Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011

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Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011

Date introduced: 21 September 2011

House: House of Representatives

Portfolio: Resources and Energy

Commencement: Sections 1 to 3 on Royal Assent. Schedule 1 commences the day after Royal Assent and immediately after Parts 1 and 2 of Schedule 2 of the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011, whichever is the later. However, if the National Regulator Act provisions do not commence, the provisions in this Bill do not commence at all.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011 is to amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 to enable the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) (the new regulator) to issue directions to the registered petroleum titleholder when significant offshore petroleum incidents occur within or outside the title area.

Background

For the policy background to this Bill and the additional functions and responsibilities of the Regulator NOPSEMA see the Bills Digest for the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011.¹

NOPSEMA

The Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011 has expanded the role of the National Offshore Petroleum Safety Authority (NOPSA) as the national regulator. It now includes:

not only the regulation of occupational health and safety, wells and well operations, but also structural integrity of facilities and environmental management within Commonwealth waters. The amalgamation of these functions into a new agency, the National Offshore Petroleum and Environmental Management Authority (NOPSEMA) is expected to reduce regulatory burden on industry and standardise Australia’s offshore petroleum regulation to a best practice model.

NOPSEMA once established, will have a CEO and there will be a Board. The primary function of the Board is to give advice, and make recommendations to the CEO about the operational policies and strategies to be followed by NOPSEMA in the performance of its functions. NOPSEMA continues the National Offshore Petroleum Safety Authority and the National Offshore Petroleum Safety Authority Board continues as the National Offshore Petroleum Safety and Environmental Management Authority Board.

Directions

Under new section 576B, NOPSEMA will be given the power to issue directions to registered titleholders if a significant offshore petroleum incident has occurred. The direction may require the titleholder to do a number of things within a reasonable period to prevent an escape of petroleum or to eliminate it or mitigate or manage the effects of the escape or to take remedial action to deal with the effects of the escape. The titleholder may be required to take any other action as required or not take particular action as is required by the direction. At present under the Offshore Petroleum and Greenhouse Gas Storage Act 2006, the Commonwealth Minister, Designated Authorities and the joint Authority are empowered to issue directions in relation to particular matters.

The Minister in his second reading speech noted:

In addition, NOPSEMA will have a general power to give directions to petroleum titleholders under the OPGGSA in relation to a number of matters. However, it is desirable that NOPSEMA have a specific power to issue directions in the event of a significant offshore petroleum

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2. NOPSA, A Commonwealth statutory agency, is the occupational health and safety regulator for the offshore petroleum industry.


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Basis of policy commitment

Montara Commission of Inquiry

The Montara well blowout of 21 August 2009 led the Commonwealth Government to establish a Commission of inquiry into the incident. The report of the Montara Commission of Inquiry found that the regulatory framework should provide powers to regulators to enable directions to a petroleum titleholder requiring remediation of environmental damage both within and outside the title area. In response to the June 2010 inquiry report, the Government decided to introduce a package of legislation in May 2011 which has passed both Houses of Parliament.

The existing provisions are primarily for the purposes of decommissioning and are limited to requiring action to be taken within the titleholder’s area. As can be seen in Appendix 2, the Montaro well blowout released oil into the oceans that eventually covered 90,000 square kilometres and reached the seas off Indonesia and Timor Leste. It is essential that the titleholder be able to be directed to remediate any damage to the environment outside its title area from oil discharged from its wells.

The Montara Development is owned by and operated by PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEPAA), an Australian subsidiary of PTT Exploration and Production Public Company Limited (PTTEP). It is located in the Timor Sea (690 km west of Darwin in the Northern Territory and 250 km northwest of Truscott in Western Australia) and it consists of the Montara, Skua, Swift and Swallow oil fields, located in Production Licences AC/L7 and AC/L8. It is proposed that there will be four wells in the Montara field; two in the Skua field and three in the Swift/Swallow field with the total estimated oil reserves of 37 million barrels.


