australian network of environmental defender's offices

Submission to Productivity Commission Draft Report on *Mineral and Energy Resource Exploration*

15 July 2013

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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INTRODUCTION

The Australian Network of Environmental Defender's Offices (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. Our lawyers have extensive experience working with and analysing mining laws – providing legal advice and representation, policy and law reform and community legal education across all Australian states and territories. Much of our offices' mining law work has arisen from increased public concern about the impacts of mining on environmental, social and other economic values. In our experience public concern about mining and CSG operations across Australia is currently very high in both metropolitan and regional areas.

Over the last two years ANEDO offices have advised hundreds of clients who are concerned about the impact of mining in their local area, and have provided workshops to thousands of concerned community members across Australia. For example over the last two years, at local communities' request, the Victorian EDO has conducted over 30 community legal education workshops on mining and coal seam gas (**CSG**) with almost 3000 attendees. Public queries to EDO NSW regarding mining and CSG development have quadrupled over the past two years from previous years. EDO NSW has conducted 24 workshops at the request of rural communities. The majority of legal queries and workshop requests are from rural and regional communities and while the type of people seeking assistance from EDOs within these communities is very broad, most are farmers. Most of these people have not been active in environmental protection in the past but are now very concerned about the impacts of mining and CSG on their property, water, environment and local community.

This submission will address some of the information requests and draft recommendations set forth in the **Land Access** and **Environmental Management** sections of the Productivity Commission's draft *Report on Mineral and Energy Resource Exploration*, in particular recommendations **4.1**; **4.3**; **6.2**; and **6.4**, as well as issues of community rights.

SUMMARY OF RECOMMENDATIONS

Recommendation 4.1 should state:
Governments should recognise that mining activities degrade environmental values in environmentally sensitive areas and should not allow exploration or mining activities in national parks, conservation areas and other environmentally sensitive areas.

Additional Recommendation
The Commission's final report should reflect the fact that the evidence shows there is no unnecessary regulatory burden on exploration projects from environmental regulation.

Recommendation 6.2 should state:
The Commonwealth should retain its powers to make approval decisions for all matters under the Environment Protection and Biodiversity Conservation Act.

The Commonwealth should ensure Federal environmental standards are met under the Environment Protection and Biodiversity Conservation Act by issuing a uniform set of national standards with which any state processes must comply in order to be accredited by the Commonwealth for assessment bilateral agreements. It should review all current and proposed bilateral assessment agreements against those standards and revoke any that do not comply until the State meets the requirements.

The Commonwealth should improve the efficiency of environmental assessment and approval processes under the Environment Protection and Biodiversity Conservation Act by establishing improved administrative arrangements with the States under assessment bilateral agreements.

Additional Recommendation

Strategic assessment should be used only under the following two conditions:

1) ***it should not replace the need for project assessment. Project assessment may be able to be minimised in cases where it is clear the full impacts have been assessed under the strategic assessment.***
2) ***Individual project assessments conducted before development commences must include assessment of changed social and environmental conditions including impacts that are new, were unknown or unclear at the time of the strategic assessment.***

Recommendation 6.4 should state:

The regulator should have power to require the explorer to conduct relevant assessments of likely impacts of full production, were a production licence granted, in order to determine whether impacts of production would be acceptable.

Where full production is unlikely to be unacceptable because, for example, it is in a sensitive environmental area or high value agricultural land, the regulator should have power to refuse an exploration licence.

Additional Recommendation

- ***Any person should have the right to object to the regulator to the grant of an exploration licence.***
- ***Any person who objected to the grant of a licence should have the right to seek merits review of that decision***

Additional Recommendation

- ***All licence applicants should be required to notify the local council, and owners and occupiers of land within 2 km of the licence area, in writing.***
- ***Government agencies should take a transparent and timely approach to providing information to the public —for example, through a practice of making information available unless it is in the public interest not to.***
- ***Government agencies should improve community access to exploration project information through their websites and offices.***

DISCUSSION

Part 4 - Land Access

Productivity Commission Draft Recommendation 4.1
Drawing on the guiding principles of the Multiple Land Use Framework endorsed by the Standing Council on Energy and Resources, Governments should, when deciding to declare a new national park or conservation reserve in recognition of its environmental and heritage value, use evidence-based analyses of the economic and social costs and benefits of alternative or shared land use, including exploration.

Governments should, where they allow for consideration of exploration activity, assess applications by explorers to access a national park or conservation reserve according to the risk and the potential impact of the specific proposed activity on the environmental and heritage values and on other users of that park or reserve.

Although we note that the Commission is not recommending exploration in national parks per se, we are concerned with the tenor of this recommendation.

