



Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010

This is a revised edition of a Bills Digest previously prepared for the 42nd Parliament

Sharon Scully
Law and Bills Digest Section

Contents

Reintroduction of Bill	2
Purpose	3
Background	3
Independent NOPSA Review 2008.....	3
Productivity Commission Inquiry 2008–09.....	4
Onshore petroleum safety regulation inquiry 2009	5
Committee consideration	6
Position of major interest groups	6
Financial implications.....	7
Key provisions	7
NOPSA’s new non-OHS functions	7
Comment	9
Strict liability offences	10
Comment	11
Restricting titleholders’ OHS responsibilities	12
Concluding comments	14

Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010

Date introduced: 29 September 2010

House: House of Representatives

Portfolio: Resources and Energy

Commencement: Sections 1–3: on Royal Assent; Schedule 1 Parts 1–6: day after Royal Assent; Schedule 1 Part 7: 1 January 2010

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Reintroduction of Bill

The Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010 (the Bill) was first introduced into the 42nd Parliament on 10 February 2010 and lapsed on the proroguing of Parliament in July 2010.

The Bill was re-introduced in the first week of the 43rd Parliament with some changes. One particular amendment is that the current Bill no longer proposes to enable the Commonwealth to retain registration fees to fund the establishment of the National Offshore Petroleum Regulator (NOPR).¹ That proposal had arguably been the most contentious proposal in the original Bill.²

1. For a discussion about the policy behind this proposal in the original Bill, see the Bills Digest for that Bill: S Scully, *Offshore Petroleum and Greenhouse Gas Storage (Miscellaneous Measures) Amendment Bill 2010*, Bills Digest, no. 126, 2009–10, Parliamentary Library, Canberra, 2010, viewed 6 October 2010, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd126.pdf>

2. For information and commentary about this proposal, see *ibid.*, p. 8. For comments by the Legislation Committee of the Senate Standing Committee on Economics on this proposal in the original Bill, see Senate Standing Committee on Economics, *Final Report*, April 2010, Chapter 2, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/economics_ctte/petroleum_2010/report/report.pdf

For information about the inquiry by the Senate Standing Committee on Economics into proposed provisions of the original Bill, please refer to p. 6 of this Digest.

Purpose

The Bill seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) for several reasons, including:

- adding to the functions of the National Offshore Petroleum Safety Authority (NOPSA) the regulatory oversight of non-occupational health and safety (OHS) structural integrity for facilities, wells and well-related equipment
- making certain offences under the Act (consisting of a failure to do or the doing of an act) strict liability offences, and
- restricting titleholders' OHS responsibilities to wells and not to facilities more generally.³

Background

For background information about inquiries and reforms relating to offshore petroleum and greenhouse gas storage, and in particular, NOPSA's role and issues relating to OHS, see the Bills Digests for:

- the [Offshore Petroleum Amendment \(Greenhouse Gas Storage\) Bill 2008](#), and
- the [Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Bill 2009](#).⁴

Please note that, along with this Bill, the Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Amendment Bill 2010 (the Safety Levies Amendment Bill) had also been re-introduced into Parliament on 29 September 2010.⁵

Independent NOPSA Review 2008

NOPSA was established on 1 January 2005 under the *Petroleum (Submerged Lands) Act 1967* (PSLA) and, under the PSLA, NOPSA's operational effectiveness had to be reviewed after three years.⁶ A

3. As to the meaning of 'facilities', 'non-OHS structural integrity' and 'well-related equipment', see *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, Schedule 3 clause 4; and **items 1** and **5** of **Schedule 1 Part 1** of the Bill, respectively.

4. J Styles, M Coombs, S Scully and K Post, *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008*, Bills Digest, no. 26, 2008–09, Parliamentary Library, Canberra, 2008, pp. 6–14; M Coombs, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Bill 2009*, Bills Digest, no. 133, 2008–09, Parliamentary Library, Canberra, 2009, pp. 3–11.

5. For further information about the Safety Levies Amendment Bill, see M Coombs, *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Amendment Bill 2010*, Bills Digest, no. 7, 2010–11, Parliamentary Library, Canberra, 2010.

