THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE AMENDMENT (COMPLIANCE MEASURES NO. 2) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Resources and Energy, the Honourable Martin Ferguson AM, MP)
OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE AMENDMENT (COMPLIANCE MEASURES NO. 2) BILL 2013

OUTLINE

The purpose of this Bill is to amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (the Act) to strengthen the offshore petroleum regulatory regime, through measures to continue the implementation of the Australian Government’s response to the June 2010 Report of the Montara Commission of Inquiry (Montara Report), and other policy and technical amendments. These measures aim to improve compliance, improve environmental performance of offshore petroleum titleholders, introduce an express polluter-pays obligation and strengthen financial assurance arrangements.

The importance of effective offshore petroleum industry regulation has been highlighted in recent years by three serious incidents: a blowout at the Montara Wellhead Platform on 21 August 2009 off the northern coast of Western Australia; the explosion of the Deepwater Horizon on 20 April 2010 in the Gulf of Mexico; and the death of two drill workers on the Stena Clyde rig located in the Otway Basin off the Victorian coast in October 2012.

The Montara Report, which was prepared by the Montara Commission of Inquiry following the Montara incident, made several recommendations proposing amendments to strengthen the offshore petroleum regulatory regime. To give effect to those recommendations, the Australian Government undertook a review of Commonwealth legislation applicable to offshore petroleum activities and the marine environment (the Legislative Review).

The Bill will amend the Act to implement a number of the findings of the Legislative Review, which aim to strengthen the implementation of the ‘polluter pays’ principle in the offshore petroleum regulatory regime, and provide additional enforcement powers to regulators and courts. The amendments in this Bill will:

- Introduce alternative enforcement mechanisms (infringement notices, daily penalties for continuing offences and civil penalty provisions, injunctions and adverse publicity orders) into the offshore petroleum regulatory regime;
- Enable inspectors appointed by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) to issue environmental improvement notices and environmental prohibition notices to petroleum titleholders to remove threats to the environment from offshore petroleum operations;
- Introduce a statutory duty on petroleum titleholders, in the event of an escape of petroleum arising from operations in the titleholder’s title area, to stop, control and clean-up the spill, carry out appropriate monitoring and remediate the environment;
- Provide an ability for the regulator to take the necessary action and recover costs from the titleholder, in the event that the titleholder does not fulfil its statutory duty; also provide that where a state or territory has incurred costs of clean-up or
remediation of environmental damage within its jurisdiction resulting from a release of petroleum in Commonwealth waters, the state or territory has a right to recover those costs from the titleholder.

- Improve the effectiveness of insurance requirements in the Act to ensure that titleholders are in a financial position to comply with the new statutory polluter pays duty and also with other extraordinary regulatory costs they might incur.

**Alternative enforcement mechanisms**

The introduction of alternative enforcement mechanisms into the offshore petroleum regulatory regime will provide regulators and courts with a broader range of enforcement tools that can be applied when a person has failed to comply with their obligations under the Act. The Legislative Review concluded that the current enforcement mechanisms, sanctions and penalties available under the Act are insufficient to provide an effective and meaningful deterrent against non-compliance. A combination of factors – including the complexity of the legislation, the technical nature of the evidence pertaining to prosecutions, and the criminal standard of proof applicable to court proceedings – have operated as impediments to effective enforcement of the requirements of the Act.

The Legislative Review found that there is a strong need for a greater range of enforcement mechanisms to be considered for inclusion in the offshore petroleum regulatory regime, as a supplement or alternative to the existing criminal regime, in order to encourage improved compliance outcomes. The Legislative Review considered strong evidence that regulators are best able to secure compliance when they have a range of graduated sanctions that can be imposed, depending upon the severity of the misconduct or breach of statutory requirements. The ability to apply a range of enforcement tools can ensure a more targeted enforcement response, which can also be directed at achieving future behavioural change, rather than serving a purely punitive function. The introduction of infringement notices, daily penalties for continuing offences and civil penalty provisions, injunctions and adverse publicity orders into the Act will therefore ensure that the regulator and the courts have the capacity to apply an appropriate and proportionate response to incidents of non-compliance with the Act, in order to encourage improved compliance outcomes. These amendments will also complement additional amendments being made to the Act in a separate Bill that will introduce a civil penalty regime into the Act.

**Environmental improvement notices and environmental prohibition notices**

Under Schedule 3 to the Act, NOPSEMA inspectors currently have the ability to issue OHS prohibition notices and improvement notices to persons where necessary in order to remove or minimise risks to the occupational health and safety of any person. The amendments in this Bill will insert new provisions to also enable NOPSEMA inspectors to issue environmental prohibition notices and environmental improvement notices to petroleum titleholders in order to remove threats to the environment. A NOPSEMA inspector will have the ability to issue an environmental prohibition notice, to require that a particular activity not be conducted, or not be conducted in a specified manner, or that an offshore vessel or structure not be operated, if the inspector determines there is an immediate and significant threat to the environment. An environmental improvement notice will be able to be issued by a NOPSEMA
inspector where there is a current contravention, or has been a contravention which is likely to be repeated, of an environmental management law and, as a result, there is a threat to the environment. The notice would require action to be taken by the titleholder to remove that threat. Failure to comply with an environmental prohibition notice or environmental improvement notice will be an offence, or a civil penalty may apply for a failure to comply with an environmental improvement notice.

**Application of the ‘polluter pays’ principle**

It is appropriate that, in the event of an escape of petroleum, the polluter is responsible for ensuring that any damage as a result of the escape is minimised, and for paying the costs associated with cleaning up the spill and remediating the environment. The Legislative Review determined that, although the ‘polluter pays’ principle is given effect to varying degrees in the Act, there is scope to clarify its application, particularly as it relates to ensuring that the social, environmental and economic impacts of a significant offshore petroleum incident are appropriately addressed in the legislative regime.

The amendments in this Bill will strengthen and clarify the application of the ‘polluter pays’ principle in the Act through the introduction of a statutory duty requiring titleholders, in the event of an escape of petroleum occurring as a result of operations within the title area, to stop, contain, control and clean up the spill, remEDIATE the environment and carry out appropriate environmental monitoring. This will include the ability for the regulator (NOPSEMA or the Commonwealth Minister) to recover from the titleholder costs incurred by them in cleaning up the spill, remediating the environment and carrying out appropriate environmental monitoring if the titleholder fails to comply with the statutory duty.

This duty of the titleholder and the ability of the regulator to take the necessary action and recover costs in the event that the titleholder fails to perform its duty apply only in Commonwealth waters. The Act cannot and does not either require or authorise a titleholder to carry out any clean-up or remediation operations in areas that are within state or Northern Territory jurisdiction. The amendments in this Bill do, however, provide a right of action to a state or territory that has had petroleum originating from a release in a Commonwealth title area pollute waters that are within state or territory jurisdiction or places within the state or territory such as beaches or estuaries. The new right of action will enable the state or territory to recover from the titleholder their costs of clean-up and environmental remediation and environmental monitoring. There is no fault element to this right of action. It is simply a right to recover costs and expenses as a debt due to the state or territory. The right of action does not extend to economic costs, which will remain subject to recovery under existing law. The new right of action does not affect any other rights against the titleholder that a state or territory or any other person would have available to them.

**Financial assurance**

The Bill will also amend the existing insurance provisions in the Act to clarify the operation of those provisions, in order to support the application of the ‘polluter pays’ principle in the offshore petroleum regulatory regime by reinforcing that the obligation for managing operational risks rests with the titleholder. The amendments will ensure that it is compulsory for a titleholder to maintain sufficient financial
assurance to ensure that it can meet the costs of any expenses or liabilities arising in connection with work done under the title, including expenses relating to the clean-up or other remediation of the effects of an escape of petroleum.

These amendments collectively implement and address the matters raised in Recommendations 95 and 96 of the Montara Report.

Other minor policy and technical amendments

This Bill will further improve OHS and environmental outcomes and streamline the administration of the Act through additional amendments to:

- Enable NOPSEMA to publish on its website improvement notices and prohibition notices issued by NOPSEMA inspectors under Schedule 2A or 3 to the Act;
- Enable matters relating to the service of documents under the Act or legislative instruments to be provided for in regulations under the Act;
- Enable an acting SES employee in the Department to act as the National Offshore Petroleum Titles Administrator;
- Enable administrative arrangements for taking eligible voluntary actions when there is more than one registered holder of a title to be carried through into legislative instruments under the Act;
- Replace specific references to the Standing Council on Energy and Resources with a more general description.

FINANCIAL IMPACT STATEMENT

The Bill has no financial impact.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The Bill makes various amendments to the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (the Act) to strengthen the offshore petroleum regulatory regime, in order to improve compliance, occupational health and safety (OHS) and environmental outcomes, and to streamline the administration of the Act. A number of the amendments continue the work of the Australian Government to implement the lessons learned from recent incidents in the offshore petroleum industry, including the blowout at the Montara Wellhead platform on 21 August 2009 off the northern coast of Western Australia and the explosion of the Deepwater Horizon on 20 April 2010 in the Gulf of Mexico.

The principle amendments in the Bill will:

- Strengthen and clarify the application of the ‘polluter pays’ principle in the offshore petroleum regulatory regime, by imposing a statutory duty on petroleum titleholders, in the event of an escape of petroleum arising from operations in the titleholder’s title area, to stop, control and clean-up the escape of petroleum, remediate damage to the environment caused by the escape, and undertake environmental monitoring of the impacts of the escape; and

- Provide the offshore petroleum regulator, the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), and the courts with an increased range of enforcement tools to encourage improved compliance by persons with their obligations under the Act, and ensure that the response to instances of non-compliance is appropriate and proportionate in relation to specific breaches of the Act. The particular tools that will be inserted into the Act by this Bill are infringement notices, daily penalties for continuing offences or contraventions of continuing civil penalty provisions, injunctions, and adverse publicity orders.

The Bill also includes additional amendments to:

- Enable a NOPSEMA inspector to give an environmental prohibition notice or an environmental improvement notice to a titleholder requiring action to remove significant threats to the environment;

- Enable NOPSEMA to publish on its website improvement notices and prohibition notices issued by NOPSEMA inspectors under Schedule 2A (environment) or Schedule 3 (OHS) to the Act;

- Enable matters relating to the service of documents under the Act or legislative instruments to be provided for in regulations under the Act;
• Enable an acting SES employee in the Department to act as the National Offshore Petroleum Titles Administrator;

• Enable administrative arrangements for taking eligible voluntary actions when there is more than one registered holder of a title to be carried through into legislative instruments under the Act;

• Replace specific references to the Standing Council on Energy and Resources with a more general description.

**Human rights implications**

This Bill engages the following human rights:

• The right to work and rights in work;

• The protection against arbitrary interference with privacy;

• The right to a fair and public hearing;

• The right to minimum guarantees in criminal proceedings.

*The right to work and rights in work*

The measures in this Bill to introduce alternative enforcement mechanisms into the Act promote the right to work and rights in work, specifically the right to just and favourable working conditions in article 7 of the International Covenant on Economic, Social and Cultural Rights. The right to just and favourable conditions of work encompasses a number of elements, including safe and healthy working conditions. The introduction of measures such as injunctions and daily penalties for continuing offences or contraventions of continuing civil penalty provisions encourages persons to comply with their obligations under the Act, or return to a position of compliance if the person is in breach, including obligations relating to occupational health and safety.

For example, the measures in this Bill will enable the court to grant an injunction, on application by an authorised person, to restrain a person from contravening a provision that is made enforceable by the Bill, or to compel compliance with such a provision. The provisions that are made enforceable by injunction in the Bill include provisions that place OHS duties on persons, including facility operators and employers, to ensure that risks to persons from operations at an offshore petroleum facility are safe and without risk to health; the obligation to comply with OHS compliance notices, such as do-not-disturb notices, prohibition notices and improvement notices, which are given to persons by a NOPSEMA inspector to require action to remove the threat to OHS; and the obligation to not interfere with any equipment or device provided for the health, safety or welfare of members of the workforce. Therefore, if a person is contravening any of these important health and safety obligations, they can be required by the court to cease the contravention, and thereby ensure that safe and healthy working conditions are provided for employees.

Similarly, the introduction of daily penalties for continuing contraventions of certain provisions relating to OHS will encourage persons in breach of their obligations under the Act in relation to health and safety to quickly remedy the non-compliance. For example, a continuing failure to comply with an OHS prohibition notice or OHS
improvement notice may attract a daily penalty due to the amendments in this Bill. These notices are given by NOPSEMA inspectors where activities that are or may be carried out at a facility, or where contraventions by a person against a listed OHS law, create threats to the health or safety of any person, and require action to remove the threat. If a person fails to comply with the notice, the risks to employees will continue; however the potential for a daily penalty (up to 60 penalty units per day for an individual and 300 penalty units per day for a body corporate for a continuing failure to comply with an OHS prohibition notice) will strongly encourage persons to comply with the notice, and thereby remedy risks to health and safety and ensure that safe and healthy working conditions are provided.

On the whole, the introduction of these alternative enforcement mechanisms will help to promote a focus on safe and healthy working conditions in offshore petroleum operations and ensure that, where persons are in breach of obligations relating to the provision of safe and healthy working conditions, creating potential risks to health and safety, those persons are encouraged or required to return to a position of compliance.

The right to privacy and reputation

The amendments in Part 2 of Schedule 2 to this Bill that will require NOPSEMA to publish prohibition notices and improvement notices given by a NOPSEMA inspector under Schedule 2A (environment) or Schedule 3 (OHS) to the Act may engage the right to privacy and reputation in Article 17 of the International Convention on Civil and Political Rights (ICCPR), as there is a possibility that such notices may contain personal information. Article 17 prohibits arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence, and protects a person’s honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

1) Legitimate objective

The purpose of the amendments to require NOPSEMA to publish prohibition notices and improvement notices is to enable lessons learned from inspections to be shared with other members of the offshore petroleum industry, which will in turn assist those companies to comply with regulatory requirements, and will also help to increase the transparency of NOPSEMA’s operations. Publication of notices will enable lessons to be shared by enabling companies to view and consider the content of notices, in particular the types of activities in relation to which notices have been given due to threats to OHS or the environment caused by those activities, and assess their own activities against the activities described and, where necessary, implement measures to improve and reduce potential risks caused by their operations. By assisting companies to comply with regulatory requirements through the publication of notices, potential threats to OHS and the environment can thereby be reduced or removed. Given the high-hazard nature of the offshore petroleum industry and the potentially serious consequences of incidents, the potential for the prevention of threats to OHS and the environment as a result of these amendments is a highly desirable outcome.
2) Reasonable, necessary and proportionate response

The amendments in Part 2 of Schedule 2 include a provision requiring that, if a notice to be published does contain personal information (within the meaning of the Privacy Act 1988), NOPSEMA must take such steps as are necessary in the circumstances to ensure that the information is de-identified before the notice is published. Personal information is de-identified if the information is no longer about an identifiable individual or an individual who is reasonably identifiable. In practice, it would be unusual for a circumstance to arise in which any personal information would not be de-identified, or even removed, by NOPSEMA prior to publication of the notice in accordance with this safeguard. In the majority of cases, the relevant information in the notice to be published would generally describe particular activities undertaken at offshore petroleum premises, such as petroleum facilities, threats to OHS or the environment caused by those activities, and action required to remove those threats, without the need to refer to particular persons or personal information.

