



Australian Government

Department of the Environment, Water, Heritage and the Arts

Submission to the Commission of Inquiry established to report on the uncontrolled release of hydrocarbons from the Montara well head platform and subsequent events

Part 1 contains background information relating to the *Environmental Protection and Biodiversity Conservation Act 1999*, the role of the Department of the Environment, Water, Heritage and the Arts (DEWHA) and details relevant to the incident from DEWHA's perspective.

Part 2 addresses the Terms of Reference of the inquiry (including the matters specifically raised in the Issues Paper) where it is able to do so from matters within its own knowledge.

Part 3 suggests some improvements in light of the lessons learned from the Montara incident, both in the initial approval process (including contingency planning), as well as the events taken in response to the incident.

Part 4 attaches copies of relevant documentation that DEWHA has referred to in this submission.

NB: It is emphasised that this is the submission of DEWHA. It does not reflect the views of any other agency or person.

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Part 1 – Background

THE EPBC ACT AND DEWHA'S ROLE

- 1.1 The desire to facilitate a cooperative national approach to the environment between the Australian and State and Territory governments, a better definition of respective roles and better overall environmental protection gave rise to the 1992 *Intergovernmental Agreement on the Environment* (IGAE). Subsequently in 1996, the Council of Australian Governments (COAG) initiated a major reform process, building on the IGAE but designed to deliver more effective environmental protection while also removing duplication and delivering a more efficient development approvals process. The review's outcomes were formally agreed in the 1997 COAG *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment*. The changes required to Commonwealth environmental legislation in order to give effect to the 1997 agreement resulted in the development of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).
- 1.2 The EPBC Act is Australia's primary piece of environment legislation. It establishes a national approach to a wide range of environmental protection and biodiversity conservation matters. The Department of the Environment, Water, Heritage and the Arts (DEWHA) administers the EPBC Act.
- 1.3 Key objectives of the EPBC Act are to provide for the protection and conservation of Australia's environment, especially those aspects of the environment that are matters of national environmental significance (NES), to promote the conservation of biodiversity and heritage and to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.
- 1.4 There are four main areas of the EPBC Act that are relevant to the Inquiry:
 - Environmental impact assessment: that is, the assessment and approval of activities that have, will have or are likely to have a significant impact on matters of NES, or on the environment in relation to proposals involving Commonwealth land or Commonwealth agencies or activities.
 - Biodiversity conservation: primarily, this involves the listing, management, protection and conservation of threatened species and ecological communities, migratory and marine species and the assessment of sustainability of fisheries.
 - Protected areas: this includes the management and protection of Commonwealth protected areas, including marine areas, islands and reefs, Ramsar wetlands, biosphere reserves and conservation zones.

- Regulation: including audit, compliance and enforcement.
- 1.5 Matters protected under the EPBC Act include eight matters of NES. These are:
- World Heritage Properties;
 - National Heritage places;
 - wetlands of international importance (Ramsar wetlands);
 - listed threatened species and ecological communities;
 - listed migratory species;
 - nuclear actions;
 - the Commonwealth marine environment; and
 - the Great Barrier Reef Marine Park (*as at 25 November 2009*).
- 1.6 Generally, an ‘action’ that has, will have or is likely to have a ‘significant impact’ on a protected matter requires approval by the Australian Government Minister who is responsible for the EPBC Act (the Minister) (or his/her delegate) before that action can be taken.
- 1.7 An action is defined in the EPBC Act as including a project, development, activity or series of activities. The term significant impact is not defined in the Act, but its meaning has been determined through a series of judicial decisions. It may be defined as ‘an impact which is important, notable, or of consequence, having regard to its context or intensity’. The *EPBC Act Policy Statement 1.1 – Significant Impact Guidelines* (May 2006) provides further guidance on the application of ‘significance’ (Attachment A).

Environmental Assessment and Approval Framework

- 1.8 The EPBC Act sets out a regulatory framework for environmental assessment of actions that have, will have or are likely to have a significant impact on a protected matter. The environmental impact assessment (EIA) process is contained in Chapter 4 of the EPBC Act. The purpose of the EIA process is to ensure that the potential and actual impacts of a particular action on matters protected under the EPBC Act are understood and considered before a decision is made whether or not to approve a proposal and, if so, what conditions, if any, to impose.
- 1.9 Key concepts of the environment assessment and approval regime of the EPBC Act are likelihood, significance and the precautionary principle. The EPBC Act does not attempt to capture every action that might have an impact on the environment. Rather, it regulates proposed actions that are *likely* to have a *significant* impact.
- 1.10 The precautionary principle underpins the EPBC Act because managing the environment and natural resources unavoidably involves uncertainty. The precautionary principle addresses this by requiring that, where there is scientific uncertainty and there is concern about a

serious or irreversible environmental impact, decision-makers under the EPBC Act must appropriately take account of those risks and not defer action because of the uncertainty. The principle does not, however, mean that decision-makers can act in the absence of a rationally based concern or act in a way that is disproportionate to, or otherwise not reasonably directed at, managing identified, rationally based risks.

Referral

- 1.11 A person who considers that a proposed action may have a significant impact on a matter of NES must refer that proposed action to the Minister. The onus for referring an action under the EPBC Act rests with the person or company responsible for the proposed action (the proponent). The EPBC Act also provides for a person to make a referral when the question of significance is uncertain.
- 1.12 Section 74(3) of the EPBC Act provides that as soon as practical after receipt of a referral, the Minister must cause the referral (and any supporting documentation) to be published on DEWHA's website with an invitation for public comment.
- 1.13 The proponent is responsible for preparing the referral documentation. Once a referral is received, the Minister (or delegate) has 20 business days to decide whether or not the matter is a 'controlled action' for the purposes of the EPBC Act. A controlled action is one that is likely to have a significant impact on a matter of NES, or other protected matter such as 'the environment' of Commonwealth marine waters and therefore requires assessment and approval under the EPBC Act before it can proceed.
- 1.14 Under s.77A(1) of the EPBC Act, the Minister (or delegate) may decide that an action will not have, or is not likely to have, a significant impact on a matter protected under the EPBC Act because the Minister believes the action will be taken in a particular manner. Particular manner decisions allow for quick decision-making for projects that have been designed to avoid or adequately mitigate significant impacts.

Assessment

- 1.15 If the Minister decides that an action is a controlled action, then the assessment and approval provisions of the EPBC Act come into effect. There are a number of assessment options available under the EPBC Act. The Minister (or delegate) decides when the controlled action decision is made which is the most appropriate depending on the complexity of the project, the degree of uncertainty about possible impacts, the scale and magnitude of potential and actual environmental impacts, the level of community interest and public submissions received in relation to the referral of the action. The alternative methods of assessment are:

- on referral information;
- on preliminary documentation
- by public environmental report
- by environmental impact statement
- by public inquiry; or
- by an accredited Commonwealth or State or Territory process.

1.16 Each of these assessment types have their own provisions under the Act which guide the processes.

Approval

1.17 At the completion of the assessment phase, the Minister must decide whether or not to approve the proposed action. The options available for an approval decision are to:

- approve the proposed action;
- approve the action subject to conditions (necessary or convenient for protecting, mitigating, or repairing damage to relevant protected matters); or
- not approve the action.

1.18 In deciding whether to attach a condition to an approval, the Minister must consider any relevant conditions likely to be imposed under State laws or any other Commonwealth laws. In the case of offshore petroleum activities the Minister must therefore consider relevant approvals under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and the *Petroleum (Submerged Lands) Act 1967* as well as any relevant State laws.

Compliance and enforcement

1.19 The EPBC Act regulatory framework includes a wide range of coercive powers as well as criminal, civil and administrative sanctions for breaches of the EPBC Act. For example, undertaking an action with a significant impact on a protected matter without approval may be a criminal offence (maximum imprisonment 7 years) or attract a civil penalty (maximum \$5.5 million for a corporation). DEWHA's approach to compliance and enforcement is described in the *DEWHA Compliance and Enforcement Policy* (Attachment B).

1.20 DEWHA undertakes routine monitoring and follow up of conditions of approval and particular manner requirements for projects assessed under the EPBC Act. Routine compliance audits of projects based on random and strategic audit programs is also undertaken. The EPBC Act provides for a civil penalty of up to \$1.1 million for a corporation that contravenes any conditions attached to an approval.

1.21 Section 70 of the EPBC Act provides for the Minister to request that a person refer a specific action that the Minister believes may be a

controlled action (eg likely to have a significant impact on a protected matter) in the event of non-referral. If the person still does not make a referral, the Minister has the power to deem that the action has been referred and to decide that it is a controlled action accordingly. The normal assessment and approval provisions of the EPBC Act then apply. In practice, DEWHA's Compliance and Enforcement Branch will proactively pursue a proponent to ensure that they make a referral if DEWHA believes that significant impacts from an action are likely. To date, all such actions have been referred and it has not been necessary to use the 'deeming' provisions.

- 1.22 The EPBC Act also provides for administrative remedies in circumstances where a breach of the legislation has occurred. These remedies include Remediation Determinations (requirement to rectify damage caused to a protected matter), Directed Audits (requirement for the responsible person to undertake an audit of their compliance with approval conditions) and Enforceable Undertakings (agreement between the responsible party and the Minister for the former to pay monetary reparations).

POLICY AND PLANNING IN THE MARINE ENVIRONMENT

- 1.23 Marine bioregional plans made under s.176 of the EPBC Act are being developed as the basis of the Australian Government's approach to protecting the varied environments found in Commonwealth waters. The planning program is designed to provide a clearer focus on conservation and sustainable management of Australia's marine environment. It is a process that is underpinned by the principles of ecologically sustainable development and it takes an ecosystem approach in managing Australia's marine biodiversity and environment.
- 1.24 Marine bioregional plans for each of Australia's five marine regions are scheduled to be completed during 2010. Each plan will identify key habitats, flora and fauna, natural processes, human uses and benefits, and threats to the long-term ecological sustainability of a region. The plans will provide greater certainty and understanding on how the Commonwealth marine environment is protected under the EPBC Act. They will provide details about conservation priorities at the regional level, outline the various statutory obligations under the EPBC Act that apply in a region, describe the range of conservation measures that already exist or are to be applied and facilitate decision-making under the EPBC Act, including in relation to approvals for activities proposed to be undertaken in the Commonwealth Marine Area.
- 1.25 The marine bioregional planning process is also being used to identify proposed Commonwealth marine reserves throughout the Commonwealth Marine Area in order to fulfil the Australian Governments commitment to establish a National Representative System of Marine Protected Areas (NRSMPA), as agreed by all Australian governments in 1998. The proposed marine reserves

identified through the planning process will be declared under the EPBC Act and together with the existing network of 27 Commonwealth marine reserves will become part of the NRSMPA.

- 1.26 Of the 27 existing Commonwealth marine reserves, 26 are managed by DEWHA through authority delegated to the Director of National Parks under the EPBC Act. The EPBC Act and its regulations provide specific powers to allow the control, management and administration of the 26 reserves. This includes the power to prohibit or control some activities including commercial activities such as petroleum exploration and extraction.
- 1.27 The 27th Commonwealth marine reserve is the Great Barrier Reef Marine Park (GBRMP) which is managed by the Great Barrier Reef Marine Park Authority (GBRMPA) under the *Great Barrier Reef Marine Park Act 1975*.
- 1.28 DEWHA's management of Commonwealth marine reserves is primarily undertaken through joint cooperative arrangements. To the extent appropriate and necessary, DEWHA contracts operational activities to various service providers including Commonwealth, State and Territory agencies that have the operational capacity to undertake activities on DEWHA's behalf, for example:
- NSW, Tasmanian, Victorian and WA government agencies provide direct management in Commonwealth marine reserves by carrying out activities such as maintenance of visitor infrastructure, communication and education, research and monitoring and management and administration;
 - The Australian Customs and Border Protection Service undertakes monitoring, compliance and enforcement activities on DEWHA's behalf reporting sightings of cetaceans and breaches of the EPBC Act (including in relation to Commonwealth marine reserves) and, where possible, responds to those breaches; and,
 - The Australian Fisheries Management Authority provides DEWHA with monitoring data to assist with Commonwealth marine reserve management and compliance activities.

REGULATION OF THE UPSTREAM PETROLEUM SECTOR

- 1.29 Petroleum activities in Australia's offshore areas beyond three nautical miles from the territorial sea baseline are the responsibility of the Australian Government, although State and Territory Governments act as Designated Authorities (DAs) under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) administered by the Resources, Energy and Tourism portfolio (see below).
- 1.30 The Commonwealth marine area is a matter of NES under the EPBC Act, where it is 'the environment' that is protected. Onshore, and as far as three nautical miles seaward from the baseline (coastal

waters), the EPBC Act protects other matters of NES, such as listed threatened migratory species, World Heritage areas, and Ramsar wetlands. In these coastal waters, State and Territory regulatory requirements apply to matters not protected by the EPBC Act.

- 1.31 The upstream petroleum sector is potentially regulated for the purpose of environmental protection under the EPBC Act and various other pieces of Commonwealth legislation such as the *Historic Shipwrecks Act 1976* and the *Environment Protection (Sea Dumping) Act 1981*, as well as State and Territory Acts for matters within their borders. Regulation is generally on a project by project basis.
- 1.32 Petroleum activities in Commonwealth waters must also comply with the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* made under the *Petroleum (Submerged Lands) Act 1967* (PSLA), also administered by the Resources, Energy and Tourism portfolio, and the OPGGS Act. The OPGGS Act replaces the PSLA, however, that Act has not yet been repealed as there remains a number of Regulations made under the PSLA which still apply to the industry (e.g. environment plans made under the relevant PSLA Regulations). The Regulations and the OPGGS Act are administered by the States and Northern Territory on the Commonwealth's behalf through the DAs.
- 1.33 Petroleum related activities in non-Commonwealth areas are also subject to the requirements of the various States' and the Northern Territories' upstream petroleum regulatory legislation.

