

# Chapter 3

## Regulatory issues

3.1 This chapter examines concerns raised by submitters regarding the transparency and independence of the regulatory regime, the adequacy of community consultation during project development, and the provision of information to interested stakeholders.

### Ministerial oversight and decision-making expertise

3.2 As previously noted, prior to 2014 all proposed offshore oil and gas projects in Commonwealth waters were required to be referred to the Minister for the Environment for assessment and approval under the EPBC Act if they were likely to have a significant impact on a Matter of National Environmental Significance (MNES). Following the development of the 'one-stop-shop' model for the approval of offshore oil and gas projects, this responsibility was transferred to the National Offshore Petroleum Safety and Environment Authority (NOPSEMA).<sup>1</sup>

3.3 The industry supported the oil and gas regulatory framework with Chevron stating that it welcomed NOPSEMA's regulatory regime as 'it adds independence and rigour to the process'.<sup>2</sup>

3.4 Several submitters raised issues with the removal of departmental and ministerial oversight of the approval process. The International Fund for Animal Welfare (IFAW) expressed concern that 'there is no longer any ministerial accountability for such decisions now that sole assessment and approval powers have been given to an unaccountable arms-length body'. Further, it stated that 'it is not appropriate that decisions about proposals that could have catastrophic impacts...are taken without proper political accountability'.<sup>3</sup>

3.5 The Humane Society International (HSI) also stated that it has 'consistently opposed the devolution of responsibility for the environmental assessment and approval of offshore oil drilling projects in Commonwealth waters'. It considered that 'ministerial accountability and in particular confirmation of the role of the Federal Environment Minister with regard to threatened species must be restored'.<sup>4</sup> Similarly, the Australian Marine Conservation Society (AMCS) stated that it:

...is concerned about the lack of ministerial accountability regarding threatened species impacts and other impacts and the lack of full public

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1 See Chapter 2.

2 Dr David Moffat, Chevron, *Committee Hansard*, 16 November 2016, p. 43.

3 International Fund for Animal Welfare, *Submission 29*, p. 8.

4 Humane Society International, *Submission 3*, p. 3.

access and consultation in the approvals process. NOPSEMA has been the sole assessor and approver of offshore oil and gas activities since March 2014, [and] there is no longer any ministerial accountability for such decisions and public access and transparency has been lost in the system.<sup>5</sup>

3.6 Dr David Ellis, an environmental consultant, expressed concern that 'with no Commonwealth Government ministerial oversight and the establishment of a relatively new regulator NOPSEMA, the Australian public and international community are yet to see how this regulatory body begins to attempt to seriously and scientifically assess the potential impacts of BP's proposed project'.<sup>6</sup>

3.7 Mr Lyndon Schneider, The Wilderness Society, commented that the US National Commission which investigated the Deepwater Horizon disaster 'spoke...damningly about the poor level of political oversight and a failure by, if you like, the political class to properly regulate and manage the risks around this industry. They talked a lot about a national interest'. Mr Schneider went on to note that:

A national interest in this instance involves both the national interest around the use of resources, which is the more traditional one, but a national interest also involves the idea of making decisions that are to the benefit of the wider community and managing risk. I think an argument that would say, 'Leave this to the experts,' when we are dealing with Commonwealth of Australia waters, we are dealing with a resource that is owned by the Australian people, and we are dealing with an environment that is fragile—of course there needs to be political oversight. The needs to be very direct political oversight. These decisions are being made around resources owned by the Australian community.<sup>7</sup>

3.8 Mr Stuart Smith, Chief Executive Office, NOPSEMA, in acknowledging concerns raised, stated that:

The idea of having a minister making the decision on environmental factors has some merit, but I also recognise that that sort of approach brings with it the possibility that factors other than economic conditions would be taken into account, and I do not think that is appropriate for determining environmental impacts and the subsequent decisions arising from that. I think an independent statutory authority is the appropriate way to go. Having said that, I do see there being a role for elected officials in determining whether an activity should proceed, and there is in the current process. The decision to award acreage, for instance, is a decision made by the elected officials in the federal government and the state and territory governments, and I think that is quite appropriate. But, when it comes to decisions around the environmental impacts and how those impacts should

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5 Australian Marine Conservation Society, *Submission 19*, p. 6.

6 Dr David Ellis, *Submission 30*, p. 75.

7 Mr Lyndon Schneiders, The Wilderness Society, *Committee Hansard*, 28 April 2016, p. 36.

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be managed, I think those decisions should be made by an independent statutory authority such as NOPSEMA.<sup>8</sup>

3.9 In addition to concerns regarding the lack of ministerial and departmental oversight, some submitters were concerned that the streamlining of the approvals process could 'lead to a lowering of environmental standards' and a failure to meet the standards of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).<sup>9</sup> Some submitters also raised concerns that NOPSEMA staff lack the expertise to make assessments which support the objectives of the EPBC Act. For example, The Wilderness Society stated that the 'devolution of environmental decision-making powers to NOPSEMA is highly inappropriate' and that there is not the appropriate EPBC Act expertise within NOPSEMA.<sup>10</sup> It particularly noted that it had been advised by Mr Stuart Smith, Chief Executive Officer of NOPSEMA that as at December 2015 there had not been a transfer of staff experienced in making EPBC Act assessments from the Department of Environment to NOPSEMA.<sup>11</sup>