The amendments will also apply only to notices that are given by a NOPSEMA inspector after the commencement of the amendments, so that the requirement to publish prohibition notices and improvement notices will not be applied retrospectively as it relates to personal information.

In addition to these safeguards, the use or disclosure of any information that is personal information is subject to the Privacy Act 1988. Accordingly, the requirement to publish prohibition notices and improvement notices pursuant to this provision is reasonable, necessary and proportionate in the circumstances.

Given the legitimate objective of the amendments, and the safeguards that ensure the amendments are reasonable, necessary and proportionate in the circumstance, the amendments in Part 2 of Schedule 2 of this Bill are consistent with Australia’s human rights obligations in relation to the right to privacy.

The right to a fair and public hearing

The amendments in Part 1 of Schedule 1 to this Bill engage the right to a fair and public hearing in article 14 of the ICCPR through the creation of an infringement notice scheme. Article 14 ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

1) Legitimate objective

The ability to only seek criminal prosecution or application of a civil penalty creates a potential barrier to appropriate enforcement of minor breaches and less serious contraventions of the Act and regulations. For example, the regulator or the Commonwealth Department of Public Prosecutions may determine that the cost of undertaking court proceedings is not justifiable in relation to the level and nature of the breach. In the absence of an appropriate alternative enforcement mechanism that may be applied in these cases, such as the ability to issue an infringement notice, there
is a high risk that no enforcement action will be taken in relation to such minor or technical breaches and contraventions.

The introduction of an infringement notice scheme into the Act will therefore enable the regulator to respond quickly to an alleged contravention of the Act, and provide an additional option for the regulator to enforce legislative requirements to in turn encourage compliance by persons with all of their obligations under the Act, including minor administrative or technical obligations. It will also enable the regulator to respond in a manner proportionate to the level and seriousness of the particular breach.

2) Reasonable, necessary and proportionate response

The Bill provides for infringement notices under the Act to be issued and enforced in accordance with Part 5 of the proposed Regulatory Powers (Standard Provisions) Act 2013 (the Regulatory Powers Act). Under the Regulatory Powers Act, an infringement officer will be able to issue an infringement notice for contraventions of strict liability offences that are made enforceable under that Act by the provisions in this Bill.

In accordance with the principles in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, infringement notices are proposed to be applied by this Bill in relation to minor offences with strict liability only. It is appropriate that more serious offences should be prosecuted in court, and are not suitable for inclusion in an infringement notice scheme. Fault-based offences are also not suitable, as proof of fault is often not a straightforward, objective assessment. In order to determine the provisions in the Act that would be enforceable by an infringement notice, each strict liability offence provision was therefore examined to determine whether it would be appropriate to apply an infringement notice in relation to a breach, based on the above principles. An additional key criterion was that an enforcement officer, such as a NOPSEMA inspector, should easily be able to make an assessment of innocence or guilt based on straightforward and objective criteria, for example where there are clear-cut physical elements of the offence.

The following table lists the provisions that are proposed to be enforceable by an infringement notice, which demonstrates the administrative and clear-cut nature of those provisions:

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subsection 249(2)</td>
<td>A failure by a registered holder of a petroleum access authority to give a written report about operations carried on in a block/s, where the block/s are also the subject of a petroleum exploration permit, petroleum retention lease, or petroleum production licence, to the holder of the permit, lease or licence, within 30 days of the end of the month during which the operations are carried on.</td>
</tr>
<tr>
<td>Subsection 284(5)</td>
<td>Failure by a titleholder to inform the National Offshore Petroleum Titles Administrator (the Titles Administrator) of the discovery of petroleum in the title area before the end of the 30 day period that began on the day of completion of the well that resulted in the discovery.</td>
</tr>
<tr>
<td>Subsection</td>
<td>A failure to notify the Titles Administrator and NOPSEMA on</td>
</tr>
<tr>
<td><strong>286A(7)</strong></td>
<td>becoming a registered holder of a title, ceasing to be a registered holder of a title, or where there is a change of contact details of a registered holder of a title.</td>
</tr>
<tr>
<td><strong>Subsection 508(4)</strong></td>
<td>Failure by a party to an approved dealing to provide, as requested by NOPTA, information about alterations in the interests or rights existing in relation to the title.</td>
</tr>
<tr>
<td><strong>Subsection 509(4)</strong></td>
<td>Failure to comply with a written request from the Titles Administrator to produce a document that relates to a transfer or dealing for which approval is sought.</td>
</tr>
<tr>
<td><strong>Subsection 575(4)</strong></td>
<td>Failure by a titleholder to cause a copy of a direction that has extended application to be displayed as required.</td>
</tr>
<tr>
<td><strong>Subsection 602K(6)</strong></td>
<td>Failure by a titleholder to nominate a titleholder representative for the purposes of an inspection, and ensure that representative is present at the time required in a notice given by a NOPSEMA inspector.</td>
</tr>
<tr>
<td><strong>Subsection 697(3)</strong></td>
<td>Failure to comply with a direction to keep accounts and records, collect and retain cores, cuttings and samples, and/or give to the Titles Administrator or a specified person such accounts, records, cores, etc.</td>
</tr>
<tr>
<td><strong>Subclause 6(3) of Schedule 3</strong></td>
<td>Failure by a facility operator to ensure there is an operator’s representative present at the facility, and that the name of the operator’s representative is displayed in a prominent place at the facility.</td>
</tr>
<tr>
<td><strong>Subclause 82(9) of Schedule 3</strong></td>
<td>Failure by an operator to give a report to NOPSEMA about an accident or dangerous occurrence.</td>
</tr>
<tr>
<td><strong>Subclause 83(4) of Schedule 3</strong></td>
<td>Failure by an operator to keep records of accidents and dangerous occurrences.</td>
</tr>
</tbody>
</table>

The right of a person to a fair and public hearing by a competent, independent and impartial tribunal is preserved by the Bill in its application of the Regulatory Powers Act, as the provisions of that Act allow a person to elect to have the matter heard by a court rather than pay the amount specified in the notice. Additionally, the Regulatory Powers Act provides that this right must be stated in an infringement notice issued to a person, ensuring that a person issued with an infringement notice is aware of their right to have the matter heard by a court.

The Bill also ensures against arbitrariness or abuses of power through limitations as to who can issue an infringement notice. Infringement notices may be issued by the Chief Executive Officer (CEO) of NOPSEMA, the National Offshore Petroleum Titles Administrator (the Titles Administrator) or a NOPSEMA inspector. The CEO of NOPSEMA may delegate this function, but only to a member of the staff of NOPSEMA, an employee of the Commonwealth or a Commonwealth authority, or an employee of a State or of the Northern Territory (NT) or an authority of a State or the NT. Similarly, the Titles Administrator may delegate the function only to an SES employee or APS employee who holds or performs the duties of an Executive Level 2 position in the relevant Department, or an employee of a State or the NT.

Generally, the persons who may be appointed as a NOPSEMA inspector are members of the staff of NOPSEMA, employees of the Commonwealth or a Commonwealth
authority, or employees of a State or of the NT or an authority of a State or the NT. It is acknowledged, however, that a person who is not a member of the staff of NOPSEMA, an APS employee or an officer of a State or the NT may be appointed as a NOPSEMA inspector in certain circumstances. However, such appointments are only able to be made for limited periods and limited functions, specified in the instrument of appointment, to enable persons with particular expertise to assist during inspections where required. It is unlikely that such persons would be appointed to perform the functions of an infringement officer.

The selection of offences that may be enforced by an infringement notice and the additional safeguards described above ensure that the power to issue an infringement notice is reasonable, necessary and proportionate. The Bill ensures that relevant courts have sufficient oversight to ensure against arbitrariness or abuses of power. Regulatory functions and powers in the issuing of infringement notices are limited to government officers and a person can elect to have the matter heard by a court.

Given the legitimate objective of the amendments, and the safeguards that ensure the amendments are reasonable, necessary and proportionate in the circumstances, the amendments in Part 1 of Schedule 1 to this Bill to introduce an infringement notice scheme are consistent with Australia’s human rights obligations in relation to the right to a fair and public hearing.

**The right to minimum guarantees in criminal proceedings**

New section 611G, to be inserted by item 1 of Schedule 1 to this Bill, will enable a relevant chief executive (i.e. the CEO of NOPSEMA or the Secretary of the relevant Department, as the case may be) to issue a signed certificate stating that they did not allow further time for a person to pay a penalty stated in an infringement notice given to the person, and that the penalty has not been paid within 28 days after the notice was given, or that they did allow further time to pay the penalty and the penalty was not paid within that further time period. In addition, the relevant chief executive may issue a signed certificate stating that a specified infringement notice was withdrawn on a day specified in the certificate. For the purposes of all proceedings, including criminal proceedings, a document purporting to be a certificate must, unless the contrary is established, to taken to be such a certificate and to have been properly given. In addition, a certificate is taken to be prima facie evidence of the matters stated in the certificate.

This would engage the right to minimum guarantees in criminal proceedings in article 14 of the ICCPR, insofar as that right relates to the law of evidence governing examination of witnesses. In accordance with article 14, the right to cross-examine prosecution witnesses would normally require evidence to be given in person, so that the reliability and credibility of the witness can be tested. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective. For example, evidence given other than in person, such as by way of written statement, may not violate this right, provided that the reliability and credibility of the witness giving the statement can still be tested.
1) **Legitimate objective**

The purpose of this provision is to facilitate proof of the matters stated in the evidentiary certificate, given that these relate to formal or technical matters of fact that would be difficult to prove by adducing admissible evidence. This will ensure that evidence of a failure to pay an amount stated in an infringement notice or of withdrawal of the notice can be efficiently presented to the court in any criminal proceedings for an alleged contravention of the offence provision that was the subject of the unpaid or withdrawn notice.

2) **Reasonable, necessary and proportionate response**

The provision enables an evidentiary certificate to be issued by a “relevant chief executive”; that is, the Secretary of the relevant Department, or the CEO of NOPSEMA. Given the level of responsibility that needs to be exercised by persons in those positions, there would be a very low risk in relation to the reliability and credibility of the witness giving the certificate.

As an additional safeguard, the certificate is prima facie evidence of the matters stated in the certificate only, and is not conclusive. This allows an opportunity for evidence of contrary matters to be adduced, and there is nothing to prevent the relevant chief executive appearing as a witness at trial to give further evidence if necessary. These safeguards ensure that the ability for the relevant chief executive to issue an evidentiary certificate in relation to the matters discussed above is reasonable, necessary and proportionate.

Given the legitimate objective of the proposed provision, and the safeguards that ensure the provision is reasonable, necessary and proportionate in the circumstances, the amendments to insert new section 611G in item 1 of Schedule 1 to this Bill are consistent with Australia’s human rights obligations in relation to the right to minimum guarantees in criminal proceedings.

**Conclusion**

The Bill is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.
NOTES ON CLAUSES

Clause 1: Short title
Clause 1 is a formal provision specifying the short title of the Act.

Clause 2: Commencement
Schedule 1 to the Bill will commence at the later of the following:
(a) the start of the day after this Act receives the Royal Assent; and
(b) immediately after the commencement of Schedule 2 to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013.

Schedule 2 of that Act is linked to the commencement of the Regulatory Powers (Standard Provisions) Act 2013 (the Regulatory Powers Act). Therefore this Schedule 1 similarly cannot commence until the commencement of the Regulatory Powers Act. This is necessary because certain measures within this Schedule trigger the application of the Regulatory Powers Act, or refer to provisions that will not be inserted into the Offshore Petroleum and Greenhouse Gas Storage Act 2006 until the commencement of Schedule 2 to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013.

Schedule 2 to the Bill will commence at the later of the following:
(a) the start of the day this Act receives the Royal Assent; and
(b) immediately after the commencement of Schedule 1 to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013.

Schedule 1 to that Act is linked to the commencement of the Regulatory Powers Act. Therefore this Schedule 2 similarly cannot commence until the commencement of the Regulatory Powers Act. This is necessary because Schedule 2 to this Bill contains amendments to provisions of the Offshore Petroleum and Greenhouse Gas Storage Act 2006, including Schedule 2A to that Act, which will not be inserted into that Act until the commencement of Schedule 1 to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013.

The following aspects of the Bill will commence on a day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period:

- Schedule 3, Part 1
- Schedule 4, Part 1
- Schedule 4, items 15 to 19
- Schedule 4, item 22

Part 1 of Schedule 3 is to commence by Proclamation to allow time to make necessary changes to regulations under the Offshore Petroleum and Greenhouse Gas Storage
Act 2006 to give full effect to the amendments in that Part, and to allow time for registered holders of petroleum titles to ensure they have sufficient financial assurance arrangements in place as required by the amendments in that Schedule.

Part 1 of Schedule 4 is to commence by Proclamation to allow time to make necessary changes to regulations under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 to include service of documents provisions in those regulations. The existing service of documents provisions in the Act will be repealed by the amendments in this Part – see item 5 of Part 1 of Schedule 4.

Items 15 to 19 and item 22 of Schedule 4 will commence by Proclamation to allow time to inform titleholders of the amendments that will be made by those items, and in particular to enable titleholders who have made existing nominations under section 775B or 775C of the Act to make any consequential changes to their nominations prior to commencement if necessary – see further discussion in relation to those items below.

