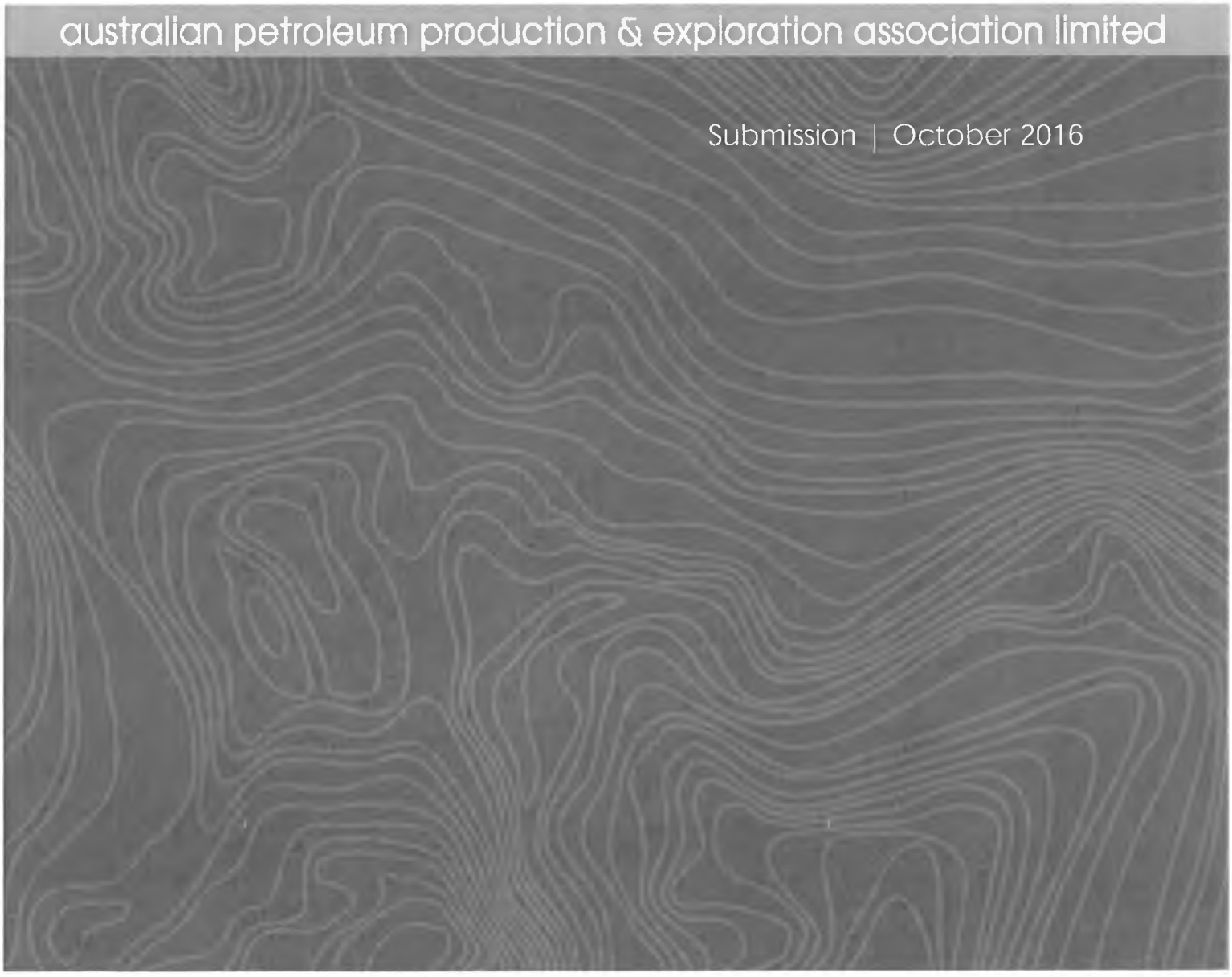
Submission No. 38
Received 07 October 2016

appea

Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill2016



the voice of Australia's oil and gas industry

Introduction

The Australian Petroleum Production and Exploration Association (**APPEA**) is the peak national body representing the upstream oil and gas exploration and production industry. APPEA has more than 80 full member companies comprising oil and gas explorers and producers in Australia.

APPEA members produce an estimated 98 per cent of the nation's petroleum. APPEA also represents more than 250 associate member companies providing goods and services to the oil and gas industry. Further information about APPEA can be found at www.appea.com.au.

