



Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Bill 2011

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Law and Bills Digest Section

Contents

Purpose	2
Background	2
National Offshore Petroleum Safety Authority (NOPSA).....	2
Cost Recovery	3
Expansion of functions.....	3
Basis of policy commitment.....	4
Montara Incident.....	4
Commission of Inquiry	4
Independent Review.....	5
Committee consideration	6
Financial implications.....	8
Key provisions	8
Part 4—Well investigation levy.....	9
Part 4A—Annual well levy	10
Part 4B—Well activity levy.....	11

Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Bill 2011

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House: House of Representatives

Portfolio: Resources and Energy

Commencement: Sections 1 to 3 on Royal Assent. Schedule 1 on the earlier of a day fixed by proclamation or the day after a period of six months has elapsed from the date of Royal Assent.

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 and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The Bill amends the *Offshore Petroleum and Greenhouse Storage (Safety Levies) Act 2003* (the Act) to:

- impose three new levies on holders of offshore petroleum titles to enable the National Offshore Petroleum Safety Authority (NOPSA) to discharge its regulatory functions in relation to the structural integrity and safety of wells and equipment.
- rename the Act as the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* so as to indicate a widening of its ambit to include levies relating to wells.

Background

National Offshore Petroleum Safety Authority (NOPSA)

The Australian government established the National Offshore Petroleum Safety Authority (NOPSA) with effect from 1 January 2005, to regulate offshore health and safety. NOPSA is an independent statutory authority created under the *Petroleum (Submerged Lands) Act 1967*.¹

1. The *Petroleum (Submerged Lands) Act 1967* was repealed and replaced by the *Offshore Petroleum Act 2006*. That Act was renamed the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* by amendments contained in the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*.

NOPSA is a jointly administered authority and is required to report to both the Australian Government and all State and Northern Territory Ministers with responsibility for the offshore petroleum industry, and members of the Ministerial Council on Mineral and Petroleum Resources (MCMPR).

On 13 September 2002, the MCMPR endorsed the establishment of the NOPSA to regulate occupational health and safety in Commonwealth waters and State/Northern Territory coastal and inland waters.²

Cost Recovery

The Australian government has published Cost Recovery Guidelines for all those agencies to which the *Financial Management and Accountability Act 1997* applies.³ NOPSA is one of those agencies. Its operations are fully funded by a system of levies on operators.⁴

Expansion of functions

Although NOPSA was originally tasked with regulating occupational health and safety (OHS), the enactment of the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Act 2010* expanded its functions to a number of non-OHS matters. As a result, NOPSA's existing functions were extended to cover the 'structural integrity of facilities (including pipelines) and also to wells that are part of these facilities, to the extent to which the structural integrity affects the safety of the offshore workforce at the facilities.'⁵ The Bills digest⁶ covers the relevant reviews and inquiries in relation to this current Bill and includes detail concerning the new non-OHS functions of NOPSA.

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2. Ministerial Council on Mineral and Petroleum Resources, *MCMPR 2 Communiqué*, Perth, 13 September 2002, viewed 3 March 2011, http://www.ret.gov.au/resources/Documents/mcmpr/Final_Communique_MCMPR2_13_Sept_2002.pdf
 3. Further information about the Government's Cost Recovery Guidelines is available on the Department of Finance and Deregulation website at: http://www.finance.gov.au/publications/finance-circulars/2005/09.html#FMG_4
 4. National Offshore Petroleum Safety Authority, NOPSA Cost Recovery, website, viewed 1 March 2011, http://www.nopsa.gov.au/cost_recovery.asp
 5. S Scully, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010*, Bills Digest, no. 14, 2010-11, Parliamentary Library, Canberra, 2010, viewed 1 March 2011, <http://www.aph.gov.au/library/pubs/bd/2010-11/11bd014.pdf>
 6. Ibid, refer to the digest by Sharon Scully for information on the non-OHS functions introduced in 2010.