The following aspects of the Bill will commence the day after this Act receives the Royal Assent:

- Schedule 3, Parts 2 and 3
- Schedule 4, Part 2
- Schedule 4, items 20 and 21
- Schedule 4, item 23
- Schedule 4, Part 4

Clause 3: Schedule(s)

This clause gives effect to the provisions in the Schedules to this Bill.
Schedule 1 – Compliance measures

The amendments in this Schedule will introduce four new alternative enforcement mechanisms into the Act:

- Infringement notices
- Injunctions
- Adverse publicity orders
- Cumulative penalties for continuing offences

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

In addition, the review found that there is a strong need for a greater and graduated range of enforcement mechanisms to be considered for inclusion in the offshore petroleum regulatory regime, as a supplement or alternative to the existing criminal regime, in order to encourage improved compliance outcomes. The review considered strong evidence that regulators are best able to secure compliance when they have a range of graduated sanctions that can be imposed, depending upon the severity of the misconduct or breach of statutory requirements in a given set of circumstances. The ability to apply a range of enforcement tools can ensure a more targeted enforcement response, which can also be directed at achieving future behavioural change, rather than serving a purely punitive function.

Non-monetary enforcement mechanisms, such as injunctions and adverse publicity orders can be incorporated into a regulatory regime in addition to direct financial penalties in order to provide a graduated range of compliance tools. The benefits of implementing non-monetary enforcement mechanisms include the ability for the regulator to tailor the application of enforcement measures to suit the particular circumstances of non-compliance, the ability to better align the penalty with its purpose, and to enable the regulator to seek an outcome directed towards future behavioural change to bring persons into a position of compliance. The potential for application of non-monetary enforcement mechanisms in the context of a well-resourced industry such as the offshore oil and gas industry is also useful as a means to further encourage compliance, given that the level of financial penalties that can be applied may in itself provide an insufficient deterrent.

The introduction of the abovementioned alternative enforcement tools into the Act will therefore ensure that the regulator and the courts have the capacity to apply an appropriate and proportionate response to incidents of non-compliance with the Act, in order to encourage improved compliance outcomes.

These amendments complement additional amendments being made to the Act in a previous Bill that introduced a civil penalty regime into the Act.
Schedule 1, Part 1 – Infringement notices, injunctions and adverse publicity orders

Division 1: Amendments

Item 1: At the end of Part 6.5

Infringement notices

Item 1 inserts a new Division 5 which introduces the ability for the regulator to issue infringement notices for contraventions of selected provisions of the Act, and provides the power to make regulations to the same effect – see new paragraph 790A(ab) inserted by item 3 of Schedule 1. It enables the infringement notices to be enforced in accordance with Part 5 of the Regulatory Powers Act.

Only providing an ability to seek criminal prosecution or seeking application of a civil penalty in a court creates a potential barrier to the pursuit of appropriate and effective enforcement of minor breaches and less serious contraventions of the Act and regulations. For example, the regulator or the Commonwealth Department of Public Prosecutions (CDPP) may determine that the cost of undertaking court proceedings is not justifiable in relation to the level and nature of the breach. In the absence of an appropriate alternative enforcement mechanism that may be applied in these cases, such as the ability to issue an infringement notice, there is a high risk that no enforcement action will be taken in relation to such minor breaches and contraventions therefore reducing the likelihood of overall compliance.

It is considered that the introduction of an infringement notice scheme into the Act will enable the regulator to respond quickly to an alleged contravention of the Act, and provide an additional option for the regulator to enforce legislative requirements to in turn encourage compliance by persons with all of their obligations under the Act, including minor administrative or technical obligations. It will also enable the regulator to respond in a manner proportionate to the level and seriousness of the particular breach.

In accordance with the principles in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, infringement notices are proposed to be applied to minor offences with strict liability only. It is acknowledged that it is appropriate that more serious offences should be prosecuted in court, and are not suitable for inclusion in an infringement notice scheme. Fault-based offences are also not suitable, as proof of fault is often not a straightforward, objective assessment. In developing the infringement notice scheme for inclusion in the Act, each of the strict liability offence provisions in the Act was individually examined to determine whether it would be appropriate to apply an infringement notice in relation to a breach, based on the above principles. An additional key criterion was that an enforcement officer, such as a NOPSEMA inspector, should easily be able to make an assessment of innocence or guilt based on straightforward and objective criteria, for example where there are clear-cut physical elements of the offence.

The amendments in this Part also trigger the application of Part 5 of the Regulatory Powers (Standard Provisions) Act 2013 (the Regulatory Powers Act), which creates a
framework for the use of infringement notices where an infringement officer reasonably believes that a provision has been contravened. The Regulatory Powers Act incorporates the standard principle that if the person to whom an infringement notice has been issued in relation to an alleged contravention pays the amount in the notice in the time stated within the notice, the person is not regarded as having admitted guilt or liability for the alleged contravention, and the person is not regarded as having been convicted of the offence. Additionally, any liability for the alleged contravention is discharged, and the person may not be prosecuted in a court for the alleged contravention, or proceedings seeking a civil penalty order may not be brought in relation to that alleged contravention (if applicable).

The Regulatory Powers Act also sets out the penalty to be applied in an infringement notice. The penalty must be the lesser of: (a) one-fifth of the maximum penalty that a court could impose for a contravention of the relevant provision and (b) 12 penalty units for an individual or 60 penalty units for a body corporate. This is in accordance with the principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, and as such this Bill will not provide for any alternative penalties for breaches of infringement notice provisions.

In addition, the Regulatory Powers Act provides for an infringement notice to be given in relation to continuing offences. An infringement officer will have the ability to give an infringement notice relating to multiple contraventions of a single provision if the provision requires the person to do a thing within a particular period or before a particular time, the person fails or refuses to do so, and the failure or refusal occurs on more than one day. Further provisions relating to cumulative penalties for continuing offences are inserted by Part 2 of Schedule 1 to this Bill – see discussion below.

The Regulatory Powers Act also provides for matters including: the period of time following an alleged contravention within which an infringement notice must be given; the matters that must be dealt with in an infringement notice; extension of time to pay the amount in an infringement notice; and the process for withdrawal of an infringement notice.

Section 611E Infringement notices

A new section 611E Infringement notices lists the existing provisions in the Act which will be subject to an infringement notice. In accordance with the principles in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, infringement notices are proposed to be applied by this Bill to minor offences with strict liability only. As already stated above, it is acknowledged that it is appropriate that more serious offences should be prosecuted in court, and such offences are not suitable for inclusion in an infringement notice scheme. Fault-based offences are also not suitable, as proof of fault is often not a straightforward, objective assessment which can be made by anyone other than a court of law. In order to determine the provisions in the Act that would be enforceable by an infringement notice, each strict liability offence provision was therefore examined to determine whether it would be appropriate to apply an infringement notice in relation to a breach, based on the above principles. An additional key criterion was that an enforcement officer, such as a NOPSEMA inspector, should easily be able to make an
assessment of innocence or guilt based on straightforward and objective criteria, for example where there are clear-cut physical elements of the offence.

On the basis of this analysis, the following strict liability offences will be enforceable by infringement notice:

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>249(2)</td>
<td>A failure by a registered holder of a petroleum access authority to give a written report about operations carried on in a block/s, where the block/s are also the subject of a petroleum exploration permit, petroleum retention lease, or petroleum production licence, to the holder of the permit, lease or licence, within 30 days of the end of the month during which the operations are carried on.</td>
</tr>
<tr>
<td>284(5)</td>
<td>Failure by a titleholder to inform the National Offshore Petroleum Titles Administrator (the Titles Administrator) of the discovery of petroleum in the title area before the end of the 30 day period that began on the day of completion of the well that resulted in the discovery.</td>
</tr>
<tr>
<td>286A(7)</td>
<td>A failure to notify the Titles Administrator and NOPSEMA on becoming a registered holder of a title, ceasing to be a registered holder of a title, or where there is a change of contact details of a registered holder of a title.</td>
</tr>
<tr>
<td>508(4)</td>
<td>Failure by a party to an approved dealing to provide, as requested by NOPTA, information about alterations in the interests or rights existing in relation to the title.</td>
</tr>
<tr>
<td>509(4)</td>
<td>Failure to comply with a written request from the Titles Administrator to produce a document that relates to a transfer or dealing for which approval is sought.</td>
</tr>
<tr>
<td>575(4)</td>
<td>Failure by a titleholder to cause a copy of a direction that has extended application to be displayed as required.</td>
</tr>
<tr>
<td>602K(6)</td>
<td>Failure by a titleholder to nominate a titleholder representative for the purposes of an inspection, and ensure that representative is present at the time required in a notice given by a NOPSEMA inspector.</td>
</tr>
<tr>
<td>697(3)</td>
<td>Failure to comply with a direction to keep accounts and records, collect and retain cores, cuttings and samples, and/or give to the Titles Administrator or a specific person such accounts, records, cores, etc.</td>
</tr>
<tr>
<td>6(3) of Schedule 3</td>
<td>Subclause 6(3) of Schedule 3</td>
</tr>
<tr>
<td>82(9) of Schedule 3</td>
<td>Subclause 82(9) of Schedule 3</td>
</tr>
<tr>
<td>83(4) of Schedule 3</td>
<td>Subclause 83(4) of Schedule 3</td>
</tr>
</tbody>
</table>

The new section 611E also specifies the persons who would be able to issue an infringement notice, i.e., the Chief Executive Officer (CEO) of NOPSEMA, the Titles Administrator, the Titles Administrator of the National Offshore Petroleum Titles Administrator (NOPSEMA), and the Titles Administrator.
Administrator, or a NOPSEMA inspector, depending on the provision that has been breached.

This item inserts a new subsection 611E(6). This subsection gives an infringement officer the ability to give a single infringement notice relating to multiple contraventions of a single provision if the provision requires the person to do a thing within a particular period or before a particular time, the person fails or refuses to do so, and the failure or refusal occurs on more than one day. A single infringement notice may also be given in relation to alleged contraventions of 2 or more provisions. This will be despite subsection 107(3) of the Regulatory Powers Act - the reason for the departure from the standard being that the remoteness of offshore operations makes it a virtual impossibility to attend on consecutive days in order to issue individual infringement notices for each day that the offence continues. NOPSEMA inspectors only attend on offshore facilities or premises, for the purposes of an inspection, as a result of well-planned arrangements with facility operators. The same policy reasoning applies to the departure stated in new section 611F of this same item.

Also in new section 611E, the ‘relevant chief executive’ is defined as the CEO of NOPSEMA or the Secretary for notices issued in relation to NOPSEMA or NOPTA functions respectively. The relevant chief executive is defined for the purposes of standard provisions in Part 5 of the Regulatory Powers Act which provide for requests to be made for extensions of time to make infringement notice payments or consideration of withdrawal of the infringement notice.

In the case of the Secretary, delegation of these functions is permitted on the policy basis that there are SES officials within the Department in possession of the relevant expertise necessary and seniority required to make such decisions.

Noting that regulatory functions in issuing infringement notices may be conceivably performed by non-public servants (in that there may be NOPSEMA inspectors appointed who are not Commonwealth or State/Northern Territory employees), this ability is provided on the basis that the delegation is legislatively restricted to persons of suitable seniority and expertise and the person outside the Australian Public Service is subject to full public sector accountability. Paragraph 6.4.2 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers is noted, which sets out the relevant legislation, to which any infringement officers should be made subject either through legislation or the terms of the contract for service. Delegation in the offshore petroleum regime occurs in limited circumstances and the non-public servant officer is appointed for a specified limited period and limited to performing express functions under the NOPSEMA inspector appointment arrangements as provided for in the Act, together with the CEO of NOPSEMA’s satisfaction that the person in question has suitable training or experience to properly exercise the powers of a NOPSEMA inspector.

Section 611G Evidentiary matters

New section 611G allows the relevant chief executive to issue a signed certificate in relation to matters such as whether he or she allowed further time for payment of the penalty of an offence or whether an infringement notice was withdrawn. This is not a legislative instrument, however it may be used in court proceedings to provide the
court with evidence. Part 5.3 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers limits use of these certificates, which is the basis for the provision specifying that certificates issued under section 611G are prima facie evidence of the matters stated in it and allow for an opportunity for evidence of contrary matters to be addressed.

**Injunctions**

This item also inserts a new Division 6 providing the ability for a court to grant an injunction, on application by an authorised person, to restrain a person from contravening certain provisions of the Act, or to compel compliance with those provisions. Item 1 inserts a new Division 6 which provides for the issue of injunctions to enforce compliance with this Act, relying on the framework set out in Part 7 of the Regulatory Powers Act.

The introduction of the ability for a court to grant an injunction in relation to contraventions of certain provisions of the Act will ensure that persons who are failing to meet their regulatory obligations can be required to return to a position of compliance, in addition or as an alternative to the application of any financial penalty for the contravention. This measure thereby also aims to encourage future behavioural change; for example, an injunction against a company whose breach is due to poor compliance programs and internal controls will encourage that company to address those internal deficiencies, and thereby reduce the risk of future non-compliance.

This Bill provides for injunctions to be granted in relation to all offence and civil penalty provisions under the Act, and two additional regulatory obligations for which a contravention is not an offence (i.e. requirements relating to the timing of commencement of works or operations in section 568 and the requirement to maintain sufficient financial assurance in section 571).

Part 7 of the Regulatory Powers Act provides for a court to grant an injunction, on application by an authorised person, to restrain a person from contravening a provision that is enforceable under that Part, or to compel compliance with such a provision. Part 7 of the Regulatory Powers Act, among other things, provides for the grant of interim injunctions, in addition to the grant of “final” injunctions.

To ensure the broadest possible application, the amendments are drafted such that an injunction can be granted in relation to any conduct or omission that would constitute an offence or contravention of a civil penalty provision under the Act. In addition, two additional regulatory obligations, contravention of which is not an offence, would be made enforceable under Part 7 of the Regulatory Powers Act. These provisions are: s568, which requires works or operations under certain petroleum titles to be commenced within a certain period of time in specified circumstances; and s571, which requires petroleum titleholders to maintain sufficient financial assurance for the costs of expenses and liabilities arising from carrying out work under the title and complying with legislative obligations. The ability to grant an injunction in relation to each of these provisions will ensure that persons who are failing to meet the requirements of the Act can be compelled to comply with their legislative obligations, whether or not a failure to comply is an offence or contravention of a civil penalty provision.
Section 611J Injunctions

New section 611J sets out in a table the authorised persons who would be able to apply to the court seeking an injunction, being the responsible Commonwealth Minister, the Secretary of the Department of the responsible Commonwealth Minister, the Chief Executive Officer of NOPSEMA, or the Titles Administrator, depending on the specified enforceable provision in relation to which an injunction is sought.

