NORTHERN TERRITORY GOVERNMENT SUBMISSION TO

THE PRODUCTIVITY COMMISSION

REVIEW OF REGULATORY BURDEN ON THE UPSTREAM PETROLEUM (OIL AND GAS) SECTOR DRAFT RESEARCH REPORT

BACKGROUND

On 11 April 2008, the Productivity Commission was asked to research the regulation of crude oil and natural gas projects involving more than one jurisdiction, to:

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

The comments on the draft research report and its recommendations provided by the Northern Territory Government are from a whole-of-government perspective in response to:

- Regulatory overview (chapter 4);
- Resource management and land access (chapter 5);
- Environment and heritage (chapter 6);
- Occupational health and safety (chapter 7); and
- A way forward (chapter 10).

Regulatory overview

Conceptually, the proposal for a single National Off-shore Regulator would appear to have some merit as it could serve to reduce administration inconsistencies between jurisdictions and improve governance arrangements (by separating the regulatory and policy roles) of the Commonwealth government and State and Territory agencies.

However, there are some potential disadvantages of having a single regulator. In particular, it may create a conflict of interest in its regulatory objectives, for example a single regulator might have a potential conflict between its occupational health and safety (OH&S) and environmental and resource development objectives.

In addition, an area where a single National Off-shore Regulator would not be as effective, is the administration of a project that comes On-shore, as local economy, planning and social issues are better understood by a specific States or Territory jurisdiction. It is considered that unless the National Regulator is also responsible for the administration of On-shore projects that there will be further regulatory burdens for businesses.

The Northern Territory Government notes the omission in the *Current State and Territory Reviews* section of the draft research report (refer pages 61-65), the review of the *Environmental Assessment Act* (NT), which is being undertaken by the Environmental Protection Authority (EPA), (an independent Authority established to advise and give recommendations to Government on ecologically sustainable development). The terms of reference have been established and the first public discussion papers are due to be released in April 2009.

The review will examine how the environmental impact assessment process interacts with subsequent Northern Territory Government approval processes as well as the interaction between the *Environmental Assessment Act* and the *Environment Protection Biodiversity Conservation Act* (Cth) and will consider information and take direction from the Western Australian review.

The EPA has also examined and will be recommending a framework for ecologically sustainable development (ESD) in the Northern Territory. A public discussion paper to support this project is due in February 2009 with the final recommendation to government expected in around April/ May 2009.

Resource management and land access

Governments should clearly articulate the objectives of intervention in approving the method and timing of petroleum extraction and periodically assess the benefits and costs to ensure such intervention is justified. (5.1)

The Northern Territory Government agrees that more efficient and effective communication between the existing regulators and businesses should occur at the infancy stage of projects. A way in which this could be achieved is for regulators to provide a service to "vet" or check draft proposals by businesses, with a view to having all proposals and applications meet the necessary legislative requirements prior to lodgement. This would provide comfort to all parties and allows for the approvals to be processed expeditiously. This could be achieved within existing administrative arrangements.

Governments should introduce lighter handed regulation of retention leases by increasing the period of the initial lease from five years to 15 years, with renewals for a period of ten years (to reduce uncertainty and enhance the incentive to invest in exploration). (5.2)

In relation to the regulation of retention leases and the proposal to increase the period of the initial lease from five years to 15 years, with renewals for a period of ten years, the Northern Territory Government is supportive of the recommendation, subject to the condition of the inclusion of mechanisms in the lease documents to ensure that clients develop the resource, once it is considered to be commercially viable to proceed.

State and Territory Governments should mirror amendments resulting from the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 in coastal waters, and implement nationally consistent legislation for onshore carbon capture and storage as originally endorsed by the Ministerial Council on Mineral and Petroleum Resources in 2006. (5.3)

The Northern Territory Government supports this recommendation.

Governments should update legislation and its administration to ensure relevant offshore State and Territory legislation effectively 'mirrors' the Commonwealth offshore legislation as intended. (5.4)

The NTG supports this recommendation, but considers that to be effective; each jurisdiction would need to have appropriate levels of resources. Changes to the costing of administering legislation would be required to develop a "cost recovery" culture for all petroleum and gas administration.