3.10 However, Mr Cameron Grebe, Head of Division, Environment, NOPSEMA, told the committee that NOPSEMA employs appropriately qualified staff including:

...28 environment specialists in the environment division, and many of them have been there since we started in 2012—so for quite some time. They cover a range of expertise. There are eight PhDs covering marine science, eco-toxicology and cetacean biology—whales, dolphins and so on—and we have arrangements in place and we do seek external advice if we do not have the skills and experience necessary in-house.<sup>12</sup>

3.11 NOPSEMA submitted that its staff 'includes former Department of the Environment employees, regulatory experts and other Australian and international technical scientific experts with extensive knowledge of the OPGGS Act and the EPBC Act regimes' which ensures that 'it has the capacity to implement the necessary environmental safeguards'.<sup>13</sup> NOPSEMA also noted that it has 'systems in place to ensure that regulatory staff obtain and maintain relevant competencies and that these competencies are demonstrated prior to staff undertaking lead regulatory roles'.<sup>14</sup>

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8 Mr Stuart Smith, NOPSEMA, *Committee Hansard*, 16 November 2016, p. 34.

9 Ms Rachel Walmsley, EDOs Australia, *Committee Hansard*, 28 April 2016, p. 19.

10 The Wilderness Society, *Submission 43*, p. 63.

11 The Wilderness Society, *Submission 43*, p. 62.

12 Mr Cameron Grebe, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 54. See also NOPSEMA, *Submission 7*, p. 5.

13 NOPSEMA, *Submission 7*, p. 15.

14 NOPSEMA, *Submission 7*, p. 5.

3.12 In addition, Mr Smith commented that the 'current arrangements have some substantial strengths, and I think it can be argued that it is actually superior to many other environmental approvals processes'.<sup>15</sup>

### **NOPSEMA's environmental standards**

3.13 Prior to the endorsement of NOPSEMA's environmental authorisation program by the Minister for the Environment in 2014, a number of environmental groups participating in the consultation process<sup>16</sup> expressed their concerns with the streamlined process. HSI stated in its submission to this inquiry that their concerns, initially expressed during that consultation, remain relevant. Specifically that 'the decision to allow NOPSEMA to assess environmental impact has enshrined a less rigorous process for assessment and approval of offshore activities that impact nationally significant matters of environmental significance into law'.<sup>17</sup>

3.14 Similarly, EDOs of Australia provided the committee with its original 2013 submission provided during the consultation process<sup>18</sup> and noted that it remains concerned that the NOPSEMA assessment and approval processes do not equate to the regulatory requirements under the EPBC Act.<sup>19</sup> In particular, it is concerned that the OPGGS Environment Regulations 'do not mirror key components of the EPBC Act and are therefore unlikely to adequately regulate impacts associated with offshore petroleum activities on Matters of National Environmental Significance'.<sup>20</sup>

3.15 The Wilderness Society submitted that NOPSEMA's objective-based regulatory approach is 'an entirely inappropriate framework for the protection of environmental values'. It stated that 'even if risks and impacts can be managed to ALARP ("as low as reasonably practical") levels, this will not necessarily represent an appropriate protection of MNES as defined under the EPBC Act'.<sup>21</sup> It also submitted that the OPGGS Regulations are 'inadequate to enable an assessment of cumulative impacts and risks' arising from multiple offshore petroleum ventures in the Great Australian Bight.<sup>22</sup>

3.16 The Wilderness Society further criticised NOPSEMA's regulatory approach by stating that the OPGGS Regulations 'do not provide an appropriate range of assessment process options of complex and controversial' offshore proposals. In

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15 Mr Stuart Smith, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 15.

16 For more information on this consultation process see Department of Industry, Innovation and Science, *Submission 4*, p. 23.

17 Humane Society International, *Submission 74*, p. 1.

18 See EDOs of Australia, *Submission 14*, Appendix 1.

19 EDOs of Australia, *Submission 14*, p. 2.

20 EDOs of Australia, *Submission 14*, p. 2.

21 The Wilderness Society, *Submission 43*, p. 62.

22 The Wilderness Society, *Submission 43*, p. 63.

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particular, it noted that under the EPBC Act, the Minister for the Environment 'could decide to assess projects under a Public Environment Report or Public Inquiry assessment process' however under the OPGGS Regulations, a 'non-transparent process of one-size-fits-all appears to be the only assessment option'.<sup>23</sup>

3.17 In responding to criticisms of its environmental approvals process, NOPSEMA noted that it is subject to a range of governance controls including parliamentary scrutiny, ministerial policy direction and independent statutory review.<sup>24</sup> In particular, it stated that it has been:

...subject to an independent operational review of its regulatory performance every three years. It has also been subject to a review of its environmental management performance under the endorsed EPBC Act Program after the first 12 months of operating under this arrangement. Both reviews were most recently completed in 2015 and the reports from these reviews are public documents.<sup>25</sup>

