Paper Title: Offshore Oil and Gas Industry Face New Compliance Measures

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Since the 2009 Montara incident, involving the worst uncontrolled release of hydrocarbons of its kind in the history of Australian's offshore petroleum industry, the energy sector has undergone significant legislative reform. The *Federal Government Response to the Report of the Montara Commission of Inquiry 2011* led to the establishment of the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**), with responsibility to investigate and report on offshore environmental management practices.

The environmental management of offshore petroleum activities is regulated by the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth) (**OPGGSA**) and its regulations. The regulations are an objective-based regulatory regime that requires that the environmental impacts and risks of petroleum activities are reduced to 'as low as reasonably practicable and an acceptable level'. Titleholders are required to demonstrate how environmental protection will be achieved through the implementation of appropriate performance objectives best suited to the particular petroleum activity.

As a result of recent legislative changes based on recommendations by the Montara Commission of Inquiry, NOPSEMA has wider powers of investigation and compliance monitoring while titleholders are subject to an express 'polluter pays' obligation, new financial assurance requirements and alternative enforcement mechanisms.

The Federal Government has also streamlined the approvals process for offshore petroleum activities. Since February 2014, offshore projects are subject to approval by NOPSEMA without additional approval from the Commonwealth Department of Environment under the EPBC Act.

1. Summary of the Australian offshore regulatory regime

NOPSEMA was formerly the National Offshore Petroleum Safety Authority. The Authority's powers were expanded due largely to the *Federal Government Response to the Report of the Montara Commission of Inquiry 2011*. Following the uncontrolled oil and gas release at the Montara oil field in the Timor Sea between 21 August 2009 to 3 November 2009, the Report recommended the establishment of a national offshore petroleum regulator for Commonwealth waters. As a result, from

1 January 2012, NOPSEMA was given responsibility to investigate and report on offshore environmental management practices.

The key Commonwealth legislation regulating offshore petroleum operations from an environment perspective is set out below. There are also a number of State-based laws that will apply if operations take place in State waters or on State land.

- The OPGGSA and its regulations deal with the issuing of titles, licences, and approvals and establish an environmental and safety compliance regime, enforced by NOPSEMA.
- The *Navigation Act 1912* (Cth) regulates maritime environmental and safety matters, and provides for marine pollution duties and offences.
- The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is the primary Commonwealth legislation for the protection of the environment and is administered and enforced by the Commonwealth Department of the Environment.
- The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) prohibits the discharge of pollutants into Commonwealth waters and regulates the transfer of oil cargo between vessels.

2. Summary of recent OPGGSA reforms

Several revisions and amendments have been made to the OPGGSA since the Montara Commission of Inquiry, including the establishment of NOPSEMA. Further enhancement of the OPGGSA occurred on 1 October 2014, with the commencement of previously dormant provisions of the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013* (Cth) and *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Act 2013* (Cth). These changes are significant, elevating the risk of substantial criminal and civil penalties for breaches by organisations and individuals, and materially altering the scope of compliance monitoring and enforcement powers possessed by NOPSEMA.

As a result of the changes, there is now provision for daily penalties, that is, a dollar amount per day for every day that the offence continues, in addition to the primary penalty. Daily penalties can quickly run into the millions of dollars if the offence continues for more than a few days. The changes to the OPGGSA also introduce additional enforcement mechanisms, including infringement notices, court imposed adverse publicity orders, environmental prohibition and improvement notices and injunctions.

The changes are targeted at publicly listed companies that highly value their business reputation and social licence to operate. For example, the introduction of adverse publicity orders is intended to encourage compliance with regulatory obligations and create a deterrent effect. If a company is found guilty of an offence under the OPGGSA, the Court will have the power to make an adverse publicity order. This may include the publication on the NOPSEMA website of the nature of the offence or civil penalty order, its consequences and the penalty imposed.

3. OPGGSA legislative framework

Environmental management

The environmental management of offshore petroleum exploration and production activities is regulated by the OPGGSA and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) **(Environment Regulations).**

The Environment Regulations are an objective-based regulatory regime that requires that the environmental impacts and risks of petroleum activities are reduced to 'as low as reasonably practicable and an acceptable level'. Titleholders are assessed against the environmental performance outcomes, standards and measurement criteria set out in an approved Environment Plan (**EP**) but the Environment Regulations do not prescribe specific processes or procedures for this purpose. This can be contrasted to the EPBC Act which outlines prescriptive requirements to ensure actions do not have an unacceptable impact on matters of national environmental significance.

