Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011

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Law and Bills Digest Section

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Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011

Date introduced: 25 May 2011

House: House of Representatives

Portfolio: Resources and Energy

Commencement: Various dates as set out in section 2 of the Bill.

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

Purpose

The purpose of the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011 (the Bill) is to improve regulation under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGS Act) by:

- extending the functions of the National Offshore Petroleum Safety (NOPSA) and renaming it the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
- establishing a National Offshore Petroleum Titles Administrator (Titles Administrator) to administer petroleum and greenhouse gas titles in offshore waters to replace the present Designated Authorities and
- together the two new regulatory entities replace the present Designated Authorities while the roles and responsibilities of the Joint Authorities are maintained.

Background

The Bill is the principal Bill in a package of complementary Bills relating to offshore petroleum and greenhouse gas activities introduced into the Parliament on 25 May 2011.¹ The Government has said that the Bill would largely implement the Government response to the Productivity Commission’s 2009 report of its Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector (the Productivity Commission Report).²

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In its report, the Productivity Commission found ‘solid evidence that the current regulatory framework imposes a significant burden on the upstream petroleum sector’ and that:

Although compliance costs are large (sometimes amounting to millions of dollars for a project), they are typically modest relative to the total project cost. Delays impose far more significant burdens, because they can increase project costs, reduce flexibility in responding to market conditions, impede financing of projects, and defer production and revenues.3

To improve existing arrangements and to cut through regulatory duplication and overlap, the Productivity Commission Report proposed:

- clarifying and clearly articulating the objectives for intervention in resource management and ensuring the costs of intervention are the minimum necessary
- the staged development of a national offshore petroleum regulator to undertake resource management, pipeline and environmental regulation in all Commonwealth, state and territory waters:
  - initially, the regulator would only operate in Commonwealth waters
  - subsequently, the states and territories would be given, on a bilateral basis, the option of conferring their petroleum regulatory obligations
- the national regulator would be self-funding through fees, and
- NOPSA would remain a separate entity, with functions extending to offshore pipelines, subsea equipment and wells, and its geographical coverage should include all Commonwealth, state and territory waters (including islands).4

The Bill also proposes to implement the Government Response5 to the Report of the Montara Commission of Inquiry (the Montara Report).6 This is the report of the Commission of Inquiry set up by the Government to investigate the likely causes of the uncontrolled release of oil and gas into the Timor Sea from the Montara Wellhead Platform on 21 August 2009, and to make recommendations to the Government on how to prevent future incidents. Recommendations made in the Montara report included:

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4. Ibid., p. xx.

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• creation of a single independent regulatory body, responsible for safety as a primary objective, well integrity and environmental approvals, and
• establishment, as a minimum, of the national offshore petroleum regulator recommended by the Productivity Commission.8

The Government has indicated that the reforms proposed in the Bill would be in accordance with the Government’s commitment to the Council of Australian Government’s (COAG’s) reform priorities. Specifically, COAG’s National Partnership Agreement to Deliver a Seamless National Economy ‘includes milestones to implement the agreed Productivity Commission recommendations and remove unnecessary burdens on industry’.9

History of the offshore regulatory regime

In 1975, the High Court upheld the validity of the Seas and Submerged Lands Act 1973 (SSL Act) in which the Commonwealth asserted sovereignty over the territorial sea, including the seabed beneath the three nautical miles of waters from the low tide mark, commonly described as coastal waters.10

Following this decision, the Commonwealth and the states negotiated the Offshore Constitutional Settlement (OCS), in which they agreed to a division of their offshore rights and responsibilities. In accordance with the OCS, the Commonwealth legislated to confer jurisdiction on the states and the Northern Territory over the three nautical miles of the territorial sea adjacent to their respective coastlines.11 The Commonwealth also amended the Petroleum (Submerged Lands) Act 1967 (PSL Act) to confine the application of that Act to petroleum exploration, and exploitation beyond the three mile limit.12 The states passed mirror legislation to apply landward of that limit.


The essential elements of the regulatory scheme established under the OPGGS Act may be described as follows:

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7. Ibid., recommendation 73, p. 362.
8. Ibid., recommendation 74.
11. Similar legislation was also enacted for the Northern Territory.

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The OPGGSA regulates the exploration for, and production of, petroleum resources, as well as infrastructure construction, through requirements to obtain titles in the form of exploration permits, retention leases, and pipeline, production and infrastructure licences. Special prospecting authorities and access authorities can also be allocated to allow for exploration activity (excluding the drilling of wells).

All titleholders must carry out operations in accordance with ‘good oilfield practice’, including carrying out operations in a manner that is safe and prevents the escape of petroleum into the environment. In order to retain title, titleholders must meet conditions of work and pay annual fees.

The OPGGSA also regulates key areas of resource management through a variety of regulations which the Australian Government, in consultation with the State and Territory Governments as well as industry, has been implementing since the early 1990s. The existing regulations cover well operations, safety on offshore facilities, occupational health and safety, diving safety, environment, pipelines, data management and fees.\textsuperscript{14}

### The OPGGGS Act and the administration of the Commonwealth offshore area

**Current position**

Consistent with the OCS\textsuperscript{15}, each of the states and the Northern Territory share in the administration of the Commonwealth offshore petroleum legislation through the Joint Authority and the Designated Authority.\textsuperscript{16}

The **Joint Authorities** comprise the responsible Commonwealth Minister (presently the Minister for Resources and Energy) and the relevant state or Northern Territory Minister. The Joint Authorities make decisions about granting, imposing conditions on and cancelling petroleum titles.\textsuperscript{17} They also make ‘core decisions about resource management and resource security’.\textsuperscript{18} In the event of a disagreement the view of the responsible Commonwealth Minister prevails.

