australian network of environmental defender's offices

Submission on the draft Government response to the Report of the Montara Commission of Inquiry

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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.

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Executive Summary

ANEDO welcomes the opportunity to comment on the Commission of Inquiry into the Montara oil spill (**the Inquiry**) and the Commonwealth Government's draft response to that Inquiry (**the Response**). The Montara oil spill was one of the worst in Australia's history, attracting domestic and international concern as oil spilled into the ocean at a rate of 400 barrels per day for well over 2 months.[1] The Government's decision to appoint an independent commission of inquiry is a welcome recognition of the fact that environmental catastrophes like this one cannot be allowed to recur.

ANEDO strongly believes that the Government needs to strengthen the regulation of offshore petroleum installations like the Montara Wellhead Platform (**WHP**). The Montara oil spill and the recent disaster in the Gulf of Mexico have shown that it only takes one poorly operated or unsafe oil rig to create an environmental and human disaster of historic proportions. The expectations of the Australian and international public are high. If the Government is serious about preventing further irreversible environmental catastrophe and the large-scale loss of human life, significant reform is required.

In summary, ANEDO submits that:

- the creation of a single national regulator, NOPSEMA, by January 2012 is in principle a good idea;
- the current regulator, the NT DoR, should be stripped of its regulatory authority;
- the OPGGSA should be amended to include some minimum, prescriptive standards relating to well integrity;
- penalties for marine pollution should be substantially increased, and be made payable on a strict liability basis;
- as a deterrent, the Joint Authority should suspend or cancel all petroleum titles held by operators who intentionally or recklessly allow catastrophic blowouts;
- the Minister for Resources, Energy and Tourism should issue a 'show cause' notice to the operator of the Montara WHP, and cancel (or at least suspend) its permits and licences for Montara well, along with the rest of its petroleum titles;
- no new petroleum titles should be granted until the review and reform of applicable legislation is completed, and the regulatory regime is safe; and
- the OPGGSA should be amended to ensure that petroleum titles are not granted in areas that may become marine reserves.

We note that many of the recommendations made by the Inquiry and accepted by the Government are framed in general terms. We also note that the Government has committed to a broad review of all Commonwealth legislation applicable to the marine environment, to be undertaken by the Department of Resources, Energy and Tourism (**DRET**) in 2011. ANEDO is very happy to meet with DRET and discuss the detail of these reforms.

[1] Montara Commission of Inquiry, *Report of the Montara Commission of Inquiry* (2010) (**Inquiry Report**) p 26.

1. Responsible regulators

1.1 A single national regulator for well integrity, safety and environment

Recommendation 73 and Response supported in principle.

ANEDO supports in principle the creation of a single, independent, national regulator — the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) — to manage the day-to-day administration and regulation of well integrity, safety, and environmental plans in Commonwealth marine areas.[2] Combining these three elements of offshore petroleum regulation is a welcome recognition that, in the Government's own words, "[t]here is a fundamental connection between the integrity of structures, the safety of people, and protection of the environment."[3]

It should also bring more probity and integrity to offshore petroleum regulation. Separating the responsibility for regulating well integrity, safety and environment from the responsibility for encouraging and facilitating the development of offshore petroleum reserves should remove the damaging conflict of interest which has undermined effective regulation in this area for some time. By ensuring that NOPSEMA is independent from the economic regulator, from DRET, and from the Minister, this reform should engender more rigorous and effective regulation. It is consistent with the recommendations of the Productivity Commission, and with regulatory best practice.[4]

However, an important exception must be made to the separation of titles management and safety, well integrity and environmental regulation, to allow NOPSEMA to impose conditions upon a petroleum title, or refuse to grant unsafe petroleum titles altogether. One of the benefits of taking responsibility for well integrity, safety and environmental regulation out of DRET is that it allows DRET to focus on industry promotion and resource development. It would therefore be concerning if DRET — with its renewed focus on generating resource revenue — were solely responsible for refusing permits or imposing conditions on environmental or safety grounds. The relevant legislative amendments should make it clear that, although the Joint Authority has responsibility for awarding permits, it *must* take the advice of NOPSEMA on refusing or imposing conditions on petroleum titles.

