SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2005

7 September 2005

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 2005

The Committee presents its Ninth Report of 2005 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Offshore Petroleum Bill 2005

Offshore Petroleum (Annual Fees) Bill 2005

Offshore Petroleum (Registration Fees) Bill 2005

Offshore Petroleum Bill 2005

Offshore Petroleum (Annual Fees) Bill 2005

Offshore Petroleum (Registration Fees) Bill 2005

Introduction

The Committee dealt with these bills in *Alert Digest No. 8 of 2005*. The Parliamentary Secretary to the Minister for Industry, Tourism and Resources has responded to those comments in a letter dated 18 August 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2005

Offshore Petroleum Bill 2005

Introduced into the House of Representatives on 23 June 2005
Portfolio: Industry, Tourism and Resources

Background

This bill (part of a package of 6 bills) replaces the *Petroleum (Submerged Lands) Act 1967* to provide reduced compliance costs for the upstream petroleum industry and for the governments that are charged with administering it. It provides changes to the structure and style of the legislation but, according to the Minister's second reading speech, 'seeks to implement only a modest number of minor policy changes.'

The bill provides for the grant of exploration permits, retention leases, production, infrastructure and pipeline licenses, and special prospecting and access authorities which will have effect in offshore areas. Offshore areas start 3 nautical miles from the baseline from which the breadth of the territorial sea is measured and extend seaward to the outer limits of the continental shelf.

The bill also contains occupational health and safety provisions and maintains the operation of the National Offshore Petroleum Safety Authority for their administration. It proposes a number of incidental changes which deal with anomalies and past drafting errors and bring provisions into line with current Australian Government legislative drafting principles.

Commencement on Proclamation
Subclause 2(1), item 2

Item 2 of the table in subclause 2(1) of this bill provides that almost all of its provisions will commence on Proclamation, with no limit specified within which the bill must commence in any event.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. This view has long been reflected in the drafting directions issued by the Office of Parliamentary Counsel (currently *Drafting Direction 2005, No. 10* at paragraphs 16 to 22). The drafting direction provides that a clause which provides for commencement by proclamation should also specify a period or date after which the Act either commences or is taken to be repealed. It also provides that any proposal to defer commencement for more than 6 months after assent should be explained in the explanatory memorandum.

The explanatory memorandum points out, in justification of this provision, that the commencement of this measure is dependent on the enactment of complementary legislation by the States and the Northern Territory. The Committee has usually accepted this situation as justifying an extended, but not an open-ended, period for commencement (see *Drafting Direction 2005, No. 10* at paragraphs 88 to 90). The Committee also notes that there is nothing in the bill which would require a Proclamation to be issued within some specified time after the complementary legislation has been enacted.

Accordingly, the Committee **seeks the Minister's advice** as to whether the commencement clause might not also be subject to the provision that, if the necessary Proclamation has not been issued by some fixed date in the future, the Act will be automatically treated as having been repealed on that date.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Parliamentary Secretary

The Digest draws attention to the fact that item 2 of the table in subclause 2(1) of the Offshore Petroleum Bill provides that almost all of its provisions will commence on Proclamation, with no time limit specified within which the Bill must commence.

The Digest also refers to Office of Parliamentary Counsel *Drafting Direction 2005, No. 10*. I note that paragraph 22 of this document states that clauses providing for commencement by Proclamation but without restrictions of the kind discussed in paragraphs 18 to 21 "should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain and generally not within the Government's control (eg. enactment of complementary State legislation)."

As a general point, I believe the Commonwealth-State-Northern Territory interjurisdictional issues in this legislative package do have unusual characteristics in that the Commonwealth legislation recognises the State or Northern Territory Minister as having functions and powers under the Commonwealth Act itself, but these functions and powers are tied to what appears in the mirror State and Territory Acts.

Moreover, there has been a suggestion that the Acts Interpretation Act of one of the States would address the transitional issues in question and enable the State to defer the making of amendments until some time after proclamation of the new Commonwealth enactment. It has also come to light that there is at least one other State Act, unrelated to petroleum, that refers to adjacent areas under the Commonwealth Petroleum (Submerged Lands) Act. This Act, and maybe others, may likewise require pre-emptive amendments before the new Commonwealth legislation is proclaimed.

