Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2019

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House: House of Representatives
Portfolio: Industry, Innovation and Science
Commencement: Various dates as set out in this Digest

Links: The links to the Bills, their Explanatory Memoranda and second reading speeches can be found on the home pages for the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2019 or the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2019, 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 August 2019.
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The Bills Digest at a glance
Miscellaneous Amendments Bill

The Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2019 (the Miscellaneous Amendments Bill) amends the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (the OPGGS Act) to:

- transfer various regulatory functions and powers relating to offshore greenhouse gas storage activities from the responsible Commonwealth Minister to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
- strengthen and clarify the monitoring and enforcement powers of NOPSEMA inspectors
- retrospectively designate four areas, released as part of the 2005 offshore petroleum acreage release, as ‘frontier areas’ for the purposes of the Designated Frontier Area tax incentive and
- make other minor and technical amendments.

NOPSEMA’s expanded role

NOPSEMA currently regulates certain aspects of the management of offshore petroleum facilities, including occupational health and safety (OHS), structural integrity of facilities, wells and well-related equipment and environmental management. It also has statutory functions relating to OHS management of greenhouse gas storage operations under the OPGGS Act.

Statutory powers and functions under the OPGGS Act in relation to other aspects of offshore greenhouse gas storage activities, including environmental management, currently sit with the responsible Commonwealth Minister. However, the Minister’s power and functions in this regard have been delegated to NOPSEMA through an administrative delegation. This Bill proposes to formally transfer the relevant statutory powers and functions under the OPGGS Act to NOPSEMA and, at the same time, strengthen and clarify NOPSEMA’s monitoring and compliance powers.

The Government advises that one of the reasons behind the current Bills is because ‘there is a renewed focus on the adequacy of regulatory arrangements’ as a result of the ‘potential for an increase in greenhouse gas storage activities in future’.¹

History of the Bill: changes to enforceable undertakings

A version of the Miscellaneous Amendments Bill was introduced in the last Parliament and was the subject of a Senate Committee inquiry. During that inquiry, concerns were raised about Schedule 16 of the Bill, which introduces enforceable undertakings as an additional compliance and enforcement tool under the OPGGS Act. Changes have been made to Schedule 16 in the current version of the Miscellaneous Amendments Bill. In particular, a new provision would limit the circumstances in which enforceable undertakings can be accepted, including where an alleged contravention has, or may have, contributed to the death of a person.

History of the Bills

The Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (Miscellaneous Amendments Bill 2018) and Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018 (Regulatory Levies Bill 2018) were introduced into the House of Representatives on 28 March 2018. These Bills (the first Bills) lapsed at the end of the 45th Parliament on 11 April 2019.

In addition, the Offshore Petroleum and Greenhouse Gas Storage Amendment (Regulations References) Bill 2018 and the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Regulations References) Bill 2018 (the Regulation References Bills) were introduced into the House of Representatives on 5 December 2018. These Bills also lapsed at the end of the 45th Parliament on 11 April 2019.

The current Bills are largely the same as the first Bills, although some changes have been made. The most notable change is to the provisions in Schedule 16 of the Miscellaneous Amendments Bill relating to enforceable undertakings. Concerns were raised about these provisions during a Senate Committee inquiry in the last Parliament. In the current version of the Miscellaneous Amendments Bill, a new provision has been incorporated into Schedule 16 to limit the circumstances in which enforceable undertakings can be accepted. These changes are discussed further in the ‘Key issues and provisions’ section of this Digest.

Other changes include:

• minor adjustments to commencement dates and

• new Schedules—Schedule 18 to the Miscellaneous Amendments Bill and Schedule 6 to the Regulatory Levies Bill—which incorporate provisions previously contained in the Regulation References Bills.

A Bills Digest was published in respect of the Miscellaneous Amendments Bill 2018 and the Regulatory Levies Bill 2018, although no Bills Digest was published for the Regulations References Bills. Much of the material in this Bills Digest has been sourced from the earlier Digest.

Purpose of the Bills

The purpose of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2019 (the Miscellaneous Amendments Bill) is to amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (the OPGGS Act) to:

• transfer various regulatory functions and powers relating to offshore greenhouse gas storage activities from the responsible Commonwealth Minister to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)

• strengthen and clarify the monitoring and enforcement powers of NOPSEMA inspectors


• retrospectively designate four areas, released as part of the 2005 offshore petroleum acreage release, as ‘frontier areas’ for the purposes of the Designated Frontier Area tax incentive and
• make other minor and technical amendments.

The purpose of the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2019 (Regulatory Levies Bill) is to amend the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003 (Offshore Levies Act) to extend the application of various levies to greenhouse gas wells and make other minor and consequential amendments.

The Regulatory Levies Bill is separate due to the constitutional requirement for taxation, duties of excise and duties of customs to be dealt with in Bills that only include that individual, respective type of charge.5

Structure of the Bills

The Miscellaneous Amendments Bill contains 18 schedules as follows:

• **Schedule 1** contains amendments to transfer regulatory functions and powers relating to certain aspects of offshore greenhouse gas storage activities to NOPSEMA
• **Schedule 2** makes minor amendments relating to the protection of technical information
• **Schedule 3** amends the Commonwealth Minister’s power to give directions to petroleum titleholders to make the power subject to additional Regulations
• **Schedule 4** amends provisions relating to the monitoring and enforcement powers of NOPSEMA inspectors, including to enable inspectors to retain documents in certain circumstances and to limit self-incrimination protections to individuals
• **Schedule 5** contains amendments to enable petroleum access authority holders to apply for a variation of the authority, in turn allowing the National Offshore Petroleum Titles Administrator (NOPTA) to introduce fees for applications to vary petroleum access authorities
• **Schedule 8** provides for a range of fees that were previously payable to the Commonwealth to be instead payable to NOPTA
• **Schedule 11** contains amendments relating to recovery of certain costs and expenses by NOPSEMA
• **Schedule 12** amends provisions relating to appeals of decisions made by NOPSEMA inspectors
• **Schedule 13** contains provisions to clarify that certain greenhouse gas titles can be renewed in the event of a boundary change affecting those titles
• **Schedule 15** provides NOPSEMA with additional monitoring powers relating to well integrity regulation
• **Schedule 16** introduces enforceable undertakings as an additional compliance and enforcement tool under the OPGGS Act
• **Schedule 17** retrospectively designates four areas, released as part of the 2005 offshore petroleum acreage release, as ‘frontier areas’ for the purposes of the Designated Frontier Area tax incentive
• **Schedule 18** amends the OPGGS Act to remove references to specific titles of Regulations and instead enable relevant Regulations, or provisions of Regulations, to be prescribed by Regulation6 and

5. Australian Constitution, section 55.
• **Schedules 6, 7, 9, 10 and 14** contain minor technical corrections and clarifications to the *OPGGS Act*.

The Regulatory Levies Bill has six schedules:

• **Schedule 2** amends the *Offshore Levies Act* to extend the well investigation levy, annual well levy and well activity levy to greenhouse gas wells

• **Schedules 1, 3 and 4** make consequential amendments to the *Offshore Levies Act*, including to reflect past amendments made to the *OPGGS Act* and the *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011*

• **Schedule 5** repeals spent provisions in the *Offshore Levies Act* and

• **Schedule 6** amends the *Offshore Levies Act* to remove references to specific titles of Regulations and instead enable the relevant Regulations, or provisions of Regulations, to be prescribed by Regulation.

**Commencement**

Provisions of the Miscellaneous Amendments Bill will commence on various dates as follows:

• Division 1 of Part 1 of Schedule 1, Part 2 of Schedule 1, and Part 2 of Schedule 16 will commence on proclamation or six months after Royal Assent, whichever occurs first.

• Division 2 of Part 1 of Schedule 1 will commence on proclamation or six months after Royal Assent, whichever occurs first, but will not commence at all if Schedule 2 of the *Timor Sea Maritime Boundaries Treaty Consequential Amendments Act 2019* commences first

• Division 3 of Part 1 of Schedule 1 will commence immediately after the commencement of Division 1 of Part 1 of Schedule 1, or immediately after the commencement of Schedule 2 of the *Timor Sea Maritime Boundaries Treaty Consequential Amendments Act 2019*, whichever comes later. However, this Division will not commence unless Schedule 2 of the *Timor Sea Maritime Boundaries Treaty Consequential Amendments Act 2019* commences

• Schedules 2–14, Part 1 of Schedule 16 and Schedule 17 will commence the day after Royal Assent

• Schedule 15 will commence immediately after the commencement of Division 1 of Part 1 of Schedule 1

• Schedule 18 will commence immediately after the commencement of Schedule 15 and Part 3 of Schedule 16.

Provisions of the Regulatory Levies Bill will commence as follows:

• Part 1 of Schedule 1, and Schedules 4 and 5 will commence the day after Royal Assent

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6. The provisions in this Schedule were previously contained in the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Regulations References) Bill 2018*. The amendments are designed to avoid the need to amend the *OPGGS Act* when Regulations under the Act are amended or when they sunset and are remade: *Explanatory Memorandum, Miscellaneous Amendments Bill*, p. 2.

7. The provisions in this Schedule were previously contained in the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Regulations References) Bill 2018*.

8. The *Timor Sea Maritime Boundaries Treaty Consequential Amendments Act 2019* passed Parliament on 29 July 2019, and received Royal Assent on 7 August 2019. Commencement of Schedule 2 of that Act will be fixed by Proclamation, but the Proclamation must not specify a day before the Greater Sunrise Production Sharing Contract (within the meaning of the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* done at New York on 6 March 2018) comes into force.
• Part 2 of Schedule 1 and Schedule 3 will commence on proclamation or six months after Royal Assent, whichever occurs first.
• Schedule 2 will commence at the same time as Schedule 1 of the Miscellaneous Amendments Bill and
• Schedule 6 will commence immediately after Part 2 of Schedule 1.

Background

What is greenhouse gas storage?

Greenhouse gas storage, also known as carbon capture and storage (CCS), is the process of capturing carbon dioxide (CO₂) from industrial processes and then transporting and injecting that CO₂ into a secure geological formation for long-term underground storage. The key aim of CCS is to prevent large amounts of CO₂ from being released into the atmosphere and hence to reduce greenhouse gas emissions which contribute to climate change.9

The potential role of CCS in reducing greenhouse emissions and meeting international climate commitments has been acknowledged by both the International Energy Agency (IEA)10 and the Intergovernmental Panel on Climate Change (IPCC).11

Regulating offshore petroleum and greenhouse gas activities in Australia

Responsibility for the regulation of offshore petroleum and greenhouse gas storage activities in Australian waters is divided between the Commonwealth Government and state and territory governments. Under the Offshore Constitutional Settlement (OCS), the states generally have jurisdiction over activities in their own internal waters, and in the zone of ‘coastal waters’, which extends three nautical miles seaward of the territorial sea baseline.12 The Commonwealth Government has jurisdiction for the regulation of petroleum and greenhouse gas activities for offshore areas beyond coastal waters (generally those areas more than three nautical miles from the Territorial sea baseline).13 This area is referred to as ‘Commonwealth waters’.

