Major Project Development Assessment Processes:

Submission to the *Productivity Commission* as part of the consultation process to benchmark Australia's major project development assessment processes against international best practice

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The views and opinions expressed herein are solely those of the author. They do not necessarily represent the views of the University of Queensland.

1. Background to the commissioned study

The Productivity Commission study on Major Project Development Assessment Processes (MPDAS) has been commissioned as a result of identified regulatory burdens and delays in the implementation of major projects in Australia. As noted by the Productivity Commission, major projects are subject to a wide range of regulations and development control at local, state, and/or Commonwealth Level. This regulatory system, designed to provide benefits to the community, has been identified as adding a layer of cost to project development, as well as often contributing to substantial time delays. This then leads to longer construction times, and can reduce the commercial viability of some projects.

2. Aims and scope of this submission

This submission is made in response to a request by the Productivity Commission to provide information regarding MPDAS in Australian and International jurisdictions.

The Productivity Commission notes that in undertaking a study into MPDAS, there are seven areas of focus for the Productivity Commission:

1. Examination of regulatory objectives at all levels of Australian government;
2. Examine regulatory objectives and key features of comparable international systems;
3. Identify critical elements of development assessment processes and compare to assess alternative decision making processes;
4. Examine strategic planning context for major project approvals in Australia and comparable international jurisdictions;
5. Identify best practice and against this evaluate jurisdictional approaches;
6. Assess mechanisms for 'scaling' regulatory requirements relative to project size and benefits against potential impacts; and
7. Compare efficiency and effectiveness of Australian approvals process to achieve protection of social, economic heritage, cultural and environmental aspects compared to comparable international systems.

This submission particularly focuses on area 2 (regulatory objectives and key features of comparable international systems), and area 7 (compare Australian processes with international systems).

The author has expertise in petroleum law and regulation in Norway and Australia. Therefore, in undertaking this submission there is a focus on major projects assessment and development in Norway, focusing on how projects are assessed and developed as well as an analysis of the use of state agreements in Western Australia. The analyses and examples provided in this submission focus on

petroleum project development, since the author has experience in these areas of project assessment and development.

3. Major Project Development Process and Regulatory Burden

A previous study by the Productivity Commission in 2008-9 on regulatory burden in the Australian Upstream Offshore Petroleum Sector (the Report) identified regulatory burden to be a major limiting factor in project development. The Report identified that petroleum activities are regulated by more than with more than 150 statutes governing upstream petroleum activities Commonwealth and State/NT levels.[1]

The Productivity Commission also noted that there is solid evidence that the current regulatory framework imposes a significant burden on the upstream petroleum sector. Although compliance costs are large (sometimes amounting to millions of dollars for a project), they are typically modest relative to the total project cost. Far more significant burdens include project delay due to project approvals, because they can increase project costs, reduce flexibility in responding to market conditions, impeded financing of projects, and deferred production and revenues.[2]

Most importantly, the report identified that well over 50 State, Commonwealth and Territory government agencies regulate upstream petroleum activities, incorporating the regulation of petroleum activities, and approvals.[3] This means that project approvals are taking longer than a streamlined approval process would allow, potentially diminishing the present net value of petroleum resource extraction in Australia by billions of dollars each year.[4]

4. Major Project Approvals in Norway

Major petroleum projects in Norway have occurred since the development of the giant oil field Ekofisk, which commenced in 1970. Since the development of the Norwegian ten oil commandments in 1971,[5] there has been a regulatory focus on the

[1] Australian Productivity Commission, *Review of Regulatory Burden on the Upstream (Petroleum and Gas) Sector – Research Report* (2009) http://www.pc.gov.au/projects/study/upstreampetroleum/report, VXIII.
[2] Ibid, XXIII
[3] Ibid XXIII.
[4] Ibid, XX.
[5] The Norwegian ten oil commandments were approved by the Norwegian Storting (Parliament) on 14 June 1971, and comprised the following:
1. That national supervision and control must be ensured for all operations in the Norwegian continental shelf;
2. That petroleum discoveries are exploited in a way that makes Norway as independent as possible of others for its supplies of crude oil;
3. That new industry is developed on the basis of petroleum;
4. That the development of an oil industry must take necessary account of existing industrial activities and the protection of nature and the environment;
5. That flaring of exploitable gas on the Norwegian Continental Shelf must not be accepted, except during brief periods of testing;
6. That petroleum from the Norwegian Continental Shelf must as a main rule be landed in Norway, except in those cases where socio-political considerations dictate a different solution;
7. That the State becomes involved at all appropriate levels, and contributes to a coordination of Norwegian interests in Norway's petroleum industry as well as the creation of an integrated Norwegian oil community which sets its sights both nationally and internationally;
8. That a State oil company be established which can look after the government's commercial interests and pursue appropriate collaboration with domestic and foreign oil interests;
9. That a pattern of activities is selected north of the 62nd parallel which reflects the special socio-political conditions

