THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE AMENDMENT (SIGNIFICANT INCIDENT DIRECTIONS) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Resources and Energy, the Honourable Martin Ferguson AM MP)
GENERAL OUTLINE

The purpose of the Bill is to amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (the OPGGS Act) to specifically enable the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) to issue a direction to a petroleum titleholder in the event of a significant offshore petroleum incident occurring within the title area that has caused, or might cause, an escape of petroleum. The direction would require the titleholder to take an action or not take an action in relation to the escape or possible escape of petroleum and its effects, and may apply either within or outside the titleholder’s title area.

Following the uncontrolled release of hydrocarbons from the Montara Wellhead Platform in August 2009, it became evident that a clear and specific power is required in the event of a significant offshore petroleum incident to enable the regulator to give directions to a petroleum titleholder in relation to the clean-up or other remediation of the effects of an escape of petroleum, both within and outside the title area.

The Bill will therefore insert new provisions into the OPGGS Act that will clearly enable NOPSEMA, as the regulator for the offshore petroleum industry, to issue a direction to a petroleum titleholder if a significant offshore petroleum incident has occurred in the titleholder’s title area that causes, or might cause, an escape of petroleum. The direction may, among other things, require the titleholder to take action to prevent or eliminate the escape of petroleum or potential escape of petroleum, and/or to mitigate, manage or remediate the effects of an escape of petroleum.

Where necessary, the direction may require the titleholder to take action either within or outside the title area in which the incident occurred. This would include, for example, clean up of petroleum that has escaped as a result of the incident and has extended beyond the boundaries of the title area. Failure by a person to comply with a direction will be an offence of strict liability.

The proposed amendment will help ensure that the Commonwealth has the full ability to provide for remediation of the effects of an escape of petroleum in the event of an oil spill incident, and is one of a number of legislative amendments being introduced to improve the regulation of the offshore petroleum industry following the Montara incident.

FINANCIAL IMPACT STATEMENT

Nil financial impact on the Australian Government Budget.

REGULATORY IMPACT STATEMENT

This Bill does not impose any significant new regulatory burden on the offshore petroleum industry.
NOTES ON INDIVIDUAL CLAUSES

Clause 1 - Short title

Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2 - Commencement

Sections 1 to 3 of the Bill will commence on the day it receives Royal Assent.

Schedule 1 will commence on the later of (a) the day after the Bill receives Royal Assent, and (b) immediately after the commencement of Parts 1 and 2 of Schedule 2 to the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011 (the National Regulator Amendment Act).

Part 1 of Schedule 2 to the National Regulator Amendment Act will set up a national regulator for the offshore petroleum industry by establishing the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), an expansion of the existing National Offshore Petroleum Safety Authority. The power to issue significant incident directions to a petroleum titleholder will be conferred on NOPSEMA by this Bill. Therefore, if this Bill receives Royal Assent prior to the commencement of Part 1 of Schedule 2 to the National Regulator Amendment Act, Schedule 1 to this Bill will not commence operation until that Part commences and NOPSEMA commences regulatory operations. The National Regulator Amendment Act provides that Part 1 of Schedule 2 will commence on a day to be fixed by Proclamation.

However if that day is fixed prior to the day that Royal Assent is granted for this Bill, Schedule 1 to the Bill will commence on the day the Bill receives Royal Assent, as NOPSEMA will already have commenced regulatory operations.

Clause 3 - Schedules

This clause gives effect to the provisions in the Schedules to this Bill.

Schedule 1 - Amendments

Item 1 – Section 7 (paragraphs (h), (ha) and (i) of the definition of title)

This item repeals the existing paragraphs (h), (ha) and (i) and replaces them with new paragraphs (ga), (h), (ha) and (i).

The definition of “title” in section 7 includes a list of different definitions for the term depending on where it is used in the OPGGS Act. For ease of reference, this list should refer to uses of the term “title” in the order in which they appear in the Act.

