Offshore Resources Legislation Amendment (Personal Property Securities) Bill 2011

Margaret Harrison-Smith
Law and Bills Digest Section

Contents

Purpose ................................................................................................................................................. 2
Background ........................................................................................................................................... 2
Offshore Petroleum and Greenhouse Gas Storage Act ........................................................................... 2
Offshore Minerals Act ............................................................................................................................. 4
Personal Property Securities Act ........................................................................................................... 5
What is personal property? ................................................................................................................... 5
What is a personal property security? ................................................................................................... 5
Titles under the OPGGS and OMA ....................................................................................................... 5
Committee consideration ....................................................................................................................... 6
Financial implications .......................................................................................................................... 7
Main issue ............................................................................................................................................... 7
Key provisions ....................................................................................................................................... 8
Concluding comments .......................................................................................................................... 8
Offshore Resources Legislation Amendment (Personal Property Securities) Bill 2011

Date introduced: 25 May 2011
House: House of Representatives
Portfolio: Resources and Energy

Commencement: Sections 1–3 on the day of Royal Assent; Schedule 1 on the later of the start of the day after the day of Royal Assent, and the registration commencement time within the meaning of the Personal Property Securities Act 2009.¹

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 Resources Legislation Amendment (Personal Property Securities) Bill 2011 (the Bill) is to amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGS Act) and the Offshore Minerals Act 1994 (OMA) to provide that the rights, licences, permits, leases and authorities registrable under those Acts shall not constitute personal property securities that would be registrable under the Personal Property Securities Act 2009 (PPS Act).

Background

Offshore Petroleum and Greenhouse Gas Storage Act

The Bill is one of a suite of five complementary Bills relating to offshore petroleum and greenhouse gas activities that were introduced into the Parliament on 25 May 2011.² The principal Bill in the

1. The term ‘registration commencement time’ is defined in subsection 306(2) of the PPS Act as the start of the first day of the month that is 26 months after the month in which this Act is given the Royal Assent or an earlier time determined by the Minister. The Minister has announced that the legislation will commence in October 2011: see R McClelland (Attorney-General), More time for industry to prepare for Property Security Reform, media release, 17 February 2011, viewed 14 June 2011, http://agsearch.ag.gov.au/search/ag?new=1&query=personal+property+securities

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package is the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011 (National Regulator Bill). Further information and analysis about the nature of the changes is contained in the Bills Digest for the principal Bill.

The OPGGS Act provides a regulatory framework for Australia’s offshore petroleum exploration and recovery and for the injection and storage of greenhouse gas substances in offshore areas.

Under the OPGGS Act, the Joint Authority may grant a range of titles with respect to petroleum and greenhouse gas substances. Although the National Regulator Bill will make a number of changes to the regulation of offshore petroleum and greenhouse gas titles, it will not affect the role of the Joint Authority in this respect.

Chapter 4 of the OPGGS Act (Registration of transfers of, and dealings in, petroleum titles) presently requires the Designated Authority to keep a register of offshore petroleum titles and petroleum special prospecting authorities. The Designated Authority must also approve or refuse to approve transfers of, or dealings in, petroleum titles. Approvals must be recorded by the Designated Authority in the Register. In the event that the National Regulator Bill is approved, the primary responsibility for registrations will rest with a new entity, the National Offshore Petroleum Authority.

Where the title is a ‘referable title’, the Designated Authority must not make a decision before referring the proposed transfer or dealing to the responsible Commonwealth Minister. The