The OPGGS Act regulates offshore petroleum exploration and production, and greenhouse gas injection and storage activities in Commonwealth waters. The OPGGS Act is supported by a range of Regulations covering matters such as safety and environmental performance.14 The offshore petroleum legislation, Regulations and guidelines are intended to provide for the ‘orderly’ exploration and production of petroleum and greenhouse gas resources, setting out a framework of rights, entitlements and responsibilities of government and industry.15

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9. For further information see, for example, Commonwealth Scientific and Industrial Research Organisation (CSIRO), Carbon capture and storage (CCS) – frequently asked questions, CSIRO, Australia, n.d.; Global CCS Institute (GCCSI), Understanding carbon capture and storage, GCCSI website; CO2CRC, What is CCS?, CO2CRC website.
12. Attorney-General’s Department, Offshore constitutional settlement, Attorney-General’s Department website.
13. Department of Industry, Innovation and Science (DIIS), Regulating offshore oil and gas in Australian waters, DIIS website; see also Geoscience Australia, Maritime boundary definitions, Geoscience Australia website; OPGGS Act, sections 3–6.
15. DIIS, Regulating offshore oil and gas in Australian waters, op. cit.
Under this framework, the Australian Government administers the offshore regulatory regime together with relevant adjacent state and Northern Territory government involvement through ‘Joint Authority’ arrangements. In short, the Joint Authorities make certain major decisions under the OPGGS Act including releasing offshore petroleum exploration areas, granting and cancelling offshore petroleum titles, imposing or varying title conditions, as well as decisions about resource management.

The OPGGS Act also establishes two Commonwealth statutory authorities which perform regulatory functions under the OPGGS Act and Regulations:

- the National Offshore Petroleum Titles Administrator (NOPTA, also referred as the Titles Administrator), with responsibility for titles administration and data management functions in relation to offshore petroleum and greenhouse gas activities in Commonwealth waters and

- the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), which has functions relating to OHS of offshore petroleum facilities and greenhouse gas storage activities, as well as structural integrity of facilities, wells and well-related equipment and environmental management. NOPSEMA was formed as a result of the expansion of the former National Offshore Petroleum Safety Authority, in response to the Report of the Montara Commission of Inquiry.

Offshore greenhouse gas storage legal framework

The OPGGS Act regulates the exploration, assessment and testing of geological formations and the transportation to, and storage of, greenhouse gases in suitable geological formations in the seabed under Commonwealth waters.

The OPGGS Act provides for the responsible Commonwealth Minister to grant a range of offshore greenhouse gas titles that allow the titleholder to explore for and develop greenhouse gas storage sites in offshore areas. NOPTA is then responsible for the day-to-day administration of these titles. Offshore greenhouse gas titles that may be granted under the OPGGS Act include:

- greenhouse gas assessment permits—which authorise exploration in the permit area for potential greenhouse gas storage formations and injection sites

- greenhouse gas holding leases—which authorise exploration in the lease area for potential greenhouse gas storage formations and injection sites. Holding leases are generally designed to allow certain existing titleholders exclusive rights in relation to an identified greenhouse gas

16. Ibid.
18. NOPTA, ‘About NOPTA’, NOPTA website. NOPTA was established in 2012 by the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011, which also expanded the former National Offshore Petroleum Safety Authority to become the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).
20. This inquiry investigated the causes of an uncontrolled release of oil and gas into the Timor Sea from the Montara Wellhead Platform on 21 August 2009 and made recommendations to the Government on how to prevent future incidents. The Montara report recommended, among other matters, the creation of a single independent regulatory body, responsible for safety as a primary objective, well integrity and environmental approvals: D Borthwick (Commissioner), Report of the Montara Commission of Inquiry, Montara Commission of Inquiry, Canberra, June 2010, recommendation 73, p. 362; see also Productivity Commission (PC), Regulatory burden on the upstream petroleum (oil and gas) sector, PC, Canberra, 2009.
22. OPGGS Act, Chapter 3 (see section 287 for a simplified outline of Chapter 3).
storage formation, where they are not currently in a position to inject and permanently store a greenhouse gas substance, but are likely to be in such a position within 15 years\textsuperscript{24}

- greenhouse gas injection licences—which authorise the licensee to carry out greenhouse gas injection and storage operations in the licence area
- greenhouse gas search authorities—which authorise operations relating to the exploration for potential greenhouse gas storage formations or potential greenhouse gas injection sites (but not to make a well) and
- greenhouse gas special authorities—which authorise the holder to carry on certain greenhouse gas-related operations in the authority area (but not to make a well).\textsuperscript{25}

As noted earlier, NOPSEMA is the regulator of safety management of greenhouse gas storage operations under the \textit{OPGGS Act}. In addition, the Minister’s powers and functions in relation to greenhouse gas storage and management under the \textit{Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009} (Offshore Environment Regulations) have been delegated to NOPSEMA through an administrative delegation. This includes, for example, the power to assess and accept environment plans relating to offshore greenhouse gas titles.\textsuperscript{26} The Miscellaneous Amendments Bill proposes to formally transfer these powers and functions to NOPSEMA as statutory powers and functions under the \textit{OPGGS Act} and, at the same time, strengthen and clarify NOPSEMA’s monitoring and compliance powers.

In February 2014, NOPSEMA also became the sole Commonwealth environmental management regulator for offshore petroleum and greenhouse gas activities when the then Commonwealth Minister for the Environment, Greg Hunt, endorsed NOPSEMA’s environmental management authorisation process under Part 10 of the \textit{Environment Protection and Biodiversity Conservation Act 1999} (\textit{EPBC Act}).\textsuperscript{27} An approval was issued under section 146B of the \textit{EPBC Act} for all petroleum and greenhouse gas activities in Commonwealth waters taken in accordance with NOPSEMA’s environmental authorisation processes.\textsuperscript{28} This means that entities seeking to undertake offshore petroleum or greenhouse gas activities in Commonwealth waters in accordance with NOPSEMA’s processes no longer need to refer those actions for assessment and approval under the \textit{EPBC Act}.\textsuperscript{29} Instead, the environmental aspects of those activities now only require approval by NOPSEMA, after assessment under the \textit{Offshore Environment Regulations}.

\textbf{Status of offshore greenhouse gas storage in Australia}

NOPTA advises that there have been two greenhouse gas acreage release rounds by the Australian Government for offshore greenhouse gas storage exploration, one in 2009 and the other in 2014.\textsuperscript{30} Currently, there are four active greenhouse gas assessment permits in Commonwealth

\textsuperscript{24} \textit{OPGGS Act}, sections 318–354.
\textsuperscript{25} These are issued under Chapter 3 of the \textit{OPGGS Act}: see further, for example, the simplified outline in section 287.
\textsuperscript{26} \textit{Explanatory Memorandum}, Miscellaneous Amendments Bill, p. 24.
\textsuperscript{28} G Hunt, \textit{Final approval decision for the taking of actions in accordance with an endorsed program under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) [EPBC Act]}, Department of the Environment, 27 February 2014.
\textsuperscript{29} Certain actions have been specifically excluded from the approval, such as petroleum or greenhouse gas activities occurring within the boundaries of any declared World Heritage area, including the Great Barrier Reef World Heritage Area.
\textsuperscript{30} NOPTA, ‘Greenhouse gas’, NOPTA website.
offshore waters. All four permits are located in offshore Victorian waters, and were awarded to the ‘Crown in right of Victoria’ as the sole titleholder.\(^{31}\)

These permits are related to the **CarbonNet Project**, which is investigating the potential for establishing a commercial scale CCS network in the Latrobe Valley. The network would involve multiple CCS projects transporting CO\(_2\) via a shared pipeline and injecting it into deep offshore underground storage sites in the offshore Gippsland Basin.\(^{32}\) NOPSEMA accepted a related environmental plan for a marine seismic survey (known as the **Pelican 3D Marine Seismic Survey**) which was carried out in early 2018 to obtain additional geological information. An **appraisal well** is planned to be drilled in late 2019 or early 2020 to retrieve rock samples.\(^{33}\) NOPSEMA has also accepted an environment plan relating to the appraisal well.\(^{34}\)

The Government advises that one of the reasons behind the current Bills is that ‘there is a renewed focus on the adequacy of regulatory arrangements’ as a result of the ‘potential for an increase in greenhouse gas storage activities in the future’.\(^{35}\)

### Committee consideration

**Selection of Bills Committee**

The Bills have been referred to the Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 5 September 2019.\(^{36}\) Details are available at the [inquiry homepage].\(^{37}\)

In the last Parliament, the first Bills were referred to the Senate Economics Legislation Committee, which reported on 13 August 2018.\(^{38}\) The majority report recommended that the Bills be passed.\(^{39}\) However, it also recommended that the Miscellaneous Amendments Bill 2018 be amended to insert a review of enforceable undertakings after a two year period to ascertain if they are the ‘most suitable way of ensuring compliance with the relevant legislation’.\(^{40}\) Labor Senators made additional comments (discussed further later in this Digest).

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Scrutiny of Bills Committee had no comment on the Regulatory Levies Bill.\(^{41}\)

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33. Ibid.; see also NOPSEMA, *Pelican 3D marine seismic survey*, NOPSEMA website.
34. NOPSEMA, *CarbonNet Offshore Appraisal Well*, NOPSEMA website.
40. Ibid.
However, the Committee raised concerns with the reversal of the legal burden of proof in two provisions of the Miscellaneous Amendments Bill 2018. These provisions remain the same in the Miscellaneous Amendments Bill 2019, and the Committee has reiterated its comments. The first provision related to section 584 of the OPGGS Act, which provides that, in a prosecution for an offence in relation to a breach of certain directions given by the responsible Commonwealth Minister, it is a defence if the defendant can prove that they took all reasonable steps to comply with the direction. Item 40 of Schedule 1 to the Miscellaneous Amendments Bill amends section 584 to extend this defence to directions given by NOPSEMA and NOPTA.

The Committee also raised concerns about clause 23 in proposed Schedule 2B, which will provide a defence to a prosecution for refusing or failing to do anything required by a well integrity law if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time. The defendant bears a legal burden of proof in relation to that matter.

