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SUBMISSION TO THE MONTARA COMMISSION OF INQUIRY

This document comprises the submissions of the Commonwealth Department of Resources, Energy and Tourism (**RET**) to the Montara Commission of Inquiry (**Commission**) in response to the Commissioner's Call for Submissions and Issues Paper. These submissions adopt the same numbering as the Issues Paper.

RET will cooperate fully with the Commission as it proceeds with its inquiry. These submissions are intended to provide the Commission with the information in RET's possession that it can be confident will be of assistance to the Commission and of which RET can be confident as to its accuracy. With respect to a number of the identified issues, RET believes that it is appropriate that it await the presentation of relevant evidence before it makes a submission, both in order that it can do so having regard to that evidence and so that it will then be in a position to appreciate better what information may be useful to the Commission and how that information may contribute to the overall picture.

A. CIRCUMSTANCES AND LIKELY CAUSES

1. Terms of Reference: Investigate and identify the circumstances and likely cause(s) of the Uncontrolled Release.

Whilst RET will of course provide the Commission with all such assistance as it is able, for the reasons stated at the beginning of these submissions, it does not propose to make a submission in relation to this issue at this stage.

2. Terms of Reference: 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.

RET's responsibilities and role

2.1 Under the Administrative Arrangements Order (1 May 2008), the matters for which RET is responsible include, amongst other things: energy policy; the mineral and energy industries, including oil and gas, and electricity; the National Energy Market; energy-specific international organisations and activities; minerals and energy resources research, science and technology; geoscience research and information services including geodesy, mapping, remote sensing and land information co-ordination; renewable energy technology development; and industrial energy efficiency.

2.2 It is stated under the Administrative Arrangements Order, that the legislation administered by the Minister includes, amongst others, the following acts:

Offshore Petroleum Act 2006 (now known as Offshore Petroleum and Greenhouse Gas Storage Act 2006)

Offshore Petroleum (Annual Fees) Act 2006 (now known as Offshore Petroleum and Greenhouse Gas Storage (Annual Fees) Act 2006)

Offshore Petroleum (Registration Fees) Act 2006 (now known as Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006)

Offshore Petroleum (Royalty) Act 2006

Offshore Petroleum (Safety Levies) Act 2003 (now known as Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2006)

Petroleum Revenue Act 1985

Petroleum (Submerged Lands) Act 1967

Petroleum (Submerged Lands) Fees Act 1994

Petroleum (Submerged Lands) (Registration Fees) Act 1967

Petroleum (Submerged Lands) (Royalty) Act 1967

Petroleum (Timor Sea Treaty) Act 2003

This list is not inclusive of all legislation that falls within the RET portfolio, but is confined to the legislation that is likely to be relevant to the Commission.

2.3 Therefore, RET's role in terms of the offshore petroleum industry is restricted to the administration of this legislation. That role includes involvement in the regulatory regime applicable to offshore petroleum.

- 2.4 Any consideration of the adequacy and/or effectiveness of the regulatory regime applicable to operations at or in connection with the Montara oil field requires an understanding of the historical evolution of the offshore petroleum regulatory regime.

The history of and background to the regulatory regime

- 2.5 The Offshore Constitutional Settlement in 1979 (**OCS**) contained an agreement between the Commonwealth, the States and the Northern Territory (**NT**) in relation to jurisdiction over the territorial sea (which extended to 12 nautical miles from Australia's territorial sea baseline).
- 2.6 Under that agreement, the Commonwealth would pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea, with certain reservations for national purposes such as Defence. The States' and the NT's powers were to be limited to 3 nautical miles. These rights were then enshrined in Commonwealth law — under the *Coastal Waters (State Title) Act 1980* (Cth) and the *Coastal Waters (State Powers) Act 1980* (Cth). The NT was given the same title and powers under the *Coastal Waters (Northern Territory Title) Act 1980* (Cth) and the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth).
- 2.7 The OCS also confirmed the terms of the Offshore Petroleum Agreement 1967 in that the States would continue to regulate petroleum in the area within 3 nautical miles of the low water mark or historic boundaries, and the Commonwealth outside that area, but with a statutory "Joint Authority" to be responsible in respect of each State's adjacent waters. Special conditions were agreed with WA. This agreement formed the basis for the current regulatory framework, namely:
- (1) State and Territory petroleum legislation applies in coastal waters and is administered by State and Territory authorities;
 - (2) Commonwealth legislation alone applies in Commonwealth waters. However, the Australian Government shares joint regulatory authority with the relevant State or Territory in the adjacent areas of Commonwealth waters.
- 2.8 Under the *Coastal Waters (States Powers) Act 1980* (Cth) (including the legislation specific to the NT), in order to delineate the respective waters to which the agreement arising from the OCS applied, reference was made to the "adjacent" waters to a State that were as defined and set out in Schedule 2 to the *Petroleum (Submerged Lands) Act 1967* (Cth) (**PSLA**). This accommodated the requirement that the waters be limited to those that are offshore from the respective States' coastlines. The width of the relevant waters was described as "coastal waters", which were defined as being the then territorial sea, except that if their width was extended to be wider than 3 nautical miles (as it in fact later occurred), the States' coastal waters powers remained limited to 3 nautical miles. The "coastal waters" were also defined to include the landward side of the baseline of the

territorial sea, which are the “internal waters”. The legislation applicable to the NT as referred to above was essentially the same for present purposes.

