

EXPLANATORY STATEMENT

SELECT LEGISLATIVE INSTRUMENT NO. 201, 2014

Subject: *Offshore Petroleum and Greenhouse Gas Storage Act 2006*

*Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment
(Financial Assurance) Regulation 2014*

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) provides the legal framework for the exploration for and recovery of petroleum, and for the injection and storage of greenhouse gas substances, in offshore areas (Commonwealth waters).

Section 781 of the OPGGS Act provides that the Governor-General may make regulations prescribing matters required or permitted by the OPGGS Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the OPGGS Act.

The *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (the Principal Regulations) provide for the regulation of environmental management of upstream petroleum and greenhouse gas activities in offshore areas. Under the Principal Regulations, persons who want to conduct a petroleum or greenhouse gas activity are required to prepare and implement an environment plan for the activity. The regulator (the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) for petroleum activities) must assess the environment plan and decide whether to accept it.

The *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Financial Assurance) Regulation 2014* (the Regulation) amends the Principal Regulations to support recent amendments to the OPGGS Act in relation to financial assurance requirements for the offshore petroleum industry, by providing a mechanism for NOPSEMA to assess compliance with those requirements as a condition precedent to acceptance of an environment plan.

Amendments to the OPGGS Act which commenced on 29 November 2013 included a clarified and broadened financial assurance requirement in section 571, which replaced the previous requirement in section 571 to maintain insurance. The amendments clarified and confirmed the compulsory nature of the requirement for a petroleum titleholder to maintain sufficient financial assurance to ensure it can deal with extraordinary costs, expenses or liabilities arising in connection with the carrying out of a petroleum activity undertaken under the title, including expenses relating to the clean-up or other remediation of the effects of an escape of petroleum. In addition, the revised section 571 broadened the ability of the titleholder to comply with the requirement by extending the previous narrow concept of insurance to instead include and recognise a variety of forms of financial assurance by which the titleholder may demonstrate compliance, including, but not limited to, self-insurance (as defined), bank guarantees, and indemnities, in addition to traditional insurance products.

The amendments also included a new subsection 571(3), which provides that regulations may be made to require compliance with the revised financial assurance requirement, in a form acceptable to NOPSEMA, to be demonstrated as a prior condition of acceptance of an environment plan for a petroleum activity. Regulations may also be made to provide that a failure to maintain such compliance, in a form acceptable to NOPSEMA, is grounds for the withdrawal of acceptance of an environment plan for the activity.

The kinds of costs, expenses and liabilities in respect of which section 571 requires financial assurance to be maintained are expressed comprehensively, and could be taken to include all costs incurred by a titleholder in carrying out operations in the title area. This does not mean, however, that ordinary operating costs, such as costs of operating a production platform, drilling wells or meeting work program commitments require financial assurance cover under section 571. An applicant for an exploration permit (subsection 104(3)) or an applicant for approval of a transfer of a title (section 474) must provide details of the financial resources available to the applicant to the Joint Authority or the National Offshore Petroleum Titles Administrator respectively. No additional regulatory oversight is envisaged to ensure that a titleholder will have sufficient financial capacity to cover its own operating costs, including the normal range of compliance costs. Similarly, commercial commitments entered into by the titleholder in relation to its resource, such as liabilities under contracts for supply, do not require financial assurance cover. These are ordinary commercial matters that are for the titleholder to manage.

As indicated by the Explanatory Memorandum and the Second Reading speech to the Bill that introduced section 571, the section is intended to ensure that the titleholder will have the capacity to meet extraordinary costs, expenses and liabilities that go beyond the normal operational and commercial costs of engaging in the offshore resources industry. The amount of financial assurance titleholders require should consider the most potentially 'costly' unplanned incident or event that could occur in connection with the activity, and the worst realistically predictable consequences of that incident or event, having regard to the relevant circumstances in which the activity is to be carried out. The titleholder is to be required to demonstrate that it has complied with the financial assurance obligations along with the submission of the environment plan for the relevant petroleum activity.