6. For further information about this review, see Department of Resources, Energy and Tourism, *National Offshore Petroleum Safety Authority – operational review of NOPSA*, viewed 6 October 2010, http://www.ret.gov.au/resources/upstream_petroleum/offshore_petroleum_safety/national_offshore_petroleum_safety_authority/Pages/NationalOffshorePetroleumAuthority.aspx.

team of three independent safety experts (the review team) conducted the review during 2007 and subsequently reported to the Minister of Resources, Energy and Tourism on 4 March 2008.⁷

The review team supported the view that the NOPSA's regime should cover, and be adequately resourced to cover, the integrity of pipelines, subsea equipment and wells.⁸ In particular, the review team pointed out that:

Stakeholders including State regulators support the view that the legislated coverage of NOPSA should be extended to encompass the integrity of pipelines, subsea equipment and wells. These issues are currently covered under other arrangements such as Well Operations Management Plans (WOMPs) and Pipeline Management Plans, where regulatory responsibilities are shared by the DA's and NOPSA.

If the intent of the Safety Case is to include all risks impacting upon the integrity of the system, then inclusion of all hydrocarbons, carbon dioxide storage and other risks from the reservoir (well) through to the custody transfer point should be considered. In the example of WOMPs the interaction with operatorship of the drilling operations needs to be considered in parallel to ensure clarity.

The regulation of the safety aspects of carbon capture, transport and storage could feasibly fit into NOPSA's model and boundaries. There is however a concern that the additional workload/focus may detract from NOPSA's current responsibilities. Additionally, regulatory boundaries imposed by a system that may include onshore and offshore facilities may present regulatory coverage challenges.⁹

Productivity Commission Inquiry 2008–09

On 10 April 2008, the Assistant-Treasurer requested the Productivity Commission to undertake an inquiry of regulatory burdens on the upstream (oil and gas) sector, with 12 months in which to submit a report.¹⁰

In particular, the Productivity Commission was asked to:

- assess the impact of the existing regulatory framework on the international competitiveness and economic performance of Australia's petroleum sector

7. See M Ognedal, D Griffiths and B Lake, *Review of the National Offshore Petroleum Safety Authority operational activities February-March 2008*, Commonwealth of Australia, 2008, viewed 6 October 2010, http://www.ret.gov.au/resources/upstream_petroleum/offshore_petroleum_safety/national_offshore_petroleum_safety_authority/Documents/report_independent_review_team_final.pdf

8. Ibid., p. 21.

9. Ibid. 'DA' refers to 'Designated Authority': see *Offshore Petroleum and Greenhouse Gas Storage Act 2006* sections 7 and 70.

10. Productivity Commission, 'Review of regulatory burden on the upstream petroleum (oil and gas) sector', *Research report*, April 2009, Melbourne, p. 1, viewed 6 October 2010, <http://www.pc.gov.au/projects/study/upstreampetroleum/report>

- report on regulatory impediments to improved performance, such as jurisdictional inconsistencies and duplication, as well as ways to address these impediments, and
- consider options for a national regulatory authority as a means of addressing issues of regulatory inconsistencies and duplication.¹¹

During the course of conducting its inquiry, the Productivity Commission consulted with stakeholders by holding informal discussions and roundtables; as well as inviting and considering submissions to an issues paper released in July 2008 and a draft report subsequently released.¹²

The Productivity Commission made several recommendations in its final report, including:

- a staged development of a national offshore petroleum regulator to undertake resource management, pipeline and environmental regulation in all Commonwealth, State and Territory waters:
 - initially—the regulator would only operate in Commonwealth waters
 - subsequently—the States and Territories would be given, on a bilateral basis, the option of conferring their petroleum regulatory obligations¹³
- the national regulator would be self-funding through fees,¹⁴ and
- NOPSA would remain a separate entity, with functions extending to offshore pipelines, subsea equipment and wells.¹⁵

Onshore petroleum safety regulation inquiry 2009

On 9 January 2009, Martin Ferguson (Commonwealth Minister for Resources and Energy) and Norman Moore (Western Australian Minister for Mines and Petroleum) requested an inquiry into the OHS and integrity regulation of upstream petroleum operations, with reference to the oil and gas explosion on 3 June 2008 at Apache Energy Ltd’s facilities on Varanus Island.¹⁶

11. Ibid., pp. 2–3.

12. Copies of the submissions are available at: Productivity Commission, *Review of regulatory burden on the upstream petroleum (oil and gas) sector: submissions*, viewed 6 October 2010, <http://www.pc.gov.au/projects/study/upstreampetroleum/submissions>

13. See Productivity Commission, ‘Review of regulatory burden on the upstream petroleum (oil and gas) sector’, op. cit., pp. xx, 248–250.

