

12 January 2017

Committee Secretary  
Senate Standing Committees on Environment and Communications  
PO Box 6100  
Parliament House  
Canberra ACT 2601

By email: [ec.sen@aph.gov.au](mailto:ec.sen@aph.gov.au)

Dear Sir/Madam

### **Submission on Great Australian Bight Environment Protection Bill 2016**

This submission has been prepared by the Australian Environmental and Planning Law Committee of the Law Council's Legal Practice Section (**the Committee**).<sup>1</sup> The Committee is pleased to have the opportunity to provide feedback on the Great Australian Bight Environment Protection Bill 2016 (Cth) (**the Bill**).

The Committee acknowledges that the Great Australian Bight area is an important marine environment both as a home for a diverse range of marine life and endangered species and as an important source of marine species for commercial fishing. Protection of this important and biodiverse marine area is essential for both environmental and commercial reasons.

It is noted that there are presently two reserved areas in the Great Australian Bight area. The state of South Australia has within South Australian waters established the Far West Coast Marine Park which comprises areas previously listed under South Australian legislation as the Great Australian Bight Marine Park and the Great Australian Bight Marine Park Whale Sanctuary. The Commonwealth has a reserved area, the Great Australian Bight Commonwealth Marine Reserve which covers an area of more than 45,000 km within Commonwealth waters and the exclusive economic zone. The Commonwealth Marine reserve contains three zones and mining could conceivably be undertaken in at least part of that reserve area at times under the current arrangements. The Commonwealth Marine reserve is managed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). It is also conceivable that mining operations could take place in at least part of the South Australian Far West Coast Marine Park at certain times and subject to certain conditions.

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<sup>1</sup> The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

Section 3 of the Bill provides that the object of the legislation is to protect the Great Australian Bight environment (in particular marine life) and industries in the Great Australian Bight region (in particular, the fishing industry) from damage resulting from mining activities. It appears to have been prompted in part by recent proposals for deep sea oil drilling in the bight off the coast of South Australia. The 2010 Deepwater Horizon oil spill in the Gulf of Mexico, one of the worst environmental disasters in American history, was responsible for the destruction of a large amount of marine and wetland ecosystems and severely damaged the area's commercial fishing operations and tourism industry. The Bill is clearly designed to try and prevent such an incident occurring in Australia waters by prohibiting mining operations within the Great Australian Bight.

The waters of the Great Australian Bight and the maintenance of the pristine nature of those waters are essential for the fishing industries in both the South Australian and Western Australian economies. For example, the Status of South Australian Fisheries Report prepared by Primary Industries and Regions South Australia notes that:

*... the State's commercial fisheries contribute \$379 million (2012-13) annually to the South Australian economy in direct and indirect impacts and produce more than 44,000 tonnes of seafood for domestic and international markets. This includes more than 2000 tonnes of Rock Lobster and Abalone, most of which is exported to the major international markets of China and Hong Kong. Locally, the seafood industry is a vital contributor to the State economy, with the sector also supporting more than 3,000 jobs, the majority in regional South Australia.<sup>2</sup>*

While any incident involving an oil spill from mining operations in the Great Australian Bight might well occur in Commonwealth controlled waters, it will inevitably become an issue for the states of South Australia and Western Australia as tides and winds carry the oil into state waters and onto state shorelines. The potential for a very real environmental and economic catastrophe remains ever present while mining activities are allowed in the Great Australian Bight area. Therefore, the exclusion of mining activities in the region appears justified.

### **Is a separate statute necessary?**

In recent times in Australia, much has been made of the need to reduce the amount of regulation applying within our society. In light of this approach, a question arises as to the possibility of incorporating the essential provisions of the proposed act within an existing piece of legislation. For example, the prohibition on mining within the Great Australian Bight could be made part of the EPBC Act. This will be possible if the legislation is to apply only to the Commonwealth Marine reserve. However, if the intention of the legislation is to extend the control beyond the marine reserve then incorporating the provisions into the existing legislation may be more problematic. There are certainly precedents for the exclusion of mining operations in particular areas under Commonwealth control. For example, s 387 (1) of the EPBC Act prohibits mining operations in Kakadu National Park. Similarly, mining activities in the Antarctic Territory

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<sup>2</sup> Primary Industries and Regions South Australia, Government of South Australia, *Status of South Australian Fisheries Report*, Paper number 69 (2015) 1.

are prohibited by s 19A(1) of the *Antarctic Treaty (Environmental Protection) Act 1980* (Cth).

### **Comments on specific items within the Bill**

The Committee provides the following comments on specific items within the Bill:

1. It is not clear who the responsible Minister and authority would be for the purposes of overseeing this legislation. In particular, the Committee queries who would have responsibility for enforcing breaches of the proposed legislation. The Committee recommends that the Bill be clarified with reference to an enforcement/oversight body.
2. The Committee queries whether the definition of 'Great Australian Bight Marine Area' in s 5 is sufficiently specific. In particular, paragraph (c) of that definition might be better defined by the use of longitudinal and latitude references to the particular land points referred to in the definition.
3. Should the definition of 'mining operation' in s 5 be more in line with that in the EPBC Act<sup>3</sup> or is the context of such mining operations sufficiently different to warrant another definition? The Committee suggests that the EPBC Act definition (which appears to be broader) would be preferred.
4. The object of the Bill, s 3(b) refers to the protection of industries, but particularly the fishing industry, from damage resulting from mining activity. However, there is nothing further in the Bill relating to this objective. Is its purpose to give those persons involved in the fishing industry some form of standing? If so, for what purpose?
5. If a person does undertake mining activity contrary to the proposed prohibition, and in doing so does cause harm to the environment or fishing industries, apart from the criminal penalty there appears to be no other options available. In particular, should there be the ability to pursue civil enforcement options and seek orders for remediation or compensation from the offender? In that regard if the provisions could be included in the EPBC Act there might be a much better set of remedial measures available.
6. In the event of unlawful activity taking place the current Bill provides no powers to any enforcement agency or body to assist them with their investigations. Again there are such powers contained within the EPBC Act.
7. Query whether the penalty unit maximum of 1,000 units is adequate? That is the equivalent of \$180,000. The Committees suggest a scale of penalties which reflect the degree of harm and damage might be more appropriate with the highest level being more than \$180,000.

### **Conclusion**

The Committee can see that there is some merit in seeking to protect the waters and environment of the Great Australian Bight from oil spills which might occur as a

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<sup>3</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 355(2).

consequence of mining activity in the area. However, it is of the opinion that the Bill as presented in its current form has a number of deficiencies and uncertain elements which are outlined above. The Committee also believes that the possibility of incorporating controls over mining activity into an existing piece of legislation should be further explored. The Committee suggests that the EPBC Act is the most logical Commonwealth statute in which such controls might be included.

The Committee would welcome the opportunity to discuss the submission further. Please contact Adjunct Professor Greg McIntyre SC, Chair, Australian Environmental and Planning Law Committee at [gmcintyre@johntoohychambers.net.au](mailto:gmcintyre@johntoohychambers.net.au) in the first instance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Smithers', with a long horizontal line extending to the right from the end of the signature.

**Jonathan Smithers**  
**Chief Executive Officer**