The Scrutiny of Bills Committee raised concerns that the defendant bears the legal burden under these sections, effectively reversing the burden of proof. The Committee explained that an important aspect of the common law right to be presumed innocent until proven guilty is that the prosecution is normally required to prove all elements of an offence. Provisions that require a defendant to disprove one or more elements of an offence reverse the burden of proof and interfere with this common law right. As such, the Committee expects a ‘full justification each time the burden is reversed’. The Committee noted that the Explanatory Memorandum states that the burden has been reversed ‘because the matter is likely to be exclusively within the knowledge of the defendant’, particularly ‘given the remote nature of offshore greenhouse gas storage operations’. However, the Committee considered that this explanation did not adequately address the issue, and requested the Minister’s advice on this matter.

The Minister’s response to the Committee indicated that the relevant defences are likely to be used by companies with significant resources, which are ‘capable of shouldering the legal burden if they wish to claim a defence’. The Minister also advised the Committee that the relevant defences should be available ‘only to those who have genuinely done everything in their power to avert the occurrence of an adverse event and can demonstrate that this is the case’. The Minister also indicated that, due to the remote nature of the regulated activities, the facts relevant to the defences are entirely within the defendant’s knowledge and not at all within the regulator’s knowledge. In light of this information provided by the Minister, the Committee made no further comment on this matter.

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42. Senate Scrutiny of Bills Committee, Scrutiny digest, 5, 2018, op. cit., pp. 41–43.
43. Senate Scrutiny of Bills Committee, Scrutiny digest, 4, 2019, op. cit., p. 37.
44. Note that proposed sections 579A, 591B and 594A, inserted by items 27, 45 and 50 of Schedule 1 respectively, provide NOPSEMA with new powers to give directions. These provisions are discussed further in ‘Key issues and provisions’. NOPTA has powers, for example, to direct a petroleum or greenhouse gas titleholder to keep records: OPGGS Act, sections 697, 723.
45. As inserted by item 13 of Schedule 15 of the Miscellaneous Amendments Bill.
46. Senate Scrutiny of Bills Committee, Scrutiny digest, 5, 2018, op. cit., p. 42.
47. Explanatory Memorandum, Miscellaneous Amendments Bill 2018, pp. 33, 98.
50. Ibid., p. 110.
51. Ibid., p. 109.
52. Ibid., p. 110.
Policy position of non-government parties/independents

At the time of writing, non-government parties and independents do not appear to have commented on the current Bills.

As noted earlier in this Digest, Labor Senators made additional comments in the Senate Committee report on the first Bills. They indicated that they were ‘broadly supportive of the intent’ of the Bills, but highlighted that ‘offshore petroleum should be held to the highest levels of workplace health and safety standards’. In this context, they noted that the use of enforceable undertakings has been considered not to be best practice in the case of workplace fatalities and other related circumstances. As such, they recommended that ‘the Government continue to work with the Opposition to find amendments that would ‘limit the use of enforceable undertakings to where it is appropriate’.

The provisions relating to enforceable undertakings are different in the current Bills when compared to the first Bills, as discussed in the ‘Key issues and provisions’ section of this Digest.

Position of major interest groups

At the time of writing, major interest groups do not appear to have commented on the current Bills.

However, in its submission to the Senate Committee inquiry into the first Bills, the Australian Council of Trade Unions (ACTU) had ‘significant’ concerns in relation to the provisions for enforceable undertakings in Schedule 16 of the Bill. These provisions have since been amended as discussed further in the ‘Key issues and provisions’ section of this Digest.

The ACTU submission was supported by the Electrical Trades Union of Australia and the Australian Manufacturing Workers’ Union. These three unions also raised broader concerns relating to work health and safety of workers in the offshore petroleum industry, which the ACTU noted is ‘one of Australia’s most dangerous industries’. This issue has been the subject of a separate inquiry and report by the Senate Education and Employment References Committee.

Note also that environmental groups have in the past expressed concerns that NOPSEMA’s environmental assessment and approval processes for offshore activities are less rigorous and


54. Ibid., p. 21.

55. Ibid.

56. Ibid., p. 22.


transparent compared to those required under the *EPBC Act*. Media reports have indicated community concern about the proposed CarbonNet greenhouse gas storage project offshore from Victoria (this project was discussed earlier in this Digest) including ‘ineffective consultation’ in relation to this project. However, the Offshore Environment Regulations were amended in March this year to improve consultation and transparency requirements for offshore petroleum activities.

**Financial implications**

The Explanatory Memoranda state that the Bills will have no financial impact, although the amendments in the Regulatory Levies Bill ‘will ensure that NOPSEMA is fully cost-recovered for its regulatory operations’.

**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 Bills’ 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 Bills are compatible.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered that the current Bills do not raise human rights concerns. In the last parliament, the Human Rights Committee had no comment on the Regulatory Levies Bill or the Regulation References Bills.

However, in the last parliament, the Human Rights Committee did raise the same concerns as the Senate Scrutiny of Bills Committee in relation to the reversal of the legal burden of proof in two provisions of the Miscellaneous Amendments Bill 2018. These provisions (which are unchanged in the current Bill) are outlined in further detail in the ‘Senate Standing Committee for the Scrutiny of Bills’ section earlier in this Digest.

In particular, the Human Rights Committee raised concerns about the compatibility of these provisions with the right to be presumed innocent until proven guilty, which usually requires that the prosecution prove each element of the offence. The Human Rights Committee further considered that the statement of compatibility with human rights does not expressly explain how the reverse burden offences pursue a legitimate objective or are rationally connected to this

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61. See, for example, the discussion at Senate Environment and Communications References Committee, *Oil or gas production in the Great Australian Bight*, The Senate, Canberra, May 2017, pp. 48–54, 59–62.
64. See further M Canavan (Minister for Resources and Northern Australia), *Increasing transparency of oil and gas environment plans*, media release, 26 March 2019 and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Consultation and Transparency) Regulations 2019*.
66. The Statement of Compatibility with Human Rights can be found at pages 4–21 of the Explanatory Memorandum to the Miscellaneous Amendments Bill and at page 4 of the Explanatory Memorandum to the Regulatory Levies Bill.
The Human Rights Committee requested the Minister’s advice as to whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law, how the measure is effective to achieve that objective, whether the limitation is a reasonable and proportionate measure to achieve that objective and whether consideration could be given to amending the measures to provide for a reverse evidential burden rather than a reverse legal burden.

The Minister’s response to this request clarified that the offences will largely apply to corporations with significant resources, rather than individuals. The Minister also explained that the objectives of the regulatory regime were to ensure safety in the offshore petroleum industry as well as to protect the environment, and the robustness of the regime was ‘critical’ to achieving these objectives. The Minister also noted, in relation to the defence for the offence of breaching directions given by NOPSEMA, that such directions ‘are not used frequently—they are used in extraordinary circumstances...’. The Minister also pointed out that this defence ‘allows an optional exception; it is an opportunity for the defendant to prove that they took all reasonable steps to comply with the direction’. In relation to the defence for breaching a ‘well integrity law’, the Minister similarly noted that it ‘provides for an exception to strict compliance in emergency circumstances’.

The Human Rights Committee considered that the information provided in the Minister’s response indicated that the reverse burden offences are likely to be a proportionate means of achieving legitimate objectives as well as compatible with the right to be presumed innocent. The Committee thanked the Minister for the response and concluded its examination of this issue.

**Key issues and provisions**

**Miscellaneous Amendments Bill**

**Transfer of regulatory responsibility for offshore greenhouse gas storage activities**

Schedule 1 of the Miscellaneous Amendments Bill contains a range of amendments which transfer responsibility for regulatory functions and powers relating to environmental management of offshore greenhouse gas storage activities from the responsible Commonwealth Minister to NOPSEMA.

Currently, NOPSEMA primarily regulates offshore oil and gas exploration and production activities. However, NOPSEMA does deal with other aspects of offshore greenhouse gas storage activities under an administrative delegation:

NOPSEMA currently holds a delegation to undertake the Minister’s functions and powers in relation to greenhouse gas storage environmental management under the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Environment Regulations). However, there are a number...
of shortcomings in the arrangements for greenhouse gas storage environmental management and well operations. Further, the delegation does not provide a viable long-term regulatory solution...  

For example, the Explanatory Memorandum notes that NOPSEMA will accept or refuse to accept an environment plan as the ‘delegate of the Minister’ and as such ‘may therefore be perceived to be unable to act independently of government when making its decision as delegate, since the Minister remains the responsible regulator and retains the power to give directions to the delegate’. In addition, NOPSEMA inspectors do not currently have compliance monitoring and enforcement powers relating to greenhouse gas storage operations, or powers to issue administrative notices such as improvement notices and prohibition notices.

The Government considers that ‘NOPSEMA has developed expertise in the regulation of offshore environmental management and well operations through its responsibility for regulation of offshore petroleum activities’. As such, transferring regulatory oversight for similar aspects of offshore greenhouse gas activities from the relevant Minister to NOPSEMA will, in the Government’s view, ‘ensure we have an experienced and independent regulator for offshore greenhouse gas operations’. The Explanatory Memorandum emphasises that the Minister will still retain responsibility for ‘major decisions concerning the granting of greenhouse titles, the imposition of title conditions and the cancellation of titles, as well as core decisions about resource management and resource security’.

Some of the key provisions in Schedule 1 which transfer certain regulatory responsibilities under the OPGGS Act in relation to greenhouse gas titles are discussed below.

**Directions to greenhouse gas title holders**

**Proposed section 579A**, inserted by item 27 of Schedule 1, provides a new general power to NOPSEMA to give directions to greenhouse gas titleholders on any matter ‘in relation to which regulations may be made’. Under section 782 of the OPGGS Act, Regulations may be made in relation to all aspects of exploration for greenhouse gas storage formations and injection sites, and in relation to the actual injection and storage of greenhouse gas. As such, this will allow NOPSEMA to give directions in relation to health and safety, well integrity and environmental management aspects of offshore greenhouse gas activities.

This proposed section mirrors a similar, existing NOPSEMA power to give directions to petroleum titleholders contained in section 574 of the OPGGS Act. The Minister will also retain an existing general power to give directions to greenhouse gas titleholders under the existing section 580 of the OPGGS Act. However, item 30 of Schedule 1...