There is evidence that in some circumstances Indigenous land use agreements can streamline the native title approval process and reduce the backlog of future act applications. State and Territory Governments should investigate whether such agreements could be used more frequently (including state-wide, regional and conjunctive Indigenous land use agreements). (5.5)

This recommendation has merit and the NTG has a policy of using Indigenous Land Use Agreements to streamline native title approval processes.

To avoid potentially lengthy delays, State and Territory Governments should, at an early stage, undertake strategic assessment processes in particularly sensitive, resource rich areas to identify suitable land to allow the development of major resource projects. (5.6)

The NTG supports this recommendation and agrees that early stage strategic assessments are beneficial to ensuring the development of major projects and their effective management. A cooperative and coordinated partnership is the key to the development and delivery of major projects involving the Commonwealth and Northern Territory Governments. In the Northern Territory, this has been achieved in relation to the Darwin LNG and Icthys Joint Venture.

Environment and heritage

Specific measures to improve the operation of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) include: (6.1)

- ***ensuring the Department of Environment, Water, Heritage and the Arts provides available information (such as information from previous assessments and relevant scientific studies) on significant environmental risks to the Department of Resources, Energy and Tourism to report with new acreage releases and to proponents seeking approval for a new project (such as pipelines);***
- ***developing bilateral assessment and approval agreements between the Department of Environment, Water, Heritage and the Arts and the Designated Authorities to avoid the potential for duplication in environmental submissions and to streamline approvals for routine activities where a State or Territory has developed adequate local expertise and knowledge; and***
- ***where strategic assessments are proposed for particular regions, these should be conducted early and according to clear timeframes and should not prevent proponents from pursuing approvals for existing projects.***

The Commonwealth and Northern Territory Governments have arrangements in place to organise 'joint' assessments for projects which traverse Commonwealth and Territory waters. Joint arrangements have also been organised when other jurisdictions are involved, for example, the proposed PNG pipeline. For on-shore 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.

It is noted that the Commonwealth Government has not yet entered into bilateral agreements accrediting state 'approval' processes, but has indicated that it is willing to consider these (refer to the Council of Australian Government's business regulation reform agenda). As environmental approvals tend to be determined on a case by case basis depending on local conditions, it may be feasible to develop a national approach to such approvals; however, it seems unlikely that a 'one size fits all' approach could apply.

It is possible that national reporting instruments could be developed (similar to the National Greenhouse and Energy Reporting Systems for greenhouse and energy reporting), however, there would be considerable costs incurred by governments in developing such systems.

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. In addition, the forum should be directed to develop consolidated and consistent environmental guidelines (with flowcharts and procedural information) for petroleum activities that are cross-jurisdictional, such as offshore pipelines. (6.2)

The draft recommendation is supported.

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 related to petroleum activities. (6.3)

The draft recommendation is supported, however, in relation to the development of consistent and consolidated guidelines for petroleum activities that are cross-jurisdictional, such as offshore pipelines (draft recommendation 6.2), as legislation differs in each State and Territory, the level of consistency that may be achieved through those guidelines may be limited.

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. For example: by improving the provision of baseline environmental information for new acreage releases or for new applications for project approvals in relevant areas. (6.4)

The NTG agrees with the draft recommendation, however, the Productivity Commission should note that 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.

Indigenous heritage Acts in all jurisdictions should require the consideration of previous decisions made in relation to the same heritage site by other jurisdictions. In addition, the Commonwealth Act should be amended to accredit State Indigenous heritage regimes that comply with a national set of minimum standards. (6.5)

The NTG notes that the draft research report has a focus on the Indigenous heritage protection regime in Western Australia (WA), and the difficulties facing the petroleum and Gas sector in dealing with that regime.

The Northern Territory Indigenous heritage protection regime provides for consultation with Aboriginal custodians and decision making and ownership of sacred site protection decisions by a Board of majority Aboriginal custodians, alongside transparency and accountability to Government and industry.

The Evatt Review (1996) of the *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) (ATSIHPA) acknowledged the difficulties and uncertainty which can occur where Aboriginal custodians choose to rely on the intervention possibilities offered by ATSIHPA. The Evatt Review found that the *Aboriginal Sacred Sites Act* (NT) met its proposed minimum standards for Indigenous heritage protection. In the 30 years of sacred site protection legislation in the Northern Territory, Aboriginal custodians have only used the ATSIHPA to refer matters on three occasions.