The natural gas industry has invested over $70 billion in Queensland, employed over 13,000 people as at the end of 2015, supplies all of Queensland's domestic gas, and is a major exporter. The industry is a significant source of ongoing local and regional jobs and investment. In 2015, one company alone spent $4.5 billion in Queensland with 700 suppliers in eight regional local government areas.

APPEA is pleased to provide the following submission regarding the Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016 (**the Bill**). We would welcome the opportunity to present to the Committee on these matters.

LACK OF CONSULTATION AND REGULATORY IMPACT STATEMENT

APPEA is concerned that significant legislation is being introduced to Parliament without first undertaking effective stakeholder consultation or completing a Regulatory Impact Statement.

When amendments to underground water rights were first proposed in concept form in March 2016 APPEA requested a detailed Regulatory Impact Statement be prepared. Since that time there has been no further consultation on the amendments contained in the Bill which are not accompanied by a Regulatory Impact Statement.

Given these amendments may have significant impacts on major projects already approved by the Queensland Government we consider they should not be progressed until a Regulatory Impact Statement has been completed.

With respect to proposed changes to make good, APPEA supports a make good framework that enables timely resolution of agreements and ensures that impacts on landholder water bores are made good. This is clearly in the interests of industry and landholders. As such, the framework should be considered as a package and reforms should be developed through close consultation with all stakeholders.

It is therefore concerning that no consultation was undertaken prior to proposed amendments being finalised and introduced to Parliament. Taken as a whole, APPEA considers the amendments proposed are likely to increase disputes and

decrease satisfaction with the framework amongst landholders. We submit that amendments should be delayed until proper consultation occurs or alternatively be refined as proposed below.

KEY ISSUES

1. UNDERGROUND WATER RIGHTS

APPEA is concerned that financial investment decisions were made, and project approvals obtained, on the basis of the existing underground water rights regime and environmental authority process and the proposed amendments may affect project viability, costs and timeframes.

Over $70 billion in natural gas investment has been made in reliance on existing underground water rights. Underground water take is required for the production of natural gas and environmental and other impacts are considered before projects are approved. There are existing and extensive regulations and constraints placed on these rights in order to mitigate potential impacts on environmental values (eg springs) and landholder water use (via make good).

While we acknowledge the existing broad regulatory powers under the Environmental Protection Act, proposed new powers to condition and amend environmental authorities based on impacts from the exercise of underground water rights – including the past lawful exercise of underground water rights – are broad and unclear with respect to intent.

It is a major concern that there is no way to judge whether exercise of these powers would render existing operating projects uneconomic. At a minimum, the provisions duplicate existing approval requirements resulting in increased regulatory costs for no improved environmental outcome. Taken further, the amendments suggest that DEHP may seek to further constrain existing underground water rights which underpin these investments.

Given the potential impact on jobs, investment, and Queensland's reputation as an investment destination, it is essential that a full Regulatory Impact Statement is undertaken prior to amendments being progressed.

Amendment to Underground Water Rights

Section 33 of the Bill proposes to amend section 87 of Water Reform and Other Legislation Amendment Act 2014 (**WROLA Act**) (which in turn amends section 376 of the Water Act) to require that Underground Water Impact Reports (**UWIRs**) include:

(a) a description of the impacts on environmental values that have occurred or are likely to occur because of *any previous exercise of underground water rights*; and

(b) an assessment of the likely impacts on environmental values that will occur or are likely to occur because of the exercise of underground water rights over the life of the resource tenure.

The definition of 'environmental value' for section 376 of the Water Act will be the definition in the Environmental Protection Act 1994 (**EP Act**) which is very broadly defined. As a result, the requirements proposed by section 33 of the Bill will be impracticable, if not impossible, for resource tenure holders fulfil.

APPEA also questions the benefit undertaking such a task. The purpose of an UWIR is to assess the current state of underground water and assist with the prediction and management of future impacts associated with underground water extraction. However, the benefit of identifying all historical impacts on environmental values is unclear.

Further, the requirements for UWIRs proposed under section 33 of the Bill would be in addition to:

1. the existing extensive content requirements of UWIRs[1] (which already require a range of assessments, and which may be duplicated by the proposed amendments);

2. the consultation process in relation to UWIRs[2]; and

3. Section 1263 of the EP Act. Section 126 of the EP Act requires a site-specific application for CSG activities to include management criteria against which the applicant will monitor and assess the effectiveness of the management of the water including the protection of the environmental values affected by each relevant CSG activity.

