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House: House of Representatives
Portfolio: Industry, Innovation and Science
Commencement: Schedules 1 and 2 commence on the day after Royal Assent, except for Schedule 2, Part 2, Division 1, which retrospectively commences on 7 December 2011.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.
All hyperlinks in this Bills Digest are correct as at October 2016.
Purpose and structure of the Bill

The main purpose of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016 (the Bill) is to amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPPGS Act) to:

- clarify apportionment arrangements relating to certain petroleum deposits that straddle state and Commonwealth jurisdictions (Schedule 1)\(^1\)
- ensure the capacity of the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) to refund fees paid to it where necessary (Schedule 2).\(^2\)

Background

This Bill makes technical amendments to the regulation of offshore petroleum development in Australia.

Australia’s offshore petroleum jurisdiction

Australia is endowed with significant deposits of petroleum (oil and gas) lying beneath the sea floor. Oil and gas has been found off the coast of Victoria, the Northern Territory and north-west Western Australia. Oil and gas underlying the sea floor is subject to three separate regulatory regimes:

- **internal waters** are waters within the constitutional limits of a state, and subject to the exclusive regulatory jurisdiction of that state. Normally, the limits of a state are the low-water mark, although in some cases the internal waters of a state include waters in bays that are closed across their mouth (such as parts of the Gulf St Vincent in South Australia), or by connecting a series of islands (as in north-west Western Australia)
- **coastal waters** are waters three nautical miles (5.56 kilometres) to seaward of the territorial sea baseline, and also waters to shoreward of the territorial sea baseline that are not within the limits of the states. Under the terms of the 1979 Offshore Constitutional Settlement, these coastal waters fall within the jurisdiction of the states or the Northern Territory
- **Commonwealth waters** extend from three nautical miles seaward of the territorial sea baseline to the limits of Australia’s continental shelf. These waters are regulated by the Commonwealth and the adjacent state in Joint Authority, although the Commonwealth has the final say in these waters.\(^3\)

These separate jurisdictions are covered by different legislation – in Commonwealth water, the **OPPGS Act** applies; in coastal waters, the respective state’s coastal waters legislation applies; and internal waters are covered by the respective state’s own petroleum legislation (which may include both onshore and offshore petroleum activity).\(^4\)

The situation can become particularly complicated when petroleum activity straddles different jurisdictions, as occurs off north-west Western Australia, where no fewer than four separate regulatory regimes apply. For offshore petroleum in the Commonwealth jurisdiction, the **OPPGS Act** applies; in coastal waters, the **Petroleum (Submerged Lands) Act 1982 (WA)** applies; in waters landward of the territorial sea baseline, the **Petroleum and Geothermal Energy Resources Act 1967 (WA)** applies, and on Barrow Island the **Petroleum Act 1936 (WA)** applies. This map demonstrates this complex arrangement.\(^5\) In addition, the movement of petroleum towards drill sites and wells that are extracting petroleum from a pool (that is, petroleum moves towards pressure depletion points within the pool)\(^6\) is another complicating factor when determining how to apportion specific production to a particular jurisdiction.

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2. Ibid., Schedule 2.
4. For a more detailed discussion of Australia’s offshore petroleum jurisdiction, see A St John and J Tomaras, Offshore Petroleum and Geothermal Energy Resources Act 1982 (WA) applies; in waters landward of the territorial sea baseline, the Petroleum and Geothermal Energy Resources Act 1967 (WA) applies, and on Barrow Island the Petroleum Act 1936 (WA) applies. This map demonstrates this complex arrangement. In addition, the movement of petroleum towards drill sites and wells that are extracting petroleum from a pool (that is, petroleum moves towards pressure depletion points within the pool) is another complicating factor when determining how to apportion specific production to a particular jurisdiction.
The Browse Basin

The north-west coast of Western Australia is endowed with large petroleum resources, principally in the Browse, Bonaparte and Carnarvon Basins – see figure 1.

Figure 1: Oil resources in Australia

![Image of oil resources in Australia](source)

Although oil and gas in the Browse Basin has been known since the discovery of the massive Torosa gas field in 1971, development has been inhibited by the relative isolation of the area and the depth of the water. Attention was instead focussed on the North-West Shelf projects in the Carnarvon Basin. However, in recent years the development of resources in the Browse Basin has begun. The Ichthys field is being developed by the Japanese company INPEX, with gas and condensate to be piped over 800 kilometres from the Browse Basin to

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Darwin for processing. Australian oil company Woodside has also been developing its interests in the Browse Basin, with a view to developing three fields, including the Torosa field.

Most of the oil and gas for Woodside’s proposed development underlies Commonwealth waters, however, the Torosa gas field lies in part under Scott Reef. Scott Reef is an uninhabited reef lying some 275 kilometres distant from the main coastline of Western Australia, but as the reef is a part of Western Australia, the part of the Torosa field that underlies the reef (and up to three nautical miles seaward) is subject to Western Australian coastal waters jurisdiction.

