

## ***Conservation Council of Western Australia***

Written submission to the  
Mineral and Energy Resource Exploration  
Productivity Commission inquiry

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This submission sets out key extracts from the Draft Report, and then our responses to each under each extract (in all cases, highlighted in yellow to clearly distinguish the response from the extract to which it relates). Thank you for the opportunity to make this submission.

### **Key quotes from the May 2013 Draft Report:**

Page 2:

Many stakeholders are dissatisfied with the current regulatory arrangements:

- some explorers claim that governments are discouraging exploration by increasing compliance costs, extending approval times and increasing regulatory uncertainty
- some community groups claim that regulations are insufficient to protect environmental, heritage and community values and agricultural uses of the land, and that regulators are not being sufficiently diligent in protecting those values and land uses.

Yes – but in reality, the concerns of community groups are not strongly reflected in the Draft Report as a whole, and in particular in the draft recommendations.

Page 10:

### **Concerns with the regulatory framework**

Common concerns raised in this inquiry, across all regulatory domains, have been the lack of transparent and consultative processes undertaken when adding or changing regulation, the poor communication of some regulators and the scant use of evidence based decision making and proportionate risk management.

There can be strong opposition to mineral and energy resource exploration from some in the community, particularly those who are directly impacted and for whom the potential costs are concentrated. But policy processes have sometimes failed to assess the more widely dispersed benefits for the broader community. Mitigation of the concerns of the immediate community appears to be driving some of the recent legislative responses.

There will invariably be some parties who are disaffected by land use decisions. This places added emphasis on the need to ensure transparent and consultative regulatory frameworks. In the Commission's view, those frameworks, and any changes to them, should be based on extensive community consultation informed by the best available environmental, social and economic understanding of the local and communitywide risks of impacts, and benefits, from specific exploration activities.

We were quite amazed to read this appraisal of the current Australian regulatory environment. To us, arguments about alleged benefits to the broader community have always dominated approvals processes, to the detriment of the environment, and this situation remains unchanged.

Unless of course, in the Commission's view, "benefits for the broader community" includes environmental protection? The Issues Paper and the Draft Report seemed consistently to assume not, but surely a sustainable environment is the most powerful community benefit possible!

In any case, we of course cannot oppose the idea that some sustainability-related decisions should involve a fair appraisal of all relevant environmental, social and economic risks and potential benefits. We would only insist that where a specific decision-making process is designed to consider all three aspects of sustainability, they must be tested fully, openly and properly. In the case of the Gorgon-on-Barrow proposal for example, the State Government's in-principle decision to allow access to Barrow Island completely failed to expose the supposed economic limitations of the project to public scrutiny.

Page 23:

Scientific uncertainty should not lead to poor regulatory processes or decisions. A precautionary approach should be adopted where there is concern of substantial or permanent damage. A lack of certainty should not be used to justify a lack of action to mitigate or prevent such damage. Nor does scientific uncertainty reduce the need to identify the benefits and costs of exploration activities. Rather the presence of scientific uncertainty is one factor that should be considered when deciding whether resource exploration can be reasonably expected to increase the community's wellbeing. Decision makers should weigh up the risks and impacts (both positive and negative) of an exploration proposal. This process can evolve and be revisited as scientific uncertainty is reduced.

Respectfully, the risk here should not just be about what the (human) community may or may not get out of it in terms of material benefits, but the risk to the environment. The thing some in industry fail to understand is that sometimes – sometimes – the appropriate response to the particular risk of harm to a particular part of the country, is to decide not to approve a particular development. Our experience is that sometimes regulators respond to increased environmental sensitivity by requiring the production of more and more environmental management plans – but those are often structured so as to avoid community scrutiny before overall environmental sign-off, and to in any case be unenforceable after overall environmental sign-off.

Page 59:

### **Policy levers available to governments**

Governments have a number of policy levers to influence the overall level and nature of exploration. These levers can act to either increase or lower the ‘reward to risk ratio’ for exploration activities. The levers include:

- *Availability of, and access to, land.* Governments, in controlling large tracts of Crown land and in regulating the use of private land, can influence what land is available for exploration activity and what conditions apply where exploration is allowed. There are also legislative requirements set by governments relating to access to land where native title exists.
- *Regulation of exploration.* This involves providing licences to undertake exploration and establishing the terms and conditions of these licences. Increasingly, the regulation of exploration activities focusses on environmental impacts, native title and heritage protection.