I believe these factors would have made it ill-advised to merely list the names of the mirror State and Territory Acts in the Offshore Petroleum Bill and state that the proposed Act would need to be proclaimed within a certain number of months of the last of these Acts being amended.

The Committee has asked the Minister to comment on whether the commencement clause might not also be subject to the provision that, if the necessary Proclamation has not been issued by some fixed date in the future, the Act will be automatically treated as having been repealed on that date. My response to this suggestion is that

this legislation was rewritten in close consultation with the States, Northern Territory and petroleum industry. I believe there would have been an unfavourable reaction from these stakeholders if a provision had been included in the Bill raising the possibility of repeal of the enactment before it even came into force. The Government did not, and does not, see a compelling need to write such a provision into the Bill.

I expect amendments to bring State and Territory Acts into compliance with the proposed Commonwealth Act will all have been made within 6 to 12 months of Royal Assent. However, if it were to happen that the Offshore Petroleum Bill is passed, receives Royal Assent and, 12 months later, it remains unproclaimed, I can give an undertaking that either I or departmental officials will provide the Committee with a report on the reasons for the delay.

The Committee thanks the Parliamentary Secretary for this response and notes the many factors that make it difficult to more accurately set a likely commencement date. As noted above, the Committee would ordinarily accept such factors as justifying an extended, but not open-ended, period for commencement.

The Committee notes, however, the nature of this bill as a 'rewrite' of the existing law, making only modest policy changes. Given the consequences of delayed commencement – namely that the existing scheme will continue unaffected – the Committee accepts the approach taken in relation to this bill.

While the Committee thanks the Parliamentary Secretary for his undertaking to keep the Committee informed should commencement be delayed for more than 12 months, such information must in any case be presented to the Senate each year under its standing order 139(2) and the Committee does not consider it necessary to duplicate that process.

In the circumstances, the Committee makes no further comment on this provision.

Reversal of the onus of proof
Subclause 301(7) and clause 309

Subclause 301(7) and clause 309 would reverse the onus of proof in a criminal proceeding, and require the defendant to prove, on the balance of probabilities, matters which would excuse criminal liability. The Committee usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged.

In this case, the explanatory memorandum merely notes the effect of these provisions, and does not seek to justify this departure from the general law. The Committee **seeks the Minister's advice** as to the reason for this reversal of the onus of proof.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The provisions in question are defences m a criminal prosecution. To avail himself or herself of the defence, the defendant would have to prove, on the balance of probabilities, matters which would excuse criminal liability. Both defences exist in the same terms in the Petroleum (Submerged Lands) Act, so their replication in the Offshore Petroleum Bill represents no attempt to change policy.

As a general principle, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence. The defendants to whom subclause 307(1) and clause 309 applies have the knowledge that would establish what reasonable steps they took to carry out the corresponding duty or direction. The prosecution is still required to establish that the duty or direction has been breached.

I believe placing an evidential burden on the defendant and casting the matter as a legal burden is justified in the case of the abovementioned provisions. With one exception, the maximum penalty for any offence to which subclause 301(7) or clause 309 refers is no more than 100 penalty units. The conduct proscribed by the offences in question, for example failure to carry out operations authorised by a petroleum title in a safe manner and in accordance with good oilfield practice and good processing and transport practice, can carry significant risks for human safety and the marine environment. The Government takes such risks seriously.

The exception I alluded to above is subclause 191(5), which carries a higher penalty but which is not a strict liability offence. There the onus is on the prosecution to prove intention. Thus the availability of the defence under clause 309 could be seen as a peripheral issue in this case. In consultation with the Attorney-General's Department, a comprehensive review of all penalty provisions in this legislation will be carried out after the rewrite, and the need for the defence to apply to an offence under clause 191 can be examined in that process.

The Committee thanks the Parliamentary Secretary for this response.

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004 ('the Guide'), at pages 27 to 29, outlines the respective positions of the Government and the Committee on reversing the onus of proof. The Committee considers that the justification for any proposal to reverse the onus of proof should be set out in the explanatory memorandum accompanying a bill, and that any such explanation should address the Committee's views as they are outlined in the Guide.

