

RECENT CHANGES TO THE COMMONWEALTH OFFSHORE PETROLEUM LEGISLATION: STRENGTHENING ENVIRONMENTAL LIABILITY, COMPLIANCE AND ENFORCEMENT PROVISIONS

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A robust regulatory system is required to protect the environment from oil spills arising from offshore oil installations. The Montara oil spill in 2009 exposed significant failings in Australia's offshore petroleum regulatory system, including a lack of enforcement mechanisms to ensure compliance with the relevant legislation. This article examines recent changes made to the Commonwealth's offshore petroleum legislation, which should improve the range of tools available to the industry regulator to both prevent and respond to adverse incidents. However, it is argued that the offshore regulatory system in general still suffers from a fragmentation of laws between the Commonwealth and States, and that despite the improvements introduced by the amendments, the offshore regime still does not adequately address issues of liability for loss and damage suffered by third parties.

1 Introduction

Ensuring the integrity of oil and/or gas wells and preventing the escape of petroleum and other fluids into the marine environment is a fundamental responsibility of companies involved in offshore petroleum exploration and production. Blowouts from offshore oil wells can have major and long lasting effects, including the loss of human life, the pollution of marine and shoreline ecosystems, and substantial commercial losses to the companies directly involved and third parties affected by the spill.¹

The explosion of the Piper Alpha oil rig off the coast of the United Kingdom on 6 July 1988 caused 167 deaths and significant oil pollution.² In 2009, the blowout at the Montara wellhead platform off the Northern Territory caused Australia's third largest oil spill and was the worst of its kind in Australia's offshore petroleum industry history, with oil and gas flowing unabated into the Timor Sea for a period of just over 10 weeks.³ The damage from the escaped oil resulted in a \$40 million spill cleanup bill, paid in full by the operator, PTT Exploration and Production Australasia (Ashmore Cartier) Pty Ltd ('PTTEP'), although the Department of Resources, Energy and Tourism ('DRET') estimates the total cost to PTTEP was in excess of \$230 million.⁴ In 2010, the infamous blowout of the deepwater Macondo well in the Gulf of Mexico and the explosion of the Deepwater Horizon rig led to the deaths of 11 workers, with payment for individual compensation claims and cleanup costs by the transnational oil company British Petroleum ('BP') totalling \$12.7 billion as of 31 October 2013.⁵

In May 2013, BP referred a proposal to the Australian Commonwealth Environment Minister to drill for oil in the Great Australian Bight, approximately 400 km west of Port Lincoln and 300 km southwest of Ceduna, in the offshore area of South Australia.⁶ The proposed drilling area is located in Commonwealth waters on the continental slope and abyssal plain of the Great Australian Bight, with water depths ranging between approximately 1,000 and 2,500 m. Wells will be drilled using a mobile offshore drilling unit ('MODU'), either dynamically positioned, moored with anchors, or a combination of the two.⁷ According to the documentation submitted by BP, there are 18 listed threatened species that may occur within the proposed drilling area, and 23 migratory species that may occur within or adjacent to the proposed area, including birds, whales, and one dolphin and shark species.⁸ The exploration permits overlap with the Great Australian Bight Commonwealth

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¹ David Borthwick, *Report of the Montara Commission of Inquiry* (June 2010), 5.

² The Hon Lord Cullen, British Parliament, *The Public Inquiry into the Piper Alpha Disaster, Vols 1 and 2* (1990).

³ Borthwick, above n 1, 5.

⁴ Squires, M, Department of Resources, Energy and Tourism, 'Implementing the Government Response to the Montara Inquiry' (Paper presented at Spillcon, Cairns, Queensland, April 2013, <<http://www.environment.gov.au>>, 19 June 2013. In August 2012, PTTEP pleaded guilty to four breaches of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) ('OPGGSA'), including three occupational health and safety (OHS) breaches, and was fined \$510,000 under the penalty regime applicable at the time.

⁵ British Petroleum, *Gulf of Mexico Oil Spill, Claims and Other Payments, Public Report - 10/31/2013*, 1, <<http://www.bp.com/content/dam/bp/pdf/gulf-of-mexico/Public-Report-October-2013.pdf>>, 10 July 2013.

⁶ British Petroleum, 'Great Australian Bight Exploration Drilling Program' (Referral of Proposed Action under the Environment Protection and Biodiversity Conservation Act 1999 (Cth), (2013/6883), 13 May 2013, <<http://www.environment.gov.au>>, 10 July 2013.

⁷ *Ibid* 1.

⁸ *Ibid* 14-27.

Marine Reserve, largely in the Multiple Use Zone, which allows oil and gas activities subject to approval by the Director of National Parks.⁹

Although there have been significant improvements in deepwater drilling technology since the Deepwater Horizon explosion, in particular the development of new well capping devices and containment devices,¹⁰ the prospect of significant harm from an adverse incident remains a real possibility. BP has submitted that the proposed drilling program is not a controlled activity requiring assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*), as it will not be likely to have a significant impact on a matter of national environmental significance. However, given the scepticism regarding BP's environmental credentials since Deepwater Horizon incident in the US in 2010, and concern over the unique importance of the marine environment of the Great Australian Bight,¹¹ the federal Environment Minister may well determine that the proposed drilling program requires assessment and approval under the *EPBC Act*.

While the proposal may be assessed under the *EPBC Act*, the regulation of petroleum activities occurs under the relevant offshore petroleum legislation. To protect the environment, a robust regulatory system is required, with a range of enforcement mechanisms to ensure compliance with the legislation. Significant failings in Australia's regulatory system were exposed by the Montara incident. Thus, following the Report of the Commission of Inquiry into the Montara oil spill,¹² and the Government's Final Response to the Report,¹³ the Commonwealth *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (*OPGGSA*), was amended in 2010 and 2011, with major changes to the regulatory regime effected through the *Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011* (Cth).

The federal government also undertook its own internal legislative review of offshore petroleum, the *Offshore Petroleum and Marine Environment Legislative Review*, which concluded in June 2012. Unfortunately, the results have not been made available to the general public. However, Explanatory Memoranda to Acts passed in 2013, which cite from the findings of the Legislative Review, make it clear there are significant shortcomings in the *OPGGSA*'s compliance and enforcement regime¹⁴ To strengthen that regime, the Commonwealth Parliament enacted the *Offshore Petroleum and Greenhouse Gas (Significant Incidents Directions) Act 2012* (Cth), the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013* (Cth) (*Compliance Measures Act*) and the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Act 2013* (Cth) (*Compliance Measures No. 2 Act*). While some of the amendments introduced by the two Compliance Measures Acts have come into effect, most will not come into force unless and until general legislation concerning the regulatory powers of government agencies is enacted, namely the *Regulatory Powers (Standard Provisions) Bill 2013* (Cth). This is expected to be in late 2013.

In this article I examine the major changes proposed by the Compliance Measures Acts, including new provisions regarding liability for environmental cleanup and restoration in the event of an oil spill, cost recovery, and financial assurance, new penalties, and expanded powers available to the Regulator. The focus of this article will be on environmental laws and management, and not the health and safety provisions. In Part 2, I set out the constitutional and legislative background under which offshore petroleum development takes place in Australia, to provide the necessary context in which to examine the recent amendments. In Part 3, I describe the compliance and enforcement mechanisms that exist under the *OPGGSA* prior to the 2013 amendments coming

⁹ Ibid 28.

¹⁰ For example, the well capping device developed by the UK Oil Spill Prevention and Response Advisory Group (*OSPRAG*). See OSPRAG, *Strengthening UK Prevention and Response: Final Report* (September 2011) 6, <<http://www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/EN022.pdf>>, 30 October 2012. The Australian industry's response to the Deepwater Horizon incident is taking place within that of the International Oil and Gas Producers Association (*OGP*). As part of its Subsea Well Response Project, the OGP developed a subsea incident response package of well capping equipment and a Subsea First Response Toolkit (*SFRT*) for global use. An industry consortium is funding a project to develop an Australian SFRT by the end of 2013, in partnership with the global SFRT, and compatible with it. The SFRT will provide specialised equipment in Australia for immediate use at the start of a subsea well control event, namely equipment to clean around the wellhead, enable intervention and prepare for relief well drilling and installation of a capping device: Australian Petroleum Production and Exploration Association (*APPEA*), *Subsea and Well Integrity*, <<http://www.appea.com.au/safety-environment/315-2/>>, 10 July 2013.

¹¹ See for example, Conservation Council of South Australia, *Key Concerns about BP Oil Exploration in the Great Australian Bight (GAB)*, <<http://www.conservation.sa.org.au/coast-and-marine-home/1059-key-concerns-about-bp-oil-exploration-in-the-great-australian-bight-gab.html>>, 10 July 2013. BP's documentation for referral under the EPBC Act recognises that some 'stakeholders' may view the proposal 'in the context of the 2010 Deepwater Horizon accident', before going on to justify its improved procedures/corporate culture: British Petroleum, above n 6, 33.

¹² Borthwick, above n 1,

¹³ Commonwealth of Australia, *Final Government Response to the Report of the Montara Commission of Inquiry* (2011).

¹⁴ See the Explanatory Memoranda to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2013 (Cth) and Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Bill 2013 (Cth), discussed in Part 4 below.

into effect. Part 4 examines the changes proposed by the two Compliance Measures Acts of 2013. Part 5 of this article contains critical analysis, while Part 6 concludes.

2 Constitutional and Legislative Background

2.1 Constitutional Background

The legal framework within which petroleum exploration and production takes place in Australia is a result of the division of responsibilities between the federal government and the state/Northern Territory governments under the Australian Constitution, and the relevant legislation providing the legal basis for the Offshore Constitutional Settlement,¹⁵ an agreement entered into between the Commonwealth and the states to resolve political conflict over jurisdiction and control of offshore areas and resources.

At the time of the discovery of offshore oil in the Bass Strait in the 1960s, it was assumed the states had jurisdiction over the territorial sea, the breadth of which was 3 nautical miles.¹⁶ Negotiation between the Commonwealth and states led to the 1967 Petroleum Agreement, which provided a framework for the administration of offshore petroleum legislation, but avoided questions of sovereignty or jurisdiction. The mirror Commonwealth, state and Territory Petroleum (Submerged Land) Acts of 1967 formed the basis of the agreement.¹⁷ In the early 1970s, the Commonwealth Labor government declared Commonwealth sovereignty over offshore areas seaward from the low water mark in the *Seas and Submerged Lands Act 1973* (Cth),¹⁸ which was upheld by the High Court in the *Seas and Submerged Lands Case* of 1975.¹⁹ However, the High Court's judgment caused a political dilemma for the incoming Liberal government, which had opposed Commonwealth sovereignty at the expense of the states. The solution was development of the Offshore Constitutional Settlement ('OCS').²⁰

The OCS is anchored in s 51(xxxviii) of the *Constitution* (the referral power). The first aspect is legislation extending the legislative power of the states with respect to the territorial sea (the *Coastal Waters (State Powers) Act 1980* (Cth) and mirror State and Territory legislation),²¹ and vesting title of the seabed beneath the territorial sea from the low water mark seaward to 3 nautical miles in the States (*Coastal Waters (State Title) Act 1980* (Cth) and mirror State and Territory legislation).²²

The second aspect of the OCS is the offshore petroleum package, by which the Commonwealth and the States agreed that petroleum operations in State/Northern Territory coastal waters (waters within 3 nautical miles seaward of the low water mark/baseline of the territorial sea) would be under the legislative and administrative control of the states, and operations in Commonwealth waters (waters of the territorial sea between 3 and 12 nautical miles as well as the continental shelf, and the offshore areas of external Territories, such as Ashmore and Cartier Islands) would be regulated by the Commonwealth but under the day-to-day administration of the states.²³ Given the potential for disparate arrangements, it was agreed the Commonwealth, States and the

¹⁵ *Offshore Constitutional Settlement: A Milestone in Co-operative Federalism* (AGPS, Canberra, 1980) and *Offshore Constitutional Settlement: Selected statements and documents 1978-79* (Commonwealth of Australia, 1980), <http://www.ret.gov.au/resources/Documents/upstream-petroleum/Offshore_Constitutional_Settlement.pdf>, 31 July 2013. For more information, see Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) *Marine Policy* 334; Michael White, *Australian Offshore Laws* (The Federation Press, 2009); Michael White, 'Australia's Offshore Legal Jurisdiction: Part 1 – History and Development' (2011) 25 *Australia & New Zealand Maritime Law Journal* 3.