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78. [Explanatory Memorandum](https://example.com), Miscellaneous Amendments Bill, p. 24.
79. Ibid.
80. Ibid.
81. Ibid.
83. Ibid.
84. [Explanatory Memorandum](https://example.com), Miscellaneous Amendments Bill, p. 25.
85. The Explanatory Memorandum states that amendments will also be made to relevant regulations under the regime in addition to the amendments made by these Bills: see [Explanatory Memorandum](https://example.com), Miscellaneous Amendments Bill, pp. 24–5.
86. And certain other related persons as set out in [proposed subsection 579A(3)](https://example.com).
87. [See proposed subsection 579A(2).](https://example.com)
88. [See especially tables items 2A, 2B, 3A of section 782 of the OPGGS Act.](https://example.com)
89. [Explanatory Memorandum](https://example.com), Miscellaneous Amendments Bill, p. 31.
amends section 580 to deal with the ‘unlikely event’ of inconsistent directions being given to greenhouse gas title holders by NOPSEMA under proposed section 579A and the Minister under section 580. Under proposed subsection 580(8A), in this situation, the Minister’s direction will have no effect to the extent of the inconsistency.

In addition, under paragraph 580(5)(b) of the OPGGS Act, as amended by item 29 of Schedule 1, the Minister’s power to give directions will be subject to the requirements of specific relevant Regulations. The Explanatory Memorandum advises that, in practice:

... the Minister would only give directions in relation to the Minister’s functions under the OPGGS Act and the Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011, under which the Minister assesses and determines the storage parameters of storage formations and exercises regulatory oversight over operational aspects of injection and storage operations. This includes all aspects of managing storage capacity of the storage formation, monitoring of the movement of the greenhouse gas plume through the storage formation and operations required, if the Minister considers it necessary, to remediate any failure of the plume to behave in the manner predicted by the titleholder. These matters will also include remediation of the title area and end-of-project site closing. It is not desirable to include specific limitations in the direction-giving power in case any aspect of the Minister’s functions is inadvertently excluded.

Item 31 of Schedule 1 inserts proposed section 580A to make it clear that directions to a greenhouse gas title holder given by NOPSEMA (including directions under proposed section 579A) or the Minister under section 580 may require the titleholder to do something (or not do something) anywhere in an offshore area, including outside the title area. If the direction would require action in, or in relation to, another title area, then NOPSEMA or the Minister (as appropriate) must give the other titleholder a copy of the direction as soon as practicable.

Section 582 of the OPGGS Act provides a strict liability offence for breaching a direction given by the Minister to a greenhouse gas title holder under section 580, with a maximum penalty of 100 penalty units (currently $21,000) for an individual or 500 penalty units (currently $105,000) for a body corporate. Items 35 and 36 of Schedule 1 amend section 582 to extend this offence to breaches of directions given by NOPSEMA under proposed section 579A.

Defence of taking reasonable steps to comply with a direction

Section 584 of the OPGGS Act provides that, in a prosecution for an offence in relation to a breach of a direction given by the responsible Commonwealth Minister (under various provisions of the OPGGS Act), it is a defence if the defendant can prove that they took all reasonable steps to comply with the direction. Item 40 amends section 584 to extend this defence to directions given by NOPSEMA and NOPTA, in turn extending this defence to the offences of breaching a direction given under proposed section 579A (as well as proposed sections 591B or 594A, inserted by items 45 and 50 of Schedule 1 respectively, which are discussed later in this Digest). However, the

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89. Ibid., p. 32.
90. That is, the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009, the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011 and the Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009. Note that item 1 of Schedule 3 of the Bill contains an amendment to the equivalent provisions relating to petroleum titleholders in section 574A of the OPGGS Act: in other words, the Minister’s general power to give directions to petroleum titleholders will also be subject to the requirements of these same regulations.
91. Explanatory Memorandum, Miscellaneous Amendments Bill, pp. 31–32.
92. The value of a penalty unit is set by section 4AA of the Crimes Act 1914, and is currently $210. Subsection 4B(3) of the Crimes Act 1914 provides that where a body corporate is convicted of an offence the court may, if the contrary intention does not appear, impose a pecuniary penalty that is not more than five times the maximum pecuniary that could be imposed on a natural person convicted of the same offence.
Senate Scrutiny of Bills Committee has raised concerns that the defendant bears the legal burden under section 584, effectively reversing the burden of proof. This issue is discussed in more detail in the ‘Senate Standing Committee for Scrutiny of Bills’ section earlier in this Digest.

**NOPSEMA may take action if there is a breach of a direction**

**Item 38 of Schedule 1** inserts **proposed section 582A** to enable NOPSEMA to take action to ensure things under a greenhouse gas direction are done, even if a person bound by a NOPSEMA direction does not comply with the direction. Proposed subsection 582A(2) enables NOPSEMA to recover in court any costs or expenses incurred in taking those actions. A person (other than the titleholder) will not be liable for recovery of costs unless NOPSEMA proves that the person knew, or could reasonably be expected to have known, of the existence of the direction given by NOPSEMA under **proposed section 579A**. It is also a defence if the defendant took all reasonable steps to comply with the direction.

This proposed section mirrors existing section 583, which enables the responsible Commonwealth Minister to take action if there is a breach of a greenhouse gas direction given by the Minister and to recover the associated costs.

**Greenhouse gas title holders - notification obligations**

**Item 17 of Schedule 1** inserts **proposed section 452A** which imposes notification requirements on registered holders of greenhouse gas titles. Proposed subsections 452A(1)–(5) require persons who hold, acquire or cease to hold a greenhouse gas title, or titleholders whose contact details have changed, to notify NOPTA and NOPSEMA within 30 days.

Proposed subsection 452A(7) contains a strict liability offence for failure to comply with the notification requirements, with a maximum penalty of 50 penalty units (currently $10,500) for an individual or 250 penalty units (currently $52,500) for a body corporate. A civil penalty provision is set out in proposed subsection 452A(9), with a maximum penalty of 90 penalty units (currently $18,900) for an individual or 450 penalty units (currently $94,500) for a body corporate. Proposed subsections 452A(10) and (11) provide for a penalty for each day that the offence or contravention continues (of 10% of the maximum penalty).

This proposed section mirrors similar notification requirements that are imposed on petroleum title holders by section 286A of the **OPGGS Act**.

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93. Note that **proposed section 582A** would apply not only to directions given under **proposed section 579A** (the new general power for NOPSEMA to give a directions relating to greenhouse gas titles), but also to other directions that may be given to a greenhouse gas titleholder by NOPSEMA under Chapter 6 of the **OPGGS Act** or under regulations under the **OPGGS Act**: see proposed paragraph 582A(1)(a). This includes, for example, remedial directions to current or former greenhouse gas titleholders (under proposed section 591B and proposed section 594A, inserted by items 45 and 50 of Schedule 1).

94. Proposed subsection 582A(3).

95. Proposed subsection 582A(4).

96. This is defined at proposed subsection 452A(12).

97. In the case of a deceased title holder, this information must be provided by the deceased’s legal representative under proposed subsection 452A(4).

98. Subsection 48(3) of the **Crimes Act 1914** provides that where a body corporate is convicted of an offence the court may, if the contrary intention does not appear, impose a pecuniary penalty that is not more than five times the maximum pecuniary that could be imposed on a natural person convicted of the same offence.

99. Subsection 82(5) of the **Regulatory Powers (Standard Provisions) Act 2014** provides that that the pecuniary penalty imposed by a court on a body corporate for a breach of a civil penalty provision must not be more than five times the penalty specified for the provision. Section 611B of the **OPGGS Act** provides that civil penalty provisions in the Act are enforceable under Part 4 of the **Regulatory Powers (Standard Provisions) Act**.
Remedial directions to greenhouse gas titleholders

Section 592 of the *OPGGS Act* currently enables the responsible Commonwealth Minister to give remedial directions to certain greenhouse gas titleholders in relation to:

- removing property from the title area
- plugging or closing off wells in the title area
- conserving and protecting natural resources in the title area or
- ‘making good’ damage to the seabed or subsoil.

**Item 45 of Schedule 1** inserts *proposed section 591B* to provide NOPSEMA with a similar power to give remedial directions to current greenhouse gas titleholders. **Item 50** inserts *proposed section 594A* to also enable NOPSEMA to give remedial directions to former greenhouse gas title holders.

NOPSEMA already has powers to give remedial directions to current and former offshore petroleum titleholders in sections 586 and 587 of the *OPGGS Act*.

Failure to comply with a direction given by NOPSEMA under *proposed section 591B* or *proposed section 594A* will be a strict liability offence, with a maximum penalty of 100 penalty units (currently $21,000) for an individual or 500 penalty units (currently $105,000) for a body corporate.

The Minister will also retain existing powers in sections 592 and 595 to issue remedial directions to current and former greenhouse gas titleholders. However, **item 48** proposes to amend section 592 to limit the purposes for which such directions may be given to purposes relating to resource management, resource security or decommissioning. In addition, *proposed subsection 592(8)*, inserted by **item 49**, deals with the ‘unlikely’ event that inconsistent remedial directions are given by NOPSEMA and the Minister. In this situation, the Minister’s direction will have no effect to the extent of the inconsistency. **Items 51–54** contain equivalent amendments to adjust the Minister’s existing power (in section 595) to give remedial directions to former greenhouse gas title holders.

Note that the power in section 593 of the *OPGGS Act* to give a site closing direction to a greenhouse gas injection licensee (where relevant operations have ceased), will remain solely with the Minister. The Explanatory Memorandum states that this reflects the fact that the *OPGGS Act* ‘provides that the Commonwealth will eventually take over long-term civil liability’.

**Items 55 and 56** insert *proposed sections 595A* and *596A* which will enable NOPSEMA, in the event of the breach of direction given to a former greenhouse gas titleholder under *proposed section 594A*, to take action to ensure things directed to be done under a remedial direction are done. NOPSEMA may also direct that property in a vacated greenhouse gas title area be removed or disposed of, and if that is not done, NOPSEMA may remove or dispose of the relevant property itself. If NOPSEMA incurs costs or expenses in doing so, those costs become a debt due to NOPSEMA under *proposed subsections 596A(6)* and *(7)*. The responsible Commonwealth Minister also has similar existing powers under sections 596 and 597 of the *OPGGS Act* for a breach of a remedial direction given to a former greenhouse gas titleholder.

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100. *Proposed subsections 591B(5) and (6) and proposed subsections 594A(6) and (7).*
102. Ibid., p. 39.
Safety zones

Part 6.6 of the OPGGS Act enables safety zones to be gazetted in areas surrounding wells, structures or equipment in offshore areas. Certain vessels are then prohibited from entering that safety zone without authorisation. Currently, under section 616, NOPSEMA gazettes petroleum safety zones, while the Minister gazettes greenhouse gas safety zones under section 617. Item 110 of Schedule 1 of the Miscellaneous Amendments Bill proposes to amend section 617 to allow NOPSEMA, rather than the Minister, to gazette greenhouse gas safety zones prohibiting certain vessels entering that zone without NOPSEMA’s written consent. The Explanatory Memorandum suggests that since NOPSEMA will become the regulator for offshore greenhouse gas safety and well operations, ‘NOPSEMA will be best placed to determine whether a safety zone is required’ in order to protect an offshore greenhouse gas well, structure or equipment.