3.18 The 2015 Operational Review found that NOPSEMA is delivering the levels of environmental protection required under the EPBC Act, and that it will continue to do so into the future. Though it did not make recommendations, it identified a range of opportunities to improve communication and information sharing between NOPSEMA and the Department of the Environment and Energy. NOPSEMA stated that it has implemented or is implementing a number of measures to facilitate the continuous improvement of the EPBC Act Program.<sup>26</sup>

3.19 NOPSEMA also explained that its environmental and approval processes contain the same essential elements as those of the EPBC Act. The key point of difference being that NOPSEMA is required to evaluate all environmental impacts and risks (including those to matters protected by the EPBC Act), and identify appropriate control measures to manage and monitor those impacts.<sup>27</sup> Mr Smith told the committee that:

...the environmental regulations we administer do not just focus on matters protected under EPBC Act, the national environmental significance. It is all impacts and risks. If they are not protected and if there are unacceptable impacts or risks to those parts of the environment, they will not proceed, and that includes social and economic features in the environment as well.<sup>28</sup>

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23 The Wilderness Society, *Submission 43*, pp. 62–63.

24 NOPSEMA, *Submission 7*, p. 6. See also Department of Industry, Innovation and Science, *Submission 4*, p. 13.

25 NOPSEMA, *Submission 7*, p. 6. See also Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 8 February 2017, p. 2.

26 NOPSEMA, *Submission 7*, p. 6.

27 NOPSEMA, *Submission 7*, pp. 14–15.

28 Mr Stuart Smith, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 59.

3.20 NOPSEMA rejected suggestions<sup>29</sup> that its standards do not enshrine in legislation the same protections offered by the EPBC Act. Mr Grebe told the committee that a range of legislative amendments made in 2014 as part of the streamlining process 'actually enshrined things such as the principles of ecologically sustainable development, the precautionary principle and the protection of matters protected under Part 3 of the EPBC Act into our legislation'.<sup>30</sup> Mr Grebe concluded that:

The differences that appear in the process...are that, unlike the EPBC Act, the proponent does not get a choice as to whether they need to seek our approval or not. Under the EPBC Act there is a requirement for the proponent to refer if they believe, as it is a self-identification process, that it is likely to have a significant impact on a matter of NES, national environmental significance, as defined under the EPBC Act. Under our system, the simple fact is that they do not get a choice. Every single activity that is defined as a petroleum activity must get our approval before it can proceed.<sup>31</sup>

3.21 In response to suggestions that the approvals process should be amended to require the approval of the Department of the Environment, the South Australian Government submitted that re-introducing overlapping powers for the approval of offshore petroleum activities:

...would be a retrograde step for the efficiency of objective-based legislation in Australia, as it would inevitably add unnecessary duplicative steps within the approvals process. Indeed, it is the South Australian Government's view that NOPSEMA has the necessary capabilities to be the nation's trusted regulator and approval authority for upstream petroleum operations in Commonwealth waters.<sup>32</sup>

3.22 Likewise, Santos Ltd, as a leading oil and gas producer regularly engaged with NOPSEMA's approvals process, told the committee that it:

...is of the view that this streamlining has removed unnecessary duplication between two sets of legislation without compromising environmental outcomes. Streamlining does not mean the requirements of the EPBC Act are disregarded, but rather that the Environment Minister has determined that NOPSEMA processes, through the Environment Plan assessment procedure, satisfies the rigorous EPBC Act requirements. The titleholder is still required to demonstrate, within its Environment Plan, how it will address (among other things) the potential impacts and risks to matters of

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29 Mr Stuart Smith, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 59. See also Mr Cameron Grebe, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 59.

30 Mr Cameron Grebe, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 59.

31 Mr Cameron Grebe, NOPSEMA, *Committee Hansard*, 16 November 2016, p. 34.

32 South Australian Government, *Submission 44*, p. 6.

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national environmental significance, just as it was obliged to do before streamlining.<sup>33</sup>

### **Adequacy of consultation processes**

3.23 The success of a regulatory regime in part, relies on the regulator having the confidence of both stakeholders, and the public. Public consultation is an integral part of many regulatory regimes, including the NOPSEMA approvals process for offshore petroleum ventures. Though there are many models for public consultation—including regulator-led public consultation, and proponent-led public consultation, it is generally intended to improve transparency, increase efficiency, and promote public involvement in policy making.

3.24 As noted earlier, offshore oil and gas proponents are required to identify and consult with relevant persons in the course of preparing an Environment Plan. In relation to the EPBC Act and consultation, the Department of the Environment and Energy noted that:

When the minister endorsed the NOPSEMA program the consultation requirements as mandated in that program were deemed to be sufficient in order to undertake a strategic assessment in relation to NOPSEMA...basically the requirement is as long as the consultation requirements set out in that document are met then for the purposes of the EPBC Act that would be called compliance.<sup>34</sup>

3.25 A number of submitters were generally critical of the NOPSEMA's proponent-led stakeholder consultation model while others were more specifically critical of the consultation carried about by BP in the course of preparing its Environment Plan. The following sections canvass submitters' concerns.

