Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010

Submission to the Senate Economics Committee

Assistant Professor
Tina Hunter
Faculty of Law
Bond University
Qld, Australia

March 2010

Table of Contents

Submission to the Senate Standing Committee on Economics: Economic Legislation Committee Inquiry into the Offshore Petroleum And Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010

Introduction

The Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill (OPGGLMMB) was introduced into parliament on 10 February 2010. It is described as an important bill as it progresses the intention of the government to establish a new National Offshore Petroleum Regulator (NOPR).[1] Furthermore, it purports to make only minor policy and technical amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGSA).[2] It seeks to make two major amendments to the OPGGSA and a number of minor technical amendments. These major amendments are :

1. The Commonwealth seeks to repeal section 76(1)(a)(iii) of OPGGSA, effectively enabling the Commonwealth to retain the retaining the fees raised under the *Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006;* and
2. Amendments to s7, s642 and s646 of the OPGGSA, augmenting the existing functions of the National Offshore Petroleum Safety Authority to include the non OHS structural integrity of the wells.

These two changes represent significant policy changes in the regulation of offshore petroleum activities, not minor changes as noted in both the Second Reading Speech and Explanatory memorandum. Each of these significant changes will be considered below.

[1] Second Reading Speech, House of Representatives, Offshore Petroleum and Greenhouse Gas Legislation (Miscellaneous Measures) Bill 2010 (Cth), 2.
[2] Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Legislation (Miscellaneous Measures) Bill 2010 (Cth), 2.

Part 1- Registration Fees

1. Commonwealth retention of registration fees to fund the creation of a of a new National Offshore Petroleum Regulator (NOPR)

Retention of registration fees to establish a NOPR

The Commonwealth seeks to retain the monies collected under s5 and s6 of the *Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006,* which is ordinarily remitted to the States and Northern Territory. These fees are industry fees, raised by a 1.5% ad valorem tax on transfers and dealings in offshore petroleum titles in Commonwealth Waters administered by the Designated Authority in each State/Territory. This represents an average of $15.3 over the past five financial years.[3] It is important to note that this average includes a marked drop in revenue in 2008-9 to $7,672,552, presumably as a consequence of the Global Financial Crisis.

The Commonwealth is seeking to retain these fees to fund the creation of a new National Offshore Petroleum Regulator (NOPR). The need to establish a NOPR arose out of the Productivity Commission report which identified unnecessary regulatory burden arising from the current JA/DA structure of regulation, replicated in each of the petroleum producing States/NT. In order to reduce regulatory burden and increase efficiency, the Productivity Commission recommended the creation of a National Offshore Petroleum Regulator (NOPR) (Recommendation 10.7). This represents a significant policy change from the current JA/DA model, where the States/NT are responsible for the day-to-day regulation of petroleum activities in Commonwealth waters, to a single petroleum regulator requiring the States to confer powers over State waters to the Commonwealth. As such, the proposed legislation seeking to retain registration fees should be carefully considered.

The role and function of this regulator would be to administer all regulatory approvals associated with upstream petroleum activities as a means of addressing issues of regulatory duplication and inconsistencies. The Productivity Commission considered four options for a national petroleum regulator:

1. *a National Offshore Petroleum Regulator* with responsibility for regulation of ALL upstream petroleum activities in both onshore and offshore areas;
2. a *National Offshore Upstream Petroleum Regulator* with responsibility for resource management, pipelines and environmental approval and compliance functions in all offshore areas;

[3] Department of Resources, Energy and Tourism, *Department of Energy, Resources and Tourism submission to Senate Economic Legislation Committee inquiry into the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (2010), 5.

3. a *National Offshore Upstream Petroleum Regulator for Commonwealth waters*, regulating functions for Commonwealth waters only; or
4. *a National Pipeline Authority* with responsibility for the coordination and approval of all cross-jurisdictional upstream petroleum pipelines. [4]

The preferred model for the Productivity Commission is the *National Offshore Petroleum Regulator* model, with the NOPR having responsibility for both onshore and offshore upstream regulation.[5] Under this preferred model, States and Territories should have the option of conferring upstream petroleum regulatory powers for their waters (including islands within those waters), on NOPR, and thus ultimately on the Commonwealth Minister. This option should also include powers relating to inter-jurisdictional pipelines in their waters. They should also have the option of conferring regulation of onshore inter-jurisdictional upstream petroleum pipelines. This model provides the greatest consistency in decision-making and regulatory enforcement across all jurisdictions, and minimize duplication requirements for all stakeholders. This model has the potential to consolidate existing petroleum expertise. In addition, there could be gain from significant economies of scale in administrative and support functions.[6] Whilst the creation of a single national petroleum regulator is the model most favoured model by the Productivity Commission, it requires each State/Territory to confer their existing petroleum-related regulatory powers in State and Territory waters seaward of the low tide mark, including islands within those waters, on the new NOPR, and ultimately the Commonwealth Minister.

