Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012

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Contents

Purpose of the Bill.................................................................2
Background .............................................................................3
Committee consideration .......................................................9
Policy position of non-government parties/independents...................9
Position of major interest groups ..............................................9
Financial implications............................................................10
Statement of Compatibility with Human Rights ................................10
Key issues and provisions.......................................................10
  Schedule 1—Monitoring and investigation powers........................10
    Part 2—Petroleum environmental inspections .........................................................15
    Part 3—Occupational Health and Safety Inspections ............................16
  Schedule 2—Offences and civil penalties ....................................18
    Civil Penalties ..................................................................18
Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012

Date introduced: 28 November 2012
House: House of Representatives
Portfolio: Resources and Energy

Commencement: Sections 1 to 3 on Royal Assent. Schedules 3 and 4, the day after Royal Assent. Schedule 1, the later of the day after Royal Assent and immediately after the commencement of Parts 2 and 3 of the Regulatory Powers (Standard Provisions) Bill 2012 (RPSP Bill). Schedule 2, the later of the day after Royal Assent and immediately after the commencement of Part 4 of the RPSP Bill. However, Schedules 1 and 2 do not commence at all if Parts 2, 3 and 4 of the RPSP Bill do not come into effect.

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/Parliamentary_Business/Bills_Legislation. 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 of the Bill

The Bill makes amendments to the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGS Act) aimed at strengthening the offshore petroleum regulatory regime with respect to compliance, safety, integrity and environmental management objectives. In particular the Bill:

- enables National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) inspectors to use the monitoring powers under Part 2 of the RPSP Bill, which, when enacted, will be the RPSP Act.¹

¹ The Regulatory Powers (Standard Provisions) Bill 2012 (RPSP Bill) is currently before Parliament. The homepage for the RPSP Bill is at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Title%3Aregulatory%20Dataset%3AbillsCurBef;rec=0;resCount=Default


³ The RPSP Bill is legislation designed to be of general application for the enforcement of regulatory regimes that other Acts can refer to and trigger. Currently, agencies with regulatory, enforcement and investigative functions may be subject to different pieces of legislation for the purposes of enforcing their different regulatory regimes. The RPSP Bill creates a framework of standard regulatory powers that would apply to regulatory schemes that trigger the provisions of the RPSP legislation when enacted. This requires amendments to current legislation such as the OPGGS Act, to remove existing regulatory powers and substitute and incorporate the standard regulatory provisions of RPSP Bill. Of course, some agencies will still require specialised powers which are not part of the standard regulatory powers proposed in the RPSP Bill. Those agencies may retain those specialised powers and may choose only to trigger particular provisions of the RPSP Bill. The RPSP will be enacted as the Regulatory Powers (Standard Provisions) Act.
• enables NOPSEMA inspectors to use the investigation powers in Part 3 of the RPSP Act to investigate compliance with all obligations of persons under the OPGGS Act and associated regulations

• makes the monitoring powers in Schedule 3 to the OPGGS Act, which currently apply only to the monitoring of compliance with OHS obligations and which allow for monitoring by inspectors without warrant, also available for the purpose of monitoring compliance with obligations of petroleum titleholders under environmental management laws\(^4\) and

• applies civil penalties in the form of financial sanctions as a supplement or alternative to the existing criminal penalties and seeks to set both penalties at an appropriate level to reflect the nature of the offshore petroleum industry as a high-hazard industry and to encourage improved compliance with the OPGGS Act.

**Background**

The need for this Bill arose as a result of the lessons learned from the 2009 oil spill caused by a blowout of the Montara Wellhead Platform (WHP). The Montara Development, owned and operated by PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEPAA), is located in the Timor Sea, 690 kilometres west of Darwin in the Northern Territory and 250 kilometres northwest of Truscott in Western Australia. On the morning of 21 August 2009, there was a blowout and oil and gas spilled from the WHP.

On 5 November 2009, Martin Ferguson, the Minister for Resources and Energy (the Minister), announced a Commission of Inquiry into the uncontrolled release of oil and gas from the WHP (the Commission of Inquiry).\(^5\) The report of the Commission of Inquiry was submitted to the Government by the Commissioner, Mr David Borthwick, on 17 June 2010 (the Inquiry Report).\(^6\)

According to the Inquiry Report, PTTEPAA considered a number of options for stopping the blowout before deciding to drill a relief well to intercept the well from which the spill emanated (the H1 Well) using the *West Triton* rig and then to ‘kill’ the well by pumping in heavy mud and plugging it with cement. The well was intercepted by the relief well on 1 November 2009 and finally ‘killed’ on 3 November 2009 which put out the fire on the Montara WHP and *West Atlas* rig.\(^7\)