As contained and explained under Item 3 below, a provision of a legislative instrument is also enforceable by injunction under Part 7 of the Regulatory Powers Act.

Adverse publicity orders

Item 1 then goes on to insert a new Division 7 which provides for adverse publicity orders to be made by a court.

The potential for an adverse publicity order to be granted in addition or as an alternative to a financial penalty is being inserted into the Act to encourage compliance by corporations with their regulatory obligations. Noting that the majority of corporations operating within the offshore petroleum industry are international and publicly listed companies which highly value their business reputation and social licence to operate, the mere availability of adverse publicity orders can have a significant impact in terms of encouraging compliance and creating a deterrent effect. The ability to seek an adverse publicity order will also enable the regulator to seek a penalty that is tailored to the nature of the contravention, particularly where there are broader social or environmental impacts of incidents of non-compliance.

Section 611L Adverse publicity orders

New section 611L which enables a court to make an adverse publicity order is based largely on similar provisions in other Commonwealth legislation, such as the Competition and Consumer Act 2010 and the Work Health and Safety Act 2011.

A court will be able to make an adverse publicity order if it finds a body corporate guilty of an offence against the Act or regulations (whether or not the court convicts the body corporate of the offence), or an offence against section 6 of the Crimes Act 1914 (in other words, whether or not the court convicts the body corporate of the offence) in relation to an offence against the Act or regulations, or if it orders a body corporate to pay a civil penalty for a contravention of a provision of the Act or regulations.

The adverse publicity order would be able to be made on application of the person prosecuting the offence or taking the action to obtain a civil penalty order, and could be made in addition to any penalty that may be imposed or any other action that may be taken in relation to the offence or contravention. A time limit of six years after the commission of the offence or contravention of the civil penalty provision would be imposed on the ability to apply for an adverse publicity order.
An adverse publicity order would require a person to do either or both of the following within a specified period:

a) To publicise the offence or civil penalty order, its consequences, the penalty imposed and any other related matter;

b) To notify a specified person or class of persons (such as a group of people who were particularly impacted as a result of the contravention) of the offence or civil penalty order, its consequence, the penalty imposed and any other related matter.

The adverse publicity order may also require the body corporate to give NOPSEMA or the Titles Administrator evidence that the required actions have been taken by the body corporate in accordance with the adverse publicity order. Whether the evidence will be given to NOPSEMA or the Titles Administrator will depend on the nature of the breach or contravention in relation to which the adverse publicity order is made; for example, if an adverse publicity order is made in relation to a breach of an OHS requirement, the evidence would be required to be given to NOPSEMA, as the regulator of OHS under the Act. If the body corporate fails to give evidence, NOPSEMA or the Titles Administrator may take the action or actions specified in the adverse publicity order. Alternatively, if NOPSEMA or the Titles Administrator are not satisfied that the body corporate has taken the actions specified in the adverse publicity order in accordance with the adverse publicity order, NOPSEMA or the Titles Administrator may apply to a court for an order authorising them, or a person authorised by them, to take the action specified in the adverse publicity order. If NOPSEMA or the Titles Administrator do take such action, they will be entitled to recover from the body corporate, by action in a court, an amount in relation to the reasonable expenses of taking the action.

As noted above, the proposed amendments would specify that an adverse publicity order may only be made in relation to a body corporate. This is in accordance with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, which states that non-monetary penalties such as adverse publicity orders may be more effective in the context of corporate crime. In most cases, the requirements of the Act apply in relation to large corporations which jealously guard their reputation and for whom social licence to operate is important, making it appropriate to apply adverse publicity orders in relation to bodies corporate under the Act.

New subsection 611L(7) is included to assist readers, as such an authorisation is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

Item 2: Subsection 675(1)

This item inserts a reference to the ability to issue evidentiary certificates in relation to infringement notices (new section 611G) against the exceptions listed in existing section 675 in the CEO of NOPSEMA’s ability to delegate his or her functions or powers.
Item 3: After paragraph 790A(a)

Existing section 790A allows the regulations to make a provision of a regulation a civil penalty provision. This item extends this section so that:
- civil penalties in the regulations may be made a continuing penalty provision;
- injunctions, as provided for in the new provisions in the Act, may be sought for matters contained in the regulations, and
- to enable infringement notices arrangements to be implemented in the regulations as well.

The ability to seek ‘up to 50 penalty units’ for each day on which a contravention of a civil penalty provision occurs in the regulations may on the face of it appear to create the potential for a significant cumulative penalty in the context of a contravention of regulations. However, it is considered that this maximum daily rate is justified on the grounds that, in a high hazard regime such as this, the conduct and consequences associated with a contravention of a civil penalty provision are potentially extremely serious, particularly when related to OHS or environmental matters, and therefore warrant application of a penalty high enough to provide sufficient disincentive to secure swift compliance. In addition, existing section 790 of the Act allows for a maximum fine of 100 penalty units for each day on which an offence against the regulations occurs. The amount proposed for a continuing contravention of a civil penalty provision in regulations is lower than this amount, which has previously been approved by the Parliament.

Division 2: Application

Item 10: Application

This item contains an application provision which ensures that the new injunctions provisions will only apply in relation to conduct that a person has engaged in, or a refusal or a failure by a person to do a thing, on or after the commencement of the relevant amendments. In other words the new injunctions provisions will not be retrospectively applied to conduct.

This item also contains application provisions which ensure that the new provisions enabling the making of an adverse publicity order or issuing of an infringement notice will only apply in relation to an offence or contravention committed against the Act or regulations on or after the commencement of the relevant amendments. In other words the new adverse publicity order and infringement notice provisions will not be retrospectively applied to conduct.

Schedule 1, Part 2 – Continuing offences and civil penalty provisions

This Part specifies daily penalties that may apply for a continuing offence or continuing contravention of a civil penalty provision under the Act.

The purpose of introducing daily penalties for continuing contraventions of the Act is to encourage persons to promptly rectify breaches and return to a position of
compliance with their regulatory obligations. Given the high investment costs and potential profits associated with offshore petroleum operations, strong financial penalties are likely to be one of the most significant methods to deter non-compliance with the Act. Where daily penalties are applied to continuing offences or civil penalty provisions, the cumulative impact of those penalties will provide an additional incentive for companies to comply with those provisions, and to quickly remedy any non-compliance. This in turn will reduce the potential safety, environmental or resource risks that may be associated with the particular conduct.

Certain offence provisions in the Act are automatically deemed to be continuing offences due to the operation and application of section 4K of the Crimes Act 1914, which provides that where a person refuses or fails to comply with something that is required to be done within a particular period or before a particular time, the person is guilty of an offence in respect of each day during which the person continues to fail or refuse to comply with that requirement. A similar provision is included in section 96 of the Regulatory Powers Act, in relation to continuing contraventions of civil penalty provisions. Where an offence or civil penalty provision in relation to which a daily penalty will be applied by this Bill is automatically a continuing offence or continuing civil penalty provision, this is made clear in notes inserted against those provisions by this Bill.

In some cases, provisions that are not automatically continuing offences by virtue of the Crimes Act 1914 or continuing civil penalty provisions by virtue of the Regulatory Powers Act are specified to be continuing offences or continuing civil penalty provisions by the amendments in this Bill for the purpose of applying a daily penalty for continuing contraventions. These provisions are discussed further in the notes on items below.

A daily penalty of 10% of the global maximum is inserted by this Bill in relation to each continuing offence and continuing civil penalty provision. This is in accordance with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, which states that daily penalties for continuing offences should be significantly lower to reflect that a person may be liable for multiple contraventions. This is also in line with the daily penalties applied in the Telecommunications Act 1997, which was considered during the development of these amendments.

It is acknowledged that that the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers sets a 60 penalty unit maximum for strict liability offences in primary legislation or 50 penalty unit maximum for strict liability offences in regulations. With the application of a continuing offence provision to a number of existing strict liability offences in this item, an offender may conceivably face an amalgamated penalty which totals more than 60 penalty units in the Act or more than 50 penalty units in the regulations. It is considered that a potential departure, should the offence continue for a certain number of days, from the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers is justified on the grounds that, in a high hazard regime such as this, the conduct and consequences associated with the offence are potentially extremely serious, particularly when related to OHS or environmental matters, and therefore
warrant application of a penalty high enough to provide sufficient disincentive to secure swift compliance.

Items 11-13: section 227

These items relate collectively to an offence, triggered by a failure to comply with a direction to vary aspects of a pipeline, committed under s227.

Subsection (5) is expressly noted as a continuing offence under section 4K of the Crimes Act 1914 with a maximum penalty for each day that an offence under subsection (5) continues set at 10% of the maximum penalty that can be imposed in respect of that offence.

Item 14: At the end of section 228

Section 228 makes it an offence for a pipeline licensee to cease to operate a pipeline. A pipeline licensee may also be liable for a civil penalty for ceasing to operate the pipeline.

Section 228 contains offence and civil penalty provisions that are not automatically continuing offence and civil penalty provisions by virtue of application of the Crimes Act 1914 and Regulatory Powers Act respectively, however the subsections inserted by this item will make this provision a continuing offence/continuing civil penalty provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

This amendment is made because the application of a daily penalty for each additional day that the pipeline licensee does not operate the pipeline provides a financial incentive for the licensee to return to compliance.

Items 15-18: section 249

These items relate collectively to offence and civil penalty provisions, triggered by a failure to report about operations undertaken under a petroleum access authority, committed under s249.

Subsections (2) and (4) are expressly and respectively noted as a continuing offence under section 4K of the Crimes Act 1914 and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

Items 19-22: section 284

These items relate collectively to offence and civil penalty provisions, triggered by a failure to report about a discovery of petroleum, committed under s284.

Subsections (5) and (7) are expressly and respectively noted as a continuing offence under section 4K of the Crimes Act 1914 and a continuing civil penalty provision
under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

Items 23-26: section 286A

These items relate collectively to offence and civil penalty provisions, triggered by a failure to provide required titleholder contact details, committed under s286A.

Subsections (7) and (8A) are expressly and respectively noted as a continuing offence under section 4K of the Crimes Act 1914 and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

Items 27-28: section 507

These items relate collectively to offence and civil penalty provisions, triggered by an applicant’s failure to provide required information as requested by the Titles Administrator, committed under s507.

Subsections (4) and (5A) are expressly and respectively noted as a continuing offence under section 4K of the Crimes Act 1914 and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

Items 29-33: section 508

These items relate collectively to offence and civil penalty provisions, triggered by a failure to provide required information as requested by the Titles Administrator in relation to a dealing relating to a title, committed under s508.

Subsections (4) and (5A) are expressly and respectively noted as a continuing offence under section 4K of the Crimes Act 1914 and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

Items 34-38: section 509

These items relate collectively to offence and civil penalty provisions, triggered by a failure to produce a document as requested by the Titles Administrator in relation to a dealing relating to a title, committed under s509.

Subsections (4) and (6A) are expressly and respectively noted as a continuing offence under section 4K of the Crimes Act 1914 and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.
Items 39-42: section 575

These items relate collectively to offence and civil penalty provisions, triggered by a failure to comply with requirements in relation to a direction that has an extended application, committed under s575. Section 575 applies when a direction has been given to a titleholder by NOPSEMA or the responsible Commonwealth Minister, under the general power of those entities to give directions, and the direction also applies to another person or persons. Under section 575, it is an offence for the titleholder to fail to give a copy of the direction to the other person or to display a copy of the direction at a prominent place in the offshore area. A titleholder may also be liable to a civil penalty for a failure to meet the requirements of section 575.

Section 575 contains offence and civil penalty provisions that are not automatically continuing offence and civil penalty provisions by virtue of application of the Crimes Act 1914 and Regulatory Powers Act respectively, however the subsections inserted by this item will make this provision a continuing offence/continuing civil penalty provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

This amendment is made because if a titleholder has not complied with this requirement, it is important that they do so as soon as possible, to enable the other person/s to become aware of and comply with the direction. The potential for application of a daily penalty will therefore provide a disincentive against continuing non-compliance.

Item 43: At the end of section 576

Section 576 provides that it is an offence, or that a person may be liable to a civil penalty, for failure to comply with a direction given by NOPSEMA or the responsible Commonwealth Minister under the general power of those entities to give directions.

Section 576 contains offence and civil penalty provisions that are not automatically continuing offence and civil penalty provisions by virtue of application of the Crimes Act 1914 and Regulatory Powers Act respectively, however the subsections inserted by this item will make this provision a continuing offence/continuing civil penalty provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

This amendment is made because depending on the nature of the direction, there may be clear cases of continuing misconduct over the course of one or more days following the initial breach. When this is the case, the application of a daily penalty would assist in deterring continued non-compliance.

Item 44: At the end of section 576D

This item relates to two offences and a civil penalty provision, triggered by a failure to comply with a significant incidents direction, committed under s576D.
Subsections (2) & (4) and (5) are expressly and respectively noted as a continuing offences under section 4K of the *Crimes Act 1914* and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of those offences or the civil penalty provision.

*Item 45: After subsection 587B(5)*

This item relates to two offences and a civil penalty provision, triggered by a failure to comply with a remedial direction, committed under s587B.

Subsections (2) & (4) and (5) are expressly and respectively noted as a continuing offences under section 4K of the *Crimes Act 1914* and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of those offences or the civil penalty provision.

*Item 46 - At the end of Division 4 of Part 6.5*

Item 46 inserts a new section 611C into the Act to support references in the amendments made by this Part to contraventions of civil penalty provisions. In many cases, the civil penalty provision referred to as having been contravened in the new provision that provides for a daily civil penalty actually states that a person is liable to a civil penalty for a contravention or breach of another provision, which contains a conduct rule. For example, new subsection 587B(5B), inserted by item 45, provides for the imposition of a daily penalty for a contravention of subsection 587B(5), but subsection 587B(5) itself actually states that a person is liable to a civil penalty if the person contravenes subsection 587B(1).

For this and similar provisions, as a result of new section 611C, a person will be taken to have contravened the civil penalty provision mentioned in the new provision providing for a daily penalty if the person has contravened or breached the requirement of the other provision mentioned in that civil penalty provision.