The **Designated Authorities** are state and Northern Territories Ministers who, through their departments, perform day-to-day administrative duties and regulatory functions under the OPGGS Act.\textsuperscript{19} In his second reading speech, the Minister for Resources and Energy observed that having seven separate Designated Authorities:

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15. Key elements of the OCS are set out in section 5, OPGGS Act.
16. Consistent with the OCS, each of the parties is also required to maintain, as far as practicable, common principles, rules and practices in regulating and controlling the exploration for, and exploitation of, offshore petroleum beyond the baseline of Australia’s territorial sea.
17. The titles include petroleum exploration permits, petroleum retention leases, petroleum production licences, infrastructure licences, pipeline licences, petroleum special prospecting authorities and petroleum access authorities: section 38, OPGGS Act.
19. For instance, they register titles and dealings in titles under Chapter 4 of the OPGGS Act.

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...made sense when established, particularly bearing in mind that at that time the 2 key jurisdictions — Victoria and Western Australia — both had well established regulators more familiar with day to day offshore petroleum operations than was the Commonwealth ... [however] ... as Commonwealth expertise and involvement...has developed, in particular since establishing NOPSA, the inefficiencies and limitations inherent in the DA model have become apparent. 20

NOPSA was established in 2003 to regulate occupational health and safety (OHS) standards on offshore facilities on behalf of the Commonwealth, the states and the Northern Territory. 21 When NOPSA undertakes its regulatory activities in Commonwealth waters, it acts under powers conferred on it by the OPGGS Act. In the coastal waters of states or the Northern Territory, it acts under ‘mirror’ powers conferred by the state or Northern Territory Petroleum and Submerged Lands Acts. NOPSA is funded on a full cost-recovery basis with levies raised from the offshore petroleum industry.

In 2010, consistent with the recommendation of an expert panel which was tasked to inquire into the occupational health and safety and integrity regulation for upstream petroleum operations with reference to the gas pipeline rupture and explosion at Varanus Island on 3 June 200822, the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Act 201023 extended NOPSA’s functions and powers to include non-OHS aspects of structural integrity for petroleum facilities, wells and well-related equipment in Commonwealth waters in addition to its existing OHS-related functions and powers under the OPGGS Act and the Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 (Safety Regulations).24 The amendments also addressed issues arising from the Montara incident in respect of wells operation approvals, compliance and monitoring.25

24. Previously, NOPSA’s functions had extended only to the structural integrity of facilities (including pipelines) and wells that were part of those facilities, to the extent to which the structural integrity affected the safety of the offshore workforce at the facilities.

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The responsible Commonwealth Minister presently administers greenhouse gas titles under the OPGGS Act. The Bill does not propose to change this.

Proposed changes

The Bill proposes establishing two new regulatory bodies (NOPSEMA and NOPTA, which is also known as the Titles Administrator) to administer and regulate petroleum and greenhouse gas storage operations in Commonwealth waters in the Australian offshore area and in state and Northern Territory coastal waters where this power is conferred.

These bodies would replace the Designated Authorities (state and Northern Territory Ministers) who, through their government departments, presently perform the functions and exercise the powers conferred on them by the OPGGS Act.

National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)

This would be an expanded version of NOPSA. In addition to its current principal functions with respect to OHS, structural integrity of facilities, wells and well-related equipment, it would also have functions with respect to structural integrity and environmental management. NOPSEMA would appoint and deploy OHS and petroleum (greenhouse gas) project inspectors. Like NOPSA, it is proposed that NOPSEMA will be fully funded by cost-recovery levies and fees managed in accordance with a special account under the Financial Management and Accountability Act 1997.

National Offshore Titles Administrator (Titles Administrator or NOPTA)

The Titles Administrator would be a Senior Executive Service officer of the Australian Public Service located in the Commonwealth Department of Resources, Energy and Tourism. The Titles Administrator would be assisted in the first instance by the APS staff of the Department. The Explanatory Memorandum describes the proposed principal functions of this office as being:

... to provide information, assessments, analysis, reports, advice and recommendations to members of the Joint Authorities and the ‘responsible Commonwealth Minister’ in relation to the performance of those Ministers’ functions and the exercise of their powers, the collection, management and release of data, titles administration, approval and registration of transfers and dealings, and the keeping of the registers of petroleum and greenhouse gas titles.  

As noted above, this role assumes some of the powers previously exercised by the Designated Authorities. However, the Bill does not propose to change the present Joint Authority arrangement with respect to petroleum titles. The Joint Authorities will continue to make the major decisions under the OPGGS Act with respect to the granting of petroleum titles, the imposition of title conditions and the cancellation of titles. They will also continue to make core decisions with respect to resource management and resource security.

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The Bill also proposes no alteration to the present decision-making role of the responsible Commonwealth Minister with respect to greenhouse gas titles.

**Committee consideration**

**Senate**

On 25 May 2011, the Bill was referred to the Senate Economics Legislation Committee (the Senate Committee) for inquiry and report by 16 June 2011. After a detailed consideration of the Bill, the Senate Committee concluded that:

... in light of the Productivity Commission’s report and the recommendations of the Montara Commission of Inquiry, that it is essential for a consistent national regulatory framework and titles administration process to be introduced.

The framework proposed by the National Regulator Bill will ensure that the regulation of important safety, structural integrity and environmental management matters are appropriately resourced at a national level. The arrangements will also deliver significant improvements in efficiency and decrease the burden on industry through the removal of duplication and inconsistencies present throughout the current arrangements.

... the proposals contained in the National Regulator Bill have come about after a number of inquiries and following extensive consultation. The committee also notes that the state governments will still continue to be involved in the major decisions through the Joint Authority arrangements, which are unchanged. The committee considers that any outstanding issues regarding the operation of the new authorities can be addressed through the separate agreements being developed, and should not delay consideration of these bills.

It should be noted that the Coalition Senators submitted a dissenting report.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) also considered the Bill. Comments made by the Committee are included at relevant points in the ‘Main provisions’ section of this Bills Digest.

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29. Ibid., p. 45.


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House of Representatives

The Bill was also referred to the House of Representatives Standing Committee on Agriculture, Resources, Fisheries and Forestry (the House of Representatives Committee) on 25 May 2011. The House of Representatives Committee supported the passage of the Bill, also recommending that ‘given NOPSEMA’s environmental management function, the membership of the NOPSEMA Advisory Board include members with relevant environmental expertise’.