- 2.9 The width of the Australian jurisdiction offshore, in international terms, varied over the years in accordance with variations to the width that was accepted internationally. Under section 7 of the *Seas and Submerged Lands Act 1973* (Cth) the Governor-General was given power, consistently with the *Convention on the Territorial Sea and the Contiguous Zone 1958*, to declare the outer limits of the whole or any part of the territorial sea. In 1990, the outer limit of the territorial sea was declared to be extended to 12 nautical miles, but this did not extend the jurisdiction of the States and the NT beyond the 3 nautical mile limit previously agreed under the OCS. In 1994, Australia established an exclusive economic zone (**EEZ**) of 200 miles around its coast, adopting the provisions of the *United Nations Convention on the Law of the Sea* of 10 December 1982 (**UNCLOS**).
- 2.10 The PSLA was originally enacted to give effect to the Offshore Petroleum Agreement 1967. It was amended from time to time over the years, including in 1994 when references to the 1958 international conventions were replaced with references to UNCLOS.
- 2.11 Each of the States and the NT passed their own legislation giving effect to the OCS.
- 2.12 Following the OCS, the joint regulatory authority for each adjacent area has consisted of a Designated Authority and a Joint Authority. The Designated Authority is the relevant State or Territory Minister, while the Joint Authority comprises the State or Territory Minister and the responsible Commonwealth Minister. In practice, the terms often describe the government officials to whom the powers of the Designated Authority or the Joint Authority are delegated by the respective Ministers.
- 2.13 As agreed in the OCS, the Designated Authority is responsible for the day-to-day administration of petroleum activities, while the Joint Authority is concerned with significant decisions arising under the legislation. Examples of significant decisions are:
- (1) determining areas to be open for applications for exploration permits;
 - (2) granting and renewing exploration permits and production licences;
 - (3) determining permit or licence conditions governing the level of work or expenditure required.
- 2.14 As the Commonwealth ultimately has Constitutional power, in the event of disagreement within a Joint Authority, the view of the Commonwealth Minister prevails.

The current regulatory regime

- 2.15 The PSLA was repealed and replaced by the *Offshore Petroleum Act 2006* (**OPA**), effective from 1 July 2008. Shortly thereafter, further amendments were made and the

name of the legislation was changed to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGSA**). The OPGGSA gained assent on 21 November 2008.

- 2.16 Under the OPGGSA, the term “adjacent waters” was replaced by “offshore area”. A table (in section 8 of the Act) sets out the areas of the offshore areas of each State and Territory, which are, generally, the waters that are beyond the outer limits of the coastal waters of the adjacent State or the NT and within the outer limits of the continental shelf (that is, from 3 nautical miles from the baselines to 200 miles (EEZ) and beyond that for those areas where Australia has a recognised outer continental shelf).
- 2.17 The object of the OPGGSA includes to provide an effective regulatory framework for petroleum exploration and recovery (section 3).
- 2.18 There are nine subordinate regulations to the OPGGSA, of which the following may contain provisions of relevance to the Commission:
- (1) *Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996*;
 - (2) *Petroleum (Submerged Lands) (Management of Environment Regulations) 1999*;
and
 - (3) *Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004*.
- 2.19 The following provisions of the OPGGSA may be of particular relevance to the Commission:
- (1) Section 4 provides an outline of the Act and summarises the division of responsibility for administration of the Act between Joint Authorities and Designated Authorities.
 - (2) Section 5 explains the OCS and includes a table that provides background to the OCS.
 - (3) Section 7 contains definitions, including of:
 - (a) “coastal waters”;
 - (b) “Designated Authority” (as per section 70);
 - (c) “Joint Authority” (as per section 56);
 - (d) “Offshore area” (as per section 8, and including the Territory of Ashmore and Cartier Islands);
 - (e) “responsible Commonwealth Minister”;

- (f) “responsible Northern Territory Minister” (being, generally, the Minister of the NT who is authorised under a law of the NT to perform the functions of a Designated Authority under the Act).
- (4) Sub-sections 56(8) & (9) together provide that the responsible Commonwealth Minister (alone) is the Joint Authority for each of the external territories, and for the offshore areas of each of those territories, including the Territory of Ashmore and Cartier Islands (which Joint Authority is to be known as the “Territory of Ashmore and Cartier Islands Offshore Petroleum Joint Authority”).
- (5) Similarly, sub-sections 70(8) & (9) together provide that the responsible Commonwealth Minister (alone) is the Designated Authority for each of the external territories, and for the offshore areas of each of those territories, including the Territory of Ashmore and Cartier Islands.
- (6) Section 68(1) of the OPGGSA (formerly section 49 of the OPA) allows the Joint Authority for an external Territory to delegate to a person by written instrument any or all of the functions or powers of the Joint Authority under the Act or the regulations.
- (7) Section 72(1) (formerly section 52 of the OPA) allows a Designated Authority to delegate by written instrument any or all of the functions or powers of the Designated Authority under the Act or the regulations to either:
- (a) an APS employee who is an SES employee or acting SES employee; or
 - (b) an employee of a State or the Northern Territory.
- 2.20 The Minister for Resources and Energy, the Hon Martin Ferguson AM MP, is the “responsible Commonwealth Minister” for the purposes of the OPGGSA and is therefore both the Joint Authority and the Designated Authority for the external Territory of Ashmore and Cartier Islands and its offshore area.
- 2.21 On 25 August 2008, the Minister for Resources and Energy revoked all existing delegations and:
- (1) in his capacity as the Joint Authority for the offshore area of the external territory of Ashmore and Cartier Islands, pursuant to section 49 of the OPA, delegated all his functions and powers to the person who, from time to time, holds, occupies or performs the office of General Manager, Offshore Resources Branch, Resources Division, Department of Resources, Energy and Tourism (**JA Delegation**). This is currently Mr Martin Squire, Acting General Manager, Offshore Resources Branch, RET;
 - (2) in his capacity as the Designated Authority for the offshore area of the external territory of Ashmore and Cartier Islands, pursuant to section 52 of the OPA,

delegated to the person who, from time to time, holds, occupies or performs the duties of the office of:

- (a) Director of Energy, Department of Regional Development, Primary Industry, Fisheries and Resources of the Northern Territory (now known as the Department of Resources) (**NT Department**), the functions and powers of the Designated Authority under the OPA and the Regulations specified in Item 1 of the Schedule to that instrument¹. This is currently Mr Alan Holland, Acting Director Mineral & Energy Titles, Acting Director of the NT Department;
- (b) Registrar of the NT Department, appointed under the Petroleum Act of the Northern Territory, the functions and powers of the Designated Authority under the OPA and the Regulations specified in Item 2 of the Schedule to that instrument². This is currently Ms Debby James, Manager Petroleum Titles, NT Department;
- (c) Director of Geological Survey, NT Department, the functions and powers of the Designated Authority under the Act and the Regulations specified in Item 3 of the Schedule to that instrument³. This is currently Mr Ian Scrimgeour, Director, Northern Territory Geological Survey;
- (d) Chief of Division, Petroleum and Marine Division, Geoscience Australia of the Commonwealth of Australia, the functions and powers of the Designated Authority under the Act and the Regulations specified in Item 4 of the Schedule to that instrument⁴. This is currently Dr Clinton Foster.

