

Context

- 1.1 The Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011 is one of a series of amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* that have been introduced this Parliament. The bills are intended to improve regulation of the offshore petroleum industry in response to the 2009 Montara incident and the 2008 Varanus Island gas pipeline explosion, which ‘highlighted inadequacies in the offshore petroleum regulatory regime’.¹ The bills are also intended to implement some of the recommendations of the 2009 Productivity Commission report, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*.²

Offshore petroleum regulation

- 1.2 The current regulatory regime for the offshore petroleum industry can be traced back to a High Court decision of 1975, in which the Commonwealth’s sovereignty over Australia’s offshore waters and the seabed beneath them was upheld. This decision led to the Commonwealth and the States agreeing on a division of rights and responsibilities over offshore waters, collectively known as the Offshore Constitutional Settlement (OCS). Under the OCS, the States and the Northern Territory were conferred with title and jurisdiction over the sea within three nautical miles of their coastlines, while the Commonwealth retained jurisdiction over waters beyond three nautical miles. In relation to

1 Offshore Petroleum and Greenhouse Gas Storage (OPPGS) Amendment (National Regulator) Bill 2011, Explanatory Memorandum (EM), p. 3.
2 OPGGS Amendment (National Regulator) Bill 2011, EM, p. 3; see Productivity Commission, *Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, Research Report, April 2009, p. 75.

petroleum exploration and exploitation, the OCS agreement was enacted in the *Petroleum (Submerged Lands) Act 1967*, predecessor of the current *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act).³

1.3 The role of the OPGGS Act has been summarised as follows:

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

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

The OPGGSA also regulates key areas of resource management through a variety of regulations which the Australian Government, in consultation with the State and Territory Governments as well as industry, has been implementing since the early 1990s. The existing regulations cover well operations, safety on offshore facilities, occupational health and safety, diving safety, environment, pipelines, data management and fees.⁴

1.4 The administration of the OPGGS Act is shared between the Commonwealth and each of the States and the Northern Territory. Decisions concerning the granting and conditions of petroleum titles and 'core decisions' about resource management and security are made by the **Joint Authorities**, consisting of the responsible Commonwealth Minister and the relevant State or Northern Territory Minister. The ongoing administrative and regulatory functions of the Act have to date been performed by the **Designated Authorities**, consisting of the State and Northern Territory Ministers, acting through their departments.⁵

1.5 The National Offshore Petroleum Safety Authority (NOPSA) was established in 2005 as the national regulator of occupational health and

3 Summarised from OPGGS Amendment (National Regulator) Bill 2011, EM, p. 2.

4 Productivity Commission, *Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, Research Report, April 2009, p. 75.

5 OPGGS Amendment (National Regulator) Bill 2011, Bills Digest, p. 6.

safety in both Commonwealth and State and Northern Territory waters.⁶ Its introduction was in response to a 2001 report which found that regulation of health, safety and the environment in the offshore petroleum industry was ‘complicated and insufficient to ensure appropriate, effective and cost efficient regulation’.⁷

2009 Productivity Commission regulatory review

- 1.6 In April 2009, the Productivity Commission released its *Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*. The review was prompted by ‘widespread concerns about delays and uncertainties in obtaining approvals for oil and gas projects, duplication of compliance requirements, and inconsistent administration of regulatory processes across jurisdictions’. It aimed to identify ways to ‘reduce unnecessary regulatory burdens on the sector’ and consider options for a national regulatory authority to reduce duplication and inconsistency.⁸
- 1.7 Amongst its key recommendations, the Productivity Commission recommended that the Federal Government establish a new national regulator to hold responsibility for ‘resource management, pipelines and environmental approvals and compliance’, with functions including administration of exploration permit, production and pipeline licensing; and administration and approval of production, well construction, drilling and pipeline consents (subject to NOPSA approval).⁹ It recommended that NOPSA be retained as a separate entity, with its role extended to include responsibility for ‘the safety and integrity of offshore pipelines, subsea equipment and wells’,¹⁰ and that the States and Territories consider conferring to NOPSA their powers to regulate occupational health and safety matters in the offshore petroleum sector.¹¹

6 OPGGS Amendment (National Regulator) Bill 2011, EM, p.2.

7 OPGGS Amendment (National Regulator) Bill 2011, EM, p. 2, citing Department of Industry, Science and Resources, *Future Arrangements for the Regulation of Offshore Petroleum Safety*, 2001.