Continuing with the previous example, therefore, a person will be taken to have contravened subsection 587B(5), as mentioned in new subsection 587B(5B), if the person has contravened or breached subsection 587B(1).

*Items 47-50: section 697*

These items relate collectively to offence and civil penalty provisions, triggered by a failure to comply with a direction issued by the Titles Administrator in relation to data management matters, committed under s697. Under paragraph 697(2)(c), the Titles Administrator may direct a person to give to the Titles Administrator or another person such reports, returns, documents, cores, cuttings and samples as are specified in the direction. It is an offence for a person to fail to comply with such a direction, or the person may be a liable for a civil penalty for a failure to comply.
Section 697 contains offence and civil penalty provisions that are not automatically continuing offence and civil penalty provisions by virtue of application of the Crimes Act 1914 and Regulatory Powers Act respectively, however the subsections inserted by this item will make this provision a continuing offence/continuing civil penalty provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

This amendment is made to make this a continuing offence and a continuing civil penalty provision in order to apply a daily penalty, in order to encourage a person to comply as soon as possible following an initial contravention.

Items 51-52: section 699

These items relate collectively to offence and civil penalty provisions, triggered by a failure to comply with a notice given by the Titles Administrator or a NOPSEMA inspector to provide information or a document to the Titles Administrator or a NOPSEMA inspector under paragraphs 699(2)(a)-(c), committed under s699.

Subsections (5) and (5A) are expressly and respectively noted as a continuing offence under section 4K of the Crimes Act 1914 and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

Paragraphs 699(2)(d)-(e) are excluded from this item as they relate to appearing to provide evidence before the Titles Administrator or a NOPSEMA inspector, a contravention not deemed appropriate for a continuing offence or civil penalty provision.

Item 53: After subsection 780F(6)

Under section 780F a person commits an offence if they have been issued with an identity card for the purpose of conducting inspections in relation to an inquiry into a significant offshore incident, and the person does not immediately return the identity card to the Secretary or another person specified by the Secretary on completion of the person’s duties.

Section 780F contains an offence that is arguably not an automatically continuing offence by virtue of application of the Crimes Act 1914, however the subsections inserted by this item will, for the avoidance of doubt, make this provision a continuing offence provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence provision.

This amendment is made because although time-based, it is not clear that section 4K of the Crimes Act 1914 would apply to this provision, and it is therefore proposed to be made a continuing offence to ensure that a daily penalty may be applied for each day that the person fails to return their identity card.
Items 54-58: clause 6 of Schedule 3

Clause 6 of Schedule 3 makes it an offence for a facility operator to fail to ensure that an operator’s representative is present at all times at the facility when there are individuals present at the facility, and to fail to ensure that the name of the representative is displayed in a prominent place. An operator is also liable to a civil penalty for a failure to comply with these requirements.

Clause 6 of Schedule 3 contains offence and civil penalty provisions that are not automatically continuing offence and civil penalty provisions by virtue of application of the Crimes Act 1914 and Regulatory Powers Act respectively, however the subclauses inserted by this item will make this provision a continuing offence/continuing civil penalty provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence or civil penalty provision.

This amendment is made because if an operator has not ensured there is an operator’s representative at a facility, a daily penalty will provide a continuing financial incentive to do so. A similar consideration applies if the operator has failed to ensure that the name of the operator’s representative is displayed in a prominent place at the facility.

Item 59: At the end of clause 77 of Schedule 3

Clause 77 of Schedule 3 makes it an offence for a person to fail to comply with an OHS prohibition notice that has been issued by a NOPSEMA inspector.

Clause 77 of Schedule 3 contains an offence that is not an automatically continuing offence by virtue of application of the Crimes Act 1914, however the subclauses inserted by this item will make this provision a continuing offence provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence.

Given the potentially severe consequences to human health and safety of a failure to comply with a prohibition notice, the application of a daily penalty for a continuing failure to comply will encourage persons to comply with the notice as soon as possible and thereby remove the threats to health and safety that are the subject of the notice.

Item 60: At the end of clause 78A of Schedule 3

This item relates to an offence and a civil penalty provision, triggered by a failure to comply with an OHS improvement notice, committed under clause 78A of Schedule 3.

Subclauses (2) and (3) are expressly and respectively noted as a continuing offences under section 4K of the Crimes Act 1914 and a continuing civil penalty provision under section 96 of the Regulatory Powers Act, with a maximum penalty for each day
that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of those offences or the civil penalty provision.

Items 61-66: clause 82 of Schedule 3

Under clause 82 of Schedule 3, the operator of a facility has a duty to notify and report to NOPSEMA on any accidents or dangerous occurrences that occur at or near the facility.

Clause 82 of Schedule 3 contains an offence that is arguably not an automatically continuing offence by virtue of application of the *Crimes Act 1914*, however the subsections inserted by this item will, for the avoidance of doubt, make this provision a continuing offence provision, with a maximum penalty for each day that non-compliance with requirements continues set at 10% of the maximum penalty that can be imposed in respect of that offence provision.

A time limit within which the operator is required to give notice or a report to NOPSEMA is specified in the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009*. However, to avoid any doubt about application of section 4K of the Crimes Act, it is proposed to specify in the Act that clause 82 of Schedule 3 is a continuing offence for the purposes of applying a daily penalty.
Schedule 2 – Prohibition and improvement notices

The amendments in this Schedule will:

- Enable a NOPSEMA inspector to issue environmental prohibition notices and environmental improvement notices to a petroleum titleholder in order to require action to remove threats to the environment from petroleum operations
- Require NOPSEMA to publish on its website OHS and environmental prohibition notices and improvement notices that have been issued to a person by a NOPSEMA inspector.

Schedule 2, Part 1 – Environmental prohibition and improvement notices

The purpose of these main amendments in Division 1 of Part 1 of Schedule 2 is to give NOPSEMA inspectors undertaking environmental inspections the power to issue environmental prohibition notices or environmental improvement notices in order to remove a threat to the environment arising from the carrying out of a petroleum activity or the operation of a petroleum vessel or structure.

The notices and the processes for issuing them are closely modelled on the equivalent OHS notices in Schedule 3. They perform very much the same function and the kinds of circumstances in which they may be issued are very similar.

Notes on clauses

Item 4: After clause 11 of Schedule 2A

Item 4 inserts the following new clauses into Schedule 2A to the Act.

Clause 11A Petroleum environmental inspections—environmental prohibition notices (issue)

New clause 11A enables a NOPSEMA inspector who is conducting a petroleum environmental inspection in relation to ‘offshore petroleum premises’ to issue an environmental prohibition notice. (Offshore petroleum premises are, essentially, an offshore vessel or structure where a petroleum activity is taking place. They include seismic vessels, drilling rigs and production platforms.)

Subclause 11A(2) provides that an inspector may issue an environmental prohibition notice to a titleholder, in writing, if the inspector, in conducting the inspection, is satisfied on reasonable grounds that an activity is occurring or may occur that involves, or would involve, an immediate and significant threat to the environment or that the operation or use of the premises involves, or would involve, an immediate and significant threat to the environment, and that it is reasonably necessary to issue the notice in order to remove the threat. The notice may be issued to the titleholder by giving it to the titleholder’s nominated representative.

The notice must direct the titleholder to ensure that the activity is not engaged in, or is not engaged in in a specified manner or that the premises are not operated or used or not operated or used in a specified manner.
The notice may specify action that may be taken to satisfy an inspector that adequate action has been taken to remove the threat to the environment.

The notice issued by the NOPSEMA inspector is required to contain a substantial amount of information. It must state that the inspector is satisfied as mentioned in subclause 11A(2), identifying the particular circumstances in whichever subparagraph in paragraph 11A(2)(a) is applicable, and giving the grounds on the basis of which the inspector is satisfied. It must specify the activity at the premises or the operation or use of the premises that involves the threat to the environment. It must specify the threat to the environment and describe the environment that is subject to the threat. This last requirement is important to deal with the problem that ‘the environment’ is an amorphous concept that can refer to anything from a very small to a very large part of the world environment, with potential ramifications for extremely varied and complex ecosystems. This is especially significant in the case of threats to the marine environment or the atmosphere, which are potentially at risk when offshore petroleum activities are being carried on.

Subclause 11A(6) makes it an offence to fail to comply with an environmental prohibition notice. Subclauses (7) and (8) provide for continuing offences.

Clause 11B Petroleum environmental inspections—environmental prohibition notices (notification)

Clause 11B imposes notification requirements. Subclause (2) requires that a copy of the prohibition notice be given, as applicable, to the operator’s representative at the facility, the master of the vessel or the owner of the premises, plant, substance or thing. Subclause (3) requires the titleholder to cause a copy of the notice to be prominently displayed at the vessel or structure.

Subclause 11B(4) provides that if a NOPSEMA inspector is satisfied that action taken by the titleholder to remove the threat to the environment is not adequate, the inspector must inform the titleholder accordingly. (It is not an offence to fail to implement the action set out in the notice as being sufficient to remove the threat, because the threat has been removed by the prohibition on the activity or the prohibition on the operation of the premises, as the case may be.) The notice continues in force until an inspector notifies the titleholder that the inspector is satisfied that adequate action has been taken to remove the threat to the environment.

Clause 11C – Petroleum environmental inspections - environmental improvement notices (issue)

New clause 11C enables a NOPSEMA inspector who is conducting a petroleum environmental inspection in relation to ‘offshore petroleum premises’ to issue an environmental improvement notice. (Offshore petroleum premises are, essentially, an offshore vessel or structure where a petroleum activity is taking place. They include seismic vessels, drilling rigs and production platforms.)

A NOPSEMA inspector may issue an environmental improvement notice to a titleholder, in writing if, in conducting the inspection, the inspector is satisfied on reasonable grounds that the titleholder is (currently) contravening a petroleum environmental management law or has contravened such a law and is likely to
contravene it again and, as a result, there is or may be a significant threat to the environment. The notice may be issued to the titleholder by giving it to the titleholder’s representative at the premises who has been nominated for the inspection.

The notice must state the inspector’s grounds for satisfaction that a specified contravention is occurring, or has occurred and is likely to occur again. It must also state the inspector’s grounds for satisfaction that the contravention will or may result in a significant threat to the environment. This last element is very significant, because it is important, for constitutional reasons, that these improvement notices not be able to be used simply to enforce compliance with environmental management laws. The improvement notice must be directed at removing the threat to the environment, not merely at securing compliance with the law.

The notice must also specify the threat to the environment and describe the environment that is under threat. This last requirement is important to deal with the problem that ‘the environment’ is an amorphous concept that can refer to anything from a very small to a very large part of the world environment, with potential ramifications for extremely varied and complex ecosystems. This is especially significant in the case of threats to the marine environment or the atmosphere, which are potentially at risk when offshore petroleum activities are being carried on.

The notice must specify action that is required to be taken by the titleholder to remove the threat and specify a reasonable period within which the titleholder is to take the action. This period may be extended by the inspector.

Clause 11D – Petroleum environmental inspections - environmental improvement notices (compliance and notification)

Subclause 11D(2) provides that the titleholder must ensure that the notice is complied with. Subclause (3) makes it an offence to fail to comply. Subclause (4) provides that a person who contravenes a requirement under subclause (2) is liable to a civil penalty.

Subclause 11D(5) requires the NOPSEMA inspector to take reasonable steps to give a copy of the notice to other affected persons – the operator’s representative at the facility, the master of the vessel or the owner of the premises, as the case may be. Subclause (6) requires the titleholder to cause a copy of the notice to be displayed at a prominent place at the offshore premises.

Subclauses 11D(7) and (8) provide for continuing penalties and continuing contraventions of civil penalty provisions.

Penalty levels

It is acknowledged that the penalty levels specified in these amendments exceed the recommended maximum, for offences with delegated content both for the global offences and potentially where amalgamation of continuing offences occurs, as outlined in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. The reason for this is that in response to the Montara Commission of Inquiry and corresponding Australian Government response, the Australian Government formed the Better Regulation Ministerial Partnership. This
Partnership, as part of its work, commissioned an independent review all Commonwealth Legislation applicable to the offshore petroleum industry. This review culminated in a report containing a number of recommendations, one of which was that criminal offences in the Act should be increased to be consistent with the penalties applied in other high hazard legislation. This recommendation resulted in an increase to the levels of penalties applied to OHS improvement and prohibition notices in the Act to 300 and 600 penalty units respectively. Therefore with the introduction of improvement and prohibition notices for environmental matters in the offshore regulatory regime warrants the same level of penalties applied given: that they will be key enforcement tools utilised by the regulator; that the consequences of environmental breaches in an offshore context are potentially extremely serious for the Australian marine environment; and as well as the fact that the companies operating in this industry are extremely well-resourced multinationals for the most part, a higher level of penalty is required to provide a sufficient deterrent effect.

Merits review

Neither the issue of an environmental prohibition notice nor the issue of an environmental improvement notice is made subject to review on the merits by a tribunal (merits review).

No provision for merits review was put into Schedule 2A by the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013. This was accepted by the Attorney-General’s Department and by the Senate Standing Committee for the Review of Bills on the basis that the powers exercisable by NOPSEMA under that Schedule were not of a kind that typically were subject to merits review.

Prohibition notices and improvement notices are, however, commonly made reviewable by an administrative tribunal, and the equivalent OHS notices in Schedule 3 are in fact reviewable, even if they have rarely if ever been the subject of applications for review.

There is a difficulty with offshore petroleum environmental notices, however, in that there appears to be no tribunal established under Commonwealth legislation that would have the necessary environmental credentials, and there is certainly not one that combines expertise in environmental regulation and offshore petroleum operations. Even if it were possible to put together a particular group of appropriately-qualified persons who were members of the Administrative Appeals Tribunal, they would not have a flow of work that would enable them to build and maintain their expertise. Added to that is the difficulty of assembling such a group of persons within the very short timeframe necessary to review decisions, given the very high cost of delaying offshore operations even for a short time.

In any case, it would seem inappropriate that decisions of NOPSEMA, which was established to be the single national offshore petroleum regulator for the very reason that no other body had the critical mass of expert, trained personnel that was required to regulate environmental management of offshore operations, should be subject to review by a demonstrably less-qualified and less-experienced body. If such review were available, there is a very high risk that it would result in gaming by the industry, with an inevitable loss of effectiveness of NOPSEMA as regulator.
This would be particularly undesirable, given the potentially catastrophic consequences of a breach of environmental management laws by an offshore petroleum titleholder.