The Multiple Land Use Framework (**MLUF**) should not be used as a guide for considering whether exploration or mining should be allowed in environmentally sensitive areas. The MLUF is flawed (as we have discussed elsewhere[1]), and is not designed for this purpose. The MLUF's guiding principles focus on high-level, ambiguous terms like 'coexistence' and 'multiple and sequential land use'. It assumes that economic and social benefits from mining can be maximised whilst environmental values are respected and protected. This may be a desirable goal, however there is no evidence that attaining this goal is possible in relation to mining in sensitive environmental areas. A 'multiple land use framework' that fails to consider or adopt 'mining exclusion areas' effectively prioritises mining over other land uses, including biodiversity conservation. The general thrust of the MLUF suggests that mining could be allowed to occur in almost any land-use context.[2] There is no acknowledgement that in some cases, CSG and mining will be incompatible with existing or preferred land uses, as both planning experts and natural resource management (NRM) scientists have acknowledged elsewhere.[3]

There needs to be a recognition that there are areas where two different land uses cannot co-exist, because one land use erodes the values of the other land use. Mining carries with it a raft of undesirable environmental impacts that permanently degrade the value of natural areas. National parks and conservation reserves are essential for the ongoing health of ecosystems and the provision of ecosystem services to the community. National parks and conservation areas have been protected based on a government's recognition of their extremely high environmental value. Those declarations should be respected. Exploration and mining should be permanently excluded from national parks and conservation areas.

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[1] Our concerns are set out in detail in our Submission on the *Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012* 28 February 2013 - see www.edo.org.au/

[2] See, for example, the 'desired outcome' of *Merit based land use decisions* – 'Ensure land is not arbitrarily excluded from other uses without fully understanding the consequences. Providing certainty for industry and improved community confidence in land use decisions.' See also the 'Coexistence' principle.

[3] See, for example, The Hon R. Dyer and The Hon T. Moore, *The Way Ahead for Planning in NSW: Recommendations of the NSW Planning Review*, recommendation 8 – that strategic planning should 'Identify sensitive areas containing (or likely to contain) factors that will limit or prevent development taking place, such as: [among other things] biodiversity and other ecological constraints…'. See also John Williams Scientific Services, *An analysis of coal seam gas production and natural resource management in Australia* (2012), p 106, which asks: 'Will governments establish 'no go' zones for CSG development?', and notes that in some circumstances, 'coexistence is not possible'.

Recommendation 4.1 should state:
Governments should recognise that mining activities degrade environmental values in environmentally sensitive areas and should not allow exploration or mining activities in national parks, conservation areas and other environmentally sensitive areas.

Part 6 - Environmental Management

General comments

In ANEDO's experience, statements over the last 18 months from various development proponents about excessive environmental regulatory burden are highly exaggerated.

This is particularly the case in relation to mineral and energy exploration projects. Very few exploration projects in Australia are required to undergo formal environmental impact assessment (**EIA**) at either the State or Federal level. The extent of EIA required by exploration projections is so minimal that it does not warrant mention as a non-financial barrier in this inquiry. In most States, all that is required before an exploration permit is granted is a low level consideration of environmental impacts by the relevant resource department as part of the exploration licence application process.

For example:

- In Victoria and Queensland EIA is *not required* for exploration projects.
- In Tasmania EIA is only required if the exploration activity is likely to have a significant impact on the environment, but *none have ever been conducted.*
- In NSW a low level environmental assessment (Review of Environmental Factors) is required unless the exploration will cause significant environmental impacts and then an EIS is required. As far as we are aware no EIS has ever been required for an exploration project.
- In WA EIA is only required if the exploration activity is likely to have a significant impact on the environment. *None have been required* in the last two years.
- For Commonwealth EIA under the *Environment Protection and Biodiversity Conservation Act* only exploration projects that are likely to have a significant impact on matters of national environmental significance are required to undergo assessment. Of the 76 exploration projects referred under the EPBC Act in the last two years *only 4 exploration projects required assessment*.

The following table shows the number of exploration permits granted in Australia in 2011-2013 and how many of those projects were required to undergo formal EIA. Further information and sources is in Appendix 1.

Table 1: Exploration permits and EIA in Australian Jurisdictions.[4]

Jurisdiction	**Number of exploration permits granted from January 2011 to June 2013**	**Number of EIAs required**
Victoria	110	0
New South Wales	123	0
South Australia	225	Unknown
Western Australia	3146 (Oct 2011 to March 2013)	0
Queensland	1230	2
Tasmania	Not publicly available	0
Northern Territory	Not publicly available	0
Commonwealth	N/A	4
Total	**4834**	**6**

It is clear that the "unnecessary regulatory burden" placed on exploration projects by environmental regulation is nil.

Furthermore we note that table 6.1 of the Commission's draft report contains a list of "Key State/Territory environmental protection legislation for onshore exploration". This list is not accurate and contains a number of pieces of legislation that do not apply to exploration projects. For example in Victoria the *Environmental Effects Act* and the *Flora and Fauna Guarantee Act* do not apply to exploration projects. This table should be revised and corrected or removed from the final report as it is inaccurate.

Recommendation

The Commission's final report should reflect the fact that the evidence shows there is no unnecessary regulatory burden on exploration projects from environmental regulation.

Productivity Commission Draft Recommendation 6.2

The Commonwealth should improve the efficiency of environmental assessment and approval processes under the Environment Protection and Biodiversity Conservation Act by strengthening bilateral arrangements with the states and territories for assessments and establishing bilateral agreements for the accreditation of approval processes where the state and territory processes meet appropriate standards. The necessary steps to implement this reform should be properly scoped, identified and reviewed by jurisdictions and a timetable for implementation should be agreed.

We are surprised that the Commission is considering a change to its earlier position on the retention of Commonwealth approval powers[5]. There is no evidence to support recommendation 6.2 of the Commission's draft report to transfer Federal environmental approval powers to States via approval bilateral agreements. In particular:

1) there is no duplication of Federal and State assessment processes for exploration projects.