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Basis of policy commitment

Montara Incident

On 21 August 2009, during drilling operations at the Montara Wellhead Platform in the Timor Sea, an uncontrolled release of oil and gas or a blowout occurred.⁷ This resulted in Australia's third largest oil spill.⁸ 'The Montara Wellhead Platform is part of the Montara Development Project which is owned by and operated by PTTEP Australasia (Ashmore Cartier) Pty Ltd, an Australian subsidiary of PTT Exploration and Production Company Limited (PTTEP), a publicly listed company on the Thai stock exchange.'⁹

Commission of Inquiry

There were two inquiries into this incident. The Minister for Resources, Energy and Tourism established the Montara Commission of Inquiry on 5 November 2009, which had all the powers and authority of a Royal Commission under the *Royal Commissions Act 1902*.

The inquiry was tasked with providing recommendations to government, regulators and industry on measures which would mitigate against incidents similar to Montara occurring in future and aim to alleviate the safety, environmental and resource impacts of such incidents.¹⁰

The report of the Commission of Inquiry was presented to the Minister on 18 June 2010.¹¹ When presenting the Commission of Inquiry report to Parliament in November 2010, the Minister stated that:

The report concluded that PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEP AA) did not observe sensible oilfield practice at the Montara field.¹²

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7. A O'Brien, 'Rig spilling 400 barrels a day', *Australian*, 14 September 2009, p. 2, viewed 3 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F5TNU6%22>
 8. Noetic Solutions Pty Ltd, *Review of the PTTEP Australasia's response to the Montara Blowout for the Department of Energy, Resources and Tourism*, report, November 2010, viewed 1 March 2011, <http://www.ret.gov.au/Department/Documents/MIR/Montara-Response-Review.pdf>
 9. Department of Resources, Energy and Tourism, Fact sheet 3: Montara Incident and Response, viewed 1 March 2011, http://www.ret.gov.au/Department/Documents/MIR/FS_3_INCIDENT-AND-RESPONSE.pdf
 10. Department of Resources, Energy and Tourism, Fact sheet 7: Montara Commission of Inquiry, viewed 1 March 2011, http://www.ret.gov.au/Department/Documents/MIR/FS_7_COMMISSION-OF-INQUIRY.pdf
 11. Commissioner D Borthwick, *Report of the Montara Commission of Inquiry*, June 2010, viewed 3 March 2011, <http://www.ret.gov.au/Department/Documents/MIR/Montara-Report.pdf>
 12. M Ferguson (Minister for Resources and Energy and Minister for Tourism), Ministerial statement: Montara Commission of Inquiry, House of Representatives, *Debates*, 24 November 2010, viewed 1 March 2011,

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Other findings of the Commission of Inquiry included:

- that well control practices approved by the regulator would have been sufficient to prevent the loss of well control; however, PTTEP AA did not adhere to these practices or its own well construction standards
- that the Northern Territory Department of Resources was not a diligent regulator and its minimalist approach to its regulatory responsibilities gave it little chance of discovering these poor practices
- that, at a minimum, the proposal to establish a single national offshore regulator should be pursued
- that the existing legislative regime be adjusted to further reduce the risks of similar incidents occurring.¹³

Independent Review

The Commissioner also recommended that a review of PTTEP AA's licence to operate at the Montara field be undertaken.¹⁴ This review would have been restricted to the Montara operations, however the Minister decided to instigate an independent review of the action plan that PTTEP, the parent company had submitted to the Commission of Inquiry.¹⁵

That report was presented to Parliament on 4 February 2011.¹⁶ The Independent Review was undertaken by industry experts and examined both technical and governance issues.¹⁷

The Minister's second reading speech states that:

In light of the issues arising from the Montara incident, the Australian Government is committed to ensuring that NOPSA has sufficient powers and capability to effectively regulate all aspects of well integrity and well operations, pending the establishment of a single National Offshore Petroleum operator. Collection of these levies from titleholders who carry out well operations

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-11-24%2F0070%22>

13. Ibid, p. 3596.

14. Ibid, p. 3596.

15. Ibid, p. 3596.

16. Noetic Solutions Pty Ltd, *Review of PTTEP Australasia's Response to the Montara Blowout for the Department of Energy, Resources and Tourism*, Canberra, November 2010, viewed 3 March 2011, <http://www.ret.gov.au/Department/Documents/MIR/Montara-Response-Review.pdf>

