



Australian Government

Department of the Environment, Water, Heritage and the Arts

Our reference: 2008/23520

Mr Philip Weickhardt
Commissioner
Productivity Commission
Locked Bag 2
Collins Street East
MELBOURNE VIC 8003

Dear Mr Weickhardt

The Department of the Environment, Water, Heritage and the Arts (the Department) welcomes the opportunity to respond to the Productivity Commission's Draft Research Report *Review of Regulatory Burdens on Upstream Petroleum (Oil & Gas) Sector* released on 4 December 2008. The Department's response brings together comments and suggestions from across the organisation, and represents the accumulated input of a wide cross-section of environmental expertise.

To maintain relevance and ease of use, the Department has restricted its comments and suggestions to the substantive material presented in the Draft Report. Wherever possible, individual responses relate to particular passages in the Draft Report – the aim is to improve on, or add to, an already substantial collection of data and insights.

The Department notes that an independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is currently underway. Some issues raised in the draft report are of direct relevance to the EPBC Act and its application and may therefore be addressed in that process.

The Department hopes that our contribution will add value to making this year's report a document of high quality. We look forward to working with the Commission on subsequent reviews in future years.

Yours sincerely,

Sean Sullivan
A/g First Assistant Secretary
Policy Coordination Division

20 February 2009

Attachment 1: The Department of the Environment, Water, Heritage and the Arts: Response to the *Productivity Commission Review on Regulatory Burdens on Upstream petroleum (Oil & Gas) Sector*



Australian Government

Department of the Environment, Water, Heritage and the Arts

Responses are set out in the following manner:

- The Report Section is identified in *Italic* font.
- The relevant text is identified in **bold** font.
- The Departmental response is identified in normal font.

Chapter 6. Environment and Heritage [p109]

Section 6.2 Key regulatory requirements and processes

A general comment is that heritage places relating to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) (ie World Heritage, National Heritage and Commonwealth Heritage listed places and the Register of the National Estate listed places) can be listed for their natural and/or cultural values. Cultural values can include those for Indigenous and/or European historic values.

Environmental assessments under the EPBC Act [p115]

We note that matters of Natural Environmental Significance (NES) such as World Heritage and National Heritage listed places are not the only ones to trigger referrals under the Act. Matters relating to Commonwealth Heritage listed places can also trigger the EPBC Act through the provisions relating to the environment. An example is Scott Reef, within the Browse Basin, with referrals being triggered through s23. Scott Reef is on the Commonwealth Heritage List for its natural values.

Heritage regulation [p118]

The matter protected under the EPBC Act is the listed values of World, National and Commonwealth Heritage List places not the sites themselves. This relates to the referral process in general, not just emergency listing procedures.

Historic Shipwrecks Act 1976 [p119]

The jurisdiction of the Commonwealth *Historic Shipwrecks Act 1976* is not limited to Commonwealth marine areas, as defined by the EPBC Act. It applies to the coastal waters of the Australian, states and territories to the low water mark. The requirements of the Historic Shipwrecks Act must be taken into consideration when applying for any Australian, state or territory planning approval for actions or developments in these waters. **(This issue touches on several draft recommendations such as 6.1, p133 and 10.2, p242)**

Any proposed actions involving contact with the seabed, or operations in close proximity to the seabed, that could potentially damage, destroy or interfere with historic shipwrecks or relics, should include risk mitigation strategies to ensure both located and previously un-located historic shipwrecks are not disturbed. Operational protocols should be put in place to ensure that identified risks are appropriately dealt with and to prevent possible breaches of the Historic Shipwrecks Act.

The Historic Shipwreck Act is mirrored in state legislation in WA, VIC, NSW and SA. TAS and QLD have historic archaeology underwater legislation. The Historic Shipwrecks Act applies to all NT waters seaward of the low water mark.

There are **19** Protected Zones declared under the *Historic Shipwrecks Act 1976*.

Section 6.3 Sources of unnecessary regulatory burdens [p120]

Approval Timelines [p125]

The report notes that the preparation of referral information and assessment documentation is *“not subject to statutory timelines, as such, the Department is able to make requests to proponents for further information without any time restrictions”*

To clarify, there are no time restrictions, minimum or maximum, because these stages involve information-gathering by proponents. It is difficult to see what timeframes could be reasonably imposed, what would be the repercussions for proponents if they did not meet these timeframes, or what benefit would be delivered.

Seismic survey permit approvals [p130]

The Department 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. The Department appreciates the efforts of the Productivity Commission to put forward both viewpoints but feels it would be useful to emphasise the fact that most seismic operations are conducted in accordance with the guidelines and do not encounter approval delays.