DEWHA's role in environmental regulation of the upstream petroleum sector

- 1.34 Prior to the introduction of the EPBC Act in 2000, the key Commonwealth environment protection legislation was the *Environment Protection (Impact of Proposals) Act 1974* (EPIP Act). The majority of oil-gas activities were not designated by Resource Ministers for assessment under the EPIP Act. Further, when they were, the Resources Minister, not the Environment Minister, was the decision-maker with the Environment Minister providing advice. The environment portfolio did not have an ongoing regulatory role. As such, the production facilities in Australia that preceded the EPBC Act are not regulated by DEWHA.
- 1.35 As previously mentioned, under the EPBC Act the onus is on a proponent to refer actions that have, will have or are likely to have a significant impact on a matter of NES which includes the environment of Commonwealth marine waters. A referral may also be made when an operator requires certainty as to whether or not an approval is needed. An operator may also decide not to make a referral if they believe that significant impacts are not likely.

Statistics on referrals from the upstream oil and gas sector

1.36 In regard to offshore petroleum exploration, DEWHA believes that most seismic surveys are referred under the EPBC Act, while only a small proportion of exploratory drilling is referred. Production activities are also usually referred and commonly require assessment and approval under the EPBC Act.

1.37 The table below shows the referrals in the oil and gas sector over the years since the EPBC Act came into operation.

Table 1: *Statistics on referrals made under the EPBC Act (as at 25 November 2009)*

Energy Generation and supply – non-renewables (includes all non-renewable energy sectors)

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	TOTAL: 2000-2009
Number of referrals	4	14	17	17	9	31	25	12	43	28	200

Exploration oil and gas - marine

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	TOTAL: 2000-2009
Number of referrals	13	27	21	19	29	26	32	50	56	31	304

Application of significance test to oil and gas sector

1.38 DEWHA's published *EPBC Act Policy Statement 1.1 – Significant Impact Guidelines* (May 2006) outline a 'self-assessment' process, including detailed criteria to assist a person who proposes to take an action to decide whether or not they should submit a referral to DEWHA for a decision on whether assessment and approval is required.

1.39 The guidelines provide guidance as to when a significant impact is considered to be 'likely'. To be likely, it is not necessary for a significant impact to have a greater than 50% chance of occurring; it is sufficient if a significant impact on the environment is a real or not a remote chance or possibility.

1.40 The Appendix to the guidelines provides further assistance for specific industry sectors. The Appendix refers specifically to exploration for oil and gas. In relation to offshore exploratory drilling the Guidelines explain that this:

would be expected to have a significant impact on matters of national environmental significance if it is undertaken in an area that contains habitat for threatened or migratory species and the seismic activity is likely to interfere with breeding, feeding or migration, or if habitat critical to the survival of the species (or important habitat for a migratory species) is damaged by the drilling. Offshore exploratory drilling would also be expected to have a significant impact on a Ramsar wetland or the Commonwealth marine environment if drilling occurs in a sensitive area, (e.g. sea mounts and other areas with high biodiversity value or which contain important habitat). Offshore exploratory drilling may also potentially have a significant impact on historic shipwrecks in the Commonwealth marine area.

- 1.41 As noted, exploratory drilling is not routinely referred to DEWHA for assessment. Referrals tend to occur for drilling adjacent to sensitive marine areas or in close proximity to the coast, including, in some instances, following a request by DEWHA. Potential environmental impacts, including the risk of an uncontrolled oil spill, have been assessed in such instances. To date, no exploratory drilling has required approval under Part 9 of the EPBC Act.
- 1.42 In accordance with the EPBC Act, each referral is considered on a case by case basis on its merits, and approval conditions, if applicable are set individually. The requirement for an Oil Spill Contingency Plan (OSCP) is considered in this context and informed by the location and composition of the field (oil and gas) and the potential consequences for matters of NES of an unplanned release of hydrocarbons.
- 1.43 DEWHA is aware of five well blowouts prior to the Montara incident occurring in Australian waters. Of these, it is understood none resulted in any oil reaching the water or the coast. None were of the duration or extent of the Montara incident. Despite this historical record, DEWHA has always recognised that an oil spill is a possibility and this has resulted in the approval of an OSCP being required in most circumstances, as a condition of approval for production activities.

Regulation of Approval Conditions in the Oil and Gas Sector

- 1.44 Section 142 imposes civil penalties of up to \$1.1 million for corporations that contravene any conditions attached to an approval. Section 142A imposes a criminal offence when a person recklessly or deliberately contravenes a condition, and where this results in a significant impact on a protected matter. Strict liability provisions apply.
- 1.45 Other provisions of the EPBC Act provide for conditions of approval to be varied if the original conditions have been contravened or it is otherwise necessary to avoid an unforeseen significant impact (s.143). In addition, the Minister may suspend an approval (s.144) or revoke an approval (s.145) if, for example, the Minister believes, on reasonable grounds, that a significant impact on a protected matter has occurred because of the contravention of an approval condition.

- 1.46 The power to suspend or revoke an approval is a powerful compliance measure, given that it effectively means that the project must stop all activities, and would normally only be used as a last resort. The Minister has used this power previously to suspend an approval related to a development near Cairns, Queensland.
- 1.47 In order to use this power, the Minister must reasonably believe that a condition of approval has been breached and that the consequences of this breach are likely to have or have had a significant impact on a protected matter. These 'facts' must be demonstrated to a reasonable burden of evidentiary proof given the possible serious consequences to the proponent and challenge in the Federal Court.
- 1.48 In addition to responding to complaints, DEWHA's post-approval monitoring and audit includes a random audit program and a strategic audit program, determined annually. The 2008/09 strategic audit program focussed on mining projects, commercial and residential projects in coastal areas and seismic surveys. One-off audits may also be undertaken in response to a major incident or where a high risk of non-compliance has been identified.
- 1.49 Audits commence with a desktop audit based on available information from internal files, online material and discussions within DEWHA. This is followed by discussion with a proponent, as required, to obtain further documents and information as may be necessary to determine compliance with approvals. A site visit component is usually undertaken. A summary of the results of each audit undertaken is posted on DEWHA's website.

Interaction between the upstream petroleum sector and Commonwealth marine reserves

- 1.50 The EPBC Act controls the conduct of a number of actions and activities in Commonwealth reserves established under the EPBC Act. Mining operations (including oil and gas exploration and production) can only be undertaken in accordance with a management plan in operation for a reserve or, when a management plan is not in operation, with approval from the Director of National Parks.
- 1.51 Commonwealth reserves (and any zones that a reserve is divided into) are assigned to one of seven IUCN categories. Management principles for each category are prescribed by the EPBC Regulations. Reserve management plans must not be inconsistent with the principles that apply to the category to which the reserve (or zone) is assigned. When a management plan is not in operation for a Commonwealth reserve the Director of National Parks must manage the reserve (and any zones) in accordance with the relevant management principles.

- 1.52 As at December 2009, there are 14 Commonwealth marine reserves (listed at Attachment C) in which restricted mining operations are allowed, subject to compliance with specific conditions.
- 1.53 The EPBC Act does not include provisions for the Director of National Parks to control actions taken outside a Commonwealth reserve, including actions that may have an impact on the reserve. This includes impacts to a reserve arising from incidents such as the Montara oil spill.

DEWHA's interaction with other agencies with an interest in the upstream petroleum sector

Australian and State and Territory Government agencies - DRET and DAs

- 1.54 As discussed, State and Territory petroleum legislation applies in coastal waters. This legislation is administered by the various State and Territory authorities.
- 1.55 The OPGGS Act is administered jointly by the Australian Government and the States and NT. The OPGGS Act establishes a Joint Authority comprising the Australian Resources Minister and the relevant State or Territory Minister. The Joint Authority is concerned with major matters arising under the legislation such as granting and renewing exploration permits and production licenses etc.
- 1.56 The OPGGS Act makes the relevant State or Territory Minister responsible for most of its day-to-day administration of petroleum activities. The relevant State and Territories agencies are the Designated Authority (DA) for the Australian Government's Resources Minister.
- 1.57 DRET provides advice and policy support to the Australian Government regarding Australia's resources, energy and tourism sectors. DRET has dual roles – both promoting the development of resources and overseeing the regulation of the upstream petroleum sector by the DAs. DEWHA undertakes formal consultation with DRET on every resource related referral.
- 1.58 Under the EPBC Act there are statutory requirements for the Minister to consult with relevant Commonwealth Ministers and States and Territories regarding referral/approval decisions for proposals within their jurisdiction. There are no statutory mechanisms requiring consultation or liaison between the DAs and DEWHA, however, it is DEWHA's administrative practice to consult with the relevant DAs on all offshore oil and gas proposals referred under the EPBC Act, For reasons of information sharing and consistency of decision-making. DEWHA also participates in the Environment Assessors Forum meetings (DRET-led meetings of the DAs).

- 1.59 The EPBC Act does not impose a statutory obligation for DEWHA to consult with other Australian Government and State and Territory government agencies regarding the development of Marine Bioregional Plans. However, DEWHA has adopted a broad whole-of-government (including DRET and DAs) interaction approach on the development of these plans, as a best practice model.

National Offshore Petroleum Safety Authority (NOPSA)

- 1.60 NOPSA is a statutory agency regulating Commonwealth off shore and State and Territory coastal waters with accountability to the relevant Ministers. The role of the NOPSA is to administer offshore petroleum safety legislation.
- 1.61 DEWHA has no regular dealings with this agency.

Australian Maritime Safety Authority (AMSA)

- 1.62 AMSA is a largely self-funded government agency with the charter of enhancing efficiency in the delivery of safety and other services to the Australian maritime industry.
- 1.63 DEWHA liaises with AMSA on a variety of petroleum related issues, particularly in relation to the disposal of waste at sea and where relevant in relation to oil spills.

Industry representatives and non government organisations (NGOs)

- 1.64 The Australian Petroleum Production & Exploration Association (APPEA) is the peak national body representing Australia's oil and gas exploration and production industry. DEWHA has regular dialogue with APPEA about broader policy issues affecting the industry as well as regarding some individual projects.
- 1.65 DEWHA also consults broadly with NGOs and the industry generally on the development of policy, for example, in the development of *EPBC Act Policy Statement 2.1 – Interaction between offshore seismic exploration and whales* (September 2008) and in the marine bioregional planning processes.

HISTORY OF THE MONTARA PROJECT UNDER THE EPBC ACT

Approval and Assessment process

- 1.66 On 5 August 2002, Newfield Australia (Ashmore Cartier) Pty Ltd referred its proposal to drill two wells (Montara 4 and Montara 5) in 2003 in Permit Area AC/RL3 (in the Timor Sea approximately 200km from the West Australian coast) for the purpose of using these wells for

oil production commencing in 2004. It was also proposed that an existing exploration well (Montara 3) be re-completed in 2003 for use as a gas re-injection well.

- 1.67 On 29 August 2002, it was determined that the proposed action was a controlled action pursuant to s.75 of the EPBC Act. Newfield Australia (Ashmore Cartier) Pty Ltd was designated as proponent of the action. The Part 3, Division 1 controlling provisions for the action were stated to be ss.23 and 24A (Commonwealth marine environment).
- 1.68 The action did not trigger the controlling provisions for listed threatened or migratory species or the Ramsar wetlands located on Ashmore Reef National Nature Reserve located off Ashmore Island, 57 nautical miles from the proposed well site, nor for potential impact on nearby Commonwealth land (i.e. Ashmore Islands, and Cartier Island located 80 nm from the well head). The decision-maker did not believe that a significant impact on these matters was likely to result from the proposed action. These species and areas are, however, protected under the EPBC Act.
- 1.69 Pursuant to s.87 of the EPBC Act, it was decided, on 12 May 2003, that the approach to be used for assessment of the relevant impacts of the proposed action was assessment by preliminary documentation.
- 1.70 The proposed development was located wholly within Commonwealth waters and was not subject to any local or State or Territory government approvals.
- 1.71 The proponent published the Preliminary Information and invited public comment for a 20 day period commencing 26 May 2003 and closing on 23 June 2003. A letter was received from the proponent on 25 June 2003 advising that there were no public comments submitted.
- 1.72 In July 2003, Newfield (PTTEP) prepared and submitted a supplementary or final environmental assessment report.
- 1.73 PTTEP has changed its name on two occasions since the referral process began. The referral was originally submitted in the name of Newfield Australia (Ashmore Cartier). That entity subsequently changed its name to Coogee Resources (Ashmore Cartier) on 18 September 2003, and on 11 February 2009, changed its name to PTTEP Australasia (Ashmore Cartier). As the ACN remained the same, no formal transfer of the approval was required.

Approval with conditions

- 1.74 On 3 September 2003, approval was granted to PTTEP to take the following action:

To drill and operate Montara 4, Montara 5 and Montara 6 wells for the purpose of oil production and to recomplate and operate Montara 3 for use as a gas re-injection well in Permit Area AC/RL3, in the Timor Sea approximately 200 kilometres from the coast of Western Australia.

- 1.75 On 5 April 2006, Coogee Montara (PTTEP) submitted an addendum to its Preliminary Information which included a revision to the Montara field development from subsea well completions to an unmanned wellhead platform, and up to four production and one gas injection well to be drilled by a jack-up drilling rig through the platform and completed with dry (surface) trees.
- 1.76 The approval conditions were not specific to the field development design originally submitted by PTTEP and there were no preservable new impacts on matters of NES arising from the proposed revision. Accordingly, by letter dated 2 May 2006, DEWHA advised PTTEP that the original conditions were adequate in addressing issues under the EPBC Act and that no change to the conditions of approval were required.
- 1.77 The approval was subject to six conditions relating to the operation of the rig. A copy of the approval document and conditions is at Attachment D.
- 1.78 Condition 1 required the proponent to submit for the Minister's approval an Oil Spill Contingency Plan detailing the strategy to mitigate the environmental effects of any hydrocarbon spills. The Plan was required to be approved before operations commenced. The approval conditions did not define 'operations'.
- 1.79 PTTEP submitted an OSCP to DEWHA on 6 June 2008. On 10 July 2008, DEWHA emailed PTTEP advising that the proposed plan was deficient in that it did not include sufficient details of equipment to be used, mode of storage and deployment. PTTEP advised that a revised OSCP was submitted on 14 January 2009 however this was not received by DEWHA. A further copy of the revised OSCP was received on 19 May 2009.
- 1.80 The revised OSCP included strategies to mitigate the environmental effects of any hydrocarbon spills. It outlines the equipment available to be used, identified their storage and the way in which they may be deployed, as well as identifying responsibilities. The OSCP was approved for the purposes of Condition 1 of the EPBC Act approval for the project on 5 June 2009 and communicated by a letter from DEWHA dated 5 June 2009.
- 1.81 Drilling at the Montara oil field commenced some time after July 2008, after submission of the original draft OSCP but prior to its being amended and approved. As noted above, the approval conditions did not define the meaning of 'operations' and, on the basis that the approval related to oil production, PTTEP interpreted 'operations' as

being the commissioning or start-up phase for commercial extraction rather than drilling operations. DEWHA did not dispute this interpretation at the time.

