency approach, such as that applied in South Australia, is one potential way of coordinating environmental assessments and streamlining referral arrangements. Such an approach potentially minimises formal referrals to other agencies except for activities with a 'high' level of environmental impact. The merits of lead agency arrangements are discussed further in chapter 10.

Conditions related to environmental research

Regulators often require proponents to undertake environmental research as a condition of Environment Plan approval, or as part of offset arrangements. Approval conditions related to research projects can cause delays for proponents and significant additional expense — in some cases without an obvious benefit to proponents or the community. For example, APPEA stated:

In some instances regulators have tied a commitment to long term research to project approvals, which as a result can significantly delay projects. In addition, as this approach to research is ad-hoc and dependent on linkages to project approvals, the research is not incorporated into broader strategic research programs, which can then result in significant amounts of money being spent on an issue, while other far more important strategic priorities receive substantially less funding. (sub. 16, p. 40)

It appears that under current arrangements, proponents are sometimes classifying environmental and scientific information obtained as a condition of approvals as ‘commercial in confidence’ or governments are not properly using information submitted as part of a broader research strategy. This information may be a valuable source of baseline information for new acreage releases, as well as being of general scientific benefit to the community. Indeed, if the petroleum information obtained is not of this type it is unclear as to whether it should be required to be gathered in the first place.

In its draft report, the Commission proposed governments actively manage and release information that proponents obtain as a condition of environmental approvals. Nexus supported this view, and observed:

A certain amount of environmental information exchange already occurs between companies. If this can be more formalised, similar to the existing government managed geoscience data open file system, but in a simpler way without the requirement for complex data management plans, it should be encouraged. (sub. DR25, p. 3)

The NT Government also agreed, but noted the potential costs of managing such information:

... if the intention is the development of a national repository of all States and Territory’s environmental data, the development and ongoing management of a database and of the information is a considerable undertaking, which would require significant resources. (sub. DR32, p. 5)

DMP observed that implementation would depend on the willingness of proponents to release this information, and also noted that a national database of all environmental data would need substantial resources (sub. DR22, p. 14). DMP further noted that any proposal that has been formally assessed under the EPBC Act or by the WA EPA will have an impact assessment that is publicly available.

There may be issues of confidentiality in releasing information prior to proponents obtaining the approvals that the data relates to. Governments should require proponents to agree to the public release of such information but only after they have obtained the appropriate approvals.

In the Commission’s view, managing and releasing environmental information should be handled in a way similar to that for geophysical data. Currently, under the OPGGSA, operators must meet reporting requirements whenever a geophysical, geological or drilling activity is conducted (chapter 5). All such information and data remains confidential until publicly released, with the period of confidentiality (prescribed in regulations) depending upon the type of data. The Commission believes that similar arrangements should occur for environmental information and

data that is obtained as a condition of environmental approvals or as part of an offset plan.

Inconsistencies between jurisdictions

There appear to be inconsistent regimes across States and Territories in relation to environmental approval processes for petroleum activities under onshore petroleum and environmental regulations. In addition to the inconsistencies in the approach taken to petroleum-specific environmental approvals, there appears to be inconsistent environmental assessment and planning regimes across jurisdictions. This includes inconsistent environmental offset arrangements, weeds management, control of contaminated sites and rehabilitation requirements (APPEA, sub. 16).

Although some States and Territories have adopted objective-based regimes for environmental approval of petroleum activities, some have a more prescriptive approach. Under petroleum regulation, Victoria and South Australia explicitly use a criterion of reducing environmental risks to ‘as low as reasonably practicable’ to assess these proposed plans. In contrast, Queensland uses a code of environmental compliance approach to petroleum regulation — to undertake low-risk petroleum activities (described as ‘level 2’ activities under the regulations) proponents must agree to conform with the detailed conditions outlined in the code of compliance. To obtain an environmental authority to undertake petroleum activities the Queensland Environmental Protection Agency assesses whether the operator has the capacity to comply with the conditions of the code.

There is also inconsistent use of mechanisms to streamline approvals, such as public MoUs, across jurisdictions. For example, in Western Australia and South Australia the resource and environmental agencies have detailed MoUs that are publicly available. In other jurisdictions, there are less transparent administrative arrangements for addressing coordination between agencies.