[4] See Appendix 1 for a more detailed breakdown and full source references.

[5] Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, April 2009, p. 145

2) there is no empirical evidence of unnecessary environmental regulatory burden for *any* development as a result of concurrent Federal and State approval processes.
3) there is no evidence that the use of bilateral approval agreements would reduce time and costs associated with project assessment (indeed the evidence is to the contrary).
4) evidence shows that adoption of bilateral approval agreements would lead to a lowering of environmental standards and thus have a negative impact on the environment.

Each of these is discussed below.

No duplication of Federal and State assessment for exploration projects
As noted previously, a number of States do not require EIA for exploration activities at all, and those that do hardly ever conduct them.

Further, as Table 1 shows only four exploration projects were required to undergo EIA at the Federal level in the last two years. The data indicates that on average over 1000 exploration licences are granted across Australia each year. This means that at most, two exploration projects per year out of over 1000 are subject to concurrent Federal and State EIA. This is hardly significant. The argument about "duplication" in relation to exploration projects is therefore greatly exaggerated.

We note that in a limited number of cases an EIA is required at the State and Federal level and some procedural overlap can occur. However that can be dealt with by improving the existing *assessment* bilateral agreements and administrative procedures. Assessment bilateral agreements are discussed further below.

No evidence of unnecessary regulatory burden for any development from concurrent Federal/State assessment & no evidence that time and costs would be reduced from the use of approval agreements.

Despite the clear evidence above that State and Federal overlap is not an issue for exploration projects, we feel compelled to directly address the issue of duplication and bilateral approval agreements in the broader development context in order to dispel some of the misinformation that pervades current discourse on environmental regulation. We therefore provide the following information.

In a recent inquiry into the EPBC Act the Senate Standing Committee on Environment and Communications (**Committee**) did not support the transfer of Commonwealth approval powers to State Governments via approval bilateral agreements. The Committee's findings were based on evidence presented to it by 175 submitters including the Business Council of Australia, Minerals Council of Australia, Australian Chamber of Commerce and Industry, the Premier of Queensland and SEWPAC.

The Committee made the following statements:

- "the committee was presented with no empirical evidence to substantiate claims that Commonwealth involvement was hampering approval processes"[6]

[6] Senate Environment and Communications Legislation Committee, *Report on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, p. 26

- "The committee rejects the claims made by business interests that Commonwealth powers of approval are the cause of inefficiencies, delays, and loss of income to project proponents."[7]

The Committee also stated that there was no evidence that existing arrangements were imposing unreasonable cost on industry, or that approval bilateral agreements would improve business efficiency. The Committee strongly concluded that Federal approval powers should be retained by the Commonwealth.

The April 2012 COAG proposal to adopt bilateral approval agreements was ill-conceived and not based on proper understanding of what a transfer of approval powers to States would entail. As the Commonwealth's Department of Sustainability, Environment, Water, Population and Communities (**SEWPAC**) itself subsequently noted after it had thoroughly investigated the proposal, adoption of bilateral approval agreements would not result in any simplification of the regime and in fact would add to the complexity as each State overlaid their own approval processes onto the Federal system. On this point SEWPAC stated "…significant challenges emerged in developing approval bilateral agreements that provide consistency and certainty for business, and assurance to the community that high standards will be met and maintained. Consequently, approval bilateral agreements are not being progressed until these challenges can be met by states and territories."[8]

Evidence that bilateral approval agreements would lead to a lowering of environmental standards

In its inquiry into the EPBC Act the Committee found that the use of bilateral approval agreements would weaken environmental standards due to the inability of State governments to comply with Federal standards and the need to retain national oversight of these important functions. For example the Committee stated "international obligations compel the Commonwealth to retain its powers for approving matters of national environmental significance in order to deliver strong national coordination and control to protect Australia's biodiversity, to reduce habitat loss and land degradation and to protect the nation from biosecurity risks"[9]

The Committee also found that de-funding of environment departments by a number of State Governments meant that environmental assessments would suffer.

Moreover the Committee in its 2013 inquiry into the EPBC Act Amendment Bill introducing the new water resources trigger stated that, in relation to Commonwealth retention of approval powers that, based on the evidence supported the conclusion that "there is sufficient concern and evidence of the inadequacy of State processes to warrant the involvement of the Commonwealth Government".[10] Significantly, in response to public concern, that Bill (now passed) also removes the ability to delegate federal approval powers to the States under the new water trigger.

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[7] Senate Environment and Communications Legislation Committee, *Report on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, p. 26

[8] Senate Environment and Communications Legislation Committee, Report on *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, p. 11

[9] Senate Environment and Communications Legislation Committee, Report on *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, p. 26

[10] Senate Environment and Communications Standing Committee, Report on *Environment Protection and Biodiversity Conservation Amendment Bill 2013 [Provisions],* May 2013, p. 21.

ANEDO's own assessment of legislation and procedures in each State and Territory has revealed that no State or Territory legislation or process is commensurate with Federal requirements[11]. It would take significant legislative and procedural changes in every State and Territory for this to occur. On this basis we disagree with any statement by any State Government that their EIA system is currently ready for Federal accreditation. Our view is supported by SEWPAC's statements on the issue as noted above.

