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19 September 2018

Dr Jennifer Buckley
Secretary Economic Policy Scrutiny Committee
GPO Box 3721
DARWIN NT 0801

(Via email: EPSC@nt.gov.au)

Dear Dr Buckley,

RE: Water Legislation Amendment Bill 2018

Thank you for your email dated 24 August 2018 inviting the Australian Petroleum Production & Exploration Association (APPEA) to provide a submission on the Water Legislation Amendment Bill 2018.

APPEA is the peak body representing Australia's oil and gas explorers and producers. Our members account for nearly all of Australia's oil and gas exploration and production. In the Northern Territory, APPEA's members have been exploring for and producing, oil and gas for decades onshore and offshore.

The oil and gas industry is a vital part of the Australian economy:

- supplying energy to 5 million households;
- supplying the fuel for gas-fired generation in the electricity market;
- supplying essential inputs to the manufacturing sector, underpinning 225,000 jobs;
- investing more than $200 billion in developing new supply for domestic and export customers;
- paying more than $9 billion in taxes and resource charges to governments;
- employing tens of thousands of Australians in highly skilled, highly paid jobs; and
- generating $25.5 billion in export earnings – adding almost 0.5% to annual GDP growth.[1]

APPEA welcomes the opportunity to comment on the Water Legislation Amendment Bill 2018. The Territory's oil and gas industry commends the decision of the NT Government to lift its moratorium on hydraulic fracturing and to encourage the industry to safely and sustainably seek to development the NT's vast onshore gas resources.

APPEA appreciates the work undertaken to date to progress policy and regulatory reforms by the end of 2018 to enable hundreds of millions of dollars of important exploration work to recommence during the 2019 dry season. It is vital that this Bill, and further legislative amendments, pass the Legislative Assembly in a timely manner to facilitate this significant private sector investment.

[1] EnergyQuest (2017) EnergyQuarterly December 2017. Access at: http://www.energyquest.com.au; Reserve Bank of Australia *Statement on Monetary Policy*, August 2017, p.33.

Detailed Comments

APPEA provides the following detailed comments on the Bill:

Topic	Comment
Criminal Proceedings	The note to recommendation 14.32 in the Hydraulic Fracturing Inquiry Final Report (Final Report) makes it clear that the recommendation was only made in relation to civil proceedings and was not intended for criminal proceedings. The Bill proposes a "reverse onus of proof" for many of the strict liability offences (which are criminal offences) in the form of an evidentiary deeming provision. However, many of the provisions relate to criminal proceedings and go beyond the terms of the recommendations in the Final Report. As the Final Report observed, the defendant should always be presumed innocent unless proven otherwise by the prosecutor beyond reasonable doubt.
Rebuttable Presumption	The wording of the "evidence" provisions do not expressly provide for the presumption to be rebutted by the defendant. For example, section 40(8) provides that *"proof of the existence of a structure or obstruction on land, or on, in or below a waterway, is evidence that the waterway was interfered with if the structure or obstruction was capable of interfering with the waterway".* At a minimum, words should be inserted which enable the accused to rebut the statutory presumption as contemplated in the Final Report.
Broad and Vague Drafting	The "evidence" provisions are insufficiently precise to provide a foundation for criminal proceedings. It is noted, for example, that the Final Report provides examples from other jurisdictions for a rebuttable presumption in circumstances where there is a locational proximity between the gas infrastructure and the alleged impact (1000 feet in one case). However, the provisions in the Bill are drafted in broad vague terms. For example: • as identified above, section 40(8) as drafted would seem to have the effect that a structure on land on, in or below a waterway is evidence that the relevant waterway has been interfered with, irrespective of distance between the structure and the impact on the waterway. This is an unreasonably broad imposition of statutory liability; and • section 59(6) provides that *"proof of the existence on land of pumping equipment or other prescribed means by which water may be taken from a bore is evidence that water was taken in contravention of this section at the time the equipment or those means are proved to have existed".* The primary offence in section 59(1) is if the person *"a) takes water from a bore; and b)*

	is not authorised under this Act to take the water." The effect of section 59(6) would seem to be that the mere presence of pumping equipment on land, is without anything more, evidence that water was taken in contravention of section 59 (ie. that water was taken and that the taking of the water was not authorised under the Act). When this is coupled with no express right to rebut the presumption, the provision would seem to have the effect that merely putting pumping equipment on the land, even with a relevant authorisation in place, would result in a criminal breach of the Act. This is an unreasonable position. • Section 66(6) – similar comments are made in relation to this section. It is requested that these provisions be removed from the Bill.
Occupier definition	It is unclear if the definition of occupier includes all petroleum tenure holders or just the operator. This definition should be made clearer.
Joint approval holder	Similarly, it is not clear if all petroleum tenure holders need to hold the Water Act authorisation or if it is just be the operator.
Liability (general overview)	Civil offence provisions apply to 'a person', which could be operator or petroleum tenure holder or both. Criminal offence provisions apply to the *occupier* of the land. It also extends to executive officers of the *occupier*. As noted above, the definition of occupier is important. Related to the above comments, Industry needs clarity on the liability scenario where the *occupie*r is the petroleum tenure holders and the Water Act authorisation holder is only one of the tenure holders or the operator. The Act imposes strict liability for offences. It also sets out how the defendant can defend any prosecution; took reasonable steps and exercised due diligence. The department can claim an offence easily and it will be up to the defendant to discharge the burden of proof. Therefore, the elements of the offence should be more clearly articulated than they currently are in the proposed amendments.
Absolute liability	The proposed amendments insert a new section placing absolute criminal liability on an executive officer in some circumstances where the company commits an offence. This is serious and it is important that the offence under the proposed amendments is drafted very clearly and is not vague nor uncertain. An example of absolute liability applying is the amended section 40; if a person intentionally engages in conduct that interferes with a waterway, without authorisation, and was reckless in relation to the result. The language needs to be certain. "What is the 'result'?" "What is the

	definition of 'reckless'?" The elements of the offence need to be very clearly stated.
Third party interference	The proposed amendments include offences in respect of adverse impact on third parties; see sections 98 and 99. These sections have been very broadly drafted given that strict liability applies. For example, s98 requires intentional conduct (which would capture day-to-day petroleum activities) that diminish benefits derived from works. There is no guidance or threshold on what "diminish" means. This section could capture negligible impacts, even perceived impacts, from petroleum activities. There is no requirement that that diminishment must have occurred – it could be future diminishment. Section 99 suffers similar issues with: "reckless"; "materially diminish"; and "enjoyment". As noted above, the elements of the offence need to be very clearly stated.

APPEA supports the passage of the Bill through the Legislative Assembly with the above amendments and trusts that the above comments assist the Committee in this regard. Please contact Mr Adam Welch on 08 9426 7205 or awelch@appea.com.au should the Committee wish to discuss any aspects of APPEA's submission.

Regards,

Matthew Doman
Director – South Australia & Northern Territory