1.2 Removing NT DoR as Designated Authority

Recommendation 76 supported; Response opposed.

There is a need for transitional measures before NOPSEMA is established on 1 January 2012. ANEDO notes the findings of the Inquiry that the Director of Energy in the Northern Territory Department of Resources (**NT DoR**) (the Designated Authority for the Ashore and Cartier Islands marine territory in which the Montara WHP resides) failed to discharge its regulatory responsibilities. The Commission found that the NT DoR erred in approving the Montara well drilling program,[5] failed to monitor the

[2] Inquiry Report recommendations 73.
[3] Australian Government, *Draft Government Response to the Report of the Montara Commission of Inquiry* (2010) (**Response**) p 2.
[4] Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009).
[5] Inquiry Report 213.

operator's activities properly or at all,[6] and was not adequately resourced to discharge its functions.[7]

These are systemic problems which will only be fixed over a long period of time. That being so, ANEDO submits that the Government should adopt the Inquiry's recommendation that NT DoR be stripped of its regulatory responsibilities as the Designated Authority for the Ashmore and Cartier Islands territory.[8] We recognise that the Government and NT DoR have taken steps to address these problems.[9] However, until these problems are actually fixed — particularly the lack of resources identified by the Inquiry — the National Offshore Petroleum Safety Authority (**NOPSA**) (and ultimately NOPSEMA) should assume regulatory responsibility.

2. Regulatory regime

The Response recognised that, "the cause of the Montara incident was not a lack of industry-accepted procedures, standards and operating manuals, but failure to follow them."[10] This is tantamount to an admission that the Montara disaster was caused by regulatory failure: the operator knew what it had to do, and was able to do it, but was not compelled by strong and effective laws and regulators to comply. It is therefore important that the offshore petroleum regulatory regime be significantly strengthened.

2.1 Prescriptive minimum standards for well integrity

Recommendations 64 and 66 supported; Response supported in part.

ANEDO supports the Inquiry's recommendation that, although the objective-based approach to offshore petroleum regulation has its merits, in some areas (especially relating to well integrity) the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGSA**) needs to include prescriptive minimum standards.[11] This is especially the case for well integrity standards. We therefore welcome the Government's commitment to consider if elements of the previous legislation *Schedule of Specific Requirements as to Offshore Petroleum Exploration and Production* should be incorporated into the *Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004*.[12]

ANEDO accepts the point made in the Response, that "[p]rescriptive based regulation focuses on minimum compliance, requires frequent amendment and relies heavily on the ability of legislative drafters to understand and anticipate the risks and operational environment of the industry."[13] However, it is also the case that objective-based regulation can tend to lapse into self-regulation. This type of regulation places the onus on regulators to accurately identify risks and assess their reduction and management. It can become very weak if the regulator lacks resources, lacks expertise, or becomes too close to those it regulates.

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[6] Inquiry Report 214.
[7] Inquiry Report 217.
[8] Inquiry Report, recommendation 76.
[9] Response p 48.
[10] Response p 49.
[11] Inquiry Report recommendation 66.
[12] Response pp 42-3.
[13] Response p 43.

Prescriptive minimum standards can complement an objective-based regime. They can augment the focus on flexibility and outcomes by providing a 'backstop' — a minimum level of well integrity beyond which no rigs may go. They could also help the regulator apply the objective-based approach to regulation more effectively: by providing a 'checklist' of safety features which the regulator must keep in mind, and giving shape to the all-important yet potentially amorphous concept of "good oilfield practice".