8 Productivity Commission, *Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, p. XXI.

9 Productivity Commission, *Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, Recommendation 10.7, p. 292.

10 Productivity Commission, *Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, Recommendation 7.1, p. 175.

11 Productivity Commission, *Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, Recommendation 7.2, p. 179.

The Montara incident and its Commission of Inquiry

- 1.8 On 21 August 2009, a ‘blowout’ occurred at the Montara Wellhead Platform, around 250 kilometres off the northwest coast of Australia, resulting in the uncontrolled release of oil and gas into the Timor Sea for over 10 weeks, affecting an area of up to 90 000 square kilometres. The incident represented the third largest oil spill in Australia’s history and the worst incident of its kind in Australia’s offshore petroleum industry.¹²
- 1.9 The Montara Commission of Inquiry concluded that the operator of the platform ‘did not observe sensible oilfield practices at the Montara Oilfield’ and that there were ‘widespread and systematic’ shortcomings in the company’s procedures which directly led to the blowout.¹³ It also found that the incident could have been prevented with more effective regulation by the Northern Territory based regulator:
- Well control practices approved by the delegate of the Designated Authority, the Northern Territory Department of Resources (the NT DoR), most likely would have been sufficient to prevent the Blowout if PTTEPAA [the platform operator] had adhered to them and to its own Well Construction Standards. However, the NT DoR was not a sufficiently diligent regulator: it should not have approved the Phase 1B Drilling Program for the Montara Oilfield in July 2009 as it did not reflect sensible oilfield practice; it also adopted a minimalist approach to its regulatory responsibilities. The way the regulator (the NT DoR) conducted its responsibilities gave it little chance of discovering PTTEPAA’s poor practices. In this case, the regulatory dog did not bark.¹⁴
- 1.10 The Commission of Inquiry recommended that a ‘single, independent regulatory body’ be created with responsibility for safety (‘as a primary objective’), well integrity and environmental approvals. It supported the Productivity Commission’s proposals that a new national regulator be established (‘at a minimum’) and that NOPSA be given responsibility for well integrity.¹⁵

12 *Report of the Montara Commission of Inquiry*, June 2010, p. 5.

13 *Report of the Montara Commission of Inquiry*, June 2010, p. 6.

14 *Report of the Montara Commission of Inquiry*, June 2010, p. 6.

15 *Report of the Montara Commission of Inquiry*, June 2010, p. 362.

Package of OPGGS bills introduced in May 2011

1.11 On 25 May 2011, the Minister for Resources, Energy and Tourism introduced a package of five bills into the House of Representatives as part of the Government's response to the recommendations of the 2009 Productivity Commission review and the Montara Commission of Inquiry. By far the largest of these bills was the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) 2011. The bills were inquired into by committees of both the House and the Senate, and received Royal Assent on 14 October 2011 after passing both houses in September. A brief summary of each of the bills is provided below.

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

- 1.12 The bill amended the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to establish two new regulatory bodies to administer and regulate petroleum and greenhouse gas storage operations in Commonwealth waters in the Australian offshore area – the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and the National Offshore Petroleum Titles Administrator (NOPTA). The new bodies will replace the role of the Designated Authorities (i.e. State and Northern Territory Ministers).¹⁶
- 1.13 NOPSEMA will be an expanded version of NOPSA. In addition to NOPSA's current occupational health and safety functions, NOPSEMA will be responsible for the 'structural integrity of facilities, wells and well-related equipment; environmental management; and regulation of day-to-day petroleum operations'.¹⁷ NOPSEMA will begin operations from 1 January 2012.
- 1.14 NOPTA will operate within the Department of Resources, Energy and Tourism (RET). Its key functions will be to provide information, assessments, analysis, reports, advice and recommendations to the Joint Authorities in relation to the performance of their functions and the exercise of their powers, the collection, management and release of data, titles administration, approval and registration of transfers and dealings, and the keeping of the registers of petroleum and greenhouse gas titles.¹⁸

16 OPGGS Amendment (National Regulator) Bill 2011, EM, p. 1.

17 OPGGS Amendment (National Regulator) Bill 2011, EM, p. 1.

18 OPGGS Amendment (National Regulator) Bill 2011, EM, p. 1.

Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Amendment Bill 2011

- 1.15 The bill amended the *Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006* to correctly reference the new National Offshore Petroleum Titles Administrator (NOPTA).¹⁹

Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 2) Bill 2011

- 1.16 The bill amended the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* to impose new cost-recovery levies on holders of offshore petroleum and greenhouse gas storage titles to recover the costs of NOPTA in undertaking its functions in relation to titles administration and NOPSEMA in undertaking its functions in relation to environmental management.²⁰

Offshore Petroleum (Royalty) Amendment Bill 2011

- 1.17 The bill amended the *Offshore Petroleum (Royalty) Act 2006* to confer the functions currently exercisable by the Designated Authority under that Act on the responsible State Minister. This bill also modified some functions to take account of the fact that the State Minister individually does not have any functions under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.²¹

Offshore Resources Legislation Amendment (Personal Property Securities) Bill 2011

- 1.18 The bill amended the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and the *Offshore Minerals Act 1994* to exclude application of the *Personal Property Securities Act 2009*.²²

The OPGGS (National Regulator) Bill and the power to issue directions

- 1.19 Of the five bills, the OPGGS (National Regulator) Bill is the most directly relevant to the current inquiry. Prior to the bill's passage, the OPGGS Act granted the Designated Authorities the power to issue **directions** to petroleum titleholders 'as to any matter in relation to which regulations may be made'.²³ The Act also enabled the Designated Authorities to issue

19 OPGGS (Registration Fees) Amendment Bill 2011, EM, p. 1.

20 OPGGS Regulatory Levies Legislation Amendment (2011 Measures No. 2) Bill 2011, EM, p. 1.

21 Offshore Petroleum (Royalty) Amendment Bill 2011, EM, p. 1.

22 Offshore Resources Legislation Amendment (Personal Property Securities) Bill 2011, EM, p. 1.

23 OPGGS Act 2006, s. 574(2).

‘remedial’ directions in relation to the restoration of the environment, requiring the removal of property, the plugging or closing off of wells, conservation and protection of natural resources, and/or restoration of damage to the seabed or subsoil by the petroleum titleholders or former titleholders.²⁴

- 1.20 The OPGGS (National Regulator) Bill conferred the full range of the Designated Authorities’ direction-giving powers onto NOPSEMA. This includes the power to issue directions in relation to resource management, which are outside NOPSEMA’s areas of responsibility. Primary responsibility for resource management rests with the Joint Authorities. For this reason, the Bill inserted additional sections into the Act that enable the Commonwealth Minister (acting on behalf of the Joint Authorities for reasons of expedience) to also issue directions, but only in relation to resource management and security. The Commonwealth Minister may not issue directions of a standing or permanent nature without approval of the Joint Authorities. In the unlikely event that directions issued by NOPSEMA and the Commonwealth Minister (in relation to resource management and security) are inconsistent, the Minister’s direction takes precedence.²⁵
- 1.21 Under the OPGGS Act, as amended, directions given to the registered holder of a title by NOPSEMA or the Commonwealth Minister are also taken to apply to employees or agents of the holder and persons performing work or services on behalf of the titleholder. The direction may also be taken to apply more broadly to any person who is in the offshore area, or in the vicinity of a vessel, aircraft, structure, installation or other property for the purposes of petroleum exploration or exploitation.²⁶
- 1.22 It is an offence of ‘strict liability’ to not comply with a direction and the penalty for not complying is 100 penalty units (currently around \$11 000). Under prosecution for a breach of direction, the OPGGS Act stipulates that it is a defence (with the onus of proof on the defendant) ‘if the defendant can prove that they took all reasonable steps to comply with the direction’ or if they ‘can provide evidence that they did not know, and could not reasonably be expected to have known, of the existence of the direction’.²⁷