#### *Consultation—general concerns*

3.26 Submitters raised a range of concerns with the level and type of consultation required under NOPSEMA's approvals process. These included concerns that proponent-led consultation is inadequate or inappropriate, and that insufficient information is provided to the public and interested stakeholder groups as well as difficulties of stakeholders in accessing and understanding the system. In this regard, the South Australian Oyster Growers Association (SAOGA) provided the committee with evidence of its interactions with regulatory process.

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33 Santos Ltd, *Submission 16*, p. 7.

34 Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 8 February 2017, p. 7.

3.27 SAOGA commented that it had been involved BP approval process for two years and that:

We became very frustrated with the process for a couple of reasons. Firstly, we found the consultation process frustrating from the point of view that we did meet with BP on a number of occasions, however we did not feel that the points that we thought were important to consider were being considered. It took quite a long time to get feedback and information back. The second point was that we also struggled with the NOPSEMA process. We found it difficult to work out how that worked when you were always directed to ask your questions to the drilling party of BP, and they could say, 'No, we're not going to provide that information,' and we kind of had nowhere to go. So we did not really understand how that worked.<sup>35</sup>

3.28 IFAW pointed to concerns about public consultation and submitted that:

...the new system leaves consultation to be dictated by the proponent oil and gas companies and has no direct mechanism for public consultation, with information supplied under the new system frequently very scant and mostly supplied after a decision has been made and even then only in summary form.<sup>36</sup>

3.29 IFAW also expressed disquiet with the apparent 'limited public access to important information determining decisions'.<sup>37</sup> This sentiment was echoed by the AMCS which stated that:

The NOPSEMA system abdicates the consultation process to proponent oil and gas companies and has no direct mechanism for public consultation. The system also fails in transparency in that little or no information is provided by NOPSEMA about the decisions it makes i.e. approvals are given or rejected without any reasoning/justification provided to the public. Similarly little information is provided publically prior to decisions being made to facilitate public interest input.<sup>38</sup>

3.30 The Wilderness Society submitted that 'no clear minimum requirements [for consultation] are outlined or properly enforced under the NOPSEMA regulation'. It went on to describe consultation processes as 'deeply flawed'.<sup>39</sup> Similarly, the Conservation Council of South Australia stated that:

The nature of the consultation process is that NOPSEMA tell BP to do 'sufficient consultation'. So what is defined as sufficient? We are telling the

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35 Ms Trudy McGowan, Executive Officer, South Australian Oyster Growers Association, *Committee Hansard*, 16 November 2016, p. 51.

36 International Fund for Animal Welfare, *Submission 29*, p. 8.

37 International Fund for Animal Welfare, *Submission 29*, p. 8.

38 Australian Marine Conservation Society, *Submission 19*, p. 6.

39 The Wilderness Society, *Submission 43*, p. 61.



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Australian public and this Senate committee that we believe this consultation is insufficient.<sup>40</sup>

3.31 The Environmental Defenders Office SA (EDO SA) was concerned that there are limitations on participation placed on both the public and environmental advocacy organisations. EDO SA noted that NOPSEMA's guidelines provide for a broad interpretation of the concept of a 'relevant person' for titleholders, and guidance on how people and organisations may assert their relevance. However, it submitted that 'it is unjust that the titleholder determines the relevancy status of members of the public, as opposed to members of the public having an unfettered right to information as is the case under the EPBC Act'.<sup>41</sup>

3.32 EDO SA stated that it is concerned that by allowing titleholders to determine relevancy, affected people and organisations may not be involved in the consultation process. It submitted that 'any person should be allowed to comment' as this would improve accountability.<sup>42</sup>

3.33 In addition, EDO SA raised concerns that relevant persons are only required to be provided with 'sufficient information', rather than the Environment Plan, to make an assessment of the potential impact on their interests. EDO SA submitted that:

Given the scale of some offshore projects and possible serious environmental and other impacts, it is clearly in the public interest that full and complete information about such projects is disseminated as occurs with proposals assessed under the EPBC Act.<sup>43</sup>

3.34 NOPSEMA, in responding to concerns regarding the adequacy of consultation requirements, assured the committee that all Environment Plans submitted for assessment and approval 'must demonstrate that appropriate consultation with relevant state, territory and Commonwealth agencies and person or organisations whose functions, interests or activities could be affected by the proposed activity has been undertaken by the titleholder'. This demonstration includes a range of criteria such as the provision of a report of any objections or claims made about adverse impacts, and a statement responding to each objection and claim. The Environment Plan must also include provisions for ongoing consultation with affected persons.<sup>44</sup>

3.35 Mr Grebe told the committee that in contrast under the EPBC Act, there is no specific requirement or prescription about the type or degree of consultation a proponent must engage in, prior to making an application. Mr Grebe further noted that

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40 Ms Kathryn Warhurst, Conservation Council of South Australia, *Committee Hansard*, 28 April 2016, p. 25.