(DA Delegation).

2.22 On 25 August 2008, the Commonwealth Minister for Resources and Energy also proposed to the NT Minister for Primary Industry, Fisheries and Resources, the Hon Konstantine Vatskalis MLA, that the Instruments of Delegation of Joint Authority in relation to the NT offshore area be updated. The Minister for Resources and Energy signed the delegation for the "Commonwealth-Northern Territory Offshore Petroleum Joint Authority" on 25

¹ Item 1 refers to all the functions and powers of the Designated Authority under the: *OPA; Petroleum (Submerged Lands) Regulations 1985; Petroleum (Submerged Lands) (Management of Environment) Regulations 1999; Petroleum (Submerged Lands) (Pipelines) Regulations 2001; Petroleum (Submerged Lands) (Diving Safety) Regulations 2002; Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004; and Petroleum (Submerged Lands) (Data Management) Regulations 2004.*

² Item 2 refers to all the functions and powers of the Designated Authority prescribed in Chapter 3 of the *OPA*.

³ Item 3 refers to sections 419, 421, 422, 423, 424 and Schedule 5 of the *OPA*; the *Petroleum (Submerged Lands) (Data Management) Regulations 2004*; and Regulations 2A, 2B and 2C of the *Petroleum (Submerged Lands) Regulations 1985*.

⁴ Item 4 refers to sections 422 and 423 of the *OPA*; and Parts 1 and 6 of the *Petroleum (Submerged Lands) (Data Management) Regulations 2004*.

August 2008 and the NT Minister signed that delegation on 17 September 2008. This relates to the NT offshore area and is not relevant for present purposes.

- 2.23 RET views the functions and powers of the delegate/s of the Designated Authority in relation to the offshore area of the external territory of Ashmore and Cartier Islands as being in all respects identical (save for the power to delegate) to the functions and powers of the respective Designated Authorities in relation to the State and NT offshore areas.
- 2.24 Accordingly, by way of summary, for the purposes of the Territory of Ashmore and Cartier Islands:
- (1) the Commonwealth Minister alone is both the Joint Authority and the Designated Authority; but
 - (2) all of the Minister's functions and powers as the Joint Authority are delegated to Mr Squires; and
 - (3) all⁵ of the Minister's functions and powers as the Designated Authority have been delegated to officers of the NT Department.

Review of the regulatory regime by the Productivity Commission

- 2.25 In April 2008, following an agreement by the Council of Australian Governments (**COAG**), the Productivity Commission was given terms of reference, to undertake a research study on the regulation of crude oil and natural gas projects that involve more than one jurisdiction and, in doing so, to:⁶
- *“assess the impact of the current regulatory framework on international competitiveness and economic performance of Australia's petroleum sector and on the performance of the economy as a whole;*
 - *report on regulatory impediments to improve performance, including inconsistencies and duplication across jurisdictions, and the ways in which governments in Australia could address them; and*
 - *consider options for a national regulatory authority (for example, along the lines of the National Offshore Petroleum Safety Authority Model) to manage all regulatory approval for the upstream petroleum industry as a means of addressing issues of regulatory duplication inconsistencies.”*
- 2.26 The Productivity Commission released its report, entitled “Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector”, in April 2009 (**Research Report**). That report contains useful and pertinent descriptions and analyses of the regulatory arrangements concerning offshore petroleum exploration and production. Although a response by COAG to the report is not due until later this year, as noted in paragraph 2.51

⁵ Other than as described in paragraph 2.21(2)(d)

⁶ Productivity Commission 2009, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, Melbourne, pp.2-3.

below, the recommendations made by the Productivity Commission have, in general terms, been endorsed by the Minister for Resources and Energy.

- 2.27 For the purposes of this Inquiry, RET refers to and endorses, in particular, the following sections of the Research Report.
- 2.28 The Productivity Commission described the current regulatory arrangements as “complex”, summarising them in the following terms:⁷

“The regulatory framework governing the upstream petroleum sector reflects Australia's federal system, with powers shared between the Australian and the State and Territory Governments.

- *The Offshore Constitutional Settlement established the States' rights over coastal and internal waters, and established joint regulatory authority over the Commonwealth waters adjacent to each State and the Northern Territory.*
- *The joint regulatory authority for each adjacent area consists of a 'Designated Authority' (DA) and a 'Joint Authority' (JA). The DA is the relevant State or Territory Minister and the JA is made up of the State or Territory Minister and the responsible Commonwealth Minister.*

In addition to 22 petroleum and pipeline laws applying at both the Commonwealth and State and Territory levels, there are more than 150 statutes governing upstream petroleum activities in areas such as occupational health and safety (OHS), environmental and heritage protection, development, native title and land access (table 1). Well over 50 agencies at the Australian, State and NT Government levels regulate upstream petroleum activities.

...

The regulatory environment for the upstream petroleum sector has been undergoing reform - such as the consolidation of Commonwealth regulations under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cwlth) (OPGGSA). Many reviews of regulation affecting the sector are currently being (or have already been) undertaken.”⁸

- 2.29 A useful overview of the regulatory framework governing the upstream petroleum sector is located in chapter 4 of the Research Report, which also includes a summary of the historical development of the existing regulatory framework.
- 2.30 A summary of the current legislative arrangements is depicted in Table 4.1 of the Research Report. A more complete list of the legislation affecting the upstream petroleum sector is contained in Appendix B to the Research Report.
- 2.31 The Research Report contains the following description of the process with respect to field development plans:

“A field development plan is prepared during the production licence process. The stated objective of the plan is ensuring production satisfies so called 'good oilfield

⁷ *Ibid*, p.XXIII.