Where is the evidence for that last sentence? Since the Barnett Government came to power, the reverse has been true in WA.

Pages 59 to 61:

### **Explorers views of regulation**

The nature of the regulatory framework and regulator behaviour can play an important role in shaping the structure of incentives faced by explorers. Equally, other stakeholders have views on the adequacy of regulation to deliver on a range of other social, economic and environmental objectives. These views are canvassed in the relevant chapters in this report.

A Canadian research group — the Fraser Institute — has been undertaking annual surveys of mining companies to examine the relative attractiveness of

different jurisdictions and has developed a Policy Potential Index (PPI)<sup>3</sup> (Wilson et. al 2013).

<sup>3</sup> The PPI is a composite index that captures the opinions of managers and executives of mining companies on issues such as uncertainty concerning the administration, interpretation, and enforcement of existing regulations, environmental regulations, regulatory duplication and inconsistencies, taxation, uncertainty concerning disputed land claims and protected areas, infrastructure, socio economic agreements, political stability, labour issues, the geological data base, and security.

The Fraser Institute surveys suggest that regulatory change and governance in Australia are impinging on the attractiveness of many Australian jurisdictions as destinations for exploration. Compared to the 60 jurisdictions that have been included in every Fraser Institute survey, New South Wales (ranked 33/60 in 2012-13), South Australia (18/60) and Tasmania (38/60) have failed to maintain their relative attractiveness for mining companies over recent years. Only Western Australia (13/60) has unambiguously improved its ranking. The rankings of the Northern Territory (20/60 in 2012-13) and Queensland (27/60) show no trend over recent time.

The Fraser Institute highlights the following quote about resource exploration in Australia:

Across Australia, political and regulatory panic is seriously impacting the quality and timeliness of decisions, and certainty about access to land is very concerning. The ‘Twitter’ factor is determining political attitudes and actions, and regulators are reacting to minimize the perceived ‘risk exposure’ of their ministers.  
— An exploration company, Company president. (Wilson et al. 2013 p. 39)

Industry concerns with the regulatory framework are echoed in several submissions from explorer peak bodies:

The underlying theme in AMEC’s submission is that regulatory barriers through time and cost reduce the quantity of minerals exploration in Australia. If governments can reduce these barriers Australia would be able to increase efficiency and productivity and ultimately the amount of exploration. (AMEC 2013 sub. 24 p. 7).

Recent years have brought NSW explorers a significant increase in legislative and policy requirements, as well as administrative expense. There is evidence that these issues have already deterred exploration in NSW, with explorers moving to other states and more favourable international jurisdictions. (NSW Minerals Council sub. 3 p. 3)

There is considerable opportunity to update Australian regulatory practice to reflect the significant advances in industry performance and capability that have occurred in recent decades. (AusIMM sub. 12, p. 5)

The Minerals Council of Australia referred to a number of other business surveys of the mining sector reiterating the view that regulatory burdens have increased:

Grant Thornton's *Mining Business Outlook Report 2013* ... concluded that increased regulation has 'dampened the enthusiasm' of international investors in the Australian mining sector. (sub. 27 p. 21)

Baker & McKenzie's report, *Mining investment: local challenges - global implications*, similarly reported 'a growing perception amongst the industry of a complex maze of green and red tape' in Australia. (sub. 27 p. 21)

Explorers have identified a range of regulatory barriers that they see as impinging on the efficiency and effectiveness of the exploration industry. This report examines the impact of these non-financial regulations on exploration to determine if existing regulations are consistent with the principles of best practice regulation or, if they are inconsistent, to examine the scope for beneficial reforms.

We are unable to comment in detail on the assumptions and primary information sources that formed the basis for the Fraser work and other surveys referred to in the above quote. Suffice it to say that as the Draft Report itself notes, it appears that it is the opinions of mining managers and executives – which is but part of the whole story. On the ground here in WA, our experience is that the system is not fully and strongly administered!

Page 89:

DRAFT RECOMMENDATION 3.3

***If an Act requires the Minister to notify a person of a decision regarding an exploration licence, the Act should require that the notice include the reasons for the decision.***

Further to the brief discussion during our oral submissions, we agree! It's important to all stakeholders that key decisions are justified – and key decision-makers made accountable – in this way.

Page 95:

Adequate, skilled staffing is something governments must address so that exploration proponents, communities and other stakeholders can be confident that the regulations in place are being properly administered.