14. Ibid., pp. 263–265.

15. Ibid., pp. xx. For a discussion regarding OHS issues and NOPSA’s role in the regulation of upstream petroleum sector, see *ibid.*, pp. 167–195.

16. For further information about this inquiry, see Department of Resources, Energy and Transport, *Offshore Petroleum Safety*, viewed 6 October 2010, http://www.ret.gov.au/resources/upstream_petroleum/offshore_petroleum_safety/Pages/OffshorePetroleumSafety.aspx

Note that the Terms of Reference of the inquiry had to be altered due to the Federal Court’s findings in proceedings initiated by Apache Energy on 22 May 2009: see K Bills and D Agostini, *Offshore Petroleum Regulation: better practice*

The report was released in July 2009.¹⁷

In summary, the panel conducting the inquiry found that NOPSA was ‘seriously under-resourced’ even to discharge its existing responsibilities.¹⁸ The panel also recommended that NOPSA be given powers to enable it to regulate the safety and integrity of all facilities and pipelines in the water and Western Australian islands which export gas by pipelines.¹⁹

Committee consideration

As previously noted, the Bill was first introduced into the 42nd Parliament. On 24 February 2010, the original Bill had been referred to the Legislation Committee of the Senate Standing Committee on Economics (the Economics Legislation Committee) for inquiry and report by 23 April 2010.²⁰ The Economics Legislation Committee recommended that the Senate pass the Bill.²¹

In addition, the original Bill had been examined by the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee), whose comments will be addressed, where relevant, in the Key Provisions section of this Digest.²²

The Senate Standing Committee for the Selection of Bills resolved to recommend that the current Bill not be referred to a parliamentary committee for inquiry and report.²³

Position of major interest groups

Several submissions were received in relation to the Economics Legislation Committee’s inquiry into the provisions of the original Bill.²⁴

and the effectiveness of the National Offshore Petroleum Safety Authority, June 2009, pp. ix–x, viewed 6 October 2010,

<http://www.ret.gov.au/resources/Documents/Offshore%20Petroleum%20Safety/NOPSA%20Safety%20AuthorityWEB.pdf>.

17. Department of Resources, Energy and Transport, *Offshore Petroleum Safety*, op. cit.
18. K Bills and D Agostini, op. cit., p. xi.
19. Ibid., p. 17.
20. Details of the inquiry are at Senate Standing Committee on Economics, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010: information about the inquiry*, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/economics_ctte/petroleum_2010/info.htm
21. Senate Standing Committee on Economics, *Final Report*, April 2010, p. 12, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/economics_ctte/petroleum_2010/report/report.pdf
22. For a copy of the Scrutiny of Bills Committee’s comments, see Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 2, 24 February 2010, pp. 55–60, viewed 2 March 2010, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2010/d02.pdf>
23. Senate Standing Committee for the Selection of Bills, ‘Report no. 11 of 2010’, Senate, *Hansard*, 30 September 2010, p. 104.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

Stakeholders' comments regarding the extension of NOPSA's functions are also set out in submissions made to the various inquiries mentioned above.²⁵

Stakeholders' comments will be addressed, where relevant, in the Key Provisions section of this Digest.

Financial implications

The Explanatory Memorandum states that the Bill has no financial impact and would not impose any new regulatory burden on the petroleum industry.²⁶

Key provisions

Schedule 1 of the Bill contains provisions relating to several matters. Due to time restrictions, this Digest will only focus on the following:

- new functions for NOPSA relating to non-OHS structural integrity for facilities, wells and well-related equipment
- making certain existing offences under the Act strict liability offences, and
- restricting titleholders' OHS responsibilities to wells and not to facilities more generally.