development of resources for the economic, social and environmental benefit of the nation. This focus is reiterated in section 1-2 of the Norwegian *Petroleum Activities Act 1996* (PAA), which states that:

> Resource management of petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole. In this regard the resource management shall provide revenues to the country and shall contribute to ensuring welfare, employment and an improved environment, as well as to the strengthening of Norwegian trade and industry and industrial development, and at the same time take due regard to regional and local policy considerations and other activities.

The regulatory implementation if this objective is stipulated in section 4-2 of the PAA, which requires that:

> Production of petroleum shall take place in such a manner that as much as possible of the petroleum in place in each individual petroleum deposit, or in several deposits in combination, will be produced. The production shall take place in accordance with prudent technical and sound economic principles and in such a manner that waste of petroleum or reservoir energy is avoided.

This means that there has been a regulatory focus on the collective good of the country when developing the public-owned petroleum resources. As such, the development of the petroleum is undertaken in a manner that benefits the country, and where companies are legally required to undertake major projects in a manner that benefits Norway.

Role of the state

In response to significant problems with project development on the Norwegian Continental Shelf (NCS), the Norwegian Government has made it its position clear regarding major project development. The Norwegian Petroleum Directorate notes that the management of Norway's petroleum resources is based on the governing principle that companies have a clear responsibility for development and operation:

> … responsibility for the successful completion of projects on the Norwegian continental shelf lies with the operators and the licensees. The authorities develop the regulatory framework, and do not participate in the development of commercial projects. It is important that this division of roles is maintained. [6]

prevailing in that part of the country; and
10. That large Norwegian petroleum discoveries could present new tasks for Norway's foreign policy.
See Bjørn Vidar Lerøen, *Drops of Black Gold: Statoil 1972-2002* (2002), 46.

[6] Minister of Petroleum and Energy, Ola Borten Moe, http://www.regjeringen.no/en/dep/oed/whats-new/news/2013/norwegian-petroleum-directorate-asked-to.html?id=717107

Project development under petroleum legislation

Under Norwegian Law, major petroleum projects are assessed and developed under the Norwegian *Petroleum Activities Act 1996* and subordinate legislation, particularly the *Petroleum Activities Regulations 1997*. Under section 4-2 of the Act requires the submission of a *Plan for Development and Operation* (PDO):

> If a licensee decides to develop a petroleum deposit, the licensee shall submit to the Ministry for approval a plan for development and operation of the petroleum deposit.
>
> The plan shall contain an account of economic aspects, resource aspects, technical, safety related, commercial and environmental aspects, as well as information as to how a facility may be decommissioned and disposed of when the petroleum activities have ceased. The plan shall also comprise information on facilities for transportation or utilisation comprised by Section 4-3. In the event that a facility is to be placed on the territory [Norwegian land], the plan shall in addition provide information about what applications for licences etc. have been submitted according to other applicable legislation.[7]

This general section provides a general legislative capacity of Norwegian Government to undertake the approval of major projects under the PDO. This means that a major project's assessment and development falls under the legislative competence of a single section – s 4-2 of the PAA.

To assist in MPDAS, the Norwegian Government has developed guidelines for a PDO – *Guidelines for plan for development and operation of a petroleum deposit (PDO) and plan for installation and operation of facilities for transport and utilisation of petroleum (PIO)* (the guidelines).[8] The guidelines integrate all aspects of a project development, including information about the installation or facility, impact assessment, how the authorities process the PDO's and requirements for documentation. This system under the PDO has been developed in consultation with the Norwegian Oil Industry Association (the equivalent of APPEA). Its role is to facilitate coordination between licensees and the regulators in the planning and decision process for the development of all petroleum projects. It is important to note that some of these projects are mega-projects, comprising investment of tens of billions of dollars.

