

The Senate

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Economics  
Legislation Committee

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Offshore Petroleum and Greenhouse Gas Storage  
Amendment (Miscellaneous Amendments) Bill  
2018 [Provisions]

Offshore Petroleum and Greenhouse Gas Storage  
(Regulatory Levies) Amendment Bill 2018  
[Provisions]

August 2018

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# Senate Economics Legislation Committee

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# Chapter 1

## Introduction

1.1 On 28 June 2018, the Senate referred the provisions of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018; and the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018 to the Economics Legislation Committee for inquiry and report by 13 August 2018.<sup>1</sup> As the bills are directly related to one another, both bills are to be dealt with together in this inquiry report.

1.2 In essence, the introduction of these bills is designed to update and make amendments to *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*.

1.3 On the 28 March 2018, the Hon Dr John McVeigh MP, Minister for Regional Development, Territories and Local Government, gave his second reading speech for both bills. Primarily, the Minister noted that the bills are part of the government's ongoing commitment to the maintenance and continued improvement of a strong and effective regulatory framework for offshore petroleum and greenhouse gas storage, and to ensuring the regime's currency and alignment with international best practice. In regards to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018, Dr McVeigh noted that the bill contains important measures that make amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, specifically stating that:

The bill will transfer regulatory oversight for offshore greenhouse gas storage environmental management and well operations from the responsible Commonwealth minister to the National Offshore Petroleum Safety and Environmental Management Authority, or NOPSEMA. Currently, NOPSEMA is the regulator for offshore petroleum environmental management and well operations. The reason for the division of petroleum and greenhouse gas responsibilities is largely historical. NOPSEMA did not have any environmental management functions in 2008, when the greenhouse gas regulatory provisions were introduced into the act. With the potential for an increase in greenhouse gas storage activities in future, there is a renewed focus on the adequacy of regulatory arrangements.<sup>2</sup>

1.4 Further, Dr McVeigh noted that as a consequence of the related amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (above) the Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018 is also being introduced to make necessary amendments to the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*:

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1 *Journals of the Senate*, No. 105, 28 June 2018, p. 3358.

2 The Hon Dr John McVeigh MP, Minister for Regional Development, Territories and Local, *House of Representatives Hansard*, 28 March 2018, p. 3044.

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* as a consequence of related amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to transfer regulatory oversight for offshore greenhouse-gas-storage-well operations from the responsible Commonwealth minister to the National Offshore Petroleum Safety and Environmental Management Authority, or NOPSEMA.

NOPSEMA operates on a fully cost recovered basis through levies and fees payable by the offshore petroleum and greenhouse gas storage industries. This includes well related levies imposed in relation to petroleum titles. To ensure NOPSEMA can also recover the cost of its oversight of well operations under greenhouse gas titles, this bill will amend the levies act to extend the application of the well related levies to greenhouse gas wells.

This bill also amends the levies act as a consequence of amendments made to well related regulations under the OPGGS Act which commenced on 1 January 2016.<sup>3</sup>

### **Conduct of the Inquiry**

1.5 Submissions to the inquiry closed on 25 July 2018. The committee received five submissions and no public hearings were held. The submissions are listed in Appendix 1 of this report.

### **Scope and structure of the report**

1.6 The report consists of three chapters:

- Chapter 1 (this chapter) provides an overview of the inquiry;
- Chapter 2 provides a background to the bills and a summary of the bills' main provisions; and
- Chapter 3 details the views on the bills as received in submissions to the inquiry as well as the committee's views and recommendations.

### **Acknowledgements**

1.7 The committee thanks all submitters and witnesses who provided evidence to the inquiry.

### **Overview of the bills**

#### ***Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018***

1.8 The explanatory memorandum (EM) to the bill states that the purpose of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (the MA bill) is to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act) to:

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3 The Hon Dr John McVeigh MP, Minister for Regional Development, Territories and Local, House of Representatives Hansard, 28 March 2018, p. 3046.

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- transfer regulatory responsibility for offshore greenhouse gas wells and environmental management from the responsible Commonwealth Minister (the Minister) to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA);
  - strengthen and clarify the powers of NOPSEMA inspectors to monitor and enforce compliance by regulated entities with their obligations under the OPGGS Act and associated regulations;
  - ensure valid designation of certain areas as 'frontier areas' for the purposes of the Designated Frontier Area tax incentive; and
  - make minor policy and technical amendments to improve the operation of the OPGGS Act.<sup>4</sup>

### *Schedules to the MA bill*

1.9 The bill consists of 17 schedules:

- Schedule 1—Greenhouse gas storage
- Schedule 2—Protection of technical information
- Schedule 3—Directions given by the responsible Commonwealth Minister
- Schedule 4—Compliance powers
- Schedule 5—Variation of petroleum access authority
- Schedule 6—Directions by the Titles Administrator
- Schedule 7—Listed NOPSEMA laws
- Schedule 8—Fees payable to the Titles Administrator on behalf of the Commonwealth
- Schedule 9—Functions and powers of NOPSEMA
- Schedule 10—Courts
- Schedule 11—Recovery of costs and expenses
- Schedule 12—Appeals
- Schedule 13—Boundary changes
- Schedule 14—Fixed term petroleum production licences
- Schedule 15—Additional NOPSEMA inspection powers relating to well integrity laws
- Schedule 16—Civil penalties, enforceable undertakings, infringement notices, injunctions
- Schedule 17—Designated frontier areas

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4 *Explanatory Memorandum*, p. 1.