In the existing definition, paragraph (i) provides for the definition of “title” when used in Chapter 5. Paragraphs (h) and (ha) provide for the definition of “title” when used in sections 574 and 574A respectively. Sections 574 and 574A are in Chapter 6 of the Act, and therefore the references to these provisions should come after the reference
to the use of the term “title” in Chapter 5 of the Act. This item therefore corrects this technical error.

This item also adds a new definition of “title” (in the amended paragraph (i)) that applies when the term is used in Division 2A of Part 6.2 (i.e. the new Division which enables NOPSEMA to issue significant incident directions). When used in this Division, “title” has the meaning given by subsection 576A(3); that is, a petroleum exploration permit, a petroleum retention lease, a petroleum production licence, an infrastructure licence, or a pipeline licence – see item 10.

Item 2 – Section 7 (after paragraph (b) of the definition of title area)
This item inserts a new paragraph (ba) in the definition of “title area” in section 7. The new paragraph provides for the definition of the term “title area” when used in Division 2A of Part 6.2 (i.e. the new Division which enables NOPSEMA to issue significant incident directions). When used in this Division, “title area” has the meaning given by subsection 576A(3) – see item 10.

Item 3 – Paragraph 569(8)(c)
This item provides that section 569 of the OPGGS Act, which imposes general and specific requirements on petroleum titleholders in relation to work practices for petroleum operations, is subject to a direction under the new section 576B (i.e. a significant incident direction issued by NOPSEMA – see item 10). This provision ensures that a titleholder is not able to avoid a specific duty imposed by a significant incident direction, and makes clear the requirement with which a titleholder must comply in the event of a competing obligation under a significant incident direction and under section 569.

Section 569 of the OPGGS Act will be subject to a direction under section 576B in addition to the existing list of provisions, regulations and directions to which section 569 is already subject under subsection 569(8).

Item 4 – At the end of subsection 569(8)
This item inserts two notes at the end of subsection 569(8), to provide information for the reader of the legislation about the type of direction that can be issued under sections 574 and 574A (Note 1) and section 576B (Note 2). These sections are referred to in the list of requirements to which section 569 is subject under subsection 569(8) – see item 3.

Item 5 – Paragraph 572(7)(c)
This item provides that section 572 of the OPGGS Act, which places certain obligations on titleholders in relation to the maintenance and removal of property and equipment in the title area, is subject to a direction under the new section 576B (i.e. a significant incident direction issued by NOPSEMA – see item 10). This provision ensures that a titleholder is not able to avoid a specific duty imposed by a significant incident direction, and makes clear the requirement with which a titleholder must comply in the event of a competing obligation under a significant incident direction and under section 572.
Section 572 of the OPGGS Act will be subject to a direction under section 576B in addition to the existing list of provisions, regulations and directions to which section 572 is already subject under subsection 572(7).

**Item 6 – At the end of subsection 572(7)**
This item adds two notes at the end of subsection 572(7), to provide information for the reader of the legislation about the type of direction that can be issued under sections 574 and 574A (Note 1) and section 576B (Note 2). These sections are referred to in the list of requirements to which section 572 is subject under subsection 572(7) – see item 5.

**Item 7 – Section 573**
This item amends the existing simplified outline of Part 6.2 of the OPGGS Act, which deals with directions relating to petroleum.

The amendment inserts additional text to describe the specific power of NOPSEMA to give a direction to a petroleum titleholder in the event of a significant offshore petroleum incident in a petroleum title area, which has been inserted into Part 6.2 of the OPGGS Act – see item 10.

**Item 8 – At the end of subsection 574(2)**
This item adds a fourth note after subsection 574(2), to inform the reader about the effect of new subsection 576C(2) on a direction under section 574. Subsection 576C(2) provides that a direction under section 574 (which enables NOPSEMA to issue a general direction to a petroleum titleholder) will have no effect to the extent of any inconsistency with a direction under section 576B (i.e. a significant incident direction). See item 10.

