Chapter 3

Issues raised in submissions

Introduction

3.1 A number of issues concerning the bill and access to the WPA were raised in submission to the inquiry. Largely, these concerns related to people and organisations which were existing users of the WPA or had existing interests in the WPA. These included:

- Defence use and the co-existence scheme;
- mining and resources;
- railway and road access;
- Indigenous groups with interests in the WPA;
- environmental issues;
- the Woomera Rules.
- pastoral leases;
- security regime and offences; and
- compensation issues;

Defence use and the co-existence scheme

3.2 Defence described the Woomera Prohibited Area (WPA) as 'a globally unique military testing range'. The area is nearly 124,000 square kilometres and is the largest land range in the world.[1] The WPA is a Prohibited Area under the Defence Force Regulations. It is used for the 'testing of war material' under the control of the Royal Australian Air Force and Defence can control access to the area, excluding the Stuart Highway.[2]

3.3 Support was expressed in submissions for the co-existence scheme for the WPA proposed by the Hawke Review. For example, Arrium Mining, which stated it had a significant mining and exploration presence in the WPA, was supportive of the bill. In particular it noted that the legislation-based scheme:

- implements the co-existence principles of the Hawke Review;
- has a high level of transparency about the issue of access to the WPA;
- has a high level of flexibility to enable the multitude of stakeholders and circumstances in the WPA to be appropriately managed; and

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1 http://www.defence.gov.au/woomera/about.htm

2 http://www.defence.gov.au/woomera/about.htm

- contains merit review mechanisms which should help ensure that the inherent, but reasonable, flexibility of the scheme can always be tested to ensure it is being administered reasonably.[3]

3.4 Arrium Mining noted that it was their experience 'that co-existence is certainly achievable, primarily because…the Department of Defence (with and through the assistance of WPACO) has been continually improving and tailoring the arrangements for access'.[4]

3.5 However, Mr Mark Zanker expressed doubts regarding the co-existence model of the access to the WPA proposed in the bill. He described the 'objectives of Defence and those of miners' in the WPA as 'irreconcilable'. He noted that the WPA was established as a weapons test range 'precisely because there was an absence of large scale commercial activity in the area and weapons testing could be conducted securely and without risk of potentially significant damage to life or property'. He commented:

> Since 1947 there have been a number of developments in and around the WPA that have detracted from its suitability as a weapons testing area. Amongst those developments are an enormous increase in tourism, the construction of a new sealed Stuart Highway, the relocation of the Central Australia Railway (CAR) to commence at Tarcoola instead of Stirling North, the extension of the CAR to Darwin, and the transfer from the Commonwealth to private operators of the Tarcoola to Alice Springs section of the CAR.[5]

3.6 Consequently, Mr Zanker recommended that consideration be given to shifting the WPA further west, beyond the pastoral country. He noted that '[p]ublic access to the area further west is much more difficult and less frequent and because of its remoteness less attractive to the mining industry'.[6]

3.7 Under the bill, the Minister may suspend permission (clause 72TH) to be in the WPA and give directions to those in the WPA (clause 72TJ) where it is necessary for the purposes of the 'defence of Australia'. In relation to section 72TH, the EM to the bill gives the example of 'an urgent national Defence requirement' as justifying the use of the section. The EM also notes that these particular clauses are exempt from review by the Administrative Appeals Tribunal under the bill because they are decisions which:

> [A]ffect the defence of Australia; for example, where there is an urgent national Defence requirement. In such an instance, the Minister for Defence is best placed to determine use of a national defence asset and review of such a decision could put national security at risk.[7]

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3 *Submission 3*, pp 1-2.

4 *Submission 3*, p. [3].

5 *Submission 4*, p. [2].

6 *Submission 4*, p. [3].

7 EM, pp 8, 10.

3.8 South Australian Chamber of Mines and Energy requested the committee 'clarify for the users of the WPA under this framework that the words "defence of Australia" refer to the direct armed attack by State and Non-State actors outlined in the 2009 White Paper and originally discussed as policy in the 1986 Dibb Report'. It noted that the clarification of these words in the bill will alleviate any concerns that a Minister of Defence may utilise this power to restrict access 'based on no direct armed incursion on the sovereignty of Australian territories'.[8]

Mining and resources

3.9 Expanding and providing certainty of access for the mining and resources sectors to exploit the WPA was perceived as a key purpose of the bill. The Second Reading Speech noted:

> Woomera Prohibited Area overlaps a major part of South Australia's potential for significant minerals and energy resources, including 30 percent of the Gawler Craton, one of the world's major mineral domains, and the Arckaringa, Officer and Eromanga Basins for hydrocarbons and coal. Olympic Dam is adjacent to the Woomera Prohibited Area and is part of the same geological formations. In fact, the minerals that are known to be found in the area include copper, gold and iron ore. There is high potential for oil, gas and uranium to also be found in the area.
>
> The South Australian Government has assessed that over the next decade about $35 billion worth of iron ore, gold and other minerals resources are potentially exploitable from within the Woomera Prohibited Area.[9]

3.10 The importance and value of mining activities in the WPA was also emphasised in a number of other submissions. Geoscience Australia noted that the WPA is one of the more prospective areas for mineral and energy resources in Australia and would continue to attract exploration activity. Geoscience Australia was supportive of the bill, noting it would provide a framework within which 'exploration can occur'. It noted:

> The WPA has a diversity of mineral deposits and energy resources. The WPA contains four operating mines: Challenger, a mid-size gold mine in the west; Cairn Hill, a small iron ore (magnetite)-copper-gold mine; Prominent Hill copper-gold mine in the south east; and the iron ore mine at Peculiar Knob (Southern Iron). There are some 150 known occurrences of minerals dominated by gold, iron ore, copper and opal but including uranium, silver, zinc, lead, diamonds, and heavy mineral sands. The potential for undiscovered deposits of the different mineral and energy commodities varies across the WPA and reflects the range of geological environments.[10]

8 *Submission 9*, p. 2.

9 Second Reading Speech, *Senate Hansard*, 27 March 2014, p. 2247.

10 *Submission 2*, p. [2].

3.11 The South Australian Chamber of Mines and Energy (SACOME), which represents over 340 members in the resources and energy sectors in South Australia, was broadly supportive of the bill but had a number of reservations. Among its reservations, SACOME stated that while existing users and infrastructure corridors are specified in the bill, 'it makes no mention of future corridors or how they can be handled when they do occur'. SACOME noted:

> It is understood that there are provisions for combining various mining leases under a resource purpose permit under the new WPA Rules, which can include relevant licences for infrastructure. However as there is no definitive section in the Bill for future infrastructure corridors and operators, or an updated draft of the Rules it is difficult for the industry to assess whether future infrastructure needs could be impacted.[11]

Rail and road access

3.12 The Hawke Review considered there 'should be a public right of access to the north-south rail link and the Stuart Highway' as part of the recommended co-existence scheme. However, this access should be 'subject to a Defence right to close the rail-link and highway when required, inspect traffic, and to refuse entry and confiscate equipment to preserve the safety and security of testing activity'.[12]

3.13 In their joint submission, the Department of Defence and the Department Industry highlighted amendments made to the bill to address the concern of the 'Tarcoola-Darwin railway owner and operator…that the scope of their existing use includes the railway and all associated infrastructure'. They stated:

> The status of the owner and operators of the Tarcoola-Darwin railway as existing users of the Woomera Prohibited Area has been clarified in this Bill in section 72TB. Continuing positive engagement with the rail owners and operators, including the development of a working level agreement, will minimise the effect that any testing activity may have on rail operations and schedules.[13]

3.14 Three railway corporations with interests covering the Central Australian Railway track made submissions to the inquiry: Australian Rail Track Corporation (ARTC), AustralAsia Railway Corporation, and Genesee and Wyoming Australia (GWA). All highlighted their concerns regarding certainty of rail access through the WPA under the bill. For example, ARTC's submission noted that 80 per cent of land transport freight to Western Australia and to Darwin is by rail – therefore '[e]xclusion periods measured in days and several times a year are not acceptable'.[14]

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11 *Submission 9*, p. 1.

12 Hawke Review, p. 16.

13 *Submission 12*, p. 4.

14 *Submission 8*, p. [9].

3.15 GWA outlined that it had previously called for the legislation to explicitly recognise the Tarcoola and Darwin railway owner and operators as existing non-Defence users of the WPA. GWA stated:

> We note that subsections 72TB(1) (m),(n) and (o) of the draft Bill, will codify existing rail users in legislation by amending the *Defence Act 1903*. As such, we understand the Bill therefore recognises GWA as the Concession Holder as being the railway owner and those rail operators subject to a current access regime governed by the *Defence Force Regulations 1952*. This also clarifies that GWA will not be subject to the new access regime established by the Bill, in the form of the proposed Rules.[15]

3.16 However, ARTC stated that while the exclusion 'goes quite some way towards addressing…previous concerns', it considered the 'exclusion needs to be broadened to ensure it covers the actual train operators (ie. freight rollingstock operators such as GWA)':

> ARTC owns the railway and is clearly within the exclusion definition. ARC would also be excluded as it is clearly the "operator" of the railway as it manages the line under its long term lease granted by ARTC. It is unclear whether GWA (or any other rail company offering rail services) also gains the exemption by being the next level of operator of the railway by virtue of running train services on the line.[16]

3.17 ARTC requested the Commonwealth expand the exclusion to include 'owner, operator, concession holder, rail service provider and in fact the users of those rail services'. It stated this could be 'easily achieved' by amending the proposed section 72TB(l)(m).