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7. Ibid., p. 39.
Although all 69 personnel on the platform were safely evacuated, a considerable amount of oil was released from the blowout. Estimates vary but the Inquiry Report observed that, if the worse-case scenario used in the initial response planning by PTTEPAA of 400 barrels per day were used, then the spill would amount to 29 600 barrels or about 4736 tonnes. This would be Australia’s third largest oil spill after the Kirki (17 280 tonnes) in 1991 and the Princess Anne Marie (14 800 tonnes) in 1975. PTTEPAA advised the Commission of Inquiry that the initial release could have been as high as 1500 barrels per day. If this figure was the actual average amount of oil released into the ocean per day until the well was ‘killed’ then the spill would be the largest in Australian history at 17 760 tonnes, slightly larger than that of the Kirki which broke up off Western Australia.

While most of the oil released from the blowout remained within 35 kilometres of the Montara well head, some oil was observed some 94 kilometres off the Indonesian island of Palau Roti and in the joint Petroleum Development Area off Timor Leste. The area of ocean where oil sheen or oil patches were observed was about 90 000 square kilometres.

The National Plan to Combat Pollution of the Sea by Oil and other Noxious and Hazardous Substances (the National Plan), which is underpinned by an Inter-Governmental Agreement (IGA) between the Commonwealth, the states and the Northern Territory, provides the national framework for responding to marine pollution incidents. The Australian Maritime Safety Authority (AMSA) ‘manages the National Plan, working with other Commonwealth government agencies, state/Northern Territory (NT) governments, the shipping, oil, exploration and chemical industries, emergency services and fire brigades to maximise Australia’s marine pollution response capability’. As set out in the Inquiry Report:

In all response arrangements under the National Plan, there is both a Statutory Agency [which is the relevant government agency assigned the oversight of the response, institution of prosecutions and the recovery of clean-up costs] and a Combat Agency [which is the government agency or company assigned the operational responsibility for responding to an oil spill in accordance with the National Plan]. The IGA and National Plan allocate responsibility for these two key roles based on the circumstances of the spill, such as its source, location and scale.

When the spill occurred, PTTEPAA handed the management of oil spill response operations to AMSA, which was the Combat Agency responsible for the operational response to the oil spill. Under the National Plan, the Northern Territory Department of Resources was the Statutory Agency, due to its

8. Ibid.
12. Ibid., p. 302.
13. Ibid., p. 303.
role as the Designated Authority for the Montara Oilfield development but, according to AMSA, it played no part in the response.\textsuperscript{17}

From 5 September 2009 through 3 December 2009, two vessels were used to operate a 300 metre containment boom and skimmer around the oil well which recovered an estimated 493 000 litres of oil or oil emulsion over 35 days of operation.\textsuperscript{18} Part of the response strategy aimed to protect Ashmore Reef, Cartier Islands and the Western Australian coastline because of their significant environmental features and the fact that trajectory models showed the oil spill threatened Ashmore Reef and Cartier Islands. A total of 184 000 litres of dispersants were used on the oil spill to accelerate the weathering and breaking down of oil at sea over the period 23 August 2009 through 1 November 2009, including: Ardrox 6120; Corexit 9500 and 9527; Tergo R-40; Slickgone NS and LTSW.\textsuperscript{19}

When the Commission of Inquiry reported in June 2010, it found that the blowout occurred due to several factors, including:

- the defective installation by PTTEPAA in March 2009 of a cemented shoe in the well casing that was intended to operate as the primary barrier against a blowout\textsuperscript{20}
- failures on the part of PTTEPAA and Atlas personnel to carry out a test of the cemented casing shoe after the cement had set\textsuperscript{21}
- the failure to install a pressure containing anti-corrosion cap (PCCC) on the 13¾ inch well casing string in March 2009 to operate as a secondary barrier against a blowout\textsuperscript{22}
- the removal of a PCCC on the 9¼ inch well casing string on 20 August 2009, leaving the well without any secondary barriers against a blowout and
- if this PCCC had been re-installed, the blow-out would not have occurred.\textsuperscript{23}

On 15 September 2009 the then Department of Environment, Water, Heritage and the Arts (DEWHA), now the Department of Sustainability, Environment, Water, Population and Communities (SEWPaC), was designated the Environmental and Scientific Coordinator (ESC) under the National Plan to support the Combat Agency (AMSA) and provide advice on environmental priorities and preferred response options. DEWHA raised the need for a Scientific Monitoring program with PTTEPAA on 23 August 2009\textsuperscript{24} which agreed to the Montara Monitoring Plan\textsuperscript{25} on 9 October 2009.