### *Summary of Amendments*

1.10 The following section discusses those amendments that are highlighted in the introduction of the EM as the main elements of the MA bill. This is then followed by specifics from schedules 1, 4, 15 and 16 also highlighted in the bill's EM. The other schedules make minor policy and technical amendments to the OPGGS Act.

#### *Transfer of regulatory functions and powers in relation to greenhouse gas storage operations*

1.11 The amendments in the MA bill, together with amendments to the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (the Environment Regulations) and the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011 (the Wells Regulations), will make NOPSEMA the regulator for offshore greenhouse gas well operations and environmental management of greenhouse gas storage activities, in addition to its existing functions as the regulator of offshore petroleum well operations and environmental management of offshore petroleum activities. Hitherto, the Minister was the regulator for greenhouse gas wells and environmental management.<sup>5</sup>

1.12 With the relative increase in greenhouse gas storage, the government, according to the bill's EM, has renewed its focus on the adequacy of greenhouse gas storage regulations. NOPSEMA has also developed substantial expertise in the regulation of offshore environmental management and well operations through its responsibility for the regulation of offshore petroleum activities.<sup>6</sup>

1.13 To ensure an experienced and independent regulator has oversight of offshore greenhouse gas storage activities, it is appropriate, according to the EM, to transfer regulatory oversight for offshore greenhouse gas wells and environmental management from the Minister to NOPSEMA.<sup>7</sup>

1.14 The Minister will retain responsibility for major resources related decisions concerning: granting greenhouse titles; imposing title conditions; the cancellation of titles; and core decisions about resource management and resource security.<sup>8</sup>

#### *Strengthen and clarify powers of NOPSEMA inspectors*

1.15 The bill strengthens and clarifies the powers of NOPSEMA inspectors to monitor and enforce compliance under the OPGGS Act and associated regulations. This change is in response to issues that NOPSEMA has identified in undertaking its compliance monitoring functions. According to the EM, it is important that NOPSEMA has appropriate powers to undertake this function, given the potential risks associated with non-compliance in a high-hazard industry.<sup>9</sup>

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5 *Explanatory Memorandum*, p. 1.

6 *Explanatory Memorandum*, p. 1.

7 *Explanatory Memorandum*, p. 1.

8 *Explanatory Memorandum*, p. 2.

9 *Explanatory Memorandum*, p. 2.

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*Valid designation of certain areas as 'frontier areas'*

1.16 The MA bill amends the OPGGS Act to retrospectively designate four areas, released as part of the 2005 Offshore Petroleum Exploration Acreage Release as 'frontier areas' for the purposes of the Designated Frontier Area tax incentive (DFA). As part of the scheme, which was in place between 2004 and 2009, the Resources Minister was able, under the *Petroleum Resource Rent Tax Assessment Act 1987* (the PRRTA Act), to allocate up to 20 per cent of each year's acreage release areas as frontier areas. Where an exploration permit was granted over a 'frontier area', the permit holder could claim up to 150 per cent of expenditure on particular exploration activities conducted in the permit area as a deduction for the purposes of the Petroleum Resource Rent Tax (PRRT).<sup>10</sup>

1.17 Under the PRRTA Act, the Resources Minister was required to designate areas in writing to include them within the DFA. However, a recently discovered administrative oversight shows this requirement was not met for the 2005 acreage release—four exploration permits that were granted were not validly designated as 'frontier areas'. To avoid any doubt regarding validity of claims under the tax incentive scheme, the amendments will retrospectively designate the areas as DFAs. This will, according to the EM, remove any doubt about the entitlement of the relevant titleholders to the uplifted PRRT deductions.<sup>11</sup>

1.18 The EM to the MA bill, while convoluted, provides explanations for specific key elements in certain schedules of the bill which are described and discussed below.

***Schedule 1: Transfer of greenhouse gas storage regulatory functions and powers***

*Monitoring and investigations*

1.19 Schedule 1 of the MA bill amends to OPGGS Act to support the transfer of regulatory functions and powers for offshore greenhouse gas storage environmental management and wells to NOPSEMA.<sup>12</sup>

1.20 The amendments extend all of the existing inspectorate functions and powers of NOPSEMA inspectors under Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) and in schedule 2A to the OPGGS Act to offshore greenhouse gas storage operations. The EM notes that this will enable NOPSEMA inspectors to monitor and investigate compliance by greenhouse gas titleholders with their obligations under the OPGGS Act and regulations. These amendments, according to the EM, represent an extension of existing inspectorate functions and powers relating to offshore petroleum operations.<sup>13</sup>

1.21 According to the EM, in all cases the inspection powers are and will continue to be limited by purpose; namely the purpose of determining whether titleholders are

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10 *Explanatory Memorandum*, p. 2.

11 *Explanatory Memorandum*, p. 2.

12 *Explanatory Memorandum*, p. 4.