**Item 9 – At the end of subsection 574A(2)**
This item adds a third note after subsection 574A(2), to inform the reader about provisions in the OPGGS Act relating to inconsistency between a direction given under section 574A and either a direction given under section 574 (NOPSEMA’s general direction-giving power) or a direction given under the new subsection 576B (i.e. a significant incident direction). See item 10 for further discussion about new subsection 576C(2) which provides, among other things, that a direction under section 574A (which enables the responsible Commonwealth Minister to issue a general direction to a petroleum titleholder in relation to resource management or resource security) will have no effect to the extent of any inconsistency with a direction under section 576B.

**Item 10 – After Division 2 of Part 6.2**
This item inserts a new Division 2A in Part 6.2 of the OPGGS Act to provide a clear and specific power for NOPSEMA to issue a direction to a petroleum titleholder, in the event of a significant offshore petroleum incident occurring in the title area, that has caused, or might cause, an escape of petroleum. A direction could require the titleholder to take an action or not take an action in relation to the escape or possible escape of petroleum and its effects, and may apply either within or outside the titleholder’s title area.
Section 576A – Directions for significant offshore petroleum incidents – definitions for Division 2A

The new section 576A defines terms and concepts used in the new Division 2A of Part 6.2.

The definition of “significant offshore petroleum incident” is substantially the same as the definition for this term used in Part 9.10A of the OPGGS Act, which relates to inquiries into significant offshore incidents. The difference between the definition as used in Division 2A and in Part 9.10A is that a “significant offshore petroleum incident” for the purposes of Division 2A does not include circumstances in which a significant incident or occurrence nearly happened, as a significant incident direction relates only to dealing with the effects or possible effects of an incident that has happened. The definition ensures that directions may only be issued in the event of an incident that is regarded as significant, and identifies the offshore petroleum operations that are within the scope of Division 2A.

The terms “title” and “title area” are defined to specify the types of title and associated title area in relation to which a direction may be given in the event of a significant offshore petroleum incident.

Subsection 576A(4) defines the terms “related title”, “related title area” and “related titleholder” – see discussion in relation to subsection 576B(6). These concepts may cover petroleum or greenhouse gas operations.

Section 576B – Directions for significant offshore petroleum incidents – NOPSEMA power to give directions

Section 576B enables NOPSEMA, as the regulator of the offshore petroleum industry, to issue a direction to a petroleum titleholder in the event of a significant offshore petroleum incident occurring in the titleholder’s title area that has caused, or may cause, an escape of petroleum. The specific ability to issue a direction provides NOPSEMA with a clear power to require the titleholder to take action (or not to take an action) in order to prevent and/or remediate the effects of an escape of petroleum as a result of the incident.

The scope of the direction is potentially quite broad, but must relate to the escape or possible escape of petroleum and its effects. For example, a direction may require the titleholder to take action to prevent or eliminate an escape of petroleum, and/or to mitigate, manage or remediate the effects of an escape of petroleum. The ability to also issue a direction in relation to the possible escape of petroleum would, for example, enable NOPSEMA to require action that may prevent an escape of petroleum before petroleum actually escapes following a significant offshore petroleum incident. This may help prevent environmental damage or mitigate risks to the health or safety of persons as a result of the incident.

Subsection 576B(5) makes it clear that a direction may require action by the titleholder anywhere within the offshore area, whether within or outside the title area. This will ensure that, in the event that an escape of petroleum extends beyond the title area, NOPSEMA has an unambiguous ability to require the titleholder to manage and remediate the effects of the escape of petroleum beyond the borders of the title area.
If the direction requires the titleholder to take an action in an area that is subject to a title held by another titleholder (i.e. a “related title area”, “related title” and “related titleholder”), NOPSEMA must give a copy of the direction to the related titleholder as soon as practicable after the direction is given to the titleholder that is subject to the direction. Given that these directions are likely to be issued in the event of an emergency situation and may require action to be taken relatively quickly, there may not be sufficient time to consult with the related titleholder prior to issuing the direction to prevent or remediate an escape of petroleum. However, it is important that the related titleholder is made aware that action is required by another titleholder in their title area under a direction issued by NOPSEMA.