\textsuperscript{17} Ibid., p. 280.
\textsuperscript{18} Ibid., p. 285.
\textsuperscript{19} Ibid., p. 283.
\textsuperscript{20} Ibid., p. 60.
\textsuperscript{21} Ibid., p. 91.
\textsuperscript{22} Ibid., p. 98.
\textsuperscript{23} Ibid., p. 110.
\textsuperscript{24} Ibid., p.24.
Questions and answers of the environmental monitoring studies are available\textsuperscript{26} on the SEWPaC website.

DEWHA commissioned a team of independent marine biologists to assess and report on the impacts of the Montara oil leak on birds, cetaceans and marine reptiles.\textsuperscript{27} An assessment was carried out between 25 September and 4 October 2009 to identify what species were in the region, what behaviour those species were exhibiting, and if the oil spill had resulted in any behavioural and physical impacts.\textsuperscript{28} The researchers considered that systematic long-term monitoring was needed to ascertain the true impacts of the oil spill on the biodiversity.\textsuperscript{29}

The Inquiry Report noted that while the blowout ‘was substantial and sustained, impacts on the Ashmore Reef National Nature Reserve, the Cartier Island Marine Reserve, or the Kimberley coast of Western Australia were largely avoided’.\textsuperscript{30} However, it also noted that it is unlikely that the actual environmental impact of the oil spill will ever be known and there was little pre or post oil spill evidence available to the Commission of Inquiry about its environmental impacts. It stated that the observed wildlife toll was only a portion of the total fatalities because dead animals may not have stayed afloat long enough to be detected in large numbers.\textsuperscript{31}

The report stated that ongoing scientific monitoring is required to understand the impact of the blowout and because the impact on ‘organisms, such as coral spawn and fish larvae, may be profound but may not become apparent for some years, if at all’.\textsuperscript{32} The Commission of Inquiry was critical of the lack of targeted monitoring of environmental impact of both oil spill and use of dispersants.\textsuperscript{33}

On 24 November 2010, the Minister presented the Inquiry report to Parliament, along with the Commonwealth’s draft response.\textsuperscript{34} In the final Government response, which was presented to Parliament on 25 May 2011, the Government accepted 90 recommendations, with two ‘accepted in

\textsuperscript{28} Ibid., pp. 286-7.
\textsuperscript{31} Ibid., p. 307.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid., p. 306.
principle’. It noted 10 recommendations and did not accept three, which it decided were technically inappropriate. 35

The core recommendations of both reports is the establishment of a single national regulator. This morning I introduced a package of amendment bills that established the National Offshore Petroleum Safety Environment Management Authority and the National Offshore Petroleum Titles Administrator. The government will also review all other Commonwealth legislation applicable to the marine and offshore petroleum environment to strengthen the marine and offshore petroleum legislative frameworks to ensure a comprehensive consistent approach to the regulation of petroleum activities in Commonwealth waters. 36

NOPSEMA was established on 1 January 2012 by the OPGGS Act, as Australia’s first national regulator for health and safety, well integrity and environmental management for offshore oil and gas operations. NOPSEMA consolidated state, territory and national regulation for health and safety, structural integrity, environmental plans and day-to-day operations associated with petroleum activities in Commonwealth waters (that is, the waters beyond three nautical miles from the territorial sea baseline, extending to the outer limits of the continental shelf). Further information about NOPSEMA can be found in the Parliamentary Library’s Bills Digest 37 for the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011.

To further implement the Government’s response to the Commission of Inquiry, the Government introduced the Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011 in September 2011; see the Bills Digest 38 for information on this Bill.

The implementation plan in the Government’s final response committed the Commonwealth to complete a review of all Commonwealth legislation applicable to the marine and offshore petroleum environment to strengthen the marine and offshore petroleum legislative frameworks, by 30 June 2012. 39 This commitment related to recommendations 2; 23-26; 28; 44; 48; 66; 68; 71; 72; 79;


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83; 88; 89; 91; 92; and 95-97 of the Inquiry Report. The legislative review was in fact an internal review, carried out by a consultant, and which to date has not been released publicly.