¹⁶ Haward above n 15, 335. The breadth of Australia's territorial sea is currently 12 nm.

¹⁷ *Ibid.*

¹⁸ Australia's maritime zones under international law currently include the territorial sea with a breadth of 12 nm, the Contiguous Zone with a breadth of 24 nm, the continental shelf and an Exclusive Economic Zone with a breadth of 200 nm.

¹⁹ *New South Wales v Commonwealth* (1975) 135 CLR 337.

²⁰ Haward above n 15, 335.

²¹ Beyond their territories, states have power to legislate for 'peace order and good government' of the state, which means there must be a nexus between the subject matter of the legislation and the state. Under the *Coastal Waters (State Powers) Act 1980* (Cth), states have legislative power over all activities in 'coastal waters' (ie in the first 3 nautical miles of the territorial sea) and in relation to specific activities beyond coastal waters, even if these are not for the 'peace order and good government' of the state. Specified activities include fisheries, shipping facilities and works, and subterranean mining from land within the limits of the state.

²² The *Coastal Waters (State Title) Act 1980* (Cth) vests the same rights in the coastal waters of the state, and the same right and title to property in the seabed and subsoil beneath these waters, as the state has in its internal waters and seabed and subsoil beneath these waters. The rights and title are subject to exceptions: (a) the preservation of rights acquired by third parties prior to commencements of Act; and (b) the right of the Commonwealth to use the coastal waters and subjacent seabed for the purpose of communications, navigational safety, quarantine and defence; and (c) the right of the Commonwealth to authorise construction and use of pipelines to carry petroleum from the continental shelf.

²³ Section 5 of the *OPGGSA* explains the *Offshore Constitutional Agreement* to the extent the agreement relates to exploring for, and exploiting petroleum.

Northern Territory should ‘try to maintain, as far as practicable, common principles, rules and practices in regulating and controlling the exploration for, and exploitation of offshore petroleum beyond the baseline of Australia’s territorial seas’.²⁴

2.2 Legislative and Regulatory Background

Following the OCS, the application of the *Petroleum (Submerged Lands) Act 1967* (Cth) (‘PSLA’), was confined to waters outside the 3 nautical mile limit. A major feature of the PSLA regulatory regime was the shared administration of offshore petroleum operations in Commonwealth waters through the Joint Authority/Designated Authority arrangements.

The Joint Authority comprises the responsible Commonwealth Minister and the responsible State/Northern Territory Minister (usually the Energy and Resources Minister).²⁵ The Joint Authority may delegate any or all of its functions and powers to the respective Commonwealth and State/Northern Territory resources departments. Key functions and powers include: the release of offshore petroleum exploration areas; assessment of industry bids for these areas; the grant (or refusal) and renewal of petroleum titles; variation of title conditions; and the suspension, extension and cancellation of titles. The Designated Authority for the offshore area of a State/Northern Territory was the responsible State/Northern Territory Minister. The Designated Authority was responsible for the day-to-day administration of petroleum titles in their respective offshore areas, including: receiving reports and applications; collecting fees; granting Access and Special Prospecting Authorities; and approving transfers and dealings.

While Commonwealth waters were under the shared administration of the Commonwealth and the States, State/Northern Territory coastal waters remained under the legislative and administrative control of the respective States/NT. The State and Northern Territory PSLAs of 1967 regulate offshore petroleum operations in state coastal waters. Thus, occupational health and safety (‘OHS’), and environmental matters, were regulated by state laws and enforced by state authorities in state coastal waters.

Following the Piper Alpha disaster in the UK in 1988, the Commonwealth Parliament passed the *Petroleum (Submerged Lands) Amendment Act 2003* (Cth) to establish a new national authority, the National Offshore Petroleum Safety Authority (‘NOPSA’), with the power to regulate OHS in Commonwealth waters from 1 January 2005.²⁶ As the States amended their offshore petroleum laws to confer power on NOPSA to administer OHS laws in state coastal waters,²⁷ NOPSA became responsible for regulating OHS on all offshore operations, in both Commonwealth and State/Territory waters.²⁸

At this stage, one of the key issues in offshore pollution, that of well integrity, remained divided in its administration. Because well integrity can have an impact on both human health and wellbeing and the environment, it is relevant to both environmental regulation and OHS. A distinction was drawn in the Commonwealth and State offshore petroleum legislation between the need to regulate ‘OHS well integrity’ (human health and safety) and ‘non-OHS well integrity’ (environmental health). The OHS aspects of well integrity were administered by NOPSA in Commonwealth and State coastal waters. However, the environmental aspects of well integrity were administered by the states in both State coastal waters and in Commonwealth waters through the Designated Authorities.

²⁴ *OPGGSA* s 5.

²⁵ In 2013, schedule 4 to the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013* (Cth) (‘Compliance Measures Act’) amended the *OGPPSA* such that the Joint Authority for the offshore area of Tasmania is now comprised solely of the responsible Commonwealth Minister, and is to be known as the Commonwealth-Tasmania Offshore Petroleum Joint Authority: *OPGGSA* s 56. Following the transition to a national regulator on 1 January 2012, Tasmania indicated its preference to be removed from participation in Joint Authority arrangements under the *OPGGSA*.

²⁶ It should be noted that there were many other amendments to the *Petroleum (Submerged Lands) Act 1982* (Cth) between 1988 and the amendments to establish NOPSA in 2003: Tina Hunter, ‘Offshore Exploration and Production, Policy and the Offshore Petroleum Act: Whither Now?’ (Paper presented at *Annual Excellence in Upstream Energy*, Sydney, Australia, July 2006, 8 <http://epublications.bond.edu.au/law_pubs/66> 10 July 2013; below n 33.

²⁷ In the coastal waters of the Northern Territory, NOPSA administered Commonwealth OHS laws.

²⁸ Patrick Brazil and Peter Wilkinson, ‘The Establishment of a National Offshore Petroleum Safety Authority’ (2005) 24 *Australian Resources and Energy Law Journal* 87; Tina Hunter, ‘Australian Offshore Petroleum Regulation After the Varanus Island Explosion and the Montara Blowout – Drowning in a Sea of Federalism?’ (2011) 25 *Australia & New Zealand Maritime Law Journal* 69.

Other changes to the Commonwealth petroleum regimes were introduced from 2006-08.²⁹ In 2006, an industry-wide request for rewrite of the *PSLA* resulted in the enactment of the *Offshore Petroleum Act 2006* (Cth) ('OPA'),³⁰ while in 2008, the OPA was amended to establish a system of offshore titles that authorises the transportation, injection and storage of greenhouse gas substances under the seabed, and renamed the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).³¹ Further changes were made in 2010-11, following the Report of the Commission of Inquiry into the Montara oil spill,³² other reviews and reports regarding offshore petroleum safety prior to that incident,³³ and a 2009 Productivity Commission report into offshore petroleum regulation.³⁴

Amendments introduced into Parliament on 29 September 2010 extended NOPSA's functions to include oversight of the non-OHS structural integrity of facilities, wells and well-related equipment.³⁵ These came into effect on 29 April 2011. Further regulatory reform was achieved through the *Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011* (Cth), which amended the *OPGGSA* to establish the National Offshore Petroleum Safety and Environmental Management Authority ('NOPSEMA') and the National Offshore Petroleum Titles Administrator ('NOPTA'). From 1 January 2012, these two bodies replaced the 7 Designated Authorities in the administration and regulation of petroleum operations in Commonwealth waters.

The Joint Authorities continue to make the major decisions concerning the granting and cancellation of petroleum titles, title conditions, and key decisions about resource management and resource security, while NOPTA's main functions are: to assist the Joint Authorities and the responsible Commonwealth Minister through the provision of information, assessments, analysis, reports, advice and recommendations; to collect, manage and release data; titles administration; to approve and register transfers and dealings in titles; and to keep the petroleum and greenhouse gas titles registers.³⁶

NOPSEMA is an expanded version of NOPSA. Its main functions now include the regulation and administration not only of OHS, but also the structural integrity of facilities, wells and well-related equipment; environmental management; and day-to-day petroleum operations in Commonwealth waters. However, NOPSEMA cannot administer environmental laws, including the approval of well operations management plans and environmental plans, in state coastal waters without the conferral of powers upon it by the states. In designated coastal waters, this may be done only if the States and Northern Territory amend their Petroleum (Submerged Lands) Acts³⁷ and regulations.³⁸ The legislative position is such that states now cannot confer power on NOPSEMA to administer OHS laws in state coastal waters unless power to administer well integrity is *also* conferred. Western Australia actively withdrew conferral of the OHS functions on NOPSEMA in

²⁹ The *Offshore Petroleum Amendment (Greater Sunrise) Act 2007* (Cth) put in place the framework necessary for Australia to meet its obligations under the agreement between Australia and the Democratic Republic of Timor-Leste, while the *Australian Energy Market Amendment (Gas Legislation) Act 2007* (Cth), repealed the redundant common carrier provisions and made some other changes.

³⁰ Hunter above n 26, 8. The main changes concerned structure and style, and only a modest number of minor policy changes were implemented.

³¹ Stuart Barrymore and Ann-Maree Mathison, 'Update: Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008 (Cth)' (2008) 27 *Australian Resources and Energy Journal* 469, 469.

³² Borthwick, above n 1.

³³ Department of Industry, Science and Resources, Australian Offshore Petroleum Safety Case Review, *Future Arrangements for the Regulation of Offshore Petroleum Safety* (2001); Magne Ognedal, Derek Griffiths, and Bruce Lake, *Review of the National Offshore Petroleum Safety Authority Operational Activities*, Report of the Independent Review Team (Commonwealth of Australia, Department of Resources, Energy and Tourism, February-March 2008); Kim Bills and David Agostini, *Offshore Petroleum Safety Regulation: Better Practice and the Effectiveness of the National Offshore Petroleum Safety Authority* (Commonwealth of Australia, Department of Resources, Energy and Tourism, June 2009). See also *Offshore Petroleum Safety Regulation Inquiry (June 2009) and Review of the National Offshore Petroleum Safety Authority Operational Activities (March 2008): Government Response* (Commonwealth of Australia, Department of Resources, Energy and Tourism, September 2010).