The NTG supports the recommendation to amend the *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) to:

- establish minimum standards for Indigenous heritage protection across Australia: and
- accredit State and Territory Indigenous heritage regimes that comply with national minimum standards.

Further, it is agreed that a single point of access for information regarding Indigenous heritage protection, particularly in relation to sacred sites, should be established at the State and Territory level.

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 may also be merit in introducing nationally consistent principles. (6.6)

The NTG 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.

Occupational Health and Safety

The legislated coverage of the National Offshore Petroleum Safety Authority should be extended to include the integrity of offshore pipelines, sub sea equipment and wells. Governments should also expand its responsibilities to include offshore environmental compliance regulation. If the National Offshore Petroleum Safety Authority is given these additional responsibilities, it would be necessary to ensure the authority was adequately resourced to carry them out. (7.1)

The NTG supports the recommendation. However, as identified in its response to "Regulatory overview", a potential disadvantage of having a single regulator is that it may create a conflict of interest in its regulatory objectives. For example: a single regulator might have a potential conflict between its occupational health and safety (OH&S) and equipment integrity objectives.

In addition, an area where a single National Off-shore Regulator would not be as effective, is the administration of a project that comes On-shore, as local economy, planning and social issues are better understood by a specific States or Territory jurisdiction. It is considered that unless the National Regulator is also responsible for the administration of On-shore projects that there will be further regulatory burdens for businesses.

This may in turn result in double-handling of projects as industry will need to liaise with the national and local authorities in the assessment, compliance and approval process which could result in delays. It would be more advantageous for these processes to be undertaken by a single local entity that is experienced and understanding of local issues and would result in a far more efficient and effective process.

The Australian Government should amend occupational health and safety regulations under the Offshore Petroleum Act 2006 (Cth) to ensure that only the petroleum-related functions of sea going vessels that pose a potential threat to health, safety and the environment are regulated under the safety case regime. (7.3)

The NTG notes the draft recommendation, but considers that clarification of this recommendation is required to determine if pipeline laying vessels are classed as petroleum related vessels as the *Offshore Petroleum Act 2006* (Cth) also regulates gas.

State and Territory Governments should make efforts to harmonise safety standards, or the interpretation of those standards, for imported upstream petroleum equipment across jurisdictions, whilst giving recognition to appropriate prevailing international standards. Where the application of standards is more onerous than those prevailing in other jurisdictions or comparable countries, efforts should be made to ensure that the application of these more onerous standards provides net public benefits. (7.4)

The NTG supports the draft recommendation to standardise regulations across all jurisdictions with a view to developing nationally consistent guidelines and procedures.

A way forward

State and the Northern Territory Governments should make clear the scope of local government's role in the approval of upstream petroleum developments (and other major developments). Where aspects of these developments are already regulated by environmental agencies or major hazard facilities regulators or when the regulation requires specialist industry knowledge, involvement by local government is not warranted. (10.1)

The NTG agrees with the draft recommendation. Guideline to clarify the role of Local Government (if any) at the early stages of a project where there are issues that fall within their sphere of responsibility in which they have expertise would aid in the approval process.

Governments should review and update all existing legislation to ensure it is consistent with the features of best practice regulation and good regulatory design. In particular, updated legislation and its administration should:

- ***separate policy advice from regulation;***
- ***promote the use of objective-based legislation where feasible;***
- ***ensure approval processes are best practice and clearly defined;***
- ***set statutory timelines for individual regulatory decisions (any decision should include a 'stop the clock' mechanism). There should be two timelines: one excluding periods when the 'clock' is stopped and one including all time elapsed. There should also be disclosure of reasons for regulators requesting additional information, and measurement and public disclosure of their performance against these targets;***
- ***measure and report overall timelines taking into account all stages of key regulatory processes (including scoping, advising, consultation and decisions);***
- ***be consistent with the definitions, format and approach of the updated Offshore Petroleum Act 2006 (Cth); and***
- ***provide clear guidelines where feasible on information requirements to assist proponents in efficiently providing the necessary information to allow timely regulatory decisions. (10.2)***

The NTG agrees with the draft recommendation and considers that timelines for regulators and industry should either be set in legislation or reviewed with the view to having realistic timelines for all parties.