⁸ *A list of which is contained in Box 4.4 on page 60 of the Research Report.*

practice' albeit the definition of what constitutes good oil field practice is imprecise and subject to considerable judgement. Following the applicant submitting a preliminary field development plan, the DA and RET prepare a joint technical paper on the field development plan for the JA. RET seeks technical advice from Geoscience Australia. The proponent then prepares a finalised field development plan, taking into account the matters raised in the joint technical paper. Once production commences, considerable reporting must be undertaken for regulators, who have the power to require changes to the field development plan (DITR 2007b; DoIR 2007a).⁹

- 2.32 The Research Report also summarises the process with respect to well operations management plans:

"All drilling operations are regulated. A titleholder of a retention lease, exploration permit, or production or infrastructure licence must have a well operations management plan that has been approved by the DA. The well operations management plan should include information on well drilling, testing, well completion, abandonment or suspension of a well, and well intervention.

The objective of a well operations management plan is to ensure the well is designed and managed in accordance with sound engineering principles and 'good oilfield practice', including identification of risks. A range of reporting on well operations is required, including daily drilling reports, monthly production reports and well completion reports (DITR 2007b; DoIR 2007a). As part of the consolidation of the OPGGSA, safety issues will be removed from well operations management plans. This will remove overlap with the safety case, and means such plans will now focus purely on resource management issues (RET 2008h)."¹⁰

- 2.33 The environmental and heritage regulations that apply to petroleum activity are summarised in the following extract from the Research Report:¹¹

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

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

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

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

⁹ *Op cit*, p.78.

¹⁰ *Ibid*, p.79.

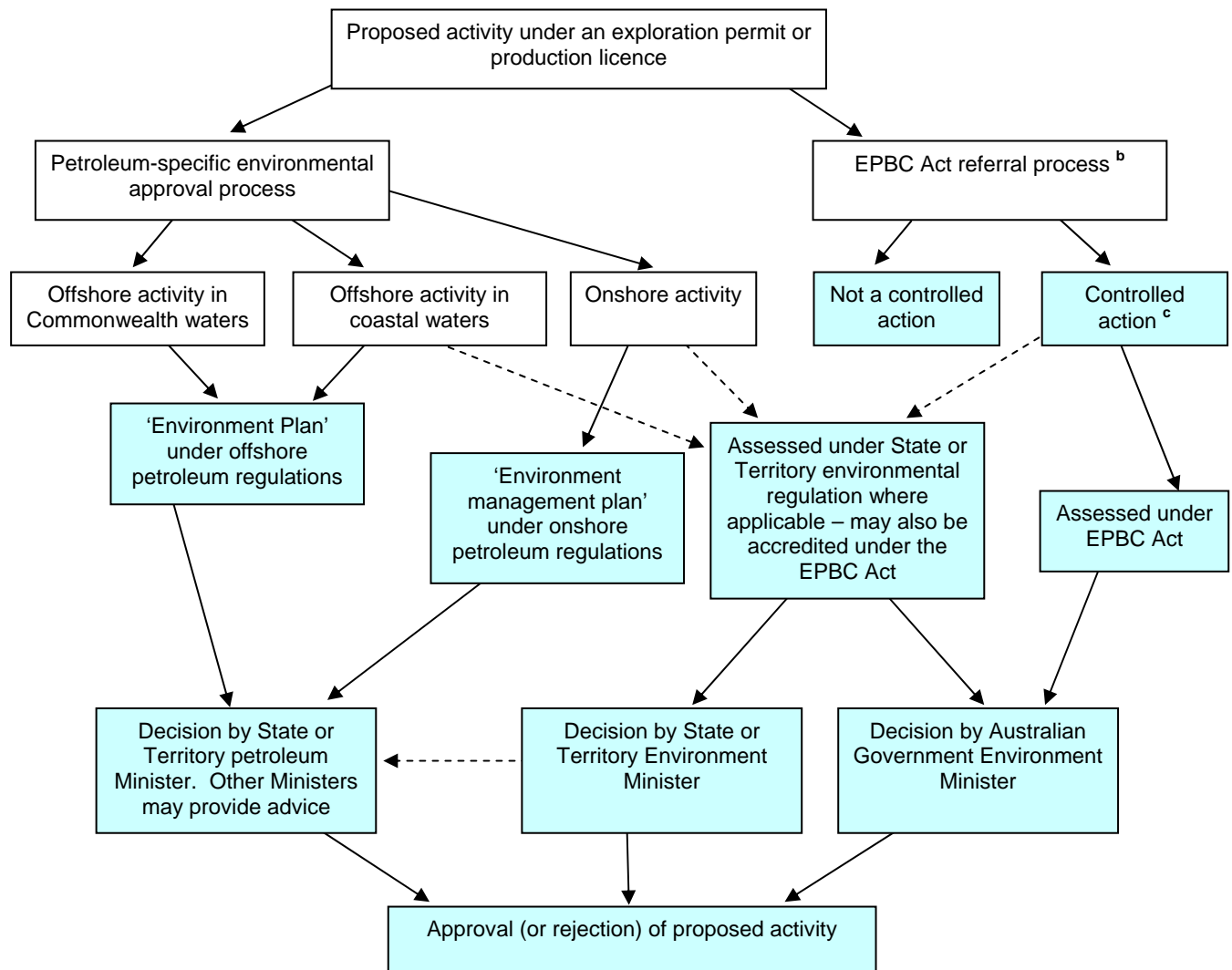
¹¹ *Ibid*, pp.121-125.

(see appendix D for further discussion of EIA processes and international comparisons).

