

Energy & Resources Alert

Increased environmental and pollution compliance requirements for offshore oil and gas facilities

WHAT YOU NEED TO KNOW

- On 20 March 2013, the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No 2) Bill 2013 ("the Bill") and Explanatory Memorandum were presented and read for a first time to the House of Representatives. The Bill comes about as a result of the Commonwealth Government's response to the June 2010 *Report of the Montara Commission of Inquiry*. It seeks to increase compliance under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* ("OPGGSA"), particularly in relation to environmental and pollution obligations.
- The key changes proposed by the Bill are:
 - a) additional and alternative enforcement mechanisms for the offshore petroleum regulator, the National Offshore Petroleum Safety and Environmental Management Authority ("NOPSEMA"), and the courts for breaches of the offshore petroleum regulatory regime, including the introduction of adverse publicity orders;
 - b) the provision of powers to NOPSEMA to require petroleum titleholders to remove threats to the environment from offshore petroleum operations;
 - c) a new statutory duty on petroleum titleholders to contain, control and clean up and pay for costs incurred to contain, control and clean up the spill, remediate the environment and carry out appropriate environmental monitoring; and
 - d) a new (broader) requirement on petroleum titleholders to maintain sufficient financial assurance to meet the costs and liabilities arising in connection with carrying out petroleum activities or complying with the requirements under the OPGGSA or regulations.

WHAT YOU NEED TO DO

- Offshore industry participants need to be aware of the progression of the Bill and prepare for the additional and more extensive enforcement measures available to NOPSEMA.
- Petroleum titleholders should review their insurance programme to ensure they are compliant with the changes in relation to the levels of "financial assurance" to be held and have adequate cover for the increased potential pollution liabilities.

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Additional/alternative enforcement mechanisms

A system of more graduated sanctions are proposed under the Bill, ensuring that NOPSEMA is best able to secure compliance through a targeted enforcement response. In particular, the Bill introduces infringement notices and adverse publicity orders.

Infringement notices may be issued in relation to minor offences with strict liability only. This will enable NOPSEMA to enforce minor breaches and less serious contraventions, without needing to seek the imposition of a penalty in court. The Explanatory Memorandum acknowledges that the introduction of these notices infringes upon the internationally recognised right to a fair and public hearing. However, it states that this infringement is aimed at a legitimate objective and is reasonable, necessary and proportionate and as such is compliant with international law and Australia's treaty obligations.

Another significant development is the introduction of adverse publicity orders. These provisions are based on existing sections in other Commonwealth legislation, for example, the *Competition and*

Consumer Act 2010 (Cth) and the *Work Health and Safety Act 2011* (Cth). These provisions enable a court to require a person who is found guilty of an offence under the Bill, or guilty of being an accessory to such an offence under the *Crimes Act 1914* (Cth) or ordered to pay a civil penalty under the Bill, to do either or both of the following:

- a) publish the offence or civil penalty order, its consequences, the penalty imposed and any other related matter; and/or
- b) notify a specified person or class of persons (such as a group of people who were particularly impacted as a result of the contravention) of the offence or civil penalty order, its consequence, the penalty imposed and any other related matter.

The imposition of an adverse publicity order upon an offshore industry participant may have significant flow on effects, including (but not limited to):

- a) increased civil litigation or claims against the participant, on the basis of the advertised finding of guilt;
- b) notifying persons contemplating contractual arrangements with the participant; and
- c) general damage to the participant's reputation and (if applicable) share price.

A pertinent example of the effects of bad publicity upon offshore participants is the PRWeek/One Poll survey conducted on BP's public image following the oil spillage in the Gulf of Mexico. One year following the incident, 93% of respondents felt that the oil spill had damaged BP's reputation, and 50% said their opinion of BP was more negative since the spill. In addition, positive advertising by BP had failed to significantly remedy the bad press. More pertinently, however, it was argued that it was not only BP that suffered, rather the *entire offshore industry* suffered a fallout. For further information about the survey and related commentary, see PR Week's summary of results [here](#).

Environmental improvement/prohibition notices

Under the OPGGSA, NOPSEMA already has powers to issue prohibition notices and improvement notices to remedy areas of concern in relation to occupational health and safety risks. The Bill extends this power to environmental threats also. These powers are far

reaching, including the ability for a NOPSEMA inspector to order that a particular activity not be conducted, or that an offshore vessel or structure not be operated, if the inspector determines that there is an immediate and significant threat to the environment.

The penalties for failure to comply with a notice are significant, with the maximum penalty for a corporation being \$510,000. However, a failure to comply is also a continuing offence, meaning that for every day that the corporation fails to comply with the notice, a separate offence is incurred. Whilst the maximum *daily* penalty is \$51,000, it is not limited to the total maximum \$510,000, rather will continue to accrue for every day that the notice is not complied with. The Explanatory Memorandum justifies this on the basis that:

"in a high hazard regime such as this, the conduct and consequences associated with the offence are potentially extremely serious, particularly when related to...environmental matters, and therefore warrant application of a penalty high enough to provide sufficient disincentive to secure swift compliance".

Importantly, the issue of an environmental improvement or prohibition notice will not be subject to merits review. The Explanatory Memorandum explains that it is not feasible to have a body of duly-qualified persons to conduct such reviews, and that NOPSEMA should not have its decisions reviewed by a "demonstrably less-qualified and less-experienced body". Therefore, a determination by NOPSEMA that activities or vessels be shut down will not generally be subject to external review, unless there is an error that comes within the purview of the courts.

Conclusion

Offshore industry participants need to be aware of the progression of the Bill and prepare for the additional and more extensive enforcement measures available to NOPSEMA. Further, petroleum titleholders should

Statutory duty – "polluter pays"

Finally, the Bill introduces a statutory duty requiring petroleum titleholders, in the event of an escape of petroleum occurring as a result of operations within the title area, to stop, contain, control and clean up the spill, remediate the environment and carry out appropriate environmental monitoring. This is designed to strengthen the application of the "polluter pays" principle in offshore petroleum regulation, in accordance with the recommendations of the Montara Report.

Notably, this includes the ability of both the State and Commonwealth Governments to reclaim costs incurred from environmental incidents occurring within Commonwealth territory (particularly if they subsequently cause damage within State territory). There is no fault element to the ability to reclaim costs, therefore participants will be strictly liable for the costs incurred from any discharge of pollution, even if reasonable precautions were taken.

In addition, a new section 571 is introduced into the OPGGSA by the Bill, which requires petroleum titleholders to, at all times while the title is in force, maintain financial assurance sufficient to give the titleholder the capacity to meet the costs, expenses and liabilities arising in connection with, or as a result of, the carrying out of a "petroleum activity", the doing of any other thing for the purposes of the petroleum activity; or complying with a requirement under the Act or regulations in relation to a petroleum activity. This is only required to meet extraordinary costs, rather than ordinary operating costs. Whilst the concept of "financial assurance" is broader than "insurance" and may allow petroleum titleholders to self-insure, the areas for which they are required to insure are potentially broader than under the existing provisions.

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