The Parliamentary Secretary's explanation appears to bring the provisions within the exceptions the Committee has previously been prepared to accept. In particular, the Committee notes the contention in the response that 'where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence.' While the Committee does not accept that this is necessarily sufficient to justify reversing the onus, in this case the provisions enable the defendant to raise a defence of reasonableness which might not otherwise be available.

In the circumstances, the Committee makes no further comment on these provisions.

'Henry VIII' clause
Imposition of a tax by regulation
Subclause 399(1)

A Henry VIII clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation.

Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee. Clause 399 creates such a delegation of legislative power.

Subclause 399(1) would exempt the National Offshore Petroleum Safety Authority from any liability to taxation under the laws of the Commonwealth, States or Territories. However, subclause 399(2) would permit that exemption to be removed, in relation to a specified law, by regulation. The effect of that subclause is therefore to permit the imposition of taxation on the Authority by delegated, rather than primary, legislation.

One concern which the Committee has regularly raised in relation to the imposition of any form of taxation or levy by regulation is that the regulation takes effect as soon as it is made, and might not be disallowed for many sitting days after it has been made. The relevant tax could have effect for a number of months before a disallowance motion was considered by the Senate. In the meantime, the tax would have been validly levied, and could not be refunded without further Parliamentary intervention.

The Committee **seeks the Minister's advice** on the reason for this 'Henry VIII' clause, especially in view of the fact that it would permit the imposition of taxation by delegated legislation.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Parliamentary Secretary

> The Committee drew attention to the provision in subclause 399(2) on the grounds that it might be considered to delegate legislative powers inappropriately. The provisions of clause 399 are identical to those of section 150YU of the Petroleum (Submerged Lands) Act.
>
> I would point out that, if a tax law is prescribed by a regulation under subclause 399(2), the tax will not, in a legal sense, be imposed by the regulation. The tax will be imposed by the relevant Commonwealth, State or Territory Act, applying of its own force. The effect of the regulation under subclause 399(2) will merely be to remove the exemption provided by subclause 399(1).

It is true that, if the regulation is disallowed, the tax will have been validly imposed during the period prior to disallowance. However, it is always the case when a regulation is disallowed that it will have had a period of operation prior to disallowance.

This is not a case of a private citizen or a commercial entity being made subject to a tax as a result of the making of a regulation. The 'taxpayer' in question is a Commonwealth statutory corporation that does not hold money on its own account but operates by means of a Special Account under the *Financial Management and Accountability Act 1997.* It is therefore a 'FMA Act' body that operates out of the Commonwealth Consolidated Revenue Fund.

A scenario under which I could envisage the making of a regulation under subclause 399(2) would be a policy decision, for the purpose of adjusting Commonwealth-State-Territory financial relations, that the National Offshore Petroleum Safety Authority should pay a particular State/Territory tax.

Provisions such as clause 399(2) of the Bill are not unprecedented. There is a similar one in section 139 of the *Australian Securities and Investment Commission Act 2001* and another in section 165 of the same Act.

The Committee thanks the Parliamentary Secretary for this response.

The Committee accepts that 'in a legal sense' tax would be imposed by primary legislation, but is concerned that in a practical sense it is the regulations which allow that tax to be imposed. The Committee is also aware of precedents for this kind of provision – including provisions in the existing legislation – but considers that, as a matter of principle, the Parliament should specifically consider, on a case-by-case basis, whether it is appropriate to enact clauses of this nature.

The Committee notes the Parliamentary Secretary's contention that 'it is always the case when a regulation is disallowed that it will have had a period of operation prior to disallowance'. This is the concern alluded to in the Committee's comments about the disallowance period. In fact, however, there is nothing to prevent regulations being made to commence after the disallowance period has expired. The Committee raised similar concerns in relation to the Superannuation Bill 2005. In that case, the responsible minister undertook to make regulations with delayed commencement to address the Committee's concerns. Another approach might be to insert a similar requirement in the primary legislation itself. These options might be considered in the policy review of the legislation foreshadowed in the explanatory memorandum.

In any case, as the Parliamentary Secretary points out, the taxation arrangements affected by this clause exist between government agencies. This reduces the Committee's concerns with the particular clause.

In the circumstances, the Committee makes no further comment on this provision.