The September 2012 progress report of the implementation of the Inquiry recommendations states that 81 of the 92 accepted recommendations have been implemented with the rest (72; 84; 85; 86; 88; 92; 93; 94; 97; 98; 100) anticipated to be implemented by the end of 2013.\(^{40}\)

The progress report outlined the proposed changes to Commonwealth legislation arising from the completed legislative review:

- Amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGS Act) and associated Regulations to include a statutory duty requiring titleholders to stop, contain control and clean up a hydrocarbon spill; carry out appropriate monitoring; and remediate the environment, including strengthening and clarifying the ability for third parties to recover from the titleholder costs incurred by them if the titleholder breaches the duty. This enhances the existing legislative application of the ‘polluter pays’ principle (Refer Montara Commission of Inquiry (MCI) recommendation 95 and 96);

- Clarifying as appropriate in the OPGGS Act and associated Regulations directions giving powers, arrangements for recovery of costs from third parties, insurance, and requirements for environmental monitoring during and post an offshore petroleum incident;

- The introduction of a civil penalty regime to the OPGGS Act, providing the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) with a broader range of compliance and enforcement tools aimed at improving compliance outcomes (Refer MCI Recommendation 71). Specifically:
  - current criminal penalty levels under the OPGGS Act and associated Regulations will be increased, consistent with major hazard industry legislation
  - the OPGGS Act and associated regulations will be amended to introduce a range of alternative enforcement mechanisms (e.g. options will include infringement notices, enforceable undertakings, civil penalties, adverse publicity orders, injunctions, and orders for restoration, broadly consistent with those provided for in like legislative regimes, as a supplement to existing criminal penalties)
  - penalties, including custodial penalties, for occupational health and safety offences under the OPGGS Act will be harmonised with the Work Health and Safety Act 2011 (WHS Act) (Cth) or made greater, as appropriate, to reflect the greater consequences in a major hazard industry
  - the OPGGS Act will be amended to allow for cumulative penalties for appropriate strict liability offences; and
  - NOPSEMA’s inspectorate powers will be redrafted to provide greater clarity and consistency between the various powers of each category of inspector and remove

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unnecessary procedural requirements that are likely to impede NOPSEMA’s ability to effectively perform its enforcement functions.

- Amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to strengthen the legislative application of the ‘polluter pays principle’, with a focus on creating offences for causing damage to the environment in connection with the Commonwealth marine area, and strengthening remediation determination powers (Refer MCI recommendation 95 and 96).  

The Minister’s second reading speech noted several changes to the OPGGS Act proposed by the legislative review, including:

- the introduction of a civil penalty regime; increases to the current criminal penalty levels under the act to achieve consistency with compliance offences in other major hazard industry legislation; ensuring that penalties, including custodial penalties, for occupational health and safety offences under the act be harmonised with the Work Health and Safety Act 2011, or made greater as appropriate to reflect the serious consequences potentially resulting from regulatory breaches in a major hazard industry; and redrafting the National Offshore Petroleum Safety Environmental Management Authority (NOPSEMA) inspectorate powers to provide greater clarity and consistency between the various powers of each category of inspector and remove unnecessary procedural requirements that are likely to impede NOPSEMA’s ability to effectively perform its enforcement functions.

**Committee consideration**

The Senate Standing Committee for the Scrutiny of Bills reported on the Bill on 6 February 2013. The Committee’s comments can be viewed at:


**Policy position of non-government parties/independents**

No specific policy positions of non-government parties or independents have been located to date.

**Position of major interest groups**

The only policy position of major interest groups to be located is the November 2012 report of the offshore safety project, prepared for the Australian Council of Trade Unions (ACTU), the Maritime Union of Australia and the Australian Workers Union, which made twenty detailed recommendations. Recommendation one states:

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41. Ibid., pp. 2-3.

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The relevant Minister responsible for administering the OPGGS Act (the Minister) be requested to urgently convene discussions with the stakeholders (including the ACTU and offshore unions) to finalise legislative amendments and introduced into Parliament as a matter of priority.

**Financial implications**

The Explanatory Memorandum states that the Bill will have no financial impact.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Human Rights Committee comments on the Bill raised concerns in relation to the imposition of reverse onus offences and the use of civil penalties and sought clarification from the Minister about the effect of these before forming a view on whether these provisions are compatible with human rights.

**Key issues and provisions**

**Schedule 1—Monitoring and investigation powers**


*Offshore Petroleum Greenhouse Gas and Storage Act 2006* (OPPGS Act)

**NOPSEMA inspectors**

*Items 1, 2 and 5* have the effect of placing two categories of inspectors (‘petroleum project inspectors’ and ‘OHS inspectors’), into a single class called **NOPSEMA inspector** and enabling NOPSEMA inspectors to use the monitoring and investigation powers in Parts 2 and 3 of the RPSP

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44. Explanatory Memorandum, op. cit., p. 4.

45. The Statement of Compatibility with Human Rights can be found at page 5 of the Explanatory Memorandum to the Bill.


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Act\textsuperscript{47} (when enacted) to monitor and investigate compliance with all obligations of persons under the Act and associated regulations.