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The blowout occurred on the morning of 21 August 2009 on the H1 Well in the Montara Field and all 69 personnel on the West Atlas drilling platform were safely evacuated.

Committee consideration

Senate Selection of Bills Committee

The Committee resolved at its meeting on 12 October 2011 not to refer the Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011 to a committee.9

Senate Standing Committee for the Scrutiny of Bills

The Committee drew attention to proposed section 576D and the strict liability offence in failing to comply with a direction by NOPSEMA. Section 578 of the principal Act refers to taking reasonable steps to comply which is a defence to a prosecution. However, the Committee refers to the reversal of onus of proof where section 578 provides that the defendant bears a legal burden of proof in relation to matters relevant to establishing this defence.10

The Committee in its Alert Digest notes the following:

The Explanatory Memorandum at pages 8 and 9 deals with each of these issues comprehensively. The high-risk nature of the industry, the complex and remote nature of operations, and the serious risks to human health and safety and the environment are all given emphasis. In relation to the reversal of onus of proof for establishing whether all reasonable steps to comply with a direction have been taken, the explanatory memorandum states that ‘only the defendant will have knowledge of the steps taken to comply with the direction, particularly given the remote nature of offshore petroleum operations’. It is also the case that, although the burden of proof is a legal burden, the standard of proof that must be discharged is the balance of probabilities (not beyond reasonable doubt).

In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.11

Policy position of non-government parties/independents

Position of major interest groups

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11. Ibid., pp. 22-23.

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Initially, the Western Australian Government was not supportive of the National Regulator package of Bills commenting in a submission to the Senate Economics Committee Inquiry:

Western Australia is not supportive of the legislative amendments as they do not reflect the progress made on co-location and WA’s understanding of the continuing role of the Joint Authority.\(^{12}\)

However, in talks between the Western Australian Government and the Commonwealth compromises have been reached.

Under the compromise being discussed by Mr Ferguson and Mr Moore, NOPSEMA will be based in Perth and share resources with the West Australian Department of Mines and Petroleum.\(^{13}\)

The Minister for Resources and Energy, Martin Ferguson, MP, commented after the package of Bills had passed the Senate:

Throughout this process we have been working closely with the State and Northern Territory Governments who all share the Commonwealth’s commitment to seeing that Australia’s offshore industry is world’s best when it comes to the protection of workers and the environment.

I thank the Western Australian Government and Minister Moore in particular for working constructively with the Commonwealth to reach an outcome acceptable to all parties...

The Government aims to have NOPSEMA and the National Petroleum Titles Administrator (NOPTA) operational by 1 January 2012.\(^{14}\)

### Financial implications

The Explanatory Memorandum states that there is a nil financial impact on the Australian Government budget.\(^{15}\)

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Key provisions

Schedule 1 — amendments to the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Principal Act)

Part 6.2 of the principal Act deals with directions relating to petroleum. Existing Division 2 deals with the general power to give directions by a Designated Authority. Item 10 inserts new Division 2A which deals with NOPSEMA giving directions for significant offshore petroleum incidents.

New section 576A contains definitions for proposed Division 2A. This includes a definition of significant offshore petroleum incident. Other definitions include title, related title area and related titleholder. New subsection 576A(1) defines significant offshore petroleum incident as a significant incident that may occur in operations in an offshore area related to the following:

- petroleum exploration
- petroleum recovery
- processing or storage of petroleum
- preparation of petroleum for transport
- construction or operation of a pipeline and
- decommissioning or removal of structures, equipment or other items of property that have been brought into an offshore area for or in connection with any operations mentioned above.

Power to give directions

New section 576B relates to the power given to NOPSEMA to give directions for significant offshore petroleum incidents.

New subsection 576B(1) provides that NOPSEMA may give a direction by written notice to a registered titleholder if a significant incident has occurred where an escape of petroleum has happened or might happen.

New subsection 576B(2) provides that a direction may require a registered titleholder to take any or all of the following action including:

- preventing the escape of petroleum
- eliminating the escape of petroleum
- mitigating the effects of an escape
- managing the effects of an escape or
- remedying the effects of an escape.