Offshore Petroleum (Annual Fees) Bill 2005

Introduced into the House of Representatives on 23 June 2005
Portfolio: Industry, Tourism and Resources

Background

Introduced with the Offshore Petroleum Bill 2005 and related bills, this bill sets out the annual fees payable in relation to petroleum exploration permits, retention leases and production, infrastructure and pipeline licences. The amount of the fees is to be specified in regulations.

Setting an amount of tax by regulation
Subclause 4(3)

The purpose of this bill, as the name suggests, is to impose annual fees for various aspects of drilling for and recovering petroleum in offshore areas. By virtue of subclause 4(3) the amount of each of the fees is to be fixed by regulation, with no upper limit set in the primary legislation. The Committee has noted in the past, with similar provisions, that to set the amount of what could be a tax by delegated legislation may be regarded as an inappropriate delegation of legislative power.

The Minister appears to suggest, in his second reading speech, that the amount of the fees will be set with a view to no more than cost recovery, when he says that 'the holders of permits, leases and licences must pay a fee to help [to] recover the costs of administration.' The Committee takes the view that, if the amount of the various fees is limited to cost recovery, then they cannot properly be regarded as taxes, and the setting of their amount by regulation could no longer be regarded as an inappropriate delegation of legislative power.

The Committee therefore **seeks the Minister's advice** as to whether the amount of the fees will be limited to cost recovery and, if so, whether the bill should not also contain a clause prescribing an appropriate limit.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Parliamentary Secretary

> The Committee draws attention to the fact that, by virtue of subclause 4(3) of the Annual Fees Bill, the amount of each of the annual fees is to be fixed by regulation, with no upper limit set in the primary legislation. This is identical to the provision that exists in the *Petroleum (Submerged Lands) (Fees) Act 1994.*
>
> As suggested in the second reading speech and explanatory memorandum, I can assure the Committee that the amount of the fees has always been, and will be, set only with a view to cost recovery. Therefore, I hope the Committee will take the view that, as these fees cannot be regarded as taxes, the setting of their amount by regulation is an appropriate delegation of legislative power. Accordingly, the Government does not believe the Annual Fees Bill should contain a clause specifying an upper limit for these fees.

The Committee thanks the Parliamentary Secretary for this response, and for his assurance that the fees will be set 'only with a view to cost recovery'. This assurance meets the Committee's concerns. The Parliamentary Secretary might care to consider, in the foreshadowed policy review of the legislation, whether it might not be possible to include a clause giving legislative force to this assurance.

In the circumstances, the Committee makes no further comment on this provision.

Offshore Petroleum (Registration Fees) Bill 2005

Introduced into the House of Representatives on 23 June 2005
Portfolio: Industry, Tourism and Resources

Background

Introduced with the Offshore Petroleum Bill 2005 and related bills, this bill sets out the different levels of registration fees payable in relation to the registration of transfers and dealing in titles under the proposed Offshore Petroleum Act. They can range from a minimum amount prescribed in regulations to an '*ad valorem*' fee of 1.5% of the value of the consideration or of the value of the title or interest. The bill proposes a policy change, providing that registration fees be extended to cover transfers of, and dealings in, infrastructure. This could, in the long term, be expected to lead to some increase in registration fee revenues.

The bill also proposes a minor clarification of what appears in the Petroleum (Submerged Lands) (Registration Fees) Act in relation to the deduction from the amount of registration fee imposed by the Act of the value of any exploration works to be carried out under the dealing that is being registered.

Setting an amount of tax by regulation
Clauses 5 and 6

Items 2, 3 and 4 in the table to subclause 5(2) provide that the amount of the fees referred to in those items is to be set by regulation, with no upper limit specified in the primary legislation. Subclause 5(4) states that the 'fee imposed by this section is imposed as a tax.' Similarly, items 5 and 6 in the table to subclause 6(2) provide that the amount of the fees referred to in those items is to be set by regulation, with no upper limit specified in the primary legislation, and subclause 6(6) states that the fee is again 'imposed as a tax'.

The Committee has noted in the past, with similar provisions, that to set the amount of what could be a tax by delegated legislation may be regarded as an inappropriate delegation of legislative power.