It is a matter for NOPSEMA to make an assessment, on reasonable grounds, as to whether the financial assurance obligations have been met, including the scope of costs, expenses and liabilities that may arise in relation to an activity, and the extent to which the titleholder should be required to have financial assurance to cover those potential costs, expenses and liabilities.

The Regulation amends the Principal Regulations to implement the matters permitted to be provided for in subsection 571(3) of the OPGGS Act, and thereby puts in place a mechanism for NOPSEMA to oversee and ensure compliance by titleholders with their financial assurance obligations in section 571 of the OPGGS Act. In effect, the amendments ensure that, while NOPSEMA may assess an environment plan for a petroleum activity, it must not accept the plan unless it is reasonably satisfied that financial assurance in relation to the activity (or activities) is sufficient, and in an acceptable form. It is an offence for a titleholder to carry out a petroleum activity without an accepted environment plan.

The new provisions in the Principal Regulations will be supported by: (a) a methodology for assessing the monetary value of sufficient financial assurance, with flexibility for titleholders to use the methodology or propose other mechanisms when either the titleholder or regulator considers that the methodology is not appropriate to be applied in the particular circumstances; and (b) a guideline outlining acceptable forms of financial assurance.

NOPSEMA operates on a fully cost-recovered basis, through fees and levies payable by the offshore petroleum industry. There is no existing mechanism whereby NOPSEMA can recover its costs of assessment of proposed financial assurance arrangements submitted by titleholders. Subsection 685(1) of the OPGGS Act states that regulations may be made to provide for the payment of fees to NOPSEMA in respect of matters in relation to which expenses are incurred by NOPSEMA under the

Act or regulations. The Regulation therefore also provides for a fee to be payable to NOPSEMA for assessment of financial assurance arrangements in relation to a petroleum activity.

The Regulation commences on 1 January 2015, to allow sufficient time for industry to understand and prepare to comply with the new regulatory arrangements, including finalisation and publication of the supporting methodology and guideline. However, it should be noted that titleholders are already required by operation of the OPGGS Act to hold sufficient financial assurance in relation to petroleum activities in accordance with the requirements of section 571.

Details of the Regulation are set out in [Attachment 1](#). The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full Statement of Compatibility is set out in [Attachment 2](#).

Consultation

The Department of Industry hosted information sessions for offshore petroleum titleholders, to whom the amendments made by the Regulation will apply, in Perth and Melbourne in October 2013 to outline the policy intention of the amendments, consult on a draft of the Regulation, and discuss practical implementation of the financial assurance assessment process.

Following consideration of comments received from titleholders in relation to the draft Regulation, including concerns in relation to the complexity and practical application of the draft Regulation, a further intensive workshop with a select group of industry stakeholders and NOPSEMA was held in Canberra in February 2014 to discuss alternative options to implement the regulatory compliance mechanism for the financial assurance obligations in the OPGGS Act. As an outcome of the comments and stakeholder workshop, the implementation approach was revised to include the making and application of basic regulations under subsection 571(3) of the OPGGS Act, together with the development and application of guidelines in relation to the decision by NOPSEMA.

A further revised draft Regulation was subsequently released on the Department's website, and provided specifically to industry stakeholders for comment through the Australian Petroleum News, on 27 October 2014. No comments were received in relation to the revised Regulation.

Details of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Financial Assurance) Regulation 2014*

Section 1 – Name

This section provides that the title of the Regulation is the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Financial Assurance) Regulation 2014*.

Section 2 – Commencement

This section provides that the Regulation commences on 1 January 2015. The delayed commencement will provide time for industry to understand and prepare to comply with the regulatory arrangements put in place by the Regulation, and for the finalisation and publication of supporting guidelines relating to sufficiency of financial assurance and acceptable forms of assurance.