13 *Explanatory Memorandum*, p. 4.

complying with their obligations under the OPGGS Act and associated regulations. The bill states that these powers are necessary to enable NOPSEMA to monitor and investigate regulatory compliance. In the context of a high-hazard industry, it is particularly important, according to the EM, to ensure the regulator has sufficient powers to ensure regulations are being complied with as non-compliance may potentially have serious consequences.<sup>14</sup>

1.22 NOPSEMA's existing inspection powers and functions for petroleum activities were designed to ensure these powers are available only to the extent that those matters relate to compliance or non-compliance of a person with their obligations under the OPGGS Act and associated regulations. Any limitation of the right to privacy in extending the existing powers and functions to inspections relating to greenhouse gas storage obligations is, according to the EM, to meet a legitimate objective, and is reasonable, necessary and proportionate to meeting that objective.<sup>15</sup>

1.23 Further, when an inspection occurs using the monitoring or investigation powers in the Regulatory Powers Act, the provisions in that Act will protect against arbitrary abuses of power and arbitrary limitations on the right to privacy.<sup>16</sup>

1.24 Similarly, right to privacy protections are in place for the powers in the OPGGS Act's schedule 2A. The powers under which NOPSEMA inspectors may enter premises without warrant specifically exclude residential premises, including the expanded categories of regulated business premises. Therefore, the risk that such entry would infringe a person's right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence is, according to the EM, extremely low. In addition to these safeguards, the use or disclosure of personal information is subject to the *Privacy Act 1988* (the Privacy Act).<sup>17</sup>

1.25 The EM argues that any limitation of the right to privacy, through the extension of existing functions and powers to greenhouse gas storage operations as they already apply to offshore petroleum activities, is considered reasonable, necessary and proportionate.<sup>18</sup>

### *Information sharing*

1.26 Schedule 1 also includes amendments to Part 6.11 of the OPGGS Act that will ensure parties responsible for the Act's administration and associated regulations have the ability to share information relating to offshore greenhouse gas storage operations with each other, and with other relevant Commonwealth, State and Northern Territory government agencies in circumstances where it is appropriate in order to enable those bodies to adequately discharge their legislative functions and powers.<sup>19</sup>

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14 *Explanatory Memorandum*, p. 4.

15 *Explanatory Memorandum*, p. 4.

16 *Explanatory Memorandum*, pp. 4-5.

17 *Explanatory Memorandum*, p. 5.

18 *Explanatory Memorandum*, p. 5.

19 *Explanatory Memorandum*, pp. 5-6.

1.27 The MA bill notes that the ability to share information will be discretionary. The amendments in schedule 1 of the bill provide that information which can be shared may include personal information. While this constitutes an interference with privacy, the use or disclosure of any personal information is also subject to the Privacy Act. The EM states that a person in possession of the information will be able to consider the type of information to be shared and the rationale for sharing it before making a decision to share that information. The Chief Executive Officer (CEO) of NOPSEMA will also have the ability to place conditions on the sharing of information with other Commonwealth, State or Northern Territory government agencies, such as conditions restricting further disclosure. A provision has been included to require parties to de-identify personal information wherever possible. The sharing of information provision, as it relates to personal information, is not to be applied retrospectively.<sup>20</sup>

1.28 According to the EM, the information sharing provisions are not arbitrary and are considered reasonable, necessary and proportionate in the circumstances and, according to the EM, lawful.<sup>21</sup>

*Expanded definition of regulated business premises*

1.29 Schedule 1 of the MA bill also contains amendments to strengthen and clarify the powers of NOPSEMA inspectors to determine whether regulated entities are compliant with their obligations. This includes expanding the categories of places that NOPSEMA inspectors may enter, without a warrant, for the purposes of conducting a monitoring inspection under schedule 2A or schedule 3 to the OPGGS Act. Expansions to the categories of places that NOPSEMA inspectors may enter without a warrant will apply to premises used in connection with either offshore petroleum operations or greenhouse gas storage operations.<sup>22</sup>

1.30 Extensions to the definition of regulated business premises in schedules 2A and 3 are, according to the EM, necessary as the current scope of regulated business premises is proving to be inadequate in practice. For example, a company that is a titleholder may not be the entity that makes decisions about the operations being carried out under the authority of that title. Oil spill response equipment could also likely to be stored at premises of a contractor of a titleholder, and it is vital, according to the EM, that NOPSEMA can readily ensure titleholders are compliant with their obligations.<sup>23</sup>

1.31 In the course of an environmental or OHS inspection, an inspector may observe things relating to persons in their capacity as private individuals. A NOPSEMA inspector would only be able to inquire into personal matters relating to an individual to the extent that those matters relate to compliance or non-compliance

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20 *Explanatory Memorandum*, p. 6.

21 *Explanatory Memorandum*, p. 6.

22 *Explanatory Memorandum*, p. 6.

23 *Explanatory Memorandum*, pp. 6-7.

with their obligations under the OPGGS Act and associated regulations. Any limitation of the right to privacy is, according to the EM, to meet a legitimate objective, and is reasonable, necessary and proportionate to meeting that objective.<sup>24</sup>

#### ***Schedule 4: Compliance powers***

1.32 Schedule 4 of the MA bill includes amendments to enable a NOPSEMA inspector to take possession of a document, or a thing, produced by a person under existing schedules and clauses of the OPGGS Act, and retain it for as long as reasonably necessary.<sup>25</sup>

1.33 The existing subclauses enable a NOPSEMA inspector to require a person to produce information if the inspector is satisfied on reasonable grounds that the person is capable of producing information that is reasonably connected with the conduct of an environmental or OHS inspection. The owner and the person with overall control at the relevant premises will be notified of the taking of possession of that item or information and the reasons for it. The power to take possession of information and items is limited to the purpose of determining whether obligations of persons under the relevant laws and regulations are being complied with.<sup>26</sup>