The House of Representatives Committee concluded that:

The starting point for these Bills is the essential reforms identified by the Productivity Commission report and the report of the Montara Commission of Inquiry. The Committee agrees with the Government that failing to address the findings of these reports is not an option. The Committee also believes that these Bills do fulfil the objectives laid down by those reports. The Bills are actually reforming regulatory processes, tidying up the present arrangement between regulatory bodies for the new era we are in [sic] now in for the regulation of offshore petroleum. The Bills are making the regulatory environment more efficient and effective and are moving towards world’s best practice.

Position of major interest groups

Industry

In its report, the Senate Committee found the ‘[m]oves towards minimising regulatory differences across jurisdictions have been welcomed by industry’. The Senate Committee noted that the Australian Petroleum Production and Exploration Association (APPEA), (which represents the upstream oil and gas industry in Australia) considered that the Productivity Commission ‘made a compelling case for setting up a single integrated offshore regulatory authority’, described the introduction of these bills as ‘a big step forward’ towards developing ‘new regulatory frameworks that comprehensively address efficiency, safety and environmental concerns’.

In its submission to the Government’s draft response to the Montara Report, APPEA considered:

A compelling case has also been made for the establishment of a single integrated, independent, offshore regulatory authority to manage these critical operational areas. It is important, however, that the reform delivers tangible, demonstrable and measurable improvements

31. Details of the terms of reference, the submissions to the inquiry, and the final report can be viewed at: http://www.aph.gov.au/house/committee/arff/petroleum/index.htm
33. Ibid., p. 62.
34. Economics Legislation Committee, op. cit., p. 32.
35. Ibid.

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including inter- and intra-jurisdictional consistency, substantially improved efficiency, less decision points and the removal of duplication.36

APPEA has also released a report highlighting the significant regulatory burden in the sector, stating:

More than 90 per cent of Australia’s oil and gas resources are found in Commonwealth waters and are usually brought onshore for processing in a state or the Northern Territory via pipelines crossing Commonwealth then state waters. In many cases there are different requirements for a given activity for each of the respective jurisdictions (Commonwealth waters, state waters and onshore). Although development of the extensive approval requirements in each jurisdiction in isolation might have been appropriate at the time, the multi-jurisdictional nature of oil and gas projects leads to potentially hundreds of approvals being required and therefore hundreds of opportunities for a development proposal to be delayed.37

Employee representatives

In its submission to the House of Representatives Committee, the Maritime Union of Australia has indicated that it ‘strongly supports the policy and regulatory intentions of the Commonwealth to strengthen the regulation of offshore petroleum activities and reduce unnecessary regulatory burden’.38

Concerned at the possibility that NOPSEMA will not have jurisdiction in state and coastal territorial waters, Maritime Union of Australia sought an amendment to the Bill:

...to ensure that the Commonwealth exercise its full powers to regulate OHS in State designated waters in the absence of referral to ensure the current status whereby NOPSA regulates OHS in Commonwealth waters under the Commonwealth Act and in State and Northern Territory coastal waters under the OPGGS Act, continues seamlessly.39

The Australian Council of Trade Unions (ACTU) made a submission to the House of Representatives Committee indicating that it:

...supports the expansion of functions of the National Offshore Petroleum Safety Authority (NOPSA) to include well-integrity, safety and environmental planning, The ACTU believes there is a definite


39. Ibid., p. 2.

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nexus between these functions. Having one regulatory body should result in greater coordination and linkage of these areas of concern providing greater safety outcomes.  

The ACTU asked that ‘safety case guidelines issued by the proposed NOPSEMA specifically require consultation with the workforce before any change at the workplace takes place’, and indicated its support for:

...the MUA’s previous call for a taskforce that includes representatives from the relevant government departments, unions and industry to identify high risk and hazardous operations that may require minimum enforceable standards through regulation.  

**Government of Western Australia**

In its submission to the House of Representatives Committee, the Western Australian Government (represented by the Department of Mines and Petroleum) (Government of WA) indicated that it did not support the reforms proposed in the Bill on the grounds that ‘[t]he establishment of NOPTA and NOPSEMA does not, in itself, improve the areas of the regulatory system which really need reform—environment and native title’.

The Government of WA made a number of other criticisms of the Bill including:

- that there is no provision for consultation or notice provided in the amendments for giving the State of Western Australia information from NOPSEMA
- that there is no provision in the Bill for the state member of the Joint Authority to have access to advice other than that from NOPTA
- Western Australia will suffer a funding gap due to the loss of registration fee revenue at the same time that it covers start-up costs for the co-location of the state and Commonwealth petroleum regulator
- the Bill should recognise that state/NT members of the Joint Authorities will incorporate advice from their agencies in making decisions, and this may require limited staffing resources.

It is clear from the House of Representatives Committee report that each of these matters was canvassed in public hearings which occurred on 17 June 2011. In relation to the first of these points, the Department of Resources, Energy and Tourism (RET) responded by saying that a

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41. Ibid., p. 2.


43. Ibid.

44. The transcript of the public hearings can be viewed at:  

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proposed amendment to the Bill requiring formal consultation between NOPSEMA and the Western Australian Government ‘would impinge upon the independence of the regulator and confuse operation and safety/integrity/environmental decision making’. 45

In relation to the second, RET suggested that the issue of advice to the state member of a Joint Authority is a matter for the states themselves. One of the members of the Joint Authority is always a state Minister, who would have access to advice from their department. 46

In its submission, RET referred to a Memorandum of Understanding (MOU) between the Government of Western Australia and the Commonwealth which is in the final stages of development. The MOU was also referred to by RET in evidence before the House of Representatives Committee, as covering ‘all those issues relating to consultation—the notion of the executive liaison committee and how these three co-located organisations would operate—is explained in the MOU’. 47

The importance of the MOU was also referred to by APPEA in its evidence before the House of Representatives Committee. 48

**Financial implications**

According to the Explanatory Memorandum, the Bill will have no financial impact. 49 The Bill will allow the Commonwealth to retain amounts received under the *Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006* (Registration Fees Act) to fund the establishment of NOPTA and the expansion of NOPSA to NOPSEMA. 50

After the funding of these costs, the Bill will repeal the Registration Fees Act as well as the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*. NOPTA and NOPSEMA will operate on a cost recovery basis with levies raised by the offshore petroleum industry imposed by the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*. 51

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45. Standing Committee on Agriculture, Resources, Fisheries and Forestry, op. cit., p. 17.
46. Ibid.
47. Ibid., p. 16.
48. Ibid.
49. Explanatory Memorandum, p. 4.
50. These fees must presently be paid to the states and the Northern Territory.