Information sharing

Part 6.11 of the OPGGS Act contains provisions relating to the use and sharing of certain information, documents (referred to as ‘offshore information’) and other things obtained under the OPGGS Act. The offshore information may be used within NOPSEMA for the purpose of exercising its powers or performing its functions, and can also be shared between certain entities, including the responsible Commonwealth Minister, the Secretary, NOPSEMA, NOPTA and other agencies, including law enforcement agencies and state and territory government agencies.

In particular, subsection 695U(1) provides that Part 6.11 applies in relation to offshore information or things obtained in the course of the exercise of a power, or the performance of a function, under the OPGGS Act, or administration of the OPGGS Act. However, NOPSEMA inspectors may also obtain information, documents or things using powers provided in the Regulatory Powers (Standard Provisions) Act 2014 for the purpose of monitoring and investigating compliance by persons with their obligations under the OPGGS Act and Regulations.

Item 114 therefore proposes to amend subsection 695U(1) to clarify that Part 6.11 also applies in relation to offshore information or other things obtained in the course of:

• exercising a power or performing a function under the Regulatory Powers Act or
• administering the Regulatory Powers Act

so far as these apply in relation to a provision of the OPGGS Act.

Currently, under subsection 695U(6), the information sharing provisions in Part 6.11 do not apply to offshore information or a thing relating to offshore greenhouse gas storage operations, unless obtained in relation to a listed OHS law. Given that regulatory responsibility for greenhouse gas wells and environmental management will be transferred to NOPSEMA, item 117 amends subsection 695U(6) so that the application of the information sharing provisions in Part 6.11 is extended to information relating to greenhouse gas storage operations.

103. See the simplified outline in section 612 of the OPGGS Act.
104. Explanatory Memorandum, Miscellaneous Amendments Bill, p. 47.
105. See subsection 695U(1).
106. See OPGGS Act, Part 6.5; Explanatory Memorandum, Miscellaneous Amendments Bill, pp. 48–49.
107. ‘Listed OHS laws’ are set out in section 638 of the OPGGS Act.
108. See further Explanatory Memorandum, Miscellaneous Amendments Bill, p. 50.
Subsection 695U(4) also currently provides that Part 6.11 does not apply to offshore information, or a thing, covered by Part 7.3 of the OPGGS Act. Part 7.3 is designed to ‘safeguard commercially sensitive or technical offshore information’ about petroleum activities, such as petroleum mining samples.\(^{109}\) Part 8.3 of the OPGGS Act contains similar protections for technical information relating to greenhouse gas storage. Item 116 inserts proposed subsection 695U(4A), which provides that Part 6.11 does not apply to offshore information, or a thing, covered by Part 8.3. As the Explanatory Memorandum states, this is needed ‘given that the application of the information sharing provisions in Part 6.11 is to be extended to information relating to greenhouse gas storage operations’ under item 117.\(^{110}\)

**Other related amendments**

Schedule 1 also contains a range of other technical and consequential amendments to reflect the transfer of relevant responsibilities to NOPSEMA. These are not discussed in detail in this Digest as they do not appear to raise any issues in relation to their operation and are adequately covered by the Explanatory Memorandum.

For example, section 446 of the OPGGS Act lists the grounds for cancelling a greenhouse gas assessment permit, holding lease or injection licence. Under paragraph 446(b), this currently includes where the registered holder has not complied with a direction given to the holder by the responsible Commonwealth Minister. Item 15 of Schedule 1 amends this paragraph to include non-compliance with directions given by NOPSEMA or NOPTA.

**Monitoring and enforcement powers**

**Extending existing powers of NOPSEMA inspectors**

Schedule 1 of the Miscellaneous Amendments Bill also extends existing monitoring and investigation powers of NOPSEMA inspectors to all aspects of offshore greenhouse gas storage operations under the OPGGS Act and Regulations. Currently the powers of NOPSEMA inspectors can generally only be used in connection with provisions related to petroleum titles and activities, and only OHS provisions relating to greenhouse gas storage activities.

In particular, section 601 of the OPGGS Act contains a table of ‘listed NOPSEMA laws’ for the purposes of the OPGGS Act. NOPSEMA inspectors, appointed by the Chief Executive Officer (CEO) of NOPSEMA,\(^{111}\) can exercise a range of monitoring and investigation powers under Parts 2 and 3 of the Regulatory Powers Act in relation to these listed NOPSEMA laws.\(^{112}\)

Currently, only provisions related to petroleum titles and activities are listed NOPSEMA laws in section 601, along with OHS provisions relating to greenhouse gas activities. Items 63–75 of Schedule 1 amend section 601 to include various other greenhouse-gas related provisions as listed NOPSEMA laws. This includes, for example, Part 6.3 of the OPGGS Act which relates to directions given to greenhouse gas title holders (see item 66) and Part 6.4 of the OPGGS Act which relates to remedial directions given to greenhouse gas title holders (item 67). This means that NOPSEMA inspectors can exercise monitoring and investigation powers under Parts 2 and 3 of the Regulatory Powers Act in relation to these greenhouse gas provisions.

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109. Ibid., p. 49.
110. Ibid.
111. Under section 602 of the OPGGS Act.
112. See sections 602C–602H of the OPGGS Act.
Similarly, Schedule 2A of the *OPGGS Act* confers a range of monitoring powers on NOPSEMA inspectors for the purpose of monitoring compliance with ‘petroleum environmental laws’. A range of amendments in **Schedule 1** extend the relevant powers to offshore greenhouse gas activities. For example, many items replace references to ‘petroleum environmental laws’ with ‘environmental management laws’, and ‘petroleum environmental inspection’ with ‘environmental inspection’.  

Consequential amendments are made by **items 94** and **95** to repeal sections 605-608 of the *OPGGS Act* which currently provide for the separate appointment of greenhouse gas project inspectors and enable those inspectors to exercise monitoring powers for the purposes of the *OPGGS Act* and Regulations.  

However, section 609 of the *OPGGS Act*, which contains an offence for interfering with greenhouse gas installations or operations, will be retained.

**Expanded definition of regulated business premises**

**Schedule 1** also contains amendments to expand the categories of places that NOPSEMA inspectors may enter, without a warrant, for the purposes of conducting a monitoring inspection under Schedule 2A (which covers environmental inspections) or Schedule 3 to the *OPGGS Act* (which relates to OHS inspections).

For example, a NOPSEMA inspector may enter ‘regulated business premises’ (without a warrant) if satisfied, on reasonable grounds, that documents or things are likely to be at those premises that are relevant to compliance with an environmental management law. ‘Regulated business premises’ are currently defined in clause 2 of Schedule 2A as premises, other than offshore petroleum premises, that are:

- occupied by the registered holder of a petroleum title and
- used, or proposed to be used, wholly or principally in connection with operations in relation to one or more petroleum titles, including that petroleum title.

The Explanatory Memorandum notes that ‘the scope of (onshore) regulated business premises is proving to be inadequate in practice’:

One reason is that a company that is a titleholder may not be the entity that makes decisions about the operations being carried out under the authority of the title. For example, these decisions may be made by a parent company with a subsidiary established for the purposes of holding the title. Relevant documents or things may therefore be at the premises of the latter company. Another reason is that operations (for example drilling a well) may be carried out entirely by a contractor, so any documents or things relating to the operations will be located at the premises of the contractor, rather than at the premises of the titleholder.

**Item 155** of **Schedule 1** of the Miscellaneous Amendments Bill therefore proposes to amend the definition of ‘regulated business premises’. First, the definition will be extended to relate to all titles, including both petroleum titles and greenhouse gas titles. This amendment will also

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113. See, for example, **items 80–83, 86, 93, 142, 146, 150, 164–165** of Schedule 1.
114. **Items 118–129** and **Divisions 2 and 3** of Schedule 1 contain consequential amendments, including replacing references to greenhouse gas project inspectors with references to NOPSEMA inspectors.
116. Note that ‘premises’ is also defined in clause 2 of Schedule 2A to have the same meaning as in the *Regulatory Powers Act*.
118. See also **item 156** of Schedule 1.
clarify that regulated business premises means eligible premises\textsuperscript{119} on land and extend the
definition of ‘regulated business premises’ to onshore premises of:

• a related body corporate\textsuperscript{120} of a titleholder and

• a person who has carried out, is carrying out, or is to carry out operations under a contract,
  arrangement or understanding with a titleholder, or a related body corporate of a titleholder.

The Explanatory Memorandum states that this amendment will ensure the full scope of relevant
premises can be accessed by a NOPSEMA inspector:

For example, the titleholder may have set up access to spill response materials and equipment, in the
event of an oil spill, through an arrangement with an entity, such as the Australian Marine Oil Spill
Centre. It is important that NOPSEMA inspectors can access premises of a spill response entity with
which the titleholder has made such arrangements to ensure adequate and appropriate materials will
be available in the event of an oil spill, in accordance with risk management arrangements in a

titleholder’s environment plan.\textsuperscript{121}

The Explanatory Memorandum also notes that ‘NOPSEMA inspectors will in all cases be required
to obtain a warrant or consent … before entering premises to exercise powers to search for and
gather evidential material’.\textsuperscript{122}

Other amendments are related to this extended definition. This includes for example, item 178 of
Schedule 1 of the Miscellaneous Amendments Bill. Under paragraph 5(1)(b) of Schedule 2A of the
OPGGS Act, when NOPSEMA inspectors enter regulated business premises to conduct an
environmental inspection (in the circumstances set out in subclause 5(1)), they have powers to
‘search for, inspect, take extracts from, or make copies of, any such documents at those premises’. However, the Explanatory Memorandum suggests that, since the extended definition of regulatory
business premises is likely to capture, for example, premises of spill response entities, and of
drilling contractors, ‘it is likely that there will be things other than documents (e.g. substances) at
those premises that NOPSEMA inspectors may wish to examine as part of a monitoring
inspection’:

For example, dispersants for use in the event of an oil spill may be stored at onshore premises of a spill
response entity. Inspectors may also wish to examine structural parts of the premises that are relevant
to the titleholder’s spill preparedness compliance — e.g. built-in tanks for storage of contaminated
water, soil or other substances following clean-up operations.\textsuperscript{123}

Item 178 therefore proposes to replace paragraph 5(1)(b) to provide NOPSEMA inspectors with
additional powers at regulated business premises to search the premises for relevant plant,
substances, documents and things, to inspect the premises, and to inspect, take extracts from,
examine or measure or conduct tests on the plant, substances or things found at those premises.
The Explanatory Memorandum states:

This will ensure NOPSEMA inspectors have a full set of powers to determine whether a titleholder is
compliant with its environmental obligations under the OPGGS Act and regulations. This is particularly

\textsuperscript{119} Note that a definition of ‘eligible premises’ is inserted by item 144, and will be defined to mean premises including a structure
or building, or a place that is enclosed.