A significant incident direction must be given to the titleholder in writing and must specify a time within which the titleholder is expected to comply with the direction. The period specified in the direction must be reasonable. A minimum time for compliance is not specified in this provision. As these directions will be issued in the event of an emergency situation, in many cases the direction may need to be complied with within a short period of time, such as if the direction requires a particular action that will prevent an escape of petroleum. Requiring the period to be reasonable provides NOPSEMA with the flexibility to issue a direction that must be complied with quickly in an emergency situation, while providing an administrative safeguard that the period specified should not be unreasonable for the titleholder concerned. In addition, under general administrative law principles, a direction given by NOPSEMA under this section must be reasonable, both in relation to the time for compliance and the action required by the direction itself.

Subsection 576B(7) provides that NOPSEMA should seek the approval of the relevant Joint Authority if NOPSEMA proposes to issue a direction of a permanent nature. However, a direction of this nature issued by NOPSEMA will not be invalid by reason only that NOPSEMA has failed to seek the approval of the Joint Authority.

Section 576C – Directions for significant offshore petroleum incidents – related matters
Section 576C provides for matters related to the giving of a significant incident direction by NOPSEMA under section 576B.

Subsections 576C(1) and (2) clarify the relationship between a significant incident direction and other directions, legislative provisions and regulations under the OPGGS Act. In effect, a significant incident direction issued by NOPSEMA must be complied with despite:

• any previous significant incident direction given to the titleholder by NOPSEMA;
• any previous direction given to the titleholder by NOPSEMA under the general directions power in section 574 or by the responsible Commonwealth Minister under the general directions power in section 574A;
• anything in the regulations; and
• the applied provisions (i.e. the laws of a State, Northern Territory or external Territory that apply onshore from an offshore area, which are applied in the offshore area – see section 80 of the OPGGS Act).
In addition, if a direction given under section 574 or 574A is inconsistent with a significant incident direction, the direction under section 574 or 574A will be of no effect to the extent of that inconsistency. However, if compliance with the direction under section 574 or 574A in part would not be inconsistent with the significant incident direction, the titleholder must still comply with the section 574 or 574A direction to the extent possible.

A significant incident direction also overrides the obligations of a titleholder under sections 569 and 572 – see items 3 and 5.

These provisions will ensure that a titleholder in not able to avoid a specific duty imposed by a significant incident direction, and makes clear the requirement with which a titleholder must comply in the event of a competing obligation under a significant incident direction and another direction, provision or regulation.

Subsection 576C(3) makes it clear that, if for any reason a person who is subject to a significant incident direction ceases to be the registered holder of the title in relation to which the significant incident occurred, the person will remain subject to the requirements of the direction. This means that it will be an offence for that person to fail to comply with the direction – see the discussion in relation to section 576D.

Subclause 576C(4) provides that a significant incident direction given by NOPSEMA may apply, adopt or incorporate a code of practice or standard contained in an instrument. This could, for example, provide practical guidance to titleholders in relation to compliance with the direction, such as particular methods for remediating the effects of an escape of petroleum, or appropriate standards to meet compliance obligations.

To ensure regulatory certainty for persons who are subject to a direction, any code of practice or standard that is adopted by a direction is required to be published on NOPSEMA’s website (subject to copyright). In addition, the code or standard is applied as in force or existing when the direction takes effect. If the code or standard is subsequently amended by the entity responsible for the code or standard, the code or standard applied by the direction will not also be amended.