Section 3 – Authority

This section provides that the Regulation is made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act).

Section 4 – Schedule(s)

This section provides that existing named instruments are amended or repealed as per the terms of the Schedules contained in the Regulation. Any other item in a Schedule has effect according to its terms.

Schedule 1 – Amendments

Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009

Item [1] – After Part 1A

This item inserts a new Part 1B (regulation 5G) in the Principal Regulations to provide a mechanism for NOPSEMA to oversee and ensure compliance by titleholders with their financial assurance obligations in section 571 of the OPGGS Act.

Regulation 5G applies if an environment plan for a petroleum activity is submitted to NOPSEMA under regulation 9, or a proposed revision of an environment plan for a petroleum activity is submitted under regulation 17, 18 or 19, of the Principal Regulations.

Under regulation 10 of the Principal Regulations, NOPSEMA must accept an environment plan or proposed revision of an environment plan if NOPSEMA is reasonably satisfied that the plan or proposed revision meets the criteria set out in regulation 10A, whether on first submission or after the titleholder has been given one or more reasonable opportunities to modify and resubmit the plan. However, regulation 5G ensures that NOPSEMA must not accept the plan or proposed revision, even if it meets the acceptance criteria in regulation 10A, unless NOPSEMA is reasonably satisfied that the titleholder for the petroleum activity to which the plan relates is compliant with its financial assurance obligations in section 571 of the OPGGS Act in relation to the activity, in a form that is acceptable to NOPSEMA. That is, the titleholder must demonstrate that it has 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 carrying out of the petroleum activity, 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 regulation in relation to the petroleum activity, as a condition precedent to the acceptance of an environment plan for the activity by NOPSEMA. In requiring that NOPSEMA be 'reasonably satisfied' that the titleholder is compliant with section 571, regulation 5G(2) requires: (i) that NOPSEMA be satisfied; and (ii) that NOPSEMA's satisfaction be on reasonable grounds. The expression 'reasonably satisfied' does not require the application of any particular 'burden of proof' or standard of evidence. Broadly, it is a matter for NOPSEMA to decide the point at which and on what reasonable grounds it considers itself satisfied that something is the case. However, there must be some evidentiary basis for NOPSEMA's conclusions. This does not require any particular kind of evidence or that NOPSEMA must be persuaded up to a certain standard before it can consider itself to be satisfied. Rather, NOPSEMA must be able to point to some evidence on the basis of which it could rationally have reached its conclusions.

Regulation 6 of the Principal Regulations makes it an offence for a titleholder to undertake an activity without an accepted environment plan. Therefore, a titleholder cannot legally undertake a proposed petroleum activity until NOPSEMA has accepted an environment plan for the activity.

A methodology could be developed to assist titleholders with a standard approach for calculating sufficient financial assurance. NOPSEMA may have regard to this methodology when determining whether financial assurance arrangements proposed by a titleholder are sufficient in a particular case. It may also be appropriate in some cases for other mechanisms to be used when the titleholder or regulator considers that the methodology is not appropriate to be applied in particular circumstances.

It is important to emphasise that a decision made under new regulation 5G does not modify or cap liability as determined in a court of law, or under the 'polluter pays' statutory duty currently in force under section 572C of the OPGGS Act or the duties to reimburse NOPSEMA, the Commonwealth or a State or Territory in sections 572D, 572E and 572F. The titleholder will be, in the event of an escape of petroleum, liable for all the costs and expenses associated with the duties as cited in those sections, regardless of the level of financial assurance that the titleholder held to demonstrate to NOPSEMA compliance with the section 571 obligation.