The misunderstanding surrounding "duplication"

With regard to the issue of so called "duplication" of State and Federal environmental assessments, we believe that much of the discussion about duplication reflects a misunderstanding of the State/Federal situation. Contrary to industry claims and some media reports, State and Federal environmental regulation is not duplicative; instead environmental regulation by both State and Federal government is part of the shared responsibility for the environment set up by the 1992 Inter-Governmental Agreement on the Environment. Federal and State governments have responsibility for different aspects of environmental protection.

In particular:

1) Federal regulation considers the impacts on the nationally significant environmental matters set out in the EPBC Act. A number of these matters do not come within State considerations at all.
2) Federal assessment considers those matters from the perspective of the national interest, and Australia's international obligations. These considerations are not part of State assessments at all.

Federal environmental regulation therefore provides a critical role in Australia's national environmental protection regime and achieving our international obligations.

The ANEDO position on "duplication" has been misrepresented in the Commission's draft report. We do not "support duplication" as the draft report states, as duplication does not exist. We support the continuation of shared responsibilities between State and Federal governments. We would like this reflected in the final report.

Assessment bilateral agreements

Each State and Territory has an assessment bilateral agreement with the Commonwealth under the EPBC Act (although the NSW agreement has lapsed and is being renewed). The best way to achieve greater efficiency in any concurrent Federal and State assessments while maintaining environmental standards is to improve the operation of assessment bilateral agreements. However, although States have been accredited by the Commonwealth, in reality a number of States processes do not meet Federal standards even for environmental assessments and should not have been accredited. Therefore action under assessment bilateral agreements should be twofold.

1) The Commonwealth should develop, consult on and issue a uniform set of national standards with which state processes must comply in order to be accredited by the Commonwealth for assessment bilateral agreements (not approval agreements). This will ensure environmental standards are not weakened for projects undergoing assessment under bilateral agreements. Any

[11] See ANEDO's submission on the Draft Environmental Standards to accredit State/Territory approval processes under the EPBC Act, November 2012.

bilateral agreement that does not meet this standard should be renegotiated to reflect this standard.

2) The Commonwealth should work with the States to improve administrative processes under assessment bilateral agreements. This will lead to greater efficiency and certainty for proponents.

Recommendation 6.2 should state:

The Commonwealth should retain its powers to make approval decisions for all matters under the Environment Protection and Biodiversity Conservation Act.

The Commonwealth should ensure Federal environmental standards are met under the Environment Protection and Biodiversity Conservation Act by issuing a uniform set of national standards with which any state processes must comply in order to be accredited by the Commonwealth for assessment bilateral agreements. It should review all current and proposed bilateral assessment agreements against those standards and revoke any that do not comply until the State meets the requirements.

The Commonwealth should improve the efficiency of environmental assessment and approval processes under the Environment Protection and Biodiversity Conservation Act by establishing improved administrative arrangements with the States under assessment bilateral agreements.

Information request regarding strategic assessments

While strategic assessments can provide much needed assessment of cumulative impacts and can identify environmental issues early, we do not support the use of strategic assessments as an alternative for project by project assessment as is the case under the EPBC Act currently.

There are two key problems with strategic assessments under the EPBC Act:

1) Strategic assessments by their nature only assess high level, and largely theoretical impacts as they are not based on an assessment of specific projects, locations and impacts.
2) The approval that flows from the assessment can last for decades, allowing development to commence many years after the approval was given. By the time development commences the environmental situation may have changed dramatically. For example there may be significant new scientific knowledge about impacts or the environment, species that were not previously threatened may now be threatened, and social impacts on the community may be dramatically different, all factors which may have significantly altered the decision had it been taken at the time when the development commenced.

These problems are exemplified by the situation in Western Australia where strategic environmental assessment of planning schemes around the community of Busselton occurred some 40 years ago resulted in an exemption for the need for individual project approvals that were consistent with the original planning scheme. At the time, extensive clearing of native vegetation was approved along the coastline for housing and holiday development. Despite the fact that this area is now known to be critical habitat for the

endangered western ringtail possum, myriad developments are occurring under the original approval resulting in extensive clearing of possum habitat and high conservation value native vegetation with no ability to review or prevent those impacts. EDO NSW has previously noted other problems in relation to the strategic assessment of the Western Sydney Growth Centres.[12]

Strategic assessments are very useful for setting out at an early stage what environmental sensitivities are likely to be and whether areas should be no-go zones for development. However as occurs in other countries they should be used as the first stage of an environmental assessment process, in conjunction with project assessment, not instead of project assessment.

Recommendation

Strategic assessment should be used only under the following two conditions:

1) It should not replace the need for project assessment. Project assessment may be able to be minimised in cases where it is clear the full impacts have been assessed under the strategic assessment.

2) Individual project assessments conducted before development commences must include assessment of changed social and environmental conditions including impacts that are new, were unknown or unclear at the time of the strategic assessment.

Strategic assessment used in this manner will have many benefits for proponents, as early strategic assessment will increase certainty around which areas are prima facie suitable or unsuitable for project development. It will also allow environmental impacts to be identified and assessed early which will reduce the number and type of investigations needed at the project stage. It will benefit the broader community by providing a more orderly and planned process for landscape scale land use, including consideration of cumulative impacts.