3.18 The AustralAsia Railway Corporation stated:

> As a result of earlier submissions from the concession holder Genesee and Wyoming Australia, the Australian Rail Track Corporation and representatives from the SA government to the Department of Defence, there is currently a protocol being developed for consultation between the railway operator and the Department of Defence in the lead up to testing that may impact railway operations. The development and adoption of this protocol would enable the required access window for deployment of weapons within the WPA to be coordinated so as not to adversely impact scheduled train services and maintenance activities along the corridor.[17]

3.19 The Northern Territory Government also raised concerns about the potential for Defence activities to cause major disruptions to the road and rail links between Adelaide and Darwin. The Chief Minister, the Hon Adam Giles, wrote to the committee to state that '[i]t is simply unacceptable for these major arterial routes, which are vital for the Territory's economy and the development of Northern

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15 *Submission 13*, p. 1.

16 *Submission 8*, p. 2.

17 *Submission 5*, p. 2.

Australia, to be subject to lengthy closures'. He noted the bill 'does not appear to contain any substantive changes and there is no consideration of the Bill's impact on the Stuart Highway and the Darwin to Adelaide railway in the Bill's Regulatory Impact Statement'.[18]

3.20 The joint submission by the Department of Defence and the Department of Industry to the similar bill introduced by Senator Farrell acknowledged the concerns of the Northern Territory Government regarding the 'potential for long disruptions to the railway, and the impact of that for tourism and freight delivery'. However, it stated:

> Current arrangements…allow the Minister to suspend permission to access the railway and Stuart Highway for safety or security for the testing of war materiel - with no time limit specified.
>
> Rail and road closures occur only for as long as is required to conduct the test and ensure safety or security. This will continue to be the case under the proposed new arrangements.
>
> A recent long range missile test, for example, required the suspension of rail traffic through the WPA for a period of three hours on three occasions over a 21 day period. This was done in close consultation with the rail operator and did not impact their schedule.
>
> By defining set exclusion periods, the proposed measures in the bill will provide greater certainty to non-Defence users for the periods in which closures may need to occur.
>
> Continuing positive engagement with the rail owners and operators, including the development of a working level agreement, will minimise the effect that any testing activity may have on rail operations and schedules.[19]

3.21 AustralAsia Railway Corporation also questioned a statement in the Regulatory Impact Statement for the bill that '[m]inor amendments to the [Defence Force Regulations] are proposed to include a change in control provision to require Ministerial consent for any transfer of ownership or change in the ownership of the shares of the company'. It stated:

> As it is unclear whether minor amendments to the [Defence Force Regulations] that would impose change of control provisions may be proposed through the introduction of some other legislation, we note this may be at odds with the current provisions of the Concession Deed. For the avoidance of doubt, the Corporation submits that the existing authorisation provided under the *Defence Force Regulations 1952* for the operation of the railway should be transferable (whether by way of assignment of the authorisation or change of control) without requiring the consent of the Federal Minister.[20]

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18 *Submission 15*, pp 1-2.

19 *Submission 12*, p. [7].

20 *Submission 5*, p. 2.

3.22 The WPA is also used by commercial and private tourists, mostly for 4WD activity and visits to the Tallaringa Conservation Park. Permits are required for tourist activity under the bill.[21] Since the moratorium was lifted, over 632 road access permits covering about 2262 passengers in over 637 vehicles (mostly for tourists) have been granted.[22] The Ilkurlka Aboriginal Corporation in a submission to the committee's first inquiry into similar bill outlined its concerns about the communication from Defence regarding road closures in the WPA. The Ilkurlka Station is an outpost which provides fuel, supplies, communication and medical assistance in a remote area and much of its business depends on visitors traversing the area. A lack of clarity around the times of the road closures would mean visitors are less likely to plan trips – or may cancel their trips altogether.[23]

Indigenous groups with interests in WPA

3.23 Two aboriginal groups (Maralinga Tjarutja and Anangu Pitjantjatjara Yankunytjatjara) have freehold land ownership over portions of the WPA. There are also other native title holders (Antakirinja Matu-Yankunytjatjara, Arabana and Gawler Ranges) and a native title claimant group (Kokatha Uwankara).[24]