NOPSA's new non-OHS functions

Part 1 sets out proposed amendments relating to NOPSA's new non-OHS functions.

NOPSA currently regulates OHS matters arising from petroleum and greenhouse gas operations in Commonwealth waters.²⁷ Its functions extend to structural integrity of facilities (including pipelines), and also to wells that are part of those facilities, to the extent to which the structural integrity affects the safety of the offshore workforce at the facilities.²⁸

24. See Senate Standing Committee on Economics, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010: information about the inquiry – submissions received*, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/economics_ctte/petroleum_2010/submissions.htm

25. And in particular, submissions made to the Productivity Commission's inquiry. Copies of those submissions are available at: Productivity Commission, *Review of regulatory burden on the upstream petroleum (oil and gas) sector: submissions*, viewed 2 March 2010, <http://www.pc.gov.au/projects/study/upstreampetroleum/submissions>

26. Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010*, pp. 3–4.

27. For the meaning of 'Commonwealth waters', see *Offshore Petroleum and Greenhouse Gas Storage Act 2006* section 643. See also *ibid.*, section 8 (offshore areas of the States and Territories).

28. Explanatory Memorandum, *op. cit.*, p. 2. As to NOPSA's functions under the Act, see *Offshore Petroleum and Greenhouse Gas Storage Act 2006* section 646.

Items 1–5 proposes to insert the following **new definitions into section 7** of the Act:

- ‘non-OHS structural integrity’
- ‘non-OHS structural integrity law’
- ‘structural integrity’
- ‘structural integrity law’, and
- ‘well-related equipment’.

In particular, it is noted that ‘non-OHS’ applies to the extent to which something *‘does not relate to a matter or thing that affects, or is likely to affect, the occupational health and safety of persons’* engaged in offshore petroleum and greenhouse gas storage operations (see **items 1 and 2**).

Item 8 proposes to insert **new paragraphs 646(ga)–(gf)** into the Act, specifying what NOPSA’s new non-OHS functions would be. These are:

- functions conferred onto NOPSA by or under the Act, or a State or the Northern Territory PSLA, in relation to the non-OHS structural integrity of:
 - facilities
 - wells, or
 - well-related equipment

located in Commonwealth waters or the designated coastal waters of the State or Northern Territory, as the case may be²⁹

- develop and implement effective monitoring and enforcement strategies to ensure compliance with obligations under non-OHS structural integrity laws
- investigate accidents, events and circumstances that involve, or may involve, deficiencies in the non-OHS structural integrity of:
 - facilities
 - wells, or
 - well-related equipment

located in Commonwealth waters

- report to the relevant Commonwealth, State and Territory Ministers on those investigations, and
- provide advice about matters relating to the non-OHS structural integrity of:
 - facilities
 - wells, or

29. As for the meaning of a ‘State PSLA’ and ‘Territory PSLA’, see *Offshore Petroleum and Greenhouse Gas Storage Act 2006* section 643.

- well-related equipment

located in Commonwealth waters.

An example of how this would apply is as follows:

in accepting a safety case for a pipeline under the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* NOPSA will consider all aspects of the structural integrity of the pipeline. The pipeline will be on the seabed, and for much of its life people will not be in contact with it. Until now, NOPSA's functions in relation to the structural integrity of the pipeline have focused on the safety of the pipeline for persons who, from time to time, do maintenance or other work on the pipeline. The intent of the current amendments is that a probably meaningless distinction will be removed in relation to unmanned facilities, and NOPSA can focus on structural integrity of facilities as a whole. NOPSA will also acquire responsibility for the structural integrity of wells that are not part of a facility.³⁰

The Explanatory Memorandum also states that:

The proposed amendments to its functions and powers have the intent of strengthening the ability of NOPSA to carry out its existing regulatory responsibilities and augmenting its responsibilities by expressly including oversight of the whole of structural integrity of facilities (including pipelines), wells and well-related equipment. For achieving completeness of this oversight role, the amendments include non-OHS structural integrity aspects to ensure complete coverage of this particular function.³¹

According to the Government:

... regulations relating to structural integrity will provide a more detailed delineation between NOPSA's structural integrity functions and the Designated Authorities' functions relating to resource security and resource management which may also have a structural integrity aspect.³²

Comment

This proposal has been somewhat contentious.