Productivity Commission Draft Recommendation 6.4

Governments should ensure that their environment-related regulatory requirements relating to exploration:

- *are the minimum necessary to meet their policy objectives*
- *proportionate to the impacts and risks associated with the nature, scale and location of the proposed exploration activity.*

ANEDO disagrees with the intent of this recommendation. The intention at the onset of mineral exploration is that if a viable resource is found, it will be exploited. This is the expectation given to explorers when they receive an exploration permit. Exploration should not be treated as an isolated activity, rather it should be treated for what it is - the first step on the path to production.

Acknowledgement of this through regulation would entail two things:

1) The regulator should have power to require the explorer to conduct some assessment of likely impacts of full production, were a production licence granted. This allows a more holistic understanding of the activity and its impacts on the local area.

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[12] See EDO NSW *Submission on the proposed Sydney Growth Centres Strategic Assessment*, 25 June 2010 http://www.edo.org.au/edonsw/site/policy_submissions.php#4

We do not argue that every exploration project should be required to complete environmental, social and economic studies of the likely impacts of full production. However, in circumstances where the regulator is concerned that production is likely to have significant social, environmental or economic impacts the regulator should be able to consider those impacts to determine whether production and therefore exploration is appropriate and/or whether the exploration approval should be modified to take account of likely problems in production.

2) Where full production is unlikely to be acceptable because, for example, it is in a sensitive environmental area or high value agricultural land, the regulator should have power to refuse an exploration licence.

Allowing a regulator to intervene at this stage to reject clearly unacceptable projects provides more certainty to explorers and saves the exploration company from huge expenditure that is unlikely to ever be realised. It is a practical and commonsense approach. The grant of an exploration licence gives an expectation that production will be allowed. As a result there is significant pressure to grant a mining licence once significant time and funds have been spent on exploration, regardless of negative impacts. (Such pressure can be exacerbated where the licensing body and regulator is also responsible for facilitating and promoting the industry.[13])

This power is commensurate to that already provided for under some EIA regimes for development projects. For example in the Federal and Western Australian EIA regimes, the regulator can decide based on preliminary information that a proposal is unlikely to be environmentally acceptable. This saves considerable proponent expense, community angst and appropriately dampens proponent expectations. This power is reserved for projects where it is clear from the outset that they will have no possibility of being realised.

The Commission itself supports the ability of the regulator to consider issues that are only relevant to *production* in the exploration stage in draft recommendation 3.2 where it recommends that exploration licences not be given in locations where full production would be inefficient. This is the same principle we advocate here.

We do not agree that "exploration can be valuable in its own right, regardless of whether it leads to production".[14] We doubt that explorers would be of that view either. Instead in our view, exploration that results in discovery of an economically viable resource will lead to immense pressure to allow full production, regardless of any other values associated with the land.

Recommendation 6.4 should state:
The regulator should have power to require the explorer to conduct relevant assessments of likely impacts of full production, were a production licence granted, in order to determine whether impacts of production would be acceptable.

[13] See for example, NSW Ombudsman submission to the NSW Legislative Council inquiry in to the impacts of coal seam gas (2011), at http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/AD721DC3EB00C54ECA25791B00115C73.

[14] Productivity Commission draft report p192.

Where full production is unlikely to be unacceptable because, for example, it is in a sensitive environmental area or high value agricultural land, the regulator should have power to refuse an exploration licence.

Other Matters

Community rights

In the experience of EDOs, communities directly affected by exploration licences are frustrated by their lack of rights and the lack of information provided to them about exploration. As noted in our submission to this inquiry's issues paper, the key concerns raised by workshop participants are:

- Lack of notification or consultation about exploration licences (particularly coal/CSG);
- Difficulty obtaining information about exploration licences;
- Concerns about environmental, social and economic impacts associated with exploration and production, especially on water, health and property values;
- Confusion and concern about environmental assessment and development approval processes, and landholders' (often limited) ability to influence them;
- Concern about negotiating 'access arrangements', and the ability to protect properties from damage caused by mining activities.

These concerns can be distilled into two main concerns – lack of public information, and lack of rights for communities affected by exploration.

Lack of information

We are not aware of any instances of good community consultation/engagement in regards to exploration licences. This may be because we have not been informed of any, or because they do not exist.

The two main information issues in regard to exploration projects are:

- communities are not properly notified of exploration licence applications (in most cases because the legislation does not require them to be properly notified). A small advertisement in a newspaper does not constitute proper notification
- once a person is aware of an exploration licence, it is very difficult to access any information about it. This is because the relevant departments often have very poor information provision, and/or because the exploration company will not answer the communities' requests for information.

The following case studies are examples of poor community engagement. Similar stories have been repeated to us by numerous clients.

In 2012 EDO Victoria spoke at a community meeting at Modella, in Cardinia Shire, which is covered by an exploration licence for coal and coal seam gas.
In the course of the meeting we asked for a show of hands for those who had heard about the exploration licence application before it was approved. Of the 95 people in the room, not a single hand was raised. Nobody had known about it.
The application for that licence was only advertised in The Australian and the Warragul and Drouin Gazette. No other steps were taken to inform the community.[15]

A client of EDO Victoria did not know there was an application for a licence to explore for coal and coal seam gas on his land until a reporter at The Age called him for a comment.
By that time he had missed the deadline for lodging an objection to the application. He nonetheless immediately set about preparing an objection on behalf of the Mardan and Mirboo North Landcare Group, of which he is the President.
The applicant had taken no steps to notify the local community other than some advertisements in The Age and the Warragul and Drouin Gazette — neither of which are local to or widely read in the area, unlike the Mirboo North Times or Herald Sun.
The advertisements were exceptionally small and hard to read — they would not have been seen unless someone was looking for them.[16]