The offence-related search and seizure provisions in Part 4 of Schedule 3 of the OPPSG Act are repealed and replaced with equivalent powers under Part 3 of the RPSP Act (when enacted) and these powers will then apply to all investigations.

For monitoring and investigating compliance with non-OHS and non-environmental management obligations of persons under the OPGGS Act and associated regulations, NOPSEMA inspectors will have to use the powers in Parts 2 and 3 of the RPSP Act.

**Appointment of NOPSEMA inspectors**

*Proposed subsection 602(1)*, inserted by item 6, lists the classes of persons that may be appointed by the CEO as a NOPSEMA inspector (a member of staff of the NOPSEMA, an employee of the Commonwealth or a Commonwealth authority, and an employee of a state or of the Northern Territory, or of an authority of a state or of the Northern Territory). The CEO may appoint persons outside one of those classes for a specified period of time. However, the CEO must not appoint a person as a NOPSEMA inspector unless the CEO is satisfied that the person has suitable training and experience (*proposed subsection 602(3)*).

In addition to the powers and functions given by the OPSGG Act, a NOPSEMA inspector will have the powers and functions given by or under a Petroleum (Submerged Lands) Act of a state or territory (*proposed section 602(5)*).

**Directions by the CEO to NOPSEMA inspectors**

The CEO may give written directions (which must be complied with) stating conditions subject to which a NOPSEMA inspector’s powers may be exercised for the purposes of the OPSGG Act (*proposed subsection 602A(1)*). A direction which is of general application is a legislative instrument, whereas a direction that is not of general application is not a legislative instrument (*proposed subsections 602A(3) and 602A(4) respectively*).

**Listed NOPSEMA laws— meaning and significance**

*Proposed section 601* inserts a table of listed NOPSEMA laws. Listed NOPSEMA laws refers to provisions of the OPGGS Act and related regulations that are provisions subject to monitoring and provisions subject to investigation under the RPSP Act. Provisions of the RPSP Act mainly deal with monitoring and evidence gathering powers designed to determine compliance with provisions of a triggering Act or regulation. The RPSP Act will also provide for the use of civil penalties, infringement notices and so forth to enforce compliance with that Act (*clause 3, RPSP Bill*).

The Explanatory Memorandum articulates how the two Bills dovetail:

\textsuperscript{47} See footnotes 1 and 3 for information on the RPSP Bill.
In order for the Regulatory Powers Act provisions to operate as designed, it is also necessary that the applying [OPGGS] Act specify a number of matters for the purposes of that application. These include the specification of ‘provisions subject to monitoring’ and ‘provisions subject to investigation’ – see sections 9 and 39, respectively of the Regulatory Powers (Standard Provisions) Act 2012.\(^\text{48}\)

**Listed NOPSEMA laws—monitoring powers (general)**

By providing that the **listed NOPSEMA laws** are **subject to monitoring** under Part 2 of the RPSP Bill, **proposed subsection 602C(1)** creates a trigger for the application of the monitoring powers by NOPSEMA inspectors in the under the RPSP Act, when both this Bill and the RPSP Bill receive Royal Assent.

A NOPSEMA inspector is authorised to exercise monitoring powers and to apply for a monitoring warrant under the RPSP Act (**proposed subsections 602C(5) and 602C(4)**). **Proposed subsection 602C(9)** provides that a NOPSEMA inspector may be assisted by staff of the NOPSEMA in exercising monitoring powers or performing functions in relation to Part 2 of the RPSP Act.

**Proposed subsection 602C(2)** provides that any information (evidential material seized by NOPSEMA inspectors in the exercise of their monitoring powers in relation to petroleum matters) given in compliance or purported compliance with any of the listed NOPSEMA laws, is also **subject to monitoring**. In addition, all offence provisions and civil penalty provisions under the OPGGS Act, or a provision for a related offence under the Crimes Act 1914 or the Criminal Code are specified as being **related to** the listed NOPSEMA laws (**proposed subsection 602C(3)**). According the Explanatory Memorandum:

> This is concerned with evidential material that can be secured or seized under a monitoring warrant or investigation warrant. The main effect of this subsection as it concerns NOPSEMA inspectors is that they can secure or seize evidential material relating to an offence under the Act or the associated regulations relating to greenhouse gas operations, if such material is found while they are exercising monitoring or investigation powers in relation to petroleum matters. \(^\text{49}\)

**Listed NOPSEMA laws—investigation powers (general)**

**Proposed section 602D** contains provisions which mirror those in **proposed section 602C above** (which deals with monitoring powers) but in relation to **investigation powers** in Part 3 of the RPSP Act. The key difference in the powers of NOPSEMA inspectors is that in executing an investigation warrant, a NOPSEMA officer and the person assisting them may use such force against **things** as is necessary and reasonable in the circumstances (**proposed subsection 602D(9)**).