In its submission to the Senate Economics Committee, the Western Australian government noted that the form and function of a NOPR is currently the subject of intense negotiations between the Commonwealth and the Western Australian government.[7] The WA government has clearly stated that it does not support the establishment of a NOPR, nor will it roll in its State Waters (Internal and Coastal waters) to a NAPR.[8] The reasoning of the WA government is that over two thirds of petroleum exploration and development occurs over the WA coast,[9] and therefore WA wishes to retain administrative control over developments off its coast.

---

[4] Australian Government Productivity Commission, *Review of Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009, 245.

[5] Australian Government Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009, 292.

[6] Australian Government Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009, 247.

[7] Western Australia, Department of Mines and Petroleum, *Department of Mines and Petroleum Submission: Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (2010), 1.

[8] Western Australia, Department of Mines and Petroleum, *Department of Mines and Petroleum Submission: Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (2010), 1.

[9] Western Australia, Department of Mines and Petroleum, *Department of Mines and Petroleum Submission: Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (2010), 1.

The Commonwealths introduction of legislation under the OPGGLMMB to retain registration revenue fees for the establishment of a new NOPR presumes that all of the States have already agreed to the establishment of the regulator. As demonstrated by the WA DMP submission, this is clearly not the case. The refusal by WA to roll in its coastal waters[10] will prevent the establishment of a NOPR. To pass legislation retaining registration fees from the States/NT, thereby reducing the income of the states/NT by some $10 million, is presumptive and pre-emptive on behalf of the Commonwealth. Unless and until there is certainty that a NOPR will be created, the Commonwealth should not seek to retain the registration fees for the establishment of a regulator that has no certainty that it will be established.

The Department of Resources, Energy and Tourism justifies the retention of the registration fees as a measure to recover from the industry the establishment costs of a NOPR.[11] Until there is agreement between the Commonwealth and WA on the establishment of a NOPR, legislation enabling the retention of registration fees by the Commonwealth should not be passed.

Removal of ad valorem registration fees to reduce regulatory burden

The Department of Resources, Energy Tourism (DRET), in its submission to the Senate Economics Committee, justifies the retention of the registration fess by reference to the Productivity Commission's report on regulatory burden.[12] DRET states that 'the Commission recommended that the Australian governments should abolish the ad valorem registration fee and replace it with a cost recovery fee'.[13] However, the recommendation from the Commission is that a full cost recovery model should be used for any new regulatory agency, recommending that the 1.5% registration fee for transfers and dealings *should be removed as a precondition* to the full cost recovery model for NOPR being introduced.[14]

The OPGGLMMB does not recommend the removal of the 1.5% registration fee for transfers and dealings. Rather it will enable the Commonwealth to retain the fees in order to establish a NOPR. This is clearly against the intention of Productivity Commission's recommendation for the removal of these fees. Therefore, the Commonwealth should not seek to retain these fees for the creation of a NOPR.

---

[10] As noted in Western Australia, Department of Mines and Petroleum, *Department of Mines and Petroleum Submission: Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (2010), 1.

[11] Department of Resources, Energy and Tourism, *Department of Energy, Resources and Tourism submission to Senate Economic Legislation Committee inquiry into the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (2010), 3.

[12] Australian Government Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009.

[13] Department of Resources, Energy and Tourism, *Department of Energy, Resources and Tourism submission to Senate Economic Legislation Committee inquiry into the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (2010), 7.

[14] Australian Government Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009, 266.

Part 2 - Functions of the Safety Authority

The legislative changes proposed under Part 2 of the OPGGLMMB seeks to enhance the functions and powers of the National Offshore Petroleum Safety Authority (NOPSA) to increase NOPSA's regulatory responsibilities regarding the non-OHS structural integrity of offshore petroleum facilities, wells and well-related equipment.[15]

The need to increase the role of NOPSA over the non-OHS structural integrity of facilities, wells, and well-related equipment has arisen as a result of the recommendations of the Productivity Commission (Recommendation 7.1).[16] This need for NOPSA to regulate well integrity was highlighted by the recent uncontrolled hydrocarbon release at the Montara Wellhead Platform (MWHP) resulting from a failure of the integrity of the H1 Well.[17] In its submission to the Montara Commission of Inquiry (MCI), NOPSA noted that it did not have responsibility to undertake any onsite activities other than the inspection and investigatory actions under powers afforded to it by listed OHS laws of OPAGGSA.[18] Furthermore, NOPSA noted in its submission that it is the responsibility of the Designated Authority (DA) to regulate well operations and the integrity of the Wells.[19] The petroleum industry, through its peak body APPEA, noted in the Productivity Commission report that the it believes:

> 'reform is required is the administration of Well Operations Management Plans (WOMPs), subsea equipment and Pipeline Management Plans, where currently regulatory responsibilities are shared by the [Designated Authorities] and NOPSA. These activities carry risks that impact upon the integrity of the total petroleum systems. The interaction between the various activities is critical to the safety performance of operations and should be regulated by a single body.'[20]

By increasing the functions and powers of NOPSA to include well integrity and well related equipment, safety of petroleum activities will be increased. Therefore, changes to NOPSA's functions will contribute to improved safety of workers on offshore petroleum facilities.

---

[15] Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill, s9.
[16] Australian Government Productivity Commission, *Review of Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009, 174.
[17] Refer to NOPSA submission to the Montara Commission of inquiry in NOPSA, *Commission of Inquiry: Montara Well Head Platform Uncontrolled Hydrocarbon Release (Submission No SUBM.3003.0001.0001)* (2010).
[18] NOPSA in NOPSA, *Commission of Inquiry: Montara Well Head Platform Uncontrolled Hydrocarbon Release (Submission No SUBM.3003.0001.0001)* (2010), 9.
[19] NOPSA in NOPSA, *Commission of Inquiry: Montara Well Head Platform Uncontrolled Hydrocarbon Release (Submission No SUBM.3003.0001.0001)* (2010), 9.
[20] APPEA: *Submisson to Australian Government Productivity Commission*, *Review of Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009 (submission 22), 20 in Australian Government Productivity Commission, *Review of Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector* (2009) Productivity Commission Research Report, April 2009, 173.

It should be noted that well operations management and the integrity of the well comprises not only safety of workers, but also protection of the environment from uncontrolled hydrocarbon releases. The recent Montara oil spill illustrated that a failure of well integrity affects workers, (particularly the risk of unignited hydrocarbons), but also the environment. These legislative changes proposed will still split the responsibilities for Well Operations Management Plans (WOMPS) between NOPSA and the responsible DA (who assesses the well design and construction and drilling applications). This means that well integrity regulation will be split between NOPSA and the DA. Furthermore, the regulatory amendments do not consider the environmental regulation of well operations and integrity, which also remains with the relevant Commonwealth or State Authority. Therefore, whilst in principle these proposed legislative amendments will provide benefits for the regulation of well integrity, it will still split the regulatory responsibility of well integrity between multiple regulators.

Part 4 – Strict Liability Offences for Titleholders

The legislative amendments in Part 3 of OPGGLMMB seeks to alter the penalty for offences of only a physical element (the doing of or failure to do an act) from imprisonment fro 5 years to 100 penalty points, thereby removing the requirement to prove intention as an element of the offence.[21] DRET maintains that having to prove fault as an element reduces the likelihood of securing a conviction for offences comprising a physical element only (eg failure to install a pressure containing cap on a exploration well, with the uncontrolled release of hydrocarbons from the well).

The major concern is that if the possibility of a criminal conviction is removed and replaced with only a monetary fine, there may be less of a deterrent to companies to ensure they company with regulatory requirements. Not surprisingly, APPEA did not object to the removal of criminal offence provisions for strict liability offences, to be replaced with 100 penalty units (which equates to a fine of $11,000 (based on the value of a penalty unit equaling $110 under s 4AA of the *Crimes Act 1914* (Cth)). This represents a significant downgrading of the penalty for an offence. Furthermore, whilst this penalty might be in line with *A Guide to Framing Commonwealth offences, Civil Penalties and Enforcement Powers, 2003*[22] it does not reflect the severity of the possible outcome of the physical element offences. The possibility of a criminal conviction, punishable by 5 years imprisonment is a greater deterrent for companies than a fine of $11000 that may result in an oil spill that causes millions of dollars in damage and cleanup expenses. As such, the offence provisions should not be reduced to a regulatory fine of 100

[21] Explanatory Memorandum, Offshore Petroleum and Greenhouse Gas Legislation (Miscellaneous Measures) Bill 2010 (Cth), 9.
[22] See *A Guide to Framing Commonwealth offences, Civil Penalties and Enforcement Powers, 2007* (2007) http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers at 29 March 2010.

penalty units, but maintained as a criminal offence, punishable by up to 5 years imprisonment. Whilst the element of intention may pose difficulties for the regulators to prove, where it can be proved the harsh penalties should remain. Without this provision, it is possible that industry will view the fines as 'soft', and the penalty will no longer act as a deterrent where the fault element is a failure to do or not to do an act as required.