3.24 The Kokatha Uwankara native title claimant group stated that the proposal to open areas of the WPA to future mining and exploration 'to the maximum extent possible' was 'of great concern'. It identified a number of sites which were 'extremely important to the Kokatha people and to their continued acknowledge and observance of traditional law and custom'.[25] It submitted that 'Defence ensure that no exploration licenses or Mining Tenements or permissions to access are grant over the area…identified by the Kokatha'. Futher:

> Kokatha would also like to point out that it is not just the direct results of mineral exploration that will impact upon Kokatha's heritage as a result of the outcomes of the Hawke Review. Increased presence of explorers camping, staying at Woomera and driving to their tenements also means the more likely it is that damage to sites will occur merely through increased human presence in the area. People are naturally inquisitive- and get bored. Kokatha has learnt from experience that whenever explorers are out in the field conducting work, during 'down time' they go for walks, drive their vehicles into sacred areas, and visit sites which could be gender restricted.[26]

3.25 The Kokatha Uwankara wished for the *Mining Act 1971* (SA) to be amended to provide that exploration licences and tenements are granted subsequent to the right to negotiate process, not prior to the initiation of negotiations. It also wished that

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21 *Submission 16*, p. 6.

22 *Submission 12*, p. [2].

23 *Submission 1* to the Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013, pp 1-2.

24 Government of South Australia, *Submission 16*, p. 6.

25 *Submission 1*, p. [2].

26 *Submission 1*, p. [4].

South Australia exclude culturally significant areas identified by the Kokatha Uwankara from the issue of exploration licences.[27]

3.26 The submission from the Maralinga Tjarutja and Anangu Pitjantjatjara Yankunytjatjara (MT and APY) focused on Section 400. Section 400, which was used for British nuclear tests, comprises 3,125 square kilometres and approximately 40 per cent of which overlaps the WPA. The MT and APY requested that Section 400 be removed from the WPA. It stated that following the rehabilitation of the area affected by the nuclear tests, this area was handed back to the MT who 'now own Section 400 and strictly control access…in accordance with a Land Management Agreement negotiated with the Commonwealth and South Australia'. The MT have subsequently developed a tourism enterprise conducting guided tours of the atomic test sites which are an important source of income for the MT. It stated:

> APY and Maralinga people have suffered enough as a result of weapons testing on their lands - from the dislocation of the Maralinga people from their traditional lands for 30 years, to the deposition of fallout and radioactive materials over the APY and Maralinga Lands, to the need to rehabilitate and manage the MT Lands as a result. This is the appropriate time to recognise the injustices already suffered by them.[28]

3.27 While the MT and APY highlighted 'very poor initial efforts at consultation' during the Hawke Review and by Defence in the development of the bill, it included an update which indicated consultations had progressed with Defence and the WPA Board. It noted that 'the remaining issues where MT and APY may be at odds with the Department of Defence have been narrowed and we are planning to commence negotiations on a 'Good Neighbour Agreement' as soon as practicable in relation to further progress the matters on which we have reached agreement'.[29]

3.28 The Government of South Australia noted that Defence has 'been working with the Maralinga Tjarutja Executive and Anangu Pitjantjatjara Yankunytjatjara Executive, as well as the native title holders and registered claimant group to better understand and respect aboriginal cultural and site protection activities within the WPA':

> Joint land management arrangements and agreements that take these activities into account are being negotiated. Amendments have also been made to the bill and draft Rules to reflect existing traditional ownership, native title rights and the land management role of the Anangu Pitjantjatjara Yakunytjatjara and Maralinga Tjarutja corporations.[30]
>
> The State Government is also aware that the Maralinga Tjarutja traditional owners (supported by Anangu Pitjantjatjara Yakunytjatjara) have requested excision of the remainder of Section 400 (historic Maralinga nuclear test

27 *Submission 1*, p. [4]

28 *Submission 11*, p. 5.

29 *Submission 11*, p. [1].

30 *Submission 16*, p. 6.

> site) from the WPA. The State Government and the WPA Advisory Board are both supportive of ongoing bilateral discussions between Defence and relevant parties on this issue.
>
> The State Government notes that the area is safe for some purposes but remains highly contaminated. The significance of this land to the Maralinga Tjarutja people, major rehabilitation efforts and prior land hand back are acknowledged.[31]

3.29 The joint submissions by the Department of Defence and the Department of Industry have also highlighted the ongoing consultations which have taken place with Indigenous groups with interests in the WPA. For example, in its submission into the bill introduced by Senator Farrell, it noted:

> Defence has continued consultations with Indigenous groups around the proposed new arrangements. Indigenous groups sought formal written confirmation of their existing access permissions under the Defence Force Regulations, including confirmation that any entitlement to compensation would be on 'just terms·. This has been provided by Defence.
>
> Some Indigenous groups have also sought agreements to formalise working level consultation and communication as pan of range administration. Defence is working with them on the shape and detail of these arrangements.[32]

Environmental issues

3.30 Environmental, conservation and biodiversity issues in relation to the use of the WPA were also raised in submissions. For example, the Conservation Council of South Australia (Conservation Council SA) considered the proposal that the WPA be 'opened up for resources exploration and mining "to the maximum extent possible" has significant risks to the natural environment. It argued:

> The Bill fails to make reference to environment or sustainability and ignores that this change may lead to an ad hoc exploration and mining rush in the WPA that may cause serious harm to environmental assets and ecological communities. The Bill fails to recognise that there is an environmental vulnerability caused by this legislation because until now the environmental assets that have been identified and are yet to be identified have not been exposed to the level of exploration and mining that may now occur. Additional measures are required in this legislation to ensure that access is not granted to those areas that need to be protected.[33]

3.31 Similarly Bush Heritage Australia, the lessee of the Bon Bon Station Reserve, stated that the proposal included 'no recognition of the valuable environmental assets and natural capital of the WPA and the need to protect this largely intact area for the long-term health of the region's biodiversity and human population'. It stated:

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31 *Submission 16*, p. 7.

32 *Submission 12*, p. [6].

33 *Submission 6*, p. 1.

> Given the level of habitat degradation and species loss in large parts of the South Australian landscape, the WPA provides an opportunity to protect and promote this quintessentially Australian landscape, and create long-term job opportunities through controlled ecotourism and other sustainable income-producing activities.
>
> It is important that the issues of protecting biodiversity and ensuring long-term environmental health of the WPA are also expressly recognised in the Bill, and included as part of the natural and economic values of the area. We recommend that the biodiversity, cultural and landscape assets are formally recognised and made spatially explicit in the Bill (at the very least the second reading speech should give voice to strong environmental values contained in the lands), and that the South Australian Government then honour the intension of the Bill by protecting these assets when assessing exploration and mining applications within the WPA.[34]

3.32 In particular, Bush Heritage Australia highlighted the risk of mining activity leading to transportation of weed seeds such as buffel grass into previously unaffected areas and the potential for water intensive mining activities to adversely affect water availability for other users 'in the WPA and beyond'. It recommended the 'Bill acknowledges the cultural and environmental importance of water in the landscape and requires mining entities to manage water use in such a way as to prevent any adverse impacts on natural water bodies, soaks and springs'.[35] Water access issues were also raised by the Conservation Council SA, which noted that opening the WPA for exploration and mining activity would increase pressure on water sources:

> Water availability in the area needs to take into account, including what is available to the mining industry and other users, but also what is available for the environment. The Great Artesian Basin (GAB) is a finite a resource and the main water source for several ecologically significant springs in the Far North. Some of these springs are already experiencing draw down, no longer receiving the water required from the GAB. Coupled with predicted rainfall decrease and increased temperatures, groundwater should be used conservatively.[36]

3.33 The Conservation Council SA highlighted biodiversity conservation issues in the WPA. It observed:

> The eastern area of the WPA is within the South Australian Arid Lands Natural Resource Management region. This region has a high rate of species decline and extinction. Threatened flora and fauna species listed under the *[Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)]* or the *[National Parks and Wildlife Act 1972]* include in the Stony Plains bioregion 50 plants, 5 mammals, 39 birds and 1 reptile; and in the Gawler bioregion 58 plants, 3 mammals, 61 birds and 2 reptiles.[37]

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34 *Submission 7*, p. 2.

35 *Submission 7*, pp 2-3.

36 *Submission 6*, p. 4.

37 *Submission 6*, pp. 2-3.

3.34 The Conservation Council SA asserted that it did 'not see a sufficient process to ensure that priority biodiversity conservation issues have been adequately identified or considered' in regards to the bill and its setting of zones and exclusion periods.[38] It stated:

> No mention is made in the Bill of threats to biodiversity and threatened species from infrastructure, including remnant vegetation destruction, increased weed and pest species vectors and transmission of disease. The legislation should ensure that baseline assessments of invasive species are undertaken in the WPA and that any exploration and mining activity ensure that the region is not compromised through activities that would further introduce or spread existing weed species, such as buffel grass.[39]

3.35 The joint Department of Defence and Department of Industry submission outlined consultation that had occurred between the Woomera Advisory Board and Conservation Council SA:

> Conservation SA expressed concern about potential environmental damage with the possibility of additional mining within the Woomera Prohibited Area. It was clarified that minerals exploration and production licenses would still be subject to any South Australian legislative or Government requirements, including environmental protection and rehabilitation processes.[40]