Many of the specific measures recommended in Chapter 3 of the Inquiry Report could have prevented the Montara disaster if they had been mandatory, legislative minimum standards which neither the operator nor the regulator could ignore. If the Government is serious about stopping oil spills, it is not enough to say that these measures are "accepted industry practice" and assume that operators will do the right thing (see, for example, pages 17, 25, 26, 29, 36 of the Response). This point was made by the Inquiry, and is borne out by the Montara oil spill itself.[14] Likewise, Government cannot shirk its responsibility to protect the public from dangerous blowouts by saying that these measures are "an industry operational matter" (see, for example, pages 20, 22, 28, 29, 33, 37, 38, 39 of the Response). ANEDO submits that preventing catastrophic oil spills which endanger the environment and human life falls well within the Government's regulatory responsibilities, whether it is an "industry operational matter" or not.

2.2 Penalties for pollution of Commonwealth waters

Recommendations 71 and 95 and Response strongly supported.

ANEDO strongly supports the Government's commitment to consider improving the penalties for pollution of Commonwealth waters from oil rigs.[15] ANEDO submits that strong new penalties for polluting the marine environment are required. There are a number of ways that these could be implemented: as new offences, through amendments to strengthen existing penalties, as conditions or deemed conditions of approvals under the EPBC Act, or through a combination of all of these measures. The important thing is that any reform:

- make it an offence to pollute the Commonwealth marine environment;
- impose absolutely liability; and
- impose high penalties, commensurate to the scale of the damage done.

The current regulatory regime does not include adequate offences for polluting the Commonwealth marine environment. The EPBC Act does not include any offences for polluting the marine environment *per se* — it only imposes penalties for failing to obtain approvals,[16] and breaching conditions of those approvals.[17] The OPGGSA includes an offence for failing to prevent the escape of petroleum, and failing to act in a "proper and workmanlike manner and in accordance with good oilfield practice."[18] However, the penalty for that offence is only $110,000 and it is a defence if the operator took all

[14] Inquiry Report, recommendation 64.
[15] Response p 69.
[16] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 23 makes it an offence to take an action in a Commonwealth marine area which has or is likely to have a significant impact on the Commonwealth marine environment without approval. If approval is obtained, and a 'significant impact' eventuates, this offence does not apply.
[17] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 142A.
[18] *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 569(1)

reasonable steps to do these things.[19] Other penalties imposed under the OPGGSA regulations are lower still: for example, the penalty for breaching an environment plan is $8,800.

ANEDO supports the Inquiry's recommendation that these offences operate on a no fault basis.[20] Offences for polluting the marine environment should be absolute liability offences. The defences of 'taking all reasonable steps' and 'honest and reasonable mistake of fact' should be excluded. This is consistent with comparable legislation prohibiting pollution of land.[21] If offences for pollution of land under State legislation are absolute liability, it is hard to understand why offences for marine pollution are not. Marine pollution can spread further and faster through the environment than land pollution, and can be much harder to clean up. It is also consistent with the regulatory objectives of marine pollution offences. After all, the aim is not to make operators take all reasonable steps to prevent catastrophic blowouts — it is to prevent such disasters at all costs.

ANEDO also supports the Inquiry's recommendation that the maximum penalties for breaches of the relevant legislation be substantially increased. The Inquiry heard evidence to suggest that the daily cost of running a drilling rig is in the order of $500,000 - $1,000,000.[22] In that context, a penalty of $110,000 for failing to prevent the escape of oil from a facility appears positively inconsequential. However, in an objective-based regime that places the onus of disaster prevention on operators, it is crucial that the incentives to prevent disasters are high. ANEDO therefore submits that the penalty for polluting the marine environment should be at least $5,000 per barrel of oil released. This is comparable to the penalty of $4,300 per barrel under equivalent legislation in the United States.[23] In the case of the Montara oil spill this would have worked out at about $2,000,000 per day — $150,000,000 in total.

An even more effective regulatory deterrent would be to give the Joint Authority the power to suspend or cancel all petroleum titles held by an operator who recklessly allows a catastrophic oil spill to occur. The threat of losing the opportunity to conduct offshore oil and gas production in Australia, and losing investments in existing petroleum titles, will be a far greater deterrent than a one-off fine. Of course, this is a very strong deterrent, and it should therefore be reserved for the worst offenders — those who recklessly or intentionally allow blowouts of catastrophic proportions. Further, the Minister would retain discretion to decide whether or not this penalty should be imposed. It may be that the Minister already has this power under ss 274-6 of the OPGGSA. However, in the interests of making this penalty clear and transparent, the OPGGSA should be amended to expressly include this provision.