The Environment Regulations set out various offences relating to conducting petroleum activities without an EP, breaching an EP or continuing operations after an environmental risk is identified.

A titleholder must submit an EP before commencing any petroleum activity. The EP must be in writing and must set out how operational risks to the environment will be managed. Failure to conduct operations consistently with the approved EP can attract criminal and civil penalties.

Requirements for an Environment Plan

An EP must include:

(a) a comprehensive description of the proposed activity, including its location, an outline of construction, layout and operational details and additional information relevant to environmental impacts and risks;

(b) a description of the existing environment that may be affected by the activity, including the relevant values and sensitivities of that environment (if any);

(c) details of the environmental impacts and risks of the activity;

(d) environmental performance objectives, environmental performance standards and measurement criteria, addressing legislative and other controls that manage environmental features of the activity;

(e) an implementation strategy, which:

  (i) complies with the OPGGSA, the Environment Regulations and any other environmental legislation applying to the activity;

  (ii) contains an oil pollution emergency plan; and

  (iii) provides for appropriate consultation with relevant authorities of the Commonwealth, a State or Territory and other relevant interested persons or organisations; and

(f) recording, monitoring and reporting arrangements.

Once an EP has been submitted, NOPSEMA, as the regulator, must accept or refuse it within 30 days. A revised EP can be submitted because of a proposed change to circumstances or operations.

Importantly, NOPSEMA may withdraw the acceptance of the EP in force in certain circumstances, for example, where the titleholder has not complied with environmental requirements of the OPGGSA or a direction given by NOPSEMA to the titleholder under the OPGGSA.

Compliance with an EP was originally the responsibility of the operator but amendments to the OPGGSA that took effect on 28 February 2014 transferred this responsibility to the titleholder(s). Where there are multiple titleholders for a petroleum title, each titleholder is liable for any statutory breach, which may have important consequences for joint venture parties.

4. Streamlining of the assessment process for offshore projects

Background to reform

Offshore petroleum activities that have or are likely to have a significant impact on matters of national environmental significance are regulated under Part 3 of the EPBC Act, including activities in Commonwealth waters and designated State and Territory waters managed by the Commonwealth. In addition, the OPGGSA requires that all petroleum activities in Commonwealth waters have an EP accepted by NOPSEMA in order to proceed. Following criticism of duplication and inefficiency, the Commonwealth government sought to streamline the approvals process by delivering a 'one stop shop' for the assessment of offshore projects by NOPSEMA.

The dual assessment by NOPSEMA and the Commonwealth Department of the Environment under the EPBC Act prompted a number of governmental reviews. These reviews recommended further expansion of NOPSEMA's powers so that it is the sole environmental regulator of offshore petroleum activities. The Hawke Report of the Independent Review of the EPBC Act stated that: 'It is appropriate that the EPBC Act continue to apply to petroleum activities. However, the approvals processes under the OPGGSA and the EPBC Act should be streamlined.' In 2013, the draft Productivity Commission Report on Mineral and Energy Resource Exploration concluded that since NOPSEMA undertakes assessments of EPs associated with petroleum activities in Commonwealth waters, it was equipped with the technical expertise to undertake assessments and approvals under the EPBC Act.

On 25 October 2013, the Commonwealth Minister for Industry, the Commonwealth Minister for the Environment and the CEO of NOPSEMA entered into an agreement to undertake a strategic assessment of NOPSEMA's environmental approvals process. This was followed on 22 November 2013 by a Program Report (**Program**) and a draft Strategic Assessment Report released for public comment by the Offshore Environmental Approvals Streamlining Taskforce which provide a description of the processes to be administered by NOPSEMA.

The primary objective of the strategic assessment was to ensure the Program, including the new Offshore Project Proposal delivered an assessment process that

would meet equivalent environmental outcomes for matters protected under the EPBC Act and provide an efficient regulatory regime.

The Offshore Project Proposal

A proponent of an offshore project is required to submit to NOPSEMA an Offshore Project Proposal (**OPP**) for public comment, assessment and acceptance. To provide flexibility to proponents on the timing of engagement with NOPSEMA and the submission of proposals, any person proposing an offshore project may submit an OPP to NOPSEMA for consideration. It is not limited to titleholders or title applicants.

The OPP is a whole-of-project authorisation process, which considers potential environmental impacts and risks over the entire life-cycle of large-scale development projects. The introduction of the OPP is intended to streamline the environmental approvals process and ensure the protection of matters of national environmental significance identified in Part 3 of the EPBC Act. An 'offshore project' is one or more of the following:

- construction of facilities or pipelines
- operation of facilities or pipelines
- recovery of petroleum other than on an appraisal basis
- injection of greenhouse gas, and
- permanent storage of greenhouse gas.