The explanatory memorandum notes the amount of each of these fees at the time of the introduction of this legislation. The Committee **seeks the Minister's advice** as to whether it would be possible for the primary legislation to specify a maximum amount for each of these fees.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Parliamentary Secretary

In this Bill, amounts are permitted to be prescribed by regulation under items 2, 3 and 4 of the table in subclause 5(2) and items 5 and 6 of the table in subclause 6(2). These items replicate without change the provisions of the *Petroleum (Submerged Lands) (Registration Fees) Act 1967.* The Committee likewise draws attention to the fact that these amounts, classed as a tax, are not subject to an upper limit in the Bill.

The explanatory memorandum to the Offshore Petroleum (Registration Fees) Bill describes in more detail the nature of each of these prescribed amounts. Each is a minimum or a cap that, in specified cases, overrides the ad valorem calculation set out in the Bill for determining the amount of the registration fee payable for registering a transfer or a dealing. In each case, there are reasons why the ad valorem figure would be considered either too low or too high.

Until 1989, the equivalents of these prescribed amounts were specified as dollar amounts in the Petroleum (Submerged Lands) (Registration Fees) Act itself. That year, legislative amendments were passed to enable these components of registration fees, and all other fees under the Petroleum (Submerged Lands) Act and incorporated Acts, to be prescribed by regulations. The rationale for this was to enable the timely adjustment of fees so that they more closely reflect actual administrative costs and so that the Government is not in a situation of trying to retrospectively catch up with incurred costs. In the case of this legislation, the costs are, of course, administrative costs incurred by the States and Northern Territory.

There is evidence to suggest that the Parliament of the day saw the abovementioned amounts, if not all amounts, imposed under the Petroleum (Submerged Lands) (Registration Fees) Act as essentially about cost recovery, not as a tax. Whether advice had then been received that this Act is a taxing Act is unclear, but later legal advice has definitively affirmed that finding.

Despite the tax status of the moneys paid under this Act, I do not see these prescribed amounts as a significant element of the tax base. Rather, I see them

representing a minimal contribution covering the administrative costs of the registration procedure in the specified situations where application of the ad valorem calculation would be inappropriate. During the term of the current Government, the level of the amounts prescribed in regulations under the Petroleum (Submerged Lands) (Registration Fees) Act has been increased by no more than the consumer price index, and this will continue to be the policy pursued.

Now that the more editorially focussed project of rewriting the Petroleum (Submerged Lands) Act and incorporated Acts has been completed, a general review of policy issues in this legislation is to be carried out by the Department of Industry, Tourism and Resources in consultation with the States, Northern Territory and industry. This may possibly lead to the introduction of legislative amendments at a later point in time. I have asked the Department to include in that review' the question of whether an upper limit should be set in the Act for the prescribed amounts. The review could also consider the alternative of merely inserting a new provision stating at these amounts cannot increase by more than the consumer price index.

The Committee thanks the Parliamentary Secretary for this response, for his observations that the fees represent 'a minimal contribution covering the administrative costs of the registration procedure' and for outlining the Government's policy to ensure that the amount will be increased by 'no more than the consumer price index.' These assurances meet the Committee's concerns.

The Committee thanks the Parliamentary Secretary for asking the Department to include this matter in the foreshadowed policy review of the legislation.

In the circumstances, the Committee makes no further comment on this provision.

Brett Mason
Deputy Chair

THE HON WARREN ENTSCH MP
PARLIAMENTARY SECRETARY
TO THE MINISTER FOR INDUSTRY, TOURISM AND RESOURCES

Senator Robert Ray
Chair
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the issues raised by your Committee about the Offshore Petroleum Bill 2005, the Offshore Petroleum (Annual Fees) Bill 2005 and the Offshore Petroleum (Registration Fees) Bill 2005 in the Scrutiny of Bills Alert Digest No. 8 of 2005 (10 August 2005). On behalf of the Minister for Industry, Tourism and Resources, I would like to respond to the questions raised.

Offshore Petroleum Bill 2005

Commencement on Proclamation
Subclause 2(1), item 2

The Digest draws attention to the fact that item 2 of the table in subclause 2(1) of the Offshore Petroleum Bill provides that almost all of its provisions will commence on Proclamation, with no time limit specified within which the Bill must commence.

The Digest also refers to Office of Parliamentary Counsel *Drafting Direction 2005, No.10*. I note that paragraph 22 of this document states that clauses providing for commencement by Proclamation but without restrictions of the kind discussed in paragraphs 18 to 21 "should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain and generally not within the Government's control (eg. enactment of complementary State legislation)."