[19] *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 569(7).
[20] Inquiry Report, recommendation 95.
[21] See, eg, *Environment Protection Act 1970* (Vic) s 45. See also *Allen v United Carpet Mills Pty Ltd* [1989] VR 323, considering the offence of 'pollution of waters' in s 39 of the *Environment Protection Act 1970* (Vic).
[22] Inquiry Report p 192.
[23] Inquiry Report p 193.

2.3 Reform to the EPBC Act

Recommendations 89, 95, 96 and Response supported. Recommendations 98 and 100 and Response supported in principle.

ANEDO supports the Inquiry's recommendations for reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).[24]

We welcome the Government's commitment to include requirements for scientific monitoring and environmental remediation as conditions of approval for offshore petroleum operations under the EPBC Act.[25] It is completely unacceptable that after the Montara blowout, arrangements for scientific monitoring were not put in place until 49 days after the response operation. The Inquiry attributes this delay to the fact that the Department of Environment, Water, Heritage and the Arts (**DEWHA**) had no legal power to compel this monitoring and remediation to occur, and had to negotiate these arrangements with the operator.

ANEDO also supports the Government's commitment to ensure that these conditions reaffirm the "polluter pays" principle and require the operator to cover the costs of this monitoring and remediation.[26] We support the introduction of conditions requiring operators to take out insurance to cover these potential costs.[27] We support the Inquiry's recommendation that the nature and extent of monitoring and remediation should be determined by environmental regulatory agencies rather than the companies involved.[28] ANEDO supports the recommendation that these conditions be imposed on approvals under both the EPBC Act and the OPGGSA.[29]

ANEDO submits that the best way to implement these conditions is to include them in the legislation as a deemed condition of approvals under the EPBC Act and OPGGSA. This will ensure consistency and transparency in the content of these conditions, ensuring public confidence in the environmental integrity of these approvals, and providing greater certainty for business. Further, the conditions should be framed in broad and general terms, to complement the more circumscribed powers to require remediation of an oil spill in Part 6.4 of the OPGGSA.

ANEDO is happy to provide further submissions or assistance in developing the detail of these recommendations.

3. Review of PTTEPAA's Permit and Licence at Montara

Recommendations 101, 102 and 103 supported. Response opposed.

The Inquiry made damning findings about the operator of the Montara WHP, PTTEP Australasia (Ashmore Cartier) Pty Ltd (**PTTEPAA**). It found that PTTEPAA "succumbed to a significant number of serious deficiencies in its approach to well control" which were "emblematic of larger systemic problems which afflicted PTTEPAA

[24] Inquiry Report recommendations 89, 95, 96, 98 (in principle), 100 (in principle).
[25] Inquiry Report , recommendations 89 & 96; Response pp 63, 70.
[26] Inquiry Report, recommendations 89 & 96; Response pp 63, 70.
[27] Inquiry Report, recommendations 89 & 96; Response pp 63, 70.
[28] Inquiry Report recommendation 95(b), Response p 69.
[29] Inquiry Report recommendation 96, Response p 70.

in the leadup to the Blowout."[30] It found that "PTTEPAA's investigations into the Blowout were manifestly deficient," and that PTTEPAA had failed to respond to the spill in an "irresponsible and inexcusable" manner.[31] It found that "PTTEPAA seriously misled NOPSA in a number of important respects (over a six month period)", and "largely adopted an argumentative and finger-pointing position".[32]

In light of these findings, ANEDO has serious concerns about the Minister's decision *not* to issue a 'show cause' notice to PTTEPAA as recommended by the Inquiry,[33] and not to suspend or cancel any of PTTEPAA's production licences.[34] The Inquiry's findings that PTTEPAA failed to meet good oilfield practice in several key respects require appropriate disciplinary action to deter potential future offenders. Allowing PTTEPAA to continue to operate at Montara and other sites after such an egregious and highly publicised failure sends entirely the wrong message to the offshore petroleum industry at large. Oilfield operators cannot be allowed to preside over environmental catastrophes like the Montara oil spill with impunity.