A proponent may voluntarily submit an OPP for any offshore petroleum or greenhouse gas activities not listed above but must comply with all requirements of the OPP assessment process, including the public consultation component. Although the OPP can be used for all petroleum activities, it will be mandatory for development projects. The aim is to create certainty for industry by obtaining an early regulatory decision on large scale projects. An accepted OPP must be in place for the project as a whole before the submission and assessment of individual EPs for the component activities. This aligns the OPP process with the existing regulatory requirement for EPs, with the aim of maintaining flexibility in approaches to the management of environmental impacts and risks over the life of the project.

If NOPSEMA determines that the OPP is suitable for public comment, a minimum four week mandatory consultation period applies. To meet this threshold, the OPP must identify and evaluate the environmental impacts and risks of the project, demonstrate that the impacts and risks will be appropriately managed and contain environmental performance outcomes that are consistent with the principles of ecologically sustainable development and relevant to the identified impacts and risks. Following the public comment period, a revised OPP must be submitted to NOPSEMA for assessment. The revised OPP must contain a summary of all public comments received and address any objection or claim made about the adverse impacts of the projects.

NOPSEMA must accept the OPP if it is appropriate for the nature and scale of the project, appropriately identifies and evaluates the environmental impacts and risks,

contains appropriate environmental performance outcomes and adequately addresses public comments on the proposal. NOPSEMA may request further information about any matter included in the OPP. It is open to NOPSEMA to make a decision that the OPP is unacceptable if, following further requests for information, the acceptance criteria are not satisfied. The outcome of the OPP process is published on NOPSEMA's website.

Following the streamlining of environmental approvals by the Commonwealth government, offshore projects are subject to approval by NOPSEMA without additional approval from the Commonwealth Department of Environment under the EPBC Act. The Department remains responsible for enforcement where an incident results in a contravention of the EPBC Act. In addition to civil and criminal penalties, the Department has a range of enforcement tools available, including the power to direct the holder of an approval to carry out an environmental audit, seek injunctions, apply for remediation orders, or make conservation orders or remediation determinations.

5. New titleholder obligations and compliance measures

Polluter pays obligation

As a response to the June 2010 Report of the Montara Commission of Inquiry, titleholders are now under an express statutory 'polluter pays' obligation under the OPGGSA. Titleholders are obliged to eliminate and control petroleum that escapes, remediate damage and continue to monitor the impact on the environment. If the titleholder fails to do any of these things, NOPSEMA or the responsible Commonwealth Minister may do them instead. The titleholder must reimburse NOPSEMA or the Commonwealth for the costs and expenses incurred in carrying out such action. Similar provisions apply in respect of State and Northern Territory waters. The express 'polluter pays' obligation came into effect on 29 May 2013 and is supported by a stronger civil penalty regime.

New civil penalty regime

NOPSEMA is now able to allege breaches of the OPGGSA and seek penalties by way of court proceedings which only require proof on the balance of probabilities, rather than the criminal standard (proof beyond reasonable doubt). A number of the new civil penalties for environmental offences are significantly higher than previous criminal penalties. For example, a breach of a NOPSEMA significant offshore petroleum incident direction attracts a maximum civil penalty of over $1.9M compared with a maximum of $85,000 for the criminal strict liability offence.

It is a defence in a prosecution for an offence, or in proceedings for a civil penalty order, for a breach of a direction if the defendant proves that the defendant took all reasonable steps to comply with the direction.

Continuing penalties may be up to 10% of the maximum civil or criminal penalty per day, creating scope for very significant penalties in the event of extended non-compliance.

Duty to report incidents

A titleholder must notify NOPSEMA as soon as reasonably practicable of a 'reportable incident'. This is an incident that has caused or has the potential to cause moderate to significant environmental damage. A titleholder must also notify NOPSEMA of a 'recordable incident' in writing as soon as practicable and not later than 15 days after the end of the calendar month. A recordable incident, for an activity, means a breach of an environmental performance outcome or environmental performance standard in the EP that applies to the activity that is not a reportable incident.

Financial assurance requirements

Since 1 January 2015, titleholders have been required to maintain financial assurance. The assurance must be sufficient to give the titleholder the capacity to meet costs, expenses and liabilities arising from carrying out a petroleum activity and complying with the requirements of the OPGGSA or regulations, for example, complying with a direction to remediate damage to the seabed or subsoil as a result of an escape of petroleum.