³⁴ Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil & Gas) Sector* (April 2009).

³⁵ *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Act 2010* (Cth). To fully implement these legislative amendments, changes were also made to Part 5 of the *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011*. The statutory amendments also clarified the imposition of an OHS duty of care on titleholders in relation to wells under Schedule 3 of the Act, and extended the powers of OHS Inspectors in respect of inspection and enforcement.

³⁶ Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011* (Cth), 1; *OPGGSA* ss 695AB-695R.

³⁷ Victoria recently reformed the *Petroleum Submerged Lands Act 1982* (Vic) and renamed it the *Offshore Petroleum and Greenhouse Gas Storage Act 2010* (Vic).

³⁸ Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011* (Cth), 4-5. Similarly, in "eligible coastal waters", these being waters landward of the (3-mile) territorial sea baseline that are external to the state, functions and powers may be conferred on NOPSEMA on the same basis as in designated coastal waters. Only Western Australia has any offshore resources activity in waters in this category. A State or the Northern Territory may also contract with NOPSEMA for the provision of regulatory services onshore, but constitutional restrictions apply.

January 2012. Furthermore, as of 1 January 2013, the other states (with the exception of Victoria) and the Northern Territory had not made the legislative changes necessary to confer power to regulate well integrity on NOPSEMA, and consequently their existing conferral of powers on NOPSEMA to administer OHS laws in state coastal waters lapsed.³⁹

Thus, currently, NOPSEMA administers OHS and well integrity in Commonwealth and Victorian coastal waters, while the other States and the Northern Territory administer OHS and well integrity and environmental assessment in state coastal waters.

3 Compliance and Enforcement prior to May 2013

3.1 Prevention and Punishment

The *OPGGSA* implements a licensing/approval system. To undertake petroleum activities such as the exploration for or production of petroleum, the relevant authority must be obtained under the *OPGGSA*.⁴⁰ The *OPGGSA* empowers the Joint Authority power to place licence conditions on titles,⁴¹ and sets out certain standard conditions or obligations on titleholders, which are aimed at the prevention of environmental harm. These include the work practices requirements in s 569, for example, to carry out all operations in a 'proper and workmanlike manner' and in accordance with good oilfield practice, and to control the flow, and prevent the waste or escape, in the permit area, lease area or licence area, of petroleum or water;⁴² and the obligation in s 572 to maintain in good condition and repair all structures, equipment and other property used for petroleum operations in the area of the title.⁴³ Titleholders must also carry on petroleum activities in a manner that does not unreasonably interfere with other users of the sea.⁴⁴

Before commencing operations, a proponent must have an approved Environment Plan (EP) under the relevant regulations.⁴⁵ The legislative regime also puts in place particular requirements concerning well integrity. Titleholders need a well activity approval before undertaking certain well activities that lead to the physical change of a well bore.⁴⁶ Before undertaking a well activity, an operator must have an approved Well Operations Management Plan (WOMP) under the relevant regulations,⁴⁷ and must operate in accordance with these Plans.⁴⁸ NOPSEMA is responsible for approving EPs and WOMPs and is empowered to undertake investigations to ensure compliance with title conditions, EPs and WOMPs through the appointment of petroleum project inspectors,⁴⁹ who may exercise certain powers of access, inspection and entry under s 601 of the Act.

To 2013, the major tools available to ensure compliance with the Act have been punitive. The *OPGGSA* establishes offences for contravening a range of provisions of the Act, including: conducting petroleum activities without the necessary authorisation/title,⁵⁰ failing to abide by licence conditions,⁵¹ and operating without an approved EP⁵² and/or WOMP. The penalties include fines and imprisonment. Another major punitive tool is the power to suspend a title,⁵³ revoke/cancel a title,⁵⁴ or the refusal to renew a title,⁵⁵ if a pollution incident breaches the conditions of a title or otherwise causes a contravention of certain provisions of the Act.

³⁹ NOPSEMA, *Offshore Regulatory Reform Legislation – 2013*, <<http://www.nopsema.gov.au/legislation-and-regulations/recent-changes-to-legislation>>, 6 June 2013.

⁴⁰ For example, s 97 of the *OPGGSA* prohibits the unauthorised exploration for petroleum in an offshore area, that is, exploration without a petroleum exploration permit.

⁴¹ For example, s 162 of the *OPGGSA* allows the Joint Authority to grant a petroleum production licence subject to whatever conditions the Joint Authority thinks appropriate.

⁴² *OPGGSA* s 569.

⁴³ *Ibid* s 572.

⁴⁴ *Ibid* sub-s 280(2).

⁴⁵ *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*, regs 6, 9.

⁴⁶ *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011*, regs 5.22 -5.55.

⁴⁷ *Ibid* reg 5.04.

⁴⁸ *Ibid* reg 5.05.

⁴⁹ *OPGGSA* s 600(1).

⁵⁰ For example, it is an offence under s 97 to explore for petroleum without an authorisation, and under s 160 to recover petroleum without an authorisation. The maximum penalty in both cases is imprisonment for 5 years.

⁵¹ For example, it is an offence of strict liability to engage in conduct and thereby breach the work practices obligations set out in s 569: *OPGGSA* ss 569(6), (6A).

⁵² *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*, reg 6.1.

⁵³ *OPGGSA* ss 264-268.

⁵⁴ *Ibid* s 274.

⁵⁵ See, for example, sections 185(4) and 186(2) regarding refusal to renew a fixed-term petroleum production licence.

In addition to the approvals required under the *OPGSSA*, environmental approvals may also be required for petroleum industry activities under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and subordinate regulations. An approval under Chapter 4 of the *EPBC Act* is required to undertake an activity that is likely to have a significant impact on a matter of National Environmental Significance; a permit under Chapter 5, Part 13, of the *EPBC Act* is required to undertake activities that may potentially affect protected species, in particular cetaceans (whales and dolphins); and a permit under Chapter 5, Part 15, Division 4, of the *EPBC Act* is required to carry out activities in a Commonwealth Marine Reserve. The *EPBC Act* contains various compliance and enforcement tools in relation to activities that breach the provisions of the Act, including civil and criminal penalties, and injunctions.

3.2 Cleanup and Restoration – Administrative Directions

NOPSEMA's power to issue directions to titleholders is one of the other major compliance and enforcement mechanisms of the Act, as the *OPGSSA* has placed no statutory liability on titleholders to clean up or restore the environment, or pay for the costs of cleanup and restoration, where there has been an escape of petroleum.

First, under s 574(2), NOPSEMA may, by written notice given to the registered holder of a title, give the registered holder a direction as to any matter in relation to which regulations may be made.⁵⁶ Sub-section 782(1) lists a number of items about which Regulations may be made, and of these, things, item 7 is 'the clean up or other remediation of the effects of the escape of petroleum or a greenhouse gas substance' as a matter about which directions may be made. It is an offence of strict liability to engage in conduct that breaches a direction under s 574, with a maximum penalty of 100 penalty units (\$17,000).⁵⁷ The value of a penalty unit increased from \$110 to \$170 as of 28 December 2012,⁵⁸ and will be reviewed every three years from 2013.⁵⁹

Secondly, s 576B, introduced in 2012, gives NOPSEMA power to give directions where there has been a 'significant offshore petroleum incident'.⁶⁰ NOPSEMA may give a direction to the titleholder if a significant offshore petroleum incident has occurred in a title area that has caused, or that might cause, an escape of petroleum.⁶¹ The direction may require the registered title holder to take any action for the purpose of preventing and/or eliminating the escape of petroleum; for mitigating, managing and/or remediating the effects of the escape of petroleum; and/or to take any other action stated in the direction.⁶² The direction may apply to petroleum that escapes beyond the title area.⁶³ It is an offence of strict liability to engage in conduct that breaches a direction under s 576B, with a maximum penalty of 100 penalty units.⁶⁴ If a person engages in conduct that breaches a direction under s 576B, NOPSEMA may do any or all of the things required by the direction to be done, and may recover the costs or expenses incurred as a debt due to the Commonwealth from the person who engaged in the conduct.⁶⁵

More specifically, under ss 586 and 587 contained in Part 6.4 of the Act, entitled 'Restoration of the environment', NOPSEMA may give 'remedial directions' to petroleum titleholders or former petroleum titleholders about the removal of property; the plugging or closing off of wells; the conservation and protection of natural resources; and the making good of damage to the seabed or subsoil. Under s 586A, the responsible

⁵⁶ *OPGSSA* s 574(2).

⁵⁷ *Ibid* s 576(1).

⁵⁸ *Crimes Act 1914* (Cth) s 4AA(1).

⁵⁹ *Ibid* s 4AA(1A).

⁶⁰ The power to issue directions was introduced in 2012 by the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Act 2012* (Cth). Section 576A of the *OPGSSA* defines a *significant offshore petroleum incident* to be a significant incident or occurrence that relates to any or all of the following operations in an offshore area:

- (a) petroleum exploration operations;
- (b) petroleum recovery operations;
- (c) operations relating to the processing or storage of petroleum;
- (d) operations relating to the preparation of petroleum for transport;
- (e) operations connected with the construction or operation of a pipeline;
- (f) operations relating to the decommissioning or removal of structures, equipment or other items of property that have been brought into an offshore area for or in connection with any of the operations mentioned in paragraph (a), (b), (c), (d) or (e).

⁶¹ *OPGSSA* s 576B.

⁶² A direction under s576B has effect, and must be complied with, despite any other direction under s574 and, anything in the regulations; and the applied provisions. If a direction under s 574 is inconsistent with a direction under s 576B, the direction under s 574 has no effect to the extent of the inconsistency: *OPGSSA* s 576C. A direction under section 576B also overrides the obligations of the registered holder of the title under sections 569 (work practices) and 572 (structures, equipment and property).

⁶³ *OPGSSA* s 576B(5).

⁶⁴ *Ibid* s 576D.

⁶⁵ *Ibid* s 577.

Commonwealth Minister may also give remedial directions to petroleum titleholders or former petroleum titleholders about the following matters: the plugging or closing off of wells; the conservation and protection of natural resources; and the making good of damage to the seabed or subsoil. It is an offence of strict liability to omit to do an act, and thereby breach a remedial direction.⁶⁶ If the titleholder has omitted to do an act and thereby breached a remedial direction, NOPSEMA or the responsible Commonwealth Minister may do anything required by the direction to be done and recover the costs and expenses as a debt.⁶⁷

Failure to comply with a direction is grounds for cancellation of a title under s 274. Because s 274(c) states that it is grounds for cancellation of a licence if ‘the registered holder has not complied with a provision of chapter 6’, it appears that an omission to act that causes non-compliance with any direction will be grounds for cancellation of a title, as well as any positive conduct. Thus, rather than a statutory duty to clean up and restore the environment, there has been an expectation under Commonwealth law that it is in the best interests of the oil rig operator to pay environmental cleanup costs and compensation in compliance with a direction, to ensure their tenement is not cancelled, which would significantly affect their ability to gain further titles in Australia’s offshore region.⁶⁸

Beyond the OPGGSA, liability for cleanup and cost recovery may also arise under other laws, namely, general State environment protection legislation. This is a result of the ‘applied provisions’ in s 80 of the OPGGSA, the effect of which is that the laws in force in a State or Territory (other than laws of the Commonwealth) apply as laws of the Commonwealth in the offshore area of that State or Territory as if that area were part of that State or Territory and part of the Commonwealth.⁶⁹ The offshore waters of the State are, generally speaking, the waters of the sea that are beyond the outer limits of the coastal waters of that State and within the outer limits of the continental shelf, where there is one; otherwise it is to the limits of the Exclusive Economic Zone (‘EEZ’) (200 nm).⁷⁰ Section 80 does not apply a law in so far as the law would be inconsistent with a law of the Commonwealth.