As a general point, I believe the Commonwealth-State-Northern Territory interjurisdictional issues in this legislative package do have unusual characteristics in that the Commonwealth legislation recognises the State or Northern Territory Minister as having functions and powers under the Commonwealth Act itself, but these functions and powers are tied to what appears in the mirror State and Territory Acts.

Moreover, there has been a suggestion that the Acts Interpretation Act of one of the States would address the transitional issues in question and enable the State to defer the making of amendments until some time after proclamation of the new Commonwealth enactment. It has also come to light that there is at least one other State Act, unrelated to petroleum, that refers to adjacent areas under the Commonwealth Petroleum (Submerged Lands) Act. This Act, and maybe others, may likewise require pre-emptive amendments before the new Commonwealth legislation is proclaimed.

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I believe these factors would have made it ill-advised to merely list the names of the mirror State and Territory Acts in the Offshore Petroleum Bill and state that the proposed Act would need to be proclaimed within a certain number of months of the last of these Acts being amended.

The Committee has asked the Minister to comment on whether the commencement clause might not also be subject to the provision that, if the necessary Proclamation has not been issued by some fixed date in the future, the Act will be automatically treated as having been repealed on that date. My response to this suggestion is that this legislation was rewritten in close consultation with the States, Northern Territory and petroleum industry. I believe there would have been an unfavourable reaction from these stakeholders if a provision had been included in the Bill raising the possibility of repeal of the enactment before it even came into force. The Government did not, and does not, see a compelling need to write such a provision into the Bill.

I expect amendments to bring State and Territory Acts into compliance with the proposed Commonwealth Act will all have been made within 6 to 12 months of Royal Assent. However, if it were to happen that the Offshore Petroleum Bill is passed, receives Royal Assent and, 12 months later, it remains unproclaimed, I can give an undertaking that either I or departmental officials will provide the Committee with a report on the reasons for the delay.

Reversal of the onus of proof
Subclause 301(7) and clause 309

The provisions in question are defences in a criminal prosecution. To avail himself or herself of the defence, the defendant would have to prove, on the balance of probabilities, matters which would excuse criminal liability. Both defences exist in the same terms in the Petroleum (Submerged Lands) Act, so their replication in the Offshore Petroleum Bill represents no attempt to change policy.

As a general principle, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence. The defendants to whom subclause 307(1) and clause 309 applies have the knowledge that would establish what reasonable steps they took to carry out the corresponding duty or direction. The prosecution is still required to establish that the duty or direction has been breached.

I believe placing an evidential burden on the defendant and casting the matter as a legal burden is justified in the case of the abovementioned provisions. With one exception, the maximum penalty for any offence to which subclause 301(7) or clause 309 refers is no more than 100 penalty units. The conduct proscribed by the offences in question, for example failure to carry out operations authorised by a petroleum title in a safe manner and in accordance with good oilfield practice and good processing and transport practice, can carry significant risks for human safety and the marine environment. The Government takes such risks seriously.

The exception I alluded to above is subclause 191(5), which carries a higher penalty but which is not a strict liability offence. There the onus is on the prosecution to prove intention. Thus the availability of the defence under clause 309 could be seen as a peripheral issue in this case. In consultation with the Attorney-General's Department, a comprehensive review of all penalty provisions in this legislation will be carried out after the rewrite, and the need for the defence to apply to an offence under clause 191 can be examined in that process.

Clause 399

The Committee drew attention to the provision in subclause 399(2) on the grounds that it might be considered to delegate legislative powers inappropriately. The provisions of clause 399 are identical to those of section 150YU of the Petroleum (Submerged Lands) Act.

I would point out that, if a tax law is prescribed by a regulation under subclause 399(2), the tax will not, in a legal sense, be imposed by the regulation. The tax will be imposed by the relevant Commonwealth, State or Territory Act, applying of its own force. The effect of the regulation under subclause 399(2) will merely be to remove the exemption provided by subclause 399(1).

It is true that, if the regulation is disallowed, the tax will have been validly imposed during the period prior to disallowance. However, it is always the case when a regulation is disallowed that it will have had a period of operation prior to disallowance.