Clear criteria will be required to ensure that decisions are time-bound and will require flexibility by both regulators and the industry.

To support the system of objective-based legislation and to minimise regulatory creep governments should:

- ***ensure that the intent of legislation is clearly defined at the parliamentary level and that objects clauses are clearly defined; and***
- ***clearly define the powers of regulators in developing guidelines and the intent and style of those guidelines. (10.3)***

The need for clear defining legislation which is rational and realistic is supported. Government regulation is essential for the proper functioning of society and the economy. It is important that government deliver effective and efficient regulation that is effective in addressing an identified problem, necessary to achieve policy objectives and efficient in terms of maximising benefits to the community.

The NTG through its Regulation-Making Framework: Principles and Guidelines acts to provide best practice principles as part of the normal policy and legislative processes, to assist its agencies in complying with formal regulation-making requirements.

The Australian Government should explore options for the introduction of an electronic approvals tracking system to improve the timeliness, accountability and transparency of approval processes. Such a system should allow for tracking of individual regulatory areas (for example, resource management and environment) as well as the overall approval process. In exploring options, the Australian Government should consider whether additional features should eventually be included as part of the system (for example, licence payments and data submission).

Based on the proof and initial experience of this system, State and Territory Governments should consider, where possible, adopting the national tracking system. (10.4)

The NTG agrees with the draft recommendation.

Where not already implemented, States and Territories should consider establishing a lead agency for petroleum approval processes. Such an agency would manage an integrated approval process and would require a clear mandate for all relevant areas (for example, resource management, environment and heritage) and clear decision-making powers over these areas except in exceptional circumstances. With appropriate governance, experience in South Australia suggests that such an agency can achieve an appropriate balance between enforcing legislative provisions and expediting approvals. (10.5)

This is currently being achieved, except for the grant process when the project is in differing jurisdictions. Changes to administrative arrangements will be required at the Commonwealth level and agreed to at the State and Territory level and will necessitate a form of cost recovery to the lead agency.

The Australian Government should establish a new national offshore petroleum regulator in Commonwealth waters, with regulatory responsibility for resource management, pipelines and environmental regulation. It should have the following functions:

- ***• administration of exploration permit, production and pipeline licensing — it would process applications, prepare advice and make recommendations to the Commonwealth Minister for resources; and***
- ***administration and approval of production, well construction and drilling, and pipeline consents — it would have the authority to approve consents for these activities.***

The new national offshore petroleum regulator should also incorporate the National Offshore Petroleum Safety Authority, which would continue to regulate offshore petroleum occupational health and safety. (10.6)

The NTG notes that there could be advantages by creating a new National Off-Shore Regulator and agrees that there should be a level of streamlining of the regulatory regime, however having Commonwealth departments regulating Commonwealth legislation from each State and Territory and based in each State and Territory would not provide a greater streamlining as proposed.

If the States / Territory regulate in the same manner following consistent policy and procedures as set by the Commonwealth in conjunction with closer communications and understanding between the States / Territory and the Commonwealth, this would achieve a similar outcome as proposed by the Productivity Commissions.

The primary factor to improving the regulatory regime is to ensure that the States / Territory are closely aligned and administer the legislation in the same manner rather than having a "local" flavour in each jurisdiction. With all projects that come on shore, there must be some consideration to the local economy and social impact and this may not be as closely considered by a National Off-Shore Regulator as it would if administered by the State / Territory.

Further, the requirement for technical resources to set up a National Off-Shore Regulator in each jurisdiction would replicate resources required for State / Territory on-shore technical requirements. This could result in under resourced State or Territory administrators or similar issues for the National administrators.

If a National Off-shore Regulator was created and based in each State / Territory, the technical resources required to appropriately administer projects would be similar to that required for the remaining State / Territory requirements. This could effectively double-up resource requirements in that field or divide the resource pool available for each which could reduce the State / Territory regulatory capability.

The draft recommendation is not supported.