41 EDO (SA), *Submission 9*, pp. 2–3.

42 EDO (SA), *Submission 9*, p. 3.

43 EDO (SA), *Submission 9*, p. 3.

44 NOPSEMA, *Submission 7*, p. 13. See also Chapter 2.

under the NOPSEMA process, 'the regulations set out detailed requirements about who must be consulted with and how that consultation at a principle level should be conducted. That is quite a unique feature of an environmental approvals process'.<sup>45</sup>

### *Adequacy of BP's stakeholder engagement*

3.36 As noted earlier, criticisms of inadequate consultation were both general, and specifically directed against BP. Submitters who were concerned with BP's consultation process raised a number of issues including that BP did not consult with all stakeholders. Concerns were also raised regarding BP's failure to release sufficient information to allow for informed public consultation. In particular, BP was criticised for not releasing its oil spill modelling prior to, or during its public consultation phase, and for not releasing its complete Environment Plan.

### *Release of information*

3.37 Access to information is important in ensuring open, accountable and transparent governance. Further, public access to information is an internationally recognised procedural right in environmental and planning law. This right manifests in a variety of ways including: the right to be notified of an opportunity to participate in decision-making processes; and the right to access and comment on proposals. Access to information is a critical pre-cursor to exercising other rights such as the right to challenge government decisions in court.<sup>46</sup>

3.38 Submitters highlighted the importance of information being available to the public in order to make an informed assessment of the risks associated with offshore ventures. Mr Peter Owen from The Wilderness Society told the committee that 'consultation is...about being open and transparent with the community as to the magnitude of the risk that is potentially being imposed on that community and how that risk is being dealt with'.<sup>47</sup> However, submitters stated that in the case of BP's consultation process, stakeholders were not provided with sufficient information to make an informed view of the potential risk.

3.39 Ms Jessica Lerch from The Wilderness Society commented that her organisation had faced difficulties in obtaining 'basic information' from BP which would be required in order to fulfil their function as relevant persons under consultation guidelines. Ms Lerch stated:

...it is very hard to form any kind of legitimate and credible opinion on how a project might affect your organisation and your members'—in our case—functions and interests in the absence of information like the worst credible potential impact of an oil spill in the region, which we were unable to get

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45 Mr Cameron Grebe, NOPSEMA, *Committee Hansard*, 16 November 2016, p. 34.

46 Environmental Defenders Office SA (Inc), *Submission 9*, p. 2.

47 Mr Peter Owen, The Wilderness Society, *Committee Hansard*, 16 November 2016, p. 24.

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from BP until, somewhat strangely, it was suddenly provided in retrospect almost at the eleventh hour of their latest assessment process.<sup>48</sup>

3.40 Similarly, the Clean Bight Alliance Australia (CBAA) told the committee that it has 'been advocating for full public disclosure of industry commissioned oil spill modelling and emergency response information' since its inception in 2014. It stated that as a 'small local group based in a remote area we only have access to information made readily available within the public record' and as such, the 'lack of transparency provided to the public' has an impact on their ability to adequately assess the risks associated with offshore petroleum ventures.<sup>49</sup>

3.41 CBAA went on to acknowledge that though BP was prepared to meet with several members of its organisation, it concluded that 'overall the information provided has been inadequate and our requests for BP's full environmental plan and oil spill modelling and emergency plan [were] declined'.<sup>50</sup>

3.42 Mr Lyndon Schneiders, The Wilderness Society, stated that in order for BP to operate in the Great Australian Bight, it needed to do so 'with the maximum confidence from the regional and local communities, and the Australian community, that something will not go wrong'. Further:

...an environment that is clouded with secrecy, where core documents are not on the public record and are inaccessible to the public record through things like FOI, is just bad communications management...The issues around transparency are fundamental here. Getting all the information on the table is going to be critical, not just for decision makers, but also for communities potentially affected by these developments and what happens.<sup>51</sup>

3.43 Ms Warhurst from the Conservation Council of South Australia also commented that it had requested 'in the earliest consultation meetings' oil spill modelling but that 'BP have consistently refused to release the basic oil spill modelling'.<sup>52</sup> Similarly, The Wilderness Society submitted that since January 2014 it had repeatedly asked BP to release detailed worst case oil spill modelling for its proposed exploration program. It stated that:

This modelling is necessary for a full assessment of the potential impacts a catastrophic oil spill in the Great Australian Bight could have on the

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48 Ms Jessica Lerch, The Wilderness Society, *Committee Hansard*, 16 November 2016, pp. 24–25. See also The Wilderness Society, *Submission 43*, p. 61.

49 Clean Bight Alliance Australia, *Submission 23*, p. 2.

50 Clean Bight Alliance Australia, *Submission 23*, p. 2.

51 Mr Lyndon Schneiders, The Wilderness Society, *Committee Hansard*, 28 April 2016, p. 36.

52 Ms Kathryn Warhurst, Conservation Council of South Australia, *Committee Hansard*, 28 April 2016, p. 25.

threatened and migratory species, the values of the marine environment and the social and economic values of the region.<sup>53</sup>

3.44 In its April 2016 submission, The Wilderness Society stated that BP failed the 'transparency test' because 'there is little relevant public information available regarding the potential worst case spill risk' arising from BP's proposed drilling program. The Wilderness Society submitted that this relevant information included:

...the proposed location of the four wells, the total well depths (both the water depth and further well depth into the seabed), the potential well pressures, and potential well flow rates or times when each well is expected to be drilled.<sup>54</sup>