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4. There is a Joint Authority for each offshore area. The Joint Authority for an offshore area of a state is constituted by the responsible state and the responsible Commonwealth Minister, and the Joint Authority for the Principal Northern Territory offshore area is the responsible Northern Territory Minister and the responsible Commonwealth Minister: section 56, OPGGS Act.
5. The petroleum titles include petroleum exploration permits; petroleum retention leases; petroleum production licences; infrastructure licences; pipeline licences; petroleum special prospecting authorities and petroleum access authorities. The greenhouse gas titles include greenhouse gas assessment permits; greenhouse gas holding leases; greenhouse gas injection licences; greenhouse gas search authorities and greenhouse gas special authorities: section 38, OPGGS Act. In addition, sections 486 and 537 OPGGS Act list the dealings in petroleum and greenhouse gas titles (other than transfers of title) that are registrable under the OPGGS Act.
6. There is a Designated Authority for each offshore area. The Designated Authority for the offshore area of a state or the Northern Territory is the responsible Minister: section 70, OPGGS Act. The Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011 proposes replacing the Designated Authorities with a single new body—the National Offshore Petroleum Titles Administrator (NOFTA).
7. Subsections 478(2) and 493(2), OPGGS Act.
8. A ‘referable title’ is a greenhouse gas assessment permit, gas holding lease or gas injection licence: section 467, OPGGS Act.
9. Subsections 478(6) and 493(6), OPGGS Act.

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Designated Authority must then act on any direction from the Minister concerning the proposed transfer or dealing.\textsuperscript{10}

**Chapter 5** of the OPGGS Act (Registration of transfers of, and dealings in, greenhouse gas titles) requires the responsible Commonwealth Minister to maintain a register of greenhouse gas titles and greenhouse gas search authorities.\textsuperscript{11} The Minister may either approve or refuse to approve a proposed transfer or dealing in a greenhouse gas title.\textsuperscript{12} If approved, the approval must be entered in the Register.\textsuperscript{13}

**Offshore Minerals Act**

The OMA provides a regulatory framework for the exploration and mining of Australia’s offshore mineral resources.\textsuperscript{14} Offshore mining licences may be granted by the Joint Authority.\textsuperscript{15}

**Chapter 3** of the OMA (Registration and dealings) provides for the registration by the Designated Authority\textsuperscript{16} of mining licences (including renewals and extensions of licences) and transfers, and other dealings in, devolutions of, and caveats on mining licences.\textsuperscript{17}

The Designated Authority under the OMA appears to have less discretion with respect to registration than the Authority under the OPGGS Act. For instance, the OMA Authority cannot register the transfer of a licence unless the transfer has been approved by the Joint Authority\textsuperscript{18}, and with respect

\begin{itemize}
\item \textsuperscript{10} Subsections 478(8) and 493(8), OPGGS Act.
\item \textsuperscript{11} Responsibility for the approval and registration of greenhouse gas titles would not be affected by the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011.
\item \textsuperscript{12} Subsections 529(2) and 543(2), OPGGS Act. Note that where a greenhouse gas holding lease or a greenhouse gas injection licence is tied to a petroleum retention lease, the responsible Commonwealth Minister must not approve the transfer of the greenhouse gas holding lease or the greenhouse gas injection licence unless a number of conditions are satisfied. Set out in subsections 529(4) and 543(2), these conditions include that a transfer of the petroleum retention lease has been approved by the Designated Authority under section 478, OPGGS Act.
\item \textsuperscript{13} Sections 530 and 540, OPGGS Act.
\item \textsuperscript{14} The OMA does not apply to the offshore exploration, or recovery, of petroleum: section 35, OMA.
\item \textsuperscript{15} There is a Joint Authority for each offshore area. The Designated Authority for a Commonwealth-state offshore area is the responsible state Minister and the responsible Commonwealth Minister: section 32, OMA. The nature of the Commonwealth-state offshore area is described in section 13, OMA. For the purposes of the OMA, ‘State’ also includes the Northern Territory: section 5, OMA.
\item \textsuperscript{16} There is a Designated Authority for each offshore area. The Designated Authority for the Commonwealth-state offshore area of a state is the responsible state Minister: section 29, OMA.
\item \textsuperscript{17} The Designated Authority under the OMA has very little discretion with regard to registration. For instance, subsection 339(3), OMA provides that ‘if a document purports to create, transfer, affect or otherwise deal with an interest in a licence, the Designated Authority is to register the document under this section without inquiring into or concerning itself with the legal effectiveness of the document’.
\item \textsuperscript{18} Sections 339 and 362, OMA.
\end{itemize}
to ‘other dealings’, the Authority is required to register relevant documents ‘without inquiring into or concerning itself with their legal effectiveness’.¹⁹