Further to the brief discussion during our oral submissions, we agree, and would respectfully but strongly submit that the Commission should make a recommendation about boosting regulatory staff (either from consolidated revenue or by way of moving toward proponents bearing the full costs of industry regulation).

Page 101:

Reporting should be done as transparently as possible, with methodological information available to describe the design of performance indicators (sub. 24, p. 23). The Commission's view is that reporting should include:

- the number of applications received and finalised, separated into types of application (including exploration licence applications and subsequent applications, for example for detailed environmental and work program approval)
- percentage of applications meeting target timeframes
- average and median time taken, separated into total elapsed time and time when the 'clock' was stopped because the regulator was waiting on further information from the applicant.

DRAFT RECOMMENDATION 3.5

***Governments should ensure that their regulators publish target timeframes for approval processes, including exploration licensing and related approvals (for example environmental and heritage approvals). The lead agency for exploration should publish whole-of-government performance reports against these timeframes on their website.***

Given the precursor to this recommendation, that reporting should separate out the time elapsed when the clock is stopped because of proponent-related delays, we agree with this recommendation. In our experience, delays on the proponent's side of the equation are very common.

Page 114:

The principles underpinning the Framework can be used to inform assessments on whether or not to declare an area of land as a national park or conservation reserve. Any assessment should weigh up the costs and benefits to all Australians of the use of the land as a park or reserve (including any permitted shared use) against the costs and benefits of alternative land uses. Again with reference to the Framework, any assessment should be conducted in a consultative and transparent manner and involve participation of local communities and land holders and other interested and affected parties. Only then should declarations include prohibitions on other land uses.

And then the first part of recommendation 4.1:

DRAFT RECOMMENDATION 4.1

***Drawing on the guiding principles of the Multiple Land Use Framework endorsed by the Standing Council on Energy and Resources, Governments***

***should, when deciding to declare a new national park or conservation reserve in recognition of its environmental and heritage value, use evidence-based analyses of the economic and social costs and benefits of alternative or shared land use, including exploration.***

Comments on both of the above propositions:

As we said in our oral submissions, this approach is inconsistent with existing national and especially international commitments for reserve creation as part of biodiversity conservation. There are landscape types to retain, and scientifically that means minimum levels of fully-protected reserves. Mineralisation may affect where those reserves are placed, but it should not affect whether or not Australia seeks to achieve those targets.

How does the Commission propose such knowledge of extractive industry potential is achieved? Specifically, how intensely must the area be explored before “the community” can be sure? At whose expense might that happen? If privately funded, there will be strong expectations from industry about being allowed to develop if resources are uncovered – after which there is very unlikely to be a balanced decision about weighing up the potential as a mine against the potential as a national park.

Page 116:

Gaps in geoscience knowledge can limit the ability of governments to consider the benefits of other land uses in areas where pre-declaration exploration was incomplete or where subsequent exploration is prohibited. The Association of Mining and Exploration Companies (AMEC) argued:

Restricted access to the conservation estate leaves significant gaps in our knowledge of our mineral resources. AMEC is aware of an example where a series of aerial surveys excluded a conservation estate resulting in a blank spot in the data set. Aerial surveys are a low impact exploration activity. (sub. 24, p. 19)

This is entirely appropriate! Mostly Australia is behind where it needs to be with establishment of its CAR reserve system – why should we allow existing reserves to be under attack?

Page 117:

Second part of draft recommendation 4.1:

***Governments should, where they allow for consideration of exploration activity, assess applications by explorers to access a national park or conservation reserve according to the risk and the potential impact of the specific proposed activity on the environmental and heritage values and on other users of that park or reserve.***

This area was obviously discussed at some length during our oral submissions. In this document we only wanted to add two examples illustrative of the problems we had identified.

One is Irvine Island in the Kimberley. The EPA had previously recommended against any mining on the island, but when subsequently presented with a new exploration proposal, found itself unable to say no because the impacts of the exploration alone were not significant enough to warrant formal EIA. Should that proponent end up seeking to mine though, they have essentially been allowed to spend money exploring an area they will likely not be able to mine.

Another concerning example related to this topic is the fact that some years ago Karrara Mining was given approval to mine in one area with conditions that included, among other things, protecting a different area as an offset. More recently, the company has sought successfully to explore in the offset area. Presumably both the EPA and the community will push back against any potential future applications to mine in that offset area.