The Australian Government should give State and Territory Governments, on a bilateral basis, the option of delegating their existing petroleum-related regulatory powers in coastal waters to the new national offshore petroleum regulator and ultimately the Commonwealth Minister as relevant. The governance arrangements that would then apply should be similar to those applying to the National Offshore Petroleum Safety Authority. For States and Territories that wish to opt-in, it would be a requirement that their State or Territory offshore petroleum Act fully mirrors the Offshore Petroleum Act 2006 (Cth) and its subordinate regulations, including provisions relating to pipelines. (10.7)

If legislation is amended to allow the "parent" legislation to govern when needed, this can be achieved within existing administrative arrangements. The decision to "opt-in" would be on a case by case basis and considered when the major part of the project was not in Territory waters or responsibilities. With reference to pipelines, this would be a greater challenge to achieve.

Where States and Territories have agreed to delegate their coastal water powers, including pipelines, to the national offshore petroleum regulator and ultimately the Commonwealth Minister as relevant, States and Territories should also have the option to delegate responsibility for the regulation of onshore inter-jurisdictional upstream petroleum pipelines. For States and Territories that wished to opt-in, it would be a requirement that their legislative provisions applying to onshore pipelines were harmonised with the Offshore Petroleum Act 2006 (Cth) where relevant. (10.8)

The NTG considers that if local waters and on-shore areas are also administered by the National Regulator, significant changes to legislation and Government direction would be required. There is also the possibility that a National Regulator may not take local considerations into account at the same level as would it be if administered by the States/ Territory. For example: land rights and future State / Territory planning for areas.

Further, if these areas were only to be administered for specific projects, this could lead to further confusion as it would provide a framework for two potentially different administrative regimes for similar projects.

The draft recommendation is not supported.

The current full cost recovery model used for the National Offshore Petroleum Safety Authority should be used to fund any new regulatory agency. As with the National Offshore Petroleum Safety Authority, the cost recovery model adopted for a new regulatory agency should be subject to regular review and appropriate governance arrangements. (10.9)

The NTG agrees with the draft recommendation on the proviso that the same model is used for existing administrative arrangements to ensure adequately resourced areas.

Summary of the Northern Territory Government position

Overall, the majority of the smaller points made in the draft research report in relation to regulatory regimes and that these regimes could be streamlined through harmonisation of legislation and regulations between the Commonwealth, State and Territory are valid.

However, the establishment of a single National "Off-Shore Regulator" based in each State or Territory would not result in a more effective or streamlined regulatory regime, and it would be unlikely that a National Regulator would consider as closely the local economic and social impact of a project coming on-shore as it would be if it was administered by the State / Territory. Stronger communication and clearly defined procedures and guidelines for the administration of Commonwealth legislation by the States / Territory would result in similar gains.

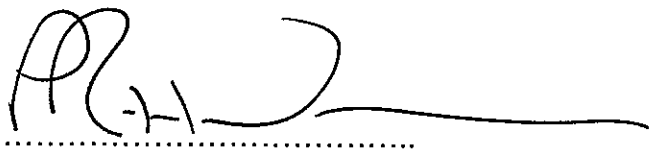
In most cases, land access in the Northern Territory is subject to Commonwealth legislation, that is: the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and Native Title and not Northern Territory legislation. Changes to legislation to ease land access would be controversial and challenging. It is the view that the Northern Territory's petroleum and gas legislation is simple to administer in comparison to Commonwealth legislation in relation to land access and consistency across State / Territory legislation would be required to further ease land access conditions restrictions in the event Commonwealth legislation was amended.

Greater success with land access could be achieved through a more considered and sensitive approach to the cultural and social issues. However, Commonwealth legislation has time frames and conditions that must be administered and in some cases these time-frames are in year terms and can be excessive.

The draft research report recognises the Northern Territory as a place where industry can do business. To ensure that the Northern Territory remains a competitive place for business, the NTG is continuously reviewing its regulatory and administrative environment to improve timeliness and reduce uncertainty while delivering on community expectations in respect to the environment and occupational health and safety.

The NTG looks forward to continuing to work with the Commonwealth and State Governments to ensure that the Northern Territory and Australia remains and enhances its position as an investment location for the petroleum sector.

Signed for and on behalf of the
Northern Territory Government
By the Chief Minister



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