Under the PDO, a project is divided into two phases:

1. The planning phase, defined as starting when the conceptual development phase is complete, and leads up to a decision to implement a project); and
2. The implementation phase, which runs up to the operation of the finished development.

[7] Section 4-2, Norwegian Petroleum Activities Act, 1996.
[8] These guidelines can be found at http://www.npd.no/Global/Engelsk/5-Rules-and-regulations/Guidelines/PDO-PIO-guidelines_2010.pdf

The definition and process for the assessment of major projects in clearly outlined in the Guidelines.

Where a project is a major development, the PDO will be approved at Parliamentary level rather than at Ministry (departmental) level. For example, when the development of the Ormen Lange PDO was submitted, it was considered and approved by the Norwegian Parliament (Stortinget). The approval at parliamentary process ensures transparency in the assessment and approvals process, and enables the parliament to vote as a collective to approve or reject a major project.

Third party access

As part of a major project, the Norwegian Government has the legislative capacity to order that a licensee must provide third parties access to their facilities. Such facilities may include platform, storage, accommodation, or pipeline facilities. This access will be required in order to achieve the regulatory objectives stipulated under section 1-2 and 4-1 of the PAA, including that of prudent production and benefiting Norwegian society as a whole. The requirement to allow third party access to facilities is outlined in section 4-8 of the PAA:

> The Ministry may decide that facilities comprised by Sections 4-2 and 4-3, and which are owned or used by a licensee, may be used by others, if so warranted by considerations for efficient operation or for the benefit of society, and the Ministry deems that such use would not constitute any unreasonable detriment of the licensee's own requirements or those of someone who has already been assured the right of use. Nevertheless, natural gas undertakings and eligible customers domiciled in an EEA State shall have a right of access to upstream pipeline networks, including facilities supplying technical services incidental to such access. The Ministry stipulates further rules in the form of regulations and may impose conditions and issue orders relating to such access in the individual case.
>
> Any agreement on the use of facilities comprised by Sections 4-2 and 4-3 shall be submitted to the Ministry for approval unless otherwise decided by the Ministry. The Ministry may on approving an agreement according to the first sentence, or in the event that no such agreement is reached within a reasonable period of time, as well as in the case of an order according to the first paragraph, stipulate tariffs and other conditions or subsequently alter the conditions that have been agreed, approved or stipulated, in order to ensure that implementation of projects is carried out with due regard to considerations relating to resource management and providing the owner of the facility with a reasonable profit taking into account, among other things, investments and risks.[9]

When undertaking major project assessment and development, the Norwegian Government assesses existing facilities is and infrastructure, ensuring that there is

[9] Section 4-8, Petroleum Activities Act, 1996

no duplication of facilities and that all licensees have access to appropriate infrastructure to ensure that the petroleum can be developed in a timely manner consistent with regulatory objectives.

Example of major project development and third party access to infrastructure: the Johan Sverdrup field in the North Sea

The development of petroleum resources in the North Sea has occurred for the last forty years. As such, there is an acknowledgement that the infrastructure is ageing and will need to be upgraded or removed. Most fields in the area are ending their production life, and petroleum facilities are also approaching the end of their useful life. However, in 2010-11, Lundin Petroleum and Statoil discovered a major new field (the Johan Sverdrup) in two licence areas that had been surrendered in the 1980s. This field was discovered as a result of the application of new technologies over previously explored areas. Nearby infrastructure is ageing, however without access to this infrastructure the economic viability of development of the field would be more marginal. Therefore, under the provisions of section 1-2 and 4-1 of the PAA, the Norwegian Government will prioritise the development of the field, which is expected to be a multi-billion dollar investment. As part of the development, there will be a requirement under section 4-8 of the PAA that other platform and pipeline operators will grant third party access to the operator, Statoil. This third party access is necessary to ensure that the petroleum resources can be developed in a manner that is economically viable and efficient, with minimal environmental impact.

This contrasts to CSG-LNG MPDAS in Queensland, where at present there are four separate project proponents (Queensland Curtis LNG, Gladstone LNG, Arrow LNG and Australia Pacific LNG) constructing pipelines and LNG processing facilities in Gladstone in order to process the coal seam gas originating from the central Queensland gas fields.