As discussed in chapter 4, the EAF was established to minimise inconsistencies in offshore environmental approvals. APPEA suggested that in the future the EAF should consider the range of onshore State and Territory environmental regulations:

With a successful and pragmatic [offshore] model to follow, EAF could now consider the range of onshore environmental regulations affecting the international competitiveness of Australia’s oil and gas industry. (sub. 16, p. 24)

The NT Government supported this suggestion (sub. DR32, p. 5).

The Commission endorses the EAF as a potentially valuable mechanism to streamline current environmental assessment processes across jurisdictions. However, if the EAF sought to address onshore environmental assessment

requirements it would need to actively engage with other State and Territory agencies, relevant inter-government committees and Ministerial council working groups.

FINDING 6.4

Environmental approvals under State, Territory and local government planning arrangements appear to be a significant source of delays and complexity. There are several issues of particular relevance to petroleum approvals:

- The WA Government, in particular, has conducted a number of reviews of environmental and development approval processes, and made some efforts to streamline approvals, but these appear incomplete and there would appear to be inadequate resourcing of agencies responsible for environmental approvals of petroleum projects. To some extent this may reflect periods when there are a large number of new approval applications in the State.*
- Not all jurisdictions have clear administrative arrangements between environmental and petroleum agencies, with publicly available administrative agreements or memorandums of understanding between agencies.*
- There remains a lack of statutory or firm approval timelines in relation to many environmental approvals. Where there are firm timelines, there appears to be no consequence when regulators fail to comply with these timelines.*
- There would appear to be insufficient public access to environmental data obtained either in previous assessment processes, or as a condition of previous approvals, or to information collected as part of an offset plan. It seems that although some information may be in the public domain, the management of the data, particularly between government agencies, can make it difficult to access. Access to other information is at times inhibited by companies or their consultants classifying it as ‘commercial in confidence’.*

RECOMMENDATION 6.3

Governments should actively manage and release information obtained by proponents as a condition of environmental approvals to enhance the public stock of environmental information and to assist in streamlining future approvals.

- Governments should improve the provision of baseline environmental information for new acreage releases or for new applications for project approvals in relevant areas. Notwithstanding this, governments should only require a company to provide information collected at its expense after that company has acquired its own appropriate approvals.***
- Governments should manage environmental data in a way similar to the current system for geophysical data: with all environmental data relating to Commonwealth, coastal and inland waters residing with Geoscience Australia***

and all onshore data with the relevant State and Territory agencies. All such information provided by companies at the request of governments should be publicly accessible in the same way as geophysical data, after an appropriate fixed period.

RECOMMENDATION 6.4

The Ministerial Council on Mineral and Petroleum Resources should task the Environmental Assessors Forum to review the range of onshore environmental regulations to identify scope for streamlining onshore approval processes and associated regulations related to petroleum activities.

Duplication of Indigenous heritage arrangements

The overlap between Commonwealth, and State and Territory Indigenous heritage legislation is a potential source of unnecessary regulatory burden. APPEA considered the multiplicity of such legislation as being a significant source of potential delay and additional cost burdens:

In addition to Native Title processes however, Indigenous heritage issues can cause delay (and potentially denial) to project schedules. This is exacerbated by the multiplicity of legislation that companies are required to comply with in relation to Indigenous heritage. (sub. 16, p. 26)

In Western Australia, for example, proponents undertaking petroleum activities that are perceived as likely to affect Indigenous heritage sites must apply for a consent to perform those activities from the Minister for Indigenous Affairs under the *Aboriginal Heritage Act 1972* (WA). Further, the Act in Western Australia can include Indigenous heritage considerations when classified as a significant environmental factor. Under the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Aboriginal people may apply for an 'emergency declaration' of a potential heritage site. Chapter 2 of the EPBC Act also contains provisions protecting declared Indigenous heritage sites.