- 1.82 Having an OSPC does not reduce the likelihood of an uncontrolled release of hydrocarbon but does document the course of action that will be taken if an uncontrolled release occurs. Therefore, on reflection and notwithstanding any ambiguity in the terms of the approval, DEWHA acknowledges it should have addressed with PTTEP their having an OSPC approved prior to drilling.
- 1.83 DEWHA believes that problems with the wording of approvals have essentially been overcome in recent times. It has been standard practice since 2006 to draft conditions in consultation with the Department's Compliance and Enforcement Branch to reduce the likelihood of ambiguity in interpretation.

Compliance and Audit

- 1.84 A compliance incident relating to drilling associated with the Montara project was brought to DEWHA's attention in the first half of 2009.
- 1.85 On 31 March 2009 and 4 April 2009, DEWHA received Coastwatch reports of a 7km long plume of discoloured water from the West Atlas drilling rig. The matter was logged as a compliance incident by DEWHA in accordance with routine procedures. Initial inquiries were made with the NT Department of Regional Development, Primary Industry, Fisheries and Resources and PTTEP. PTTEP advised that the muddy water was associated with normal operational discharges of the drilling phase of the project, being undertaken in accordance with an environment plan, under the OPGGS Act approved by the NT as DA.
- 1.86 DEWHA decided that the incident did not constitute any breach of the conditions of approval under the EPBC Act. The compliance incident was closed on 7 April 2009 and no further actions were taken.

Certificate of compliance with approval

- 1.87 Condition 4 requires that, on 1 July of each year after the commencement of construction, the managing director of Newfield (i.e. PTTEP) must provide a certificate stating that Newfield (i.e. PTTEP) has complied with the conditions of the approval.
- 1.88 The inclusion of such a condition was, at the time, accepted as 'best practice' in condition setting. The intent was to ensure proponents continued to keep DEWHA informed of the approved project's progress. Further, the annual requirement for compliance certificates would encourage a continued awareness of the proponent's obligations in complying with the conditions of approval.

- 1.89 PTTEP submitted a certificate of compliance on 28 August 2009 for the period ending 1 July 2009. PTTEP's correspondence noted that with respect to Condition 1, the OSCP had been approved on 5 June 2009 and that it was being implemented through the implementation of the AC/L7 Production and Exploration Drilling Environment Plan accepted pursuant to Regulation 14(8) of the PLSA. Condition 2 (regarding the submission of a decommissioning plan) was not yet applicable. In relation to Condition 3, which referred to the management of produced formation water (PFW), PTTEP advised that monitoring of PFW would begin on the commencement of production operations at the Montara field which was scheduled to occur in late 2009. Condition 5 and 6, which related to the submission of revised plans, or revisions to existing plans were not addressed as they were not applicable at this time. A copy of the certificate of compliance is Attachment E.
- 1.90 DEWHA notes at the time of receipt that the certificate was received approximately eight weeks late. This is a matter that will be taken into account in DEWHA's internal audit of Montara's operations. At the time, however, DEWHA considered that the delay in submitting the certificate, while constituting a 'technical breach', was not significant in relation to the protection of matters of NES. It was not considered to warrant compliance action under the EPBC Act at the time.

Implementation of Oil Spill Contingency Plan (OSCP)

- 1.91 The OSCP required PTTEP to take action in response to the incident. The first step was for the company to estimate the size of the spill. Having determined it to be a Tier 3 magnitude spill, PTTEP was required, under the OSCP, to immediately contact AMSA for assistance on the basis that the response to the incident was beyond the capacity of PTTEP to manage. AMSA thereafter co-ordinated the incident in accordance with the National Plan. The Montara OSCP was therefore fully implemented by PTTEP in respect of the incident.

Compliance audit post oil spill

- 1.92 On 22 January 2009, DEWHA sent PTTEP a letter noting that the Montara project may be selected for review under DEWHA's strategic audit program and requesting an update on the status of the project. PTTEP responded on 9 February 2009 advising that drilling of the Montara wells had commenced in January 2009 and that a certificate of compliance for the approval conditions would be provided by 1 July 2009, pursuant to condition 4, as set out at paragraphs 1.87 to 1.90.
- 1.93 DEWHA subsequently wrote to PTTEP on 16 October 2009 to advise that, in light of the circumstances of the spill, an audit would be undertaken, commencing with a desktop review of the available information in accordance with DEWHA's usual practice.

- 1.94 The desktop review stage of the audit has been completed based on the available information from internal files, information available online and discussions within DEWHA.
- 1.95 The next stage of the audit is to meet with representatives of PTTEP, as necessary, to identify and obtain any necessary further documents and information related to compliance with the approval conditions and associated management plans. DEWHA has yet to contact officers from PTTEP and will await the outcomes of the Commission of Inquiry before proceeding further.
- 1.96 The usual process of audit is for DEWHA to prepare its preliminary findings once necessary information has been obtained from the proponent. A draft audit report would then be prepared and sent to proponent for comment. Comments would be considered and taken into account in the preparation of the final audit report. A summary of the key findings of the audit would be published on DEWHA's website.
- 1.97 In the event the audit identified instances of non-compliance with the approval conditions, these would be considered by DEWHA's Compliance and Enforcement Branch (CEB) in accordance with the DEWHA *Compliance and Enforcement Policy* to determine if further action was warranted under the EPBC Act.

NOTIFICATION OF THE INCIDENT

- 1.98 On 21 August 2009, DEWHA was informed by AMSA that the West Atlas drill rig had suffered a well head accident at sea bed, resulting in an uncontrolled and continuing discharge of oil and gas. In accordance with the OSCP for the Montara project and the National Plan, on the basis that the response to the incident was beyond the capacity of PTTEP to manage, PTTEP handed response management to AMSA.

THE RESPONSE – OPERATIONAL

- 1.99 AMSA has led the Australian Government's response to the Uncontrolled Release since 21 August 2009. On 15 September 2009 DEWHA was appointed as the incident's Environmental and Scientific Coordinator (ESC). Since that date, DEWHA has led the Australian Government's wildlife response and provided AMSA with advice regarding environmental impacts and preferred response options. In accordance with the National Plan AMSA continued to lead the overall response.
- 1.100 The National Plan states that during a spill response, the ESC role is to provide advice on the likely environmental effects of the oil spill. The position normally forms part of the planning unit within the Incident Management Team governance structure.

1.101 The terms of DEWHA's appointment as the ESC for the Montara incident differed from those described in the National Plan. DEWHA's responsibilities included environmental impact advisory provisions as well as oiled wildlife response and the provision to advise AMSA to seek specialist environmental and species advice and assistance on matters when required. In addition, the governance structure differed by way of the ESC being remotely located from the Incident Management Team and by the ESC providing advice, initially to the Marine Pollution Controller and, after the appointment of a DEWHA liaison officer, through the liaison officer to the Incident Management Team.

Whole of government response coordination

1.102 DEWHA has worked with AMSA and other relevant Commonwealth, State and Territory agencies in responding to this incident. This included attending and contributing to daily incident coordination meetings (as of 23 August 2009, hosted by AMSA), providing input to daily situation reports and other operational reports, and deploying a Departmental liaison officer to the Incident Response Team.

1.103 DEWHA formed an oil spill response taskforce to coordinate the wildlife response, negotiate the long-term monitoring plan with PTTEP and facilitate interaction with relevant Commonwealth, State and Territory agencies.

1.104 DEWHA has ensured that the Australian Institute of Marine Science (AIMS), CSIRO and the West Australian and Northern Territory ESCs have been kept abreast of relevant wildlife and environmental issues through regular dialogue and correspondence. Australian Government agencies were informed in daily situation reports.

Wildlife response

1.105 The wildlife response to the Montara incident has been led by DEWHA and has involved numerous other Commonwealth, State and Territory agencies. DEWHA has worked with the following agencies to ensure that the response to wildlife impacts was adequate, appropriate, effective and proportionate:

- Australian Customs and Border Protection Service (for the provision of a wildlife response platform at Ashmore Reef Reserve and for transport of wildlife response experts);
- AMSA (for approval to mobilise AMSA wildlife response kits);
- GBRMPA (for oiled wildlife response equipment and response centre establishment specifications);
- NT Department of Natural Resources, Environment, the Arts and Sport (for logistical support in transferring response equipment to Ashmore Reef Reserve);

- Queensland Department of Environment and Resource Management (DERM) (for expertise in oiled wildlife response and the secondment of a wildlife response officer); and
- WA Department of Environment and Conservation (DEC) (expertise in oiled wildlife response, the secondment of wildlife response officers and wildlife response centre establishment).

Note: primary responsibility for potential impacts to fish and fisheries management issues rested with relevant fisheries management agencies including the Australian Fisheries Management Authority, the Northern Territory Department of Primary Industry, Fisheries and Resources and the West Australian Department of Fisheries. Impacts on fish as either protected species or as a component of the Commonwealth marine area, to the extent that it falls under the EPBC Act, is DEWHA's responsibility.

1.106 DEWHA also sought advice from veterinarians to ensure response efforts were appropriate and effective. Specifically, advice was sought from a veterinarian from Taronga Zoo who has international experience in oiled-wildlife response and a veterinarian who works with the NT Parks and Wildlife service who has experience in working with sea birds in the north-west region.

Environmental monitoring

1.107 Throughout the response DEWHA's key concerns were the:

- effect of the oil and response operations on water quality, habitats and wildlife;
- profile of the oil, dispersants and oil-dispersant mixes in the water column (including vertical and horizontal distribution);
- fate of the oil, dispersants and oil-dispersant mixes; and
- timeframe in which impacts to wildlife, islands, reefs, shoals and coasts may occur.

1.108 On 26 August 2009, DEWHA met with PTTEP and AMSA to discuss the need for a long-term environmental monitoring plan. Throughout the development of the plan, DEWHA consulted with experts from AIMS and CSIRO. DEWHA also consulted AMSA, AFMA and relevant WA and NT agencies on the detail of the plan. A detailed description of the long-term monitoring plan is included at paragraphs 1.153 to 1.168.

1.109 During the response, DEWHA recommended that water quality monitoring, in addition to oil monitoring and character and weathering studies, be undertaken to determine the distribution of the oil and oil-dispersant mixes in the water column.

1.110 DEWHA provided comments on the Net Environmental Benefit Analysis undertaken by AMSA to assess the use of chemical dispersants as a response option. The advice was provided from an environmental

perspective and did not consider economic or human cost/benefits. The advice recommended the continued use of chemical dispersants on fresh oil slicks (one to two days old), in conjunction with collection and mechanical and natural dispersion. It also recommended that chemical dispersants should not be used directly in the vicinity of coral habitats and that application near marine megafauna should be avoided.

- 1.111 Individual studies for scientific monitoring under the environmental monitoring program must be approved by DEWHA prior to implementation. In providing approval, DEWHA seeks peer review of the proposal from AIMS and CSIRO and the WA and NT ESCs.

International engagement

- 1.112 International engagement on Montara oil spill issues have been led by the Department of Foreign Affairs and Trade (DFAT). Between 9 and 12 November 2009 DEWHA participated in a delegation that met with Indonesian Government officials to provide a briefing on the oil spill, Australia's response efforts, environmental monitoring and the mandate for the Inquiry.
- 1.113 DEWHA is also facilitating discussions with PTTEP to refund costs incurred by the Australian and Indonesian Governments in undertaking aerial surveillance and shoreline assessments of Indonesian waters and coasts to determine if there have been any oil spill impacts in those areas.

The National Marine Oil Spill Plan (National Plan)

- 1.114 An Inter-Government Agreement between the Commonwealth, all States and the Northern Territory was finalised on 25 May 2001 for the National Plan. This plan was last reviewed in June 2005.
- 1.115 The National Plan was developed to ensure Australia would be prepared to respond to ship-sourced pollution incidents. The National Plan includes some provisions for spills emanating from offshore petroleum operations. However, the operational responsibility for clean up actions rests with the company responsible for operations, unless the incident exceeds those companies' effective response capacity.
- 1.116 The National Plan states that the Commonwealth and each State/NT Statutory Agency shall pre-appoint the Environmental and Scientific Coordinator (ESC) and that the ESC will provide the Incident Controller with an up-to-date and balanced assessment of the likely environmental effects of an oil spill. Four AMSA officers have been appointed Commonwealth ESCs prior to this Incident.
- 1.117 The National Plan also states that under most State and Territory agreements, arrangements and legislation, the National Parks and

Wildlife Services, Natural Resource and Conservation Agencies or Environment Protection Authorities have responsibility to protect wildlife and respond to wildlife impacts. It states that detailed wildlife response arrangements should be specified within the regional oiled wildlife response plan. Prior to this incident, an oiled wildlife response plan did not exist for incidents occurring entirely within the Commonwealth marine jurisdiction.

1.118 DEWHA's role in responding to oil spills under the National Plan is to provide advice on:

- obligations, including permitting and reporting of emergency dumping, under the *Environment Protection (Sea Dumping) Act 1981*;
- Australia's obligations under the London Dumping Convention and its 1996 Protocol¹;
- potential impacts of oil spills on threatened marine and migratory species;
- proposals approved under the EPBC Act;
- habitats in Commonwealth Marine Reserves, Antarctic and sub-Antarctic flora and fauna; and
- rates of hydrocarbon biodegradation, dispersal and use of dispersants in cold climates.