Environmental authorities

Section 6 of the Bill proposes to insert a new subsection 207(1)(g) into the EP Act which provides that a condition imposed on an environmental authority (**EA**) or draft EA may relate to the exercise of underground water rights. Such a section is unnecessary given the broad power to condition EAs that is already contained in sections 203, 207(2) and 215 of the EP Act. The Explanatory Notes for the Bill

---

[1] Water Act, s376.

[2] Water Act, Chapter 3, Part 2, Division 4, Subdivision 2.

[3] Proposed section 126A (as contained in section 5 of the Bill) would impose similar requirements to section 126 on all resource projects and resource activities for which the relevant tenure is a MDL, ML or PL.

identifies that other provisions of the EP Act are already broadly drafted to allow EAs to be appropriately conditioned.

Government's intention in respect of section 6 of the Bill should be clarified. The amendment indicates that Parliament is of the view that all current and future EAs should contain conditions in relation to underground water rights. Singling out underground water rights in this way may result in the Department of Environment and Heritage Protection (**DEHP**) undertaking a wholescale review of relevant EAs.

APPEA is of the view that section 6 of the Bill should not be progressed. However, if the section is retained (and subsection 207(1)(g) and ultimately inserted in to the EP Act, it would be essential that further guidance should be provided as to how the section is to be applied and implemented. For example, existing projects should not be subject to new conditions, such as restricting the take of underground water that was not previous subject to such a constraint, merely as a result of the amendment.

Proposed solutions

- The Bill should not be passed until a full Regulatory Impact Statement has been prepared and considered.
- Section 6 of the Bill should not be progressed.
- The Bill should be amended so that it is not retrospective and does not further constrain underground water rights for existing activities.
- if the amendments proposed in section 33 of the Bill proceed, the drafting should be revised to clarify that it is only in relation to the exercise of underground water rights *by the responsible entity in relation to the relevant petroleum tenure*. The section may otherwise be interpreted to extend the requirement to the exercise of underground water rights by any person.
- DEHP should provide further guidance on how environmental authorities may be conditioned in response to identified environmental impacts.
- DEHP should provide further guidance on application requirements to ensure information already available in the Surat Basin UWIR is not duplicated at the environmental authority application stage.

2. MAKE GOOD – FREE GAS

APPEA fully supports the principle that landholders should be 'made good' if gas activity impairs the capacity of a water bore such that it can no longer be used for its authorised purpose.

However, the Bill's drafting creates introduces additional uncertainty which is counterproductive to achieving the shared goal of ensuring make good

negotiations are simple and resolved quickly. In the industry's experience extended make good negotiations are a key driver of dissatisfaction with the process.

Issues we have identified are as follows:

- Make good is required if the exercise of underground water rights has 'materially contributed to' the adverse effect: This term is unclear and is therefore likely to generate disputes. We note that at present there is no agreed methodology for assessing bores to this effect.

- The Bill gives no consideration to the possibility that new water bores may be drilled into aquifers that are known to contain free gas. Given that the cost of drilling a water bore is considerably less than the cost of making good, this creates significant potential for gaming of the make good framework.

Proposed solutions

- Drafting should be amended to ensure all key terms are clearly defined and able to be objectively determined.

- Make good should not be required for new water bores drilled into aquifers known to contain significant free gas. This could be addressed by including a qualification in proposed section 412(2A) of the Water Act.

3. MAKE GOOD – NEGOTIATION PROCESS

APPEA seeks a make good framework that clearly sets and rights and responsibilities, provides a balanced approach, and supports timely resolution of make good negotiations.

We are concerned that the Bill's proposals will not have this effect and would lead instead to extended negotiations and increased disputes. In turn, this would have the effect of undermining industry's social licence and community confidence in government. Specific issues are discussed below.

Requirement for industry to pay for independent hydrogeological advice

APPEA supports landholders having access to relevant information to support informed decision making with regard to make good negotiations.

At present the Water Act provides for up to two hydrogeological assessments of landholder water bores:

1. The tenure holder is required to undertake a Bore Assessment Report which identifies whether a bore has or is likely to have an impaired capacity.

2. Landholders can request a review by DNRM's Groundwater Investigation and Assessment Team.

In addition to these legal requirements, in some instances companies have already reimbursed landholders for the cost of separate hydrogeological advice.

However, the proposal to make tenure holders automatically liable to pay for 'hydrogeological advice' is likely to result a number of negative outcomes including:

1. Significantly increasing timeframes for completing make good agreements – there would be three competing sets of hydrogeological advice that may be inconsistent with one another.

2. Increasing the likelihood of failure to reach an agreement, necessitating court action – three sets of advice creates more scope for disagreement.