3.45 As noted above, when BP submitted its Environment Plan to NOPSEMA for approval in 2015, it had not yet released any oil spill modelling to stakeholders or the public. As a result, 'The Wilderness Society commissioned independent, expert oil spill modelling to enable an understanding of the likely impacts of a significant oil spill from BP's Great Australian Bight drilling area'.<sup>55</sup> Many submitters made reference to this oil spill modelling, and utilised it in formulating their concerns regarding the potential impacts associated with BP's proposed drilling.<sup>56</sup>

3.46 BP released its oil spill modelling in September 2016. Submitters raised a number of concerns regarding BP's timing, and the details provided in the modelling. For example, The Wilderness Society questioned:

- why BP, after receiving numerous requests for this information during public consultation, only chose to release its modelling and oil spill response strategy at 'the eleventh hour of the assessment of its latest Environment Plan';
- how BP could have appropriately identified key stakeholders and relevant persons in the absence of oil spill modelling. Further, how members of the community could have self-identified as having interests which could potentially be impacted, without this information being publicly available; and
- why BP's 15 page publicly available response plan was lacking in detail, especially when compared to similar documents provided by proponents operating in the Arctic, which are over 400 pages in length.<sup>57</sup>

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53 The Wilderness Society, *Submission 43*, p. 37.

54 The Wilderness Society, *Submission 43*, p. 37.

55 The Wilderness Society, *Submission 43*, p. 39. For a further discussion of the results of this modelling see Chapter 5.

56 See The Conservation Council of South Australia, *Submission 14*; Dr David Ellis, *Submission 30*; Clean Bight Alliance Australia, *Submission 23*; International Fund for Animal Welfare, *Submission 29*; Miss Rebecca Faulkner, *Submission 38*; Emeritus Professor Robert Bea, *Submission 73*; Whale and Dolphin Conservation, *Submission 76*.

57 The Wilderness Society, *Submission 79*, p. 14.

3.47 The Kangaroo Island Council submitted that in order to understand BP's oil spill modelling conclusions, the data inputs for the modelling would be required. As BP had not released these data inputs, the Kangaroo Island Council stated that it 'therefore cannot accept the accuracy of the information provided by BP'.<sup>58</sup>

3.48 Similarly, The Wilderness Society was critical of BP's decision to withhold the assumed worst case flow rate used in its oil spill modelling released in September 2016, and stated that this information is:

...critical to enable stakeholders, relevant experts and the public to assess the adequacy of modelling. It is also needed to enable an informed assessment of the full potential impact of a worst-case oil spill from the Great Australian Bight - a critical factor in any assessment of the risk of the proposal to the Australian community.<sup>59</sup>

3.49 BP, in its Environment Plan Summary agreed that the conclusions of oil spill modelling and the response plans derived from it are important matters of public consideration. It stated that it had provided information to stakeholders regarding how the modelling was conducted, such as the thresholds used and scenarios modelled. BP also submitted that it discussed key modelling results with stakeholders.<sup>60</sup>

3.50 BP stated that the details of how the proposed drilling program would incorporate lessons learned from the Deepwater Horizon incident were also discussed during consultation meetings. Specifically, information regarding prevention of loss of well control and technical solutions to a loss of well control event, such as capping and containment and relief well planning were provided.<sup>61</sup>

3.51 However, BP noted that due to the commercial sensitivities, model inputs, which are of commercially competitive significance (including hydrocarbon phase, volume and reservoir quality assumptions) would not be released.<sup>62</sup>

#### *Adequacy of consultation with stakeholders*

3.52 A number of submitters noted that not all affected stakeholders had been consulted by BP. For example, Ms Kerry Colbung, Chief Executive of the Aboriginal Lands Trust, stated that the Trust was concerned that there had been a lack of consultation as it had not been identified as one of the key Aboriginal stakeholders.<sup>63</sup>

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58 Kangaroo Island Council, *Submission 78*, p. 5.

59 The Wilderness Society, *Submission 79*, p. 8.

60 BP Developments Australia Pty Ltd, *Submission 20*, Attachment 5, p. 21.

61 BP Developments Australia Pty Ltd, *Submission 20*, Attachment 5, p. 21.

62 BP Developments Australia Pty Ltd, *Submission 20*, Attachment 5, p. 21.

63 Ms Kerry Colbung, Aboriginal Lands Trust, *Committee Hansard*, 16 November 2016, p. 9.

3.53 Ms Colbung noted that three groups—the Far West Coast Aboriginal Corporation, Yalata Aboriginal Community, and the Alinytjara Wilurara Natural Resources Management Board—had been identified as stakeholders during consultation. However, Ms Colbung stated that:

...anecdotally people have indicated that they are not aware of the consultation that has taken place. Some groups have indicated that there have been public forums. They serve their purpose, but I think, specifically, when we deal with Aboriginal people we have to acknowledge that there needs to be Aboriginal space and there needs to be Aboriginal-specific forums. It would be great if there was the opportunity to allow Aboriginal space for Aboriginal people to talk about the issues that impact on them, particularly given the significance of this and the relevance to the responsibility that Aboriginal people hold for all those knowledge systems and structures, as well.<sup>64</sup>