1.119 The appointment as the ESC for this incident provided DEWHA with the authority to mobilise equipment and personnel to respond to affected wildlife and facilitate cost recovery processes. As ESC, DEWHA has been responsible for:

- leading the oiled wildlife response in Commonwealth waters and working with relevant State and Territory agencies for oil affected wildlife in their jurisdiction;
- providing advice to AMSA regarding the likely environmental impacts of the oil spill, environmental priorities and preferred response options based on the available species and marine environment information; and
- advising AMSA to seek specialist environmental and species advice and assistance on matters when required for operational response.

EPBC Act exemptions

National Maritime Oil Spill Contingency Plan exemption

1.120 On 28 August 2000, the then Environment Minister granted a national interest exemption from Part 3 of the EPBC Act for all actions

¹ The 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972*, known as the London Protocol, limits the types of materials that may be considered for ocean disposal.

undertaken in accordance with the National Plan. (Attachment F). This exemption remains current.

- 1.121 The exemption was granted on the basis that it was in the national interest to allow the rapid and unimpeded response to pollution incidents in accordance with the National Plan, to maximise the chances of containing pollution and minimising the threat to the environment.

Montara specific exemption

- 1.122 On 31 August 2009, PTTEP wrote to the Minister to apply for an exemption under s.158 of the Act for operations to bring the Montara H1 well under control and stop the flow of oil gas and condensate into the ocean.
- 1.123 PTTEP's proposal was to stop the uncontrolled flow of hydrocarbons from the Montara H1 well by drilling a relief well (and all associated activities) in production licence AC/L7 or AC/L8 (using the West Triton drilling rig) to intercept the Montara H1 well approximately 2500m below the sea bed surface, and thereafter pump mud into the well to stop the flow of oil, gas and condensate.
- 1.124 It was also envisaged that the exemption would include the clean up of the West Atlas rig and making it safe to tow away from the Montara well head platform.
- 1.125 As indicated previously, the Commonwealth marine environment, listed threatened species and listed migratory species are protected matters under the EPBC Act, as are the Ashmore Reef, Ramsar wetlands and Ashmore Reef and Cartier Islands Commonwealth marine reserves. These species and areas were likely to be impacted by the continued uncontrolled hydrocarbon release from the well head.
- 1.126 Spill monitoring and modelling by AMSA indicated that while these species and areas were then not being impacted by hydrocarbons, the continued uncontrolled release could result in environmental impacts.
- 1.127 Section 158 of the EPBC Act allows the Minister, by written notice, to exempt a specified person from the application of specified provisions of Part 3 and Chapter 4 in relation to a specified action if satisfied that it is in the national interest that the specified provisions not apply to the person in relation to the action.
- 1.128 In determining the national interest, the Minister may consider, Australia's defence or security, or a national emergency. Subsection 158(5) specifically states that this provision does not limit the matters the Minister may consider in making a decision under this section.

- 1.129 An exemption under s.158 of the EPBC Act from the application of all of the provisions of Part 3 and Chapter 4 in relation to the Montara H1 well control operations would preclude the need for the EIA processes under the EPBC Act to be applied to the proposed action. A specific exemption would also provide certainty that the operations would be exempt from Part 3 and Chapter 4 of the EPBC Act.
- 1.130 The Minister decided that it was in the national interest to limit the impact on the Commonwealth marine environment, listed threatened species, listed migratory species, wetlands of international importance and the environment on Commonwealth land from the uncontrolled release of oil, gas and condensate from the Montara H1 well. The Minister also decided that the drilling of a relief well to stop the uncontrolled flow of hydrocarbons should commence as soon as practicable to minimise the impact on matters protected by the EPBC Act.
- 1.131 On 6 September 2009, the Minister granted the exemption (Attachment G). A copy of the Minister's statement of reasons for decision in compliance with s.558(7) of the EPBC Act is Attachment H to this submission.

Wildlife response

- 1.132 Thirty one confirmed reports of oil affected birds and sea snakes were received.
- 1.133 Twenty nine birds were treated by experts on site at Ashmore Reef Reserve. Twenty one of these died, five were released after treatment (on veterinary advice) and three are in care awaiting release. In addition, 13 dead birds were found during a wildlife survey (examination by a wildlife response experts identified no external signs of oil contamination), three birds were reported as having died on a nearby oil rig (one appeared oiled however this could not be independently confirmed) and one apparently oiled bird landed on a patrolling Customs vessel (this bird flew off before the presence of oil could be confirmed).
- 1.134 Two reports of oil affected sea snakes were received. One was collected by a fisherman in the vicinity of the spill. Toxicology analysis confirmed the likely cause of death as exposure to oil. The second was collected from the oil slick during a wildlife survey. This sea snake is being analysed to confirm the cause of death. PTTEP also reported the deaths of three sea snakes in the vicinity of the Montara well (these animals were not collected for toxicology analysis and therefore cause of death is unknown).
- 1.135 Four fish samples were collected by a commercial fisherman in the vicinity of the oil spill on 4 September 2009. Toxicology testing was conducted to ensure the catch was safe for human consumption.

Expert analysis of the skin, stomach contents and muscle indicated no oil contamination. Further monitoring and testing of the impact to Timor Sea fish and fisheries is being conducted under the environmental monitoring plan.

- 1.136 Aerial surveillance of the region was undertaken daily. Trained wildlife observers reported any sightings of wildlife in the area, in addition to reporting information to inform the operational response to the spill.
- 1.137 DEWHA's wildlife response commenced on 27 August 2009 when advice was sought from an oiled wildlife response expert on how oil affected birds should be caught and handled.
- 1.138 DEWHA commissioned the expert to undertake aerial surveillance of the region, to determine the potential for wildlife to be affected by oil, and to develop a wildlife response plan.
- 1.139 The expert participated in a Customs surveillance flight of the region on 31 August 2009, and provided preliminary wildlife response advice on 1 September 2009. The preliminary advice (Attachment I) recommended an on-ground survey of the Ashmore and Cartier reserve islands and detailed three options for dealing with oil affected wildlife including:
 - record sightings and take no further action;
 - euthanise oil affected wildlife; and
 - provide primary care, triage and rehabilitate wildlife for release.
- 1.140 Following receipt of the preliminary wildlife response advice DEWHA decided to activate option three, that is, to provide oil affected wildlife with primary care, triage and rehabilitation for release.
- 1.141 DEWHA commissioned the expert to undertake an on-ground survey of Ashmore and Cartier Islands. The vessel departed Darwin for Ashmore on 4 September 2009, however, due to logistical issues, arrived at Ashmore on 8 September 2009. Surveys of the islands at Ashmore and Cartier reserves were undertaken between 8 and 13 September 2009. A wildlife response officer was stationed at Ashmore on a continuous basis between 8 September and 5 December 2009.
- 1.142 DEWHA received an updated wildlife response advice on 14 September 2009. The updated plan incorporated operational phases and recommendations against each phase. A copy of the revised advice is at Attachment J and copies of the implemented wildlife response plans are at Attachment K.
- 1.143 In accordance with the wildlife response advice the following activities were undertaken:

- Live oil impacted animals were collected and provided primary treatment. Dead animals were collected for analysis.
- A remote site stabilisation centre was established at Ashmore Reef reserve. This included ensuring appropriate response equipment and qualified personnel were on site.
- Live oil impacted wildlife were stabilised at Ashmore which included the provision of adequate housing, temperature control, ventilation, fluid therapy and meeting nutritional needs.
- Stabilised animals were provided with a 'quick wash' (rinsing and drying) to remove the worst of any oil contamination. Wildlife that survived these processes were transported to Darwin and placed in veterinary care or released on veterinary advice.
- On 18 September 2009, DEWHA entered into an agreement with WA's DEC to establish a joint wildlife response centre in Broome. A suitable location was identified, equipment mobilised and veterinary staff placed on standby. GBRMPA and Queensland's DERM provided advice on the specifications for the setup of the facility.
- The centre was to be used to rehabilitate affected wildlife found in State and Commonwealth waters. The centre was to be activated when 25 oil affected birds were in care. This trigger point was advised by the expert who prepared the wildlife response plan and ensured a proportionate response. However, the trigger of 25 birds in care was not reached therefore the response centre was not activated.
- Wildlife that were placed in veterinary care have been provided with adequate housing, temperature control, ventilation, fluid therapy (where required) and fed in preparation for release. At the time of the submission three birds are in veterinary care awaiting release.
- When assessed as fit to be released, these birds will be transported to Ashmore under the supervision of a wildlife response officer and released.
- Due to the very low number of birds to be released post release, monitoring will be undertaken through population monitoring to determine if the oil spill has had any impacts on Ashmore bird populations.

1.144 Between 25 September 2009 and 4 October 2009, a wildlife survey was conducted in the region of the oil spill. The survey was commissioned by DEWHA and formed part of the wildlife response to the incident. A team of three independent marine biologists undertook the study which aimed to identify what species were in the region, what behaviour those species were exhibiting and if the oil spill had resulted in any behavioural and physical impacts. The survey identified a high diversity and abundance of birds, cetaceans, sea snakes and turtles and recommended further monitoring to ascertain the oil spill impacts on wildlife. The survey report is at Attachment L.

1.145 DEWHA contracted Curtin University of Technology to conduct toxicology analysis on wildlife carcasses collected in the region of the oil spill including at Ashmore Reef Reserve. Specifically, toxicology

analysis is being conducted on six sea birds, a sea snake and a turtle (showed no external signs of oiling, however was collected to determine cause of death) to determine the likely cause of death and whether oil impacts include internal effects. The results of the analyses will inform future monitoring efforts.

- 1.146 The wildlife response to the Montara oil spill was terminated on 3 December 2009, when specified triggers were reached. The triggers were designed to ensure the response remained active while there were continued risks of oil impacts to wildlife.

THE PUBLIC'S EXPECTATIONS IN MANAGEMENT OF THE INCIDENT

- 1.147 Throughout the incident, it was DEWHA's experience that public and media expectations were that the Minister had the primary role as 'protector' of the environment. Members of the public demanded in correspondence that the Minister take action varying from withdrawal of PTTEP approvals to taking over the intervention. Such commentary did not appear to be informed by an understanding and/or acceptance of the complex administrative arrangements that exist under the National Plan. However, they did evidence the extent of public concern about the incident.
- 1.148 The actual response to the incident involved a range of agencies having roles in managing the spill. The National Plan defines the responsibilities of the major participants: the Commonwealth, States and NT and industry. This is provided in a set of Commonwealth / State / NT arrangements by way of an Inter-Governmental Agreement, which also details such matters as divisions of responsibilities, contingency planning, access to Commonwealth equipment, and the management and control of financial affairs.² These matters are further discussed at paragraphs 1.114 to 1.119 and at paragraphs 2.58 to 2.63 of Part 2 of this submission.
- 1.149 While there was some criticism in the media suggesting a delay in response from the Minister, activities were occurring 'behind the scenes'. For example, from Sunday 23 August 2009, DEWHA participated in daily situational briefings convened by AMSA and attended by all relevant agencies. Further, ongoing detailed negotiations occurred between PTTEP and DEWHA culminating in the signing on 9 October 2009 of a *Memorandum of Understanding for Environmental Monitoring Programme to be Conducted Following Blowout of Montara H1 Well on 21 August 2009* (MoU) (Attachment M). A copy of the environmental monitoring program is at Attachment N.
- 1.150 Upon notification of the incident, DEWHA recognised the need for oiled-wildlife response operations. However, DEWHA did not have the

² National Marine Oil Spill Contingency Plan, Version 2.0, June 2005 at p.2.

operational capacity to undertake such response operations itself. Nor did it have the authority or responsibility under the National Plan to mobilise appropriate equipment or personnel or secure cost-recovery for response operations.

- 1.151 On 27 August 2009, DEWHA was notified that a potentially oiled bird had landed on a patrolling Australian Customs Vessel. DEWHA immediately sought AMSA's advice and engaged an oiled wildlife response expert. The expert provided basic care instructions that could be provided on a temporary basis to oil affected wildlife and advised that detailed observations were required to develop adequate wildlife response plans.
- 1.152 Given the lack of existing 'in house' wildlife response guidance and capability, DEWHA commissioned the expert to undertake aerial and on-ground surveillance to assess wildlife impacts. DEWHA also mobilised the recommended response equipment to Ashmore where a triage and assessment station for oil affected wildlife was established. These activities were undertaken prior to DEWHA formally taking responsibility for wildlife response under the National Plan (see paragraphs 1.99 to 1.101).

THE RESPONSE – LONG TERM

Environmental monitoring program

- 1.153 On 23 August 2009, DEWHA raised the need for long-term environmental monitoring with PTTEP. A discussion was held between PTTEP, AMSA and DEWHA on 26 August 2009 to identify the species and habitats DEWHA considered to be most at risk and what research currently exists in the area. It was made clear during this discussion that any environmental monitoring then being discussed or planned would not be conducted under a regulatory framework, except in relation to monitoring necessary to support the operational response, and also distinct from any future compliance action that may arise.
- 1.154 The environmental monitoring program was developed by negotiation between DEWHA and PTTEP. This process involved the several iterations of the monitoring program, upon which comment was provided.
- 1.155 Consistent with standard Australian practice, the environmental monitoring program divides monitoring the environmental impacts of the oil spill into two types. Type one monitoring (or operational monitoring) is undertaken during response operations and is focussed on providing information for use in planning or executing the response. Type two monitoring (or scientific monitoring) is undertaken to estimate environmental damage and assist in post response recovery.