Specifically, APPEA raised concerns that the overlap in Indigenous heritage processes allows applicants to seek decisions under both the Commonwealth and State and Territory regimes, which can result in excessive delays and uncertainty:

It is becoming increasingly common for applicants to use both [Commonwealth and State] Acts in an attempt to delay or deny construction activities. (sub. 16, p. 26)

Woodside (sub. 11) also raised the overlap between the Commonwealth Act and State heritage approvals, and the lack of a requirement for the Commonwealth

Minister to take State approvals into account. It indicated that this matter has previously been subject to review:

In particular, applications under section 9 and section 10 of the [*Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cwlth)*] are frequently made by Aboriginal groups even when companies have complied with all relevant State heritage laws ... This issue, and others, were explored by Elizabeth Evatt AC in her 1996 Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, commonly referred to as the Evatt Review. (sub. 11, p. 3)

The Evatt Review found that delay and uncertainty had arisen because interaction between the Commonwealth, and State and Territory processes had not been clearly established — despite the intention that the Act be a last resort after the application of State and Territory laws (Evatt 1996). Further, the review observed:

Since, in practice, applicants are expected to go through the State process before applying to the Commonwealth, most applicants seeking action at Commonwealth level have not been satisfied by the State or Territory process. The Commonwealth is asked to take a view different from that taken by the State or Territory government and, in effect, to override State law. The potential for both legal and political clash is obvious. State and Territory Governments have expressed concern that their decisions are subject to ‘appeal’ to the Commonwealth Minister. (Evatt 1996, s. 5.13)

The Commission in its report on the regulatory burdens on the primary sector (PC 2007a) also noted concerns relating to duplication and inconsistency in Aboriginal cultural heritage processes across Australia. In particular, the Commission noted that the absence of consolidated information regarding Aboriginal heritage sites listed by each jurisdiction could potentially add to the burdens on business by not providing access for information in a simple and timely manner. In response to a recommendation by the Commission, the Australian Government agreed that it would provide a single point of information about Indigenous cultural heritage places in all jurisdictions (Australian Government 2008b).

As the Evatt Review acknowledged, the Commonwealth Act was originally introduced to provide ‘last resort’ protection for Indigenous heritage sites in situations where State and Territory heritage legislation does not provide adequate protection. However, as this review also noted, the current overlap in Commonwealth, and State and Territory heritage Acts also leads to potential duplication and delays in approvals. The Evatt Review made a number of recommendations to address issues of overlap and duplication (box 6.4). Several of these recommendations were included in proposed amendments to the Act in 1999, although these were not subsequently passed by the Parliament.

In its draft report the Commission concluded that there was a case for requiring Indigenous heritage Acts in all jurisdictions to consider previous decisions by other jurisdictions about the same heritage site and including provisions in the Commonwealth Act that accredit State and Territory Indigenous heritage regimes that meet a certain minimum standard.

In general, study participants supported these proposals (for example, APPEA, sub. DR29). DMP observed:

DMP supports this draft recommendation as it would streamline Indigenous heritage approval processes by reducing the duplication of functions between State and Commonwealth legislation regulating for the protection of Aboriginal sites. Furthermore, State accreditation by the Commonwealth under a national set of Indigenous heritage standards, would reduce the likelihood of appeals to Commonwealth for review of State Indigenous heritage approval processes in respect to consent for the use of land. (sub. DR22, p. 14)

Box 6.4 Recommendations of the Evatt Review

The Evatt Review made a number of recommendations to address the issue of overlap between Commonwealth, and State and Territory Indigenous heritage Acts.

Minimum standards for State and Territory Laws

The Australian Government should support and encourage the process of developing, in consultation with State and Territory Governments, the Aboriginal community, and other interested parties, agreed minimum standards as the basis for uniform or model laws on Aboriginal cultural heritage protection, for the States and Territories and the Commonwealth to adopt, where relevant.

Accreditation and referral

The Commonwealth should accredit, for the purposes of the Act, determinations and procedures under State and Territory laws that comply with minimum standards. It should provide, where appropriate, for the referral of matters to State and Territory agencies or bodies that meet minimum standards.

Recognition of decisions on significance

The Commonwealth should accredit or recognise, for the purposes of the Act, State and Territory Aboriginal cultural heritage bodies decisions concerning the significance of a site that meet the required standards and apply definitions comparable with the Commonwealth definition.

Source: Evatt (1996).

In contrast, DEWHA considered that it is not necessary to require Indigenous heritage agreements in all jurisdictions to consider previous decisions by other jurisdictions about the same heritage site:

This is not needed. This proposal could apply when a State or Territory has made a decision about whether to protect a heritage site and the Australian Government also is asked to make a decision about protecting the area. While it could apply if the Australian Government has made a report before the matter was considered by the State or Territory, this would be unusual. It could not apply between States or Territories because their decisions can only apply within their separate (non-overlapping) jurisdictions.