Single operator for multiple facilities -

In addition to the capacity under the Norwegian PDO for project development and assessment the legal right to third party access to facilities, there is also provision under the Norwegian legal framework to grant a single operator overall responsibility for not only the petroleum producing facility, but also the associated facilities, including pipelines and land based processing facilities:

> The Ministry may appoint someone to assume extended operator responsibility for the overall operation of upstream pipeline network and associated facilities, including undertake change of operator when warranted for particular reasons.
>
> The overall operation of upstream pipeline network and associated facilities shall be carried out in accordance with prudent technical and sound economic principles. Whoever has the extended operator responsibility as mentioned in the first

paragraph, shall act in a neutral and non- discriminatory manner.

The King may issue further rules relating to the responsibility as mentioned in the first and second paragraphs, including deciding that whoever has been assigned to assume this responsibility, shall also make decisions in respect of access to upstream pipeline network, and may order owners and users of upstream pipeline network and associated facilities and licensees of production licences where petroleum is produced, to adapt their activities. Such order might be given to ensure prudent resource management and efficient operation of the of upstream pipeline network in question.[10]

The example of Ormen Lange

The integration of facilities into a single major project development considerably reduces regulatory and approvals duplication.

An excellent example of this is the development of the giant *Ormen Lange* gas field in the Norwegian Sea. This mega-project was developed under a single PDO, ensuring that all necessary approvals and regulatory requirements were encapsulated together as a single project, rather than each segment of the project (i.e. gas processing facility, pipelines, and production platform). The PDO comprised two sub-projects: the subsea production facilities, and the Nyhanma gas processing facility.

The Ormen Lange PDO also contained the PIO for the pipeline of the produced gas from Ormen Lange to Nyhanma, and the Langeled pipeline from Nyhanma (Norway) to Easington in the UK.

A number of excellent resources regarding the Ormen Lange Project and how the project was developed under a single PDO are included below:

- http://www.igu.org/html/wgc2006/pdf/paper/add21361.pdf
- http://www.uio.no/studier/emner/matnat/math/MEK4450/h11/undervisningsmateriale/modul-1/2%20-%20Field%20development.pdf
- http://e-book.lib.sjtu.edu.cn/otc-2007/pdfs/otc18971.pdf
- http://www.navitas.no/site/img/366/Hydro_OrmenLange_Ulsteinvik_081105.pdf

5. Major project development and approvals in Western Australia: Use of State agreements

Overview of State agreements

An excellent example of reduction of regulatory burden in the development and assessment of major projects is the use of State agreements in Western

[10] Petroleum Activities Act 1996, section 4-9.

Australia.[11] State Agreements are contracts between the Government of Western Australia and proponents of major resource projects (both mining and petroleum, onshore and offshore). They are ratified by an Act of the State Parliament.[12] They specify the rights, obligations, terms and conditions for development of the project and establish a framework for ongoing relations and cooperation between the State and the companies developing the petroleum.[13] Rather than a regulatory tool for resource development, State Agreements are a facilitating mechanism, ensuring development of specific long-term projects through a negotiated agreement to ensure long-term certainty, land tenure and complex approvals. They are utilised to provide greater certainty to the project, security of tenure, and reduce sovereign risk for investors.[14]

When entering into a State Agreement, the Western Australian government seeks to satisfy several objectives. Primarily, the objective is to facilitate the efficient and effective development of Western Australia's petroleum resources.[15] This includes managing the development by ensuring it is consistent with state policies on issues such as land use, conservation, competition, and infrastructure.[16] However, the government also seeks to ensure that the resource development provides economic and social benefits for the Western Australian community.[17]

Western Australian State Agreements generally operate throughout the life of the project. They are statutory agreements that have been passes by the Western Australian parliament. To this end, there are provisions in the State Agreements that deal with matters such as assignment, variation of contractual provisions, and *force majeure*. Provisions are also included for the submission of additional proposals if the joint venturers wish to modify, expand or vary the project. It is important to note that only the JV parties can alter the terms of the project, since the State Agreement does not give the Western Australian government the right to alter the project proposal once it has been approved by the parliament.