‘Laws’ include written laws such as legislation and regulations, and the common law.⁷¹ State laws apply in relation to acts, omissions, matters, circumstances and things touching, concerning, arising out of or connected with exploration, exploitation or conveyance of petroleum across the offshore area.⁷² State laws also apply to and in relation to an act or omission that takes place in, on, above, below or in the vicinity of, a matter, circumstance or thing that exists or arises in relation to, or in connection with, a structure or installation, or equipment or other property, that is in the offshore area for any reason touching, concerning, arising out of or connected with exploring, exploiting or conveying petroleum across the offshore area.⁷³

This extremely broad expression of the application of state laws mean state laws regarding clean up and cost recovery for pollution damage may apply in waters from the coastal waters to the outer boundary of the continental shelf, unless those laws are inconsistent with a law of the Commonwealth. For example, in South Australia, when pollution from Commonwealth waters from a facility licensed under the OPGGSA reaches coastal waters and the lands and internal waters of a State, the *Environment Protection Act 1993* (SA) (‘*Environment Protection Act*’) will apply. In addition to the applied provisions of the OPGGSA, s 9(1) of the *Environment Protection Act* explicitly extends its application to the coastal waters of the State and the air above and land beneath those waters.⁷⁴ While the *Environment Protection Act* does not apply in relation to petroleum

⁶⁶ OPGGSA ss 586(5)–(5A), 586A(5)–(5A), 587(6)–(7), 587A(6)–(7).

⁶⁷ OPGGSA s 588.

⁶⁸ Australian Maritime Safety Authority, *Response to the Montara Wellhead Platform Incident – Report of the Incident Analysis* (March 2012) 15.

⁶⁹ http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Incident_and_Exercise_Reports/documents/Montara_IAT_Report.pdf 11 June 2011.

⁷⁰ State and territory OHS laws do not apply: OPGGSA s 89.

⁷¹ OPGGSA s 8. The map in s 5 provides a useful example of the offshore areas. For Western Australia and the Northern Territory, the offshore area excludes the Timor Sea Joint Petroleum Development Area. For Queensland, the offshore area includes the Coral Sea but excludes the Great Barrier Reef. For further explanation, see White, M, ‘Australia’s Offshore Legal Jurisdiction: Part 2 – Current Situation’ (2011) 25 *Australia & New Zealand Maritime Law Journal* 19, 23-24.

⁷² OPGGSA s 79.

⁷³ *Ibid* s 80(4).

⁷⁴ *Ibid* s 80(5).

⁷⁵ Also, s 3 and the Schedule to the *Off-shore Waters (Application of Laws) Act 1976* (SA) apply State laws (with some exceptions) in, over or under off-shore waters to and in relation to— (a) a person connected with the State; or (b) a person who does any act or makes any omission affecting the person or property of a person connected with the State. ‘Off-shore waters’ are defined in the Schedule as those waters between the southward prolongation of the Western Australian and Victorian boundaries of the State— (a) that lie within the outer limits of the coastal waters of South Australia; and (b) that lie within nine nautical miles seaward of the seaward boundary of the waters referred to in paragraph (a) hereof; and (c) that lie within eighty-eight nautical miles seaward of the seaward boundary of the waters referred to in paragraph (b) hereof.

exploration activity undertaken under the *Petroleum Act 2000* (SA) or the *Petroleum (Submerged Lands) Act 1982*,⁷⁵ nor to circumstances to which the *Environment Protection (Sea Dumping) Act 1984* applies,⁷⁶ petroleum activities undertaken under the OPGGSA are not expressly excluded from the application of the Act.

Under the *Environment Protection Act*, where the Environment Protection Authority ('EPA') is satisfied that a person has caused environmental harm by a contravention of the Act, the Authority or another administering agency may issue either a cleanup order,⁷⁷ or a cleanup authorisation under which officers or other persons authorised by the EPA may take specified action on the Authority's behalf to make good any resulting environmental damage.⁷⁸ Sub-sections 103(1) and (2) allow the Authority or another administering agency taking action on non-compliance with a cleanup order to recover the reasonable costs and expenses as a debt from the person who failed to comply with the requirements of a cleanup order, and similarly, to recover the reasonable costs and expenses of taking action in pursuance of a cleanup authorisation as a debt.

'Environmental harm' is defined in the *Environment Protection Act* as any harm, or potential harm, to the environment (of whatever degree or duration) including an environmental nuisance.⁷⁹ For the purposes of the Act, environmental harm is caused by pollution whether the harm is a direct or indirect result of the pollution; and whether the harm results from the pollution.⁸⁰ It is a contravention of the *Environment Protection Act* to cause serious⁸¹ or material environmental harm⁸² or an environmental nuisance by 'polluting the environment intentionally or recklessly and with the knowledge that environmental harm will or might result',⁸³ and to cause serious or material environmental harm or an environmental nuisance by polluting the environment.⁸⁴ It is also a contravention of the Act to fail to observe (without a defence) the general environmental duty in s 25(1), that a person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm.

Furthermore, under s 104 of the *Environment Protection Act*, if a person has caused environmental harm by a contravention of the Act or a repealed environment law, an individual or a public authority may apply to the Environment, Resources and Development Court for an order requiring the person to take specified action to make good any resulting environmental damage and, if appropriate, to take specified action to prevent or mitigate further environmental harm.⁸⁵ If the EPA or any other public authority has incurred costs or expenses in taking action to prevent or mitigate environmental harm caused by a contravention of the Act or a repealed environment law, or to make good resulting environmental damage, the EPA/public authority may seek an order against the person who committed the contravention for payment of the reasonable costs and expenses incurred in taking that action.⁸⁶

3.3 Cleanup and Restoration - Financial Assurance

To date, the Australian Commonwealth Act provides that insurance requirements may be given as a direction by the Minister,⁸⁷ or may be included as a licence condition,⁸⁸ in order to meet 'expenses, or liabilities, or specified things, including insurance against expenses of complying with directions relating to the cleanup or other remediation of the effects of the escape of petroleum'. This 'typically includes pollution cleanup, well control

⁷⁵ *Environment Protection Act 2003* (SA) ('*Environment Protection Act*') s 7(4).

⁷⁶ *Ibid* s 7(2).

⁷⁷ *Ibid* s 99(1).

⁷⁸ *Ibid* s 100(1).

⁷⁹ *Ibid* s 5(1). An 'environmental nuisance' is any adverse effect on an amenity value of an area that is caused by pollution, and which unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area. It also includes any unsightly or offensive condition caused by pollution: *Environment Protection Act* s 3.

⁸⁰ *Ibid* s 5(5).

⁸¹ Environmental harm is 'serious' if: it involves actual or potential harm to the health or safety of human beings that is of a high impact or on a wide scale, or other actual or potential environmental harm (not being merely an environmental nuisance) that is of a high impact or on a wide scale; or it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$50,000: *Ibid* s 5(3).

⁸² Environmental harm is 'material' if: it consists of an environmental nuisance of a high impact or on a wide scale; or if it involves actual or potential harm to the health or safety of human beings that is not trivial, or other actual or potential environmental harm (not being merely an environmental nuisance) that is not trivial; or if it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$5,000: *ibid* s 5(3).

⁸³ *Ibid* ss 79(1), 80(1), 82(1).

⁸⁴ *Ibid* ss 79(2), 80(2), 82(2). The maximum criminal penalties are lower for these strict liability offences.

⁸⁵ *Ibid* s 104(1)(c).

⁸⁶ *Ibid* s 104(1)(d).

⁸⁷ For exploration, production, infrastructure and pipeline authorisations: OPGGSA sub-s 571(1).

⁸⁸ For a petroleum special prospecting authority or a petroleum access authority: OPGGSA sub-s 571(2).

and relief well drilling, removal of debris and liability to third parties'.⁸⁹ In general, insurance amounts of between US\$100m and US\$300m have been considered standard practice, excluding third party claims, with the amount of coverage set by the operator in consultation with the insurer and its underwriter, although the regulator may challenge the set insurance amounts 'if it believes the insurance does not meet stakeholder expectations or is considered too low based on industry best practice'.⁹⁰

Mandatory insurance requirements have been criticised for their narrowness, as there are a number of ways beyond insurance that a titleholder can provide financial assurance against a pollution incident.⁹¹

4 Compliance and Enforcement – 2013 Amendments

In comparison with the broad range of tools typically available in state environment protection acts, and indeed in onshore mining and petroleum Acts, the *OPGGSA* has contained limited options by which the Regulator may ensure compliance with the Act. In 2013, the Commonwealth government enacted the two new Compliance Measures Acts to significantly strengthen the compliance and enforcement provisions of the *OPGGSA*, as part of its implementation of the recommendations of the Report of the Montara Commission of Inquiry and its own internal legislative review.⁹²

The *Compliance Measures Act* passed Parliament on 28 February 2013, and received Royal Assent on 14 March 2013. The *Compliance Measures No. 2 Act* passed Parliament on the 16 May 2013 and received Royal Assent on 28 May 2013. As stated above in the Introduction, the Commonwealth Parliament has proposed a new *Regulatory Powers (Standard Provisions) Act* ('*Regulatory Powers Act*'), which will set out standard powers for all Commonwealth government regulatory agencies that undertake monitoring, investigation and enforcement functions. While some of the provisions of the new Compliance Measures Acts have come into force, the majority have not, as they will not come into effect unless and until the *Regulatory Powers Act* does. Other provisions of the new Compliance Measures Acts are expressed to come into force at time that is the earlier of the following: either six months after the Act receives Royal assent, or when the *Regulatory Powers Act* comes into force.

The major improvements that have been or will be introduced by the Compliance Measures Acts together are as follows:

4.1 Expanded Powers of Monitoring and Inspection

First, Schedule 1 of the Compliance Measures Act redrafts the *OPGGSA* to allow for future triggering of what will be standard monitoring and investigation powers for government agencies, which will be set out in the *Regulatory Powers Act*.⁹³ The *Regulatory Powers Act* sets out a range of powers and responsibilities of authorised officers, and rights and responsibilities of occupiers of premises, in relation to monitoring (Part 2) and investigation (Part 3). These address a range of matters such as power to enter premises, operating electronic equipment, asking questions and seeking production of documents, seizure of evidence, identity cards, and warrants. The *Regulatory Powers Act* will also set out standard provisions regarding actions for civil penalty provisions (Part 4), infringement notices (Part 5), enforceable undertakings (Part 6) and injunctions (Part 7).

Secondly, the introduction of 'petroleum environmental inspections' in a new Schedule 2A to the *OPGGSA* will confer powers on NOPSEMA inspectors to monitor compliance with petroleum environmental laws, which are additional to those in the *Regulatory Powers Act*. The resulting monitoring and inspection provisions will be

⁸⁹ Australian Maritime Safety Authority, above n 68, 15.