1.34 However, once information or items are produced, NOPSEMA inspectors do not currently have the power to take possession of and retain them for review. Such powers, according to the EM, are necessary to enable NOPSEMA to monitor and investigate compliance by persons (generally oil companies) with their obligations under the OPGGS Act and regulations. In the context of a high-hazard industry where compliance requires a major financial investment, the regulator must have sufficient powers to determine whether regulatory obligations are being complied with. According to the EM, impeding NOPSEMA's ability to retain documents or things produced in the course of an environmental or OHS inspection would not be in the public interest given the nature of the potential harm non-compliance with the OPGGS Act could cause.<sup>27</sup>

1.35 The amendments in schedule 4 provide for the documents or items to only be held for as long as reasonably necessary, and the person otherwise entitled to possession of the document would be provided with a certified true copy, which has the same status as the original in all courts and tribunals. Until that copy is provided, the person will have reasonable access to the original document. Reasonable access to an item will also be provided as long as NOPSEMA remains in possession of that item.<sup>28</sup>

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24 *Explanatory Memorandum*, p. 7.

25 *Explanatory Memorandum*, p. 7.

26 *Explanatory Memorandum*, p. 7.

27 *Explanatory Memorandum*, p. 8.

28 *Explanatory Memorandum*, p. 8.

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**Schedule 15: Additional inspection powers relating to well integrity laws**

1.36 Schedule 15 of the MA bill introduces a new schedule 2B to the OPGGS Act, which will enable NOPSEMA inspectors to undertake inspections without a warrant to monitor compliance by offshore petroleum and greenhouse gas titleholders with well integrity-related obligations under the OPGGS Act and regulations. The new schedule includes inspections powers that are equivalent to those in the existing OPGGS Act's schedule 2A (environmental management inspections) and schedule 3 (OHS inspections).<sup>29</sup>

1.37 Non-compliance by a person with well integrity-related obligations may increase the risks to health or safety of persons and the environment from offshore operations, which may have potentially serious consequences.<sup>30</sup>

1.38 As accessing offshore facilities can be difficult, the risks associated with offshore activities and the frequent changes to operational decisions, the requirement to obtain a warrant may impede NOPSEMA's ability to conduct inspections of well activities at the appropriate time. Delays involved in obtaining a warrant, where the well activity has been brought forward for operational reasons, could mean the well activity is completed and the rig has departed before the NOPSEMA inspector has authority to conduct the inspection. This, according to the EM, could impede NOPSEMA's ability to respond quickly in an emergency.<sup>31</sup>

**Schedule 16: Civil penalties and enforceable undertakings**

1.39 Schedule 16 amends the OPGGS Act to enable the Minister, the National Offshore Petroleum Titles Administrator (the Titles Administrator) and the CEO of NOPSEMA to accept and enforce undertakings in relation to compliance with provisions of the OPGGS Act and regulations.<sup>32</sup>

1.40 If the Minister, the Titles Administrator or the CEO of NOPSEMA, accept an undertaking, they will be required to publish the undertaking. This requirement, the EM notes, is considered important in the context of government transparency.<sup>33</sup>

1.41 To ensure the right to privacy is safeguarded, if an undertaking contains personal information within the meaning of the Privacy Act, the Minister, the Titles Administrator or the CEO of NOPSEMA (as applicable) is required to take reasonable steps to ensure the information is de-identified before the undertaking is published.<sup>34</sup>

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29 *Explanatory Memorandum*, p. 8.

30 *Explanatory Memorandum*, p. 8.

31 *Explanatory Memorandum*, p. 8.

32 *Explanatory Memorandum*, p. 9.

33 *Explanatory Memorandum*, p. 9.

34 *Explanatory Memorandum*, p. 9.

*Enforceable undertakings*

1.42 The EM highlights a review undertaken by the Australian Government of Commonwealth legislation applicable to offshore petroleum activities and the marine environment (the Legislative Review), in the wake of the incident at the Montara Wellhead Platform in August 2009, which concluded that the enforcement mechanisms, sanctions and penalties available under the OPGGS Act at the time were insufficient to provide an effective and meaningful deterrent against non-compliance.<sup>35</sup>

1.43 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. As such, the introduction of enforceable undertakings into the OPGGS Act is designed to ensure the regulator has the capacity to apply an appropriate and proportionate response to incidents of non-compliance with the OPGGS Act and regulations, in order to encourage improved compliance outcomes. These amendments will also complement the existing alternative enforcement tools that were introduced in amendments to the OPGGS Act made in 2013, including civil penalties, infringement notices and injunctions.<sup>36</sup>

1.44 The amendments trigger the application of the standard provisions in Part 6 of the Regulatory Powers Act. This Part creates a framework for accepting and enforcing undertakings relating to compliance with provisions, where another Act makes the provision enforceable under that Part. An undertaking accepted by a regulator may be enforced in a court, which may make an order directing compliance, an order requiring any financial benefit from the failure to comply to be surrendered, and/or an order for damages. Failure to comply with an enforceable undertaking would also be an offence under the OPGGS Act.<sup>37</sup>

1.45 Although the regulators currently have access to a range of enforcement tools, enforceable undertakings, the EM states, offer a unique benefit. While existing regulatory tools can require a duty holder to cease an activity or reach a minimum standard of compliance, enforceable undertakings can go beyond this to effect meaningful changes to overall compliance culture. Enforceable undertakings allow the regulator to secure more timely and cost-effective outcomes that would not be achievable by a prosecution. Further, enforceable undertakings remove the need for the regulator to pay the potentially sizeable costs associated with prosecution in a court. The regulator can also tailor the enforcement response to individual circumstances, taking specific titleholder and broader industry considerations into account.<sup>38</sup>

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35 *Explanatory Memorandum*, p. 99.