**Delegation of rule-making power to officials – Delegating offence content**

The above provisions authorising the issuing by NOPSEMA inspectors of environmental prohibition notices and environmental improvement notices raise issues of delegation of rule-making power and delegation of offence content to officials. The issuing of an environmental prohibition notice triggers the requirement in subclause 11A(4) that the titleholder ensure that the specified activity is not conducted, or not conducted in a specified manner, or that the vessel or structure is not operated or used, or not operated or used in a specified manner, with the inspector specifying the activity, the premises and the manner. Similarly, the issuing of an environmental prohibition notice will trigger the requirement to take the action specified by the inspector in the notice. In each case, failure by the titleholder to comply is an offence.

The environmental management obligations that the Act and regulations impose on a titleholder are relatively generic, and it is not until those obligations are given content by the environment plan relating to highly technical operations such as operating a production facility or drilling a petroleum well, that those generic requirements can be subject to inspection and enforcement. The operations at each offshore site are unique and give rise to a unique set of environmental challenges and hazards. It is necessary for an inspector to carry out an inspection before he or she will be aware of the existence of specific issues that affect the relevant activity or vessel/structure at that particular time. It is therefore necessary to put in place processes that will enable the inspector to assess the environmental performance of the particular titleholder and to tailor the actual requirements to be imposed on the titleholder to remove specific threats to the environment.

In order to put strict parameters around the exercise by a NOPSEMA inspector of these far-reaching powers, the provisions being inserted into the Act require that the inspector provide a considerable amount of detail in the notice prior to its issue, including the inspector’s reasons for being satisfied of the key matters that form the basis for the exercise of the power.

**Schedule 2, Part 1, Division 5 - Quasi-retrospective commencement of powers to give environmental prohibition or improvement notices**

Item 40 provides that the amendments made by this Part (the powers to give environmental prohibition and improvement notices) apply to acts or omissions of persons, whether occurring before, on or after the commencement of this Part and to any other matter, whether arising before, on or after that commencement, that is relevant to the exercise of the powers or performance of functions under this Part.

This commencement provision does not involve any true retrospectivity – the powers to issue the notices do not arise until the Part commences, and the notices themselves operate only prospectively. The provision merely ensures that if a threat to the environment and/or infringing conduct in relation to petroleum activities was already existing at the time of commencement of the Part, a (prospective) notice under the
Part may be issued in relation to that environmental threat or infringing conduct. These notices are not punitive – they are directed at removing threats to the environment. It would be absurd if the prior existence of the threat or the infringing conduct giving rise to a threat were to prevent a NOPSEMA inspector from taking action under this Part in relation to that (current) threat or infringing conduct.

**Schedule 2, Part 2 – Publication of prohibition and improvement notices**

The amendments to the Act made by this Part will require NOPSEMA to publish on its website improvement notices and prohibition notices issued by NOPSEMA inspectors under Schedule 2A (environment) and Schedule 3 (OHS) to the Act. The purpose of publication would be to enable lessons learned from inspections to be shared with other members of the offshore petroleum industry, which will in turn assist those companies to comply with regulatory requirements, and will also help to increase the transparency of NOPSEMA’s operations.

Publication of notices will enable lessons to be shared by enabling companies to view and consider the content of notices, in particular the types of activities in relation to which notices have been given due to threats to OHS or the environment arising from those activities, and assess their own activities against the activities described and, where necessary, implement measures to improve and reduce potential risks caused by their operations. By assisting companies to comply with regulatory requirements through the publication of notices, potential threats to OHS and the environment can thereby be reduced or removed. Given the high-hazard nature of the offshore petroleum industry and the potentially serious consequences of incidents, the potential for the prevention of threats to OHS and the environment as a result of these amendments is a highly desirable outcome.

The application of subsections 602E(3) and (4) of the Act extends the requirement to publish a notice, so that the requirement would apply whether the notice was given by a NOPSEMA inspector during an inspection under Schedule 2A or 3 to the Act or under the Regulatory Powers Act. Section 602E enables a NOPSEMA inspector who has entered premises under the Regulatory Powers Act to exercise certain powers the inspector would have been able to exercise if the inspector had entered premises under Schedule 2A or 3 to the Act, including the power to give an environmental prohibition notice, an environmental improvement notice, an OHS prohibition notice or an OHS improvement notice. Subsections 602E(3) and (4) then state that Schedule 2A or 3 (including the requirement to publish notices being inserted into those Schedules by this Part) respectively apply in relation to the exercise of those powers by the inspector as if the inspector had entered premises under the applicable Schedule rather than under the Regulatory Powers Act.

**Division 1: Amendments**

**Item 41: At the end of Division 2 of Part 2 of Schedule 2A**

This item inserts a new clause 12A in Schedule 2A to the Act to require NOPSEMA to publish environmental prohibition notices and environmental improvement notices issued by NOPSEMA inspectors under clauses 11A and 11C of Schedule 2A (to be inserted into the Act by item 4 of this Schedule) respectively.
New subclause 12A(1) requires NOPSEMA to publish an environmental prohibition notice or an environmental improvement notice within 21 days after the notice is issued by a NOPSEMA inspector. This timeframe may enable NOPSEMA to become aware of any application for judicial review of the decision to issue a notice prior to publishing the notice on its website.

New subclause 12A(2) ensures that NOPSEMA must not publish a notice if NOPSEMA is aware that the decision to issue the notice is the subject of an application for judicial review by a court. To ensure fairness to the titleholder who is making the application in relation to the decision to issue the notice, the notice will not be able to be published unless the decision to issue the notice is upheld by the court – see new subclause 12A(4).

New subclause 12A(3) ensures that, where a notice has already been published by NOPSEMA under new subclause 12A(1), and the notice is or subsequently becomes the subject of an application for judicial review by a court, NOPSEMA must remove the notice from its website as soon as practicable after becoming aware of the application. To ensure fairness to the titleholder who is making the application in relation to the decision to issue the notice, the notice will not be able to be published again unless the decision to issue the notice is upheld by the court – see new subclause 12A(4).

If the decision to issue the notice is upheld by the court, and all rights for judicial review, including any right of appeal, have been exhausted, new subclause 12A(4) requires NOPSEMA to publish the notice within 21 days after becoming aware that the rights have been exhausted. The notice must not be published, however, if the decision to issue the notice is not upheld.

New subclauses 12A(5) and (6) require NOPSEMA to take such steps as are reasonable in the circumstances to ensure that any personal information (within the meaning of the Privacy Act 1988) that is contained in the notice is de-identified. This is to ensure the protection of personal information and the right to privacy. Further discussion in relation to the privacy impacts of the amendments in this Part are discussed in the statement of compatibility with human rights following the general outline in this EM.

**Item 42: At the end of subclause 77(1) of Schedule 3**

This item inserts a note at the end of subclause 77(1) of Schedule 3 to the Act (which provides for a NOPSEMA inspector to issue an OHS prohibition notice) to advise the reader that a notice issued by a NOPSEMA inspector under that subclause will be published on NOPSEMA’s website within 21 days of being issued.

**Item 43: At the end of subclause 78(1) of Schedule 3**

This item inserts a note at the end of subclause 78(1) of Schedule 3 to the Act (which provides for a NOPSEMA inspector to issue an OHS improvement notice) to advise the reader that a notice issued by a NOPSEMA inspector under that subclause will be published on NOPSEMA’s website within 21 days of being issued.
Item 44: At the end of Division 3 of Part 4 of Schedule 3

This item inserts a new clause 80AA in Schedule 3 to the Act to require NOPSEMA to publish OHS prohibition notices and OHS improvement notices issued by NOPSEMA inspectors under clauses 77 and 78 of Schedule 3 respectively.

New subclause 80AA(1) requires NOPSEMA to publish an OHS prohibition notice or an OHS improvement notice within 21 days after the notice is issued by a NOPSEMA inspector. This timeframe may enable NOPSEMA to become aware of any application for judicial or merits review of the decision to issue a notice prior to publishing the notice on its website.

New subclause 80AA(2) ensures that NOPSEMA must not publish a notice if NOPSEMA is aware that the decision to issue the notice is the subject of an application for merits review by the reviewing authority (the Fair Work Commission) under clause 80A of Schedule 3 or for judicial review by a court. To ensure fairness to the titleholder who is making the application, the notice will not be able to be published unless the decision to issue the notice is upheld by the court or affirmed by the reviewing authority (as the case may be) – see new subclause 80AA(4).

New subclause 80AA(3) ensures that, where a notice has already been published by NOPSEMA under new subclause 80AA(1), and the notice is or subsequently becomes the subject of an application for merits review by the reviewing authority or judicial review by a court, NOPSEMA must remove the notice from its website as soon as practicable after becoming aware of the application. To ensure fairness to the titleholder who is making the application, the notice will not be able to be published again unless the decision to issue the notice is upheld by the court or affirmed by the reviewing authority – see new subclause 80AA(4).

If the decision to issue the notice is upheld by the court or affirmed by the reviewing authority, and all appeal and review rights in relation to that decision have been exhausted, new subclause 80AA(4) requires NOPSEMA to publish the notice within 21 days after becoming aware that the rights have been exhausted. The notice must not be published, however, if the decision to issue the notice is revoked by the reviewing authority or is not upheld by the court.

New subclause 80AA(5) applies if the reviewing authority revokes the decision to issue the notice and substitutes its own decision to issue a notice. The substituted notice must be published by NOPSEMA within 21 days after becoming aware that all appeal and review rights in relation to the decision to issue the substituted notice have been exhausted.

New subclauses 80AA(6) and (7) require NOPSEMA to take such steps as are reasonable in the circumstances to ensure that any personal information (within the meaning of the Privacy Act 1988) that is contained in the notice is de-identified. This is to ensure the protection of personal information and the right to privacy. Further discussion in relation to the privacy impacts of the amendments in this Part are discussed in the statement of compatibility with human rights following the general outline in this EM.
Division 2: Application

Item 45: Application

This item provides for the new requirement for NOPSEMA to publish prohibition notices and improvement notices issued by a NOPSEMA inspector under Schedule 2A or Schedule 3 to the Act to apply only to notices issued on or after the commencement of this Part. NOPSEMA are not required to publish notices issued prior to the commencement of this Part.

This Part will commence on the later of (a) the start of the day after this Bill receives the Royal Assent and (b) immediately after the commencement of Schedule 1 to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013 (the Compliance Measures Act) – see clause 2 of this Bill. Schedule 1 to the Compliance Measures Act inserts Schedule 2A into the Act, and therefore the amendments in this Part cannot commence prior to the commencement of Schedule 1 to the Compliance Measures Act.
Schedule 3 – Financial assurance, polluter pays and directions

The amendments in this Schedule will:

- Strengthen the application of the polluter pays principle in the Act, through the introduction of a statutory duty requiring petroleum titleholders, in the event of a hydrocarbon spill in the title area, to stop, control, and clean-up the hydrocarbon spill, remediate the environment and carry out appropriate monitoring

- Enable NOPSEMA or the responsible Commonwealth Minister to take necessary action and recover costs from the titleholder in the event the titleholder does not fulfil its statutory duty

- Provide a right of action for a state or territory that has incurred clean-up, remediation and monitoring costs as a consequence of a hydrocarbon spill in a Commonwealth title area to recover those costs from the titleholder

- Strengthen section 571 to require titleholders to maintain sufficient financial assurance arrangements in order to support the application of the polluter pays principle, and to provide for NOPSEMA to manage compliance via the environment plan acceptance process under the regulations.

- Clarify the scope of NOPSEMA’s various direction-giving powers in the Act to ensure that NOPSEMA can always issue effective directions.

Schedule 3, Part 1 – Financial assurance

Item 4 of Part 1 Division 1 repeals existing section 571 which imposed obligations in relation to insurance. Obligations were imposed in relation to petroleum and greenhouse gas titles, in different subsections. Subsection 571(3) which related to greenhouse gas titles has now been relocated without any material change to section 571A.

The new section 571 imposes an obligation on a petroleum titleholder to maintain adequate ‘financial assurance’. This is a broader term than ‘insurance’ and extends to various other types of financial instrument and to ‘self insurance’.

Section 571 Financial assurance—petroleum titles

Subsection 571(2) imposes the core obligation in relation to financial assurance. It imposes on a petroleum titleholder, at all times while the title is in force, to maintain financial assurance sufficient to give the titleholder the capacity to meet the costs, expenses and liabilities arising in connection with, or as a result of:

(a) the carrying out of a ‘petroleum activity’ (which has the meaning that it has in the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009) (“Environment Regulations”);

(b) the doing of any other thing for the purposes of the petroleum activity; or

(c) complying (or failing to comply) with a requirement under the Act (eg a direction) or the regulations in relation to a petroleum activity.
As is apparent from the Examples provided in subsection (2), financial assurance is required to deal with extraordinary costs, expenses and liabilities that a titleholder might not have the capacity to meet. It is not expected to cover ordinary expenses of a titleholder in meeting ordinary operating costs, such as the costs of compliance with title conditions.

Subsection 571(3) provides for the administrative mechanisms that will be put in place for NOPSEMA to oversee compliance by a titleholder with its obligation in subsection (2). Subsection (3) provides that the Environment Regulations may provide for a titleholder to be required to demonstrate sufficient financial assurance as a condition precedent to obtaining NOPSEMA’s acceptance of the environment plan for the relevant activity. The regulations may also require that the financial assurance be in a form that is acceptable to NOPSEMA. (This is to ensure, for example, that NOPSEMA is not required to accept financial assurance that is unworkably complex or piecemeal or that is too difficult to assess.) The regulations may also make a failure to maintain sufficient financial assurance in a form acceptable to NOPSEMA (essentially, the package that has been accepted by NOPSEMA) to be a ground for withdrawal of acceptance of the environment plan.

Subsection 571(4) lists inclusively the forms of financial assurance that may be taken to satisfy the financial assurance requirement.

 Clause 2 of Schedule 2A (at the end of the definition of petroleum environmental law)

Item 5 of Part 1 Division 1 inserts provisions relating to financial assurance in the list of provisions that are ‘environmental management laws’ for the purposes of the definition of that term in Schedule 2A. The purpose of this amendment is to enable a NOPSEMA inspector to carry out an inspection into compliance with the financial assurance obligations of a titleholder.