24 OPGGS Act 2006, s. 586(2) and s. 587(2).

25 OPGGS Amendment (National Regulator) Bill 2011, EM, pp. 43–44.

26 OPGGS Act 2006, s. 574(3); OPGGS Amendment (National Regulator) Bill 2011, EM, p. 45.

27 OPGGS Act 2006, s. 576(3), s. 578; OPGGS Amendment (National Regulator) Bill 2011, EM, pp. 47–49.

Previous inquiry findings

- 1.23 On 25 May 2011, the package of bills was referred to both the House of Representatives Standing Committee on Agriculture, Resources, Fisheries and Forestry and the Senate Economics Legislation Committee for inquiry and report. Both committees expressed their support for the 'essential' reforms contained in the bills, in light of the Productivity Commission's report and the report of the Montara Commission of Inquiry. The Senate report, however, also incorporated a dissenting report in which Coalition Senators raised concerns about a perceived lack of consultation and cooperation with the Western Australian Government.²⁸
- 1.24 In its submission to the two inquiries, the Western Australian Government indicated that it was opposed to the formation of NOPTA and NOPSEMA, arguing that it would only complicate the regulatory framework and stating that 'the establishment of NOPTA and NOPSEMA does not, in itself, improve the areas of the regulatory system which really need reform – environment and native title'.²⁹ The WA Government recommended that further measures be introduced to improve information sharing and consultation measures between NOPSEMA and the States and Northern Territory. In a public hearing, the WA Department of Mines and Petroleum stated:
- We still think that the old joint authority and designated authority system was not broken, so we do not see a need to throw out the baby with the bathwater. There were improvements being made almost daily, and we think it could be improved to the extent that it would offer a better system than what is proposed in these amendments.³⁰
- 1.25 The other submissions to the inquiries were broadly supportive of the legislation and its creation of a national regulator, although some more specific issues concerning the transition, funding model, safety responsibilities and industry consultation were highlighted. No specific issues were raised during these two inquiries in relation to the direction-giving powers of the legislation.

28 See reports of the Senate Economics Legislation Committee, June 2011 and the House of Representatives Standing Committee on Agriculture, Resources, Fisheries and Forestry, June 2011.

29 House of Representatives Standing Committee on Agriculture, Resources, Fisheries and Forestry, *Inquiry into Bills Referred 25 May 2011, Submission 4*, p. 3.

30 Mr Bill Tinapple, Executive Director, Petroleum Division, Western Australian Department of Mines and Petroleum, *Committee Hansard*, 17 June 2011, p. 17.

- 1.26 The Senate Standing Committee for the Scrutiny of Bills also examined the bills, and raised one concern about the ability of the Minister or regulator to incorporate in its directions a code of practice or standard *as existing from time to time*. This concern was addressed in a government amendment to the National Regulator bill.

The OPGGS Amendment (Significant Incident Directions) Bill 2011

- 1.27 The Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011 was introduced into House of Representatives on 21 September 2011.
- 1.28 According to the explanatory memorandum, the purpose of the bill is to amend the OPGGS Act to ‘specifically enable NOPSEMA to issue a direction to a petroleum titleholder in the event of a significant offshore petroleum incident occurring within the title area that has caused, or might cause, an escape of petroleum’.³¹ The direction would require the titleholder to ‘take an action or not take an action in relation to the escape or possible escape of petroleum and its effects’, and unlike existing direction-giving powers in the OPGGS Act (discussed above), significant incident directions may ‘apply either within or outside the titleholder’s title area’.³²
- 1.29 In delivering the bill’s second reading speech, the Minister for Regional Australia, Regional Development and Local Government explained that the bill was one of a number of amendments being introduced by the Government in response to the Montara incident.³³ He explained that the bill would provide ‘a clear legal basis on which to issue directions that extend to requiring action outside the title area’:

In the unlikely event of a future significant petroleum incident, such as the uncontrolled release of hydrocarbons into the marine environment, remedial action would be required to be taken as quickly as practicable. These amendments will ensure that regulators have a clear and unambiguous power to direct petroleum titleholders to take remedial action as quickly as

31 OPGGS Amendment (Significant Incident Directions) Bill 2011, EM, p. 1.

32 OPGGS Amendment (Significant Incident Directions) Bill 2011, EM, p. 1.

33 *House of Representatives Hansard*, 21 September 2011, p. 6.

practicable to mitigate and manage the impacts from an escape of petroleum.³⁴

1.30 Matters that can be covered by a significant incident direction include actions to:

- prevent or eliminate the escape of petroleum; and/or
- mitigate, manage or remediate the effects of an escape of petroleum.³⁵

1.31 The bill stipulates that NOPSEMA must not issue a direction 'of a standing or permanent nature' without approval from the Joint Authority; however, the direction remains valid if this approval is not obtained.

1.32 As with other directions provided for under the OPGGS Act, discussed above, the bill identifies non-compliance with a significant incident direction as an offence of strict liability and imposes a penalty of 100 penalty units. As noted in paragraph 1.22, this is currently approximately \$11 000.

34 *House of Representatives Hansard*, 21 September 2011, p. 6.

35 OPGGS Amendment (Significant Incident Directions) Bill 2011, p. 6.