\textsuperscript{120} This has the same meaning as in the Corporations Act 2001: see item 5 of Schedule 1 of the Bill.

\textsuperscript{121} Explanatory Memorandum, Miscellaneous Amendments Bill, p. 54.

\textsuperscript{122} Ibid.

\textsuperscript{123} Ibid., p. 57.
important, for example, in the case of oil spill response preparedness, to ensure adequate and appropriate spill response equipment will be available in the event of an oil spill.\textsuperscript{124}

\textbf{Items 262–266 of Schedule 1} of the Miscellaneous Amendments Bill make equivalent amendments to the definition of regulated business premises in Schedule 3 of the \textit{OPGGS Act}.

\textbf{Additional powers relating to well integrity}

Currently, NOPSEMA has powers to conduct inspections without a warrant to monitor compliance with environmental management or OHS obligations under the \textit{OPGGS Act} and Regulations. These powers are set out in Schedules 2A and 3 respectively of the \textit{OPGGS Act}. However, NOPSEMA does not have the same sorts of powers to undertake inspections without a warrant to monitor compliance by titleholders with well integrity-related obligations under the \textit{OPGGS Act} and Regulations. These obligations include, in particular, the provisions in Part 5 of the \textit{Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011} (known as the Wells Regulations) which require titleholders operating wells in their title area to have Well Operations Management Plans (WOMPs) in place.\textsuperscript{125} The Explanatory Memorandum advises:

To date, NOPSEMA has generally used warrant-free access to offshore facilities under Schedule 3 to the \textit{OPGGS Act} (OHS inspections) to conduct well-related inspections; however, this access is only permitted to the extent the inspection relates to compliance with OHS obligations. There is no stand-alone provision for warrant-free access to a facility to monitor compliance with well-integrity related obligations.\textsuperscript{126}

However:

Given the difficulty in accessing offshore facilities, the risks associated with offshore activities, and the frequent changes to operational decisions by titleholders about the timing of well activities, the requirement to obtain a warrant may impede NOPSEMA’s ability to conduct monitoring inspections of well activities at the time they are being undertaken.\textsuperscript{127}

The Explanatory Memorandum expresses further concern that ‘a requirement to obtain a warrant before conducting a monitoring inspection would impede NOPSEMA’s ability to respond quickly in an emergency’.\textsuperscript{128}

As such, \textbf{item 13 of Schedule 15} of the Miscellaneous Amendments Bill inserts \textbf{proposed Schedule 2B} into the \textit{OPGGS Act}, to provide NOPSEMA inspectors with new powers to monitor compliance with well integrity laws. ‘Well integrity laws’ will be defined as including provisions of the \textit{OPGGS Act} that relate to the integrity of wells, and Part 5 of the Wells Regulations.\textsuperscript{129} The new powers conferred by \textbf{proposed Schedule 2B} to monitor compliance with well integrity laws will be in addition to the monitoring powers in Part 2 of the \textit{Regulatory Powers Act} as applied by the

\begin{itemize}
  \item \textsuperscript{124} Ibid.
  \item \textsuperscript{125} See especially Regulation 5.04.
  \item \textsuperscript{126} \textit{Explanatory Memorandum}, Miscellaneous Amendments Bill, p. 89.
  \item \textsuperscript{127} Ibid., p. 89.
  \item \textsuperscript{128} Ibid., p. 90.
  \item \textsuperscript{129} See definition in \textbf{proposed clause 2 of proposed Schedule 2B}, as inserted by \textbf{item 13} of Schedule 15 of the Miscellaneous Amendments Bill.
\end{itemize}
The well integrity monitoring powers conferred on NOPSEMA inspectors under **proposed Schedule 2B** generally mirror the equivalent environmental management and OHS monitoring powers in existing Schedule 2A and Schedule 3 of the **OPGGS Act** (as amended by the Bill).  

**Proposed subclause 3(1)** provides that a well integrity inspection includes an investigation or inquiry under Part 2 of **proposed Schedule 2B** and that the inspection need not include physical inspection of any premises or thing. **Proposed subclause 3(2)** enables NOPSEMA inspectors to conduct a well integrity inspection at any time to determine whether a well integrity law has been or is being complied with, or whether information given in compliance with a well integrity law is correct. The inspection powers under **proposed Schedule 2B** include, for example:

- powers of entry and search without warrant, at any reasonable time of the day or night, in order to:
  - inspect, examine, measure or conduct tests
  - take photographs, make video recordings, or make sketches of the facility 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 reasonably connected with the conduct of a well integrity inspection
- power to request the production of documents or things in connection with the conduct of a well integrity inspection and power to retain those documents or things for as long as is reasonably necessary
- power to take possession of plant, substances and samples from a facility or premises and
- power to direct that a facility 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 facility, or a particular plant, substance or thing, at the facility.

**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, require a titleholder (or their nominated representative) to provide the inspector with reasonable assistance and facilities. Reasonable assistance includes appropriate transport to or from the facility and reasonable accommodation and means of subsistence while the inspector is at the facility (**proposed subclause 7(2)**). Failure to provide such assistance, without a reasonable excuse, is an offence under **proposed subclause 7(3)**. The maximum penalty is a term of six months imprisonment or 60 penalty units (currently equivalent to $12,600) or both.

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130. See item 7 of Schedule 15, which inserts **proposed section 602JA** into the **OPGGS Act**; and also sections 602C–602G of the **OPGGS Act**. Note that item 2 of Schedule 15 adds ‘well integrity laws’ to the listed NOPSEMA laws in the table in section 601; see also **Explanatory Memorandum**, Miscellaneous Amendments Bill, p. 90.


132. See, in particular, Part 4 of Schedule 3 of the **OPGGS Act**.

133. See **proposed clauses 4 and 5 of proposed Schedule 2B**.

134. **Proposed subclause 8(1) of proposed Schedule 2B**.

135. **Proposed clause 8 of proposed Schedule 2B**.

136. **Proposed clause 9 of proposed Schedule 2B**.

137. **Proposed clause 10 of proposed Schedule 2B**.
Proposed Schedule 2B also provides for NOPSEMA inspectors to issue various notices related to well integrity inspections and creates offences for failure to comply with such notices. Proposed clause 16 makes it an offence to tamper with or remove such notices.

Under proposed clause 18, a NOPSEMA inspector must prepare a report about any well integrity inspection and give the report to NOPSEMA. NOPSEMA must give a copy of the report to the titleholders as soon as practicable after receiving the report (proposed subclause 18(4)) and may request the titleholder to provide NOPSEMSA details of any remedial action proposed to be taken as a result of the report (proposed subclause 18(5)).

Under proposed clause 23 in proposed Schedule 2B, it will be a defence to a prosecution for refusing or failing to do anything required by a well integrity law if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time. The defendant bears a legal burden of proof in relation to that matter. Similar defences are provided in existing clauses in other parts of the OPGGS Act: in clause 18 of Schedule 2A (for offences against environmental management laws) and clause 92 of Schedule 3 (for offences against OHS laws). However, the Senate Scrutiny of Bills Committee raised concerns that this clause reverses the legal burden of proof. This issue is discussed in more detail in the ‘Senate Standing Committee for Scrutiny of Bills’ section of this Digest.

Enforceable undertakings

Schedule 16 of the Miscellaneous Amendments Bill contains amendments to enable the Minister, NOPTA and the CEO of NOPSEMA to accept enforceable undertakings in relation to compliance with provisions of the OPGGS Act and Regulations. These amendments apply the framework for enforceable undertakings in Part 6 of the Regulatory Powers Act. An enforceable undertaking is a written undertaking given by a person that the person will take, or refrain from taking, certain actions. Authorised persons may then apply to a relevant court to enforce the undertaking, including for an order directing a person to comply with that undertaking.

Item 7 of Schedule 16 inserts proposed Division 8 into the compliance and enforcement provisions in Part 6.5 of the OPGGS Act. Proposed section 611N triggers the application of the standard provisions in Part 6 of the Regulatory Powers Act, which create a framework for accepting and enforcing undertakings. Proposed subsection 611N(2) contains a table setting out the provisions of the OPGGS Act that are enforceable by enforceable undertakings, as well as the ‘authorised persons’ who may accept those undertakings (either the Minister, CEO of NOPSEMA or NOPTA). According to the Explanatory Memorandum, an enforceable undertaking may be accepted ‘in relation to all of the criminal and civil penalty provisions in the OPGGS Act, with the exception of indictable offences’.

Enforceable undertakings may be enforced by a relevant court—that is, the Federal Court of Australia, the Federal Circuit Court of Australia or the Supreme Court of a state or territory that has jurisdiction in relation to matters under the OPGGS Act. The court may make any order that

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138. See for example proposed clauses 10–15.
141. Proposed subsection 611N(3).
it considers appropriate, including an order directing compliance, an order requiring any financial benefit from the failure to comply to be surrendered, and an order for damages.\footnote{142}{Explanatory Memorandum, Miscellaneous Amendments Bill, p. 105; \textit{Regulatory Powers Act}, section 115.}

Under \textbf{proposed section 611P}, the regulator who accepts an undertaking must publish the undertaking on its website, and must take reasonable steps to de-identify any personal information contained in an undertaking before it is published.