Generally, an environment plan must be submitted to NOPSEMA under regulation 9 by a titleholder. However, with respect to certain petroleum titles (a petroleum access authority, petroleum special prospecting authority, or pipeline licence), an applicant for the title may submit an environment plan for an activity under the title to NOPSEMA. The financial assurance obligation in section 571 of the OPGGS Act only applies in relation to a titleholder. Therefore, regulation 5G only applies if there is a titleholder in relation to the activity immediately before NOPSEMA decides whether or not to accept an environment plan under regulation 10; that is, if the title has been granted prior to NOPSEMA making a decision in relation to the environment plan. If the relevant title is granted after NOPSEMA accepts the environment plan, the new titleholder will immediately become subject to the obligation in section 571 upon grant of the title. The titleholder will then have to make their own financial assurance arrangements in order to avoid contravening the Act.

In addition to the upfront compliance mechanism that is put in place by new regulation 5G, ongoing compliance with the requirements of section 571 of the OPGGS Act is, and will continue to be, subject to inspection by NOPSEMA in accordance with its inspection policies and procedures. As outlined in item [3] below, should financial assurance held by a titleholder be found to be

insufficient, or the form to be unsatisfactory to NOPSEMA, during such inspections for *any* environment plan, i.e. not just those subjected to the prior condition of acceptance compliance test, this constitutes a ground for withdrawal of acceptance of the environment plan.

The Regulation does not provide for merits review of a decision by NOPSEMA in relation to the sufficiency and form of financial assurance. The decision requires an understanding of the environmental risks associated with offshore petroleum activities in order to be reasonably satisfied as to the sufficiency of financial assurance, and there appears to be no tribunal established under Commonwealth legislation that would have the necessary environmental credentials, or that combines expertise in environmental regulation and offshore petroleum operations. Even if it were possible to put together a group of appropriately-qualified persons who were members of the Administrative Appeals Tribunal, they would be unlikely to have a flow of work that would enable them to build and maintain their expertise. Added to that is the difficulty of assembling such a group of persons within the very short timeframe necessary to review a decision, given the very high cost of delaying offshore operations even for a short time.

Item [2] – At the end of subregulation 11(1)

This item inserts a note to advise the reader of the effect of new regulation 5G; i.e. that NOPSEMA must not accept an environment plan for a petroleum activity unless NOPSEMA is reasonably satisfied that the titleholder is compliant with its financial assurance obligations in section 571 of the OPGGS Act, and the compliance is in a form that is acceptable to NOPSEMA.

Item [3] – At the end of subregulation 23(3)

This item makes failure by a titleholder to maintain compliance with its financial assurance obligations in section 571 of the OPGGS Act in relation to a petroleum activity, in a form that is acceptable to NOPSEMA, a ground for NOPSEMA to withdraw acceptance of the environment plan in force for the activity.

It is an offence for a titleholder to undertake a petroleum activity without an accepted environment plan. The effect of withdrawal of acceptance of a plan, therefore, would be that the titleholder commits an offence if it commences or continues to undertake the relevant petroleum activity.

NOPSEMA has a range of graduated enforcement mechanisms available to it, and therefore a decision to take the step of withdrawing the acceptance of an environment plan would depend on all the relevant circumstances. The Regulator is required to give at least 30 days' notice of an intention to withdraw the acceptance of an environment plan, and give the titleholder or any other person to whom a copy of the notice has been given an opportunity to submit any matters for NOPSEMA to take into account in finally deciding whether or not to withdraw the acceptance of the plan.

The OPGGS Act also provides other potential consequences for failure to maintain compliance with financial assurance obligations. These include, as a last resort, the ability for the Joint Authority to cancel a title on the ground of non-compliance.

Item [4] – Subregulation 32(1)

This item amends subregulation 32(1) of the Principal Regulations as a consequence of the commencement of the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (the Consequential Provisions Act). The Consequential Provisions Act made a number of consequential amendments to the OPGGS Act, including an amendment to

subsection 685(1) of that Act. Subsection 685(1) of the OPGGS Act had previously stated that the regulations may provide for the payment to NOPSEMA, on behalf of the Commonwealth, of fees in respect of matters in relation to which expenses are incurred by NOPSEMA under the Act or the regulations. A consequential amendment made by the Consequential Provisions Act has removed the words ‘on behalf of the Commonwealth’ in this subsection.