**Personal Property Securities Act**

The PPS Act establishes a single national law governing security interests in personal property. It is anticipated that this will result in more certain, consistent, simpler and cheaper arrangements for personal property securities. As part of this Australia-wide approach, the Act establishes a single national online personal property securities register (PPS Register).

The PPS Act and the national PPS Register are scheduled to commence in October 2011.²⁰ The PPS Register will be the primary register of personal property security interests throughout Australia.

**What is personal property?**

Personal property is any property other than land and buildings. It includes tangibles (goods such as machinery, crops and livestock), financial property such as currency and letters of credit and intangibles (such as insurance policies, patents, trademarks and *chose in action*).²¹

Titles to petroleum, greenhouse gas substances and minerals under the OPGGS Act and the OMA would be personal property for the purposes of the PPS Act.²²

**What is a personal property security?**

A personal property security is an interest in personal property that secures a payment or the performance of an obligation. There are very few restrictions on what type of personal property can be used as security—almost anything of value may be acceptable as security if the lender and borrower agree.

**Titles under the OPGGS and OMA**

As they are both Commonwealth enactments, the requirements of the OPGGS Act and the OMA would not be overridden by those of the PPS Act. It therefore follows that, as well as being registrable under the OPGGS Act or the OMA, securities acquired in petroleum, greenhouse gas and mining titles would also be registrable as personal property securities under the PPS Act.

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¹⁹. Subsection 339(3), OMA. Notably, subsection 339(6), OMA provides that ‘registration of a document under section 339 of the OMA does not give the document any greater effect than it would otherwise have had’.

²⁰. See footnote number 1 above.

²¹. *A chose in action* is a property right, or the right to possession of something, that can only be obtained or enforced through legal action.


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The Explanatory Memorandum to the Bill states that, to avoid duplication and confusion, it is Commonwealth policy that existing approval and registration requirements under another Commonwealth Act are either:

• removed from the Commonwealth Act so that the provisions of the PPS Act only apply, or
• the application of the PPS Act to the Commonwealth Act is expressly excluded.\(^{23}\)

The Bill proposes the adoption of the second of these options. The Explanatory Memorandum further indicates that this would be consistent with a policy decision made by the Government to expressly exclude from the application of the PPS Act, the OPGGS Act and the OMA.\(^{24}\)

The Explanatory Memorandum also indicates that, in consultations, the States and the Northern Territory have advised the Government that they intend ‘to opt out of or exclude the operation of the PPS Act to their onshore mining regimes’.\(^{25}\) The consequences of this are considered in more detail in the ‘Main issue’ section of this Bills Digest.

Paragraph 8(1)(k) of the PPS Act gives the Commonwealth, the States or the Northern Territory the right to declare a statutory right not to be personal property for the purposes of the PPS Act. The terms of this Bill are consistent with that right.

**Committee consideration**

On 25 May 2011, the suite of Bills was referred to the House of Representatives Standing Committee on Agriculture, Resources, Fisheries and Forestry (the House of Representatives Committee) for inquiry and report.\(^{26}\) The House of Representatives Committee has now finalised its report, indicating its support for the passage of the Bills.\(^{27}\)

The Bills were also referred to the Senate Economics Legislation Committee (Senate Committee) for inquiry and report.\(^{28}\) The Senate Committee has now reported, also recommending passage of the Bills.\(^{29}\)

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23. Ibid.
24. Ibid.
25. Ibid.
26. Full details of the terms of reference to the inquiry, the submissions made and the evidence provided at public hearings can be viewed at: [http://www.aph.gov.au/house/committee/arff/petroleum/index.htm](http://www.aph.gov.au/house/committee/arff/petroleum/index.htm)

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Financial implications

According to the Explanatory Memorandum, the Bill will have no financial implications.\(^{30}\)

Main issue

The main issue raised by the Bill is whether the registration of transfers and other dealings in petroleum, greenhouse gases and mining titles should continue to occur under the OPGGS Act and the OMA, or whether these titles should be registrable as personal property securities under the PPS Act.