The development of the Browse Basin has long been a source of tension between the Western Australian Government, the Commonwealth and Woodside. It has been the wish of the Western Australian Government that Woodside’s development of its Browse Basin interests should include a land-based processing facility at James Price Point, whereas Woodside previously dropped the idea of an on-shore facility in favour of a floating gas processing and liquefaction facility. The Premier of Western Australia, Colin Barnett, has wanted an on-shore facility to promote jobs in Western Australia.

In early 2014, Geoscience Australia found that additional areas in the vicinity of Scott Reef were not submerged at mean low water, having the effect of enlarging the area around Scott Reef that is under Western Australian jurisdiction. This placed a larger portion of the resources of the Torosa field under the jurisdiction of Western Australia.

In July 2015, the Commonwealth Minister for Industry and Science and the Western Australian Minister for Mines and Petroleum, made an agreement for apportionment of the Torosa field, specifying that the Commonwealth would be allocated 34.6 per cent of the petroleum in the pool, and Western Australia would be allocated 65.4 per cent. The other two fields in the proposed Woodside development, Calliance and Brecknock, wholly underlie Commonwealth waters. In his second reading speech, the Minister for Environment and Energy, Josh Frydenberg, suggested that the certainty provided by the apportionment agreement allowed Woodside to move its development of the Browse field along to a front-end engineering and design study (FEED).

In March 2016, Woodside decided to defer its Browse development indefinitely, citing low prices and high costs.

Committee consideration
At the time of writing, the Bill had not been referred for committee consideration.

Policy position of non-government parties/independents
At the time of writing, non-government parties had not publicly expressed a position on the Bill or its underlying issues.

Position of major interest groups
At the time of writing, there had been no public discussion of the issues canvassed by the Bill.

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13. G Waters (General Manager National Offshore Petroleum Titles Administrator), 'Changes to the offshore coastal waters boundary of Western Australia', correspondence to Western Australian Joint Authority, 14 May 2014.
Financial implications

The Bill is not expected to have any significant financial impact. Although the Bill establishes a special appropriation for the purposes of providing refunds for regulatory levies paid to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) in certain circumstances, this provides retrospective legal certainty to the current practice.  

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 Parliamentary Joint Committee on Human Rights has not yet reported on the Bill.

Key issues and provisions

Apportionment agreement

The OPGGS Act defines a petroleum pool as ‘a naturally occurring discrete accumulation of petroleum’.  

Schedule 1 of the Bill is principally concerned with giving effect to, and protecting the validity of, apportionment agreements relating to petroleum pools that straddle state and Commonwealth petroleum jurisdictions.

Item 1 of Schedule 1 inserts proposed subsections 54(1A)–54(1G) into the OPGGS Act. Currently section 54 of the OPGGS Act provides that if a petroleum pool is partly inside the area of the Commonwealth and partly inside the area of a state, and petroleum is recovered from that pool, then the proportion of the resource that is attributed to the Commonwealth and the state will be determined by agreement between the titleholder, the responsible state Minister and the Joint Authority (where the Commonwealth has the final say). If an agreement cannot be reached, the allocation can be determined by the Federal Court or the relevant state Supreme Court, on application by one of the parties.

Proposed subsections 54(1A)–54(1D) specify that if, after the time of making such an agreement, it becomes clear that the petroleum actually exists in two or more pools, then petroleum from all of those pools will be apportioned according to the original agreement, based on the state of knowledge at the time of making the agreement.

Proposed subsections 54(1E)–54(1G) provide an alternate form of making an agreement, in the circumstances that the geographic extent of the petroleum pool or pools is not known, although it is known that the pool or pools straddle state and Commonwealth jurisdiction. Under this form, an agreement will specify a geographic area straddling state and Commonwealth jurisdiction that is presumed to contain a petroleum pool. If petroleum is subsequently recovered from within this specified area, it will be apportioned as set out in the agreement, as long as the apportionment would be consistent with the nature and probable extent of the petroleum in the specified area.

The net effect of these amendments is to preserve the validity of apportionment agreements in the event that petroleum pools covered by the agreements are subsequently discovered to be different from first thought, or have changed in nature or extent since an apportionment agreement was made. However, parties are not required to take up these new arrangements. For new subsections 54(1A) or 54(1E) to apply, the agreement must contain the specific terms required under proposed paragraphs 54(1A)(b) or 54(1E)(f) (the apportionment provisions). If these terms are not included, subsection 54(1) of the OPGGS Act will continue to apply.

The Commonwealth imposes a profit-based tax, the Petroleum Resource Rent Tax (PRRT), on certain petroleum projects. Section 3 of the Petroleum Resource Rent Tax Assessment Act 1987 provides that, for the purposes of the PRRT, petroleum from a petroleum pool is taken to be recovered from different jurisdictional areas.