- 1.156 The program includes species and habitats which were selected based on available information of the region's fauna and environment. Modelling of the oil spill trajectory was used to determine the area in which species and habitats had to be considered. Lessons learnt from previous spills were also used in determining potential impacts which informed the focusing of monitoring efforts.
- 1.157 To ensure the development of a robust environmental monitoring program, DEWHA ensured the program was peer reviewed by an expert advisory panel, which included representation from AIMS, CSIRO and WA and NT ESCs. The process included an initial discussion to apprise the panel of the situation, circulating draft monitoring plans and reviewing the draft plans prior to returning consolidated comments to PTTEP.
- 1.158 The environmental monitoring program was agreed on 9 October 2009 through the MoU between DEWHA and PTTEP. The MoU describes the decision-making arrangements for the monitoring program. It also describes reporting guidelines for studies implemented under the monitoring program and ownership of intellectual property rights.
- 1.159 The environmental monitoring program is an overarching plan under which all environmental monitoring undertaken by PTTEP and response agencies has and will be conducted.
- 1.160 In this case, operational monitoring has been undertaken by AMSA and includes:
- Monitoring of Oil Distribution and Marine and Coastal Resources. This involves the use of aerial and vessel based surveillance to determine the extent of oil distribution and effects;
 - Monitoring of Oil Character Fate and Effects. This involves collecting oil, water and shoreline samples to assess oil behaviour and identify distribution and effects;
 - Shoreline Assessment Ground Surveys. This involves surveying shorelines that have been or have the potential to be impacted to determine their sensitivity and amenability to clean up options;
 - Monitoring of Dispersant Efficiency and Fate of Dispersed Oil. This involves collecting oil and water samples to assess dispersant behaviour and effectiveness; and
 - Wildlife Impact Monitoring. This involves ground surveys to identify wildlife impacts and toxicology analysis to determine cause of death for wildlife carcasses.
- 1.161 Scientific monitoring has been/will be undertaken by qualified, independent experts engaged by PTTEP, as approved by DEWHA. Scientific monitoring studies rely on specified criteria being reached to trigger activation.

1.162 The environmental monitoring plan outlines indicative scopes and guidance for seven scientific monitoring studies that, if triggered, may result in impact monitoring for up to eight years. Trigger points are identified for each of the potential monitoring studies. Once a trigger point is reached, detailed proposals will be sought by PTTEP based on the following study scopes:

- Marine Megafauna Aerial Assessment Surveys. This involves assessing impacts on megafauna in open waters;
- Shoreline Ecological Assessment Aerial Surveys. This involves assessing impacts on shoreline habitats (including ecological character) of mainland shorelines, islands and reefs;
- Assessment of Fish Catch for the Presence of Oil. This involves determining if commercial fish have acquired any undesirable characteristics as a result of contact with spilt oil;
- Assessment of Effects on Timor Sea Fish and Fisheries. This involves determining any effects on fish species in impacted waters;
- Offshore Banks Assessment Survey. This involves determining whether there has been any effect on the marine banks or shoals in the region;
- Shoreline Ecological Ground Surveys. This involves quantifying any effects on coastal fauna or flora, prioritising areas and resources identified as sensitive; and
- Oil Fate and Effects Assessment. This extends the assessments of oil fate and effects undertaken as part of operational monitoring. It involves investigating the distribution, weathering and effects of residual oil at sea, including assessments of untreated and dispersant treated oil in the water and sediments.

1.163 The activation of the triggers associated with the implementation of the scientific studies has been/will be informed by the results of operational monitoring. As at 22 December 2009, five scientific monitoring studies have been triggered and two are underway including:

- Shoreline Ecological Assessment Aerial Surveys. At this stage this study has been triggered for a baseline survey of the Kimberley Coast between Darwin and Broome. The field work for this survey was conducted between 8 and 18 November 2009 and the report is expected in early 2010;
- Assessments of Fish Catch for the Presence of Oil. The proposal for this study was approved on 10 December 2009. Field work is expected to be conducted in January 2010, following postponement due to weather conditions in the region during December 2009;
- Assessments of Effects on Timor Sea Fish and Fisheries. At this stage this study has been triggered for during and post response assessments. Field work for assessments during the response was conducted between 6 and 19 November and the report is expected in early 2010. A proposal for assessments post response are expected in early January 2009;

- Shoreline Ecological Ground Surveys. Surveys for seabirds, marine turtles, sea snakes and coral have been triggered. DEWHA expects to receive proposals for these studies in late December 2009; and
- Oil Fate and Effects Assessments. Assessments of trajectory modelling and oil exposure, sediment plume modelling and dispersed oil modelling have been triggered. At 22 December 2009, proposals for these studies are being peer reviewed.

1.164 Triggers for the activation of each study are specified by the environmental monitoring program. The triggers generally conform to *EPBC Act Policy Statement 1.1 – Significant Impact Guidelines* (May 2006). Decisions on whether a trigger has been reached are made cooperatively between DEWHA and PTTEP. DEWHA may consult with the advisory panel or relevant experts for advice on whether a trigger has been reached.

1.165 PTTEP submits study proposals and curriculum vitae for the expert(s) who are proposed to implement the study to DEWHA. Proposals are then peer reviewed to ensure that each study is comprehensive and independent. Comments received from the review panel are consolidated and provided to PTTEP with either approval, conditional approval or a request that the proposal be revised.

1.166 Once approved by DEWHA, study implementation is managed by PTTEP.

1.167 On completion of each scientific monitoring study, PTTEP will provide a report to DEWHA. Interim reports for studies that extend beyond a year will be provided on an annual basis. Reports will include an assessment of the scale and persistence of environmental damage, (if any), to determine whether there are any appropriate measures that may be taken to address that damage.

1.168 DEWHA proposes publicly releasing each scientific monitoring study report.

APPROVALS OF OIL AND GAS DEVELOPMENT PROPOSALS POST MONTARA

1.169 DEWHA continues to assess new oil and gas developments that may be referred under the EPBC Act on a case by case basis having regard to its published significant impact policy guidelines. DEWHA has adopted a more conservative approach than previously and is carefully considering worst case scenarios. The potential environmental impacts of referred projects will also continue to be assessed having regard to DEWHA's contextual knowledge of the industry, including its practices and history. Further information will be sought if the referral

documentation does not include sufficient materials to enable an informed decision to be made.

- 1.170 The drilling of oil and gas wells will be approved under the EPBC Act only if the proponent has demonstrated that all appropriate measures to prevent or mitigate environmental harm will be in place. Each assessment will include the usual analysis of the measures proposed to avoid spills, while also considering the likelihood and consequences of a worst case scenario spill (outlined in paragraphs 1.38 to 1.43). Future approvals will require contingency plans to be put in place for implementation should these events occur.
- 1.171 Once the Commission of Inquiry has completed its report, DEWHA proposes analysing all relevant information relating to the Montara spill, the Commission's findings and applying the lessons learned to the assessment of proposed oil and gas developments in the future.

LESSONS LEARNED

- 1.172 There are significant lessons to be learned from the incident and the response. These and suggested improvements as to how the risks relating to uncontrolled releases can be minimised and how Australia can be better prepared to respond are set out in Part 3 of this submission.

Part 2 – Terms of Reference

DEWHA has addressed only those Terms of Reference that are either within its own knowledge, or where DEWHA has the capacity to make informed observations from a DEWHA perspective. Where appropriate, DEWHA has addressed the specific issues raised by the Commission of Inquiry in its Issues Paper published on 24 November 2009.

A. CIRCUMSTANCES AND LIKELY CAUSES

Term of Reference 1

Investigate and identify the circumstances and likely cause(s) of the Uncontrolled Release

- 2.1 DEWHA has no comment to make against this term of reference as it is beyond the scope of its knowledge.

Term of Reference 2

Review the adequacy and effectiveness of the regulatory regime applicable to operations at or in connection with the Montara oil field, including under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, and including the adequacy and effectiveness of all safety, environment, operations and resource management plans, and other arrangements approved by a regulator and in force at relevant times.

Could the regulatory arrangements have been framed and structured, or be monitored and enforced, in a way that would have avoided or mitigated the Uncontrolled release?

- 2.2 The Montara oil field project was assessed in accordance with the usual requirements that were in place by DEWHA at the time relating to oil and gas referrals. Approval was granted subject to six conditions. Condition 1 required the approval of an Oil Spill Contingency Plan (OSCP) prior to the commencement of operations at the site. Condition 4 required certification by PTTEP, annually, of compliance with the conditions of approval.
- 2.3 On the basis of its existing knowledge, DEWHA considers that it would not have been possible for different or additional EPBC Act conditions to have been imposed on the Montara oil field project which would have prevented the uncontrolled release.
- 2.4 Even though DEWHA is now adopting a more conservative approach to the assessment of new oil and gas developments, it is not clear if different regulatory arrangements could have mitigated the Montara

Uncontrolled Release. DEWHA will be looking to the Inquiry's findings and its own audit results to identify whether more stringent regulation is necessary in the future.

- 2.5 DEWHA's post approval monitoring and audit includes a random audit program and a strategic audit program which are determined annually. The 2008/2009 audit program focussed on mining projects, commercial and residential projects in coastal areas and seismic surveys. These audit processes are described in paragraphs 1.48 to 1.49 of Part 1 of this submission.
- 2.6 The Montara project was identified for potential audit as part of DEWHA's 2008/2009 strategic audit program. PTTEP was advised of this by letter dated 22 January 2009. As the audit is still underway, it is too early to say whether a different approach to monitoring and auditing the approval could have helped mitigate the uncontrolled release. The first stage of the audit was a desktop audit in accordance with DEWHA's usual audit practice. (See paragraphs 1.92 to 1.97 of Part 1 of this submission.)
- 2.7 Once the Inquiry has completed its report, DEWHA will analyse all relevant information relating to the Montara oil spill with a view to identifying whether regulation of PTTEP's activities by DEWHA post-approval could have been framed, monitored or enforced in a way that may have mitigated the spill.

Were the magnitude and risks of the Uncontrolled Release adequately foreseen by established environmental plans relating to the exploration, drilling, installation and production or by the plan established to handle an oil spill? What additional measures, if any, might have been taken either before approval of the Montara Field Development, or subsequently, in terms of on-going monitoring or auditing of the performance of parties involved in the Montara Field Development? What impediments, if any, may have prevented the additional measures being taken?

- 2.8 Drilling at the Montara field was regulated by the environmental management plan required under the OPGGS Act.
- 2.9 The requirement for an OSCP to be approved before operations commenced is set out at paragraph 1.78 of Part 1 of this submission. The implementation of the OSCP is detailed at paragraph 1.91.
- 2.10 The OSCP includes priorities for protection (sensitive environments), strategies to mitigate the environment effects of any hydrocarbon spills. The OSCP outlines the equipment available to be used, identified their storage and the way in which they may be deployed, as well as identifying responsibilities for the implementation of the OSCP.
- 2.11 The OSCP identifies the 'elimination or control of the source of the spill' as a priority action. Although the OSCP does not include any

timeframes for the achievement of this goal, there is no indication that the response to the incident was delayed.

- 2.12 PTTEP implemented the OSCP in response to the incident by immediately referring the incident to AMSA for response and management under the National Plan.
- 2.13 The post approval monitoring and audit of the performance of PTTEP is described above at paragraphs 2.5 to 2.7.
- 2.14 In the case of the Montara incident, it took approximately three weeks for a relief rig to be transported to the site. Despite complying with the OSCP, there was limited capacity within Australia to intervene in controlling the release from the well head. While compliance issues are yet to be investigated, DEWHA acknowledges that they may now, post Montara, be a greater expectation that relief equipment should be closer at hand. There have been calls for rigs to be on standby for relief drilling, however, this is a matter which the Australian Government may wish to consider following the findings of the Inquiry. It is noted that DEWHA has an obligation, when setting conditions, to consider the cost-effectiveness of any conditions it imposes.
- 2.15 The environment plan developed under the OPGGS Act and the OSCP did not foresee the need for immediate or long term environmental monitoring in the event of an oil spill. While this would not have prevented or foreseen the management of risk, it would have acted as a contingency measure, providing baseline and long-term monitoring to assist in response operations and in identifying and addressing impacts. DEWHA intends to impose such a condition in future oil and gas approval decisions as part of its more conservative approach.
- 2.16 The Inquiry's findings will be reviewed for the purposes of identifying whether any more stringent regulation is appropriate both pre-approval, during the assessment stage and post-approval, or whether any impediments existed which may have prevented additional measures being taken by way of response to the incident.

What improvements could be made to the way the regulatory regime is framed or monitored with a view to lowering, for example, the environmental and safety risks in offshore petroleum operations?

- 2.17 Earlier this year, the Productivity Commission undertook a review of the regulatory burden on the upstream petroleum sector. It published its research report in April 2009, recommending, among other things, improved regulatory practice and institutional reform through establishing a national offshore petroleum regulator. The Productivity Commission also recognised the merits of independent decision-making under the EPBC Act, particularly pertaining to matters of NES. The independent review of the EPBC Act addresses similar issues, noting the role of the Environment Minister in the ecologically

sustainable management of offshore petroleum activities, and presents options for streamlining processes under the OPGGS Act and the EPBC Act (Chapter 18). The review was released on 21 December 2009 and is available on DEWHA's website. A copy of the review is at Attachment O.

- 2.18 DEWHA believes that it is important that a regulator of environmental performance both is, and is seen to be, independent of industry interests. The EPBC Act currently provides a framework for a thorough and transparent assessment process which provides opportunities for the public and relevant stakeholders to raise concerns and provide local and technical knowledge that informs the assessment and approval decisions.
- 2.19 Recommendation 6.1 of the Productivity Commission's report identifies specific measures to improve the operation of the EPBC Act insofar as it relates to the upstream petroleum industry. DEWHA has considered these findings and has taken steps, already, to substantially address them.
- 2.20 DEWHA will also consider the findings of the Inquiry and apply the lessons learned to the assessment of proposed oil and gas developments.
- 2.21 DEWHA notes that Australia has no legislative requirement for post response environmental monitoring. This theme is explored further at paragraphs 2.28 to 2.29.
- ***To what extent do regulatory arrangements under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 in relation to petroleum exploration in Commonwealth waters, which involve the Commonwealth delegating responsibility, in this case to the Northern Territory Government through its Department of Regional Development, Primary Industry, Fisheries and Resources, contribute to or detract from best regulatory practices?***
- 2.22 The day-to-day regulation of petroleum activities by the Australian Resources Minister is delegated to the relevant State or Territories as Designated Authorities (DAs).
- 2.23 DEWHA considers that there may be a potential conflict of interest in devolving regulatory decision-making to DAs who are also promoters and advocates for the resources sector. DEWHA does not oppose delegation to, or accreditation of, State and Territory regulatory or administrative regimes and has done so in a variety of circumstances under the EPBC Act. The key issue is to ensure the regime to be accredited is rigorous, accountable and independent and provides outcomes consistent with relevant Commonwealth legislation, policy and programs.