The titleholder is required to take any other action stated in the direction or directed not to take an action in relation to the escape of petroleum and its effects.

New subsection 576B(3) requires the titleholder to take action as the direction requires.

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New subsection 576B(4) provides that a direction may prohibit the taking of an action unconditionally or subject to conditions which may require the consent or approval of the person specified in the direction.

New subsection 576B(5) provides that a direction may require the registered titleholder to take an action (or not take an action) anywhere in the offshore area, whether in or outside the title area.

New subsection 576B(6) provides that if a registered titleholder is required to take action in a related title area, NOPSEMA must give a copy of the direction to the related titleholder as soon as practicable after the direction is given to the registered titleholder.

New subsection 576B(7) provides that NOPSEMA must not give a direction of a standing or permanent nature without the approval of the Joint Authority although the validity of the direction is not affected if there is a breach of this subsection.

Matters related to directions

New section 576C is concerned with related matters associated with the directions for significant offshore petroleum incidents. New subsection 576C(1) provides that a direction under section 576B has effect and must be complied with despite any of the following:

- any previous direction under section 576B
- any other direction under this Part (sections 574 and 574A) (Part 6.2 Directions relating to petroleum)
- anything in the regulations and
- the applied provisions.

New subsection 576C(2) provides that if a direction under section 576B is inconsistent with a direction under section 574 or 574A, then directions under 574 or 574A have no effect to the extent of the inconsistency.

16. Under the Offshore Petroleum and Greenhouse Gas Storage Act 2006, there is a joint authority for each offshore area. For example the Joint Authority for each offshore area of Western Australia would be the Commonwealth-Western Australia Offshore Petroleum Joint Authority. It would comprise the responsible state Minister and the responsible Commonwealth Minister.

17. The applied provisions in the principal Act refer to the laws of a state, Northern Territory or an external territory that apply onshore and that also apply to the offshore area—see section 80. Referred to in the Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Storage (Significant Incident Directions) Bill 2011, p. 6.

18. Section 574 is amended by the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011 (National Regulator Act) and is a general power to give directions. Section 574 will provide that NOPSEMA may by written notice give a direction to any petroleum titleholder that relates to any matter to which the regulations apply.

19. Section 574A is a new section added by the National Regulator Act and is a general power to give directions. It provides that the responsible Commonwealth Minister may give a direction in writing to a registered titleholder in
New subsection 576C(3) provides that if a direction has been given to a person under section 576B, the person remains subject to the direction even if the person stops being the registered holder of the title.

New subsection 576C(4) provides that a direction under section 576B may apply, adopt or incorporate a code of practice or standard that is in force or exists at the time when the direction takes effect and to the extent that it is relevant to the matter contained in the direction.

New subsection 576C(6) requires NOPSEMA to ensure that any code of practice or standard applied, adopted or incorporated is published on NOPSEMA’s website. However, subsection (6) does not apply if publishing the code or standard would infringe copyright (new subsection 576C(7)).

New section 576D creates an offence of strict liability for a person who is subject to a direction under section 576B and the person engages in conduct which breaches the direction. The penalty is 100 penalty units ($110 000). Note 3 to new section 576D states that it is a defence to a prosecution for an offence against this section if the defendant proves that the defendant took all reasonable steps to comply with the direction.

Concluding comments

This Bill gives the National Petroleum Regulator the power to issue directions when major offshore petroleum incidents occur. The Government has followed the recommendations of three reports:

The reports of the Montara Commission of Inquiry, the Productivity Commission and Bills and Agostini all pointed to the need for one national body to have responsibility for regulating offshore activities if we are to improve safety and mitigate the risk of major incidents in the future.

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20. Section 6.1 of the Criminal Code Act 1995 states that an offence of strict liability is an offence which means there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact is available.
21. Section 4AA, Crimes Act 1914 defines penalty unit as $110.

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