3.36 APY and MT welcomed 'mining and petroleum exploration' in the WPA and considered the opening up of the WPA to mining and petroleum exploration as 'an important initiative for the State and for Traditional Owners'. However, the MT and APY submission noted that Section 400, which overlaps the WPA, was exempted from the ambit of the *Mining Act 1971* (SA) and considered it 'highly inappropriate for Defence to conduct weapons tests over an area of land which has been successfully rehabilitated but where there are still 200 square kilometres of plutonium-contaminated land'.[41] The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) also provided a submission to the committee's first inquiry which raised concerns about the areas within the WPA which remain 'lightly contaminated with plutonium, uranium and other radionuclides' as a result of activities associated with nuclear tests in the 1950s and 1960s.[42] ARPANSA recommended that restrictions applicable to relevant areas within the WPA to reduce the likelihood of significant ground disturbance continue to apply.

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38 *Submission 6*, p. 2.

39 *Submission 6*, p. 3.

40 *Submission 12*, p. 3.

41 *Submission 11*, p. 5.

42 *Submission 4*, p.1, to Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013 inquiry.

The Woomera Rules

3.37 A large number of submissions urged the committee to support the release of updated draft Woomera Rules to allow for consultation with stakeholders, or for the updated draft Woomera Rules to include specific provisions. For example, ARTC believed that, 'for the sake of all parties going forward and to cement the existing working relationship for testing', the Rules 'should make a reference to the proposed Interface Agreement between ARTC, GWA and Defence'.[43]

3.38 The Government of South Australia described the bill as 'largely enabling and procedural', noting that the substance and operational provisions of the coexistence regime will be almost entirely contained within the Rules to be declared after the bill is passed.[44] The Government of South Australia commented:

> Defence advises the WPA Rules are not settled and continue to be developed. The WPA Rules are the essence of the coexistence regime. The State cannot then fully support the introduction of the Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014 unless and until the WPA Rules are finalised and the State Government and other relevant stakeholders are given sufficient opportunity to consider their practical implications.[45]

3.39 South Australia Police also noted that the EM to the bill, 'identifies that those with an extant presence (including police) will continue to operate under their current access arrangements. However it noted that it was 'unclear…under what authority other emergency or support services, including social services, may access the WPA, should the need arise'.[46] South Australia Police stated that under the previous 'exposure draft' of the Woomera Rules it was proposed that standing permissions be provided for those using certain roads and railways, also those using the Woomera Village. It argued:

> In order to remove any ambiguity, it would seem appropriate for Part 3 (Standing permissions) of the rules to include provision addressing access to the WPA (excluding the test-range facility or other prohibited areas) by police and other emergency and social services, in circumstances where such services are requested or required in order to conduct their lawful business, or respond to an emergency.[47]

3.40 The Government of South Australia noted that '[s]takeholders were given several weeks and a Defence sponsored workshop to provide feedback on the Rules when they were released in 2013'. It considered a similar opportunity should be given when a final version of the Rules is settled. Further it recommended that the bill be

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43 *Submission 8*, p. 2.

44 *Submission 16*, p. 5.

45 *Submission 16*, p. [2].

46 *Submission 14*, p. 1.

47 *Submission 14*, p. 2.

amended to require consultation with the South Australia Government during the finalisation and any variation of the Rules.[48]

3.41 South Australian Chamber of Mines and Energy (SACOME) also considered that it was 'essential that the publication of the final draft of the Woomera Prohibited Area Rules is released to enable all stakeholders to assess the interaction of sections in the bill to the relevant parts in the Rules. It noted:

> There are instances, for example in Section 72TH(2)(b) that state "*in accordance with any requirements set out in the rules*", that cannot be holistically understood as the draft rules have not been amended or clarified based on stakeholder consultation conducted in May 2013.[49]

3.42 SACOME recommended the committee urge the release of the updated draft Woomera Prohibited Area Rules 'with sufficient time to read and comment before [the bill] is passed through both houses'.[50] Arrium Mining noted the importance of reviewability of decisions proposed an amendment to paragraph 72TP(2)(b) 'to ensure the reviewability of all decisions'. Arrium Mining also considered it critical that subclause 72TP(1) of the bill be maintained 'to provide a critical, second voice via the [Industry] Minister on the content of the Rules'.[51] In contrast, SACOME recommended that clause 72TP not be amended further.[52]