On several occasions, members of the community around Bunyip have tried to contact ECI International — the holder of EL 5320 which covers their land.
Despite several attempts to contact the company by phone and by email, the company has failed to respond or to provide the information requested.
Additionally, the company in question has no easily available data which is available to the community via a website. Because the company has chosen not to inform the community about its intention, this fuels community concerns.
At the time of writing [April 2012], members of that community continue to be frustrated in their attempts to speak to the company and obtain information about their plans.[17]

Recommendations for community engagement:

- **All licence applicants should be required to notify the local council, and owners and occupiers of land within 2 km of the licence area, in writing.**
- **Government agencies should take a transparent approach to providing information to the public —for example, through a practice of making information available, unless it is in the public interest not to.**
- **Government agencies should improve community access to exploration project information through their websites and offices.**

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[15] Case study taken from *EDO Victoria Reforming Mining Law in Victoria*, 24 April 2012 http://www.edovic.org.au/news/time-protect-environment-and-communities-from-fossil-fuel-mining

[16] Case study taken from *EDO Victoria Reforming Mining Law in Victoria*, 24 April 2012 http://www.edovic.org.au/news/time-protect-environment-and-communities-from-fossil-fuel-mining

[17] Case study taken from *EDO Victoria Reforming Mining Law in Victoria*, 24 April 2012 http://www.edovic.org.au/news/time-protect-environment-and-communities-from-fossil-fuel-mining

Lack of rights

Most States do not provide third party appeal rights to the community, or even to landholders directly affected by the grant of an exploration licence. Further, in most States, affected communities and landholders do not have any right to a say in how exploration and mining will be conducted. Ultimately, this is what affected communities and landholders want.

Denying affected members of the public with access to effective and meaningful appeals fails to recognise, and take account of, often substantial impacts that mining can have on a community's wellbeing. It is not just landholders who suffer from mining — the local community may also have to endure the potential air pollution, noise pollution, water pollution, heritage impacts, health risks, increased traffic, changed economy and, of course, the impacts of climate change that fossil fuel development creates.

Exploration and mining companies seek to make private profit from exploiting a public resource. It is entirely appropriate that the public in a developed democracy has a legal right to participate in this process.

Recommendations for community rights

- **Any person should have the right to object to the regulator to the grant of an exploration licence.**
- **Any person who objected to the grant of a licence should have the right to seek merits review of that decision**

Appeals

While a legal appeal may delay a process (p91), appeal rights are a valuable and legitimate part of our legal system. Appeal rights encourage good decision-making and promote government accountability. As the Commission has noted elsewhere, approval timeframes should not be the only measure of efficiency and effectiveness of a development assessment system.[18] A range of benchmarks including thorough assessment, minimised environmental impacts, genuine community engagement and accountable decision-making are also necessary, and in the public interest.

As noted above, exploration and mining companies seek to make private profit from exploiting a public resource and it is entirely legitimate that the public have a legal right to participate in this process to uphold their public and private rights. Mining companies generally have far greater appeal rights than objectors, and do not hesitate to use legal appeals if it is in their interest. There should be greater recognition of the legitimacy of the community to do the same.

Vexatious litigation

We are not sure why the Commission discusses 'vexatious litigation' in its draft report (p92). There is no evidence of vexatious litigation occurring in relation to exploration

[18] See Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1, p xxviii:

> *…a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.*

projects in Australia. As the Commission's report points out, only WA and Tasmania have merits appeals for exploration and therefore in most cases appeals are not even possible. As the Commission's report also points out, the courts have powers to dismiss vexatious litigation at the outset of the litigation; in addition, solicitors have professional obligations to the court to ensure cases brought on behalf of clients have reasonable prospects of success. In the unlikely event of vexatious litigation occurring in relation to exploration projects, these powers and duties are perfectly adequate to deal with such concerns.

For more information in relation to this submission please contact Nicola Rivers, Law Reform Director (EDO Victoria) on nicola.rivers@edo.org.au or (03) 8341 3100.

Attachment 1:
Exploration licences granted and environmental impact assessments required in Australian jurisdictions 2011 - 2013

VICTORIA

Number of Exploration Licences Granted in Vic: 2011 – 2013

Year	Number
Jan – June 2013	18
2012	44
2011	48
TOTAL	**110**

Department of Environment and Primary Industries, Vic (updated 3 June 2013)[19]

In Victoria, 92 exploration licences were granted in 2011 and 2012.
18 exploration licences were granted between January and June 2013.
No Environment Effect Statement (EES) was required for any of these projects.[20]

SOUTH AUSTRALIA

Number of Exploration Licences Granted in SA: 2011 – 2013

Year	Number
2013	
No. the Minister for Mineral Resources and Energy proposes to grant (at 27 June 2013)[21]	17
2011 - 2012	
No. granted[22]	225

Exploration Release Areas (ERAs) 2013[23]

Year	Number
Finalised	33
Gazetted for release	15
Under assessment	2
Open for application	3
TOTAL	**70**

Department for Manufacturing, Innovation, Trade, Resources and Energy, SA (June 2013).