Application

The amendments relating to financial assurance apply, on or after the commencement of the amendments, to a title and a titleholder regardless of whether the title came into force before or after the commencement.

Transitional—environment plan already accepted

The commencement provision above is not retrospective – it only makes the amendments apply after the date of commencement of the provisions, and there is no backdating of the commencement. The fact that the new financial assurance obligation applies to titleholders whose titles were already in force at the commencement means that a transitional provision is necessary. (There already will have been a requirement to have insurance in place under existing section 571. It is not an entirely new obligation and ideally little or no change to existing arrangements will be necessary.)

The transitional provision applies where an environment plan for an activity was accepted prior to the commencement of the financial assurance amendments, so that compliance with the requirement was not demonstrated prior to the acceptance of the environment plan.
Item 8 in Part 1 Division 2 provides that, in the course of a petroleum environmental inspection under Schedule 2A, a NOPSEMA inspector may demand that compliance with subsection 571(2) be demonstrated in relation to the activity, in a form that is acceptable to NOPSEMA. A failure to comply with the demand is grounds for the withdrawal of acceptance of the environment plan.

**Schedule 3, Part 2 – Polluter pays**

On 21 August 2009 the Montara Wellhead Platform, located in Commonwealth waters in the Timor Sea, commenced an uncontrolled release of hydrocarbons for a period of 74 days – the third largest oil spill in Australia’s history. Following the incident, the Minister for Resources and Energy, the Hon Martin Ferguson AM MP, established the independent Montara Commission of Inquiry (MCI) to investigate the likely causes of the incident and make recommendations on how to prevent future incidents. On 18 June 2010, the MCI provided the “Report of the Montara Commission of Inquiry” (the Montara Report) to the Minister. The Montara Report outlined 100 findings and 105 recommendations directed at the offshore petroleum industry’s well operations and activities, the offshore petroleum regulatory regime related to areas of well regulation, environmental monitoring and management, and arrangements for incident response.

The Montara Commission of Inquiry discussed the “polluter pays” principle in Chapter 6 of the Montara Report, noting a lack of clarity in the regulatory regime and administrative arrangements regarding the implementation of the “polluter pays” principle for costs associated with preparedness, response capability and scientific monitoring for the offshore petroleum industry. In particular, the Act currently places no statutory duty or specific liability on titleholders to pay for the clean-up or environmental damage caused by an escape of petroleum arising from operations in the titleholder’s title area.

Recommendations 95 and 96 of the Montara Report focus on aspects of the “polluter pays” principle. These recommendations specifically address matters relating to costs of addressing an oil spill, powers to require companies to remediate damage to the offshore marine environment, and powers to require companies to bear the costs of scientific monitoring.

The Australian Government released its “Final Response to the Report of the Montara Commission of Inquiry” on 25 May 2011. In its response, the Australian Government accepted Recommendations 95 (in-principle) and 96. In accepting these recommendations, the Australian Government undertook to identify and implement an ability to legislatively enforce the “polluter pays” principle for the offshore petroleum industry.

These recommendations, among others, were addressed through the “Offshore Petroleum and Marine Environment Legislative Review”, which was progressed under the auspices of a Better Regulation Ministerial Partnership (the Partnership) between the Minister for Finance and Deregulation and the Minister for Resources and Energy. The Partnership found that there is scope to clarify the application of the “polluter pays” principle in the Act, particularly as it relates to ensuring that the
social, environmental and economic impacts of a significant offshore petroleum incident are appropriately addressed in the legislative regime.

On the basis of the findings and recommendations of the Partnership, the Australian Government has agreed to amend the Act to:

- Impose a statutory duty on petroleum titleholders, in the event of an escape of petroleum arising from operations within the titleholder’s title area, to stop, control, and clean-up the escape of petroleum, carry out appropriate monitoring and remediate the environment; and
- Provide an ability for NOPSEMA or the Commonwealth to recover costs from the titleholder in the event that the titleholder does not fulfil its statutory duty.
- Provide a state or territory that has incurred consequential costs and expenses in cleaning up, remediating and monitoring areas within state or territory jurisdiction to recover those costs and expenses from the titleholder as a debt due to the state or territory.

The objective of the amendments in this Part is therefore to implement the above decisions by strengthening the application of the “polluter pays” principle in the Act, so that all reasonable costs of responding to a hydrocarbon spill, including response, clean-up, remediation and monitoring, will be met in full by the polluter.

**Notes on clauses**

Part 2 of Schedule 3 inserts into the Act a new Part headed ‘Part 6.1A—Polluter pays’.

**New Part 6.1A of the Act—Polluter pays**

**Section 572B - Relationship with significant offshore petroleum incident directions**

Following an escape of petroleum as a result of the carrying out of a petroleum activity, NOPSEMA may need to give a direction under section 576B, the power to give directions dealing with a significant offshore petroleum incident.

Section 572B is necessary to enable NOPSEMA to give an effective direction under section 576B that requires the relevant titleholder to take action that is inconsistent with the environment plan for the activity. The reason why section 572B is necessary is explained in the clause note to section 572C.

**Section 572C - Titleholder duty—escape of petroleum**

Subsection 572C(1) provides that the section applies in the event of an escape of petroleum occurring as a result of, or in connection with, a petroleum activity in relation to the listed types of title. These are, essentially, all the titles in respect of which operations may give rise to an escape of petroleum. The operations will have taken place directly or indirectly for the purposes of the exercise of the titleholder’s rights under the title or the performance of obligations imposed by or under the Act or the regulations in relation to the title.

There is no fault element to the polluter pays obligation. There merely has to be an escape of petroleum as a result of, or in connection with, a petroleum activity. The
term “petroleum activity” has the meaning it is given by the Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2009 (‘Environment Regulations’).

There is no lower limit to the amount of petroleum that escapes. – The principle applies to all escapes, big or small.

Subsection 572C(2) provides that the titleholder must, in an offshore area, as soon as possible after becoming aware of the escape, take all reasonably practicable steps to eliminate (ie stop) or control the escape, clean up the escaped petroleum, remediate any resulting damage to the environment and carry out environmental monitoring of the impact of the escape.

The obligation on the titleholder is confined to ‘an offshore area’, which equates to Commonwealth waters. These are the waters that are covered by this Act and are within Commonwealth jurisdiction. The Commonwealth does not have jurisdiction in state or territory coastal waters or state or territory land areas such as beaches, estuaries and other coastal ecosystems and so can neither require nor authorise cleanup or remediation in those areas. There is often disagreement about the effectiveness of particular techniques that are used to clean up oil from the sea or from beaches and coastal areas, and some methods are even considered by some experts to do more harm than good. A state or territory will therefore be in control of any response operations that are carried out in its jurisdiction, and NOPSEMA will be in control of the response in Commonwealth waters.

The titleholder is required by subsection 572C(2) to take measures in accordance with the environment plan that is in force under the Environment Regulations. If particular measures specified in the environment plan are considered not to be appropriate or adequate in the circumstances of a particular petroleum spill, NOPSEMA can require a revision to the environment plan. Alternatively, if there is not time for the titleholder to prepare, and for NOPSEMA to assess, a revision, NOPSEMA could give a direction under section 576B, the power to give directions dealing with significant offshore petroleum incidents. A direction under section 576B will normally prevail over the part of the environment plan that is inconsistent, to the extent of the inconsistency (see section 576C), because environment plans have effect under the regulations. In this particular case, however, the obligation to carry out response operations in accordance with the environment plan is in the Act (s 572C(2)), not merely in the regulations. The rule in section 576C that directions under section 576B prevail over regulations that are inconsistent would not be sufficient to enable NOPSEMA to require the titleholder to take action different from that set out in the environment plan, were it not for new section 572B. This provides that nothing in this Part limits the power of NOPSEMA to give a direction under section 576B in relation to an escape of petroleum.

Section 572D - Titleholder duty—action by NOPSEMA

Section 572D provides that, if NOPSEMA considers on reasonable grounds that the titleholder has failed to comply with the duty to eliminate or control the escape of petroleum or any other aspect of the duty in subsection 572C(2), NOPSEMA may do those things and then recover its costs or expenses from the titleholder. Under subsection 572D(3), the money will be recoverable by NOPSEMA on behalf of the Commonwealth. The money will then be credited to the National Offshore Petroleum
Safety and Environmental Management Authority Special Account under paragraph 683(g).

Section 572E - Titleholder duty—action by responsible Commonwealth Minister

Section 572E confers on the responsible Commonwealth Minister an equivalent power to that conferred on NOPSEMA by section 572D.

Section 572F - State or Territory may recover costs or expenses

Section 572F applies if there is an escape of petroleum that results from the carrying out of a petroleum activity in relation to a Commonwealth title, and the escaped petroleum enters waters of the sea that are within state or territory jurisdiction or land or waters within the limits of the state or territory.

The section provides that if the state or territory or an agency or authority on behalf of the state or territory incurs costs or expenses in cleaning up the petroleum, remediating any damage to the environment caused by the escaped petroleum or carrying out environmental monitoring of the impact of the escape, those costs or expenses are a debt due to the state or territory and are recoverable in a court of competent jurisdiction.

It is only costs and expenses incurred in respect of cleaning up, or remediating or monitoring the effects of, the escaped petroleum within state or territory jurisdiction that can be recovered under this section. Economic loss is not recoverable under this provision.

Section 572F does not limit or affect any right of action that the state or territory, or agency, would otherwise have against the titleholder arising out of the occurrence of the escape of petroleum.

Item 10: Application of polluter pays amendments

Item 10 provides that the polluter pays amendments above apply in relation to an escape of petroleum that occurs on or after the commencement of this Part.

Schedule 3, Part 3 – Directions

The Act includes a number of provisions that enable a regulator to give directions to petroleum or greenhouse gas titleholders to require the titleholder to do certain things. These include:

- The general power for NOPSEMA or the responsible Commonwealth Minister to give a direction to a petroleum titleholder in section 574 and section 574A respectively;
- The general power for the responsible Commonwealth Minister to give a direction to a greenhouse gas titleholder in section 580;
- The power for NOPSEMA to give a significant incident direction to a petroleum titleholder in section 576B;
- The power for NOPSEMA or the responsible Commonwealth Minister to give remedial directions to current and former holders of petroleum titles in sections 586, 586A, 587 and 587A;
• The power for the responsible Commonwealth Minister to give remedial
directions to current and former holders of greenhouse gas titles in section 592
and 595.

This Part inserts new provisions into the Act to clarify that the scope of the more
specific power to give remedial directions is not intended to narrow the scope of the
general power to give directions. For example, the specific ability for NOPSEMA to
give a remedial direction to a petroleum titleholder regarding the making good of
damage to the seabed by the end of the title does not mean a direction relating to the
making good of damage to the seabed could not be given under the general power to
give directions.

New provisions to be inserted by this Part will also make it clear that the specific
ability to give a significant incident direction that has application within the offshore
area but outside the titleholder’s title area (subsection 576B(5) of the Act) does not
mean that a direction given under the general power to give directions could not have
a similar application. Although it was never intended that the specific ability to give a
significant incident direction with an application outside the title area should limit the
general power to give directions in this manner, there is a risk that the general power
to give directions could be read down in this manner due to the fact that a similar
specific ability is not mentioned in relation to the general power to give directions in
the Act.

Item 11: After section 574A

This item inserts a new section 574B into the Act to specifically clarify that a
direction given by NOPSEMA or the responsible Commonwealth Minister under the
general power to give directions in sections 574 and 574A respectively may require
the registered holder of the title in relation to which the direction is given to take an
action, or not take an action, anywhere in an offshore area, whether within or outside
the titleholder’s title area.

New subsection 574B(2) will ensure that, if a titleholder is required by a direction to
take an action in, or relation to, an area that is subject to a title held by another
petroleum or greenhouse gas titleholder, NOPSEMA must give a copy of the direction
to that other petroleum or greenhouse gas titleholder as soon as practicable after the
direction is given. This will ensure that the other petroleum or greenhouse gas
titleholder is aware of the existence of the direction and the action that is required to
be taken with its title area by the recipient of the direction.

Item 12: Subsection 576B(5)

This item corrects existing subsection 576B(5) to reflect the policy intent of that
 provision. Currently, subsection 576B(5) enables NOPSEMA to give a significant
incident direction that requires the registered holder of the title in relation to which the
direction is given to take an action, or not take an action, anywhere in the offshore
area, whether within or outside the titleholder’s title area. However, it was always
intended that a significant incident direction could be applied in relation to any
offshore area, not just the particular offshore area in which the relevant title
operations are being undertaken. As an example, if a significant incident arose as a
result of operations carried out under a title in the offshore area of Western Australia, NOPSEMA would have the ability to give a significant incident direction that required action to be taken in the offshore area of the Northern Territory (such as requiring action to remediate damage to the environment).

This amendment also ensures that subsection 576B(5) is consistent with the new section 574B, which also clarifies that directions given by NOPSEMA or the responsible Commonwealth Minister under the general power to give directions may require action to be taken, or not taken, in any offshore area – see item 11 above.

Item 13: After section 585

This item inserts a new section 585A to clarify that the ability for NOPSEMA or the responsible Commonwealth Minister to give a remedial direction to a petroleum titleholder in section 586 and 586A respectively does not limit the power of NOPSEMA or the responsible Commonwealth Minister to give a direction to a petroleum titleholder in relation to the same (or a different) matter under the general power to give directions in section 574 and 574A respectively. As discussed in the introductory comments above, this is a clarification of existing policy intent.

Item 14 - After section 591

This item inserts a new section 591A to clarify that the ability for the responsible Commonwealth Minister to give a remedial direction to a greenhouse gas titleholder in section 592 does not limit the power of the responsible Commonwealth Minister to give a direction to a greenhouse gas titleholder in relation to the same (or a different) matter under the general power to give directions in section 580. As discussed in the introductory comments above, this is a clarification of existing policy intent.
Schedule 4 – Minor amendments

The amendments in this Schedule will:

- Enable matters relating to the service of documents under the Act or legislative instruments, which are currently regulated in Part 9.6 of the Act, to be provided for in regulations.
- Substitute references to the Standing Council on Energy and Resources (SCER) in the Act with more general references to the Ministers responsible for mineral and energy resources matter, in accordance with the SCER Terms of Reference.
- Enable the mandatory administrative arrangements that apply to the taking of eligible voluntary actions by multiple holders of a single title to be carried through into legislative instruments under the Act.
- Enable acting SES employees in the Department to act as the National Offshore Petroleum Titles Administrator.