**Listed NOPSEMA laws—additional powers**

**Proposed subsection 602E(1)** provides for additional powers that a NOPSEMA officer may use after entering premises pursuant to investigation powers under Part 3 of the RPSP Bill.

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Proposed paragraph 602E(2)(a) provides that a NOPSEMA officer may issue a do not disturb notice under clause 10 of proposed Schedule 2A to the OPGGS Act (to be inserted by Part 2 of Schedule 1 to the Bill) where the inspector’s entry is in connection with a listed NOPSEMA law that is a petroleum environmental law. A do not disturb notice may be issued if an inspector is satisfied on reasonable grounds that it is reasonably necessary to issue the notice in order to allow the inspection, examination or measurement of, or the conducting of tests concerning the premises, or a particular plant, or a particular substance or thing, at the premises. A do not disturb notice in its content must set out the reasons for an inspector issuing the notice and:

- direct the titleholder to take all reasonably practicable steps to ensure that one or more of the following are not disturbed for a period specified in the notice:
  - a particular part of the premises and
  - a particular plant, or a particular substance or thing, at the premises (proposed clause 10 of new Schedule 2A to the OPGGS Act, to be inserted by Part 2 of Schedule 1 to the Bill).

Proposed clause 10 of new Schedule 2A creates an offence for a failure to comply with or breach of a do not disturb notice. The maximum penalty is 300 penalty units.  

Proposed paragraph 602E(2)(b) provides that where the inspector’s entry to the premises is in connection with a listed NOPSEMA law that is an OHS law, the inspector will have the powers that the inspector would have if entry to the premises had been for the purposes of an OHS inspection of a facility under Schedule 3 (following entry to a facility under a warrant)—to issue:

- a do not disturb notice under clause 76 of Schedule 3
- a prohibition notice under clause 77 of Schedule 3 or
- an improvement notice under clause 78 of Schedule 3.

In practical terms, this means that the NOPSEMA officer will be able issues notices (currently issued under Schedule 3 of the OPGGS Act) under Part 3 of the proposed RPSP legislation in order to deal with OHS risks at a facility, and also to ensure that premises, structures and plant are not disturbed while an investigation is being undertaken.

Listed NOPSEMA laws—monitoring and investigative powers (special provisions)

In basic terms, the purpose of amendments under proposed section 602F is to make particular adjustments to the substance of certain terms used in the proposed RPSP Act so that they are

50. Section 4AA of the Crimes Act 1914 provides that a penalty unit is equivalent to $170. This means that the maximum penalty amounts to $51 000 for an individual. Section 4B of the Crimes Act allows the imposition on a corporation of a pecuniary penalty that is up to five times the maximum penalty that may be imposed on an individual, in this case, $255 000. The text of the Crimes Act 1914 can be viewed at: http://www.comlaw.gov.au/Details/C2013C00031

51. A prohibition notice is a notice to remove an immediate threat to health or safety.

52. An improvement is a notice specifying action to be taken to remove a risk to health or safety that may result from the continuation or recurrence of a contravention of a listed OHS law.
appropriately tailored for use and application to the offshore petroleum industry. Thus for example, 
proposed subsection 602F(2) provides that the term ‘premises’ includes any vessel, structure or 
other thing located in an offshore area that is used or has been used for offshore petroleum 
operations or greenhouse gas storage operations. Proposed subsection 602F(3) provides that the 
term ‘occupier’ includes the operator’s representative at the facility, the master of a vessel, the 
titleholder’s representative, and the person who appears to be in overall control of the premises.

Listed NOPSEMA laws—monitoring and investigation powers (reasonable facilities 
assistance)

Proposed section 602G expands the forms of assistance that a facility operator or a titleholder may 
be required to provide to a NOPSEMA inspector for the purposes of the inspector exercising 
monitoring or investigatory powers offshore under proposed RPSG Act. In addition to any facilities or 
assistance that must otherwise be provided under sections 32 and 64 of the proposed RPSG Act, 
the responsible person must provide:

• appropriate transport to or from the premises for:
  – the NOPSEMA inspector
  – any person assisting the inspector
  – any equipment required by the inspector
  – any thing of which the inspector has taken possession and
• reasonable accommodation and means of subsistence for the inspector, and any such person 
  assisting the inspector, while the inspector is at the premises.