Under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* the Australian Government Minister is required to seek the advice of the State or Territory Minister about whether the area is effectively protected under a law of the State or Territory (s. 13(2) also s. 14) before making a declaration to protect the area. The Minister cannot require the State or Territory to produce documents relating to State and Territory decisions about the area specified in the application and cannot require the State or Territory Minister to respond at all. The legislation permits the Australian Government Minister to make a declaration even he fails to elicit a response from the State or Territory Minister; otherwise the State or Territory Minister could frustrate action under the Australian Government legislation. In practice, States or Territories provide the Australian Government Minister with previous reports relevant to applications if these have not already been provided by the applicant or by another interested party. (sub. DR35, p. 5)

Nonetheless, participants have noted the duplication and delays caused by overlap between the Commonwealth and State and Territory Indigenous heritage Acts. Requiring the Australian Government, in considering Indigenous heritage protection applications, to take into account State and Territory government assessments and decisions about the same heritage site has the potential to reduce the duplication and delay.

The NT Government (sub. DR32, p. 6) and DEWHA (sub. DR35) supported the proposal to amend the Commonwealth Act to accredit State Indigenous heritage regimes that meet a national set of minimum standards. DEWHA observed it should reduce duplication of decisions and remove a source of uncertainty (sub. DR35, p. 5).

APPEA also proposed that heritage agreements be transferable in certain circumstances:

... the industry believes that any heritage agreements should be transferable across operators when permit interests change, so long as the operations remain within the bounds of the original work program. (sub. DR29, p. 11)

The Commission sees merit in this proposal. As long as the new operator adheres to the original work program and the conditions of the original heritage approval, it appears an unnecessary regulatory burden to require another Indigenous heritage approval just because ownership changes.

FINDING 6.5

Duplication of Indigenous heritage approvals appears to be a source of delays and uncertainty. In some cases, proponents, who have obtained heritage approvals after lengthy processes under State and Territory Indigenous heritage legislation, are faced with further delays when there are applications for a heritage protection 'declaration' under the Commonwealth's Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

RECOMMENDATION 6.5

The Australian Government, in considering applications for a heritage protection 'declaration' under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, should take into account previous State and Territory government assessments and decisions about the same heritage site. The Commonwealth Act should also be amended to accredit State Indigenous heritage regimes that comply with a national set of minimum standards. In addition, heritage agreements should be transferable across operators when title ownership changes, providing the new operator is willing to adhere to the original work program, and the conditions of the original heritage approval.

Clarity and transparency of environmental offsets

Some members of the sector considered the negotiation of environmental offsets between some governments and proponents as lacking clear and transparent processes. For example, APPEA indicated that some companies are of the view:

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 but could have at least as onerous an impact on the industry. (sub. 16, p. 22)

However, some in the sector consider that the use of offsets has advantages. In particular, where they allow a more flexible regulatory approach rather than the reliance on more prescriptive regulatory solutions to environmental concerns. APPEA noted:

... environmental offsets can provide a more flexible approach to ameliorating environmental impacts provided they are a substitute for a regulatory obligation rather than an additional condition. (sub. 16, p. 22)

One of the significant concerns with the current offset arrangements is the lack of consistency and clarity across jurisdictions. APPEA proposed that the Ministerial Council on Mineral and Petroleum Resources consider adopting a national and consistent approach across all jurisdictions on the issue of environmental offsets (sub. 16). The EAF is currently considering the issue of environmental offsets as part of its forward work program (RET, pers. comm., 18 August 2008).

In relation to offset requirements under the EPBC Act, DEWHA is developing a draft offsets policy (DEWHA 2007b). Environmental offsets should, in general, provide compensation for those impacts arising from development proposals that cannot be adequately reduced through avoidance and mitigation. DEWHA stated that the aim of the draft offsets policy statement is:

... ensuring a consistent, transparent, equitable and effective approach to the use of offsets under the EPBC Act. The draft policy reflects the Department's current experience with offsets and the legal requirements of the EPBC Act and forms the basis for current administrative practices and procedures. (sub. 8, p. 8)

The WA policy guidelines on environmental offsets (appendix D) allows a wide range of information gathering, research and other 'contributing offsets' to be used. This would appear to be a potential source of some of the concerns about offsets, especially regarding their potentially arbitrary and open-ended nature.