On the one hand, for example, although the Department of Mines and Petroleum (WA) had generally supported the inclusion of non-OHS structural integrity of facilities and pipelines as part of the responsibilities of NOPSA, it expressed concern that well integrity and approvals involve resource and management issues, which are part of the well operations management plan (WOMP) regulations and conditions on titles administered by the DA and that, consequently, it would be inappropriate to include them in NOPSA's responsibilities. According to the Department of Mines

30. Explanatory Memorandum, op. cit., p. 5.

31. Ibid., p. 2.

32. Ibid.

and Petroleum (WA), two layers of bureaucracy would not benefit operators.³³ Perhaps the Government's pledge to work with industry and other stakeholders to determine, in regulations, what matters relating to well and pipeline structural integrity would also be resource security or management issues, may allay these concerns.³⁴

On the other hand, other stakeholders support the proposed extension of NOPSA's functions.³⁵

It is noted that although the Productivity Commission, in its report, recommended that NOPSA's functions be extended to offshore pipelines, subsea equipment and wells, the Productivity Commission did point out that NOPSA would have to be adequately resourced in order to carry out its additional functions.³⁶ Proper use of resources is also a matter of concern for some stakeholders. For example, the Victorian Government does not support the extension of NOPSA's functions to well integrity, believing that to be an inefficient use of scarce resources.³⁷ In addition, the Australian Workers' Union (AWU) stated that it was concerned that fees collected by NOPSA under its cost recovery arrangements would be sufficient to enable NOPSA to regulate the additional functions conferred on it—that NOPSA would not be expected to do more regulatory work with fewer resources.³⁸

Strict liability offences

Part 3 sets out proposed amendments to various provisions in the Act, making particular offences in those provisions strict liability offences.

33. Department of Mines and Petroleum (WA), Submission: *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010*, p. 2, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/economics_ctte/petroleum_2010/submissions.htm

See also Department of Mines and Petroleum (WA), Submission to the Productivity Commission Draft Research Report: *Review of regulatory burden on the upstream petroleum (oil and gas) sector*, January 2009, p. 17, viewed 6 October 2010, http://www.pc.gov.au/data/assets/pdf_file/0006/85515/subdr022.pdf

34. See Explanatory Memorandum, op. cit., pp. 5–6.

35. See, for example, Australian Petroleum Production and Exploration Association Ltd. (APPEA), Submission to the Productivity Commission Draft Research Report: *Review of regulatory burden on the upstream petroleum (oil and gas) sector*, February 2009, p. 11, viewed 6 October 2010, http://www.pc.gov.au/data/assets/pdf_file/0011/85952/subdr029.pdf

For the Productivity Commission's summary of the various views of stakeholders regarding extending NOPSA's functions, see Productivity Commission, 'Review of regulatory burden on the upstream petroleum (oil and gas) sector', op. cit., pp. 173–175.

36. See *ibid.*, p. 167.

37. P Batchelor (Minister for Energy and Resources (Vic)), Submission to the Productivity Commission Draft Research Report, *Review of regulatory burden on the upstream petroleum (oil and gas) sector*, 30 January 2009, p. 2, viewed 6 October 2010, http://www.pc.gov.au/data/assets/pdf_file/0004/85783/subdr026.pdf

38. Australian Workers' Union (AWU) and Maritime Union of Australia, Submission: *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010*, p. 2, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/economics_ctte/petroleum_2010/submissions.htm

It is noted that the maximum penalty proposed in the Bill for such offences is 100 penalty units.³⁹ Existing penalties less than 100 penalty units would be retained and, where relevant, existing penalties more than 100 penalty units would be reduced.

In some provisions, penalties of five years imprisonment have been changed to 100 penalty units and existing offences in the Act have been made strict liability offences. Examples of such provisions are:

- section 227 - failure to comply with directions to vary pipeline licence (**items 11 and 12**), and
- section 228 - ceasing to operate pipeline licence without consent (**items 13 and 14**).