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19. The Statement of Compatibility with Human Rights can be found at page 4 of the Explanatory Memorandum to the Bill.
21. Offshore Petroleum and Greenhouse Gas Storage Act 2006, subsection 54(1). Subsection 59(2) of the OPGGS Act provides that, for decisions of the Joint Authority, in the case of disagreement between the Commonwealth Minister and the relevant state or territory Minister, the Commonwealth Minister may decide the matter and that decision has effect as the Joint Authority’s decision.
according to any apportionment agreement made under the *OPGGS Act*. Items 2 and 3 of Schedule 1 make minor consequential amendments to section 3 of the *Petroleum Resource Rent Tax Assessment Act*, to ensure that apportionment agreements under proposed subsection 54(1E) of the *OPGGS Act*, which are based on specified parts of the seabed, are also recognised as authoritative under the *Petroleum Resource Rent Tax Assessment Act*.

**Item 4** provides that the amendments will apply to both existing and future apportionment agreements.

### Other provisions

#### Regulatory levies

Part 6.9 of the *OPGGS Act* establishes the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and provides for its funding through industry levies. Such levies include the ‘safety case levy’ and the ‘environment plan levy’. The levies are imposed by the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (the *Regulatory Levies Act*) and calculated in accordance with regulations made under that Act.

**Refund of safety case levy**

Part 1 of Schedule 2 of the Bill deals with the ‘safety case levy’, imposed under Part 3 of the *Regulatory Levies Act*. Subsections 687(1) and (2) of the *OPGGS Act* allow regulations to make provision for the remittal of part of an amount of safety case levy, in certain circumstances. The Explanatory Memorandum to the Bill explains that concern has arisen as to what is covered by remittal:

> There is some uncertainty whether ‘remittal’ in [subsections 687(1) and (2)] has the narrow meaning of refraining from exacting a charge or fee, or also encompasses the notion of giving back an amount that has already been paid (i.e. refunding).

The ability to provide refunds of safety case levies is necessary as NOPSEMA may not have enough information to finally determine the levy payable until after the facility operator has made a provisional payment. If the final amount due is less than the provisional levy paid, a refund will be required.

**Items 1 and 2 of Schedule 2** insert the word ‘refund’ into subsections 687(1) and 687(2) of the *OPGGS Act* to clarify that the regulations may provide for remittals or refunds of an amount of safety case levy to petroleum titleholders where the amount paid by the titleholder exceeded the final levy amount.

The amendments in **Part 1 of Schedule 2** to the Bill commence on the day after Royal Assent.

#### Environment plan levy

Part 1 of Schedule 2 of the Bill deals with the ‘environment plan levy’, imposed under Part 4D of the *Regulatory Levies Act*. Section 688C of the *OPGGS Act* allows regulations to be made to specify when the environment plan levy becomes due and payable, and imposes a late payment penalty if payment is not received by the due date. Section 688C does not currently make any reference to the remittal or refund of overpaid environment plan levies. Despite this, regulation 59E of the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004* allows NOPSEMA to remit or refund an amount of an environmental plan levy in certain circumstances. The amending regulations that inserted regulation 59E were made by the Governor-General on 7 December 2011 and commenced on 1 January 2012.

The Explanatory Memorandum explains that NOPSEMA has been remitting and refunding amounts under regulation 59E since it commenced. However, given that

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26. Ibid.
27. Regulation 59E was inserted by the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Regulations 2011 (No. 2)*.
regulation 59E is not explicitly authorised by a primary Act, questions may be raised as to its legitimacy. This throws into doubt payments made under regulation 59E since its commencement.

**Item 3** proposes to insert subsection 688C(1A) to provide a clear power to make regulations to provide for remittals or refunds of part of the environmental plan levy. This provision will commence retrospectively from 7 December 2011 (**table item 4 at subclause 2(1)** of the Bill) to ensure that the Governor-General had the power to make regulation 59E at that date and that all remittals and refunds made under that regulation since it commenced are supported.

**Item 4** is a savings provision. It will apply if:

- before the commencement of item 4 (on the day after Royal Assent—see **table item 5 at subclause 2(1)** of the Bill) a refund in respect of an environmental plan levy was paid to a person
- that refund is subsequently found to be invalid as no appropriation existed for such a purpose and
- the refund therefore becomes repayable to the Commonwealth.

In these circumstances, the person will be entitled to be paid an amount that is equal to the amount repayable to the Commonwealth (**subitem 4(2)**). To avoid a situation where the person would need to pay the amount and then have that payment refunded, **subitem 4(3)** provides that the amount payable by the Commonwealth to the person may be set off against any amount owed by the person to the Commonwealth. **Subitem 4(4)** appropriates the Consolidated Revenue Fund in recognition that the Commonwealth is formally obliged to pay the person the offset amount, even though, due to the offset provision, this will not be the outcome in practice. This will ensure that the requirements spelt out by the High Court in the **Williams** decisions are met.\(^{29}\) (In those decisions it was held that generally before the Commonwealth could spend appropriated money, specific legislation—other than an Appropriation Act—authorising such payments is required).

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