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

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

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



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

The potential environment and heritage approvals for petroleum activities include:

- an approved Environment Plan for activities in Commonwealth waters under the OPGGSA Environmental Regulations - required to gain 'consents' for all offshore petroleum activities
- referral, assessment and approval requirements under the EPBC Act to undertake an activity that may potentially affect a matter of National Environmental Significance (NES). The EPBC Act applies to any upstream petroleum activity, regardless of jurisdiction

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

...

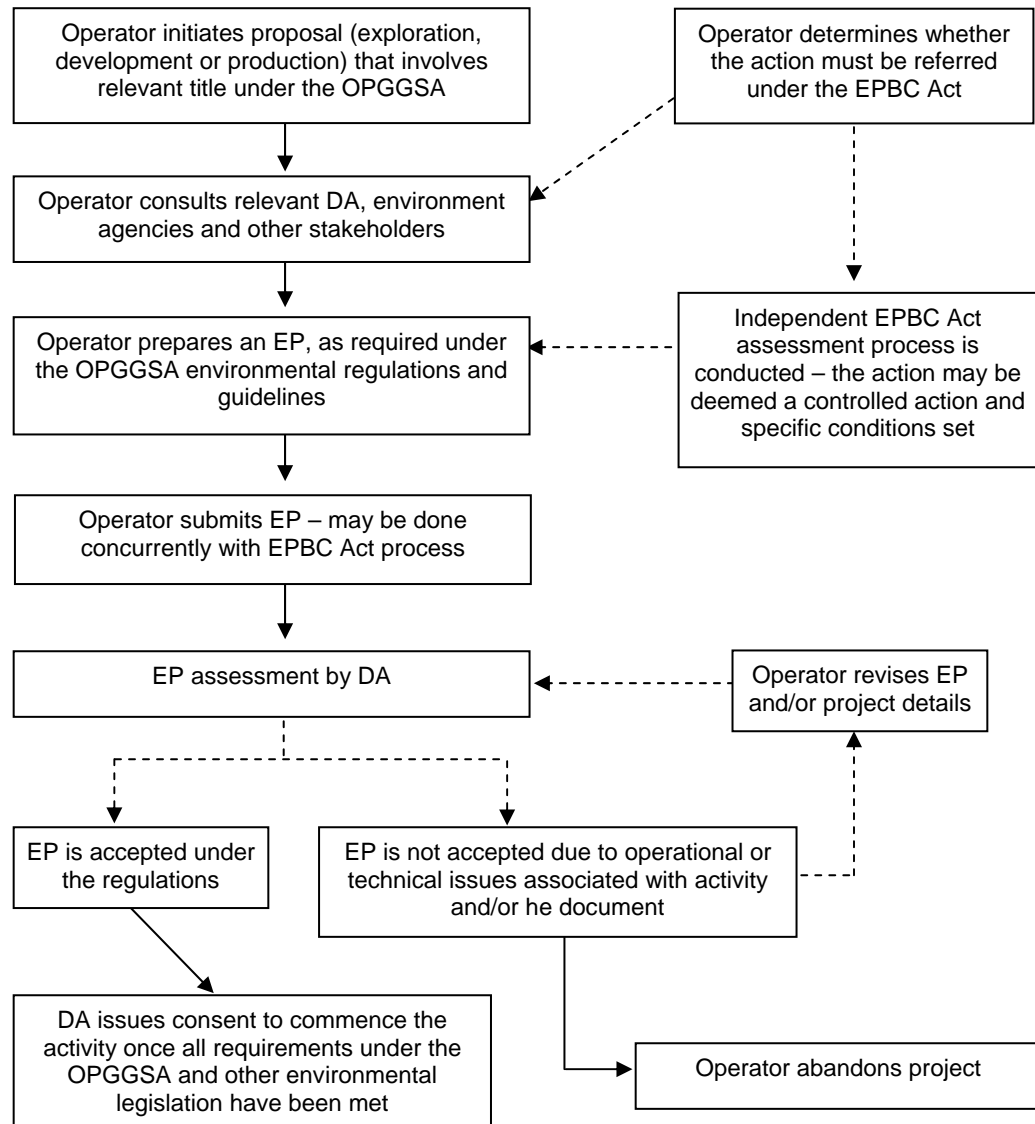
There are three main types of Australian Government environmental and heritage regulation applying to proposed petroleum activities: the requirements for Environment Plans under the OPGGSA's Environmental Regulations (for activities in Commonwealth waters), regulation under the EPBC Act and Indigenous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

...

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

Figure 6.2 Overview of Environment Plan approval process ^a

Process under the OPGGSA environmental regulations



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

Source: RET (2008c).

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

- corporate environmental policy
- applicable environmental legislation applying to the activity • description of the activity
- description and assessment of environmental risks

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

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

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

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

Promotion of consistency of approaches and procedures by Designated Authorities

2.34 The unique structure of the regulatory framework governing the upstream petroleum sector stems from Australia's federal system of government such that powers are shared between the Australian and the State and NT governments. Inevitably, this structure gives rise to various challenges. The regulatory regime is co-operative and relies on the States and NT performing their various responsibilities and discharging their obligations. The inherent nature of such a co-operative regime lends itself to circumstances where there may be inconsistencies as between the States and NT, particularly in terms of approaches, procedures and resourcing available to discharge their obligations with respect to the regulation of the offshore petroleum industry. The Productivity Commission recognised the issue of inconsistency between the States and the NT in the Research Report when it stated:

"Regulatory duplication and inconsistency between jurisdictions is not inherently bad. It may stem from different circumstances between jurisdictions and, from a competitive federalism perspective, can lead to better overall outcomes. However, duplication and inconsistency can impose some costs:

...