3.43 South Australian Coal provided the committee with its submission on the draft bill in May 2013. This included:

> SA Coal is not in a position to make any detailed submission until it has had the opportunity to review the draft Rules. SA Coal awaits receipt of the draft Rules and requests that, in the preparation of these draft Rules, close attention is made to adequately reflect the recommendations of the Hawke Report. The draft Rules should not simply provide general unlimited power to make Rules relating to WPA access, and should take into account the long term investment that SA Coal has made in its exploration licence. SA Coal also requests that it is provided adequate and a reasonable time to consider and make submission relating to the proposed Rules, unlike the time made available to consider the Bill.[53]

3.44 Genesee and Wyoming Australia also highlighted some of its concerns regarding the content of the updated draft Woomera Rules:

> We note that new rail operators as non-Defence users will be governed by the Rules, which among other practical matters, may prescribe fees in managing access under the proposed cost recovery model. The Committee

48 *Submission 16*, p. 5.

49 *Submission 9*, p. 1 [emphasis in original].

50 *Submission 9*, p. 2.

51 *Submission 3*, p. [3].

52 *Submission 9*, p. 2.

53 *Submission 10*, p. [2].

> should be aware that this has the potential to erode the competitiveness of rail in servicing the freight market relative to road…
>
> While we note that there is standing permission to travel on the Darwin to Adelaide North-South Rail Link, there is no definition in the Rules of what constitutes the railway line. We believe a definition of the Darwin to Adelaide North-South Rail Link is also required in the Rules.[54]

Pastoral leases

3.45 The Government of South Australian outlined that there are 25 pastoral leases in the WPA:

- nine are family-owned;
- eleven held by corporations;
- three held by aboriginal groups;
- one is managed by a conservation group; and
- one held by a mining interest.[55]

3.46 The pastoral leases within the WPA are governed by South Australian law. No pastoral lease holders made submissions to the committee's inquiry. The joint submission from Departments of Defence and Industry noted that the current bill 'includes provisions to address concerns raised by the South Australian Government in October 2013 regarding the sale or transfer of pastoral leases within the WPA':

> The Government determined that existing pastoral leases could be maintained under current arrangements as 'existing users', including in cases where a pastoral lease is acquired or extended.[56]

Offences and security regime

3.47 Issues regarding the offences created by the bill and the security regime for the WPA have been previously identified by other committees in considering earlier versions on the bill.

3.48 The Scrutiny of Bills Committee raised concerns regarding Schedule 1, item 3, proposed clause 72TG of the bill. The provision 'imposes an offence of strict liability for failure to comply with conditions placed on a permission to be at a place in the Woomera Prohibited Area.'[57] This means there is not a fault element to the offence, but that 'the defence of honest and reasonable mistake of fact may be raised'.[58]

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54 *Submission 13*, p. 2.

55 *Submission 13*, p. 7.

56 *Submission 12*, p. 3.

57 Senate Scrutiny of Bills Committee, Alert Digest 6/13, p. 27.

58 EM, p. 7.

3.49 The *Guide to Framing Commonwealth Offences* notes that '[b]ecause proof of fault is one of the most fundamental protections of criminal law, strict liability… should only apply where there is adequate justification'.[59] In this respect, the EM states:

> Permit holders are granted access to the Woomera Prohibited Area on a conditional basis. As the area is used for testing Defence materiel, including weapons, adherence to permit conditions by permit holders is essential to protect the security of Defence activities and to protect the safety of all users of the range. Access to the Woomera Prohibited Area is only possible on a conditional basis and for this reason it is considered reasonable that breaching a condition of a permission should attract a strict liability offence. A strict liability offence provides a solid deterrent to breaching permit conditions and ensures the integrity of the permit regime, which aims to allow access to the Woomera Prohibited Area by non-Defence users in a safe and secure manner. Breaching a permit condition will attract a minor penalty of a maximum of 60 penalty units.[60]

3.50 The Scrutiny of Bills Committee wrote to the Minister to seek a more detailed justification regarding the possible scope of any conditions and the appropriateness of the use of strict liability.[61]

3.51 The Parliamentary Joint on Human Rights has also commented that the similar bill introduced by Senator Farrell required further information to determine its human rights compatibility. It noted:

> The committee seeks further information as to why powers exercisable at defence access control points without consent are necessary. The committee also seeks further information as to how persons who are arrested without warrant by members of the Defence Force for the offence of trespass are dealt with prior to being brought before a law enforcement officer.[62]

3.52 Currently the WPA is a 'prohibited area' under the Defence Force Regulations. These regulations allow the Minister to declare a place to be a prohibited area and authorise others to give permission to persons to enter and remain in a prohibited area. It is an offence for a person to enter or remain in a prohibited area without authority or to engage in conduct which breaches a condition of permission to access a prohibited area (20 penalty units or imprisonment for 6 months or both).[63]

3.53 As previously noted, the bill amends the existing definition of 'defence premises' to add 'the Woomera Prohibited Area' to the definition. Those accessing

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59 *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p. 22.