DMP observed:

... in Western Australia's jurisdiction, environmental offsets can be included in the Environmental Protection Authority's conditions of approval. The Department also understands that the Ministerial Council on Mineral and Petroleum Resources is aware of the importance in using environmental offsets and therefore, this Ministerial Council should be consulted in this regard. (sub. DR29, pp. 14–15)

It is the Commission's view that environmental offsets should be subject to more transparent and timely processes to avoid the potential for arbitrary and inconsistent requirements across different projects, and excessive delays from open-ended negotiation processes. For instance, in cases where direct ('like-with-like') offsets are not practical or sensible, an offset fund could be established where proponents make financial contributions as an offset condition. Such a fund would need to have transparent governance arrangements and would need to allocate funding to projects on a strategic rather than ad hoc basis. There may also be merit in considering the advantages of more nationally consistent offset policy principles to avoid the potential for unnecessary complexity and inconsistency that can arise from having different arrangements applying across jurisdictions.

In response to this proposal presented in the draft report, the NT Government noted it:

... is in the process of developing approaches to offsets. There is no objection in principle to framing of national principles nor systems for identifying high priorities for offset arrangements, provided there is recognition of the limited value of strict like-for-like offsets in the Northern Territory situation. Subject to recognition of the need for some regional variation in approaches, the recommendation is supported. (sub. DR32, p. 6)

FINDING 6.6

The current process used in setting some environmental offset conditions appears arbitrary, open-ended and lacking in transparency. Offset conditions often seem to have little or no direct connection with the environmental damage they are intended to 'offset'. However, some industry participants regard offsets, despite their weaknesses, as a potentially flexible mechanism to mitigate environmental damage and overcome regulatory impediments to getting projects approved.

RECOMMENDATION 6.6

All Governments should introduce transparent policy principles for environmental offsets — especially the principle that offsets where practical should be directly related to the damage being offset. In situations where environmental damage cannot practically or sensibly be 'directly' offset, other transparent offset mechanisms should be explored — including, for example, the use of an offset 'fund', which could be devoted to the highest priority projects in the relevant jurisdiction under transparent and appropriate governance arrangements. There would be merit in introducing nationally consistent principles.

Emerging issues

Two key emerging environmental-related regulatory issues are the amendments to the OPGGSA on carbon capture and storage, and the establishment of the Australian Government's Carbon Pollution Reduction Scheme. These are likely to have a substantial future effect on the sector, consequently, these issues are a high priority for the industry. For example, a number of concerns were raised in submissions in relation to proposed carbon capture and storage policy arrangements — these include concerns about the rights of current holders of petroleum titles, third party access rules, and post-closure responsibilities and liabilities (chapter 5). Further, the Commission maintains its concern that this new area of legislation presented a real opportunity (which was missed) for regulatory burdens to be minimised by adopting mutually agreed nationally consistent legislation. Despite

attempts to achieve this it now appears that the outcome will be more of the same — disparate legislation in each State and Territory.

The Commission has previously considered a number of policy issues related to the potential introduction of a carbon pollution reduction scheme (or emissions trading scheme) (PC 2008d). Once a national emissions trading scheme is in place, other abatement policies generally change the mix, not the quantity, of emissions reduction. In many cases, retaining existing, or introducing new, policies to supplement the emissions trading scheme (such as energy efficiency initiatives) is not justified, as it imposes unnecessary costs on regulated businesses and the broader community.

In addition to legislation on carbon capture and storage, and the establishment of the Carbon Pollution Reduction Scheme, two other environment-related emerging issues were raised in submissions: the duplication of greenhouse and energy consumption reporting, and decommissioning of petroleum facilities.

Duplication between greenhouse and energy consumption reporting

The *Energy Efficiency Opportunities Act 2006* (Cwlth) (EEO Act) and the new *National Greenhouse and Energy Reporting Act 2007* (Cwlth) (NGER Act), require companies to report on energy consumption. In addition, there are State and Territory Government requirements for energy efficiency reporting. There appear to be some potential sources of duplication and unnecessary burdens under these arrangements.