Is there a more appropriate way in which regulatory responsibility can be allocated as between the Commonwealth and State/Territory Governments in relation to Commonwealth waters?

2.24 DEWHA notes the reviews referred to in paragraph 2.17 above. DEWHA is participating in the work of DRET and the States and NT Governments on petroleum legislation, to ensure consistency with the review process of the EPBC Act. Important issues will be how environmental impact assessments and day-to-day operations are coordinated across government, how they deliver the appropriate environmental outcomes and how they interface with other issues such as safety considerations.

To what extent have the current arrangements in relation to delegation of responsibility led to differing regulatory practices between jurisdictions? If there are regulatory differences, to what extent do these reflect circumstances particular to individual jurisdictions and/or different approaches to regulation across jurisdictions?

2.25 Just as occurs onshore with differences between State and Territory jurisdictions, the current DA arrangements create a setting in which there is potential for inter-jurisdictional differences to develop. One example where this may arise is through the difference in jurisdictions' allocation of resources for environmental management as opposed to other regulatory requirements.

2.26 It is DEWHA's view that the EPBC Act regime provides transparency in decision-making, and national consistency from an environmental regulator's perspective.

2.27 An example where a national approach has been successfully adopted by the oil and gas sector is in the area of seismic exploration. The development and issue of detailed policy statements such as *EPBC Act Policy Statement 2.1 – Interaction between offshore seismic exploration and whales* (September 2008) allows an Australia-wide regulatory framework to be applied via DAs.

How does Australia's offshore regulatory regime compare with relevant offshore regulatory arrangements in other countries?

2.28 DEWHA recognises that regulatory regimes relating to long-term environmental monitoring of oil spill impacts vary between countries. DEWHA notes that Australia does not have a legislative requirement for 'spillers' to assess or monitor long term ecological damage. Nor are there statutory provisions for compensation claims for environmental damage resulting from oil spills. This defers responsibility for long term monitoring to relevant government agencies or requires a voluntary undertaking by industry or research organisations.

2.29 Other countries have legislation that requires post-spill environmental impact monitoring. The level of prescription, however, varies between

countries. For example the United States' *Oil Pollution Act 1990* requires 'Natural Resource Damage Assessments' and specifies the required methodology for the assessments. The associated costs are recoverable and the results are used to inform compensation claims. Conversely, in Russia, post spill monitoring and damage assessments are required with the costs to be met by the spiller but the scope and objectives are negotiated on a case by case basis.

To what extent does the current legislation (for example, the EPBC Act) and the current regulatory regime provide an adequate framework to meet environmental objectives with respect to the offshore petroleum industry?

- 2.30 The EPBC Act provides for project by project assessments to ensure that the objectives of the legislation are met (e.g. protection of the environment and matters of NES). The assessment process considers, as a first order issue, whether or not a proposal should be approved. For example, are the impacts of drilling in a particular location, due to proximity to important habitat to endangered species or other important marine environmental attributes, acceptable? If approved, approval conditions often require construction- and operation- related environment plans, in addition to OSCPs.
- 2.31 While EPBC Act plans detail the measures for environmental protection, they are a subset of management plans the industry operates under (other plans cover safety and technical matters for example). Much of the day-to-day regulation of operations on these fronts is conducted by the DAs and, as noted in paragraph 1.18, approval conditions under the EPBC Act take those other management plans into account. The EPBC Act is administered to avoid duplication of other regulatory regimes.
- 2.32 The EPBC Act includes provisions for strategic assessments that may provide a basis for considering the cumulative impacts of a particular sector, or projects within a particular geographic range, to meet the objectives of the EPBC Act.
- 2.33 DEWHA often works with industry to develop guidelines or agreed standards to assist in avoiding or mitigating impacts on matters protected under the EPBC Act. This helps provide certainty to all parties as to the type of activities likely to be not-significant or otherwise acceptable. An example of this approach is the Australian National Guidelines for Whale and Dolphin Watching 2005.
- 2.34 DEWHA recognises that Part 13 of the EPBC Act requires that impacts (death, injury, trading, taking, keeping or moving) to listed species be reported. However there is no legislative requirement for a person to take action to assist injured listed species.
- 2.35 The National Plan was developed to ensure that Australia would be prepared to respond to pollution incidents. To achieve this, the

National Plan outlines national arrangements for responding to oil spills in the marine environment in order to protect it from oil pollution, or at least minimise the effects of oil pollution. However, the National Plan does not include provisions for post response actions, such as environmental impact monitoring.

- 2.36 As set out in paragraph 2.28 there is no legislative requirement in Australia for ‘spillers’ to assess or monitor long term ecological damage. Nor are there statutory provisions for compensation claims for environmental damage resulting from oil spills.

Term of Reference 3

Assess the performance of relevant persons in carrying out their obligations under the regulatory regime.

Relevant persons should set out:

- ***Their role and responsibilities in relation to the regulatory regime.***
- ***How they gave effect to compliance with regulatory requirements, both broadly and with respect to specific obligations established by the regulatory regime.***
- ***To the extent that the regulatory regime provides an overall framework which may or may not have been able to anticipate all events, how the relevant person exercised their responsibility to give effect to the intent of the regulatory regime.***

- 2.37 DEHWA is in the process of conducting an audit of the PTTEP’s compliance with the EPBC Act including with the existing approval under s.133. It is proposed that this audit be undertaken in a manner that will not conflict with the timing of the Commission of Inquiry.

- 2.38 On 8 September 2009, DEHWA received notification from PTTEP of the death of marine fauna, as required under the EPBC Act. The marine fauna included three birds (believed to be common noddies) and four sea snakes (species unknown).

Term of Reference 4

Review the adequacy and effectiveness of monitoring and enforcement by regulators of relevant persons under the regulatory regime.

The Commission of Inquiry invites submissions to address:

- ***The precise nature of the monitoring and enforcement regime implemented by each regulator and whether their activities were in keeping with these requirements?***

- 2.39 As an immediate response to notification of the incident, DEWHA's Compliance and Enforcement Branch (CEB) undertook initial inquiries to see whether a breach of the EPBC Act may have occurred, in particular a breach of the approval conditions.
- 2.40 DEWHA is not in a position at this stage to comment on whether or not a breach of the EPBC Act may have occurred. As noted throughout this submission, an audit of compliance with the EPBC Act and EPBC approval conditions is yet to be completed. The Inquiry may also provide relevant information which may assist in DEWHA's determination of whether a breach has occurred.
- 2.41 As noted in Part 1 of this submission, DEWHA accepted the role of ESC under the National Plan and in this capacity negotiated with PTTEP to establish a long-term monitoring plan, the scope of which exceeded any statutory obligations on the company.
- ***The overall regulatory framework within which each regulator implements a monitoring and enforcement regime and whether that framework is able to effectively deal with events such as those leading up to and subsequent to the Uncontrolled Release?***
- 2.42 The events leading up to the Uncontrolled Release are not yet known. While DEWHA is unable to comment on issues specific to this incident, it notes that the regulatory arrangements under the EPBC Act allow for and require issues, that change the overall environment or provide additional information, to be considered.
- 2.43 DEWHA responded to reports of a plume of discoloured water from the West Atlas drilling rig in March and April 2009. The matter was logged and investigated and inquiries made of the relevant NT agency and PTTEP. DEWHA determined that no breach of EPBC Act approval conditions occurred. As a consequence, no compliance action was taken. Further detail of this compliance incident can be found at paragraphs 1.84 to 1.86 of this submission.
- 2.44 DEWHA is not aware of any suggestion that this earlier incident was linked to the subsequent Uncontrolled Release incident.
- 2.45 As to the events subsequent to the incident, DEWHA had in place an approved OSCP for the Montara oil field. The incident triggered the implementation of the OSCP, however, due to the magnitude of the Uncontrolled Release, AMSA was required to be notified immediately. The response to the incident was thereafter managed by AMSA under the National Plan.
- ***Whether the specific actions taken prior to the Uncontrolled Release by the NT Department of Regional Development, Primary Industry, Fisheries and Resources; the Commonwealth Department of Resources, Energy and Tourism; NOPSA; and DEWHA, were appropriate?***

- 2.46 Actions DEWHA took prior to the Uncontrolled Release are detailed at paragraphs 1.66 to 1.90.
- ***Whether the monitoring and enforcement actions undertaken by the regulators reflects international best practice?***
- 2.47 DEWHA takes a proactive role in ensuring compliance with the EPBC Act in relation to specific projects and Marine Protected Areas. DEWHA has invested considerable resources in strengthening its monitoring and enforcement capacity, including through the establishment of a dedicated CEB in July 2007. The branch includes a unit (Compliance Support Unit) with a specific role in identifying and promulgating best compliance practice within DEWHA. The branch also includes a dedicated section undertaking rigorous post approvals monitoring and an active audit program.
- 2.48 DEWHA applies a graduated compliance policy covering options from a warning letter, encouraging voluntary compliance, administrative processes through to civil remedies including suspension or cancellation of approvals and, for serious and deliberate breaches, criminal prosecution. DEWHA's approach is described in the DEWHA's *Compliance and Enforcement Policy*. This document was recently revised following a comprehensive review of recent Australian Government regulatory publications, emerging best practice from other Australian and overseas regulators and relevant academic literature. The revised document also reflects DEWHA's evolving expertise as it matures as an environmental regulator.
- 2.49 The recent review has reinforced the benefits of DEWHA's active participation in networks such as the Australasian Environmental Law Enforcement Regulators Network (AELERT) in allowing DEWHA to keep abreast of 'best practice' developments in compliance and enforcement. DEWHA is also increasingly using administrative remedies such as remediation determinations and enforceable undertakings, as an alternative to court actions, to achieve more immediate and efficient environmental outcomes.
- 2.50 In regard to the Montara Project, DEWHA's regulatory and legislative role is limited to ensuring compliance with the approval, including conditions. DEWHA will await the findings of the Inquiry and its own audit to determine if further compliance actions are warranted under the EPBC Act.

B. ADEQUACY OF THE RESPONSE

Term of Reference 5

Assess the adequacy of the response to the Uncontrolled Release by the current title-holder of AC/L7, the owner and/or operator of the Montara Wellhead Platform and the owner and/or operator of the West Atlas drilling rig.

Why the owner/operator chose to tackle the Uncontrolled Release in the way that it did?

2.51 DEWHA has no comment to make against this issue as it is beyond the scope of its expertise.

Whether there were alternative ways of stemming or stopping the release of hydrocarbons and why these were not pursued? To what extent was the decision influenced by safety, commercial, environmental, technical or other considerations?

2.52 DEWHA has no comment to make against this issue as it is beyond the scope of its expertise.

Might decisions taken have been different in the event of a larger uncontrolled release of hydrocarbons, an alternative location, or if the consequences of that release had been thought to have been greater? How were decisions in that regard made?

2.53 DEWHA has no comment to make against this issue as it is beyond the scope of its expertise.

The effectiveness of the relationship between the owner/operators and regulators and governments, and how this relationship may have impacted the adequacy of the response to the Uncontrolled Release by the owner/operators?

2.54 PTTEP has worked effectively and willingly with DEWHA throughout the response period. This has included assistance in implementing the wildlife response through the provision of logistical support.

2.55 PTTEP has also worked with DEWHA to develop and implement an environmental monitoring plan to identify environmental impacts to habitats and species as a result of the oil spill. PTTEP has committed, via an MoU with DEWHA, to fund all monitoring conducted under the plan and for all reports produced under the monitoring plan to be publicly released (noting that in relation to operational monitoring studies, release is subject to AMSA's approval).

2.56 PTTEP is working with DEWHA and other relevant Australian Government agencies to address Indonesian concerns of impacts in their waters. Discussions are underway to address these concerns by conducting aerial surveillance and a shoreline assessment of the areas where impacts have been reported. PTTEP has agreed to refund costs incurred by the Australian and Indonesian Governments in conducting these activities.

Term of Reference 6

Assess the adequacy of regulatory obligations applicable to the titleholder of AC/L7, the owner and/or operator of the Montara Wellhead Platform, and the owner and/or operator of the West Atlas drilling rig in relation to the response to the incident and make any recommendations necessary to improve the regulatory obligations that may be applicable to any future incidents.

The Commission notes that key legislation and regulations bearing on the response to the uncontrolled release include the conditions of the EPBC Act approval, including Condition 1, which required the submission of an Oil Spill Contingency Plan, and Condition 6, which allowed the Minister to request the company to revise this Plan. Other functions under Chapter 4 of the EPBC Act may also be relevant.

2.57 DEWHA's role in assessing the Montara project, in setting the conditions of approval and approving the OSCP are noted elsewhere in this submission, in particular, at paragraphs 1.66 to 1.90 and 2.9 to 2.16.

Did the National Marine Oil Spill Contingency Plan adequately envisage an uncontrolled release of hydrocarbons of the magnitude and duration of the Uncontrolled Release and in such a remote location in Commonwealth Waters, or at least provide an adequate framework which could be adapted effectively to cope with differing events?

2.58 It is DEWHA's opinion that the implementation of the National Plan by AMSA was prompt and focused on operations to clean up the oil from the environment.

2.59 DEWHA believes that the National Plan effectively describes the Incident Management Teams governance arrangements and the roles and responsibilities. However, the roles and responsibilities and governance arrangements for the various Australian Government agencies involved in the response may warrant review.

2.60 As set out in paragraph 1.115, the National Plan is focussed on incidents originating from shipping activities. While arrangements for spills from offshore petroleum operations are referenced, they are not considered in depth. Importantly, spills originating from shipping activities usually occur over a short period. As highlighted by the Montara incident, spills from petroleum platforms can continue for extended periods.

2.61 During incidents that do not impact on State or Territory waters, the National Plan does not assign responsibility for wildlife response. Clarity around responsibility of this role is critical so that plans can be developed and resources allocated to allow for a prompt and informed responses to wildlife impacts.

2.62 Although agreement to the National Plan between the Commonwealth, States and Northern Territory was reached on the basis of polluter

(potential and actual) pays, mechanisms for seeking cost recovery for incidents originating from sources other than shipping, including the upstream oil and gas sector, are not specified.

