

ESG – ENHANCED EXPOSURE DRAFT OF ENHANCED DECOMMISSIONING FRAMEWORK IN AUSTRALIA'S OFFSHORE OIL & GAS SECTOR – PART 2

In May 2021, the Federal Government released an exposure draft Bill to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) proposing to introduce significant reforms to the legal framework regulating Australia's Offshore Oil & Gas sector. The regulatory changes will likely impact companies involved in or planning future offshore petroleum activities in Australia, specifically in respect of their management of environmental, health and safety risks, their procedures concerning decommissioning of maturing assets and environmental remediation.

The proposed amendments are intended to enhance both the government and industry's ability to manage decommissioning, remediation obligations and liabilities. This will bring Australia's decommissioning regime in line with comparable international jurisdictions, which have legal mechanisms imposing decommissioning and remediation obligations and liabilities on current/former titleholders.

INTRODUCTION

As foreshadowed in our [January 2021 briefing paper](#), the Australian Federal Government recently released its exposure draft of the proposed [Offshore Petroleum and Greenhouse Gas Storage Amendment \(Titles Administration and Other Measures\) Bill 2021 \(Bill\)](#), amending the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGSA**).

The Bill, if passed, will introduce significant reforms in the regulation of Australia's Offshore Oil & Gas sector.

It is aimed at enhancing both the government and industry's ability to manage the financial and environmental risks posed by mature offshore assets and reduce the prospects of the government (by default) being burdened with decommissioning and abandonment liabilities, ultimately at a cost to taxpayers. The proposed amendments (if passed) will bring Australia's decommissioning regime in line with comparable international jurisdictions, such as the UK, United States, Canada and Norway, each having legal mechanisms in place imposing decommissioning and remediation obligations and liabilities on current and former titleholders.

Key issues

- The maturation of Australia's Offshore Oil and Gas industry is paralleled by a need for the government and industry to start planning for and carrying out decommissioning of offshore facilities, wells and pipelines and environmental remediation
- There are significant changes to the regulatory landscape of Australia's Offshore Oil & gas sector on the horizon.
- The changes will likely impact the ESG of companies operating in or that have plans to enter Australia's Offshore Oil & Gas sector, including energy, engineering, oil field services companies, and EPC contractors
- The proposed reforms will enhance Australia's legal framework and more closely align it with its international counterparts, improving consistency with ESG principles by placing greater emphasis on environmental protection, sustainability, accountability and transparency

This briefing note summarises the key proposed areas of reform set out in the exposure draft.

OVERVIEW

The *Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021* proposes (among other initiatives):

- broader and stricter criteria for future petroleum title applicants;
- increased trailing liabilities for titleholders, increased statutory obligations and liabilities for previous and current titleholders (and related entities) with respect to decommissioning offshore petroleum infrastructure, and environmental remediation;
- significant enhancement in the regulator's change of corporate control, and of the National Offshore Petroleum Titles Administrator's (**NOPTA**) oversight and decision making, of its approval process and an increased scrutiny of industry participants by expanding the scope of transactions requiring approval;
- introduction of civil and criminal penalty provisions for titleholder default of statutory decommissioning obligations, and non-compliance with National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) directions pertaining to decommissioning and environmental remediation activities; and
- an expansion of NOPSEMA and Ministerial information gathering powers and earlier invoking of powers to redirect remediation.

APPROVAL REFORMS

Under the current framework, a technical and financial capability assessment by NOPTA is required when a title is sold or otherwise transferred, resulting in a new titleholder or a change in the interests of a registered titleholder(s).¹ Commercial transactions leading to changes of ownership or control of a titleholder entity are not presently subject to a mandatory technical and financial capability assessment. The proposed amendments will require NOPTA to assess and approve all transactions (whether occurring as a single or series of transactions) resulting in the acquisition or reduction of a 20% interest in a titleholder entity. Penalty provisions will apply for failure to procure NOPTA approval.²

The Bill also proposes to introduce:

- tracing provisions to strengthen NOPTA's oversight, information gathering powers regarding change of ownership and control in titleholder entities, and anti-avoidance penalty provisions;³ and
- section 566D of the OPGGSA. This section will expand the range of factors that NOPTA can consider on applications for changes of ownership/control of titleholder entities. The expanded list of factors will include issues concerning corporate governance, abandonment and decommissioning

¹ This requirement is set out in sections 474(b)(i)-(iii) OPGSSA

² The maximum criminal penalty is 5 years imprisonment and a fine of up to \$266,400 for an individual or \$1,332,000 for a body corporate. The maximum civil penalty is \$532,800 for an individual or \$2,664,000 for a body corporate.

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experience of directors and other executives and their environmental safety history.

Further, amendments are proposed to sections 699(1)(a) and 725(1)(a) of the OPGGSA to empower NOPTA to obtain information to satisfy itself that titleholder(s) will have sufficient technical advice and financial resources available to undertake the decommissioning operations.⁴

License Renewal Reforms

Under the proposed reforms titleholders must satisfy NOPTA and the Joint Authority of their technical and financial capacity when moving from one category of title to another, and when applying for license renewal. Under the amendments to sections 125 and 185 of the OPGGSA, titleholders seeking renewal of petroleum exploration permits or production licenses must demonstrate their technical and financial capability to undertake the operations and works authorised by the permit/license, and to discharge all applicable statutory and regulatory obligations.

