Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012

Introduced into the House of Representatives on 28 November 2012; passed both Houses on 28 February 2013
Portfolio: Resources and Energy
PJCHR comments: Report 1/13, tabled on 6 February 2013
Ministerial response dated: 28 February 2013

Summary of committee view

3.1 The committee thanks the Minister for his response.

3.2 The committee has decided to defer finalising its views on the fair trial implications of the civil penalty provisions in the bill to enable closer examination of the issues in light of the information provided.

3.3 The committee notes that the Minister's response did not address the issue of whether the reverse onus offences in the bill are compatible with human rights and requests that the Minister provide this information to the committee at his earliest convenience to enable the committee to finalise its overall assessment of this bill.

Background

3.4 This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to strengthen the regulatory regime of that Act. In particular, the bill responds to the June 2010 Report of the Montara Commission of Inquiry, which followed a blowout in 2009 at the Montara Wellhead Platform off the northern coast of Western Australia.

3.5 The committee sought further information from the Minister about the compatibility of the reverse onus offences and civil penalty provisions in the bill with the fair trial rights in article 14 of the International Covenant on Civil and Political Rights (ICCPR).

3.6 The Minister's response is attached.

Committee's response

3.7 The committee notes that it is considering the Minister's response and intends to publish its views on the bill's compatibility with human rights in a future report.

3.8 The committee notes that the response did not contain any information that addressed the committee's concerns with regard to the reverse onus offences in the bill.

3.9 The committee notes that the bill has already been passed by the Parliament.

THE HON MARTIN FERGUSON AM MP

MINISTER FOR RESOURCES AND ENERGY
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C13/399

27 FEB 2013

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
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Dear Mr Jenkins Harry,

I am writing in response to comments contained in the Parliamentary Joint Committee on Human Rights' First Report of 2013 (the Committee Report) concerning the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012* (the Compliance Measures Bill). Please see below my response to the request for further advice in the Committee Report in relation to the civil penalty regime to be introduced by this Bill.

As noted in the Committee Report and in the Explanatory Memorandum to the Compliance Measures Bill, the Bill introduces a civil penalty regime to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) on the basis of recommendations contained in the *Report of the Montara Commission of Inquiry* and a subsequent review of the OPGGS Act by the Australian Government to give effect to those recommendations. The 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 in order to encourage improved compliance outcomes, and that the offshore petroleum regulator does not currently have available sufficient compliance and enforcement mechanisms in the middle range of regulatory responses, such as civil penalties, which are available to regulators of other comparable industry sectors within Australia and under like regulatory regimes internationally.

In developing the civil penalty regime, and in particular the contraventions to which a civil penalty would apply and the appropriate level of penalty, great regard was given to the principles discussed in the Australian Law Reform Commission's (ALRC) 1995 report titled *Principled Regulation: Federal Civil and Administrative Penalties in Australia*. Careful consideration was also given to the type and level of existing civil penalties applied for contraventions of similar provisions in comparable legislation, such as the *Work Health and Safety Act 2011* and the *Environment Protection and Biodiversity Conservation Act 1999*.

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The ALRC report discusses at length the differing purpose and rationale of civil penalties in comparison to criminal offences. In particular, the report concludes that the principle purpose of civil penalties is *deterrence*, and that this purpose may be taken into account when setting the penalty level. As a result, a civil penalty may be set at a higher level than a criminal penalty for equivalent conduct, due to the absence of other indirect effects and factors that apply to a criminal conviction beyond the penalty units applied, such as the associated stigma and reputational damage, and the potential future detrimental impact of having a criminal record. While deterrence is certainly a factor in criminal offences, punishment for morally culpable behaviour is also a significant driving factor. The availability of a civil penalty will provide a middle ground between criminal proceedings and private civil actions and the trade-off is that, while there might be a sizeable civil penalty available without the need to prove fault, there is the lack of the indirect effects of a criminal conviction.

The principle purpose of including the civil penalty regime in the OPGGS Act is to create a deterrent effect to encourage compliance by persons with their obligations under the Act. The potential for a civil penalty to apply, often with a higher penalty than applies to the equivalent criminal offence, aims to provide a financial disincentive against persons contravening their obligations under the OPGGS Act, particularly in the context of offshore petroleum operations, where compliance requires a major financial investment, and non-compliance can add considerably to the profits to be made in association with any given activity.

The majority of the civil penalty provisions being introduced into the OPGGS Act will apply, either specifically or in practice, to corporations and joint ventures, and in most cases to large multinational oil companies. As the OPGGS Act regulates well-resourced companies and operations that require a significant financial investment, a number of the criminal penalties in the OPGGS Act are arguably too low to provide any real or meaningful direct punishment or deterrent, and it is the nature of the offence as "criminal", and the indirect associated effects as described above, that provides the real and meaningful punishment and deterrent. The potential imposition of a civil penalty for a contravention of the OPGGS Act provides an additional and more serious financial incentive for corporations to comply with the requirements of the Act, including important requirements relating to work practices and environmental management.