- 2.63 The National Plan does not impart responsibility for environmental monitoring during response operations. Such monitoring is critical to ensure the response is appropriate and to allow the environmental impacts of the spill to be accurately identified and addressed. It is important to note that to be comprehensive such monitoring must extend beyond surveying the horizontal extent of oil and the collection and analysis of oil samples.

To what extent should the response have been left to the owner/operator, or should it have been subject in certain circumstances to direction by regulators. In other words, to what extent does the existing regulatory regime strike an appropriate balance the commercial interests of the owner/operator compared with broader public interest considerations?

- 2.64 PTTEP briefed the Australian Government, including DEWHA on the response options and the implications of those options on 7 September 2009.
- 2.65 DEWHA's focus during the response operations was on the potential environmental impacts of both the incident and the response.
- 2.66 In this regard, the Minister considered a request by PTTEP for an exemption of the provisions of Part 3 of Chapter 4 of the EPBC Act to enable a relief rig to be towed to the site for the purpose of intercepting the Montara H1 well below the sea bed. The exemption was approved on the basis that it was in the national interest that the flow of the Uncontrolled Release be stopped as soon as possible. Full details of the exemption are detailed at paragraphs 1.122 to 1.131 of Part 1 of this submission.
- 2.67 Rather than rely on the August 2000 national interest exemption for all actions undertaken in accordance with the National Plan, an intervention specific exemption was recommended by DEWHA on the basis that full certainty was required. The details of this exemption are set out at paragraphs 1.122 and 1.131 of this submission.
- 2.68 DEWHA's post incident wildlife response is described elsewhere in this submission, for example, at paragraphs 1.105 to 1.106 and 1.132 and 1.146 of this submission.

To what extent did the decisions by the owner/operators and regulators alike comprehend the overall picture, especially since there are a number of regulators, with differing responsibilities? What steps did regulators take to ensure that they had a shared understanding of emerging events? And to what extent did regulators work separately or jointly with the owner/operator to ensure an appropriate response? To what extent could other response mechanisms available within the regulatory regime have been used if the

attempts to stop the Uncontrolled Release had continued to fail, and at what stage would these mechanisms have been implemented?

2.69 DEWHA considers that the daily inter-departmental incident coordination meetings and situation reports provided an effective means for ensuring regulators and response agencies comprehended the overall picture. The meetings also provided an avenue for the transfer of information, as appropriate, between the Australian Government and PTTEP.

2.70 In managing the incident's wildlife response, DEWHA considered the overall picture, and adapted the response as the picture changed. The following aspects informed decision making regarding the wildlife response:

- remote location;
- extent of the spill;
- clean up response operations;
- likely species impacts; and
- possible duration of the incident.

DEWHA sought advice from oiled-wildlife response experts from relevant state agencies and experienced veterinarians to ensure response efforts were appropriate and effective. This included liaison with AFMA and the WA and NT fisheries agencies on the potential impact on fish and fisheries resulting from the oil spill and response operations.

2.71 DEWHA considers that a clearer understanding of the overall picture may have been warranted during AMSA's development of the Net Environmental Benefit Analysis pertaining to the use of dispersants. DEWHA believes consideration should have been given to the distribution of oil, dispersant and oil-dispersant mixes in the water column, particularly relative to nearby coral habitat and fish spawning areas.

2.72 As set out in paragraph 1.104, DEWHA provided regular updates on environmental and wildlife impacts to PTTEP, AIMS, CSIRO and WA and NT ESCs.

2.73 During the development of the environmental monitoring plan, DEWHA consulted with relevant agencies to ensure the plan addressed all potential environmental impacts as set out in paragraphs 1.108 and 1.157 of Part 1 of this submission.

2.74 On 29 September 2009, DEWHA provided environmental advice on the Net Environmental Benefit Analysis for the use of chemical dispersants as a response option to AMSA for consideration. DEWHA's advice recognised that the protection priorities in response to the incident included (in descending order):

- urgency of the spill;
- human health and safety;
- habitats and culture;
- rare and/or endangered species;
- commercial resources; and then
- amenities.

2.75 DEWHA reported to the Montara Oil Spill Inter-Departmental Committee, led by AMSA, on wildlife response measures, environmental monitoring plan development and other relevant matters to ensure other regulators were kept up-to-date. DEWHA also provided input to the regular situation reports to ensure relevant agencies remained up-to-date with environmental matters.

Were the response from the NT Department of Regional Development, Primary Industry, Fisheries and Resources; The Commonwealth Department of Resources, Energy and Tourism; DEWHA; NOPSA; and AMSA appropriate?

- 2.76 The OSCP required that PTTEP defer response operations to the National Plan for 'Tier 3' oil spills (spills over 1000 tonnes). The National Plan requires that the relevant oil company assume operational responsibility for oil spill response unless the situation develops beyond the capacity of the company. In these cases, operational responsibility transfers to the relevant statutory agency, which is also responsible for the institution of prosecutions and recovery of cleanup costs on behalf of all participating agencies. For incidents outside coastal waters, the National Plan assigns AMSA as the statutory agency.
- 2.77 Until 15 September 2009, when DEWHA was appointed as the ESC for this incident, it was unclear where responsibility for wildlife operations rested. Notwithstanding this lack of clarity DEWHA undertook actions towards responding to wildlife impacts as described by paragraphs 1.137 to 1.143 of Part 1 of this submission.
- 2.78 Following the appointment as the ESC for the incident, DEWHA established a taskforce committing dedicated resources to the incident response. The taskforce met on a daily basis to ensure that members had an overall understanding of the relevant issues and to ensure that decisions were made in a consultative and timely manner.
- 2.79 DEWHA provided advice to AMSA, as ESC, based on the limited information available about the species, habitats and environment in the region of the oil spill. More information regarding these matters would have assisted DEWHA and allowed the provision of more detailed advice. For example a better understanding of fish spawning locations in the region would have allowed DEWHA to provide more accurate advice to AMSA regarding response operations.

2.80 DEWHA acknowledges that undertaking a wildlife survey in the region of the oil spill was delayed. However DEWHA considers that wildlife observations recorded by trained observers on daily surveillance flights has ensured that a understanding of potential wildlife impacts pre- and post- the wildlife survey exists.

2.81 Following the appointment as ESC DEWHA conducted wildlife response operations and sought associated cost recovery from PTTEP.

Were the steps taken by other regulatory agencies to respond to the incident, including the Western Australian Department of Fisheries and the Australian Fisheries Management Authority appropriate?

2.82 DEWHA is not aware of regulatory actions taken by the WA Department of Fisheries, the NT Department of Primary Industry, Fisheries and Resources or the Australian Fisheries Management Authority. However, these agencies provided input to the development of the environmental monitoring plan.

To what extent might the regulatory regime and specific obligations under the regulatory regime be improved upon in order to more effectively deal with future incidents?

2.83 There are significant lessons to be learned from the incident and the response. These and suggested improvements as to how the regulatory regime may be improved to more effectively deal with future incidents are set out in Part 3 of this submission

If the Uncontrolled Release had been of a greater magnitude, if the location of the incident had been different (including its proximity to other response equipment), or if the environmental or other consequences of the Uncontrolled Release had been greater, were there alternative avenues that regulators may have been able to pursue with the owner/operators (and other parties) to stem or plug the Uncontrolled Release?

2.84 In response to the Uncontrolled Release DEWHA conducted the actions described between paragraphs 1.122 to 1.146 and 1.153 to 1.158. Given the scope of DEWHA's operational responsibilities and capability, authority and experience in oil spill response these actions would not have differed if the Uncontrolled Release had been of a greater magnitude, the location had been different (but still in a remote area of Commonwealth waters) or if the environmental or other consequences had been greater.

2.85 However, if the Uncontrolled Release had occurred within state waters (generally three nautical miles of the coast) the implementation of the National Plan would have been different. The National Plan clearly identifies the roles of state environment agencies in relation to wildlife response and the role of ESC. The state environment agencies would have been responsible and would have been able to dedicate substantial operational resources to the incident.

2.86 DEWHA has no further comment to make against this point as it was beyond the scope of its authority to stem or plug the Uncontrolled Release.

Was the response appropriately determined between regulators and owner/operators, especially in view of the fact that public interest considerations may not necessarily align with commercial considerations or the specific interests of individual regulators?

2.87 DEWHA has no comment to make against this point as it is beyond the scope of its expertise.

Alternatively, if there were no other appropriate alternatives, what implications might this have for the way offshore petroleum developments should be regulated in the future? For example, might consideration need to be given to a more searching examination of what is proposed for offshore petroleum developments at the preapproval stage (covering environmental, safety or operational considerations)?

2.88 There are significant lessons to be learned from the incident and the response. These and suggested improvements as to how offshore petroleum developments could be regulated in the future are set out in Part 3 of this submission

C. ENVIRONMENTAL IMPACTS

Term of Reference 7

Assess and report on the environmental impacts following the Uncontrolled Release using available data and evidence including the outcomes from monitoring activities already underway, review any proposed environmental monitoring plans, and make recommendations on whether any further measures are warranted to protect the environment from the consequences of the Uncontrolled Release.

The Commission seeks a submission on the adequacy of the environmental response, including:

- ***The adequacy of the “Monitoring Plan for the Montara Well Release Timor Sea as agreed between PTTEP Australasia and DEWHA dated 9 October 2009” (the Monitoring Plan). Relevant to this issue is the fact that:***
 - o- ***The Monitoring Plan includes an Operational Monitoring Programme, with the monitoring to be undertaken by AMSA in accordance with the National Marine Oil Spill Contingency Plan.***
 - p- ***The Monitoring Plan also incorporates a Scientific Monitoring Programme, which will be managed by the owner/operator. Specific studies under this Programme will require approval from DEWHA prior to initiation.***

- 2.89 As set out in paragraph 1.153 of Part 1 of this submission, DEWHA raised the need for long-term environmental monitoring with PTTEP on 23 August 2009. Following negotiations with PTTEP, and seeking expert input from relevant agencies, the environmental monitoring plan for the Montara incident was agreed on 9 October 2009.
- 2.90 The monitoring plan was negotiated with PTTEP and is distinct from compliance action that may arise in the future. The implementation of the monitoring plan does not:
- affect PTTEP's obligation to comply with any applicable statute or legislation including the EPBC Act;
 - limit the ability of a Minister or any other office holder to exercise a statutory or executive power or discretion; or
 - prejudice the completion of any investigations undertaken into the incident or any legal proceedings arising from there.
- 2.91 The outlines of the proposed studies are based on information available during the development of the monitoring plan. Methodologies will be modified, as required, according to incident events and specific study requirements as identified by relevant experts.
- 2.92 The monitoring plan may be amended by agreement between PTTEP and DEWHA. The duration of studies under the monitoring plan will be determined at initiation and reviewed annually by agreement between DEWHA and PTTEP.
- 2.93 As set out in paragraphs 1.157, the monitoring plan was peer reviewed by experts at AIMS, CSIRO and relevant Commonwealth, State and Territory agencies.
- ***How effective was the Operation Monitoring Programme and what lessons have emerged?***
- 2.94 Operational monitoring is designed to provide information of direct relevance to spill response operations. The results of operational monitoring are used to plan or execute response strategies. The results from operational monitoring during the response to the Montara oil spill has also been used to trigger implementation of scientific monitoring.
- 2.95 Responsibility for the management of operational monitoring, in accordance with the National Plan and the environmental monitoring plan, rests with AMSA through the Incident Controller.
- 2.96 DEWHA requested on numerous occasions that water quality monitoring, to assess the vertical and horizontal distribution of oil and oil/dispersant mixes, be undertaken. These requests were actioned in late September 2009 and results were received in early November 2009.

- 2.97 Operational monitoring study one – Monitoring of Oil Distribution and Marine and Coastal Resources – has included trajectory modelling and aerial and on-water surveillance. Results from this study have been provided to DEWHA and have been used to target wildlife monitoring and response operations.
- 2.98 Operational monitoring study two – Monitoring of oil character fate and effects – has included collecting and analysing water and oil samples. The analysis of oil samples has not been used by DEWHA. The water quality monitoring undertaken was of limited assistance to DEWHA in determining the horizontal and vertical distribution of oil and oil dispersant mixes because of the limited number of useable (i.e. not contaminated) samples collected. In particular, only four dispersant operations were monitored for oil-dispersant mix distribution and of those operations, three different dispersants were applied. More timely provision of better quality information would have been beneficial in terms of assessing potential impacts on coral and fish spawning events that were occurring in the general vicinity of the Montara well.
- 2.99 Operational monitoring study three – Shoreline assessment ground surveys – have been undertaken at Hibernia Reef and Ashmore and Cartier reserves. Initially, baseline studies were conducted to provide a comparison for future monitoring to determine the effect, if any, of oil on the shorelines at these areas. Results of sample analysis from these surveys have not been received, however, visual observations have been reported. Post-impact shoreline assessment surveys are expected to be conducted at Browse and Cartier Islands and at Ashmore Reef in early 2010.
- 2.100 Operational monitoring study four – Monitoring of dispersant efficiency and fate of dispersed oil – has been undertaken and the results merged with those under Operational monitoring study two.
- 2.101 Operational monitoring study five – Wildlife impact monitoring – has been undertaken including daily aerial surveillance, daily monitoring (as allowed by tides and compliance operations) of the islands at Ashmore reserve, a wildlife survey in the region of the spill, surveys of Cartier island and a survey of Browse Island.
- ***Is the Scientific Monitoring Programme adequate; and are there any worthwhile enhancements that could be made to it?***
- 2.102 The studies outlined by the scientific monitoring component of the environmental monitoring plan provide indicative scopes and guidance. These outlines will be refined and documented in detailed study plans, the design of which requires specialist input. Such input is commissioned prior to the implementation of the particular study by PTTEP.