- *Inconsistency of regulation: regulatory inconsistencies can occur within or across jurisdictions, and increase regulatory burdens. Inconsistency is*

*likely to present particular problems for businesses operating in multiple jurisdictions.*¹²

- 2.35 This may extend to differences or inconsistencies between the Commonwealth and State or Territory petroleum legislation:

*“... it is apparent that over time differing priorities and parliamentary schedules have caused variation between the State and Commonwealth petroleum submerged lands legislation. Some industry participants raised concerns that State and Territory offshore petroleum legislation does not fully ‘mirror’ the Commonwealth legislation.”*¹³

- 2.36 The issue of variable resourcing between the States and NT was also highlighted by the Productivity Commission. It stated that “Poor enforcement and administration of regulation can arise from a number of sources”, including:

*“Inadequate resourcing of regulators (including inexperience or lack of expertise) can delay the time taken for approvals, and potentially lead to poor regulatory decisions. It can also prompt regulators to seek additional, and potentially spurious, information because of a lack of experience or expertise, or to circumvent statutory time limits (where such limits exist).”*¹⁴

- 2.37 One of the changes the Productivity Commission proposed was “ensuring that regulators are adequately resourced with appropriately experienced and skilled people”.¹⁵ In addition, it stated that:

*“The Commission also recognises the importance of appropriate resourcing to the organisational and administrative efficiency of regulation. Difficulties in attracting and retaining appropriately skilled and experienced staff to carry out regulatory functions has been frequently cited by participants in this study.”*¹⁶

- 2.38 The co-operative nature of the regulatory regime is reflected in section 5(2)(e) of the OPGSA which provides that the Commonwealth, the States and the NT have agreed that:

[they] should try to maintain, as far as practicable, common principles, rules and practices in regulating and controlling the exploration for, and exploitation of, offshore petroleum beyond the baseline of Australia’s territorial sea.

- 2.39 Notwithstanding this objective, the Commonwealth is not able to dictate nor determine the manner in which individual States or the NT approach their obligations or the amount of resources they dedicate to administering and managing the regulatory regime in their particular jurisdiction. Nor has it ever purported to do so (although, as discussed below, it **has** been active in the preparation and promotion of various protocols and guidelines). As a result, it is inevitable that differences may have emerged over time. That is, there will be differences between the manner in which each State and the NT discharges its obligations

¹² *Ibid*, p.34.

¹³ *Ibid*, p.104.

¹⁴ *Ibid*, p.33.

¹⁵ *Ibid*, p.XXXIII.

¹⁶ *Ibid*, p.8.

as DA (or delegated DA) and undertakes the day to day administration and management of offshore petroleum environment and resource management activities in their respective offshore areas, including, for present purposes, by the NT government officials referred to in paragraph 2.21(2) above in respect of the offshore area of the external Territory of Ashmore and Cartier Islands.

- 2.40 It has never been the Commonwealth's approach to stipulate the manner in which a DA or a delegated DA will carry out its functions or exercise its powers. The Commonwealth has approached the NT Department as the delegated DA for the offshore area of the external Territory of Ashmore and Cartier Islands in the same way that it has approached all other DAs.
- 2.41 The Ministerial Council on Mineral and Petroleum Resources (**MCMPR**) was established under the auspices of COAG in June 2001 to subsume the minerals and upstream petroleum component of the former Australian and New Zealand Minerals and Energy Council. The MCMPR consists of the Commonwealth Minister for Resources, Energy and Tourism and the State and Territory Ministers with responsibility for minerals and petroleum. The Ministers responsible for petroleum in New Zealand and Papua New Guinea have observer status.
- 2.42 MCMPR's mission is to contribute to the national wellbeing by promoting the progressive and sustainable development of the Australian mining, minerals and petroleum industry. Its objectives include:
- (1) progressing constructive and compatible changes to the basic legislative and policy framework for the sustainable development of minerals and petroleum resources, including influencing the direction of climate change response measures
 - (2) facilitating economically competitive development of the minerals and petroleum industries
 - (3) improving coordination and, where appropriate, the consistency of policy regimes
 - (4) encouraging new and expanded investment in competitive minerals and petroleum development opportunities
 - (5) providing an opportunity for information and policy exchange.
- 2.43 The MCMPR is supported by a Standing Committee of Officials (**SCO**), which is chaired by the Commonwealth's representative. Three sub-committees report to SCO:
- (1) The Chief Government Geologists Committee (NSW chair);
 - (2) The Chief Inspector of Mines (Tasmania chair); and
 - (3) The Upstream Petroleum and Geothermal Sub-Committee (**UPGS**) (Commonwealth chair).

- 2.44 In addition, there is an Environmental Assessors Forum (**EAF**), which focuses specifically on the environmental regulatory arrangements for the upstream petroleum sector. It is responsible for reviewing legislation and administrative procedures, and facilitating communication between industry and government. The EAF was established in 2004 to promote interaction between environmental regulators, and help ensure that there are robust systems in place to provide consistency of environmental processes over all jurisdictions. The EAF consists of representatives from RET, DEWHA, Geoscience Australia (**GA**), and the State and NT DAs. The EAF has no formal terms of reference and it reports to the MCMPR as required, through the UPGS.
- 2.45 To assist the States and the NT in the discharge of their obligations as DAs (including as the delegate of a DA) and in an endeavour to maintain “common principles, rules and practices” as between them, various protocols have been formulated by UPGS, including:
- (1) Protocol for Assessment of Application for Grant of Production Licences dated 16 August 2004;
 - (2) Protocol for Assessment of Application for Grant or Renewal of Retention Leases dated 14 December 2004;
 - (3) Protocol for Assessment of Application for Declaration of Location (date uncertain).
- 2.46 RET has published the following Administrative Guidelines relevant to offshore petroleum development, each of which can be accessed on its website:
- (1) Guidelines for the Preparation and Submission of an Environment Plan - to provide guidance to petroleum operators in terms of the preparation and submission of an Environment Plan.
 - (2) Offshore Petroleum Guideline for Grant of a Production Licence and Grant of an Infrastructure Licence.
 - (3) Offshore Petroleum Guideline for Grant and Administration of a Retention Lease.
 - (4) Offshore Petroleum Guideline for Pipeline Facilities.
 - (5) Decommissioning of Offshore Petroleum Facilities.
 - (6) Schedule of Fees - sets out fees applicable under the OPGGSA and related Acts.
 - (7) Fees on Registration of Transactions - to assist in the calculation of fees payable to register transactions under the OPGGSA and the *Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006*.