3.54 Ms Virginia Leek, Outposted Solicitor from the Crown Solicitor's Office, South Australia noted that despite the Aboriginal Lands Trust being the land owner of the land adjacent to the Head of the Bight, there had not been a direct approach for consultation from BP. Ms Leek stated:

There has not actually been an approach from BP as far as we know to the lands trust itself. We looked back at all of the documents...What we saw from the early identification of stakeholders was that there were Aboriginal stakeholders identified but not specifically the Aboriginal Lands Trust. I think there may be some misunderstanding about the role of the trust in this space because it is actually the land owner of that land adjacent to the Head of the Bight.<sup>65</sup>

3.55 The Aboriginal Lands Trust expressed its disappointment that it had not been included in consultation during the environmental approvals process. It concluded that:

Whilst BP identified Aboriginal stakeholders in the consultation phase, it has failed to identify the Trust as a key stakeholder for consultation and in doing so overlooked a major land holding body with a mandate to foster the economic, social, environmental, cultural heritage interests of all Aboriginal South Australians.<sup>66</sup>

3.56 The Australian Youth Climate Coalition and the Seed Youth Indigenous Climate Network also submitted that:

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64 Ms Kerry Colbung, Aboriginal Lands Trust, *Committee Hansard*, 16 November 2016, p. 10.

65 Ms Virginia Leek, Crown Solicitor's Office South Australia, *Committee Hansard*, 16 November 2016, p. 10.

66 Aboriginal Lands Trust, *Submission 84*, p. 3.

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Through independent consultation, we have determined that the affected Traditional Owner groups have not been consulted by any company wishing to drill or explore within the Great Australian Bight in any form.<sup>67</sup>

3.57 BP in its submission to the committee, provided the list of organisations, including Indigenous, business and commercial, non-government and community based organisations, it had consulted.<sup>68</sup> Mr Matthew Doman, APPEA, provided a response to comments received relating to BP's consultation process provided by witnesses at the committee's hearing of 16 November 2016. Mr Doman stated:

Frankly, I think there has been some misrepresentation of the stakeholder engagement that BP has undertaken in relation to this project. I understand that they consulted over 70 community groups in that process. In fact, that consultation is detailed in their submission to this very inquiry. So some of the discussion that occurred earlier today missed the mark on that. However...we operate in an environment of increasing interest in the activities of our industry whether it be onshore or offshore in South Australia, the Northern Territory or anywhere else in the country. We have to stay on top of our engagement with the community and make sure that the information flow is there. We also face the task of countering misinformation wilfully spread by many of the opponents of development. That gives us an increasing task. It is something we are focused on and determined to do a better job of.<sup>69</sup>

### **Transparency of decision making**

3.58 NOPSEMA, as the industry regulator was criticised by a number of submitters for failing to release information provided to it by BP, and for failing to publish the reasons for its decisions. The AMCS submitted that the approvals system:

...fails in transparency in that little or no information is provided by NOPSEMA about the decisions it makes i.e. approvals are given or rejected without any reasoning/justification provided to the public. Similarly little information is provided publically prior to decisions being made to facilitate public interest input.<sup>70</sup>

3.59 Similarly, Mr Lyndon Schneiders, The Wilderness Society, told the committee that:

The key thing we would want to see is the release of all of BP's documentation between it and the regulator. It should be released to this committee, at a minimum, and made public. The magnitude of the risk associated with what has been proposed here is potentially huge, so the

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67 Australian Youth Climate Coalition, *Submission 77*, p. 5.

68 BP Developments Australia Pty Ltd, *Submission 20*, p. 24.

69 Mr Matthew Doman, APPEA, *Committee Hansard*. 16 November 2016, p. 57.

70 Australian Marine Conservation Society, *Submission 19*, p. 6.

Australian public deserves to see this documentation. They deserve to know and understand what that magnitude of the risk is.<sup>71</sup>

3.60 NOPSEMA explained to the committee that, with the exception of information it is required to release by law, it does not typically publicly release information that has been provided to it as part of the deliberative process.<sup>72</sup>

3.61 Mr Stuart Smith, Chief Executive Officer, NOPSEMA explained that NOPSEMA is bound by legislation, including the *Freedom of Information Act 1982* (FOI Act). Mr Smith noted that individuals or organisations can seek information from NOPSEMA under the FOI Act, and that NOPSEMA is required to abide by any decisions made in accordance with that Act. Mr Smith reiterated that while information can be released, it is a matter of course that NOPSEMA does not release proponents' proposals 'up-front' or during the deliberative process. He explained that such a release:

...could influence the nature of the information that companies provide and therefore diminish our capability to make an assessment. However, the companies are required to release an environment plan summary at the end of the process, and we will also release information about our deliberative process.<sup>73</sup>

### **Enhancements to the regulatory framework**

3.62 In 2015, NOPSEMA identified that poor consultation practices in the offshore petroleum industry can lead to negative impacts on individuals, communities and organisations. Further, it identified that at the time, the transparency of its decision-making processes did not meet community expectations. The 2015 Operation Review, while endorsing NOPSEMA as an effective regulator, also found that there was a need for NOPSEMA to continue to build a social license to regulate by improving its capacity to engage with stakeholders. The Review made two recommendations:

- to develop a mechanism to provide greater transparency of decision making and assessment to stakeholders; and
- to continue to identify and implement cost effective and tailored/targeted education activities that improve its capacity to engage with stakeholders in order to share lessons, provide guidance and share new information.<sup>74</sup>

3.63 In August 2015, NOPSEMA announced a *Stakeholder engagement and transparency work program* to address these issues. In November 2016, it published its official guideline on consultation requirements. This document identifies

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71 Mr Lyndon Schneiders, The Wilderness Society, *Committee Hansard*, 28 April 2016, p. 39.