If this Bill were not passed prior to the commencement of the PPS Act, these titles would be registrable under the OPGGS Act and the OMA in accordance with the current law but there would be an additional requirement to register them under the PPS Act.\(^{31}\) This would clearly be undesirable because it would have a duplicating effect.

There are sound reasons for exempting the registration of transfers and other dealings in petroleum, greenhouse gases and mining titles from the operation of the PPS Act. First, the Government has been advised by the States and the Northern Territory that, in any event, they intend to opt out of, or to exclude the application of, the PPS Act to their onshore mining schemes.\(^{32}\)

Second, by excluding the application of the PPS Act to the OPGGS Act and the OMA, inconsistency between offshore and onshore mining, and the potential cost of any such inconsistency to the mining industry and its investors, would be avoided.\(^{33}\)

Third, and more significantly in terms of the Commonwealth offshore regulatory regime, under the registration requirements in the OPGGS Act, the regulator (currently the Designated Authority) and the Commonwealth Minister have certain powers of refusal. For instance, the Designated Authority has the ability to refuse to approve a transfer or dealing in relation to a petroleum title, and the responsible Commonwealth Minister has the ability to refuse to approve a transfer or dealing in relation to a greenhouse gas title. In addition, if, in the case of a transfer or a dealing in a petroleum title, if the title is a ‘referable title’, the responsible Commonwealth Minister can issue a direction to the Designated Authority in relation to the exercise of the Designated Authority’s power to approve or refuse to approve a dealing in relation to the petroleum title.\(^{34}\) The direction must be complied with. These powers enable the Australian Government ‘to ensure the suitability of the entities that

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31. As the OPGGS Act and the OMA are Commonwealth enactments, their registration requirements would not be overridden by the PPS Act.
32. Explanatory Memorandum, pp. 1–2. If the states and territories did not take this action, for Constitutional reasons, their mining registration regimes would be overridden to the extent of any inconsistency with the PPS Act, a Commonwealth enactment.
33. Ibid.
34. A ‘referable title’ is a title that is the subject of a greenhouse gas assessment permit, a greenhouse gas holding lease or a greenhouse gas injection licence: section 467, OPGGS Act.

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potentially are able to exercise control over Australia’s offshore petroleum resources’. There is no corresponding power of refusal in the PPS Act.

In its submission to the House of Representatives Committee, the Department of Energy, Resources and Tourism states that under the reforms proposed in the National Regulator Bill

This important oversight/vetting role will be exercised by the Titles Administrator to continue to meet the Australian Government’s objective of ensuring the suitability of entities that potentially are able to exercise control over Australia’s offshore petroleum and greenhouse gas storage resources.

Key provisions

**Item 1** of the Schedule to the Bill amends the OMA by inserting *proposed section 439A* which declares that a licence or an interest or right in, or in relation to a mining title licence is not personal property for the purposes of the PPS Act.

**Item 2** inserts *proposed Part 9.10B—Personal Property Securities*, and *proposed section 780 H* after existing Part 9.10A of the OPGSS Act. Paragraphs *(a)–(o)* of proposed section 780H list the items that the section declares are not to be personal property for the purposes of the PPS Act.

Each of the proposed provisions has below it a note referring to paragraph 8(1)(k) of the PPS Act. As previously mentioned, this provision gives the Commonwealth, the States or the Northern Territory the option of declaring a statutory right not to be personal property for the purposes of the PPS Act.

Concluding comments

The reasons given by the Government for the amendments to the OPGGS Act and the OMA proposed by the Bill appear to be sound.

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