Admittedly a few of the civil penalty provisions being introduced into the OPGGS Act could also potentially apply to individuals, rather than or in addition to corporations depending on the facts of any given situation. These provisions are discussed in more detail below. To provide context, however, I would first emphasise that civil penalties are being introduced as one of a range of graduated enforcement mechanisms, to encourage compliance and ensure that the appropriate enforcement tool can be applied in the circumstances of each case. Although each of the provisions below may lead to a civil penalty or a criminal penalty being sought by the offshore petroleum regulator, not all instances of non-compliance will warrant pursuit of a civil penalty or criminal conviction; for example, a particularly serious breach or flagrant disregard for the law would warrant proceedings for a criminal offence. In each case, therefore, the appropriate enforcement mechanism would be selected and applied accordingly, and this conscious selection decision also adds weight to the argument that the relevant civil penalty provisions are not akin to a "criminal charge".

The first category of civil penalty provisions that could apply to an individual are provisions relating to a failure to produce a document or provide information when requested to do so by the relevant regulator (subsections 509(6A), 699(5A) and 759(4A)). Two of these provisions apply to enable the regulator to obtain further information prior to making a decision that could have strong financial implications for interested parties, such as a decision to approve a transfer or dealing in relation to a petroleum title. The other enables the relevant regulator to obtain

information about offshore petroleum operations that is relevant for the proper administration of the OPGGS Act. Although the potential civil penalty that may be applied is higher than can be applied for an offence against these provisions, as discussed above, this can be justified by the absence of a criminal stigma associated with a civil penalty (so that a criminal proceeding would be pursued in the most serious cases of non-compliance), and the level of the penalty also aims to deter a person from failing to comply in a context where potentially large financial interests are at stake.

The second category of civil penalty provisions that could apply to an individual are provisions relating to a failure by the master of a vessel to take an unauthorised vessel outside of a petroleum safety zone or the area to be avoided, or failure to allow an authorised person to board and search a vessel that is suspected to be inside a petroleum safety zone or the area to be avoided without authority (subsections 620(4) and 621(11)). Again, the penalty level for a civil penalty has been set to *deter* non-compliance with the relevant provisions. A vessel may be, for example, in a safety zone without authority in order to gain access to better fish stocks. The potential for a civil penalty provides a financial disincentive against contravening these provisions, where there is the potential for financial gains to be made from non-compliance. Also as noted above, in the most serious cases a criminal prosecution would be available, such as, for example, if persons remained in a safety zone with the deliberate intention to cause harm or damage to petroleum operations.

The final category of civil penalty provisions that could apply to an individual are provisions prohibiting conduct that hinders or obstructs an authorised person or NOPSEMA inspector in the course of undertaking lawful functions under the OPGGS Act (subsections 620(5), 621(12), subclause 6(2) of Schedule 2A and subclause 54(1A) of Schedule 3). There are examples of existing legislation which impose a civil penalty for hindering or obstructive conduct; see, for example, section 145 of the *Work Health and Safety Act 2011*, which was considered when setting the penalty levels that are to apply in the OPGGS Act. As with the provisions discussed above, the purpose of applying a civil penalty for hindering or obstructive conduct is to deter such behaviour by persons, and the penalty has been set accordingly. While the offence provision would also provide a deterrent, the option to pursue a criminal prosecution would be exercised where the obstructing or hindering conduct was serious in nature, (e.g. where a person physically and aggressively obstructed an inspector), as a purpose of the offence provision is to punish conduct that is morally egregious (as opposed to, for example, refusing to unlock a door to a room which contains operational records). In the latter case, it is expected that the prospect of a civil penalty would provide an appropriately significant financial disincentive against engaging in such conduct.

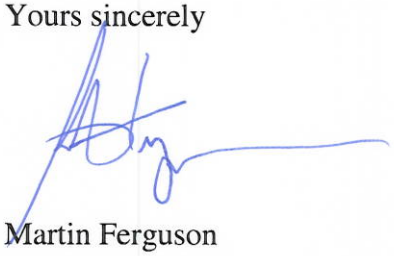
Finally, it should also be noted that civil penalties have not been applied in relation to *all* conduct which constitutes a criminal offence under the OPGGS Act, and the nature of each individual provision was taken into account in deciding whether to apply a civil penalty. Where a breach would be manifestly criminal in nature, due to, for example, a complete disregard for the safety of persons or the environment, or the provision of information that is known to be false, a civil penalty is not considered appropriate and therefore has not been applied.

For these reasons, I submit to the Committee that the civil penalty provisions being incorporated into the OPGGS Act by the amendments in the Compliance Measures Bill should not be considered to be "criminal charges" under article 14 of the International Covenant on Civil and Political Rights (ICCPR).

Given that the civil penalty provisions to be inserted into the OPGGS Act are not "criminal charges", I respectfully consider that there is no need to respond to the Committee's second question; that is, why the operation of clause 93 of the Regulatory Powers (Standard Provisions) Bill 2012 should not be seen as inconsistent with article 14(7) of the ICCPR.

I trust that this additional information will be sufficient to address the Committee's comments in the Committee Report.

Yours sincerely



Martin Ferguson