\textbf{Proposed section 611Q} creates an offence for failure to comply with an enforceable undertaking, with a maximum penalty of 250 penalty units (currently $52,500) for an individual or 1,250 penalty units (currently $262,500) for a body corporate. According to the Explanatory Memorandum, an equivalent provision in section 219 of the \textit{Work Health and Safety Act 2011} has been used as a precedent.\footnote{143}{Explanatory Memorandum, Miscellaneous Amendments Bill, p. 109. Section 219 of the \textit{Work Health and Safety Act 2011} contains a penalty of $50,000 for an individual or $250,000 for a body corporate for a contravention of a WHS undertaking.}

The Explanatory Memorandum states that introducing enforceable undertakings into the \textit{OPGGS Act} will provide ‘an appropriate and proportionate response to incidents of non-compliance with the OPGGS Act and regulations, in order to encourage improved compliance outcomes’.\footnote{144}{Explanatory Memorandum, Miscellaneous Amendments Bill, p. 105.} The Explanatory Memorandum suggests that enforceable undertakings offer unique benefits, including enabling a more tailored enforcement response and ‘more timely and cost-effective outcomes that would not be achievable by a prosecution’.\footnote{145}{Ibid., p. 106.}

However, as noted earlier in this Digest, the ACTU raised concerns during the Senate inquiry in the last parliament about this Schedule of the Miscellaneous Amendments Bill 2018, suggesting that enforceable undertakings are not an appropriate regulatory tool in certain circumstances.\footnote{146}{ACTU, \textit{Submission}, op. cit., p. 1.} The ACTU noted that enforceable undertakings ‘when properly utilised, can achieve long-term, sustainable improvements to WHS culture and practice in workplaces and across sectors’.\footnote{147}{Ibid., p. 2.} However, the ACTU expressed concern that enforceable undertakings have the ‘potential to undermine compliance’ when overused or misused and should be ‘subject to appropriate safeguards and strict guidelines’.\footnote{148}{Ibid.} The ACTU therefore recommended that the Bill be amended to prohibit enforceable undertakings in particular circumstances, such as where the contravention is connected to a fatality or involves reckless conduct.\footnote{149}{Ibid.}

These concerns were noted in the Senate Economics Legislation Committee majority report, which recommended that the Miscellaneous Amendments Bill 2018 be amended to insert a review of enforceable undertakings after a two year period.\footnote{150}{Senate Economics Legislation Committee, \textit{Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 [Provisions]; and Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018 [Provisions]}, op. cit., p. 20.}

\textbf{Changes to enforceable undertakings since 2018 Bills}

The concerns about the enforceable undertakings appear to have been addressed in the current Miscellaneous Amendments Bill through changes made to \textbf{proposed section 611N}. In particular, a new subsection has been added: \textbf{proposed subsection 611N(4)}, which would limit the ability of an
authorised person to accept an enforceable undertaking.\textsuperscript{151} Under this subsection, an undertaking cannot be accepted in response to an alleged contravention of a listed OHS law\textsuperscript{152} if:

- the alleged contravention contributed, or may have contributed, to the death of another person
- the alleged contravention involved recklessness\textsuperscript{153}
- during the previous five years, the person giving the undertaking has been convicted of an offence against a listed OHS law that contributed to the death of another person or
- during the previous ten years, the person giving the undertaking has been convicted of two or more offences against a listed OHS law and at least two of those convictions arose from separate investigations.

The Explanatory Memorandum suggests that ‘these express limitations are considered to be appropriate in the context of a high-hazard industry’.\textsuperscript{154}

However, \textit{proposed subsection 611N(5)} provides that the prohibition in subsection 611N(4) does not apply if there are ‘exceptional circumstances’. The phrase ‘exceptional circumstances’ is not defined, nor are any examples provided in the Bill or Explanatory Memorandum. The Explanatory Memorandum does note:

\begin{quote}
The person giving the undertaking will be given an opportunity to make submissions as to why there are exceptional circumstances that would make an enforceable undertaking an appropriate enforcement outcome for the alleged contravention.\textsuperscript{155}
\end{quote}

**Other amendments to monitoring and enforcement provisions**

Schedule 4 of the Miscellaneous Amendments Bill contains provisions relating to the monitoring and enforcement powers of NOPSEMA inspectors, including amendments to:

- enable NOPSEMA inspectors to retain documents in certain circumstances\textsuperscript{156}
- provide that self-incrimination protections are limited to individuals, rather than corporations.\textsuperscript{157}

In addition, \textit{items 1–2 and 4–6} of Schedule 16 of the Miscellaneous Amendments Bill amend various sections in the \textit{OPGGS Act} which apply the \textit{Regulatory Powers Act}. These amendments extend the application of the relevant monitoring and enforcement powers to all external Territories covered by the \textit{OPGGS Act}.\textsuperscript{158}

\textsuperscript{151} Note that the previous proposed subsections 611N(4) and (5) from the Miscellaneous Amendments Bill 2018 are contained in subsections 611N(7) and (8) of the current Miscellaneous Amendments Bill.

\textsuperscript{152} ‘Listed OHS laws’ are set out in section 638 of the \textit{OPGGS Act}.

\textsuperscript{153} As defined in section 5.4 of the \textit{Criminal Code}.

\textsuperscript{154} \textit{Explanatory Memorandum}, Miscellaneous Amendments Bill, p. 108.

\textsuperscript{155} Ibid.

\textsuperscript{156} See, in particular, \textit{items 11 and 18} of Schedule 4.

\textsuperscript{157} See, in particular, \textit{items 3–10, 16–17} of Schedule 4. For a detailed discussion of these provisions, see \textit{Explanatory Memorandum}, Miscellaneous Amendments Bill, pp. 77–9.

\textsuperscript{158} Section 34 of the \textit{OPGGS Act} extends the Act to Norfolk Island; the Territory of Christmas Island; the Territory of Cocos (Keeling) Islands; the Territory of Ashmore and Cartier Islands; and the Territory of Heard Island and McDonald Islands; see also \textit{Explanatory Memorandum}, Miscellaneous Amendments Bill, pp. 106–7.
Retrospectively designating ‘frontier areas’ for the Designated Frontier Area tax incentive

The Designated Frontier Area tax incentive (DFA) was in place between 2004 and 2009 and was designed to encourage petroleum exploration in Australia’s remote offshore areas.

The DFA operated under the Petroleum Resource Rent Tax Assessment Act 1987 (PRRTA Act). Under the scheme, the Resources Minister could allocate up to 20 per cent of the annual offshore petroleum acreage release areas as ‘designated frontier areas’.\(^\text{159}\) Persons conducting exploration under exploration permits in these designated areas were able to claim up to 150 per cent of the costs associated with their exploration expenditure for the purposes of determining the amount of Petroleum Resources Rent Tax (PRRT) payable (rather than the 100 per cent of expenditure that could ordinarily be claimed).\(^\text{160}\) Subsection 36B(3) of the PRRTA Act required the Minister’s designation to be published in the Commonwealth Gazette.\(^\text{161}\)

However, the Explanatory Memorandum advises that an ‘administrative oversight’ was recently discovered in relation to the 2005 acreage release, in that the Resources Minister did not publish the designated areas in the Gazette as required under the PRRTA Act. As a result, four areas that had been promoted as frontier areas in 2005 were not actually validly designated as ‘frontier areas’.\(^\text{162}\) As such, the Miscellaneous Amendments Bill proposes to retrospectively designate the areas as Designated Frontier Areas, ‘to avoid potential for doubt regarding validity of claims under the tax incentive scheme’.\(^\text{163}\)

To achieve this, item 1 of Schedule 17 of the Miscellaneous Amendments Bill inserts proposed clause 43 to Schedule 6 of the OPGGS Act. Schedule 6 of the OPGGS Act currently contains a range of transitional provisions (mainly relating to the repeal of the previous offshore petroleum legislation, the Petroleum (Submerged Lands) Act 1967). Proposed clause 43 provides that the PRRTA Act has effect, and is taken always to have had effect, as if four areas had been specified in an instrument made under subsection 36B(1) of that PRRTA Act on 17 April 2005. Proposed paragraph 43(b) further provides that the requirement to publish that instrument in the Commonwealth Gazette under subsection 36B(3) of the PRRTA Act did not apply to that instrument. Of the four areas listed in proposed clause 43, one is in the Otway Basin offshore from South Australia (Area S05-2) while three others are offshore from Western Australia (W05-5, W05-23 and W05-24).\(^\text{164}\)

Other amendments

Protection of technical information

Schedule 2 of the Miscellaneous Amendments Bill contains amendments to clarify the circumstances in which a Commonwealth Minister (other than the responsible Commonwealth

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161. PRRTA Act, subsections 36B(1) and (3).
163. Ibid.
Sections 712 to 714 of Part 7.3 of the OPGGS Act deal with the disclosure of certain documentary information or petroleum mining samples obtained by NOPTA. Subsection 714(1) enables NOPTA to disclose certain documentary information or samples to a Commonwealth Minister, a State Minister or a Northern Territory Minister. Sections 715 and 716 then control the circumstances in which a Minister may further disclose information or a sample which has been disclosed under section 714. As currently drafted, these sections only cover disclosure of information or samples by the responsible Commonwealth Minister, whereas section 714 also permits NOPTA to disclose information or samples to Ministers other than the responsible Commonwealth Minister. As the Explanatory Memorandum states:

This anomaly leads to uncertainty about the circumstances in which a Commonwealth Minister (other than the responsible Commonwealth Minister), a State Minister or a Northern Territory Minister may disclose documentary information or a petroleum mining sample.  

Items 4–14 of Schedule 2 amend sections 715 and 716 to clarify that any ‘recipient Minister’ (to whom information or samples have been disclosed under section 714) is subject to restrictions on the disclosure of information and samples, including a Commonwealth, state or Northern Territory Minister. Items 9 and 14 ensure these restrictions also extend to Ministers who have received such information from the initial recipient Minister.

Items 17–23 of Schedule 2 make equivalent amendments to similar provisions in Part 8.3 of the OPGGS Act which aim to protect technical information provided in relation to greenhouse gas titles, as well as amending technical errors in the legislation.

Under sections 745–747A of the OPGGS Act, certain decisions relating to the release of technical information may be reviewed by the Administrative Appeals Tribunal (AAT). Item 21 of Schedule 2 is a consequential amendment to the definition of ‘reviewable Ministerial decision’ in section 745 to ensure that AAT review is available for relevant decisions made by the responsible Commonwealth Minister to disclose information, including under the amended provisions.

**Appeals relating to safety inspections**

Clause 80A of Schedule 3 of the OPGGS Act provides that certain decisions made by NOPSEMA inspectors, as set out in the table in that section, may be appealed to the Fair Work Commission. Clause 81 sets out some of the rules and procedures associated with such appeals.

According to the Explanatory Memorandum, decisions made by the Fair Work Commission in 2015 and 2016 have created ambiguity as to whether an appeal against a decision of a NOPSEMA inspector should be considered based on the circumstances that exist at the time an appeal is heard, or the circumstances that existed at the time the inspector decided to issue the relevant decision.
notice. This ambiguity apparently extends to an appeal against any of the decisions of a NOPSEMA inspector referred to in the table in subclause 80A(1) of Schedule 3.