This is not a case of a private citizen or a commercial entity being made subject to a tax as a result of the making of a regulation. The 'taxpayer' in question is a Commonwealth statutory corporation that does not hold money on its own account but operates by means of a Special Account under the *Financial Management and Accountability Act 1997*. It is therefore a 'FMA Act' body that operates out of the Commonwealth Consolidated Revenue Fund.

A scenario under which I could envisage the making of a regulation under subclause 399(2) would be a policy decision, for the purpose of adjusting Commonwealth-State-Territory financial relations, that the National Offshore Petroleum Safety Authority should pay a particular State/Territory tax.

Provisions such as clause 399(2) of the Bill are not unprecedented. There is a similar one in section 139 of the *Australian Securities and Investment Commission Act 2001* and another in section 165 of the same Act.

Offshore Petroleum (Annual Fees) Bill 2005

The Committee draws attention to the fact that, by virtue of subclause 4(3) of the Annual Fees Bill, the amount of each of the annual fees is to be fixed by regulation, with no upper limit set in the primary legislation. This is identical to the provision that exists in the *Petroleum (Submerged Lands) (Fees) Act 1994*.

As suggested in the second reading speech and explanatory memorandum, I can assure the Committee that the amount of the fees has always been, and will be, set only with a view to cost recovery. Therefore, I hope the Committee will take the view that, as these fees cannot be regarded as taxes, the setting of their amount by regulation is an appropriate delegation of legislative power. Accordingly, the Government does not believe the Annual Fees Bill should contain a clause specifying an upper limit for these fees.

Offshore Petroleum (Registration Fees) Bill 2005

In this Bill, amounts are permitted to be prescribed by regulation under items 2, 3 and 4 of the table in subclause 5(2) and items 5 and 6 of the table in subclause 6(2). These items replicate without change the provisions of the *Petroleum (Submerged Lands) (Registration Fees) Act 1967*. The Committee likewise draws attention to the fact that these amounts, classed as a tax, are not subject to an upper limit in the Bill.

The explanatory memorandum to the Offshore Petroleum (Registration Fees) Bill describes in more detail the nature of each of these prescribed amounts. Each is a minimum or a cap that, in

specified cases, overrides the ad valorem calculation set out in the Bill for determining the amount of the registration fee payable for registering a transfer or a dealing. In each case, there are reasons why the ad valorem figure would be considered either too low or too high.

Until 1989, the equivalents of these prescribed amounts were specified as dollar amounts in the Petroleum (Submerged Lands) (Registration Fees) Act itself. That year, legislative amendments were passed to enable these components of registration fees, and all other fees under the Petroleum (Submerged Lands) Act and incorporated Acts, to be prescribed by regulations. The rationale for this was to enable the timely adjustment of fees so that they more closely reflect actual administrative costs and so that the Government is not in a situation of trying to retrospectively catch up with incurred costs. In the case of this legislation, the costs are, of course, administrative costs incurred by the States and Northern Territory.

There is evidence to suggest that the Parliament of the day saw the abovementioned amounts, if not all amounts, imposed under the Petroleum (Submerged Lands) (Registration Fees) Act as essentially about cost recovery, not as a tax. Whether advice had then been received that this Act is a taxing Act is unclear, but later legal advice has definitively affirmed that finding.

Despite the tax status of the moneys paid under this Act, I do not see these prescribed amounts as a significant element of the tax base. Rather, I see them representing a minimal contribution covering the administrative costs of the registration procedure in the specified situations where application of the ad valorem calculation would be inappropriate. During the term of the current Government, the level of the amounts prescribed in regulations under the Petroleum (Submerged Lands) (Registration Fees) Act has been increased by no more than the consumer price index, and this will continue to be the policy pursued.

Now that the more editorially focussed project of rewriting the Petroleum (Submerged Lands) Act and incorporated Acts has been completed, a general review of policy issues in this legislation is to be carried out by the Department of Industry, Tourism and Resources in consultation with the States, Northern Territory and industry. This may possibly lead to the introduction of legislative amendments at a later point in time. I have asked the Department to include in that review the question of whether an upper limit should be set in the Act for the prescribed amounts. The review could also consider the alternative of merely inserting a new provision stating that these amounts cannot increase by more than the consumer price index.

Yours sincerely

Warren Entsch

18 AUG 2005