- 2.103 Individual study proposals are peer reviewed by the expert advisory panel prior to DEWHA providing approval for their implementation.
- 2.104 As set out in paragraphs 1.161 and 1.163 of this submission, the activation of scientific monitoring is dependent on specified triggers being met to activate implementation. The decisions on whether a trigger has been met are made cooperatively between DEWHA and PTTEP.
- 2.105 Scientific monitoring study one – Marine megafauna aerial assessment surveys – has not been triggered.
- 2.106 Scientific monitoring study two – Baseline shoreline ecological assessment aerial surveys – has been triggered for the Kimberley coast between Darwin and Broome. A survey was conducted between 8 and 19 November 2009 and results are expected early in 2010. Ongoing activation of this study will depend on the results of operational monitoring study one.
- 2.107 Scientific monitoring study three – Assessment of fish catch for the presence of oil studies – has been triggered. The proposal for this study was approved on 10 December 2009. Field work is expected to be conducted in January 2010, following postponement due to Cyclone Laurence during December 2009.
- 2.108 Scientific monitoring study four – Assessment of effects on Timor Sea fish – has also been triggered. This study has two components; the identification and evaluation of the extent of exposure and the effect to fish health and an assessment of effects of fish and catch in the long term. Fieldwork to assess the extent of exposure and the effect to fish health was conducted between 6 and 19 November 2009 and results are expected early in 2010.
- 2.109 Scientific monitoring study five – Offshore banks assessment surveys – has not been triggered.
- 2.110 Scientific monitoring study six - Shoreline ecological ground surveys – has been triggered for birds, turtles, sea snakes and corals. DEWHA expects to receive proposals for the implementation of these studies in December 2009.
- 2.111 Scientific monitoring study seven – Oil fate and effects assessments – has been triggered and will include trajectory and exposure assessments, analysis of sediment plume modelling, dispersant application and fate modelling and water and biota sampling. At 22 December, proposals for these studies are being peer reviewed.
- ***It is noted that DEWHA is required to approve study proposals under the Scientific Monitoring Programme, which will then be managed by the owner/operator. What role will DEWHA be taking in assessing or reviewing***

the veracity of the studies that are being commissioned? What will be DEWHA's role in determining how the studies might be modified or evolve as circumstances change over time? Will there be independent peer reviews of the studies?

2.112 As set out in paragraph 1.165 of Part 1 of this submission, approval from DEWHA is required prior to the implementation of each scientific monitoring study. PTTEP will then manage the implementation of approved studies.

2.113 The approval process is designed to ensure that studies are undertaken by appropriately qualified and independent experts and to ensure the integrity of data and the validity of the approach.

2.114 Each proposal is subject to a peer review process, which includes review by DEWHA, AIMS, CSIRO and NT and WA ESCs.

2.115 Final reports, and interim reports as necessary, will be provided to DEWHA at the conclusion of each study. Each report will be considered to determine if any action to mitigate or further investigate impact is required. However, DEWHA does not have a role in assessing or reviewing the veracity of the reports.

2.116 As set out in paragraph 2.92, the monitoring plan may be amended, at any time and for any reason, by agreement between DEWHA and PTTEP.

- ***What public reporting is envisaged flowing from the Operational and Scientific monitoring programs?***

2.117 All reports received by DEWHA under the scientific monitoring component of the environmental monitoring plan will be publicly released. Where AMSA has agreed, DEWHA has also publicly released operational monitoring study reports, on AMSA's behalf.

- ***What, if any, other action is envisaged following receipt of outcomes from the Operational and Scientific Monitoring Programmes?***

2.118 The results and recommendations of studies will be assessed on case by case basis and appropriate action will be undertaken as necessary.

2.119 As set out in paragraphs 2.92 and 2.116, the monitoring plan may be amended, at any time and for any reason, by agreement between DEWHA and PTTEP.

D. THE OFFSHORE PETROLEUM INDUSTRY'S RESPONSE

Term of Reference 8

Consider and comment on the offshore petroleum industry's response to the

Uncontrolled Release.

2.120 DEWHA has no comment to make against this term of reference as it is beyond the scope of its knowledge.

E. PROVISION AND ACCESSIBILITY OF INFORMATION

Term of Reference 9

<p>Consider and comment on the provision and accessibility of relevant information regarding the Uncontrolled Release to affected stakeholders and the public.</p>

In terms of the information provided by owners/operators and from the petroleum and gas industry; and agencies with regulatory responsibilities:

- *To what extent has the information that has been provided to stakeholders and the public been adequate and timely?*

2.121 There appears to have been a public expectation that the Environment Minister would take the lead in responding to the incident and in releasing information, including on operations and activities being led by other regulators. This is further described in paragraphs 1.147 to 1.152 of Part 1 of this submission.

2.122 DEWHA acknowledges that there was a discrepancy between public expectations and the regulatory reality. In addition, DEWHA did not have formal authority to release information regarding response operations until 15 September 2009 when it accepted the role of ESC, and from this date, DEWHA only had formal authority to release information regarding the wildlife operations. To provide the public information regarding wildlife operations DEWHA developed a dedicated Montara oil spill website: <http://www.environment.gov.au/coasts/oilspill.html> which was activated on 16 September 2009.

2.123 As the environmental monitoring plan was under negotiation with PTTEP, DEWHA did not release information on the plan during its development phase. Once finalised the plan was released on the DEWHA Montara oil spill website. All reports received by DEWHA under the scientific monitoring component of the environmental monitoring plan will be publicly released. Where AMSA has agreed, DEWHA has also publicly released operational monitoring study reports on AMSA's behalf.

2.124 To ensure stakeholders remained up-to-date with environmental information, DEWHA contributed to the whole of government response as set out in paragraphs 1.102 to 1.113 of Part 1 of this submission.

2.125 It would have assisted DEWHA to appropriately target wildlife response operations and provide advice regarding the potential environmental impacts of the incident if information such as trajectory modelling, oil extent modelling and wildlife sightings had been provided in real time. To facilitate prompt information flow, DEWHA made available a 24 hour duty phone and provided relevant contact details of DEWHA's Montara oil spill taskforce members to AMSA and the incident management team.

2.126 The information flow improved somewhat following the deployment of a DEWHA liaison officer to the incident management team on 30 September 2009. However, difficulties with the information and communication services in the incident management team facilities meant that the timeliness issues were not fully resolved.

- ***Is it envisaged that at key points throughout the on-going response to the incident that there will be a stocktake – drawing together the key threads and findings – in a systematic way (for example, key operational, engineering or design issues that might be of significance for the petroleum industry); or drawing together findings from the various environmental studies?***

2.127 DEWHA has used the results from the operational monitoring studies undertaken during the response to target wildlife monitoring and to inform further environmental monitoring implementation and needs. This has included:

- The wildlife survey set out in paragraph 1.144 of Part 1 of this submission, was undertaken in the area affected by oil at the time of the survey which was informed by aerial and on-water surveillance.
- Trajectory modelling indicated Hibernia Reef and Ashmore and Cartier reserves would be impacted by oil and aerial surveillance indicated oil residue in proximity to these areas which prompted baseline shoreline assessment ground surveys.
- Water-based surveillance identified waxy residue in the lagoon at Ashmore which has prompted post-impact shoreline assessment surveys at Ashmore and Cartier. This survey is expected to be conducted in early 2010.
- Aerial and on-water surveillance indicated oil residue in proximity to Browse Island. This prompted a wildlife survey to be undertaken to determine if the oil's proximity to Browse had resulted in wildlife impacts. A post-impact shoreline assessment survey of Browse Island has also been triggered based on these observations. This survey is expected to be conducted in early 2010.

2.128 In addition, a number of the scientific monitoring studies rely on the results of operational monitoring to trigger activation.

F. OTHER MATTERS

Term of Reference 10

Make recommendations to the Minister for Resources and Energy, and through the Minister for Resources and Energy, other relevant Commonwealth Ministers, regulators and industry, as appropriate, on any measures that might help to prevent similar incidents occurring in the future and any measures that might mitigate the safety, environmental, and resource impacts arising from such an incident. Measures may include improvements to industry practices or applicable regulatory regimes and their administration.

2.129 There are significant lessons to be learned from the incident and the response. These and suggested improvements are set out in Part 3 of this submission

Term of Reference 11

Consider, assess and make recommendations in relation to any other matter the Commission of Inquiry considers relevant to or arising from the Uncontrolled Release and the prevention of similar events occurring in the future.

2.130 There are significant lessons to be learned from the incident and the response. These and suggested improvements are set out in Part 3 of this submission

Part 3 – Conclusion

- 3.1 This Part summarises some of the key messages that have arisen out of the content of Part 1 and Part 2 of this submission.

LESSONS LEARNED

- 3.2 The public expected the Environment Minister and the EPBC Act to play a role environmental regulation and response. This expectation did not reflect the reality of the regulatory arrangements or the response mechanisms.
- 3.3 The Montara incident has shown that the potential extent and duration of a wellhead leak can be greater than previously considered by DEWHA to represent a worst case scenario. Although the likelihood of such events remain low, DEWHA now requires the assessment of offshore petroleum and gas drilling proposals (both exploration and production) to take account of what we now know to be the consequences of the Montara incident, such as the potentially long duration of an uncontrolled release and the results of monitoring studies as they emerge.
- 3.4 Following the Montara spill, for all those referrals for drilling that have not included information regarding impacts on a worst case scenario oil spill, DEWHA has requested further information. The information required includes:
- analysis of the risks and likelihood of a well blowout or uncontrolled leak occurring;
 - oil trajectory modelling to allow consideration of longer timeframes for spills;
 - composition of likely spills; and
 - mitigation measures and response mechanisms to the potential impacts of worst case scenario spills.
- 3.5 As indicated earlier in this submission, once the Commission of Inquiry has completed its report, DEWHA will analyse all available information relating to the Montara oil spill, and the Inquiry's conclusions and findings, with a view to considering whether improvements can be made to the manner of assessment of proposed oil and gas developments in the future.
- 3.6 DEWHA will also consider whether any lessons learned have broader application to EIA processes specifically, and more generally, to compliance and enforcement, including performance auditing.

SUGGESTED IMPROVEMENTS

- 3.7 Consideration could be given to the establishment of an expert technical advisory group to advise oil and gas regulators. This would enable a broad based approach towards industry regulation and the development of policies and consistent practices. A possible model for consideration is the sea dumping advisory group headed by DEWHA under the London Protocol.
- 3.8 There is a degree of duplication in the regulatory regime in processes relating to environmental protection in the upstream petroleum sector. DEWHA suggests that options to regulate the environmental plans required under the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* under the EPBC Act (possibly including through assessment/approval bilateral mechanisms) should be considered, including clear roles and responsibilities for the various agencies involved. DEWHA notes that care would need to be taken with such arrangements to avoid any perception of conflict of interest.
- 3.9 To improve the Australian Government's capacity to respond to pollution incidents, DEWHA recommends that the National Plan be reviewed focusing on:
- adequately catering for the range of sources from which oil spills can emanate, including offshore oil platforms;
 - ensuring response mechanisms can effectively respond to spills occurring in remote areas of Australia's jurisdiction;
 - comprehensively defining the roles and responsibilities of relevant Australian Government agencies;
 - detailing the governance arrangements for incidents occurring in remote areas of Australia's jurisdiction, including decision-making processes and mechanisms for information flow; and
 - specifying processes for planning, implementing and using operational monitoring to maximise its efficiency, effectiveness and usefulness.
- 3.10 DEWHA notes that a significant part of the problems involved in the Montara incident arose from limited capacity within Australia to control the release from the well head because appropriate equipment was not available. DEWHA does not consider the EPBC Act presents an effective mechanism to deal with this problem because of the requirement to consider cost-effectiveness in imposing any EPBC Act conditions. DEWHA believes it would not be appropriate to require individual proponents to have rigs on standby in case of a spill, especially since spills are still expected to be a rare occurrence. DEWHA urges the Inquiry to consider this matter with a view to deciding how best Australia can ensure appropriate skills and equipment will be readily available in case of any such spill in the future.
- 3.11 DEWHA considers a wildlife response capability should be established in an existing Australian Government agency or outsourced to relevant

States and Territories to take responsibility for such operations in Commonwealth waters. DEWHA notes that dedicated resources will be required.

- 3.12 To improve communication and to ensure effective information flow between the incident management team and relevant response agencies DEWHA recommends that agreement between the Australian Government and relevant States and Territories be reached for the establishment and use of fully equipped emergency response centres for use during oil spill responses, whether in Commonwealth, State or Territory waters, in each State and Territory capital.
- 3.13 As set out in paragraphs 2.28 and 2.29 of Part 2 of this submission, Australia, unlike some other countries, does not have a legislative requirement for 'spillers' to assess or monitor long term ecological damage. DEWHA recommends that consideration be given to the amendment of the *Protection of the Sea Act 1991* to incorporate enforceable post-spill environmental impact monitoring, with appropriate cost recovery provisions.
- 3.14 As set out in paragraph 2.34 of Part 2 of this submission, the EPBC Act requires that impacts to listed species be reported but does not impose an obligation for action to be taken to assist injured listed species. DEWHA suggests that consideration be given to the inclusion of a provision that proponents be required to assist injured listed species where the injury has been caused by the proponent's action.

Part 4 – Attachments

A. EPBC Act Policy Statement 1.1 – Significant Impact Guidelines (May 2006)
B. DEWHA Compliance and Enforcement Policy (December 2009)
C. Commonwealth marine reserves allowing mining operations (December 2009)
D. DEWHA Approval document with conditions (3 September 2003)
E. PTTEP Certificate of compliance (28 August 2008) – IN CONFIDENCE
F. National Plan exemption (28 August 2000)
G. Incident response exemption (6 September 2009)
H. Statement of reasons for incident response exemption (6 September 2009)
I. Preliminary wildlife response plan advice (1 September 2009)
J. Revised wildlife response plan advice (14 September 2009)
K. Implemented wildlife response plan (includes all updates in response to new information and revisions to the Incident Action Plan)
L. A rapid assessment of the impacts of the Montara oil leak on birds, cetaceans and marine reptiles (23 October 2009)
M. Memorandum of Understanding for Environmental Monitoring Programme to be Conducted Following Blowout of Montara H1 Well (21 August 2009) – IN CONFIDENCE
N. Environmental Monitoring Plan for the Montara Well Release Timor Sea (9 October 2009)
O. Report of Independent Review of the EPBC Act