⁹⁰ Ibid.

⁹¹ For critical comment by the oil and insurance industries on making insurance and other financial assurance schemes mandatory in the Europe, see 'Results on the Public Consultation on Improving Offshore Safety, Health and Environment, Accompanying the Commission's Proposal for a Regulation of the European Parliament and of the Council on Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities' SEC (Working Paper No 1292, European Commission, 27 October 2011), 8-11 <http://ec.europa.eu/energy/oil/offshore/standards_en.htm>, 13 August 2012.

⁹² Of the 105 recommendations of the Report of the Montara Commission of Inquiry, the Commonwealth accepted 92 recommendations, including 2 accepted 'in principle'; noted 10; and rejected 3: Commonwealth of Australia, *Final Government Response to the Report of the Montara Commission of Inquiry* (no page numbers in document). Although the government is still in process of implementing the recommendations of the Report, most of them have been achieved: *Australian Government Progress Report on Implementation of the Recommendations of the Montara Commission of Inquiry – September 2012* <www.ret.gov.au/Department/MIR/Progress-Report-Sep-2012.pdf>, 19 June 2013.

⁹³ *Compliance Measures Act* sch 1 pt 1.

significantly stronger than those that currently exist under s 601 of the *OPGSSA*.⁹⁴ The Act streamlines NOPSEMA's inspectorate powers, to create one class of inspector, the 'NOPSEMA Inspector'. As well as the additional monitoring and inspection powers, the Act will also make specific provision for NOPSEMA or a NOPSEMA Inspector to issue proceedings for an offence against petroleum environmental law.⁹⁵

These provisions will come into force only when the *Regulatory Powers Act* is enacted.

4.2 Sharing of Information between Regulators

Schedule 3 of the *Compliance Measures Act* has amended the *OPGGSA* to enable the various bodies administering the Act to share information. Until 2013, the *OPGGSA* has not included an express provision to enable information obtained by regulators and/or their officers during the exercise of powers and functions under the Act and regulations to be shared. In *Apache Northwest Pty Ltd v Agostini*,⁹⁶ the Federal Court held that information compulsorily acquired under Western Australian legislation in regards to the Varanus Island gas pipeline explosion in June 2008 could not be released to the Commonwealth as part of the joint Commonwealth/state inquiry into the incident. As a result, the *OPGGSA* has been amended to allow regulators to share information in certain circumstances, including joint investigations to comprehensively investigate an incident and pursue a successful prosecution.⁹⁷

These provisions came into force on 16 March 2013.

4.3 Environmental Prohibition Notices and Environmental Improvement Notices

Schedule 2 of the *Compliance Measures No. 2 Act* will amend the *OPGGSA* to enable NOPSEMA inspectors to issue environmental prohibition notices and environmental improvement notices to require petroleum titleholders to take action to remove significant threats to the environment. An environmental prohibition notice may be issued if, when conducting an environmental inspection of an offshore petroleum premises, an inspector is satisfied on reasonable grounds that an activity that is occurring or may occur, or the operation or use of premises that is or may occur, would involve an 'immediate and significant threat to the environment'.⁹⁸ The notice must specify the threat to the environment and describe the environment that is subject to the threat, and also must direct the titleholder to ensure the activity is not conducted, or conducted in a specified manner; or that the premises are not operated or used, or are operated or used in a specified manner.⁹⁹

An environmental improvement notice may be issued if, when conducting an environmental inspection of an offshore petroleum premises, an inspector is satisfied on reasonable grounds that a titleholder is contravening a provision of an environmental law, or has contravened a provision of an environmental law and is likely to do so again, and as a result, there is or may be a significant threat to the environment.¹⁰⁰ The notice must specify the threat to the environment and describe the environment that is subject to the threat; the action that must be taken to remove the threat; and a time period for compliance.¹⁰¹

NOPSEMA will be required to publish environmental improvement notices and prohibition notices on its website within 21 days of the notice being issued.¹⁰² The titleholder must cause a copy of a notice to be displayed in a prominent place at the premises.¹⁰³ It is a criminal offence to breach an environmental prohibition notice and the offender is liable to pay a maximum criminal penalty of 600 penalty units (\$102,000).¹⁰⁴ It is a

⁹⁴ *Compliance Measures Act* sch 1 pt 2. The OHS inspection powers have also been strengthened, for example, through the introduction of 'do not disturb notices': *Compliance Measures Act* sch 1 pt 3.

⁹⁵ *Compliance Measures Act* sch 1 pt 3.

⁹⁶ In *Apache Northwest Pty Ltd v Agostini* (2009) 177 FCR 449, the Federal Court held that the rule in *Johns v Australian Securities Commission* (1993) 178 CLR 408 precluded information obtained for a particular purpose under statutory compulsion to be used for another purpose unless authorised to do so by statute. In the case of *Apache Northwest Pty Ltd v Agostini*, although the purposes of the *Petroleum Pipelines Act 1969* (WA) were broad and necessitated co-operative federalism, the purposes of the joint state-Commonwealth inquiry went significantly beyond those of the *Petroleum Pipelines Act 1969* (WA). It could not be said that the disclosure of documents obtained under section 63 of the *Petroleum Pipelines Act 1969* (WA) by the State's officers to the inquiry panel was for the purposes of that state Act.

⁹⁷ Explanatory Memorandum *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2013 (Cth)* 4.

⁹⁸ *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Act 2013 (Cth)* ('*Compliance Measures No. 2 Act*') sch 2 pt 1, inserting section 11A(2) into the *OPGGSA*.

⁹⁹ *Compliance Measures No. 2 Act* sch 2 pt 1, inserting section 11A(4) into the *OPGGSA*.

¹⁰⁰ *Compliance Measures No. 2 Act* sch 2 pt 1, inserting section 11C into the *OPGGSA*.

¹⁰¹ *Compliance Measures No. 2 Act* sch 2 pt 1, inserting section 11C(4) into the *OPGGSA*.

¹⁰² *Compliance Measures No. 2 Act* sch 2 pt 2, inserting section 12A into the *OPGGSA*.

¹⁰³ *Compliance Measures No. 2 Act* sch 2 pt 1, inserting section 11D(6) into the *OPGGSA*.

¹⁰⁴ *Compliance Measures No. 2 Act* sch 2 pt 1, inserting section 11A(6) into the *OPGGSA*.

criminal offence to breach an environment improvement notice, and an offender is liable to pay either a criminal or civil penalty, of a maximum of 300 or 400 penalty units respectively (\$51,000 and \$68,000).¹⁰⁵ A person who does not take the action required and thereby contravenes a notice, may be found guilty of a continuing offence or continuing breaches of a civil penalty provision, which carries a maximum penalty of 10% of the maximum criminal or civil penalty that can be imposed in respect of the offence/contravention per day that the offence/contravention continues.

These provisions will commence if and when the *Regulatory Powers Act* comes into effect.

Interestingly, there is no right of administrative review of either an environmental prohibition or environmental improvement notice by a tribunal, unlike the OHS provisions. The Explanatory Memorandum to the Act states that this is because the powers exercisable by NOPSEMA are not 'of a kind typically subject to merits review'; and because there is no administrative tribunal that would have the 'necessary environmental credentials, and there is certainly not one that combines expertise in environmental regulation and offshore petroleum operations'.¹⁰⁶ Even if it were possible to put together a group of people within the Administrative Appeals Tribunal, they would not have sufficient flow of work to build up expertise; and there would be difficulties in assembling a group of people in a short time, given the high costs of delay. Further, given NOPSEMA was established as the single regulator, and no other body had the 'necessary critical mass of trained personnel' to regulate environmental management, it is seen as undesirable that the notices of NOPSEMA should be reviewed by a less well-qualified and experienced body.¹⁰⁷

4.4 Other Additional Administrative Enforcement Mechanisms

Schedule 1 of the *Compliance Measures No. 2 Act* will introduce a range of alternative enforcement mechanisms to the *OPGGSA*. One is the power for NOPSEMA to issue infringement notices, which may be enforced under the *Regulatory Powers Act*.¹⁰⁸ These will be issued for minor offences of strict liability only, which will be listed in s 611E of the Act.

Other enforcement mechanisms include the power for a court to make adverse publicity orders against a corporation found guilty of an offence against the *OPGGSA*;¹⁰⁹ and the power for a relevant court to issue injunctions to restrain a person from contravening a provision of the Act or to force compliance with certain provisions of the *OPGGSA*, relying on the framework established under the *Regulatory Powers Act*.¹¹⁰ Injunctions may be granted in relation to any conduct that would constitute an offence or a breach of a civil penalty provisions, and also in relation to the requirement for titleholders to maintain sufficient financial assurance (see 4.6 below).

These provisions will commence if and when the *Regulatory Powers Act* comes into effect.

4.5 Changes to the Penalty Regime

Schedule 2 of the *Compliance Measures Act* will amend the *OPGGSA* to introduce civil penalties for contravening a range of provisions in the Act. Examples of contraventions for which civil penalties will be available include breaches of a direction issued by NOPSEMA under ss 574, 576B, 586 and 587,¹¹¹ and breaches of s 569 and s 572, which contain obligations on titleholders to carry out all operations in a proper and workmanlike manner and in accordance with good oilfield practice; to control the flow, and prevent the waste or escape, in the permit area, lease area or licence area, of petroleum or water; and to maintain in good condition and repair all structures, equipment and other property used for petroleum operations in the area of the title.

The introduction of civil penalties implements the recommendations of the internal government legislative review which followed the Report of the Montara Commission of Inquiry. This review found that NOPSEMA 'does not currently have available sufficient compliance and enforcement mechanisms in the middle range of

¹⁰⁵ *Compliance Measures No. 2 Act* sch 2 pt 1, inserting section 11D into the *OPGGSA*.

¹⁰⁶ Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Bill 2013 (Cth), 35.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Compliance Measures No. 2 Act* sch 1 pt 1, inserting sections 611D and 611G into the *OPGGSA*.

¹⁰⁹ *Compliance Measures No. 2 Act* sch 1 pt 1, inserting sections 611K and 611L into the *OPGGSA*.

¹¹⁰ *Compliance Measures No. 2 Act* sch 1 pt 1, inserting sections 611H, and 611J into the *OPGGSA*.

¹¹¹ *Compliance Measures No. 2 Act* sch 2 pt 1. To this end, the compliance provisions regarding directions issued under sections 574, 576B, 586 and 587 have been repealed and rewritten.

regulatory responses, such as civil penalties, which are available to regulators of other comparable industry sectors within Australia and under like regulatory regimes internationally'.¹¹² It was argued that introducing a civil penalty regime would 'provide an additional mechanism for the Regulator to apply within a graduated range of enforcement tools, to encourage and support improved industry compliance with the Act' and 'enable the Regulator to provide an appropriate and proportionate response, depending upon the nature and relative seriousness of the breach that has occurred'.¹¹³

Secondly, criminal penalties for breaches of the OHS provisions will be significantly increased, as the internal government legislative review concluded that 'many of the criminal penalties in the Act are too low to provide an effective and meaningful deterrent, in particular when compared with the penalties that apply for similar conduct under comparable regulatory regimes'.¹¹⁴ As regards environmental compliance and enforcement, of note are the new 'fault-based' offences of breaching a general direction, significant incident direction and a remedial direction, with a maximum criminal penalty of 2,000 penalty units or 5 years imprisonment, or both.¹¹⁵ This is in addition to the maximum penalty of 100 units for the existing strict liability offences, which have been retained, given that, 'in many cases, fault may be difficult to prove due to the remote and complex nature of offshore operations and the prevalence of multiple titleholder arrangements'.¹¹⁶

There is no fault element specified in the provisions introducing the fault-based offences. However, under section 5.6 of the *Criminal Code*, if an offence provision does not specify a fault element and if the physical element of the offence consists of a circumstance or a result, the fault element is recklessness.¹¹⁷ Thus, to be found guilty of a breach of a direction under the fault-based offence, the prosecution must prove that a person was reckless in relation to whether their conduct would result in a breach of the direction.