Subclause 576C(8) provides that a direction made under section 576B (i.e. a significant incident direction) is not a legislative instrument. This provision is included to assist readers of the legislation, as a significant incident direction is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 (i.e. the provision does not constitute an exemption from that Act). This is because the direction applies the law in a particular case, and does not apply an obligation to comply with the direction to any other person beyond the titleholder to whom it is given.

Section 576D – Directions for significant offshore petroleum incidents – compliance
Section 576D makes it an offence of strict liability for a person who is subject to a significant incident direction to engage in conduct that breaches the direction. For the purposes of this section, “engage in conduct” means either to do an act, or to omit to do an act – see the definition of “engage in conduct” in section 7 of the OPGGS Act.
This means that a failure to comply with a direction will also be a breach of a direction.

It is appropriate for the effective administration of a high risk industry, where the consequences of incidents may be significant to human life and the environment, to require persons to comply with a significant incident direction issued by NOPSEMA, and to make it an offence for a person to fail to do so.

The fact that the offence is one of strict liability means the prosecution does not have to prove intention. This is to ensure that the legislation can be enforced more effectively as, without the application of strict liability, the intention to do an act or not to do an act must be proven. Given the remote and complex nature of offshore operations and the prevalence of multiple titleholder arrangements it is extremely difficult to prove intent. The intention of the application of strict liability is to improve compliance with the regulatory regime. This is particularly important given the high risk nature of offshore petroleum operations, and the potentially serious consequences to human health and safety and the environment in the event of a failure to comply with a significant incident direction.

The penalty for failing to comply with a significant incident direction is 100 penalty units. Setting the penalty at this level is considered appropriate. It is noted this is higher than the preference stated in A Guide To Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, December 2007 for a maximum 60 penalty units for offences of strict liability. However, offshore resources activities, as a matter of course, require a very high level of expenditure and therefore by comparison a smaller penalty would be an ineffective deterrent. It is also noted that the penalties for failing to comply with directions under other sections in the OPGGS Act (such as sections 574 and 574A) are all set at 100 penalty units.

Subsection 4B(3) of the Crimes Act provides: “Where a body corporate is convicted of an offence against a law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.”

Under section 577 of the OPGGS Act, NOPSEMA may do anything that is required to be done under a significant incident direction in the event of a breach of the direction by the titleholder. This provides the necessary machinery for ensuring that things directed to be done are done even if the titleholder does not comply with the direction.

The costs and expenses incurred by NOPSEMA will be a debt due to the Commonwealth payable by the titleholder and recoverable in a court of competent jurisdiction. However, it is a defence in a civil action under this section if the defendant proves on the balance of probabilities that the defendant took all reasonable steps to comply with the direction.

Section 578 of the OPGGS Act provides that it is a defence in a prosecution for an offence against section 576D if the defendant proves that the defendant took all
reasonable steps to comply with the direction. The onus of proof is placed on the defendant as only the defendant will have knowledge of the steps taken to comply with the direction, particularly given the remote nature of offshore petroleum operations.

For example, if NOPSEMA directed a titleholder to carry out, within a limited time, a procedure that would necessarily involve the hiring of a specialist contractor and the titleholder does not fulfil the requirements of the direction, the titleholder could raise a defence to a prosecution under section 576D if the titleholder were able to prove that, despite the titleholder’s best endeavours, no contractor ready, willing and able to carry out the work could be found within the specified time.

One point of significance of the defendant bearing the legal burden is that the proof must be discharged on the balance of probabilities, rather than proved beyond reasonable doubt.

**Item 11 – At the end of section 780A**

This item adds a note at the end of section 780A (which is a section that also relates to significant offshore incidents) to inform the reader of the legislation that NOPSEMA has the power under Division 2A of Part 6.2 of the OPGGS Act to issue directions to petroleum titleholders in relation to a significant offshore petroleum incident (but not in circumstances in which a significant incident or occurrence nearly happened). See item 10.