The Explanatory Memorandum gives the following example of the problem caused by this uncertainty:

... this issue has potential consequences in cases where, despite lodging an appeal against a decision of a NOPSEMA inspector to issue an improvement notice, the person to whom the notice was issued has since carried out the improvements that the notice requires.

If, in these cases, an appeal is determined solely or primarily on the basis of circumstances existing at the time the appeal is heard, it must inevitably succeed. This risks the appeals process becoming a mechanism (with a predetermined outcome) for expunging notices, rather than serving as a proper administrative check on the powers of NOPSEMA inspectors.

As such, item 1 of Schedule 12 inserts proposed subclause 81(7A) into Schedule 3 of the OPGGS Act which provides that an appeal against a decision ‘is to be determined on the basis of the circumstances which prevailed at the time the decision was made’. Item 2 provides that proposed subclause 81(7A) will apply only to appeals instituted after the commencement of the amendment, ‘so as not to interfere with any existing appeals’.

**Boundary changes**

Schedule 13 of the Miscellaneous Amendments Bill contains amendments to clarify that greenhouse gas assessment permits and holding leases can be renewed in the event of a boundary change affecting those greenhouse gas titles.

The boundary between Commonwealth waters and state or territory coastal waters changes automatically to reflect actual changes to the territorial sea baseline. The territorial sea baseline is the line from which the three nautical mile coastal waters of a state or the Northern Territory is measured. The normal territorial sea baseline generally corresponds with the low water line along the coast. Geoscience Australia has responsibility for defining the limits of Australia’s maritime jurisdiction and, in practice, changes to Australia’s maritime boundaries are identified through the publication of new maps or datasets by Geoscience Australia.

A change to the territorial baseline therefore results in a change to the boundary between Commonwealth waters and state or territory coastal waters, which in turn may impact on existing Commonwealth petroleum and greenhouse gas titles.

The OPGGS Act contains several provisions to address the immediate impacts of a boundary change on existing Commonwealth petroleum and greenhouse gas titles. In particular, sections 283 and 463:

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170. Ibid., p. 87.
171. Ibid.
172. Ibid.
173. [Explanatory Memorandum](#), Miscellaneous Amendments Bill, p. 87. This occurs through the operation of the Commonwealth [Coastal Waters (State Title) Act 1980](#) and the [Coastal Waters (Northern Territory Title) Act 1980](#).
174. Geoscience Australia, ‘[Maritime boundary definitions](#)’, op. cit.
175. Ibid.
176. [Explanatory Memorandum](#), Miscellaneous Amendments Bill, p. 87.
... maintain certainty for titleholders by postponing the effect of boundary changes until affected titles cease to be in force (for example by way of expiry, renewal, cancellation or surrender, or if a successor title is granted (for example the grant of a petroleum production licence to the holder of a petroleum exploration permit)).

Section 11 of the *OPGGS Act* relates to the renewal of petroleum and greenhouse gas titles. Subsections 11(1A)–(1F) provide that certain petroleum titles may be renewed in the event of a changes to the boundary of state or territory coastal waters impacting on the relevant area relating to that title. However, although subsection 11(2) provides for the renewal of greenhouse gas titles, there are no equivalent provisions for greenhouse gas titles dealing with any boundary changes.

**Item 1 in Schedule 13** of the Miscellaneous Amendments Bill proposes to insert **new subsections 11(3)–(6)** which will provide equivalent provisions clarifying that greenhouse gas assessment permits and holding leases can be renewed in the event that a change to the boundary of state or territory coastal waters impacts on the relevant area relating to that title. These mirror the equivalent existing provisions in subsections 11(1A)–(1F) relating to similar petroleum titles.

**Cost recovery-related measures**

Both NOPSEMA and NOPTA operate on a cost recovery basis, whereby levies and fees are collected from titleholders. Several amendments in the Miscellaneous Amendments Bill relate to fees associated with these cost recovery arrangements as well as the recovery of other costs under the *OPGGS Act*. These are outlined briefly below.

**Fees for varying petroleum access authorities**

Schedule 5 contains amendments to enable a petroleum access authority holder to apply for a variation of the authority, in turn allowing NOPTA to introduce a fee for applications to vary petroleum access authorities.

Although petroleum access authorities may be varied under section 246 of the *OPGGS Act*, there is no specific provision for an access authority holder to apply for that variation. As the Explanatory Memorandum notes, in practice, NOPTA currently considers variations of access authorities on request of the authority holder. To clarify that NOPTA can charge a fee for an application to vary a petroleum access authority, **item 2 of Schedule 5** of the Miscellaneous Amendments Bill amends section 246 to enable an access authority holder to apply for such a variation.

Section 256 of the *OPGGS Act* enables fees to be set in Regulations for the grant, renewal or variation of a range of petroleum titles (but not petroleum access authorities). Section 427 is the equivalent provision enabling fees for the grant, renewal or variation of greenhouse gas titles.

Section 695L of the *OPGGS Act* also enables NOPTA to charge fees as specified in the Regulations for specified services provided by NOPTA in performing its functions, or exercising its powers, under the *OPGGS Act* or Regulations. Application fees for the grant of petroleum access authorities are currently set under the Wells Regulations.

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177. Ibid., pp. 87–8.
179. Explanatory Memorandum, Miscellaneous Amendments Bill, p. 81.
180. See Schedule 6, Part 1, Division 3 of the *Wells Regulations*. 
that the proposed fee for an application for variation of an access authority would be charged under section 695L of the *OPGGS Act* through amendments to the Wells Regulations.\(^\text{181}\)

**Item 4 of Schedule 5** amends section 695L to clarify that sections 256 and 427 do not limit section 695L in any way.

**Fees to be payable to NOPTA**

Section 636 of the *OPGGS Act* provides for a range of fees payable under the *OPGGS Act* to be payable to NOPTA or the Commonwealth. **Items 2–5 of Schedule 8** amend section 636 to ensure that the fees previously payable to the Commonwealth are instead payable to NOPTA. The Explanatory Memorandum states that this is because the fees currently payable to the Commonwealth (under subsection 636(2)):

... relate to functions that will be undertaken by the Titles Administrator [NOPTA], in its role to provide information, assessments, analysis, reports, advice and recommendations to the Minister, and to manage the title registers and data and information management. To ensure the Titles Administrator, which operates on a full cost-recovery basis, can be adequately cost recovered for carrying out these functions, it is appropriate that the fees referred to in subsection 636(2) should all be payable to the Titles Administrator, on behalf of the Commonwealth.\(^\text{182}\)

**Recovery of costs by NOPSEMA**

Section 589 of the *OPGGS Act* currently enables NOPSEMA to remove, sell or dispose of property in certain circumstances (such as where a person has been directed to remove the property from a vacated area of a former greenhouse gas title).\(^\text{183}\)

**Item 5 of Schedule 11** inserts proposed subsection 589(2A), which provides that NOPSEMA may, on behalf of the Commonwealth, deduct certain fees or amounts from the proceeds of sale of that property. This includes fees or amounts payable to the Commonwealth under the *OPGGS Act*, and any amounts payable under the *Offshore Petroleum (Royalty) Act 2006* or certain amounts under the *Offshore Levies Act*. Proposed subsection 589(2B), also inserted by **item 5**, requires any amounts payable to the Commonwealth that are deducted by NOPSEMA under proposed subsection 589(2A) to be remitted to the Commonwealth.

**Regulatory Levies Bill**

**Levies extended to greenhouse gas wells**

The *Offshore Levies Act* and associated Regulations\(^\text{184}\) allow for various levies to be imposed on offshore petroleum and greenhouse gas activities. Levies related to offshore petroleum and greenhouse gas storage wells and well activities (well levies) include:

- an annual well levy, payable on 1 January each year based on the number of non-abandoned wells that existed in a title area in the preceding calendar year
- a well activity levy, currently payable when a registered holder of a petroleum title submits an application for acceptance of a well operations management plan (WOMP) and

\(^{181}\) Explanatory Memorandum, Miscellaneous Amendments Bill, p. 82.

\(^{182}\) Ibid., p. 84.

\(^{183}\) Under a remedial direction made by NOPSEMA under section 587 of the *OPGGS Act*.

\(^{184}\) That is, the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004*. 

• a well investigation levy to recover costs reasonably incurred in relation to a well investigation.185

The Regulatory Levies Bill amends the Offshore Levies Act to extend the application of various levies to greenhouse gas wells. This is designed to ensure NOPSEMA can recover the cost of its oversight of well operations under greenhouse gas titles.186

Section 9 of the Offshore Levies Act provides for a well investigation levy, which is imposed where a NOPSEMA inspector is inspecting a possible contravention of a duty relating to a well associated with a petroleum title.187 Items 1–8 in Schedule 2 of the Regulatory Levies Bill amend section 9 to extend the well investigation levy to apply in relation to wells associated with an ‘eligible title’, which will include both petroleum titles and greenhouse gas titles.

Section 10 of the Offshore Levies Act provides for a similar well investigation levy to be imposed for inspections related to state or territory petroleum titles. Items 9–18 in Schedule 2 of the Regulatory Levies Bill amend section 10 to extend the well investigation levy to apply in relation to wells associated with state/territory petroleum titles and state/territory greenhouse gas titles.

Parts 2 and 3 of Schedule 2 make similar amendments to extend the annual well levy and the well activity levy respectively to both petroleum titles and greenhouse gas titles.

Consequential amendments

Other provisions of the Regulatory Levies Bill make consequential amendments to the Offshore Levies Act to reflect past amendments made to the OPGGS Act and to the Wells Regulations.188 For example, section 10C of the Offshore Levies Act imposes a well activity levy on applications for acceptance of a well operations management plan (WOMP) and on applications to seek approval to commence a well activity. Items 1 and 2 of Schedule 1 of the Regulatory Levies Bill repeal provisions imposing the well activity levy on applications to seek approval to commence a well activity, because there is no longer a requirement to seek such approval in the Wells Regulations. The well activity levy will still apply to applications for acceptance of a well operations management plan. Items 11–13 subsequently amend section 10C to also impose the well activity levy on proposed revisions of WOMPs. This also reflect amendments to the Wells Regulations, under which NOPSEMA will now conduct five-yearly assessments of WOMPs, rather than accept a new WOMP every five years.

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187. Those duties are set out in subclause 13A(1) or (2) of Schedule 3 to the OPGGS Act, and include, for example, ensuring that a well is so designed, constructed, maintained and operated that risks to the health and safety of persons at or near the well are as low as is reasonably practicable.
188. That, is, amendments made by the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Well Operations) Regulation 2015, which commenced on 1 January 2016.