Page 183:

DRAFT RECOMMENDATION 6.1

***The Commonwealth should accredit the National Offshore Petroleum Safety and Environmental Management Authority to undertake environmental assessments and approvals under the Environment Protection and Biodiversity Conservation Act for petroleum activities in Commonwealth waters.***

We have strong reservations about this recommendation – NOPSEMA doesn't have the same expertise or standards as the environmental regulator. And probably most importantly, NOPSEMA is subject to oversight by a Minister who has an inherent conflict of interest in their portfolio created by being responsible for both expanding the industry and potentially restricting it by not issuing an approval.

If the Commission is minded to pursue this recommendation anyway, at very least the involvement of NOPSEMA should not be via a permanent, irrevocable delegation – SEWCaP must maintain oversight of the quality of the science and the processes being used.

Page 187:

DRAFT RECOMMENDATION 6.2

***The Commonwealth should improve the efficiency of environmental assessment and approval processes under the Environment Protection and Biodiversity Conservation Act by strengthening bilateral arrangements with the states and territories for assessments and establishing bilateral agreements for the accreditation of approval processes where the state and territory processes meet appropriate standards. The necessary steps to***

***implement this reform should be properly scoped, identified and reviewed by jurisdictions and a timetable for implementation should be agreed.***

As discussed during our oral submissions, our response to this draft recommendation is to support the ANEDO submission as extracted at page 186 of the Draft Report:

...For example, the Australian Network of Environmental Defender's Offices (ANEDO) stated:

While some stakeholders have raised perceptions of regulatory overlap and duplication, ANEDO believes the case for shared responsibility and oversight between Commonwealth and State governments is strong. As the first headline of the *State of the Environment Report 2011* (Cth) notes, 'Our environment is a national issue requiring leadership and action at all levels.' (sub. 17, p. 5)

ANEDO has elsewhere outlined other reasons against accreditation of state and territory approvals processes, including the potential for conflict of interest if a state or territory government stands to benefit financially from a proposal, and states and territories not having a mandate to consider consequences outside their borders (Australian Network of Environmental Defender's Offices 2012).

Page 194

DRAFT RECOMMENDATION 6.4

***Governments should ensure that their environment-related regulatory requirements relating to exploration:***

- are the minimum necessary to meet their policy objectives***
- proportionate to the impacts and risks associated with the nature, scale and location of the proposed exploration activity.***

As discussed during our oral submissions, in connection with the draft report generally, we can't readily think of a WA example of a disproportionate regulatory response. We do however have recent and relevant experience of a regulatory response that undershot the environmental significance of the activity e.g. failure to have an EIA on first few WA modern fracks.

What is disproportionate in WA is the numbers of regulatory staff as compared to the size of the regulatory task!

Pages 195 and 196:

As COAG noted, there may be instances where some level of prescription is appropriate. The Commission notes that prescriptive requirements can provide

companies with a relatively high degree of certainty about what is required, and they can be simpler for the regulating agency to enforce and monitor.

However, regulators should be mindful of the many advantages of outcomes-based approaches. They provide scope for flexible and innovative solutions to environmental issues, and they permit companies to adapt to changing circumstances without compromising the environmental outcome sought.

DRAFT RECOMMENDATION 6.5

***Governments should ensure that their environment-related regulation of exploration activities should be focused towards performance-based environmental outcome measures and away from prescriptive conditions, in order to better manage risk and achieve environmentally sound outcomes.***

We obviously conceptually support the idea of increasing the weight placed on outcomes as against prescriptive conditions in and of themselves. But as the paragraphs above note, prescriptive conditions can be simpler for the regulating agency to enforce and monitor.

For the above reason, any move toward outcomes-based regulation must closely involve experienced government lawyers at least, and ideally Crown lawyers with significant experience in prosecution work. For our work as a peak ENGO, and for our constituents, the failure to draft enforceable approval conditions has been a chronic problem in WA for many years.

Another issue that must be addressed in WA (and presumably elsewhere) is that if non-environmental regulators are principally responsible for administration of environmental outcomes-based conditions, the regulator in question (in our case, DMP) needs to do the work to show the public what environmental outcomes it is seeking to achieve with those conditions. In WA, that work has not yet been done.

Page 203:

DRAFT RECOMMENDATION 6.7

***Governments should clearly set out in a single location on the internet environment-related guidance on the range of approvals that may be required.***

We support this recommendation.

Page 205:

DRAFT RECOMMENDATION 6.8

***Governments should ensure that their authorities responsible for assessing environmental plans and environmental impact statements (and equivalent documents) should make archived industry data publicly available on the internet.***

**We strongly support this recommendation!**