Although not compulsory, there is some indication that the Australian resources industry approves of State Agreements, particularly for large projects. This is indicated by the take-up rate of Western Australian State Agreements, which have been used for the last 40 years. Currently, state agreements are utilised in over 70% of all major development projects in Western Australia, accounting for over $4 billion in processed minerals and energy production in Western Australia.[18]

The State Agreements reduce a large amount of regulatory burden for oil companies, since project approvals at state and federal level are fast tracked, as well

[11] For an excellent consideration of State agreements refer to Richard Hillman, 'The future role for state agreements in Western Australia' (2006) 25 *Australian Resources and Energy Law Journal* 293-329;
[12] Western Australia Department of Industry and Resources, *State Agreements* (2007) http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf , 1.
[13] Western Australia Department of Industry and Resources, *State Agreements* (2009) http://www.dsd.wa.gov.au/6641.aspx#6666, 1.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Chamber of Minerals and Energy, *State Agreements* (2004), 1.

as brought together under a single umbrella.[19] Once a State Agreement has been ratified by the Western Australian parliament, it is the only regulatory compliance document required for project development. This considerably reduces compliance burden and costs for oil companies, thus contributing to sustainable economic development of offshore petroleum resources. To date, State Agreements have been used in all major resources projects in Western Australia, including the North West Shelf Gas Project and the Barrow Island Gas Project, and include several international oil companies.[20]

Use of State Agreements: Buru Energy in the Canning Basin

The use of state agreements for the development of major projects can be illustrated by the State Agreement concluded between Buru Energy and the Western Australian government in November 2012 to develop the vast shale gas resources in the Canning Basin.

In November 2012 Buru Energy and the Mitsubishi Corporation (the permitholders), shale gas explorers in the Canning Basin, executed a State agreement governing the exploration and development of permit areas EP 371, 391, 431 and 436 in the Canning Basin. The State Agreement provides the permit holders with a mechanism to relieve them from their existing relinquishment obligations for 25 years, with an option to extend for a further 25 years. It also allows appraisal work for gas discoveries to be credited against ongoing work commitments in adjacent permit areas, enabling work programs to be optimized for efficient and timely development of the gas resources in the Canning Basin.

As part of the State Agreement, the WA Department of State Development will take a lead agency role in the development of infrastructure in the area, including the timely and effective approval of a domestic energy pipeline for WA, and the development and facilitation of the development of LNG facilities in the Pilbara region once sufficient domestic gas has been identified to sustain the domestic gas project. This means that all approvals, assessment and development for all aspects of the project are encapsulated under the State Agreement, similar to the development of the *Ormen Lange* major project in Norway.

Although State Agreements are common in Western Australia, the Buru energy State Agreement is unique as it focuses on all aspects of the petroleum chain, from exploration, through transportation, to processing. In doing so, the agreement links onshore Western Australian natural gas to the State's domestic gas pipeline system, transporting it for use in domestic markets or to LNG processing facilities, thereby establishing an interaction between domestic gas supply and the production of LNG for export.

As noted by Stuart Barrymore from Herbert Smith Freehills:

[19] Western Australia Department of Industry and Resources, *above n 13*, 1.

[20] This includes agreements concluded under the *Anglo-Persian Oil Company Limited's (Private) Act 1919, British Imperial Oil Company, Limited (Private) Act 1925, Commonwealth Oil Refineries Limited (Private) Act 1940 and Texas Company (Australasia) Limited (Private) Act 1928.*

> Without the leadership and assistance from the State, there was a very real risk that the gas exploration effort in the Canning Basis region would become fragmented with long lead times before adequate resources could be found, tested, aggregated, developed and sold. The novel solutions embodied in the State Agreement give the Joint Venture confidence that they can design an appropriate exploratory and evaluation work program to properly test the prospectivity and deliverability of gas resources in their Canning Basin Permits. In return, the fruits of such efforts are prioritised for and marketed to the domestic customers in Western Australia.[21]

The use of State Agreements for the development of Major Projects in Australia represents a significant tool in reducing regulatory burden and streamlining project development. They are similar to the PDO process in Norway, and expanded use of these agreements in other Australian jurisdictions should be considered.

[21] Herbert Smith Freehills, *Herbert Smith Freehils advises Buru and Mitsubishi on State Gas Agreement* (2012) http://www.herbertsmithfreehills.com/news/news20121107-hsf-advises-buru-and-mitsubishi-on-canning-basin-stage-gas-agreement