72 Mr Stuart Smith, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 52.

73 Mr Stuart Smith, NOPSEMA, *Committee Hansard*, 28 April 2016, p. 56.

74 South Australian Government, *Submission 44*, p. 9.



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NOPSEMA's position on key regulatory requirements for consultation and identifies the factors that influence its decision-making.<sup>75</sup>

3.64 As part of the *Stakeholder engagement and transparency work program*, it was also agreed that APPEA would prepare and publish a methodology for the effective consultation with relevant persons.<sup>76</sup> Dr Malcolm Roberts, Chief Executive Officer of APPEA, told the committee that he agreed that the obligation for effective consultation rests on oil and gas proponents but noted that the oil and gas industry is working with NOPSEMA to 'ensure that there is greater transparency', and in order to meet expectations around public consultation.<sup>77</sup> Dr Roberts informed the committee that APPEA, in conjunction with its members is developing a:

...best practice framework which we expect will promote effective, transparent and consistent consultation with the community. We will soon be consulting with stakeholders on that framework, including some important principles such as publishing the intent to commence environmental plan preparation and related consultations as soon as possible, providing clearer information to stakeholders about industry activities and the possible impacts, ensuring sufficient time for stakeholders to review the information and provide their thoughts, following a consistent approach to assessing the merit of claims and objections made, and ensuring that assessment is provided to stakeholders and included in environmental plans and submissions to NOPSEMA. These practices are already being widely used across the industry, but we think explicitly setting higher, more rigorous standards will ensure better performance and continuous improvement.<sup>78</sup>

3.65 However, The Wilderness Society submitted that it considers it 'entirely inappropriate' to contract APPEA to deliver revised consultation guidelines. It noted that APPEA is 'behind on agreed timelines to undertake this work for its industry regulator'. The Wilderness Society concluded that it:

...does not understand why NOPSEMA and/or the Department are not sufficiently resourced or experienced to undertake this work and considers NOPSEMA's outsourcing of such important guidelines to the peak body of the industry it is supposed to be regulating completely unacceptable.<sup>79</sup>

3.66 NOPSEMA also identified two enhancements to the current regulatory regime which would improve transparency and public consultation practices. The first

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75 For more information see: <https://www.nopsema.gov.au/environmental-management/stakeholder-engagement-and-transparency/> and <https://www.nopsema.gov.au/assets/Guidelines/A459065.pdf>.

76 See <https://www.nopsema.gov.au/assets/Corporate/A491964.pdf>.

77 Dr Malcolm Roberts, APPEA, *Committee Hansard*, 28 April 2016, pp. 6–7.

78 Dr Malcolm Roberts, APPEA, *Committee Hansard*, 16 November 2016, p. 56. See also BP Developments Australia Pty Ltd, *Submission 20*, p. 10.

79 The Wilderness Society, *Submission 79*, p. 15.

enhancement would be to include a public comment period at the point where a company has completed its environment plan and the consultation for that environment plan. Mr Smith, NOPSEMA, noted that this would go beyond the existing arrangements and provide an opportunity for any parties which felt they had not been consulted appropriately, to voice their interests and have those interests addressed. Secondly, environment plans could be released up-front, that is before a decision is made to the extent that those environment plans would be released under the FOI process. Mr Smith stated:

We recognise that there is some very specific information which may be confidential, may have commercial sensitivity, so there may be some specific things that do not get released. But we think, in general, releasing the environment plans that are submitted to us would enhance the transparency of the process and assist the community in participating further in the process than they are able to do at the moment.<sup>80</sup>

3.67 The Department of Industry, Innovation and Science noted that it is working with NOPSEMA to review transparency:

...on the basis that there is a very robust system and it would be better for everybody if people understood what was going on. There is nothing to hide here. It is an extremely robust system. It is clear that some improvement in the transparency would increase the public acceptance of the results. So we are doing some work.<sup>81</sup>

3.68 Mr Mike Lawson, Department of Industry, Innovation and Science, added that the review is considering how to increase 'citizen acceptance and awareness of the robustness of that system by making it more transparent'. He noted that transparency imposes cost 'but we believe that is likely to be a price that needs to be paid'.<sup>82</sup>

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80 Mr Stuart Smith, NOPSEMA, *Committee Hansard*, 16 November 2016, p. 37.

81 Mr Mike Lawson, Department of Industry, Innovation and Science, *Committee Hansard*, 8 February 2017, p. 8.

82 Mr Mike Lawson, Department of Industry, Innovation and Science, *Committee Hansard*, 8 February 2017, p. 8.