Regulation 32 of the Principal Regulations is made under subsection 685(1), and included a reference to a fee being payable to NOPSEMA ‘on behalf of the Commonwealth’ (reflecting the original form of subsection 685(1)). The amendment in item 4 of the Regulation removes the words ‘on behalf of the Commonwealth’ in subregulation 32(1), for correctness and consistency with the amended OPGGS Act.

Item [5] – At the end of Division 4.2

This item inserts a new regulation 33 to require payment of a fee to NOPSEMA for the expenses incurred by NOPSEMA in assessing financial assurance arrangements proposed by a titleholder in relation to a petroleum activity.

NOPSEMA’s functions under the OPGGS Act and regulations are fully cost-recovered through fees and levies payable by the offshore petroleum industry. There is currently no levy or fee payable that would recover NOPSEMA’s costs of administering new regulation 5G regarding financial assurance. Under subsection 685(1) of the OPGGS Act, the regulations may provide for the payment to NOPSEMA of fees in respect of matters in relation to which expenses are incurred by NOPSEMA under the OPGGS Act or regulations.

The fee is payable at the time or times agreed in writing between the CEO of NOPSEMA and the titleholder. The total amount of the fee is an amount or rate determined by the CEO of NOPSEMA, and must not exceed the total of the expenses incurred by NOPSEMA in assessing the proposed financial assurance arrangements.

Item [6] – At the end of Part 5

This item inserts a new Division 5.3 (regulation 49) at the end of Part 5, to provide for transitional arrangements relating to the Regulation.

The new regulation 49 ensures that the amendments made by the Regulation that provide for (a) NOPSEMA to be satisfied of compliance by a titleholder with its financial assurance obligations under the OPGGS Act, in a form acceptable to NOPSEMA, in order to accept an environment plan or proposed revision of an environment plan, and (b) payment of a fee for assessment of financial assurance arrangements by NOPSEMA, only apply in relation to environment plans, or proposed revisions of environment plans, submitted on or after 1 January 2015 (i.e. on or after commencement of the Regulation). If a titleholder submitted an environment plan or proposed revision of an environment plan prior to 1 January 2015, and a decision had not yet been made by NOPSEMA in relation to the plan, the titleholder is not required to demonstrate compliance with financial assurance obligations in order for NOPSEMA to accept the plan or proposed revision.

Notwithstanding this, the clarified legislative requirement for titleholders to maintain sufficient financial assurance to give the titleholder the capacity to meet costs, expenses and liabilities arising in connection with, or as a result of, the carrying out of a petroleum activity has been in place since 28 November 2013. Titleholders should therefore already be compliant with their financial assurance

obligations under the OPGGS Act. The amendment in item 3 of the Regulation, which makes failure by a titleholder to comply with its financial assurance obligations, in a form acceptable to NOPSEMA, a ground for withdrawal of acceptance of an environment plan, applies immediately on commencement of the Regulation on 1 January 2015.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Financial Assurance) Regulation 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument amends the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* to support recent amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) in relation to financial assurance requirements for the offshore petroleum industry, by providing a mechanism for the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) to assess compliance with those requirements as a condition precedent to acceptance of an environment plan. The amendments ensure that, while NOPSEMA may assess an environment plan for a petroleum activity, it must not accept the plan unless it is reasonably satisfied that financial assurance in relation to the activity (or activities) is sufficient, and in an acceptable form.

This Legislative Instrument also makes failure to maintain compliance by a titleholder with its financial assurance obligations under the OPGGS Act, in a form acceptable to NOPSEMA, a ground for the withdrawal of the acceptance of an environment plan by NOPSEMA, and provides for a fee to be payable to NOPSEMA for assessment of financial assurance arrangements in relation to a petroleum activity.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.