[19] Department of Environment and Primary Industries, *Exploration Licences in Victoria* (updated 3 June 2013) <http://www.dpi.vic.gov.au/earth-resources/investment-and-trade/licences-permits/minerals-extractive-licences/exploration-licences>

[20] Department of Planning and Community Development, *Decisions on EES Referrals* (updated 28 June 2013) <http://www.dpcd.vic.gov.au/planning/environment-assessment/referrals/decisions-on-ees-referrals>

[21] Department for Manufacturing, Innovation, Trade, Resources and Energy, *Exploration Licence Applications* (updated 27 June 2013) <http://www.pir.sa.gov.au/minerals/public_notices/exploration_licence_applications>

[22] Department for Manufacturing, Innovation, Trade, Resources and Energy, *Mineral Exploration in South Australia 2011-2012* (Report Book 2012/00018, Mineral Resources Division, Department for Manufacturing, Innovation, Trade, Resources and Energy, 2012), p 7 <https://sarigbasis.pir.sa.gov.au/WebtopEw/ws/samref/sarig1/image/DDD/RB201200018.pdf>

[23] Department for Manufacturing, Innovation, Trade, Resources and Energy, *SA Earth Resources nformation Sheet M53: Mineral Exploration Release Areas (ERAs)* (Resources and Energy Group, Department for Manufacturing, Innovation, Trade, Resources and Energy, 1 July 2013) <https://sarigbasis.pir.sa.gov.au/WebtopEw/ws/samref/sarig1/image/DDD/ISM53.pdf>

In South Australia, 225 exploration licences were granted in 2011 and 2012.
The Minister proposes to grant a further 17 exploration licences in 2013 (current at 27 June 2013).
In 2013, a total of 70 Exploration Release Areas (ERAs)[24] have been finalised, released, are under assessment or are open for application.

There is no public listing about whether any of these projects required a higher-level EIA.

WESTERN AUSTRALIA

Number of Exploration Licences Granted in WA: Oct 2011 – Mar 2013

Year	Number
Exploration Licences: Minerals Sector	
2013: Q1[25]	
Tenure Applications (Exploration Licences)	
Total no. finalised	481
Refused, lapsed, rejected, withdrawn	234
Exploration & Mining Applications	
Total no. finalised	381
Refused, lapsed, rejected, withdrawn	33
2012[26]	
Tenure Applications (Exploration Licences)	
Total no. finalised	2103
Refused, lapsed, rejected, withdrawn	964
Exploration & Mining Applications	
Total no. finalised	2636
Refused, lapsed, rejected, withdrawn	251
2011: Q4[27]	
Tenure Applications (Exploration Licences)	
Total no. finalised	402
Refused, lapsed, rejected, withdrawn	13
Exploration & Mining Applications	
Total no. finalised	610
Refused, lapsed, rejected, withdrawn	59
Exploration Permits: Petroleum and Geothermal Sector	
2013: Q1[28]	
Total no. finalised	5

[24] An expired, surrendered, or cancelled mineral exploration licence (EL) area that may be released to industry as an 'exploration release area' (ERA).

[25] Department of Mines and Petroleum, *Approvals Performance Report: Quarter 1, 2013* (May 2013) <http://www.dmp.wa.gov.au/documents/Approvals_Performance_Report_1Q_2013.pdf>

[26] Department of Mines and Petroleum, *Approvals Performance Report: Quarter 1, 2012* (April 2012) <http://www.dmp.wa.gov.au/documents/121912_Approvals_Performance_Report_Q1_2012_updated_.pdf>;
Department of Mines and Petroleum, *Approvals Performance Report: Quarter 2, 2012* (July 2012) <http://www.dmp.wa.gov.au/documents/121985_Approvals_Performance_Report_2Q_2012.pdf>;
Department of Mines and Petroleum, *Approvals Performance Report: Quarter 3, 2012* (July 2012) <http://www.dmp.wa.gov.au/documents/Approvals_Performance_Report_3Q_2012.pdf>;
Department of Mines and Petroleum, *Approvals Performance Report: Quarter 4, 2012* (January 2013) <http://www.dmp.wa.gov.au/documents/Approvals_Performance_Report_4Q_2012.pdf>;

[27] Department of Mines and Petroleum, *Approvals Performance Report: Quarter 1, 2011* (January 2012) <http://www.dmp.wa.gov.au/documents/121704_Approvals_Performance_Report_Q4_2011.pdf>

[28] Above n 10.

No. refused, lapsed, rejected, withdrawn	1
2012[29]	
Total no. finalised	117
No. refused, lapsed, rejected, withdrawn	47
2011: Q4[30]	
Total no. finalised	38
No. refused, lapsed, rejected, withdrawn	22

Department of Mines and Petroleum, WA

In the Minerals Sector:

A total of 2,986 tenure applications for exploration licences were approved between October 2011 (Q4) and March 2013 (Q1).

A total of 3, 627 exploration and mining applications were approved between October 2011 (Q4) and March 2013 (Q1).

In the Petroleum and Geothermal Sector:

Between October 2011 (Q4) and March 2013 (Q1), 160 exploration permits were approved. During this time, 70 applications were either refused, lapsed, rejected or withdrawn.

