Environmental Defenders Office

26 March 2021

Review of the *Petroleum and Geothermal Energy Act 2000* (SA) and associated regulations- Environmental Defenders Office (EDO) supplementary submission.

1. ESD and Ministerial duties in decision making

In order that there is proper consideration of environmental factors in decision making, ecologically sustainable development (ESD) must be a key objective of the Act. Whilst the Act already makes provision for the Minister to consider the principles of ESD, through s6A this reference is indirect, not easily visible, and does not clearly and transparently demonstrate what should be the central importance of ESD to the decision-making process.

ESD principles should be incorporated where possible throughout the Act, the Regulations and relevant policies.

There are at least two possibilities for incorporating a reference to ESD in the Act.

One option is to draft an Objects section for the Act, and include a reference to ESD within the Objects. Where there is an express reference to the principles of ESD in Objects of an Act, these principles must be defined. The *Environment Protection Act 1993* (SA) sets out the Objects of that Act in section 10. One of these Objects is the promotion of the principles of ESD (sub-s 10(1)). These principles are set out in sub-s 10(1). The Act goes on to provide that the Minister, the EPA, and all other administering agencies and persons involved in the administration of the Act, must have regard to, and seek to further, the objects of the Act (sub-s10(2)).

Other Acts which refer to ecological sustainability or ESD in their Objects include: the *Planning, Development and Infrastructure Act 2016* (SA), s 12; the *Mining Act 1992* (NSW), s 3A; the *Petroleum (Onshore) Act 1991* (NSW), s 2A; the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 3; and the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009, made

T +61 8 8359 2222 W edo.org.au
E melissa.ballantyne@edo.org.au
GPO Box 170, Adelaide SA 5001
ABN: 72002 880 864

under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), which refer to the need for petroleum activities to be carried out in a manner consistent with ESD, as defined in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Alternatively there could be a statutory requirement that the decision-maker consider the principles of ESD in a revised s6A, similar to that in s 2A of the *Mineral Resources (Sustainable Development) Act 1990* (Vic). Sub-section 2A(1) of this Act, which is separate to the Objects provision, simply states that: "It is the intention of Parliament that in the administration of this Act regard should be given to the principles of sustainable development". Sub-section 2A(2) goes on to define the principles of sustainable development. This approach does not require the inclusion of a new Objects clause in the Act.

Unlike other industries, which require assessment and authorisation under the *Planning, Development and Infrastructure Act 2016* (SA) and the *Environment Protection Act 1993* (SA), petroleum and geothermal energy projects are assessed and authorised under the Act. The Minister (whose powers are delegated to the DEM-ERD) is responsible for environmental assessment and approval of activities, and for compliance and enforcement, and not the Environment Protection Authority. The Minister/DEM-ERD undertakes the role of environmental assessment, approval, and compliance and enforcement, that would otherwise be undertaken by the Planning Minister/EPA. The Act should make it absolutely clear, through an express provision, that the Minister is obliged to consider the principles of ESD in the administration of the Act, as must the Planning Minister/EPA as the regulators of other development activity in South Australia. Finally, the Act should include performance criteria on whether ESD principles are being applied, and whether objective environmental outcomes are being achieved.

2. Third party Enforcement Rights

The Issues Paper sets out proposals for improving the available compliance and enforcement mechanisms under the Act. Whilst generally supportive of these proposals the EDP also recommends expansion of enforcement under the Act beyond the current provisions. A range of environmental and other statutes across Australia allow for various degrees of public enforcement of the legislation. For example, the *Environmental Planning and Assessment Act 1979* (NSW) allows any person to take action to enforce the Act where there has been a contravention of the legislation. Section 104 of the *Environment Protection Act 1993* (SA) allows the possibility of civil enforcement and civil remedies, where the person has a 'special interest'. The *Native Vegetation Act 1991* (SA)

permits any person with an interest in land, which may be affected by a contravention of the Act, to institute enforcement proceedings. The *Planning Development and Infrastructure Act 2016* (SA) allows any member of the public to enforce a breach of the Act[i]. We recommend that the broadest possible provision be included, to allow any person to seek a court order to ensure compliance with the Act, where there has been a breach of the Act.

Arguments regarding opening the 'floodgates' to litigation, which usually form the basis for restricting public enforcement, are a fallacy. The open standing provisions of the *Environmental Planning and Assessment Act 1979* (NSW) have not led to floods of lawsuits by 'busybodies'. The prospect of financial costs, the technical evidence required, and the emotional cost mean that people do not enter litigation lightly, while the ability to enforce the Act provides a fundamental reassurance of the public right to participate in environmental protection. Alternatively, the Act could define a more limited right to enforce the Act that would at least cover members of local communities who may be affected by a breach of the Act, by defining a right to enforce the Act for those with a 'special interest'.

3. Third party Merits Appeals

There are compelling reasons for providing appeal rights to third parties in relation to approval decisions under the Act. As set out in the EDO's submission dated 24 March 2021 it is our strong view that the community should have statutory rights to ensure decisions can be scrutinized where appropriate through the legal system. Third party appeal rights in planning matters have been available in a number of states of Australia, for several decades as indicated below:

Victoria: since 1961 - Town and Country Planning Act 1961

New South Wales: since 1970 - s 342ZA Local Government Act 1919

Queensland: since 1964 (Brisbane) - s 22(8) City of Brisbane Town Planning Act 1964; since 1966 (rest of Qld) - s 33(18) Local Government Act 1936-1970

South Australia: since 1972 - Planning and Development Act

Tasmania: since at least 1974 - s 734 Local Government Act 1962

These currently exist for planning decisions made under the *Planning, Development and Infrastructure Act 2016* (SA) for projects classified as restricted[1]

Appeal rights enable the costs and benefits of proposed operations to be reviewed in a transparent manner. Such rights do not currently exist in the Act. Similar to third party enforcement rights the evidence shows that the right to appeal on the part of third parties has not opened the floodgates of litigation. The prospect of an appeal will not deter investment in quality projects namely those that meet best practice assessment.

The process for decision making under the Act should be a communicative process which embraces the public's views. Third party appeals do this by involving the public in decision making by allowing a range of views to be put forward. They provide a forum where individual rights and concerns, particularly of those who are likely to be affected, can be weighed against collective concerns. Third party appeals recognize that parties other than the Minister and the proponent have an interest in, and can make a contribution towards how a decision is made under the Act. Such appeals strongly recognised that third parties can bring detailed local knowledge, not necessarily held by the Minister or the proponent, to decision making. They ensure greater transparency of the decision making process and are a means of checking that the Minister and their delegates do not act capriciously or arbitrarily. The fact that most jurisdictions in Australia have long provided for third-party appeal rights particularly in planning decisions suggest that they are perceived to be of benefit to the community.

We strongly recommend inclusion of third party appeals and further that with respect to such appeals the rule that each party bears their own costs should apply as is generally the case in planning matters.

Please feel free to contact the writer on Melissa.ballantyne@edo.org.au with any queries.

Yours sincerely,

Environmental Defenders Office

Melissa Ballantyne

Managing Lawyer – South Australia

[1] S110(7)