17. M Ferguson (Minister for Resources and Energy and Minister for Tourism), Ministerial statement: The Report of the Independent Review of the PTTEP Australasia (Ashmore-Cartier) Pty Ltd Montara Action Plan, House of Representatives, *Debates*, 4 February 2011, viewed 2 March 2011, <http://www.ret.gov.au/Department/Documents/MIR/Noetic-Review-ministerial-statement.pdf>

will ensure that NOPSA is adequately resourced to fulfil its well-related responsibilities under the OPGGS Act and associated regulations.¹⁸

The Minister acknowledges that NOPSA is 'funded on a full cost-recovery basis with levies raised from the offshore petroleum industry.' However, he further notes that currently under the Act, the levies imposed are facility based and confined to occupational health and safety.¹⁹ This means that NOPSA's cost recovery does not reflect its expanded non-OHS functions.

This Bill addresses that anomaly by imposing three new levies— the annual well levy, the well activity levy and the well investigation levy.

The **annual well levy** will allow NOPSA to recover costs 'associated with undertaking its functions in relation to the integrity of wells and well-related equipment'.²⁰ It also includes costs incurred with monitoring and compliance with the OHS duty of care in relation to wells.²¹ The **well activity levy** is associated with the assessment and approval of specific well activities under Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations. The **well investigation levy** will recover excessive regulatory costs when NOPSA investigates well-related incidents. It will apply when NOPSA's costs in inspecting a breach or possible breach exceed \$30 000.²²

Committee consideration

The Senate Selection of Bills Committee resolved at its meeting on 3 March 2011 that this Bill not be referred to Committee.²³

The Senate Scrutiny of Bills Committee drew attention in its report to the fact that this Bill imposes levies by regulation. The report refers to the following provisions:- Schedule 1, item 17 clauses 9(4), 10(4), 10A(4) and 10B(4)

These proposed subsections provide that the rate of each well levy to be imposed is to be fixed by regulations with no upper limit being set in the bill. The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation. This creates a

18. M Ferguson (Minister for Resources and Energy and the Minister for Tourism), 'Second reading speech: Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Bill 2011', House of Representatives, *Debates*, 24 February 2011, pp. 5-6, viewed 3 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-02-24%2F0013%22>

19. *ibid*

20. *Ibid.*

21. *Ibid.*

22. *Ibid.*

23. Senate Selection of Bills Committee, Report No. 2 of 2011, 3 March 2011, viewed 9 March 2011, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2011/rep0211.pdf

risk that the levy may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.²⁴

The Committee recognised the requirement for the rate to be changed 'frequently and expeditiously', though it was of the view that 'where a compelling case can be made for the rate to be set by subordinate legislation'²⁵, it would expect 'there will be some limits imposed on the exercise of this power.'²⁶

The Committee also commented on the lack of clarity as to whether additional regulations are required to the Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004 and how the levy will be calculated.²⁷

However, the Bill does make reference to the Offshore Petroleum and Greenhouse Gas Storage (Resource and Administration) Regulations 2011. The Explanatory Memorandum states that these regulations are intended:

To give effect to NOPSA's augmented functions under the OPGGS Act, Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations will provide NOPSA with regulatory functions and powers relating to management of well operations. It is intended that these regulations will be brought into effect in April 2011.²⁸

Whether the reference to the regulations in the Bill are to these regulations or the 2004 regulations is unclear.

What is a Tax?

This question is not easily answered. The classic definition of a tax is that propounded by Latham CJ in *Matthews v. Chicory Marketing Board* (1938) 60 CLR 263 at 276:

A tax... is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered.