Other offences under the Act that have been made strict liability offences include:

- subsections 280(3) and 460(3) – interference with other rights (**items 17, 18, 27 and 28**)
- subsections 249(2) and 420(2) – failure to comply with reporting obligations to titleholders (**items 15, 16, 21 and 22**)
- subsections 284(5), 451(8) and 452(5) – failure to notify of discovery of petroleum or of greenhouse gas storage formation in particular title areas (**items 19, 20, 23–26**)
- subsections 569(6) and 570(5) – failure to comply with work practice obligations (**items 33 and 34**)
- subsections 508(4) and 557(4) – failure to comply with request for particular information (**items 29 and 32**)
- subsections 586(5), 587(6), 592(5) and 595(6) – failure to comply with directions to undertake remedial action (**items 39–42; 44–45**), and
- subsections 697(3) and 723(3) – failure to comply with record-keeping directions (**items 46 and 47**).

Comment

Concern has been expressed about the apparent downgrading of penalties and the impact this would have on deterrence.⁴⁰

However, it is noted that the Explanatory Memorandum states that:

Where offence provisions in the Act apply to titleholders and the offence itself consists of only a physical element (the doing of or failure to do an act), the amendments will have the effect that these offences will become offences of strict liability. The application of strict liability to an offence means that a fault element such as intention to do the act, or not do the act, is not required to be proved. This is to ensure that the legislation can be enforced more effectively, as

39. A penalty unit is currently \$110: *Crimes Act 1914* section 4AA. In certain circumstances, additional pecuniary penalties — up to five times the amount of maximum pecuniary penalty imposed on a natural person convicted of the same offence — may be imposed on corporations: see *ibid.*, subsection 4B(3).

40. Australian Workers' Union (AWU), *op. cit.*, p. 3.

without these changes applying strict liability the intention to do an act or not do an act needs to be proven. Given the remote and complex nature of offshore operations and the prevalence of multiple titleholder arrangements it is extremely difficult to prove intent. To date this has left these particular offence provisions largely unenforceable. The intention of the application of strict liability is to improve compliance in the regulatory regime. Due to the application of strict liability to this group of offences, some existing penalties have been reduced from 5 years imprisonment to 100 penalty units. These changes are in line with Commonwealth strict liability guidelines.⁴¹

The Explanatory Memorandum also states that:

Setting the penalty at 100 penalty units is considered appropriate. It is noted this is higher than the preference stated in *A Guide To Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007 for a maximum 60 penalty units for offences of strict liability. However, offshore resources activities, as a matter of course, require a very high level of expenditure and therefore by comparison a smaller penalty would be an ineffective deterrent.⁴²

Restricting titleholders' OHS responsibilities

Part 5 sets out proposed amendments to **Schedule 3** of the Act, which relates to restricting titleholders' OHS obligations to wells.

It is noted that, although in October 2009, the Act was amended to add a titleholder's duty of care in relation to facilities,⁴³ the Explanatory Memorandum states that:

The original intention of that amendment was to introduce titleholders' duties in relation to wells only.⁴⁴

However, the Act (as it is currently worded) may actually be interpreted as imposing a duty of care onto titleholders in relation to facilities generally. In particular, existing subclause 13A(1) of Schedule 3 provides that:

If a proposed facility is for use in connection with operations authorised by:

(a) a petroleum exploration permit; or

41. Explanatory Memorandum, op. cit., p. 3. For further explanation by the Government, see also *ibid.*, pp. 8–11.

42. *Ibid.*, p. 8. See also Attorney-General's Department, *A Guide to framing Commonwealth offences, civil penalties and enforcement powers*, December 2007, p. 25, viewed 14 October 2010, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(084A3429FD57AC0744737F8EA134BACB\)~A+Guide+to+Framing+Commonwealth+Offences,+Civil+Penalties+and+Enforcement+Powers.PDF/\\$file/A+Guide+to+Framing+Commonwealth+Offences,+Civil+Penalties+and+Enforcement+Powers.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~A+Guide+to+Framing+Commonwealth+Offences,+Civil+Penalties+and+Enforcement+Powers.PDF/$file/A+Guide+to+Framing+Commonwealth+Offences,+Civil+Penalties+and+Enforcement+Powers.PDF)

43. See *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Act 2009* (Royal Assent given on 8 October 2009) **item 47**.