Field Development Plans

The proposed amendments will require new titleholders to submit Field Development Plans (FDP) including preliminary decommissioning plans. Mandatory reviews of titleholder FDPs by the Joint Authority will be required to ensure decommissioning plans are revised (if necessary) throughout the life of the project.⁵

Expansion of Titleholder Obligations

The Bill will increase titleholder's accountability. Under the proposed amendments to section 566P OPGGSA, a person who commences or ceases control of a titleholder entity must notify NOPTA within 30 days.⁶ In addition, under the proposed amendments, an applicant for the grant, renewal or approval of transfer of a title or a registered titleholder must notify NOPTA and NOPSEMA if it becomes insolvent, is under administration or is found guilty of contravening Federal or State law.⁷

Expanded Powers for NOPSEMA

The Bill empowers the regulator to obtain information to satisfy itself that the titleholder has or will have sufficient technical advice and financial resources to carry out the operations related to decommissioning throughout the entire tenure of the title. This will be coupled with new powers for the regulator to direct titleholders to provide evidence demonstrating their ability to meet decommissioning and remediations obligations (both financially and technically).

Expanded Powers to Issue Remedial Directions

The Bill also proposes to broaden and strengthen the regulator's and the Minister's power to issue remedial directions regarding decommissioning and environmental activities. Under the new regime, NOPSEMA (sections 586 and

⁴ The maximum criminal penalty for non-compliance is 100 penalty units (\$22,000) and the maximum civil penalty is 150 penalty units (\$33,000) throughout the tenure of the title.

⁵ Australian Government, Department of Industry, Science Energy and Resources' consultation paper "[Enhancing Australia's Decommissioning Framework for Offshore Oil and Gas Activities](#)" – December 2020

⁶ Under sections 566P(2)-(3) OPGGSA, the civil penalty for contravention is 480 penalty units and 48 penalty units for each day the contravention continues.

⁷ Under section 695YC(4) OPGGSA, the civil penalty for contravention is 240 penalty units.

587 OPGGSA) and the responsible Commonwealth Minister (sections 586A and 587A⁸) can issue remedial directions for decommissioning in relation to permits, leases, licences and authorities that have wholly or partly ceased to be in force. The regulators can look to titleholders, related entities of current and former titleholders, and persons who have (or will) significantly benefit from the project or persons who are (or have been) in a position to influence an entity's compliance with the OPGGSA.

In the event of titleholder non-compliance with an issued order direction under section 587A, the proposed amendments will enable the government to recover the costs and expenses of decommissioning or remediation activities from a non-compliant entity by commencing proceedings in the Federal and State courts.

Financial Assurance

Under the new framework, the financial assurance provisions will be extended to cover existing and future decommissioning and remediation works. Further, the Bill proposes to extend the operation of the OPGGSA⁹ to cover remedial directions issued by the regulator. Decommissioning and remediation-related directions issued by the regulator may be accompanied by a requirement to provide financial assurance in a form acceptable to NOPSEMA (such as insurance, bonds or mortgages).¹⁰ In the event that a titleholder fails to uphold its decommissioning obligations, these funds will be used to cover the costs of decommissioning and remediation works.

Trailing Liabilities

Under the new framework, NOPSEMA's ability to issue directions to a former titleholder to undertake remediation works will be expanded to include decommissioning and remediation defaults. The regulator will also be able to issue directions to related entities of current and former titleholders, and persons who have (or will) significantly benefit financially from the project or persons who are (or have been) in a position to influence an entity's compliance with the OPGGSA.

The Federal Government has indicated that these will only be used as a last resort safety mechanism to mitigate the potential financial burden to the Australian taxpayer, and adverse impact to the environment. The Bill, as currently drafted, contains no provisions enabling extra-territorial application of the trailing liability provisions.

Under the revised section 595(1)-(2) OPGGSA, the responsible Commonwealth Minister may issue directions to related entities of current and former titleholders; and persons who have (or will) significantly benefit financially from the project, or persons who are (or have been) in a position to influence an entity's compliance with statutory decommissioning obligations (such as property removal, spill clean-up and seabed remediation).

CONCLUSION

The proposed reforms will enhance Australia's legal framework and more closely align it with its international counterparts, improving consistency with Environmental, Social and Corporate governance (**ESG**) principles. The reforms will significantly increase regulatory oversight of any change to ownership and/or control of a titleholder entity; increasing titleholder

⁸ The responsible Commonwealth Minister may only issue decommissioning-related remedial directions for the purposes of resource management and resource security.

⁹ Section 571 OPGGSA.

¹⁰ Sections 586 and 574 OPGGSA.

accountability by expanding statutory notification requirements, decommissioning and remediation obligations and liabilities for current and previous titleholder(s), while expanding regulator and Ministerial information gathering and direction (both general and remedial) issuing powers for matters related to decommissioning and remediation.

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