36 *Explanatory Memorandum*, p. 99.

37 *Explanatory Memorandum*, p. 99.

38 *Explanatory Memorandum*, p. 100.

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*Right to be presumed innocent until proven guilty*

1.46 Article 14(2) of the International Convention on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The protections in Article 14(2) only apply in criminal proceedings. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Offence provisions which place an evidential or legal burden on the defendant and no-fault offences, such as strict and absolute liability offences which allow for the imposition of criminal liability without the need to prove fault, will engage the presumption of innocence. This is because a defendant's failure to discharge the burden or the lack of a burden altogether may permit their conviction despite reasonable doubt as to their guilt.<sup>39</sup>

*Strict liability offences*

1.47 A number of schedules in the MA bill state that failure to comply with certain sections of the bill will result in offences of strict liability or sometimes referred to as absolute liability.<sup>40</sup>

1.48 Schedule 1 of the MA bill notes that, a failure to comply with the new sections and subsections in schedule 1, will be offences of strict liability. Further, the EM notes, amendments in schedule 1 will ensure the existing strict liability offence in clause 12 of schedule 2A will apply to a notice given during an inspection in relation to greenhouse gas environmental management obligations, as well as to existing petroleum environmental management obligations.<sup>41</sup>

1.49 The OPGGS Act contains a range of strict liability offences for circumstances where fault may be difficult to prove due to the remote and complex nature of offshore operations and the prevalence of multiple titleholder arrangements. In terms of the presumption of innocence as afforded to individuals, the reality is that investigations and prosecutions are conducted largely, if not solely, in relation to companies—not individuals. Indeed, prosecutions to date have only been in relation to companies. According to the EM, it is not anticipated that this approach will change given the industry's nature and the requirements imposed.<sup>42</sup>

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39 *Explanatory Memorandum*, p. 9.

40 Australian Law Reform Commission, strict liability offences are offences where the liability of a particular offence can be attributed regardless of fault. If the cause of action were one of strict liability, then the defendant would be held liable even though they were not at fault, that is, the defendant's actions were not intentional, reckless or negligent.  
<https://www.alrc.gov.au/publications/7-fault/strict-liability> (accessed 27 July 2018).

41 *Explanatory Memorandum*, p. 9.

42 *Explanatory Memorandum*, p. 10.

1.50 100 penalty units<sup>43</sup> are considered appropriate for a failure to comply with a direction given by NOPSEMA. This is higher than the preference stated in *A Guide To Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011* (the Guide) for a maximum 60 penalty units for offences of strict liability. However, the EM notes that offshore resources activities require a very high level of expenditure and a smaller penalty would, according to the EM, be an ineffective deterrent. Penalties for other new or extended offences of strict liability are less than 60 penalty units, consistent with the Guide's preference.<sup>44</sup>

### ***Commencement***

1.51 Commencement of the bill will be on Royal Assent.

### ***Financial Impact***

1.52 The EM states that the MA bill is expected to have no financial impact. Amendments to the Regulatory Levies Act and the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004 will ensure NOPSEMA is fully cost-recovered for its new regulatory functions in relation to greenhouse gas wells and environmental management.<sup>45</sup>

1.53 The amendments retrospectively designating certain areas as DFAs for the purposes of the tax incentive are not expected to have any financial impacts.<sup>46</sup>

### ***Compatibility with Human Rights***

1.54 According to the EM, the MA 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*.<sup>47</sup>

### ***Human Rights implications***

1.55 Schedules 1, 4, 12, 15 and 16 to the MA bill engage with rights protected under the ICCPR. The EM stated that the provisions contained in those schedules are compatible with human rights as, to the extent that they limit human rights or freedoms, those limitations are reasonable, necessary and proportionate to the legitimate objectives that the provisions aim to achieve.<sup>48</sup>

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43 A penalty unit as a monetary sum are defined by Section 4AA of the Crimes Act. Penalty units under Commonwealth laws increased from \$180 each to \$210 each from 1 July 2017 following the passing by Parliament of the *Crimes Amendment (Penalty Unit) Act 2017*. <https://www.brightlaw.com.au/penalty-units-to-increase-on-1-july-2017/> (accessed 30 July 2018.)

44 *Explanatory Memorandum*, p. 10.

45 *Explanatory Memorandum*, p. 2.

46 *Explanatory Memorandum*, p. 2.

47 *Explanatory Memorandum*, p. 3.

48 *Explanatory Memorandum*, p. 3.

1.56 The remainder of the bill's amendments are, according to the EM, mechanical or technical in nature and do not abridge or otherwise engage with applicable human rights or freedoms.<sup>49</sup>

*Right to privacy and reputation*

1.57 Article 17 of the ICCPR 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 are 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.<sup>50</sup>

***Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018***

1.58 The purpose of the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018 (the RL bill) is to amend the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (the Levies Act) to:

- impose a well investigation levy, an annual well levy and a well activity levy in relation to greenhouse gas wells;
- revise provisions which impose a well activity levy, as a consequence of amendments to Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011 (the Wells Regulations);
- revise provisions which impose a safety investigation levy and well investigation levy as a consequence of previous amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act); and
- remove certain spent provisions.<sup>51</sup>

*Schedules to the RL bill*

1.59 The bill consists of five schedules:

- Schedule 1—Well activity levy
- Schedule 2—Greenhouse gas storage
- Schedule 3—Investigations
- Schedule 4—Abandoned wells
- Schedule 5—Removal of spent provisions

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49 *Explanatory Memorandum*, p. 3.