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Main issue

The main issue is whether the package of reforms included in this Bill presents a sufficient response to the acknowledged shortcomings of the offshore regulatory regime identified in the Productivity Commission Report and the Montara Report.

Key provisions

The following provisions are considered to be the main amendments made by the Bill to the OPGGS Act. There are very many other amendments consequent upon the proposed replacement of the Designated Authorities with NOPTA and NOPSEMA, and the reconstitution of NOPSA as NOPSEMA. However, these ‘consequential’ amendments do not appear to raise any issues in relation to their operation.

Schedule 1—Amendments relating to payments to the states and the Northern Territory

Item 2 repeals subparagraph 76(1)(a)(iii) of the OPGGS Act. Repeal of this subparagraph will relieve the Commonwealth of its obligation to pay the states and the NT amounts equal to the amounts received by it, under the Registration Fees Act. The Commonwealth will retain these amounts to fund the establishment of NOPTA and the expansion of NOPSEMA. Once this is done, the Registration Fees Act will be repealed.  

Schedule 2—General amendments

Items 1–21 propose a number of amendments to the definitions in section 7 of the OPGGS Act. These amendments reflect, in large part, the Bill’s proposed replacement of Designated Authorities with NOPTA, and the expansion of the functions of, and the renaming of NOPSA, as NOPSEMA.

Item 52 of Schedule 2 to the Bill inserts proposed section 143A into Chapter 2 (Regulation of activities relating to petroleum) of the OPGGS Act. The proposed section imposes a time limit for the making by a Joint Authority of a decision under section 142 (Grant of petroleum lease—offer document) or section 143 (Refusal to grant petroleum lease) in relation to an application under section 141 (Application for petroleum retention lease by the holder of a petroleum exploration permit).

The period within which the decision must be made will begin on the date the application was made and run for a period to be specified by regulation: proposed subparagraph 434A(1)(b)(ii).  

52. Item 1, Part 1 of Schedule 4 to the Bill.
53. The intention is to allow regulators a ‘period of grace’ at the commencement of the new regulatory arrangements because of the need for paper records held since 1980 by the Designated Authorities to be physically transferred to the Joint Authority. Explanatory Memorandum, p. 14.
Alternatively, the time limit may be specified in an agreement between the Joint Authority and the applicant: **proposed subparagraph 434A(1)(b)(i)**.

A ‘stop-the-clock’ mechanism is proposed that commences whenever further information is sought from the applicant. It will cease once the information is provided: **proposed subsection 143A(2)**.

A failure of a decision maker to make a decision within the time limits specified in proposed subsection 143A(1) will not affect the validity of the decision: **proposed subsection 143A(5)**. If this were not the case, the applicant would be penalised by administrative failure.54

Similar new time limit provisions are included in the Bill by:

- **item 55** (petroleum retention leases)
- **item 58** (renewal of petroleum retention lease)
- **item 68** (production licence)55
- **item 70** (petroleum production licences over individual blocks)
- **item 72** (fixed term petroleum production licence)
- **item 80** (infrastructure licence)
- **item 85** (variation of an infrastructure licence) and
- **item 103** (variation of a pipeline licence).

In its 2009 Report, the Productivity Commission expressed the view that:

Statutory timelines and public disclosure on timelines and progress should improve the timeliness of decisions. Wherever possible, statutory timelines should apply to decision makers. To promote transparency and accountability there should be public disclosure of reasons for regulators requesting additional information, while respecting commercially sensitive information. In addition, requiring regulators to inform or get permission from the relevant Minister to seek additional information may provide further incentives for timely decision making from the proponent and extend timelines for a decision may provide further incentives for timely decision making. 56

The Productivity Commission also observed that:

Significant regulatory costs are associated with approval delays that potentially lead to increased project expenditures, reduced flexibility for responding to market conditions, inflated capital costs, increased difficulty of financing projects, and reduced present value from resource development ... [and that] ... Expediting the average approval process by one year could increase the net present value of projects by 10–20 per cent simply by bringing forward income streams.

54. Ibid. Where a Joint Authority contravenes a time limit requirement, a report must be made by the Titles Administrator to the Minister: **proposed section 286C**.

55. Where there is a pending application for a greenhouse gas assessment permit the Joint Authority must delay making a decision on the petroleum licence until the greenhouse gas assessment permit application has been resolved: **proposed subsection 173(3)**.


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Given the sector contributes 2 per cent to GDP, the potential income gains for Australian residents could be in the billions of dollars each year.\textsuperscript{57}

**Item 159** inserts proposed section 277A which requires NOPSEMA to notify NOPTA if it reasonably believes that there is reason to cancel a petroleum exploration permit, a petroleum retention lease, a petroleum production licence, an infrastructure licence, or a pipeline licence. The Explanatory Memorandum states it is the Joint Authority, acting on the advice of the Titles Administrator, which has power to cancel a licence, on the advice of and with regard to the information provided by NOPTA. This provision is designed to ensure that NOPTA and the Joint Authority will be made aware of information about which they might not otherwise become aware.\textsuperscript{58}

**Item 164** inserts proposed section 286A which imposes notification requirements on registered holders of petroleum titles, and makes it an offence if a person does not meet their obligations. **Proposed subsections 286A(1)–(5)** require specified written information to be provide to NOPTA and NOPSEMA within a 30 day time limit by persons who hold, acquire or cease to hold\textsuperscript{59} a petroleum title: defined in proposed subsection 286A(9), or whose previously notified details have been changed. **Proposed subsection 286A(7)** imposes a penalty of 50 penalty units for failing to comply with the requirements of proposed subsections 286A(1)–(5).\textsuperscript{60}