Schedule 4, Part 1 – Service of documents

The amendments in this Part will enable matters relating to the service of documents under the Act or legislative instruments to be provided for in regulations under the Act.

Currently, matters relating to the service of documents that are required or permitted to be given under the Act are regulated in Part 9.6 of the Act. Generally, Part 9.6 requires documents to be given to regulators, individuals or corporations by personal delivery of the document or by post.

It is proposed to amend the service of documents provisions to also specifically enable documents to be served by electronic means, such as email or fax. In many cases, regulators or persons will find it administratively more efficient and quicker to serve documents by electronic means. This is particularly important in situations of potential urgency, such as in relation to the issue of notices under Schedule 2A or Schedule 3 to the Act. Providing for electronic service will also facilitate the use of the national electronic approvals tracking system for matters including lodgement of title-related applications.

There are existing service provisions in the Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 which purport to enable notices given under Schedule 3 to the Act to be given by electronic means. However, there is a risk that these provisions would be invalid due to inconsistency with the service of documents provisions in Part 9.6 of the Act.

During consideration of the necessary amendments to Part 9.6 to enable electronic service of documents, it was determined that it is more appropriate to deal with matters relating to the service of documents in regulations rather than the Act, given the administrative nature of these provisions. It is therefore proposed to move the existing provisions in Part 9.6 of the Act into the regulations, including any necessary amendments to enable electronic service of documents. The amendments in this Part
will ensure that there is sufficient regulation-making power to enable the making of
the necessary amendments to the regulations.

**Division 1: Amendments**

**Item 1: Section 7 (paragraph (a) of the definition of approved)**

This item removes the reference to section 775 in paragraph (a) of the definition of “approved” in section 7 of the Act. Section 775 is repealed by this Bill – see item 5 of this Schedule.

**Item 2: Section 7 (paragraph (g) of the definition of approved)**

This item makes paragraph (g) the final paragraph of the definition of “approved” in section 7 of the Act, due to the repeal of paragraph (h) – see item 3 of this Schedule.

**Item 3: Section 7 (paragraph (h) of the definition of approved)**

This item repeals paragraph (h) of the definition of “approved” in section 7 of the Act, as section 774 (which is referenced in the paragraph) is repealed by this Bill – see item 5 of this Schedule.

**Item 4: Section 286A(9) (paragraphs (c) and (e) of the definition of contact details)**

Paragraphs (c) and (e) of the definition of “contact details” in section 286A(9) currently provide that the contact details of a petroleum titleholder which must be provided to the Titles Administrator and NOPSEMA include the titleholder’s telephone number (if any) and email address (if any). This item removes the superfluous references to “(if any)”, as in all cases a petroleum titleholder will have a telephone number and email address.

**Item 5: Part 9.6**

This item repeals Part 9.6, which currently regulates matters relating to the service of documents that are required or permitted to be given under the Act. As discussed above, it is intended that service of documents provisions will be included in regulations rather than in the Act.

**Item 6: Paragraphs 775A(2)(a) to (d)**

This item repeals references to subsections that are to be repealed by item 5 of this Schedule.

**Item 7: At the end of subsection 775A(2)**

This item amends the Act to allow regulations to be made to increase the list of notices that are not covered by the definition of “eligible voluntary action”. This will ensure that increases to the list, which are a minor administrative matter, can be made without requiring further changes to the Act.
**Item 8: After section 782**

This item amends the Act to specifically allow regulations to be made providing for or in relation to the way in which documents are required or permitted to be given for the purposes of the Act or a legislative instrument under the Act. As discussed above, it is intended that service of documents provisions will be included in regulations rather than in the Act.

Matters “in relation to” the way in which documents are served may include provision for the time at which documents given by email or post are taken to be given.

This item also ensures that the regulation-making power, and any regulation made using that power, have effect despite any provision in the *Electronic Transactions Act 1999* (the ETA); in other words, the Act is expressly over-ridden for the purpose of the offshore petroleum and greenhouse gas storage regulatory regime. This is to avoid any lack of clarity in the application of the ETA in the specific context of the regime, and to ensure that all provisions relating to service of documents under the Act are located in one place for ease of reference.

**Item 9: Paragraph 93(1)(c) of Schedule 3**

This item repeals paragraph 93(1)(c) of Schedule 3, which enables regulations to be made to prescribe the manner in which notices are to be served under Schedule 3 to the Act or under the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (the Safety Regulations). The new regulation-making power to be inserted by item 8 means that this provision is no longer required, as regulations relating to the manner in which notices are to be served under Schedule 3 or the Safety Regulations will be able to be made under the new power.

**Division 2: Application**

**Item 10: Application – documents given after commencement of amendments**

This item applies the amendments in Division 1 only to documents given for the purposes of the Act, or for a legislative instrument under the Act, on or after the commencement of the amendments (for commencement information, see clause 3 of this Bill). The existing provisions in Part 9.6 of the Act will apply to documents given prior to the commencement of the amendments.

This item also ensures, however, that if a document is given by prepaying and posting the document as a letter prior to the commencement of the amendments, the amendments do not apply in relation to that document. This will ensure that the existing rules in relation to the time that a document given by post is taken to be given under Part 9.6 of the Act will apply in relation to letters posted prior to the commencement of the amendments, even if the letter is not *received* until after commencement.
Schedule 4, Part 2 – Standing Council on Energy and Resources

The Standing Council on Energy and Resources (SCER) under the Council of Australian Governments (COAG) was officially launched by the Prime Minister in September 2011, replacing the former Ministerial Council on Mineral and Petroleum Resources (MCMPR) and Ministerial Council on Energy.

Amendments which were made to the Act in 2011 substituted all references to the former MCMPR with specific references to the Standing Council on Energy and Resources. However, in its Terms of Reference, which were released following the making of those amendments, SCER has committed that by July 2016 specific references to the former MCMPR in governing instruments (including the Act) will be changed to refer instead to the “Ministers responsible for [……]”.

The amendments in this Schedule therefore replace all specific references to “the body known as the Standing Council on Energy and Resources” in the Act with references to “the Ministers responsible for mineral and energy resources matters”. Although the new wording is more general, it remains in effect a reference to SCER. The more general reference to the Ministers collectively will, however, also ensure that the wording in the Act remains current, regardless of any future changes to the name of the Council.

The amendments in this Schedule will enable the mandatory administrative arrangements that apply to the taking of eligible voluntary actions by multiple holders of a single title to be carried through into regulations under the Act.

**Division 1: Amendments**

**Item 11: Section 7**

This item inserts a definition for “Ministers responsible for mineral and energy resources matters” into section 7 of the Act, to make clear that such references in the Act refer to a group of Ministers established or recognised by COAG. Currently, this may be read as a reference to SCER. However, a general definition will prevent the need for future amendments if changes are made to the formal name of the group in future.

**Item 12: Amendments of listed provisions – Ministers responsible for mineral and energy resources matters**

This item replaces each reference to “the body known as the Standing Council on Energy and Resources” in the Act, and substitutes references to “the Ministers responsible for mineral and energy resources matters”.

**Division 2: Transitional**

**Item 13: Board members**

Subsection 656(4) of the Act requires that each person appointed as a member of the
NOPSEMA Board must have been selected by the body known as the Standing Council on Energy and Resources. This item ensures that the continuity of appointment of existing Board members is not affected by replacing the reference to “the body known as the Standing Council on Energy and Resources” with a more general reference.

**Item 14: Chief Executive Officer**

Subsection 665(3) of the Act provides that the responsible Commonwealth Minister must not appoint a person as the chief executive officer of NOPSEMA unless the person is recommended to the responsible Commonwealth Minister by the body known as the Standing Council on Energy and Resources. This item ensures that the continuity of appointment of the current chief executive officer of NOPSEMA is not affected by replacing the reference to “the body known as the Standing Council on Energy and Resources” with a more general reference.

**Schedule 4, Part 3 – Multiple titleholders**

Due to the high cost of offshore petroleum operations, petroleum titles are often owned by a consortium of titleholders (commonly referred to as ‘multiple titleholders’). In November 2010, amendments to the Act inserted a new Part 9.6A, which applies when there are two or more registered holders of a petroleum or greenhouse gas title. The provisions in the new Part clarified the requirements of multiple titleholders in relation to, among other things, administrative actions relating to applications, requests, nominations and notices.

Division 1 of Part 9.6A provides for the taking of “eligible voluntary actions” (i.e. making an application, giving a nomination, making a request, or giving a notice, where such action is permitted, but not required, under the OPGGSA) by requiring the nomination of one titleholder to take all voluntary actions on behalf of the titleholder group. An eligible voluntary action may not be taken by a titleholder group unless a titleholder has been nominated in accordance with the provisions in Division 1 of Part 9.6A, and the nominated titleholder takes the eligible voluntary action.

Currently, Division 1 of Part 9.6A can be interpreted so that the mandatory arrangements may only apply to eligible voluntary actions taken under the Act itself. For consistency and administrative efficiency, the amendments in this Schedule will also enable the arrangements to be carried through into legislative instruments under the Act. To fully provide for this, the multiple titleholder arrangements will be extended to apply to applications, nominations, requests or notices made or given to NOPSEMA (currently the arrangements apply only in relation to applications, etc, made or given to the Joint Authority, the Titles Administrator or the responsible Commonwealth Minister). This is necessary given that a number of applications, etc, may be made to NOPSEMA under legislative instruments, such as applications for well activity approvals under the *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011*.

In addition to the above amendments, this Part includes amendments to sections 775D and 775E of the Act to ensure that, where legislative instruments impose an obligation on the registered holder of a petroleum or greenhouse gas title, and there are two or
more registered holders of the title, the obligation is imposed on each but may be discharged by any one of the registered holders. Currently, these provisions only apply where the Act (and not legislative instruments) imposes obligations on registered titleholders.

Division 1: Amendments

Item 15: Section 775A (heading)

This item inserts a new heading for section 775A and sub-heading for subsection 775A(1).

Item 16: At the end of paragraph 775A(1)(d)

This item enables new paragraphs to be inserted after paragraph 775A(1)(d) – see item 17 of this Schedule.

Item 17: After paragraph 775A(1)(d)

This item inserts new paragraphs (e) and (f) into subsection 775A(1) to include giving a plan and giving an objection in the list of “eligible voluntary actions” that are permitted to be made under the Act or legislative instruments. Existing regulations under the Act enable titleholders to give a plan or give an objection in certain circumstances. The new paragraphs therefore ensure that the taking of such actions is covered by the multiple titleholder arrangements for taking eligible voluntary actions in sections 775B and 775C of the Act.

Item 18: Subsection 775A(1)

This item adds NOPSEMA to the list of persons to whom applications, nominations, etc, that are eligible voluntary actions, can be made or given. Existing regulations under the Act enable titleholders to take actions that would be eligible voluntary actions if NOPSEMA were listed as a person to whom an eligible voluntary action can be made or given, such as submitting a well operations management plan or environment plan for acceptance. The amendment in this item will therefore ensure that taking an action that is an eligible voluntary action by giving or making an application, nomination, etc, to NOPSEMA is covered by the multiple titleholder arrangements for taking eligible voluntary actions in sections 775B and 775C of the Act.

Item 19: At the end of section 775A

This item provides that references to “this Act” in Division 1 of Part 9.6A of the Act include a legislative instrument under the Act. This will ensure that applications, nominations, requests, notices, plans or objections that are permitted, but not required, to be given under legislative instruments, in addition to such actions taken under the Act, are “eligible voluntary actions”, and therefore subject to the arrangements for multiple titleholders to take eligible voluntary actions in sections 775B and 775C of the Act.
Items 20 and 21: Paragraph 775D(1)(a) and paragraph 775E(1)(a)

These items amend sections 775D and 775E of the Act to ensure that where a legislative instrument under the Act imposes an obligation on the registered holder of a petroleum or greenhouse gas title, and there are two or more registered holders of the title, the obligation is imposed on each of the registered holders, but may be discharged by any one of them.

Division 2: Application

Item 22: Application – amendments made to section 775A

This item provides for the amendments made to section 775A by Division 1 of this Part to apply in relation to nominations given by multiple titleholder groups to the Titles Administrator under section 775B or 775C of the Act before, on or after commencement of the amendments. This will ensure that the expanded scope of eligible voluntary actions will apply in relation to existing nominations so that, for example, titleholders who have already given a nomination will not need to give a new nomination to take eligible voluntary actions under a legislative instrument.

These amendments will commence by Proclamation, to allow time to inform titleholders who have made existing nominations of the increased scope of eligible voluntary actions that will apply in relation to those nominations from commencement, and enable them to make any consequential changes to their nominations prior to commencement if necessary – see clause 2 of this Bill.

Item 23: Application – amendments of sections 775D and 775E

This item provides for the amendments of sections 775D and 775E in items 20 and 21 of this Schedule to apply in relation to an obligation incurred on or after the commencement of this item; that is, commencement is not retrospective.

This item commences on the day after Royal Assent – see clause 2 of this Bill.

Schedule 4, Part 4 – Acting Titles Administrator

Under section 695C of the Act, the Secretary may appoint a person to act as the National Offshore Petroleum Titles Administrator (the Titles Administrator) during a vacancy in the office of the Titles Administrator, or during any period when the Titles Administrator is absent or otherwise unable to perform the duties of the office. In order to be eligible to be appointed to act as the Titles Administrator, a person must be eligible to be appointed as the Titles Administrator.

Section 695A of the Act provides that the Titles Administrator is to be a person who is an SES employee in the Department. However, the appointee to the office of the Titles Administrator is in practice the only SES employee in the relevant Branch of the Department. It may therefore be necessary to enable an acting SES employee in the Department to act as the Titles Administrator. The amendments in this Part will ensure that a person is eligible to act as the Titles Administrator if the person is
eligible to be appointed as the Titles Administrator, or if the person is an acting SES employee in the Department.

Division 1: Amendments

Item 24: Subsection 695C(2)

This item amends subsection 695C(2) to ensure that a person is eligible to act as the Titles Administrator either if the person is eligible to be appointed as the Titles Administrator (i.e. is an SES employee in the Department) or if the person is an acting SES employee in the Department.

Division 2: Application

Item 25: Application

This item provides for the amendment made by this Part to apply in relation to acting appointments made on or after the commencement of the amendment, i.e. from the day after Royal Assent.