50 *Explanatory Memorandum*, p. 3-4.

51 *Explanatory Memorandum*, p. 1.

### *Summary of Amendments*

1.60 The following section discusses amendments that are specifically highlighted in the introduction of the EM as the main impact of the RL bill.

#### *Imposition of levies in relation to greenhouse gas wells*

1.61 The EM notes that NOPSEMA's operations are fully cost-recovered by way of fees and levies imposed on the offshore petroleum and greenhouse gas storage industries. As NOPSEMA is to be the regulator for greenhouse gas wells, NOPSEMA will need to recover its costs in undertaking greenhouse gas well-related regulatory functions to avoid any funding shortfalls. These levies are currently only imposed in relation to petroleum wells, as NOPSEMA is currently the regulator of offshore petroleum well operations.<sup>52</sup>

#### *Consequential amendments—well activity levy*

1.62 Amendments to the Wells Regulations commenced on 1 January 2016, which implemented the outcomes of a review of those Regulations. These amendments established a regime under which a single well operations management plan (WOMP) covers all stages of the life of a well, and is required to be revised every five years. The amendments also removed the requirement for a titleholder to apply to NOPSEMA for approval to commence well activities.<sup>53</sup>

1.63 Currently, under the Levies Act, a well activity levy is imposed on applications for acceptance of a new WOMP and on applications for approval to commence well activities. As a consequence of the amendments to the Wells Regulations, this Bill amends the Levies Act to also impose a well activity levy on submission of a five-yearly revision of a WOMP, and to remove the levy imposed on applications for approval to commence well activities.<sup>54</sup>

1.64 Previous changes to legislation and regulations have affected NOPSEMA's revenue. The Annual Report noted that:

Changes to the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011 generated an additional \$1.5 million of revenue, primarily due to a significant increase in WOMP submissions before the December 2017 deadline.<sup>55</sup>

#### *Consequential amendments—safety investigation levy and well investigation levy*

1.65 Under the Levies Act's section 5, a safety investigation levy is imposed if a NOPSEMA inspector conducts an inspection in relation to a notifiable accident or occurrence, and the costs and expenses reasonably incurred by NOPSEMA in relation

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52 *Explanatory Memorandum*, p. 1.

53 *Explanatory Memorandum*, p. 1.

54 *Explanatory Memorandum*, p. 1.

55 NOPSEMA Annual Report, 2016-17, p. 45, <https://www.nopsema.gov.au/assets/Publications/NOPSEMA-Annual-Report-2016-17.pdf> (accessed 19 July 2018).

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to the inspection exceed \$30 000. Similarly, under section 9, a well investigation levy is imposed if NOPSEMA conducts an inspection concerning a contravention, or possible contravention, of the OPGGS Act and the costs and expenses reasonably incurred by NOPSEMA in relation to the inspection exceed \$30 000.<sup>56</sup>

1.66 At the time when the provisions relating to these levies were drafted, the term 'inspection' was used to refer to either a monitoring inspection or an investigation into a possible contravention, which were both carried out under schedule 3 to the OPGGS Act. Investigations into possible contraventions are now conducted under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act), as it is applied by the Levies Act. The Bill amends the Levies Act to clarify that it is an investigation under Part 3 of the Regulatory Powers Act in relation to which a safety investigation levy or well investigation levy may be imposed.<sup>57</sup>

#### *Removal of spent provisions*

1.67 Certain transitional provisions that were inserted into the Levies Act by the *Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Act 2011* have now fulfilled their intended function. The EM noted that these provisions are fully spent and will be repealed by the Bill.<sup>58</sup>

#### ***Commencement***

1.68 Commencement will be on Royal Assent.

#### ***Financial Impact***

1.69 The bill, according to the EM, is expected to have no financial impact. The amendments will ensure that NOPSEMA is fully cost-recovered for its regulatory operations.<sup>59</sup>

#### ***Compatibility with Human Rights***

1.70 As required under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the government has assessed the bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The government considers that all schedules in the bill are compatible.<sup>60</sup>

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56 *Explanatory Memorandum*, p. 2.

57 *Explanatory Memorandum*, p. 2.

58 *Explanatory Memorandum*, p. 2.

59 *Explanatory Memorandum*, p. 2.

60 *Explanatory Memorandum*, p. 3.



## Chapter 2

### Views on the bills

2.1 This chapter summarises the views held by stakeholders on the provisions of the bills and their effects.

#### Support for the bills

2.2 The committee received five submissions in total. Of these, the area that raised the most concern related to schedule 16 of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (the MA bill).

2.3 The agency directly responsible in this area, the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), raised no concerns about the bills and advocated that they come into force 'as soon as is reasonably practicable' and argued that 'the proposed amendments will assist NOPSEMA to drive positive safety, well integrity and environmental management outcomes for regulated operations'.<sup>1</sup>

2.4 Similarly, the Department of Industry, Innovation and Science (DIIS) was also supportive of both bills with particular emphasis on the MA bill.