Thirdly, Schedule 1 of the *Compliance Measures No. 2 Act* will introduce continuing offences and continuing contraventions of the new civil penalty provisions of the *OPGGSA*.¹¹⁸ Certain offences are already automatically deemed to be continuing offences by virtue of s 4 of the *Crimes Act 1914* (Cth), and it is anticipated a similar provision will be included in the *Regulatory Powers Act* in relation to continuing contraventions of civil penalty provisions. These particular amendments to the *OPGGSA* ensure that provisions that are not automatically continuing offences by virtue of the *Crimes Act 1914* (Cth) or *Regulatory Powers Act* are specified in the *OPGGSA* to be continuing offences or continuing contraventions of civil penalty provisions. A continuing failure to abide by a direction issued by NOPSEMA under ss 574, 576B, 586 and 587,¹¹⁹ or to abide by an environmental prohibition or improvement notice, are examples of continuing offences/contraventions of civil penalty provisions.

The maximum civil or criminal penalty that can be imposed for a continuing offence or continuing breach of a civil penalty provision under the 2013 amendments will be 10% of the maximum criminal or civil penalty that can be imposed in respect of the offence/contravention per day that the offence/contravention continues. Given that the new fault-based offences of failure to abide by a general direction, significant incident direction or a remedial direction will carry a maximum criminal penalty of 2,000 penalty units (\$340,000), and a maximum civil penalty of 2,250 units (\$382,500), this could amount to very high penalties over time.

All of these changes to the penalty regimes will only come into effect if and when the *Regulatory Powers Act* comes into effect.

4.6 Cleanup and Cost Recovery

The *Compliance Measures No. 2 Act* has clarified and strengthened the cleanup and cost recovery provisions of the Act, in relation to Commonwealth offshore areas. A new Part 6.1A, entitled 'Polluter Pays' has been inserted into the *OPGGSA*. This Part came into effect on 29 May 2013.

¹¹² Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2013 (Cth) 2.

¹¹³ Ibid.

¹¹⁴ Ibid. The amendments harmonise OHS offence penalties with the *Work Health and Safety Act 2011* (Cth).

¹¹⁵ *Compliance Measures Act* sch 2 pt 1.

¹¹⁶ Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2013 (Cth) 39.

¹¹⁷ *Criminal Code Act 1995* (Cth) sch ch 2 pt 2.2.

¹¹⁸ *Compliance Measures No. 2 Act* sch 1 pt 2, amending various penalty provisions of the *OPGGSA* to allow for continuing penalties.

¹¹⁹ *Compliance Measures Act* sch 2 pt 1. To this end, the compliance provisions regarding directions issued under sections 574, 576B, 586 and 587 have been repealed and rewritten.

Among other things, the amendments have introduced a statutory duty to cleanup and remediate the environment. The Act now provides that if there is an escape of petroleum occurring as a result of, or in connection with, a petroleum activity, a titleholder must:¹²⁰ as soon as possible after becoming aware of the escape of petroleum, take all reasonable practicable steps to eliminate or control it; clean up the escaped petroleum and remediate any resulting damage to the environment; and carry out environmental monitoring of the impact of the escape on the environment.¹²¹ There is no fault element that must be proved, nor upper or lower limit on the amount of petroleum that escapes.¹²² There also appears to be no statutory limit on the amount of liability.

If the titleholder fails to do any of these things, NOPSEMA, or the responsible Commonwealth Minister, may do them instead and be reimbursed by the titleholder for the costs and expenses.¹²³ Furthermore, where a state or Northern Territory government undertakes any of these things in the land or waters of its jurisdiction,¹²⁴ the titleholder must reimburse the state or Northern Territory for the reasonable costs or expenses of so doing, or the costs can be recovered as a debt.¹²⁵ These provisions apply only to the costs of cleanup, remediation and monitoring; they do not apply to pure economic loss.¹²⁶ However, the provisions do not affect any other cause of action that the state government would otherwise have against a titleholder,¹²⁷ which presumably includes actions under the state *Environment Protection Act* or the common law.

While the powers of NOPSEMA to issue directions will remain in the Act, this statutory duty will ensure that titleholders must act as soon as possible to control an escape of petroleum, eliminating a possible gap in time between when the titleholder becomes aware that petroleum is escaping a well, and when the titleholder receives a direction from NOPSEMA.

4.7 Clarification of the Power to Issue Directions

The provisions empowering NOPSEMA to issue directions have been clarified in a number of respects. In particular, provisions have been inserted to make it clear that NOPSEMA's specific power to give remedial directions under s 586 does not narrow the scope of to give general directions under s 574.¹²⁸ For example, NOPSEMA's power to issue a remedial power to make good damage to the seabed under s 576 does not mean such a direction cannot be given under the general power to issue directions in s 574. Similarly, the fact that NOPSEMA can give a significant incident direction under s 576B to take action in any offshore area beyond the title area,¹²⁹ does not mean that a direction under the general power in s 574 cannot apply beyond the title area to any offshore area. In other words, the amendments have made it clear NOPSEMA's general power to give directions is not to be read down because of the inclusion of more specific powers in ss 576B and 586.¹³⁰

These provisions came into effect in May 2013.

4.8 Financial Assurance

The *Compliance Measures No. 2 Act* will insert new provisions on financial assurance. These will require titleholders,¹³¹ at all times while the title is in force, to maintain financial assurance sufficient to give the titleholder the capacity to meet costs, expenses and liabilities arising in connection with, or as a result of the

¹²⁰ This applies to the registered holder of a petroleum exploration permit, petroleum retention lease, petroleum production licence, petroleum infrastructure licence and petroleum pipeline licence.

¹²¹ *Compliance Measures No. 2 Act* sch 3 pt 2, inserting section 572C(2) into the *OPGGSA*.

¹²² Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Bill 2013* (Cth), 45.

¹²³ *Compliance Measures No. 2 Act* sch 3 pt 2, inserting sections 572D, and 572E into the *OPGGSA*.

¹²⁴ Under section 572F(4), these land and waters include internal waters and lands, and 'eligible coastal waters' as defined in s 650 and 'designated coastal waters' as defined in section 644 (generally speaking, the waters to landward of the territorial sea, assuming the outer boundary of the territorial sea is 3 nm).

¹²⁵ *Compliance Measures No. 2 Act* sch 3 pt 2, inserting section 572F into the *OPGGSA*.

¹²⁶ Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Bill 2013* (Cth) 46.

¹²⁷ *Compliance Measures No. 2 Act* sch 3 pt 2, inserting section 572F into the *OPGGSA*.

¹²⁸ *Compliance Measures No. 2 Act* sch 3 pt 3, inserting sections 574B and 585 into the *OPGGSA*.

¹²⁹ *Compliance Measures No. 2 Act* sch 3 pt 3, amends section 576B(5) of the *OPGGSA* to reflect the policy intent of the section. Section 576(B) empowered NOPSEMA to give directions to take an action in the offshore area; it is meant to be in any offshore area, not just the particular offshore area in which the title operations are taken.

¹³⁰ The powers of the Commonwealth Minister to issue directions to petroleum and greenhouse gas titleholders have been similarly clarified.

¹³¹ This applies to the holders of a petroleum exploration permit, petroleum retention lease, petroleum production licence, petroleum infrastructure licence, petroleum pipeline licence, petroleum special prospecting authority and petroleum access authority.

carrying out of the petroleum activity; or the doing of any other thing for the purposes of the petroleum activity; or complying (or failing to comply) with a requirement under the Act, or a legislative instrument under the Act, in relation to the petroleum activity.¹³²

The Act allows for a range of measures to be used by a titleholder as financial assurance, including, without limitation, any or all of the following: insurance, self-insurance,¹³³ a bond, the deposit of an amount as security with a financial institution, an indemnity or other surety, a letter of credit from a financial institution, and a mortgage.¹³⁴ Regulations made under the *OPGGSA* will provide that compliance with the financial assurance provisions must be demonstrated to NOPSEMA, in a form acceptable to the regulator, as a prior condition of acceptance of an environment plan, while failure to maintain financial assurance will be grounds for NOPSEMA withdrawing acceptance of an environment plan.¹³⁵

These proposed amendments to s 571 regarding financial assurance will commence the later of a day fixed after proclamation, or six months after the *Compliance Measures No. 2 Act* received Royal assent (that is, on 28 November 2013).

5 Critical Comment

There is no doubt that the amendments, assuming they come into force, will considerably strengthen the monitoring and investigation powers of NOPSEMA, and expand the range of measures available to ensure compliance with the Act. The introduction of new compliance mechanisms – administrative environmental notices, infringement notices, adverse publicity orders, injunctions, civil penalty provisions, and continuing penalty provisions – is well and truly overdue, given the range of measures available for use in other statutory regulatory regimes concerning protection of the environment. The inclusion of a statutory duty to clean up and restore the environment, explicit rights to cost recovery, and wider means of providing financial assurance, should ensure the regulatory regime is more robust in dealing with the environmental consequences of a major oil spill emanating from an offshore installation in Commonwealth waters.

The new, higher levels of penalty reflect the recommendations of the Report of the Montara Commission of Inquiry and the legislative review undertaken in response to the Report, which recommended that maximum penalties be consistent with those imposed in other ‘high hazard’ legislation. The new maximum penalties for environmental offences and breaches of civil penalty provisions are consistent with penalties for breaching the OHS provisions, and reflect the potentially extremely serious consequences to the marine environment of a breach of the environmental management provisions. They also reflect the fact that as the companies operating are, for the most part, ‘extremely well-resourced multinationals’, a higher level of penalty is required to ensure compliance.¹³⁶

Despite the definite improvements in the compliance and enforcement regime, some concerns remain. One is the continuing and possibly increasing fragmentation and complexity of the entire offshore petroleum legislative and regulatory framework. This has been critiqued in earlier legal articles,¹³⁷ and certainly appears to be a real issue in 2013 with the lapse of the referrals of power by the states to NOPSEMA to administer OHS laws in state coastal waters. Currently NOPSEMA administers OHS, well integrity and environmental management laws in Commonwealth and Victorian coastal waters, while the remaining States and the NT now administer state OHS laws in coastal waters again, along with well integrity and environmental management laws. The division in environmental and safety regulation between Commonwealth and state waters has remained, and arguably is the legal and regulatory situation is no less complicated than that which prevailed before 1 January 2012.¹³⁸

¹³² *Compliance Measures No. 2 Act* sch 3 pt 1, inserting section 571(2) into the *OPGGSA*.