DRAFT FINDING 6.2

There has already been significant effort to improve the operation of the Environment Protection and Biodiversity 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 environmental risks related to new acreage for exploration and production.**
- **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.**
- **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. [p132]

The Department requests clarification around the finding that *“in some cases limited information appears to be provided to bidders on environmental risks related to acreage release.”* As noted elsewhere in the report, the Department provides information to the Department of Resources, Energy and Tourism regarding environmental sensitivities and where further assessment may be required under the EPBC Act. This is based on the best available information at the time.

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.

DRAFT RECOMMENDATION 6.1

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

- **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**
- **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. [p133]**

The Department notes draft finding 6.2 and draft recommendation 6.1.

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*.

To date, this strategic assessment has delivered a timely result with the recent announcement of the preferred development site in the Kimberley. This site selection process worked through approximately 40 sites in 11 months, providing a level of certainty to industry at no cost. The process gathered information from a wide variety of sources (including previous studies conducted by industry) and gained support from stakeholders including key industry groups, indigenous groups, non government organisations and both the state and Australian Governments.

As the Browse Basin strategic assessment moves into its second stage, it continues to receive support from key industry players who see value in the process and who are confident in its ability to achieve common goals within agreed timeframes.

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.

DRAFT RECOMMENDATION 6.5

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. [p 143]

In relation to “Indigenous heritage Acts in all jurisdictions should require the consideration of previous decisions made in relation to the same heritage site by other jurisdictions.”

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* (ATSIHP Act) 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 (s13(2) also s14) 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.

In relation to “The Commonwealth Act should be amended to accredit state Indigenous heritage regimes that comply with a national set of minimum standards.”

The Department would support reforms to the ATSIHP Act to accredit state and territory Indigenous heritage regimes that comply with a national set of minimum standards. Accrediting states and territories that met national standards should reduce Australian Government duplication of decisions made by states and territories that meet national standards and remove a source of uncertainty about state and territory development approvals. A national set of minimum standards could also be applied to new Australian Government procedures for approving developments outside states and territories that could determine with legal certainty developers’ obligations to protect Indigenous heritage.

A single regulator for Commonwealth waters [p223]

The Department notes draft recommendation 10.6 which includes:

“The Australian Government should establish a new national offshore petroleum regulator in Commonwealth waters with regulatory responsibility for resource management, pipelines and environmental regulation.”

The Department notes draft finding 6.1 which includes:

“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 ...”

The EPBC Act is directed towards the protection of matters of National Environmental Significance across Australia and is designed to meet Australia’s obligations under a number of international conventions. In particular the EPBC Act implements Australian Government policy to achieve ecologically sustainable development for future generations. It is important that this protection is applied consistently throughout Australia and across all industry sectors.

Environmental impact assessment conducted in accordance with the EPBC Act, is directed toward the prediction and analysis of likely environmental impacts into the future and the planning of appropriate mitigation measures. It requires specialised expertise and independence from resource management.

Any options for regulatory reform must recognise and maintain the important independent role of the Australian Government Environment Minister in approving projects to ensure the protection of the environment.

The Department sees national consistency of environmental protection as a key goal and would like to see national approaches, such as that offered by the seismic-cetacean guidelines, continued and expanded.

Chapter 10. A way forward [p233]

Key Points [p233]

The Key Points state that a national offshore petroleum regulator *will* improve approval processes and timeliness. Noting the qualifications stated in the report it seems such a regulator *may* improve. Presumably improved outcomes, for the environment, safety, and resource management, is a key goal, in addition to improved process and timeliness.

10.1 Implementing best practice regulation

Timeliness of approval processes [p239]

The report states that requiring regulators to inform or get permission from the relevant Minister to seek additional information may provide incentives for timely decision-making. It should be noted that authority is delegated to undertake certain statutory steps to facilitate timely decision-making. Elevating matters to Ministerial level may, in fact, take more time, depending on the availability and workload of the relevant Minister.

DRAFT RECOMMENDATION 10.2

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 (Cwlth)***
- ***provide clear guidelines where feasible on information requirements to assist proponents in efficiently providing the necessary information to allow timely regulatory decisions. [p242]***

The recommendation that a statutory timeline should be set for '*all time elapsed*' is not clear. Would this include or exclude the time taken by proponents to prepare assessment

documentation and respond to requests for further information? As stated above, the timeliness of these matters is outside the control of regulators.

An electronic approvals tracking system [p243]

Such a system is supported in principle and it is suggested this be extended to require reporting by proponents on the progress against their own timelines. For example, predicted timing of submission of draft assessment documentation. This would assist agencies planning and managing resources more efficiently, to cater for predicted peak periods of workflow.