Under the EEO Act, businesses in an Australian joint venture are required to obtain written nominations of the operator of a joint venture, as well as the nominated reporting entity. This is to avoid the potential requirement for each member of the joint venture to report separately on energy consumption. APPEA indicated that this has been a particularly resource-intensive exercise for some specific types of joint venture:

For exploration joint ventures in particular this is a time consuming exercise requiring companies to chase responses from smaller joint venturers who may not be subject to the requirements of the [EEO] Act due to low energy consumption levels. (sub. 16, p. 37)

APPEA (sub. 16) claimed that under the new NGER Act, there has been a requirement for another round of nominations by joint venture operators. APPEA argued that although there were amendments made to the EEO Act — intended to streamline reporting requirements after the introduction of the NGER Act — it is still a potential source of unnecessary regulatory burden.

APPEA stated:

There is still a requirement for ongoing duplicate nominations, dual registrations once the thresholds [for reporting] are reached and two sets of reporting requirements for companies to understand and comply with the requirements of each Act going forward. (sub. 16, p. 37)

However, the Minister for Resources, Energy and Tourism has recently announced amendments to the EEO Act subordinate regulations to streamline energy reporting with requirements under the NGER Act (box 6.5).

Box 6.5 National greenhouse and energy reporting system

Regulations governing the Australian Government's Energy Efficiency Opportunities (EEO) program were amended from 1 July 2008. This will enable participating companies to streamline energy use reporting with requirements under the new National Greenhouse and Energy Reporting System.

The National Greenhouse and Energy Reporting System will collect energy-use data, which will form the basis for a future emissions trading scheme. Streamlining the EEO with this system is designed to address concerns expressed by some businesses that energy-use reporting would be duplicated under the two systems.

Source: Ferguson (2008b).

In some cases, there are also State and Territory Government reporting requirements in addition to the energy efficiency reporting requirements under Commonwealth legislation. In Victoria, for example, under the Environmental Protection Authority's Energy and Resource Efficiency Plans there is apparently the potential for duplicate reporting with the requirements of the EEO Act. APPEA argued that while the Victorian process allows exemptions to avoid duplicate reporting, these are not well designed:

Theoretically companies were supposed to have been able to apply for an exemption if already participating in EEO but the regulations require your EEO assessment (which is a 5 year program) to have already been completed to get the exemption. (sub. 16, p. 37)

ExxonMobil also highlighted duplication in reporting requirements for greenhouse and energy programs (sub. 13, quoted in chapter 8 of this report). Duplication of reporting requirements can contribute to unnecessary regulatory burdens. A recommendation that reporting requirements are clear, justified, and avoid duplication and overlap with other mandatory reporting requirements is presented in chapter 10.

Decommissioning

According to DEWHA (sub. 8), the decommissioning of petroleum facilities is a potentially significant future issue for Australia. Australia has two key petroleum provinces (Bass Strait and the North West Shelf), where many facilities will soon reach the end of their operating life.

APPEA has previously encouraged the Ministerial Council on Mineral and Petroleum Resources to develop a nationally consistent policy for decommissioning offshore facilities. RET has released a discussion paper on decommissioning regulation under the OPGGSA (chapter 4). APPEA (sub. 16) broadly supported the development of a consistent policy as proposed in the RET discussion paper. However, it raised two outstanding issues:

- Clarification of ongoing monitoring requirements.
- Recognition that there is minimal value in the early provision of detailed decommissioning plans at the commissioning and approval phase of a project.

Participants consider progressing the proposals of the RET discussion paper a priority to clarify future decommissioning arrangements.

Woodside stated:

The discussion paper on decommissioning was a significant work, but within Woodside it is generally felt that the focus was heavily toward the environmental issues to the exclusion of technical and commercial requirements. In any event the process has been slow in moving forward with little progress being made toward an agreed guideline. (sub. 11, p. 2)

There is also potential duplication of requirements under the EPBC Act and the *Environment Protection (Sea Dumping) Act 1981* (Cwlth). However, DEWHA noted:

The assessment of decommissioning activities to date has been coordinated so only one assessment is undertaken for both the EPBC Act and the *Environment Protection (Sea Dumping) Act 1981*. (sub. 8, p. 8)

Decommissioning is likely to be a growing area of regulatory activity, as facilities in a number of fields reach the end of their operating life. For this reason, governments should implement nationally consistent requirements — which also avoid any potential overlaps with other related processes — as a priority.