¹³³ ‘Self-insurance’ is maintained to the extent that ‘the titleholder ensures that financial resources are available at all times while the title is in force to meet costs, expenses and liabilities in relation to a petroleum activity’ arising under the title: *Compliance Measures No. 2 Act* sch 3 pt 1, inserting section 571(5) into the *OPGGSA*.

¹³⁴ *Compliance Measures No. 2 Act* sch 3 pt 1, inserting section 571(4) into the *OPGGSA*.

¹³⁵ *Compliance Measures No. 2 Act* sch 3 pt 1, inserting section 571(3) into the *OPGGSA*.

¹³⁶ Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Bill 2013 (Cth) 25–26, 34–35.

¹³⁷ White, above n 15; Hunter, above n 28.

¹³⁸ Dr Tina Hunter, having considered the particular legal situation and concerns of Western Australia, has suggested that the creation of two distinct regulators based on geography rather than levels of government, with a Western Basin Regulator to regulate petroleum activities in the Western Australian and Northern Territory Designated Authority areas as well as all Commonwealth waters, and a second regulator to regulate all other jurisdictions where states confer the necessary authority upon the relevant Commonwealth body. Hunter argues such a solution may be more successful in reducing regulatory inconsistencies across Australia: Hunter, above n 28, 84–86.

Another example of fragmentation in offshore petroleum laws is the increasing gap in substantive laws between the state Petroleum (Submerged Lands) Acts and the *OPGGSA*. In South Australia, for example, the *Petroleum (Submerged Lands) Act 1982* (SA) has not been amended to incorporate the range of compliance and enforcement tools that exist under the amended *OGPSSA* (nor those which exist under the state's onshore petroleum legislation). The state *PSLA* and accompanying regulations do not contain any specific express provisions regarding a statutory duty to clean up and restore the environment. Section 100(1) allows the Minister to give a written direction to the registered titleholders regarding any matter with respect to which regulations may be made, which includes the cleanup or other remedying of the effects of the escape of petroleum. Although the Governor may make regulations concerning the 'clean-up or other remedying of the effects of the escape of petroleum',¹³⁹ the *Petroleum (Submerged Lands) Regulations 2005* (SA) do not regulate cleanup and restoration and/or the recovery of costs and expenses. Thus, the provisions of the state *PSLA* concerning cleanup and restoration reflect those of the *OPGGSA* before the 2013 amendments came into force in May 2013.

This has led to a situation where titleholders of offshore installations licensed in Commonwealth waters will be liable to clean up, or pay South Australian government costs and expenses for oil pollution cleanup, under (a) the *OPGGSA*, where oil pollution is in the South Australia offshore area or state coastal waters; or (b) the *Environment Protection Act*, where oil pollution reaches coastal waters, and South Australian lands and internal waters. The SA government could presumably choose which statute under which it will take action regarding pollution in state coastal waters. However, if the oil pollution is sourced from an offshore installation sited in state coastal waters and licensed under the state *PSLA*, the government may issue directions to clean up under the *PSLA*, but otherwise there is no statutory duty to clean up in the *PSLA*, nor cost recovery provisions. Furthermore, the *Environment Protection Act* is expressly stated not to apply to the *PSLA*, so environmental directions and cost recovery procedures under the *Environment Protection Act* will not apply to oil pollution from facilities licensed under the *PSLA*.

Furthermore, s 96A of the *PSLA* is directed towards the maintenance of compulsory insurance, reflecting the position of the *OPGGSA* until the 2013 amendments come into force in late 2013. Under s 96A(1), the holder of a permit, lease, licence or pipeline licence must maintain, as directed by the Minister, insurance against expenses or liabilities, including expenses of complying with directions with respect to the cleanup or other remedying of the effects of the escape of petroleum. Section 96A(2) provides that the conditions subject to which a special prospecting authority or access authority is granted may include a condition that the holder maintain, as directed by the Minister insurance against expenses or liabilities, including expenses of complying with directions with respect to the cleanup or other remedying of the effects of the escape of petroleum. The amendments to s 571 of the *OPGGSA* in 2013 concerning financial assurance will be at odds with s 96A of the *PSLA*, which contains provisions similar to the current s 571 of the *OPGGSA*.

Finally, it is of concern that one issue which continues to escape legislative attention is that of compensation for third parties who have suffered loss and damage by reason of oil pollution. The Australian Commonwealth offshore petroleum legislation does not set out a right of compensation or explicit principles for civil liability for third parties for loss or damage caused by pollution arising from offshore oil facilities, whether fixed or floating, in Commonwealth waters.

The inadequacies and complexities of the law in relation to third party civil liability for damage caused by offshore oil pollution have been discussed elsewhere.¹⁴⁰ One point that has been consistently made is that the lack of reference in the Commonwealth offshore petroleum regime to liability for damages to third parties caused by oil pollution resulting from exploration and production is in stark contrast to the well-established Australian regime concerning liability and compensation for oil pollution from ships (that is, from the transport of oil) established under the *Protection of the Sea (Civil Liability) Act 1981* (Cth) and the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth).

¹³⁹ *Petroleum (Submerged Lands) Act 1982* (SA), s 151(2)(g).

¹⁴⁰ Jacqueline Allen, 'A Global Oil Stain – Cleaning up International Conventions for Liability and Compensation for Oil Exploration/Production' (2011) 25 *Australia & New Zealand Maritime Law Journal* 90; Hon Justice Steven Rares, 'An International Convention on Off-shore Hydrocarbon Leaks?' (2012) 26 *Australia & New Zealand Maritime Law Journal* 10; Shane Bosma, 'The Regulation of Marine Pollution Arising from Offshore Oil and Gas Facilities – An Evaluation of the Adequacy of Current Regulatory Regimes and the Responsibility of States to Implement a New Liability Regime' (2012) 26 *Australia & New Zealand Maritime Law Journal* 89; Brian Rom, 'Navigating the Law Regulating FPSO Operations in Australia and the Pollution Liabilities of Owners and Operators' (2012) 31 *Australian Resources and Energy Law Journal* 138; Michael White, *Australasian Marine Pollution Laws* (Federation Press, 2nd ed, 2007).

The *Protection of the Sea (Civil Liability) Act 1981* (Cth) applies the provisions of the 1969 *International Convention on Civil Liability for Oil Pollution Damage*¹⁴¹ into Australian law. This establishes for a scheme of strict liability for pollution from ships, with a cap on the limit of liability. Article 1 of the Convention, as amended by the 1992 Protocol to the Convention, defines 'ship' to mean 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo ...'. The *Protection of the Sea (Civil Liability) Act 1981*, which applies the definition in Article 1, would appear not to apply to 'mobile offshore drilling units' (MODUs) in the offshore petroleum industry. Thus, although MODUs float and are not attached to the seabed, and therefore can be defined as vessels,¹⁴² they fall outside the definition in the civil liability Convention as they are not vessels 'constructed or adapted for the carriage of oil in bulk as cargo'.

Although the Australian Commonwealth offshore petroleum legislation does not set out a right of compensation or explicit principles for civil liability for loss or damage, because of the applied provisions of the *OPGGSA*, liability for the payment of compensation for personal injury, injury to property and for economic loss may arise under other laws, namely, general State environment protection legislation and common law actions for tort. It is thus an area that currently contains significant complexity because of the existing federal-state arrangements.

For example, under s 104(1) (e) of the *Environment Protection Act 2003* (SA), if a person has suffered *injury or loss or damage to property* as a result of a contravention of the Act, or 'incurred costs and expenses in taking action to prevent or mitigate such injury, loss or damage', that person may make an application to the Environment, Resources and Development Court for an order against the person who committed the contravention for payment of compensation for the injury, loss or damage, or for payment of the reasonable costs and expenses incurred in taking that action.¹⁴³ Furthermore, if a person has caused environmental harm by a contravention of the Act or a repealed environment law, an individual may also apply to the Environment, Resources and Development Court for an order requiring the person to take specified action to make good any resulting environmental damage and, if appropriate, to take specified action to prevent or mitigate further environmental harm.

To take an action under s104, a contravention of the *Environment Protection Act* is required. As discussed above, it is a contravention of the Act to cause serious or material environmental harm or an environmental nuisance by 'polluting the environment intentionally or recklessly and with the knowledge that environmental harm will or might result',¹⁴⁴ or to cause serious or material environmental harm or an environmental nuisance by polluting the environment.¹⁴⁵ It is also a contravention of the Act to fail to observe (without a defence) the general environmental duty in s 25(1).

An action under s 104 is limited to compensation for injury or loss or damage to property. 'Loss' includes the 'reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent or mitigate the environmental harm and to make good resulting environmental damage'.¹⁴⁶ However, it is unlikely that this definition of 'loss' would include pure economic loss, that is, economic loss which is not consequential upon injury to person or property. An example of loss of income not dependent upon property damage from oil pollution would include being unable to fish in polluted waters, or the losses suffered by coastal businesses where tourism is affected because beaches are polluted by oil. This is a significant limitation, as many claims resulting from offshore pollution may entail pure economic loss. This is demonstrated by the claims resulting from the Deepwater Horizon incident, where as of 4 May 2012, BP, through the Gulf Coast

¹⁴¹ *International Convention on Civil Liability for Oil Pollution Damage* 1969, 973 UNTS 3 (entered into force 19 June 1975) as amended by the *Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage* 1969, 1992, UKTS 1996 No 87 (entered into force 30 May 1996).

¹⁴² The *Admiralty Act 1988* (Cth), which allows general maritime claims to be brought in the Admiralty courts, including claims for 'damage done by a ship' and claims under the *Protection of the Sea (Civil Liability) Act 1981*, defines 'ships' to include a 'vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved', and is expressly stated to include an 'off-shore industry mobile unit'. 'Off-shore industry mobile unit' is defined in section 3(a) to mean:

'a vessel, or a structure other than a vessel that is able to float or be floated and to move or be moved as a structure from one place to another, that is used or intended for use wholly or primarily in, or in any operations or activities associated with or incidental to, exploring or exploiting the mineral and other non-living resources of:

(i) the continental shelf of Australia; or

(ii) the seabed of the coastal sea of Australia or the subsoil of that seabed; by drilling, or by obtaining substantial quantities of material from, the seabed or its subsoil, with equipment that is on or forms part of the vessel or structure'.

¹⁴³ *Environment Protection Act* s 104(1)(e).

¹⁴⁴ *Ibid* ss 79(1), 80(1), 82(1).

¹⁴⁵ *Ibid* ss 79(2), 80(2), 82(2). The maximum criminal penalties are lower for these strict liability offences.

¹⁴⁶ *Ibid* s 5(4).