ANEDO therefore submits that the Minister should issue a 'show cause' notice to PTTEPAA and cancel its production licence (or at least suspend it until the requisite remedial actions have been taken). To send a strong message and deter other oilfield operators from repeating PTTEPAA's mistakes, the Minister should also cancel all other production licences which PTTEPAA holds.

4. New petroleum titles

New recommendations

The Government's acceptance of most of the Inquiry's recommendations, the steps it has already taken to reform the offshore petroleum regulatory regime, and the pending review of all Commonwealth legislation applicable to the marine environment all tacitly acknowledge that the regulatory regime is inadequate and needs reform. That being so, ANEDO submits that the Government should refrain from granting any new petroleum titles, at least until this process of review and reform has been completed.

ANEDO is particularly concerned that the Government has granted new petroleum titles since the Montara disaster,[35] and has even approved the acquisition of new petroleum titles by PTTEPAA.[36] This response is in stark contrast to that of the US Government after the Gulf of Mexico disaster, who suspended all new offshore petroleum exploration until the incident and its regulatory causes had been fully investigated.[37]

[30] Inquiry Report p 322.
[31] Inquiry Report p 327.
[32] Inquiry Report pp 340-1.
[33] Inquiry Report, recommendation 102; Response p 76.
[34] http://energy-pubs.com.au/pttep-australasia-can-continue-to-operate-its-petroleum-titles-in-australia.
[35] http://www.abc.net.au/news/stories/2011/01/17/3114848.htm.
[36] http://www.theaustralian.com.au/business/mining-energy/timor-oil-permit-given-despite-thai-companys-role-in-disaster/story-e6frg9df-1225864251293; http://www.perthnow.com.au/business/oil-permit-given-despite-disaster/story-e6frg2r3-1225864645630.
[37] http://www.doi.gov/news/pressreleases/Salazar-Calls-for-New-Safety-Measures-for-Offshore-Oil-and-Gas-Operations-Orders-Six-Month-Moratorium-on-Deepwater-Drilling.cfm; http://www.nytimes.com/2011/02/18/business/energy-environment/18oil.html?partner=rss&emc=rss.

ANEDO is deeply concerned that since the Montara disaster, new petroleum titles have been approved in areas earmarked for greater protection as marine reserves.[38] Allowing oil and gas exploration in areas that have been tentatively identified for their surpassing ecological significance demonstrates not just a cavalier disregard for the risks posed to important marine species and habitats, but also a deplorable lack of coordination between different arms of government. To do this so soon after one of the worst oil spills in Australian history is particularly ill-considered.

ANEDO therefore submits that the OPGGSA should be amended to prevent the Minister granting petroleum titles in areas which have been earmarked as potential marine reserves under the EPBC Act.[39] This could be achieved through a requirement that the Minister for Resources, Energy and Tourism must consult with the Minister for Sustainability, Environment, Water, Population and Communities before granting a new petroleum title, and must follow their advice on refusing titles in areas that may become marine protected areas.

5. Review of applicable legislation

ANEDO welcomes the Government's commitment to a broad review of all Commonwealth legislation applicable to the marine environment, to be undertaken by DRET in 2011. We consider that this review provides an opportunity to strengthen the offshore petroleum and marine environmental protection regulatory regimes in a considered and systematic way.

ANEDO would be happy to provide assistance, submissions or comment to this review. We are most happy to meet with the relevant persons to discuss.

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[38] http://futuremakers.com.au/time-to-press-the-pause-button-on-oil-and-gas/.
[39] See *Environment Protection and Biodiversity Act 1999* (Cth) Part 15, Division 4.