According to the Explanatory Memorandum:

The additional requirements are necessary because a NOPSEMA inspector cannot access an offshore vessel 
or structure without the operator or titleholder providing the necessary transport (usually helicopter) and 
also providing accommodation and meals when an inspection takes place over more than one day. Except 
in an emergency, inspections are planned with the operator or titleholder in advance. The provision of such 
assistance to an inspector is a normal and expected part of engaging in the offshore petroleum industry.

Listed NOPSEMA laws—monitoring and investigation powers (titleholder’s representative)

Taken together, proposed subsection 602K(1) and proposed subsection 602K(3) provide that in 
relation to an inspection by a NOPSEMA inspector at offshore premises that is wholly or partly in 
relation to a titleholder’s compliance with the titleholder’s obligations, a NOPSEMA inspector may

53. Proposed section 32 and proposed section 64 of the proposed RPSG Act deal with the responsibility of an occupier or 
person representing the occupier of a premises to provide facilities and assistance to an authorised person executing 
a warrant and any person assisting the authorised person.

54. ‘Responsible person’ means (in relation to a facility) the operator of that facility, and in any other case, the titleholder 
of a petroleum title in relation to which the powers are to be exercised — proposed subsection 602G(3) of the OPGGS 
Act.

55. Explanatory Memorandum, op. cit., p. 23.

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require the titleholder to nominate a representative to be present at offshore premises at the time stated in a written notice. The titleholder must, by written notice to the NOPSEMA inspector, nominate a representative and take all reasonably practicable steps to ensure that the nominated representative is present at the offshore premises at the time stated in the notice, and remains at the offshore premises after the stated time until no longer required for the purposes of the inspection (proposed subsection 602K(5)). A person commits an offence of strict liability if they omit to do an act in conformity with this requirement and that omission breaches the requirement in proposed subsection 602K(5); this attracts a maximum penalty of 50 penalty units for an individual, which is $8500 (proposed subsection 602K(6)). The civil penalty of not complying with the requirement is 135 penalty units (proposed subsection 602K(7)).

According to the Explanatory Memorandum the basis for this is:

[...] so that (for example, there will be someone on board who has knowledge of the titleholder’s operations at those premises, who is therefore likely to be able to give the inspector information about the operations that are the subject of the inspection and to answer questions the inspector might have. There are no specific requirements as to the level of knowledge a titleholder’s representative must have – this is left to the common sense of the titleholder."

Part 2—Petroleum environmental inspections

Schedule 2A—Petroleum environmental laws: additional NOPSEMA inspection powers

Item 9 inserts a new Schedule 2A—‘Petroleum environmental laws: additional NOPSEMA inspection powers’.

Proposed Schedule 2A confers monitoring powers on NOPSEMA inspectors equivalent to the OHS monitoring powers in existing Schedule 3 of the OPGGS Act (the OHS Schedule). The proposed environmental monitoring powers are exercisable by NOPSEMA inspectors for the purpose of monitoring compliance with environmental management laws. The powers include, for example:

- powers of entry and search without warrant, at any reasonable time of the day or night, in order to:
  - inspect, measure or conduct tests
  - take photographs, make video recordings, or make sketches of the premises and
  - inspect, take extracts from or make copies of any documents the inspector is satisfied on reasonable grounds relate or are likely to relate to the subject matter of the inspection
- power to require the answering of questions
- power to request the production of documents or things and

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• power to direct that premises not be disturbed, if an inspector is satisfied on reasonable grounds that it is reasonably necessary to issue the notice in order to allow the inspection, examination or measurement of, or the conducting of tests concerning the premises, or a particular plant, or a particular substance or thing, at the premises.

Proposed subclause 3(1) provides that a petroleum environmental inspection includes investigation or inquiry and need not include physical inspection of any premises or thing. Proposed subclause 3(2) confers the power to conduct a petroleum environmental inspection to determine whether a petroleum environmental law has been or is being complied with, or whether information given in compliance, or purported compliance, with a petroleum environmental law is correct.

Proposed clause 6 makes it an offence to obstruct or hinder a NOPSEMA inspector.

Proposed clause 7 provides that a NOPSEMA inspector may, to the extent that it is reasonably necessary to do so in connection with the conduct of a petroleum environmental inspection at or near offshore petroleum premises in relation to a petroleum title, require the titleholder or the titleholder’s representative at the premises, who is nominated for the inspection, to provide the inspector with reasonable assistance and facilities, that is or are reasonably connected with the conduct of the inspection, or with the effective exercise of the inspector’s powers in connection with the conduct of the inspection at or near the premises. Reasonable assistance includes:

• appropriate transport to or from the premises for the inspector and for any equipment required by the inspector, or any thing of which the NOPSEMA inspector has taken possession and

• reasonable accommodation and means of subsistence while the inspector is at the premises.