3. Encouraging legal advisors and hydrogeologists to advocate for unnecessary hydrogeological advice, given that such advice would come at no cost to the landholder and would provide a financial benefit to those advocating for the advice.

4. Low quality advice being given to landholders –there is no common professional accreditation for hydrogeologlsts as there is for other professions such as lawyers, accountants, and valuers.

To avoid these outcomes, any additional requirements for expert advice should be clearly defined and carefully designed to assist landholders in the make good process. The Bill fails in this respect and does not make clear the scope of advice to be provided and does not address accreditation requirements.

Again, APPEA supports the objective of ensuring landholders have access to appropriate advice. We submit this would be best achieved by a clearer, more rigorous process established to ensure parties providing hydrogeological advice, and undertaking bore assessments, meet the minimum qualifications detailed in the Department's Bore Assessment Guideline.

This would be further strengthened by government establishing a panel of recognised hydrogeological experts able to provide hydrogeological advice to landholders. Fees for advice should be set and scope of work specified to achieve independent review and confirmation of the findings of the bore assessments that are already undertaken.

Cooling off period

APPEA supports a cooling off period, but submit that the 40 days proposed is excessive and does not support the timely resolution of negotiations.

We consider the cooling off period should be five days post agreement as per other standard consumer contracts.

Alternative dispute resolution

APPEA does not support the proposal for industry to automatically pay for alternative dispute resolution (**ADR**) on the basis it would decrease incentives to reasonably resolve issues and reach agreement. Our position is not based on the cost to industry of this proposal.

We submit that mechanisms such as case appraisal (which industry could fund) would make the process simpler and faster, with all parties better informed. We would welcome the opportunity to discuss such an approach further.

Alternatively, the ADR process for make good should mirror the process for land access negotiations and, more broadly, the generally accepted practice for ADR - the costs of the facilitator in an ADR should be borne by the party requesting ADR.

If proposed changes proceed, statutory timeframes for completing Bore Assessment Reports and make good agreements should be extended to accommodate new requirements.

Shifting the standard of proof for make good

The bill proposes to shift the burden of proof for make good to 'likely to have been' caused by the exercise of underground water rights.

Industry has a track record of proactively meeting its make good obligations, in a number of cases going above and beyond regulatory requirements, and there appears to be little substantive justification for the proposed change.

The change is also of questionable legal effect other than to increase ambiguity in the Act, potentially making the Act unworkable:

- Under current arrangements bore assessments are required to establish whether a bore has an impaired capacity or is likely to start having an impaired capacity in the future as a result of resource activities.
- A bore has 'Impaired Capacity' if, amongst other things, 'because of the decline, the bore can no longer provide a reasonable quantity or quality of water for its authorised use or purpose'.
- If the definition is changed to 'is likely to have been' the Bore Assessment would have to determine whether the bore 'is likely to start having impaired capacity because there is a decline in water level likely to have been caused by the exercise of underground water rights'.
- The compounded 'likely to' makes the legislation significantly more ambiguous in meaning, increasing scope for disagreement and extending negotiating timeframes for make good.

APPEA requests that evidence of any substantive issue supporting the proposed changes be presented and considered as part of a stakeholder consultation process. In the absence of such evidence we do not support this change being made on the basis that it is likely to have a net-negative impact on landholders and industry.

If proposed change proceed, statutory timeframes for completing Bore Assessment Reports and make good agreements should be extended to accommodate new requirements.

4. *OTHER REFORMS PROPOSED BY INDUSTRY*

The lack of consultation on the Bill has resulted in significant missed opportunities for sensible reforms to the make good process.

We submit that amendments to the Bill should be made to address the following issues:

1. **Automatic requirement to undertake bore assessments:** At present, companies are required to undertake a bore assessment even when the company concedes that there will be a level of impact and wishes to proceed to an agreement. The Bill should be amended to allow for a company and landholder to agree that a bore assessment is not required and immediately proceed to a make good negotiation.

2. **Make good requirement for abandoned bores:** APPEA requests the Act be amended to make clear that if a bore is abandoned, unusable, or has no demonstrable capacity to produce a meaningful quantity of water (ie >0.1l/s on a continuous basis, it should be deemed to have no impaired capacity because any decline in the water level of the bore will not result in the bore no longer providing a reasonable quantity or quality of water for its authorised use or purpose. This would limit scope for make good claims in relation to unused water bores.

3. **Access to land:** There is no reciprocal obligation on the landholder to grant access to the tenure holder to complete required work where a bore has been identified as impaired. If the landholder refuses access the obligation on the tenure holder should end with the bore then being at the landholder's risk.