The High Court has subjected this definition to much scrutiny of late in its view of what constitutes a tax today. Commentators suggest that although the Court has introduced more flexibility it has at the same time introduced elements of uncertainty:

24. Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 2 of 2011, 2 March 2011, p. 31, viewed 8 March 2011, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2011/d02.pdf>

25. Ibid.

26. Ibid.

27. Ibid.

28. Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Bill 2011, viewed 9 March 2011, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4518_ems_cf0ee927-78ed-4b05-b8dd-42439a65a202/upload_pdf/352490.pdf;fileType=application%2Fpdf

It cannot be denied that the majority's approach in *Australia Tape Manufacturers* has removed some of the rigidity which can result from the "mechanical" application of the Latham formula. But this new flexibility has generated considerable uncertainty as to the circumstances in which an exaction, which has not met one or more elements of the formula, will be found by the Court to constitute a tax for the purposes of the Constitution.²⁹

Therefore, it is not simple to determine what is a tax and what is not a tax. The levies in the current Bill are imposed to raise money to recover costs incurred by NOPSA in relation to the newly acquired functions associated with wells and well related activities. The Committee considers that the levy could easily become a tax without some kind of limit being placed on the levy. There is no specified limit other than the actual cost of NOPSA's activities in relation to these wells which could fluctuate over time.

The Constitution requires in section 55 that laws imposing taxation deal only with the imposition of tax and any other matters that are dealt with in the same law shall be of no effect. Laws dealing with taxation shall deal with subject of taxation only.

Financial implications

The Explanatory Memorandum states that there will be nil financial impact on the Australian Government Budget as this Bill will enable NOPSA to fully recover its costs from industry associated with augmented well integrity and well safety functions.³⁰

Key provisions

Item 2 amends **section 1** to change the short title of the Act to *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*.

Items 3 to 16 insert definitions into section 3 the Act for provisions relating to the three new well-related levies. The definitions of **coastal waters**, **offshore area**, **petroleum exploration permit**, **petroleum production licence**, **petroleum retention lease**, **well** and **well-related equipment** have the same meaning as those in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. The definitions of the new levies: **annual well levy**, **well activity levy** and **well investigation levy** refer to the relevant new provisions in this Bill.

29. V Morabito and S Barkoczy, 'What is a tax? The erosion of the "Latham definition"', *Revenue Law Journal*, vol. 6 1996, pp.43-63.

30. Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Bill 2011*, p. 1, viewed 28 February 2011, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4518_ems_cf0ee927-78ed-4b05-b8dd-42439a65a202/upload_pdf/352490.pdf;fileType=application%2Fpdf

Part 4—Well investigation levy

Item 17 inserts new Parts 4, 4A and 4B.

New Part 4 —Well investigation levy. Part 4 contains separate provisions for Commonwealth petroleum titles and for State/Territory petroleum titles.

Clause 13A of Schedule 3 to the Offshore Petroleum and Greenhouse Gas Storage Act imposes duties on petroleum titleholders in relation to wells.³¹ Where there is a breach or suspected breach of those duties, NOPSA's OHS inspectors are authorised to investigate. **Proposed section 9** of the Bill provides for the imposition of a well investigation levy on Commonwealth petroleum titles if **all** the following conditions are satisfied:

- the well is used in connection with operations that are authorised under a current petroleum title (**proposed subparagraph 9(1)(a)(i)**) or the well is used in connection with operations that are authorised by a petroleum title from which the current title is derived and the wellhead is situated within the area of the current title (**proposed subparagraph 9(1)(a)(ii)**), and
- an OHS inspector has commenced an inspection for a breach, or possible breach, of subclause 13A(1) or (2) of the Schedule 3 of the Offshore Petroleum and Greenhouse Gas Storage Act (**proposed subparagraph 9(1)(b)**), and
- the breach relates to the well (**proposed subparagraph 9(1)(c)**), NOPSA's costs and expenses exceed \$30 000 in relation to the inspection—called '**threshold time**' (**proposed subparagraph 9(1)(d)**), and

NOPSA has given written notice that the costs and expenses have exceeded that amount (**proposed subparagraph 9(1)(e)**). **Proposed subsection 9(1)** provides that a levy is imposed on the inspection for a three month period beginning at the '**threshold time**' and for each successive three month period at any time during which the inspector continues to conduct the inspection.

The levy is paid by the registered holder of the current title (**proposed subsection 9(3)**).

Proposed subsection 9(4) provides that the amount of the levy to be paid will be worked out in accordance with the regulations.