44. Explanatory Memorandum, op. cit., p. 3.

(b) a petroleum retention lease; or

(c) a petroleum production licence; or

(d) an infrastructure licence; or

(e) a pipeline licence;

the permittee, lessee or licensee must take all reasonably practicable steps to ensure that the facility is so designed as to be, when properly used, safe and without risk to health.

Existing subclause 13A(2) provides similarly in relation to greenhouse gas titleholders.

Item 60 of the Bill proposes to substitute existing clause 13A of Schedule 3 in the Act with **new clauses 13A and 13B**. These new clauses would restrict titleholders' duty of care to wells, while maintaining the penalty for breach of duty (200 penalty units). Generally, if:

- a well has been or is being used; has been or is being prepared for use, in connection with operations authorised by a current title; or a well has been used in connection with operations authorised by a title from which the current title is *derived*, and the wellhead is located in the title area of the current title, and
- the well is not suspended, abandoned or closed off,

the registered current titleholder must ensure that the well is designed, constructed, commissioned, altered, equipped, maintained and operated so that risks to the OHS of persons at or near the facility are as low as practicable. Such risks include risks from the well; any unplanned escape of fluids from the well; anything in the well or in the geological formation to which the well is either connected or through which the well passes (**proposed subsection 13A(1)** and **13B(1)**).⁴⁵

A similar provision is proposed in relation to circumstances where the well has been, is being or will be suspended, abandoned or closed off (**proposed subsection 13A(2)** and **13B(2)**).

The Explanatory Memorandum states that:

The 'persons at or near a facility' include the persons who are engaged in a well-related activity, such as drilling the well, as well as any other persons who are at or near a facility. The term 'persons at or near a facility' is also expressly extended to divers, who may be exposed to risk from a well while carrying out operations at a well that are not facility-related. The risks may arise from the well, the unplanned escape of fluids from the well, from anything in the well or

45. For the meaning of 'derived', see **item 55** in Part 6 of the Bill. See also **item 59 (proposed sections 8A and 8B)** of the Bill in relation to when petroleum and greenhouse gas titles are derived from earlier titles. For the Scrutiny of Bills Committee's comments about its concerns of retrospective liability being imposed in relation to titleholders' duty of care, see Senate Standing Committee for the Scrutiny of Bills, op. cit., pp. 57–58.

anything in the geological formation to which the well is connected or through which the well passes. This duty extends to the suspension, abandonment and closing-off of wells.⁴⁶

It is noted that absolute liability would apply to the element in **proposed paragraphs 13A(3)(a) and 13B(3)(a)**—in other words, to the existence of a duty of care itself.

The Explanatory Memorandum states that:

Clauses 13A and 13B establish occupational health and safety duties of care in respect of a hazardous aspect of the offshore petroleum industry – i.e. the risk of blow-outs and other escape of fluids from wells. It is considered that the application of absolute liability to the element in paragraph (3)(a) in each case, i.e. the existence of the duty of care, is therefore appropriate. The titleholder is usually a consortium of companies. A requirement to prove a particular state of mind in relation to a non-conduct element of the offence will therefore make a breach of the duty of care difficult or impossible to prove. The application of absolute liability to this element is therefore essential to the integrity of the occupational health and safety regime.⁴⁷

Concluding comments

Some of the proposed amendments in the current Bill, as discussed above, although said to be largely technical in nature, do remain somewhat contentious.

© Commonwealth of Australia 2010

This work is copyright. Except to the extent of uses permitted by the Copyright Act 1968, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

Disclaimer: Bills Digests are prepared to support the work of the Australian Parliament. They are produced under time and resource constraints and aim to be available in time for debate in the Chambers. The views expressed in Bills Digests do not reflect an official position of the Australian Parliamentary Library, nor do they constitute professional legal opinion. Bills Digests reflect the relevant legislation as introduced and do not canvass subsequent amendments or developments. Other sources should be consulted to determine the official status of the Bill.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Enquiry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.

46. Explanatory Memorandum, op. cit., p. 13.

47. Ibid.