The offence is a strict liability offence: **proposed subsection 286A(8)**. The rationale for such an offence is that:

> The offshore petroleum industry is a high risk industry, and there may be potentially serious consequences if the industry is not effectively regulated. The intention of the application of strict liability is to improve compliance in the regulatory regime.\textsuperscript{61}

In considering the strict liability offence created under **proposed section 286A**, the Scrutiny of Bills Committee noted the reasons for this provided in the Explanatory Memorandum and ‘left the question of the appropriateness of this approach to the Senate as a whole’.\textsuperscript{62}

**Item 164** also inserts:

- **proposed section 286B** which requires the Joint Authority to publish any time limits for making decisions prescribed for the purpose of the provisions listed in the section, on the Department’s website, and

- **proposed section 286C** which will apply when the Joint Authority fails to comply with the time limits in the provisions listed in the proposed section. Where this occurs, NOPTA must, in the

\textsuperscript{57} Ibid., p. 197.

\textsuperscript{58} Explanatory Memorandum, p. 30.

\textsuperscript{59} In the case of a deceased title holder, this information must be provided by the deceased’s legal representative.

\textsuperscript{60} Under section 4AA of the Crimes Act 1914, a ‘penalty unit’ means $110. This means that the maximum penalty is $5 500.

\textsuperscript{61} Explanatory Memorandum, p. 31.

\textsuperscript{62} Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 33.

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time frame specified in proposed subsection 286C(2), prepare and submit a report to the responsible Commonwealth Minister for tabling in the Parliament in accordance with proposed subsection 286C(3).

Items amending the power of direction under Part 6.2

Directions powers under the OPGGS Act presently reside with the Designated Authorities. The powers are extensive, covering both resource management and resource security.\(^{63}\) The Bill proposes to assign to NOPSEMA the full range of direction-giving powers presently exercised by the Designated Authorities, including those relating to resource management, for which NOPSEMA does not have direct responsibility. According to the Explanatory Memorandum, ‘while NOPSEMA does not have responsibility for resource management matters’ many aspects of its regulator functions ‘will have the potential to impact on resource management, and it would hamper NOPSEMA’s performance of its functions if it were prevented from taking any action that had such potential impacts’.\(^{64}\)

Although the Joint Authority will have primary responsibility under the Bill for resource management, the Bill proposes to confer the directions power with respect to resources on the responsible Commonwealth Minister. This is because ‘the Joint Authorities for the states and the Northern Territory cannot take action without communications between the Commonwealth and state or territory members, with each requiring policy advice and recommendations before a decision is made’.\(^{65}\) This ‘will be a fairly slow process, when a direction may need to be given within a day if (for example) a direction to prevent the drilling of a well in a particular location is to be given’.\(^{66}\) It would therefore be more efficient to locate the directions power with the Joint Authority, with the power residing with the Commonwealth Minister.

To give effect to this, items 329 and 331 amend section 574 (General power to give directions) by deleting references to ‘The Designated Authority’ and inserting references to NOPSEMA.

Item 332 inserts proposed subsection 574(9A) which requires NOPSEMA to give the responsible Commonwealth Minister a copy of a direction given by it under section 574 where it considers that the direction could have significant implications for resource management or resource security. This would permit the Minister to review the direction from a resource perspective and to give a direction under proposed section 574A if the Minister considers this to be necessary to avoid unreasonable consequences to resource management or resource security.

Item 333 inserts proposed section 574A (General Power to give directions—responsible Commonwealth Minister). The proposed section is similar to section 574, apart from the following consequential differences:

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63. Explanatory Memorandum, p. 44.
64. Ibid.
65. Ibid.
66. Ibid.

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• **proposed subsection 574A(2)** limits the Minister’s direction-giving power to matters relating to resource management, resource security or data management under section 698 of the OPGGS Act, and

• **proposed subsection 574A(12)** provides that a direction given by the Minister will prevail over an inconsistent direction given by NOPSEMA under section 574.

Additionally, **proposed subsection 574A(7)** provides that a direction given by the Minister may apply, adopt or incorporate a code of practice, or standard, contained in an instrument. Where this is done, to ensure accessibility to anyone affected by the direction, the material must be published on the Department’s website: **proposed subsection 574A(10).**

**Proposed subsection 574A(7)** has been criticised by the Scrutiny of Bills Committee which stated that:

> The provision ...raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. Although the incorporation of instruments into regulations ‘from time to time’ may be justified in certain circumstances, it is unfortunate that the explanatory memorandum merely repeats the effect of these provisions without any explanation or justification of why this is considered an appropriate delegation of power in this instance. The Committee notes that while subsection 574A(10) requires any instruments applied, adopted or incorporated under subsection 574A(7) to be published on the Department’s website, this is subject to copyright restrictions.  

The Scrutiny of Bills Committee sought the Minister’s advice about the justification for the proposed approach and whether it is likely that access to any material to be incorporated ‘from time to time’ will be restricted by copyright.

**Item 337** amends section 576 (Compliance with direction) to make it an offence for a person to breach a direction issued under either section 574 (proposed to be given by NOPSEMA) or section 574A (proposed to be given by the responsible Commonwealth Minister). The offence is one of strict liability and the penalty is set at 100 penalty units.

The Scrutiny of Bills Committee report noted that 100 penalty units is higher than the standard for strict liability offences set out in *A Guide to Framing Commonwealth Offences.* The Scrutiny of Bills Committee sought the Minister’s advice about the justification for the proposed approach and whether it is likely that access to any material to be incorporated ‘from time to time’ will be restricted by copyright.

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67. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 34.
68. The amount of the penalty is $11 000.

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Committee accepted that the Explanatory Memorandum (at pages 48–50) provided a rationale for the higher penalty, and left the issue for the consideration of the Senate as a whole.  

**Item 338** repeals the heading to Division 3 of Part 6.2 of the OPGGS Act (Designated Authority may take action if there is a breach of a direction) and replaces it with the following **proposed heading**: ‘NOPSEMA or the responsible Commonwealth Minister may take action if there is a breach of direction’.