Proposed section 10 deals with the imposition of a well investigation levy for State/Territory petroleum titles. The well investigation levy will apply under similar conditions for State/Territory petroleum titles as for Commonwealth petroleum titles. That is, where an OHS inspector has begun

31. Subclause 13A(1) or (2) of Schedule 3 to the *Offshore Petroleum and Greenhouse Gas Act 2006* deals with the duties of petroleum titleholders in relation to wells. Current title holders must ensure that the well is so constructed, commissioned, altered, equipped, maintained and operated that risks to health and safety to persons at or near the facility from the well or escape of fluids from the well, anything in the well or in the geological formation are as low as is reasonably possible. These provisions also apply in relation to a well that has been suspended, abandoned or closed off.

an inspection for a breach or possible breach under a provision of a State/Territory PSLA³² that substantially corresponds to subclause 13A(1) or (2) of Schedule 3 of the Offshore Petroleum and Greenhouse Gas Storage Act.

Part 4A—Annual well levy

Similar to the drafting in proposed Part 4, proposed Part 4A contains separate provisions for Commonwealth petroleum titles and for State/Territory petroleum titles.

Proposed section 10A deals with the imposition of an annual well levy for Commonwealth petroleum titles. **Proposed subsection 10A(1)** provides that a levy is imposed if there are one or more eligible wells in relation to a petroleum title for a year. **Proposed subsections 10A(5) and 10A(6)** define an *'eligible well'* in a specific year as:

- a well situated wholly or in part in the current title area immediately before the start of a year
- the well is, or was, drilled under the current title, or under a petroleum title from which the current title is derived, and
- the well is not abandoned

Proposed subsection 10A(6) provides that if, during a year, a well began to be drilled in the current title area of a State/Territory petroleum title; and the well was drilled under the authority of a current title, or a current title derived from a petroleum title; and the well was abandoned during the same year then the well is an *'eligible well'* for the subsequent year.

Proposed subsection 10A(7) provides that an abandoned well will not be recognised as such unless the abandonment is approved by the NOPSA under the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011. If the approval is subject to conditions, then those conditions must have been complied with.

Proposed 10A(4) provides that the amount of the annual levy imposed in relation to one or more wells is an amount specified or worked out in accordance with the regulations.

Proposed subsection 10A(8) inserts relevant section-specific definitions.

Proposed section 10B deals with the imposition of annual well levy on State/Territory petroleum titles. **Proposed subsection 10B(1)** provides that if a State/Territory petroleum title has one or more *'eligible wells'* that were granted under a law of a State/Territory and if NOPSA has functions or powers under regulations of the State or Territory which substantially correspond with Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011, then a levy will be imposed on those wells. The provisions in **proposed**

32. PSLA refers to Petroleum (Submerged Lands) Act for relevant states and territories. New South Wales does not have any mirror legislation in place.

subsections 10B(5) and (6) in relation to what constitutes an *'eligible well'* and in *proposed subsection 10B(7)* relating to abandoned wells, are similar to the provisions in proposed section 10A that relate to Commonwealth petroleum titles.

Part 4B—Well activity levy

Similar to the drafting in proposed Parts 4 and 4A, Part 4B contains separate provisions for Commonwealth petroleum titles and for State/Territory petroleum titles.

Proposed section 10C deals with the imposition of a well activity levy on Commonwealth petroleum titles. **Proposed subsection 10C(1)** provides that a levy is imposed on an application by the person who holds a registered petroleum title to the Safety Authority (NOPSA) under Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011 for acceptance of a well operations management plan or for approval to commence a well activity. The amount of the levy is determined by the regulations (**proposed subsection 10C(4)**).

An exemption applies under **proposed subsection 10C(5)** so that if, during a six month period after making an application, a person makes another application to commence a well activity in relation to that well; or another person has become the petroleum title holder makes an application to commence an activity relating to the well, the levy will not be imposed.

Proposed section 10D deals with the imposition of a well activity levy in relation to State/Territory petroleum titles. These provisions are similar to those of **proposed section 10C** relating to Commonwealth titles except that the applications are made under State or Territory regulations that substantially correspond to Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011.

Item 18 amends section 11 of the Act to include reference to sections 9, 10, 10A, 10B, 10C and 10D. This amendment enables the Governor-General to make regulations for the purposes of all these sections.

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