The form that financial assurance may take includes insurance, self-insurance, a bond, a security deposit, an indemnity or other surety, a letter of credit from a financial institution or a mortgage. The amount of assurance required is to be determined by NOPSEMA. Where financial assurance is insufficient, NOPSEMA may refuse or withdraw its approval for an EP for a specific activity. The goal is to ensure that there are sufficient resources available for the 'polluter pays' principle to operate effectively.

NOPSEMA has released new guidelines on how it will assess compliance with the new financial assurance requirements, entitled *Financial Assurance for Petroleum Titles*. NOPSEMA must not accept an EP unless it is reasonably satisfied that the titleholder is compliant with its financial assurance obligations. The amount of financial assurance will be set by reference to the most potentially 'costly' unplanned incident and the worst realistically predictable consequence of that incident. Costing methodology for use by the regulator in assessing the sufficiency of financial arrangement has been developed by the Australian Petroleum Production and Exploration Association.

The methodology for assessing the monetary value of sufficient financial assurance is intended to provide flexibility to titleholders to put forward other values if the titleholder or regulator considers that the circumstances warrant it. The approach is broadly based on that used in the UK offshore petroleum regime, a key feature of which is the development by industry of a costing methodology for use by the regulator in assessing the sufficiency of financial arrangements.

Alternative enforcement mechanisms

New enforcement mechanisms such as infringement notices, injunctions and Court imposed adverse publicity orders are now available to NOPSEMA. Adverse publicity orders require a body corporate found liable for a criminal offence or civil penalty provision to take specified actions to publicize, or otherwise notify persons of, the

offence or contravention, its consequences, the penalty and any other related matter.

NOPSEMA may apply to the court for such orders up to 6 years after the commission of the offence or contravention.

The introduction of adverse publicity orders are intended to encourage compliance with regulatory obligations and create a deterrent effect. If a company is found guilty of an offence under the OPGGSA, the Court will have the power to make an adverse publicity order. This may include publication on the NOPSEMA website of the nature of the offence or civil penalty order, its consequences and the penalty imposed.

Significant offshore petroleum incident direction

In addition to seeking criminal or civil penalties, NOPSEMA inspectors have a range of compliance measures available to them, including making directions. A titleholder may be required to comply with directions of NOPSEMA or the Commonwealth Minister in certain circumstances, such as in the event of a 'significant offshore petroleum incident'. Such a direction may require the titleholder to take or refrain from action (including to remediate the environment) anywhere in an offshore area. These directions may apply to all operations, including exploration and recovery, processing or storage of petroleum, the construction and operation of a pipeline, and the decommissioning and removal of structures.

Pollution response and monitoring

The 'oil spill contingency plan' has been renamed an 'oil pollution emergency plan'. Appropriate monitoring of emissions and discharges to the environment must be undertaken throughout the life of a petroleum activity to assess whether the environmental performance outcomes and standards in the EP are being met. Titleholders must have arrangements in place for operational monitoring in the event of an uncontrolled hydrocarbon release to inform response activities and to assess impacts to the environment for the purposes of any required remediation.

Prohibition and improvement notices

NOPSEMA inspectors can also issue improvement or prohibition notices which may require a titleholder or operator to engage in or refrain from particular activities in order to address a risk to safety or the environment. Publication of these notices on the NOPSEMA website is mandatory within 21 days of the issue of the notice unless the notice is subject to appeal.

A NOPSEMA inspector can also issue a do not disturb notice if it required to allow the inspection, examination or measurement or the conducting of tests concerning the premises or particular plant or a particular substance at the premises.

Failure to comply with a notice may incur a maximum penalty of $510,000 plus daily penalties.

Conclusion

The offshore oil and gas industry is required to comply with increasingly stringent environment obligations. Titleholders now have responsibility to control, clean up and remediate environmental damage caused by a petroleum activity. The consequences of an incident can be far-reaching, including high penalties and business interruption. In addition to criminal or civil liability under the offshore regulatory regime, industry participants may be liable to compensate third parties who suffer loss from successful claims made in negligence, nuisance, breach of statutory duty or breach of contract.

In order to adjust to NOPSEMA's expanded compliance and enforcement powers, industry participants are now assessing the increased regulatory risk from the elevated penalties and new enforcement mechanisms. The extent of contractual liability for these incidents is also an issue for titleholders who may be responsible for the acts or omissions of their operators. Additional training may be required for those personnel who regularly interact with NOPSEMA to ensure that they are aware of relevant legal rights and obligations under the OPGGSA.