**Item 342** inserts **proposed new section 577A** in Division 3 of Part 6.2. The proposed section sets out the action that the responsible Commonwealth Minister may take if there is a breach of a direction given by him or her under proposed new section 574A. It mirrors existing section 577, which the Bill proposes to amend by removing references to the Designated Authority and replacing them with references to NOPSEMA.

**Item 346** inserts **proposed subsection 578(2)** which provides a defence in a prosecution for an offence in relation to a breach of a direction given by the responsible Minister, where the defendant can prove that he or she took all reasonable steps to comply with a direction. The onus of proof is, therefore, on the defendant.

The Scrutiny of Bills Committee has considered the proposed amendment but has left the issue of reverse onus of proof to the consideration of the Senate as a whole.

**Item 349** repeals and replaces **section 585** which provides a revised simplified outline of Division 1 of Part 6.4 (Restoration of the environment).

**Item 354** inserts **proposed section 586A** into Division 1 of Part 6.1 of the OPGGS Act. The proposed new section relates to the remedial directions that the responsible Commonwealth Minister may give to current holders of specified petroleum titles. It mirrors existing section 586, which the Bill proposes to amend by removing the references to the Designated Authority and replacing them with references to NOPSEMA. **Item 359** inserts **proposed section 587A** which gives the responsible Commonwealth Minister the power to issue remedial directions to former holders of specified petroleum titles. It mirrors existing section 587, which the Bill proposes to amend by removing the references to the Designated Authority and replacing them with references to NOPSEMA.

Remedial directions by the responsible Minister under proposed sections 586A and 587A must be for a purpose that relates to resource development. Under sections 586 and 587 NOPSEMA has a more

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70. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 34.
71. **Item 339**, Part 1 of Schedule 2 to the Bill.
72. The reason for the reversed onus of proof is that the matters to be proved are within the knowledge of the defendant, the remote nature of offshore operation, and the nature of the risks involved to persons and to the environment. Explanatory Memorandum, p. 50.
73. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 35.
74. **Item 353**, Part 1 of Schedule 2 to the Bill.
75. **Items 355, 356** and **358**, Part 1 of Schedule 2 to the Bill.

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general power to issue remedial directions. However, in the event of inconsistency, the order given by the responsible Commonwealth Minister will prevail: proposed subsections 586A(9) and 587A(8).

Sections 586 and 587 and proposed sections 586A and 587A contain strict liability offence provisions.

Item 364 inserts proposed section 590 which proposes to give the responsible Commonwealth Minister the same power to act in the event of the breach of a direction given under section 587A as the Designated Authority currently has under section 588. The Bill proposes to amend section 488 to transfer this power to NOPSEMA.76

NOPSEMA

Item 383 repeals the heading to Part 6.9 (National Offshore Safety Authority) of Chapter 6 of the OPGGS Act (Administration) and inserts the proposed heading, National Offshore Petroleum Safety and Environmental Management Authority.

With respect to petroleum, NOPSEMA will be the regulator under the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Environment Regulations). In the case of greenhouse gas injection and storage, regulation will be undertaken initially by the responsible Commonwealth Minister, who is the regulator under the Environment Regulations.

As regulatory practice develops... it is expected that the responsible Commonwealth Minister will devolve at least some regulatory functions onto NOPSEMA, either by delegation of functions and powers or by the naming of NOPSEMA as the regulator under regulations, including the Environment Regulations ... [and] ... Even before this occurs, the responsible Commonwealth Minister will be able to call upon NOPSEMA, pursuant to its function in new paragraph 646(go) to provide assessments, analysis, reports, advice and recommendations to the responsible Commonwealth Minister or delegate in relation to the Minister’s functions and powers with respect to greenhouse gas injection and storage operations.77

Item 399 amends section 646 (Safety Authority’s Functions). The functions currently set out in paragraphs 646(a)–(g) would remain textually almost unchanged by the Bill. The proposed amendments will not limit the scope of NOPSEMA’s OHS-related functions in any way.78 In particular, the proposed removal of the words ‘non-OHS’ from paragraphs 646(ga)–(gf) by item 399 will not limit NOPSEMA’s OHS functions in relation to OHS-related structural integrity matters.79

Item 401 inserts proposed paragraphs 646(gg)–(gr) which confer on NOPSEMA new functions with respect to offshore petroleum environmental management and offshore greenhouse gas environmental management. These include:

76. Item 360, Part 1 of Schedule 2 to the Bill.
77. Explanatory Memorandum, p. 59.
78. Ibid., p.58.
79. Ibid.

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• in relation to the environmental management of petroleum and greenhouse gas operations in Commonwealth waters: proposed paragraph 646(gg)–(gh)
• conferred by a state or NT Petroleum (Submerged Lands) Act and regulations in relation to environmental management of petroleum and greenhouse gas operations in the relevant state or NT designated coastal waters: proposed paragraphs 646(gi)–(gj)
• the same ‘ancillary’ functions in relation to environmental management as have already been conferred in relation to OHS and structural integrity: proposed paragraphs 646(gk)–(go)
• providing information, assessments, analysis, reports, advice and recommendations to the responsible Commonwealth Minister in relation to the Minister’s functions and powers in relation to greenhouse gas operations: proposed paragraph 646(gp)
• compliance monitoring and enforcement in relation to all obligations of persons under the OPGGS Act and regulations, except for the obligations in respect of which NOPSEMA already has those functions under the preceding paragraphs of section 646: proposed paragraph 646(gq), and
• cooperation with the Titles Administrator in matters relating to the administration and enforcement of the Act and the regulations: proposed paragraph 646(gr).

Item 403 inserts proposed section 646A which imposes limits on NOPSEMA when it is performing functions conferred on it by a state or the Northern Territory by a state or Northern Territory Petroleum (Submerged Lands) Act. Under the proposed provision a state or territory cannot confer any function on NOPSEMA mentioned in a state function provision (that is, OHS, structural integrity or environmental management) unless OHS and structural integrity are both conferred, and the state or territory also applies provisions equivalent to Schedule 3 of the Commonwealth Act (Occupational Health and Safety) and regulations equivalent to the Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 and Part 5 of the Greenhouse Gas Storage (Resources Management and Administration) Regulations 2011. The latter regulations provide for management of the integrity of wells and well operations.