Claims Facility, had paid a total of \$6.423 billion in compensation, of which some \$6.1bn was paid to satisfy claims for lost earning or profits (pure economic loss).¹⁴⁷

Liability for personal injury (not being workplace injury covered under legislation) and injury to property may also arise under the common law actions for nuisance and/or negligence. The availability of civil actions under the *Environment Protection Act* does not limit or derogate from any civil right or remedy, including the common law actions for negligence, and compliance with the *Environment Protection Act* does not necessarily indicate that a common law duty of care has been satisfied.¹⁴⁸

Damages are available as a remedy for nuisance or negligence. A common law action for nuisance may be available where there has been an unreasonable interference with a person's use or enjoyment of his or her property right. Negligence requires a breach of a duty of care owed by the oil operator/titleholder to the plaintiff, where the damage is foreseeable and not too remote.¹⁴⁹ A limitation in the context of using negligence as a cause of action to recover certain damages from oil pollution is that the plaintiff must prove negligence to recover damages. Also, as a general rule, damages are not recoverable in negligence for pure economic loss, even if the loss is foreseeable, although they may be recoverable in the very limited circumstances in which the defendant has knowledge or the means of knowledge that a particular person, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of the negligence.¹⁵⁰ In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,¹⁵¹ which concerned claims arising from the Longford Gas Plant explosion, Gillard J of the Supreme Court of Victoria held that the defendants owed a duty to the business users who suffered physical damage to property and economic loss resulting from damage to property, but were not liable for economic losses which did not result from damage to property, for example, the losses suffered by domestic users and by workers who had been stood down.

Furthermore, where oil pollution moves beyond the states' offshore areas, for example, where it affects the citizens of other nations, either on the high seas or in their EEZ, coastal waters or countries, the Australian national or state laws under which actions for compensation by third parties may be taken are not clear. There is no express right of compensation in the *OPGGSA* for citizens of other nations to take action to recover damages for oil pollution resulting in loss or damage beyond the EEZ claimed by Australia. Even if the common law and state Environment Protection Acts offered a cause of action beyond the states' offshore areas, the limits on recovering damages for pure economic loss would still apply.

Can NOPSEMA or the Minister give a direction under the *OPGGSA* in relation to the payment of compensation to a third party for loss or damage suffered as a result of oil pollution, as opposed to cleanup and restoration of the environment? This seems highly unlikely, given the wording of the relevant sections. The power of the Minister to issue directions is limited by the requirements that the directions concern resource management or resource security.¹⁵² NOPSEMA's general power in s 574 is to give directions regarding a matter about which Regulations may be made, and none of the items in s 720 concern the payment of compensation to individuals. NOPSEMA's power to issue significant incident directions in s576B is limited to any (or all) of the following: actions to preventing and/or eliminating the escape of petroleum; and mitigating and/or managing the effects of the escape of petroleum. Again, a direction regarding the payment of compensation to third parties does not seem to fall within this power, nor does the power to issue remedial directions under s 586, as remedial directions must concern the plugging or closing off of wells, the conservation and protection of natural resources, and/or the making good of damage to the seabed or subsoil.

In the absence of a treaty obligation and national legislation, the payment of compensation to third parties for loss or damage caused by oil pollution that extends beyond the states' offshore area may well (a) rely on the

¹⁴⁷ Gulf Coast Claims Facility, *Overall Program Statistics*, (Status Report as of 4 May 2012) <<http://www.GulfCoastClaimsFacility.com>>, 31 May 2012. The status of economic and property damage claims made through the Court-approved settlement agreement is available at the Deepwater Horizon Claims Center, <<http://www.deepwaterhorizoneconomicsettlement.com/reporting.php>>. This is updated monthly. Categories under which damages for pure economic loss have been awarded include the following: Seafood Compensation Program; Individual Economic Loss; Individual Periodic Vendor or Festival Vendor Economic Loss; Business Economic Loss; Start-up Business Economic Loss; Failed Business Economic Loss; and Real Property Sales Damage. Not all claimants are part of this class action and settlement.

¹⁴⁸ *Environment Protection Act* s 8.

¹⁴⁹ Actions for nuisance and negligence in the context of environmental law are discussed in Bates, G, *Environmental Law in Australia* (8th ed, LexisNexis/Butterworths, 2013).

¹⁵⁰ *Caltex Oil (Australia) v Dredge 'Willemstad'* (1976) 136 CLR 529 (Gibbs, Stephen and Mason JJ). See also *Perre v Apand Ltd* (1999) 198 CLR 180 where a potato grower who sued the respondent for negligently importing diseased seed recovered damages for economic loss due to the reasonable likelihood of harm and because the appellant fell into an ascertainable class of person vulnerable to the respondent's actions.

¹⁵¹ [2003] Australian Torts Reports [81-692].

¹⁵² *OPGGSA*, ss 574A, 586A.

adverse publicity a corporation may receive, and hence its incentive to voluntarily pay compensation; and (b) as regards the citizens of other nations, depend on diplomacy, and the political willingness of the Australian government to ensure compensation is paid. This in turn is likely to depend on the Australian government's assessment of the impacts of the oil spill and the obligations of the Australian government under international law. However, as the grounds to suspend or cancel a title are linked in the statute to the failure of the titleholder to comply with the provisions of the Act, and as the Act does not address compensation to third parties, a refusal by a corporation to pay compensation, particularly for controversial losses such as pure economic loss, should not of itself be used as a reason for licence cancellation, particularly if all other directions are complied with.

As regards facilities operated under a title obtained under the *Petroleum (Submerged Lands) Act 1982* (SA), neither this Act nor the accompanying regulations contain any specific express provisions regarding the payment of compensation to third parties for loss or damage caused by oil pollution from offshore installations, arising from petroleum activities licensed under the *PSLA* and taking place in state coastal waters. Furthermore, in order to establish a separate licensing regime for offshore petroleum from that which exists under the *Environment Protection Act*, the *Environment Protection Act* is expressly stated not to apply to the *Petroleum (Submerged Lands) Act 1982* (SA). It thus appears legal actions by third parties for compensation for loss or damage caused by oil pollution from offshore installations operating in state coastal waters with authorisations awarded under the *PSLA* would be undertaken mainly under the common law, namely under tortious actions for negligence or nuisance.

The lack of specific provision in the Commonwealth and state offshore petroleum legislation regarding liability for third parties is in stark contrast to the legislative regimes in South Australia and other states concerning liability and compensation for oil pollution damage caused to land from *onshore* pollution, which contain detailed provisions concerning third party liability and compensation for damage.¹⁵³

6 Conclusion

The proposed amendments to the compliance and enforcement regime of the *OPGSSA* are overdue, and particularly welcome in South Australia in light of BPs proposal to undertake deepwater drilling in the Great Australian Bight in 2015. When the suggested amendments come into force, NOPSEMA will have stronger powers of monitoring and investigation to ensure compliance with the Act and the Environment Plans and Well Operations Management Plans of titleholders.

However, the issue of liability for damage suffered by third parties needs to be considered. Should an adverse incident occur, then it is unlikely under the existing law that any parties suffering economic loss that is not consequent upon damage to property will be able to recover damages. Given that pure economic loss is a major source of damage suffered by individuals and businesses in the case of marine pollution, this is an issue that needs to be debated. The issue of liability for loss (not being environmental damage) was not within the terms of reference of the Montara Commission of Inquiry, and it thus appears to have received little attention to date from the legislature.

One of the advantages of addressing liability for third party individuals in the *OPGSSA* and the state *PSLA* is that liability can be placed directly on titleholders, as is the case for environmental restoration and recovery. This will avoid any additional complexity caused by a distinction between vessels (eg MODUs) and fixed offshore structures. The division of liability between titleholders, operators and other parties can be addressed in industry arrangements, such as private contracts between the parties. Other than this, key matters to be considered in a regime for third party liability are: whether liability should be strict, or fault-based (dependent upon proving intention, recklessness or negligence); whether damages for pure economic losses should be recoverable; whether there should be a cap on liability; and who would be able to sue under the legislation (Australian citizens and foreign persons suffering loss or damage).¹⁵⁴

Another consideration is whether the Commonwealth should pursue its legislative initiatives independently of other nations, or whether Australia should push for an international convention addressing the principles of liability for damage caused by offshore oil pollution arising from the exploring and production of oil, and how

¹⁵³ *Petroleum (Onshore) Act 1991* (NSW), s107; *Petroleum Act 1923* (Qld), s 79Q; *Petroleum and Geothermal Energy Act 2000* (SA), s63; *Petroleum Act 1998* (Vic), s 129; *Petroleum and Geothermal Energy Resources Act 1967* (WA), ss 17–19; *Petroleum Act* (NT), s 81.

¹⁵⁴ For a discussion of various aspects of these issues, see: above n140; also Hui Wang and Michael Faure, 'Civil Liability and Compensation for Marine Pollution – Lessons to be Learned for Offshore Oil Spills', 8(3) *Oil, Gas and Energy Law* (September 2010) <www.ogel.org>; Peter Cameron, 'Liability for Catastrophic Risk in the Oil and Gas Industry' (2012) 6 *International Energy Law Review* 207.

to best cover the risks associated with catastrophic events through various financial assurance arrangements. While the Deepwater Horizon incident has prompted some analysts to call for a multilateral convention, to provide a consistent global regime for operators, contractors and potential claimants,¹⁵⁵ it has been acknowledged there may be considerable difficulty in negotiating such a treaty, and in particular gaining agreement from the United States and Europe, which has its own arrangements.¹⁵⁶ Furthermore, proposals that the International Maritime Organisation (IMO) amend its strategic plan to enable it to draft a multilateral treaty on liability and compensation from offshore installations were rejected by the organisation, which concluded that there is no compelling need to develop an international regime and that bilateral and regional arrangements are the most appropriate way to address the matter.¹⁵⁷ It thus appears unlikely that a multilateral convention on this topic will be negotiated in the near future, although it may be worthwhile to pursue bilateral or regional arrangements with Australia's near neighbours.

Finally, it is submitted that the South Australian *Petroleum (Submerged Lands) Act* be amended along lines similar to the recent *OPGSSA*, to include a statutory duty regarding liability for environmental cleanup, restoration and monitoring, and for the recovery of costs and expenses as a debt, that does not require a direction by the Minister. Section 96A of the *PSLA* also needs to be amended and updated to be consistent with the new financial assurance provisions of the *OPGSSA*, and to reflect international understanding of the range of measures by which titleholders provide financial assurance. Such a reformation has occurred in Victoria, which recently significantly updated the *Petroleum Submerged Lands Act 1982 (Vic)* and renamed it the *Offshore Petroleum and Greenhouse Gas Storage Act 2010 (Vic)*. The Act, which confers authority on NOPSEMA to administer and regulate OHS laws and well integrity in state coastal waters,¹⁵⁸ now largely mirrors the Commonwealth Act, including the compliance and enforcement provisions available to the Victorian regulator. The South Australian *PSLA* is well overdue for such an update.

¹⁵⁵ The Hon Justice Rares, above n 140; Allen, above n140.

¹⁵⁶ The Hon Justice Rares, above n 140; Cameron, above n 154.

¹⁵⁷ In November 2010, the Legal Committee of the IMO agreed to recommend to the IMO Council an amendment to the Organisation's strategic plan, to enable the Committee to consider liability and compensation. In April 2012, the Legal Committee decided that bilateral and regional arrangements are the most appropriate way to address the matter, and that it will further analyse liability and compensation issues 'with the aim of developing guidance to assist States in pursuing bilateral or regional arrangements' but without amending the Organisation's strategic plan: International Maritime Organisation, *Legal Committee (LEG) - 99th session, 16-20 April 2012* <<http://www.imo.org/MediaCentre/MeetingSummaries/Legal/Pages/LEG-99th-session.aspx>> 30 September 2012.

¹⁵⁸ *Offshore Petroleum and Greenhouse Gas Storage Act 2010 (Vic)* s 704.