60 EM, pp 7-8.

61 Senate Scrutiny of Bills Committee, Alert Digest 6/13, p. 27.

62 Parliamentary Joint Committee on Human Rights, *Second report of the 44th Parliament*, 11 February 2014, p. 39. Also see Parliamentary Joint Committee on Human Rights, *Eighth report of 2013*, 19 June 2013, p. 69.

63 *Defence Force Regulations 1952*, reg 35.

'defence premises' are subject to a framework of security controls and powers provided for within the Defence Act. For example, 'Part VIA–Security of defence premises' includes:

- section 71T which provides that special defence security officials can, in some circumstances, require identification from, search, detain or remove persons on defence premises who they reasonably believe are not authorised to be on the premises;
- section 72G which provides that a defence security official may, subject to a number of provisos, use reasonable and necessary force against persons and things in protecting defence premises under Part VIA; and
- section 72P which provides it is an offence if a person enters or is on defence premises and the person is not authorised to be on the premises (50 penalty units).

3.54 The EM states that '[i]ncluding the WPA in the defence premises definition will ensure that the powers in Part VIA of the Defence Act will apply to new and existing non-Defence users of the WPA'.[64] While the Review of the Woomera Prohibited Area recommended that the '[s]ecurity risks associated with foreign investment in non-Defence activities should be mitigated through appropriate access conditions set by Defence', the amendment to the definition of 'defence premises' does not appear to be reflected in the recommendations of the Hawke Review.

Compensation

3.55 As noted in Chapter 2, Part 2, Item 5 of the bill repeals and replaces regulation 36 of the Defence Force Regulations. The EM to the bill considers this amendment 'modernises the existing compensation provisions in regulation 36…so that it reflect modern drafting terminology by providing for reasonable compensation where the operation of regulation 34 or 35 would result in an acquisition of property otherwise than on just terms'.[65]

3.56 The Government of South Australia stated that it did not support the repeal and replacement of regulation 36 as proposed in the bill. It noted that its legal advice indicated that this change would 'significantly reduce Defence's liability for its actions on the WPA in respect of current users, who include miners, pastoralists, Indigenous groups, rail users, researchers and others'. It observed that '[t]hroughout consultation with existing users, the State and Defence have both repeatedly represented that the new coexistence regime would not change the terms upon which they occupy or access the WPA.[66] However, the Government of South Australia commented:

> The new Regulation 36 is inconsistent with these assertions by limiting Defence's current obligation to compensate existing users for 'any loss or

64 EM, p. 5.

65 EM, p. 12.

66 *Submission 16*, p. 4.

> damage' to only requiring it to compensate existing users for 'acquisition of property'.
>
> For example, where an exclusion from the WPA causes loss to pastoralists due to an inability to complete shearing, they are currently compensated. This loss is not though caused by Defence's acquisition of the pastoralists' property and as such would not appear to be within the scope of the new compensation provision proposed for existing users under the new Regulation 36.
>
> Similarly, case law has held that the destruction of property by explosion does not amount the 'acquisition of property'. Such destruction is surely one of the most significant risks for existing users on the WPA.[67]

3.57 The Government of South Australia requested the bill be amended to 'reinstate the intended compensation provisions applicable to existing users of the WPA'.[68]

3.58 The Kokatha Uwankara also raised a compensation issue with the committee. It noted that 'pastoral lease holders are able to negotiate with defence in relation to compensation for defence activities on the WPA, whereas the Kokatha Uwankara claimants have no such right'. It stated:

> Due to the timing of the Defence Act and the establishment of Woomera town and the Woomera Prohibited Area, these acts will never be able to be subject to any form of compensation under the *Native Title Act 1993* (Cth).
>
> Further, the Commonwealth acquired substantial freehold property over areas at Woomera and the Range-head prior to the commencement of the *Racial Discrimination Act 1975* (Cth). These Acts resulted in substantial and complete extinguishment of native title rights and interests, and again, this extinguishment can never be subject to a compensation application under the *Native Title Act 1993* (Cth).
>
> To this end, Kokatha Uwankara submits that it is entirely appropriate for the Commonwealth to transfer some land to the Kokatha people (or facilitate its transfer), in consideration of this past history but also in consideration of the outcome of the Hawke Review, which is opening up the area to mineral exploration to the maximum extent possible…[69]

67 *Submission 16*, p. 5.

68 *Submission 16*, p. 7.

69 *Submission 1*, p. [4].