2.5 With regard to the schedule 13 amendments on coastal water boundary changes and greenhouse gas titles contained in that bill, the DIIS noted that:

... with provisions similar to those progressed a few years ago for petroleum, the Miscellaneous Bill contains amendments to remove doubt that greenhouse gas titles may be renewed in the event of a change to the boundary between Commonwealth waters and state coastal waters.<sup>2</sup>

2.6 The DIIS also noted that with regard to powers of NOPSEMA inspectors—mainly covered in schedule 15—that:

The amendments in the Miscellaneous Bill will also strengthen and clarify the powers of NOPSEMA inspectors to determine whether regulated entities are compliant with their obligations under the [Offshore Petroleum and Greenhouse Gas Storage Act 2006] OPGGS Act and associated regulations.<sup>3</sup>

2.7 The DIIS was also positive about the introduction of enforceable undertakings, (schedule 16) seeing them as adding to the extensive range of compliance and enforcement responses available to Government and enabling an

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1 National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), *Submission 1*, p. 1.

2 Department of Industry, Innovation and Science (DIIS), *Submission 2*, p. 3.

3 DIIS, *Submission 2*, p. 3.

appropriately targeted and tailored enforcement response, taking specific titleholder and broader industry considerations into account.<sup>4</sup>

2.8 The DIIS concluded that, with regard to the MA bill:

... this suite of measures underscores an ongoing commitment to the maintenance and continuous improvement of a strong and effective regulatory framework for offshore petroleum and greenhouse gas storage. The measures also serve to enhance the regime's currency and alignment with international best practice.<sup>5</sup>

### **Critical comment on the bills**

2.9 The committee also received submissions from the Electrical Trades Union of Australia (ETU),<sup>6</sup> the Australian Manufacturers Workers' Union (AMWU)<sup>7</sup> and the Australian Council of Trade Unions (ACTU) all of who were critical only of the MA bill. As the ETU and AMWU submissions were brief and their comments mirrored and supported the ACTU submission, the committee has concentrated its analysis on that submission.

2.10 The ACTU focussed its critique on schedule 16 which amends the OPGGS Act to enable the Minister, the National Offshore Petroleum Titles Administrator (the Titles Administrator) and the CEO of NOPSEMA to accept and enforce undertakings in relation to compliance with provisions of the OPGGS Act and regulations, specifically with regard to work, health and safety (WHS).<sup>8</sup>

2.11 The ACTU expressed two concerns in relation to these amendments. First, in certain circumstances the ACTU argued that enforceable undertakings are not an appropriate regulatory tool and should be prohibited.<sup>9</sup> The ACTU stated:

Enforceable undertakings are an alternative to court-imposed sanctions and, when properly utilised, can achieve long-term, sustainable improvements to WHS culture and practice in workplaces and across sectors. However, when overused or misused, enforceable undertakings have the potential to undermine compliance. The ACTU is supportive of enforceable undertakings being available to WHS regulators, but only if they are subject to appropriate safeguards and strict guidelines and their usage is consistently monitored.<sup>10</sup>

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4 DIIS, *Submission*, 2, p. 4.

5 DIIS, *Submission* 2, p. 4.

6 Electrical Trades Union of Australia (ETU), *Submission* 3

7 Australian Manufacturing Workers' Union (AMWU), *Submission* 5.

8 Australian Council of Trade Unions (ACTU), *Submission* 4, p. 1.

9 ACTU, *Submission* 4, p. 1.

10 ACTU, *Submission* 4, p. 2.

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2.12 The ACTU recommended an amendment to the bill to address these concerns:<sup>11</sup>

- Enforceable undertakings are prohibited in the following circumstances, except where exceptional circumstances exist:
  - the contravention is connected to a fatality;
  - the contravention involves reckless conduct;
  - the applicant has a recent prior conviction connected to a work-related fatality; or
  - the applicant has more than two prior convictions arising from separate investigations.<sup>12</sup>

2.13 Second, NOPSEMA is, in the ACTU's view, a regulator that has demonstrated 'an overreliance on the lower levels of the regulatory pyramid' and 'an unwillingness to sensibly penalise or prosecute repeat offenders'.<sup>13</sup> The ACTU argued that 'this problem could be exacerbated if the NOPSEMA is given this additional enforcement tool without appropriate legislative safeguards'.<sup>14</sup>

2.14 The ACTU argued that NOPSEMA needed to improve its strategic enforcement activity and argued that prosecution at 'the top of the regulatory pyramid' is necessary to maximise cooperative compliance at the bottom.<sup>15</sup> The ACTU further expressed its concern that:

...given NOPSEMA's failure to properly exercise its enforcement powers, and given the inherently dangerous nature of the offshore petroleum industries, that appropriate limitations on the use of enforceable undertakings need to be provided for in legislation and not in policy, which is developed and enforced by the regulator.<sup>16</sup>

2.15 Further critical comments of the current regulatory regime that governs the oil and gas industry and its regulator in the three union submissions were not strictly related to the schedules and clauses contained in the bills.

2.16 The committee received no negative comments regarding the Offshore Petroleum and Greenhouse Gas Storage Amendment (Regulatory Levies) Bill 2018.

### **Committee view**

2.17 As stated in chapter 1, the amendments proposed within these bills include: to transfer regulatory responsibility for offshore greenhouse gas wells and environmental management from the Minister to NOPSEMA; strengthen and clarify the powers of

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11 ACTU, *Submission 4*, p. 1.