No EIA was required for any of these projects.[31]

NEW SOUTH WALES

Exploration Licences Granted in NSW: 2011 – 2013

Year	Number	Conditions of title
Petroleum Exploration Licence Applications[32]		
2011		
Granted	19	-
2012		
Under Consideration	7	Conditions
Pending outcome of PSPAPP 57	6	Conditions
Granted	9	-
2013		
Under Consideration	2	Conditions
Pending outcome of PSPAPP 57	2	Conditions
Granted	2	-
TOTAL GRANTED	**30**	

Coal Exploration Licence Applications[33]

[29] Above n 11.

[30] Above n 12.

[31] Environmental Protection Authority WA, *Status of Active Formal Assessments* (current at 1 July 2013) <http://www.epa.wa.gov.au/EIA/statofactivformal/Pages/default.aspx?cat=Status%20of%20Active%20Formal%20Assessments&url=EIA/statofactivformal>

[32] Department of Trade and Investment, *Current Petroleum Exploration Licence Applications* <http://www.resources.nsw.gov.au/titles/current-coal-and-petroleum-exploration-licence-applications/current-petroleum-exploration-licence-applications>; and Department of Trade and Investment, *Activity Approvals Search: Approved Petroleum Exploration*

2012		
Under Consideration	4	Conditions
Pending outcome of PSPAPP 57	-	-
Granted	-	
2013		
Under Consideration	3	Conditions
Pending outcome of PSPAPP 57	-	-
Granted	2	Various
TOTAL GRANTED	**2**	

Department of Trade and Investment, Resources and Energy Division, NSW

Minerals Exploration Licences Approved[34]

Year	Number
2011	68
2012	16
2013	7
TOTAL	**91**

Department of Trade and Investment, Resources and Energy Division, NSW

In New South Wales, approximately 123 mineral, coal and petroleum exploration licences were granted between 2011 and 2013. This figure, however, is not an accurate reflection of the total number of exploration licences approved, as full data was not ascertainable from the department's website. There is no publicly available data on the number of exploration projects that were required to undergo an EIA, however from our own knowledge none have been required to in the past 2.5 years.

QUEENSLAND

Number of Exploration Licences Granted in QLD: Jan 2011 – May 2013

Year/Month	Number
Jan – May 2013	
TOTAL	**170**
2012	
TOTAL	**581**
2011	
TOTAL	**479**

Department of Natural Resources and Mines, QLD (June 2013) [35]

Number of mining exploration projects in QLD that have undergone an Environmental Impact Statement (EIS) since July 2011

Year	Number	Level of assessment
2011		
Approved	1	Stage 6: EIS Assessment Report
2012		

[33] Department of Trade and Investment, *Current Coal Exploration Licence Applications* <http://www.resources.nsw.gov.au/titles/current-coal-and-petroleum-exploration-licence-applications/current-coal-exploration-licence-applications>

[34] Department of Trade and Investment, *Activity Approvals Search: Approved Mineral Exploration*

[35] Department of Natural Resources and Mines, *Recent Granted Tenures: tenures granted by month* (updated 11 June 2013) <http://mines.industry.qld.gov.au/mining/recent-granted-tenures.htm>

-		
2013		
Approved	1	Stage 5: proponent responds to submissions (CSG exploration project)

Department of Environment and Heritage Protection, QLD (July 2013)[36]

Between January 2011 and May 2013, a total of 497 exploration licences were granted in Queensland. Since 2011, an additional Environmental Impact Statement (EIS) was required for only 2 of these projects.

Petroleum and geothermal exploration activities are subject to standard applications.[37] As such, they are deemed 'low-risk' activities. When an applicant can meet the eligibility criteria and all the assocaited standard conditions, there is no assessment by the Department of Environment and Heritage Protection.[38]

TASMANIA

In Tasmania it is unknown how many exploration licences have been granted since 2011. Regardless, no exploration projects have required an EIS.[39]

NORTHERN TERRITORY

In the Northern Territory, it is unknown how many exploration licences have been granted since 2011. Regardless, no exploration projects have required an EIS. [40]

[36] Department of Environment and Heritage Protection, *Current EIS Processes* (updated 3 July 2013) <http://www.ehp.qld.gov.au/management/impact-assessment/eis-processes/current.html>; Department of Environment and Heritage Protection, *Concluded, Withdrawn and Lapsed EIS Processes* (updated 3 July 2013) <http://www.ehp.qld.gov.au/management/impact-assessment/eis-processes/concluded.html>

1. [37] Department of Environment and Heritage Protection, *Project requirements for petroleum, geothermal and greenhouse gas storage activities* (updated 30 May 2013) <http://www.ehp.qld.gov.au/management/non-mining/project-requirements.html>

[38] Department of Environment and Heritage Protection, *Environmental Authorities* (updated 30 May 2013) <http://www.ehp.qld.gov.au/management/non-mining/environmental-authority.html>

[39] Environmental Protection Authority, *Completed Assessments* <http://epa.tas.gov.au/regulation/completed-assessments>; Environmental Protection Authority, *Assessments in Progress* <http://epa.tas.gov.au/regulation/assessments-in-progress>

[40]Northern Territory Environment Protection Authority, *Projects Assessed* <http://www.ntepa.nt.gov.au/environmental-assessments/assessed>; Northern Territory Environment Protection Authority, *Current Projects* <http://www.ntepa.nt.gov.au/environmental-assessments/projects-current>; Northern Territory Environment Protection Authority, *Projects on Hold* <http://www.ntepa.nt.gov.au/environmental-assessments/onhold>