- (8) Service of Documents - describes the procedures adopted to ensure a uniform approach to the service of documents, on two or more registered titleholders, under the OPGGSA.
- (9) Transfers and Dealings Relating to Titles - to assist in lodging documents for approval and registration of transfers and dealings under the OPGGSA.
- (10) Reconsideration and Review of Certain Decisions - Administrative Appeals Tribunal- information related to the review of decisions made under the OPGGSA through the Administrative Appeals Tribunal.
- (11) Appointment of Offshore Inspectors - to clarify the process of referral of proposals for the appointment of offshore petroleum inspectors.
- (12) Guidelines for Handling Matters Requiring Commonwealth and State/Northern Territory Decision - sets out arrangements adopted to ensure a uniform approach to the administration of the OPGGSA is followed.
- (13) Guidelines for Submission of Petroleum Data Required Under State/Territory and Commonwealth (Petroleum (Submerged Lands) Act) Legislation.

2.47 In addition, RET periodically releases General Policy Bulletins, which provide information on current policy and legislative issues related to the offshore petroleum industry. These are also publicly available via its website.

2.48 These Protocols, Administrative Guidelines and Policy Bulletins are intended to promote national uniformity and consistency of approach by the respective DAs. However, it is the DAs' responsibility to discharge their obligations in accordance with the legislation and regulations and to do so in an appropriate and autonomous manner without the necessity for the Commonwealth to supervise the day to day administration and management of the offshore petroleum environment and the resource management activities within the offshore areas.

Potential reform

2.49 The Research Report made a number of key recommendations, which it grouped into the following areas:

- (1) improving the regulatory practice;
- (2) institutional reforms (establishing a national offshore petroleum regulator, extending the role of the National Offshore Petroleum Safety Authority and establishing lead agencies);
- (3) environment and heritage; and

(4) resource management.

2.50 One of the key recommendations made by the Productivity Commission was that a new national offshore petroleum regulator be created as an independent statutory authority. It said that one of the advantages of doing so is that:

“a well resourced regulator would also be in a better position to avoid the potential for resources being diverted from compliance activities to meet upswings in approval activities.”¹⁷

2.51 In relation to the Productivity Commission’s recommendations, the Minister, the Hon Martin Ferguson AM MP, said on 5 August 2009¹⁸:

“As the Chair of the Ministerial Council of Minerals and Petroleum Resources, I will be working with my State and Territory counterparts to develop an all-of-governments’ response to the Commission’s recommendations.

At the same time, this will require strong leadership to harness the potential billions of dollars in productivity gains that reform will bring.

The Commonwealth is minded to support all the recommendations of the Productivity Commission report with a view to reducing regulatory approval timeframes and creating consistency in administration nationally.

A working group of officials is being established and that group will consult closely with industry on the way forward.

A response and an implementation plan will be submitted to the Council of Australian Governments (COAG) in early 2010.

COAG has already identified the upstream petroleum sector as one of its deregulation priorities to reduce the level of unnecessary regulation and inconsistent regulation across jurisdictions. The Commission has noted these reforms could increase the present value of petroleum extraction by billions of dollars each year.

I am very keen to progress reform to capture these potential benefits by moving to a single national regulator for offshore petroleum, minerals and greenhouse gas storage by 1 January 2012.”

2.52 In accordance with the views of its Minister, RET supports the recommendation of the Productivity Commission to move to a single national offshore petroleum regulator. Work to develop the necessary legislation is underway. Approval of any such legislation will, of course, be a matter for parliament in due course.

The Uncontrolled Release and the regulatory regime

2.53 In its capacity as the delegated DA for the offshore area of the external territory of the Ashmore and Cartier Islands, the relevant officers of the NT Department approved the:

¹⁷ As above, p.254.

¹⁸ In an address by the Minister to the APPEA Oil and Gas Safety Conference.

- (1) Montara Development Project – Installation and Commissioning Environment Plan on 30 April 2008 (Revision 1 approved on 29 June 2009); and
- (2) Montara H1 Well Operations Management Plan (**WOMP**) dated 28 November 2008.

2.54 Relevant environmental approvals were also provided under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Administration and policy responsibility with respect to these approvals resides with the Commonwealth Department of Environment, Water, Heritage and the Arts (**DEWHA**).

2.55 In addition, the following approvals were in place prior to the Uncontrolled Release:

- (1) a Field Development Plan was submitted to the NT Department in October 2006;
- (2) the AC/L7 production licence was granted to PTTEP Australasia (Ashmore Cartier) Pty Ltd (**PTTEP**) (then called Coogee Resources (Ashmore Cartier) Pty Ltd) on 20 March 2007;
- (3) approval under the EPBC Act for drilling at the Montara oil field and an Oil Spill Contingency Plan (**OSCP**) were approved on 5 June 2009.

International comparison

2.56 For a comparison of Australia's offshore regulatory regime to the offshore regulatory arrangements in other countries, RET refers the Commission to Appendix C to the Research Report, entitled "International Comparisons".

3. Terms of Reference: Assess the performance of relevant persons in carrying out their obligations under the regulatory regime.

- 3.1 RET observes that it has been informed by the NT Department, as delegate of the DA for the offshore area of the external territory of Ashmore and Cartier Islands, that it has conducted an audit of the documents submitted to it in relation to the Montara wellhead platform to determine whether they gave any indication of the cause of the leak or any departure from the requirements of the OPGGSA, the relevant regulations, protocols and guidelines or good oilfield practice, and to ensure that any approvals and authorisations granted by the NT Department were in compliance with the regulatory scheme. The NT Department has further informed RET that, as a result of this audit, it has identified discrepancies between the approved programs for the suspension and re-establishment operations with respect to the wellhead, and subsequent documents.
- 3.2 RET expects that these matters will be the subject of a submission to the Commission by the NT Department or the NT Government.
- 3.3 Otherwise, whilst RET will of course provide the Commission with all such assistance as it is able, for the reasons stated at the beginning of these submissions it does not propose to make a submission in relation to this issue at this stage.