A person commits an offence of strict liability if they omit to do an act in conformity with this requirement and that omission breaches the requirement (proposed subsection 7(3)). The maximum penalty is a term of six months imprisonment or 60 penalty units ($10 200) or both.

Clause 12 makes it an offence to tamper with or remove:

• a notice issued pursuant to a NOPSEMA inspector taking possession of plant, animal or other samples from a premises or

• a do not disturb notice.

Part 3—Occupational Health and Safety Inspections

Proposed subsection 49(1) provides that an OHS inspection includes an investigation or inquiry and need not include a physical inspection of any facility, premises or thing. A NOPSEMA inspector may, at any time conduct an OHS inspection:

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57. An inspection in relation to compliance of operations at an offshore vessel or structure can be a ‘desk’ inspection rather than an offshore visit.
• to determine whether a listed OHS law has been, or is being, complied with
• to determine whether information given in compliance, or purported compliance, with a listed OHS law is correct or
• concerning an accident or dangerous occurrence that has happened at or near a facility. (proposed subsection 49(2)).

Issue of prohibition notices

According to the Explanatory Memorandum:

The Report of the Montara Commission of Inquiry concluded that, given the potentially severe consequences of an offshore petroleum incident, the regulator should have the ability to prohibit certain conduct before there is an imminent risk of danger to health and safety, rather than waiting until the risk has actually eventuated. On this basis, the Commissioner recommended (Recommendation 72) that the prohibition notice powers of a NOPSEMA inspector should be extended to enable an inspector to issue a prohibition notice when the inspector believes, on reasonable grounds, that a risk to healthy and safety may occur, in addition to when a risk is actually occurring (as the Act currently provides). 58

Proposed section 77 gives effect to this recommendation.

According to the Explanatory Memorandum:

The amount of penalty units for the failure to comply with a prohibition notice has been increased from 250 penalty units to 600 penalty units. This is as a result of a decision to increase the relevant criminal penalties in the Act to ensure that they are at least consistent with the penalties applied in other legislation, as is appropriate for a high-hazard industry. 59

Proposed section 78 amends the current drafting of section 78 which, according to advice from the Australian Government Solicitor’s Office, may confer judicial power on NOPSEMA inspectors contrary to Chapter III of the Commonwealth of Australia Constitution Act 1901. A notice issued under current section 78 requires a responsible person to take action to prevent a contravention or likely contravention of an OHS law.

Clause 78 has therefore been recast so that action that the responsible person is required to take is directed to the health and safety risk, rather than to preventing the contravention. 60

The Explanatory Memorandum also highlights that penalty increases that are being proposed so as to encourage greater compliance with the legislation:

The amount of penalty units for the failure to comply with a prohibition notice has been increased from 100 penalty units to 300 penalty units. This is as a result of a decision to increase the relevant criminal penalties in the Act to ensure that they are at least consistent with the penalties applied in other legislation, as is appropriate for a high-hazard industry.

59. Ibid.
60. Ibid.
Finally, a civil penalty has been added to this clause with a potential liability of 400 penalty units for a contravention of a requirement to comply with an improvement notice. This addition of an alternate enforcement mechanism is to provide the regulator with an additional compliance tool to encourage industry compliance with important health and safety requirements.61

Schedule 2—Offences and civil penalties

Civil Penalties

The Explanatory Memorandum explains that the legislative review:

concluded that the current enforcement mechanisms, sanctions and penalties available under the Act are insufficient to provide an effective and meaningful deterrent against non-compliance. A combination of factors - including the complexity of the legislation, the technical nature of the evidence pertaining to prosecutions, and the criminal standard of proof applicable to court proceedings - have operated as impediments to effective enforcement of the requirements of the Act.62

A range of compliance and enforcement options was considered to be more efficacious in securing enforcement and compliance outcomes through the use of a flexible and graduated range of sanctions.

The Explanatory Memorandum further states that:

civil penalties (in the form of financial sanctions) as a supplement or alternative to the existing criminal penalties, and set at an appropriate level to reflect the nature of the offshore petroleum industry as a high-hazard industry, will encourage improved compliance with the Act.63

The range of amendments made under Part 1 of Schedule 2 of the Bill are informed by the conclusions of the legislative review; accordingly there have been increases made to criminal penalties and the insertion of civil penalty provisions under the OPGGS Act.

61. Ibid., p. 31.
63. Ibid.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.