Item 413 repeals and replaces section 650 which provides NOPSEMA with additional powers and functions. Proposed subsection 650(1) enables NOPSEMA to provide services under contract to a state or the Northern Territory or an agency of the state or territory in relation to petroleum operations, either on or offshore. If the service relates to a location within state limits, the services must relate to activities that are owned or controlled or that are connected in other specified ways to a ‘constitutional corporation’. This will ensure that the onshore activities are within the legislative power of the Commonwealth under subsection 51(xx) of the Constitution (the corporations power). The contract must be approved by the responsible Commonwealth Minister.

Proposed subsection 650(2) enables a state or the Northern Territory enactment to confer regulatory (petroleum) functions and powers on NOPSEMA with respect to waters on the landward side of the three nautical mile territorial sea baseline external to the state or territory. Only Western Australia has petroleum activity in waters within these limits.

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The Explanatory Memorandum indicates that Western Australia may confer powers and functions on NOPSEMA ‘that substantially correspond to functions and powers conferred by the OPGGS Act.\textsuperscript{80} There must be agreement between the responsible Commonwealth and state or territory Minister about the conferral according to proposed subparagraph 650(3)(c)(i), and about the fees payable by the state or territory to NOPSEMA: proposed subparagraph 650(3)(c)(ii).

**Proposed subsection 650(3)** provides for the provision by NOPSEMA of services under contract to a foreign country or the government of part of a foreign country. Prior to approving such a contract, the responsible Minister must consult the Foreign Affairs Minister: proposed paragraph 650(3)(f).

**Proposed subsection 650(5)** would preclude NOPSEMA contracting for the provision of services under subsections 650(1) or 650(3) if this would impede its capacity to perform its other functions.

**Proposed subsection 650(5)** would preclude the responsible Commonwealth Minister from giving directions or policy principles to NOPSEMA with respect to operations under proposed subsections 650(1), (2) or (3).

**Item 418** repeals and replaces section 653 which continues the existence of the NOPSA Board as the NOPSEMA Board. **Items 421, 422, 424 and 425** relate to proposed amendments to paragraphs 654(1)(b) and (c) respectively so that the functions of the Board would correspond with NOPSEMA’s expanded functions.

**Item 474** inserts *proposed section 688B* in Division 8 (Other financial matters) of Part 6.9 of Chapter 6 providing for the collection of the environment plan levy imposed by the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*. The Division includes a range of ‘levy-collecting’ provisions. The proposed section is couched in similar terms to those provisions.

**Item 489** repeals and replaces section 695 which updates the provision to include the new functions of NOPSEMA in relation to structural integrity and environmental management.

The new section also proposes to make changes to the timing of reviews. The first review would relate to the three year period after NOPSEMA commences operation. However, for subsequent reviews, the period between reviews will be increased from three, to five, years.

**NOPTA**

**Item 491** inserts a new Part 6.10 to Chapter 6 (Administration) entitled ‘National Offshore Petroleum Titles Administrator’.

**Functions of the Titles Administrator**

**Proposed section 695A** establishes the office of Titles Administrator. **Proposed section 695B** sets out the main functions of the office. In addition to assisting and advising the Joint Authority and the

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\textsuperscript{80} Explanatory Memorandum, p. 65.
responsible Commonwealth Minister and the state and Northern Territory ‘Petroleum’ Ministers\textsuperscript{81}: proposed paragraphs 658B(1)(a)–(d), the Titles Administrator would:

- take over the functions of the Designated Authorities in relation to decisions of the Joint Authority
- keep records of the decisions of the Joint Authorities
- sign documents on behalf of the Joint Authority
- be the point of communication for the Joint Authority, and
- execute instruments (for example, titles) and give notices on behalf of the Joint Authority.

The Titles Administrator would also have data management functions under Part 7.1 (Data Management and gathering Information) of the OPGGS Act.

Proposed section 695D would allow the Titles Administrator to delegate any or all of the Title Administrator’s functions or powers to:

- an SES employee, acting SES employee, EL2 employee in RET, or
- an employee of a state or the Northern Territory.

NOPTA Special Account

Proposed sections 695H, 695J, and 695K provide respectively for the establishment, crediting and purpose of the National Offshore Petroleum Titles Administrator Special Account.

Other financial matters

Proposed section 695L provides for the charging of fees for services as provided for in the regulations and for the recovery of fees as debts due to the Titles Administrator on behalf of the Commonwealth.

Proposed section 695M provides for the collection by the Titles Administrator of the annual titles administration levy imposed by the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003.

There would be a penalty for late payment: proposed subsections 695M(4)–(6). The fees would be legally enforceable by NOPTA on behalf of the Commonwealth: proposed subsection 695M(7).

Proposed section 695N provides for the provision by NOPTA of an annual report to the responsible Commonwealth Minister as soon as practicable at the end of each financial year. A copy must also be provided to the Petroleum Minister for each state and the Northern Territory and the Standing Council on Energy and Resources.

\textsuperscript{81}. This last would only be undertaken at the request of the ‘Petroleum’ Minister under a service contract.

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Proposed section 695 provides for reviews and reporting on the operation of NOPSEMA. Similarly, proposed section 695P provides for reviews of the activities of NOPTA and for the preparation of a report of the review for both NOPSEMA and NOPTA. The report must be tabled in both houses of the Parliament. With the first review taking place three years after commencement, and then every five years. Reviews must be completed within six months of the end of each period unless otherwise allowed by the responsible Commonwealth Minister.

Data management and gathering of information

Items 492–495 effectively transfer the present power of the Delegated Authority with respect to data management to the Titles Administrator. Items 496–501 do the same with respect to information gathering powers.

Item 503 inserts proposed section 707A at the end of Division 3 of Part 7.1 which provides that the Titles Administrator may give written directions to a petroleum project inspector as to the exercise of the inspector’s powers under this Division. This provision is necessary because petroleum project inspectors are appointed and deployed by NOPSEMA. However, when a project inspector is acting in furtherance of the Titles Administrator’s functions they are under the direction of the Titles Administrator.