4. Terms of Reference: Review the adequacy and effectiveness of monitoring and enforcement by regulators of relevant persons, under the regulatory regime.

- 4.1 RET refers to the matters discussed in paragraph 3.1 above.
- 4.2 The Commonwealth has no power under the existing offshore petroleum legislation to conduct any formal review or audit of DAs to assess the adequacy or effectiveness of their compliance with their obligations under that legislation. Nor does the Commonwealth have any powers of inspection or examination or rights of access in relation to DAs.
- 4.3 Nevertheless, RET, in its capacity as the Commonwealth department whose minister is the “responsible Commonwealth Minister” for the purposes of the OPGGSA, has recently initiated the establishment of a co-operative compliance program. This program is being considered through the UPGS. It is envisaged that the program will be voluntary, using a peer review approach, with a report described as a “Designated Authority Audit” report to be prepared following each review. The purpose of these reviews will be to monitor and test compliance with the legislation by State and Territory officials exercising direct or delegated powers under the OPGGSA.
- 4.4 In fact, in the past 2 years, RET has arranged voluntary peer reviews of DAs’ implementation of the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth). These reviews have involved Western Australia; South Australia; Victoria and Tasmania and the Northern Territory.

- 4.5 For the purposes of these reviews, RET has prepared a document entitled “Audit of the Designated Authorities – Implementation of the Petroleum (Submerged Lands) (Management of the Environment) Regulations 1999: Procedural Manual”. This manual is designed to provide information on the reasons for undertaking an environment audit or review, the purpose, objectives, procedures and the applicable timetable for doing so. The findings are designed to be used to improve the environmental management systems. On page 11 of the manual it is stated that:

“The Commonwealth needs to work with the States/NT Authorities to put in place common systems, providing a more consistent standard of assessment in Environmental Management and the MoE Regulations.”

- 4.6 A peer review in relation to the NT was conducted on 26-27 November 2008. The team undertaking the review consisted of Mr Chris Michel (RET), Mr Tony Stephenson (GA) (since retired) and Mr Terry McKinley (Department of Primary Industries (Victoria)). A draft report following this review was provided to the NT Department for consultation purposes in late May 2009. The normal consultation process undertaken prior to preparation of a final report has not been completed.
- 4.7 Having regard to the Productivity Commission’s recommendation that a single national offshore petroleum regulator be created, and the steps presently being taken towards implementation of that recommendation¹⁹, the future of the proposed co-operative compliance program discussed in paragraph 4.3 above is uncertain. Equally, any improvement recommendations or other outcomes that might have come from any of the environment audits discussed in paragraphs 4.4-4.6 above will, if the proposed single national regulator obtains legislative approval, be likely to be subsumed in what will be a major reform to the regulatory regime.

¹⁹ See paragraphs 2.50-2.52.

B. ADEQUACY OF THE RESPONSE

- 5. Terms of Reference: 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 owners and/or operator of the West Atlas drilling rig.**
- 5.1 Whilst RET will of course provide the Commission with all such assistance as it is able in relation to this issue, it does not presently possess sufficient relevant information to warrant it making a submission at this stage, other than to observe that it is the primary responsibility of the title holder, owner and/or operator to prevent an Uncontrolled Release.
- 6. Terms of Reference: 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.**
- 6.1 Save as follows, for the reasons stated at the beginning of these submissions, RET does not propose to make a submission in relation to this issue at this stage, although it does anticipate that it will wish to do so once relevant facts - against which the assessment that is required by this term of the reference to be made - have been disclosed, through the Commission, by those with direct knowledge of them.
- 6.2 Following the Uncontrolled Release, revisions to the Environment Plans for Installation and Commissioning and for Production and Exploration Drilling were accepted on 10 September 2009. In addition, Revised Well Operations Management Plans were approved on 10 September 2009 (including up to intersection of the well) and on 21 September 2009 (up to "*killing*" of the well).

C. ENVIRONMENTAL IMPACTS

7. Terms of Reference: Assess and report on the environmental impacts following the Uncontrolled Release using available data and evidence including the outcomes of the 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.

7.1 Whilst RET will of course provide the Commission with all such assistance as it is able in relation to this issue, for the reasons stated at the beginning of these submissions, it does not propose to make a submission at this stage.

D. THE OFFSHORE PETROLEUM INDUSTRY'S RESPONSE

8. Terms of Reference: Consider and comment on the offshore petroleum industry's response to the Uncontrolled Release.

8.1 This is not an issue upon which RET currently expects to make a submission, but it will review its position as and when evidence concerning this issue is made available through the Commission.

E. PROVISION AND ACCESSIBILITY OF INFORMATION

9. Terms of Reference: Consider and comment on the provision and accessibility of relevant information regarding the Uncontrolled Release to affected stakeholders and the public.

9.1 The Minister for Resources and Energy, the Hon Martin Ferguson AM MP, provided regular media releases and regular updates to the community following the Uncontrolled Release.

9.2 These included:

- (1) the following media releases:
 - (a) "Minister Ferguson Inspects Response to Oil Spill in North-West" dated 29 August, 2009;
 - (b) "Australian Government Welcomes Preparations for Next Attempt to Intercept Leaking Montara Well" dated 27 October 2009;
 - (c) "Minister Announces Details of Montara Commission of Inquiry" dated 5 November 2009; and

- (2) the following ministerial statements:
- (a) Ministerial Statement made on Monday 7 September 2009;
 - (b) Ministerial Statement made on Tuesday 17 November 2009.

9.3 RET may wish to make a further submission with respect to this issue, but will consider the need for it to do so following the presentation to the Commission of the relevant facts and documents.

F. OTHER MATTERS

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

11.1 Other than to refer the Commission to the recommendations of the Productivity Commission contained in the Research Report, there are not presently any other matters in respect of which RET wishes to make a submission. It may wish to do so at a later stage.

14 January 2009