12 ACTU, *Submission 4*, p. 2.

13 ACTU, *Submission 4*, p. 1, and p. 3.

14 ACTU, *Submission 4*, p. 1.

15 ACTU, *Submission 4*, p. 4.

16 ACTU, *Submission 4*, p. 4.

NOPSEMA inspectors; ensure valid designation of certain areas as 'frontier areas', impose a well investigation levy, an annual well levy and a well activity levy in relation to greenhouse gas wells; revise provisions which impose a well activity levy; and revise provisions which impose a safety investigation levy and well investigation levy.

2.18 Apart from the two explanatory memorandums which would benefit from a revisit in terms of their structure and clarity, the committee supports the intent of the amendments in both bills and believes that the amended Acts will improve the regulation of offshore petroleum and greenhouse gas wells.

2.19 The committee is cognisant of the unions' concerns regarding enforceable undertakings. A review of enforceable undertakings after a period of two years would be of assistance in determining if the concerns expressed are justified. Accordingly, the committee recommends that a review period be added to the amendments.

### **Recommendation 1**

**2.20 That Senate Standing Committee on Economics recommends a two year review period for enforceable undertakings be inserted into the proposed amendments to ascertain if are the most suitable way of ensuring compliance with the relevant legislation.**

2.21 The other concerns raised by the three unions largely deal with broader workplace safety issues not necessarily related to the schedules and clauses contained in these two bills. The committee notes that the Senate Education and Employment References Committee will shortly complete its inquiry into the work health and safety of workers in the offshore petroleum industry and is examining many of the issues raised by these submitters. Notwithstanding these concerns, which the committee see as legitimate, the committee supports the intent and content of these bills and recommends that they be passed.

### **Recommendation 2**

**2.22 That Senate Standing Committee on Economics recommends that the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018; and the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018 be passed.**

**Senator Jane Hume**

**Chair**

## Additional Comments

1.1 Labor Senators are broadly supportive of the intent of this legislation but wish to make some brief remarks, particularly about Schedule 16, which enable the Minister, the National Offshore Petroleum Titles Administrator (the Titles Administrator) and the CEO of NOPSEMA to accept and enforce undertakings in relation to compliance with provisions of the OPGGS Act and regulations.<sup>1</sup>

### *The use of enforceable undertakings*

1.2 Labor Senators agree with the Australian Council of Trade Unions (ACTU) that offshore petroleum should be held to the highest levels of workplace health and safety standards.

In considering the ACTU's recommendation, the industry context must be taken into account. Offshore petroleum is one of Australia's most dangerous industries. It is dangerous because the nature of the work performed is inherently high risk, and because it is performed in remote locations where medical assistance is not at hand. In this context our WHS laws ought to be at their most rigorous.<sup>2</sup>

1.3 Labor Senators also note that the same submission highlights that the use of enforceable undertakings in the case of fatalities at workplaces and other related circumstances was not considered best practice during the *Best Practice Review of Workplace Health and Safety Queensland*.

WHS regulation ought to be best practice in the offshore petroleum industry given its inherently dangerous nature. The Best Practice Review of Workplace Health and Safety Queensland Final Report (Best Practice Review) considered in detail the use of enforceable undertakings in WHS regulation and recommended that, among other things, in relation to the enforceable undertakings framework:

- a. The Work Health Safety Act 2011 be amended to expressly prohibit enforceable undertakings being accepted for contraventions or alleged contraventions of the WHS Act 2011 that relate to circumstances involving a fatality.
- b. The Guidelines for the acceptance of an enforceable undertaking be amended to provide a general exception (unless exceptional circumstances exist) where the applicant has a recent prior conviction connected to a work-related fatality; the applicant has more than two prior convictions arising from separate investigations, or the application relates to an incident involving a very serious injury.

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1 Explanatory Memorandum, p. 9.

2 ACTU, *Submission 4*, p. 1.

- c. For consistency, 'very serious injury' should be defined as stated in the WorkCover New South Wales Enforceable undertakings: Guidelines for proposing an enforceable undertaking.<sup>3</sup>

1.4 Labor Senators also note the work of Senator Marshall in establishing and chairing an inquiry into work health and safety impacts of workers in the offshore petroleum industry. Work such as this highlights that Labor takes issues relating to workplace health and safety very seriously.

### ***Environmental Management***

1.5 Labor Senators note this bill transfers regulatory responsibility for environmental management of offshore greenhouse gas storage from the Minister to NOPSEMA, strengthens and clarifies the role of NOPSEMA inspectors and modifies related levies.

1.6 Labor Senators further note that the Bill seeks to improve administrative regulatory compliance arrangements.

### ***Recommendations in the Chair's report***

1.7 Labor Senators note Recommendations 1 and 2 in the Chair's report. Labor Senators also note the work of the Shadow Minister, who is in discussions with the Minister with the purpose of drafting amendments that can provide suitable arrangements governing the use of enforceable undertakings.

1.8 Labor Senators reserve their final judgment on this bill until the discussions between the Minister and Shadow Minister are concluded.

### **Recommendation 1**

**1.9 That the Government continue to work with the Opposition to find amendments to this legislation that would limit the use of enforceable undertakings to where it is appropriate.**

**Senator Chris Ketter**  
**Deputy Chair**

**Senator Jenny McAllister**  
**Senator for New South Wales**

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3 ACTU, *Submission 4*, p. 5.

# **Appendix 1**

## **Submissions**

### **Submissions**

1. NOPSEMA
2. Department of Industry, Innovation and Science
3. Electrical Trades Union of Australia
4. Australian Council of Trade Unions (ACTU)
5. Australian Manufacturing Workers' Union (AMWU)