Information relating to greenhouse gas

The Bill proposes transferring the responsible Commonwealth Minister’s powers in relation to data management and gathering of information with respect to greenhouse gas operations to the Titles Administrator. Items 517–531 implement this proposed transfer.

The review of decisions

Part 9.1 of Chapter 9 of the OPGGS Act currently sets out the decisions with respect to which reconsideration or review may be sought. The following proposed amendments seek to limit review by the Administrative Appeals Tribunal (AAT) of decisions of the responsible Commonwealth Minister, or his or her delegate, as Joint Authority in relation to the offshore area of an external Territory.

Items 544 and 545 omit the definitions of ‘reviewable delegated decision’ and ‘reviewable Ministerial decision’ in section 745, and insert proposed definitions of ‘reviewable Ministerial decision’ and ‘reviewable Titles Administrator decision’.

Item 546 proposes the repeal of section 746 which relates to the reconsideration of reviewable delegated decisions while item 547 adds proposed section 747A which provides for the review by

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82. Item 489, Part 1 of Schedule 2 to the Bill.
83. Both these decisions are reviewable under the OPGGS Act.

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the AAT of reviewable Titles Administrator decisions. Section 747 makes similar provision for the review by the AAT of reviewable Ministerial decisions.

The Explanatory Memorandum gives the following rationale for the changes:

Decisions of a Joint Authority concerning the granting of titles and the imposition of title conditions are matters of high government policy, involving considerations of national economic policy as well as environmental and social policy. The decisions are also made on the basis of technical geological and geophysical data on advice from Geoscience Australia. These are not decisions that a [sic] administrative tribunal is equipped to make, particularly as requests for review would arise rarely so that there was no opportunity for members to acquire any expertise or experience in relation to such matters.  

**Transitional Provisions**

Some of the transitional provisions contained in the Bill are to commence on Royal Assent, whilst others will commence on proclamation. Transitional provisions to commence on Royal Assent include provisions:

- ensuring the continuity of the renamed NOPTA Board and the NOPSA CEO
- providing for the provision by regulation for references to the Designated Authority in specified documents to be construed as reference to NOPTA, NOPSEMA or the responsible Commonwealth Minister and
- providing for the continuation of proceedings in courts and tribunal instituted by the Designated Authority, by the appropriate new entity.

Transitional provisions to commence on proclamation include provisions:

- providing for instruments made or given by or acts of the DA to be attributed to the Titles Administrator, NOPSEMA or the responsible Commonwealth Minister
- providing for instruments made or given by the responsible Commonwealth Minister to be attributed to the Titles Administrator
- providing for the continuation and transfer of Registers and
- providing for the transfer of petroleum and greenhouse gas records to the Titles Administrator.

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84. Explanatory Memorandum, p. 81.
85. *Items 637* and *638*, Part 3 of Schedule 2 to the Bill.
86. *Item 639*, Part 3 of Schedule 2 to the Bill.
87. *Item 640*, Part 3 of Schedule 2 to the Bill.
88. *Items 643–648*, Part 4 of Schedule 2 to the Bill.
89. *Items 649* and *650*, Part 4 of Schedule 2 to the Bill.
90. *Items 651* and *652*, Part 4 of Schedule 2 to the Bill.
91. *Items 654* and *655*, Part 4 of Schedule 2 to the Bill.

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Schedule 3—Amendments relating to annual fees

Item 1 proposes the repeal of the Offshore Petroleum and Greenhouse Gas Storage (Annual Fees) Act 2006. As stated in the Explanatory Memorandum:

The annual fees imposed on holders of petroleum titles by the Annual Fees Act were required to be passed by the Commonwealth on to the DAs to fund their administration of the OPGGS Act. Following the abolition of the DAs, NOPTA and NOPSEMA will operate on a cost-recovery basis funded by levies raised by the offshore petroleum and greenhouse gas industries imposed by the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003. The annual fees imposed by the Annual Fees Act will therefore no longer be imposed on titleholders. 92

Items 2–15 contain consequential amendments to the OPGGS Act.

Item 16 provides that the proposed repeal of the Annual Fees Act applies to any year of the term of a petroleum or greenhouse gas titles that begins at or after the commencement of the item (that is, on proclamation)

Item 17 provides that the existing provisions of the OPGGS Act will continue to apply to any fees that became payable under the Annual Fees Act prior to the repeal of that Act, and late payment penalties in relation to such fees, as if the amendments made to those existing provisions by Schedule 3 to this Bill had not been made.

Schedule 4—Amendments relating to registration fees

Item 1 proposes the repeal of the Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006.

Items 9 inserts proposed section 516A in the OPGGS Act to provide for a fee for applications for approval of a transfer of a petroleum title or approval of a dealing.

Item 17 inserts proposed section 565A in the OPGGS Act to provide for a fee provision applicable to applications for approval of a transfer of a greenhouse gas title or approval of a dealing in relation to greenhouse gas.

Item 22 provides that the repeal of the Registration Fees Act applies to relevant OPGGS Act provisions only to the extent to which the Registration Fees Act relates to the entry of certain information on the Register in response to an application made after the commencement of this item.

Item 23 provides that fees contained in sections 516A and 565A of the OPGGS Act, as amended by Schedule 4, apply to eligible applications made after the commencement of this item.

92. Explanatory Memorandum, p. 94.

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Item 24 provides that fees contained in sections 516A and 565A of the OPGGS Act, as amended by Schedule 4, apply to eligible applications made after the commencement of this item.

Concluding comments

This Bill has been preceded by extensive stakeholder consultation. It seeks to establish the single regulatory body that has been recommended in two recent reports to Government—the Productivity Commission Report and the Montara Report—together with the office of Titles Administrator. Having regard to those reports, the Bill also seeks to set in place a range of reforms designed to strengthen and streamline regulatory practices; to encourage timeliness in decision making; to impose review and reporting requirements and to encourage information-sharing between the regulating entities. It would seem to represent a positive step forward. However, in view of its significant petroleum reserves, it will clearly be important to have the support of Western Australia for the proposed reforms.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2764.