Energy

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POLLUTER PAYS:
ONGOING REGULATORY CHANGES FOR THE AUSTRALIAN OFFSHORE PETROLEUM INDUSTRY

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (Act) is the primary federal statute for offshore oil and gas activities. Changes to the Act took effect on 29 November 2013 and now all proponents who apply for Australian petroleum titles must maintain "financial assurance".

"Financial assurance" means the titleholder must have the capacity to meet costs, expenses and liabilities related to the petroleum activity including expenses relating to the clean-up or other remediation of pollution. The financial assurance must be in a form acceptable to The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA). The amendments to the Act also introduce a new obligation to carry out monitoring of the impact on the environment of an escape of petroleum.

A fundamental driver to the changes to the regulatory framework is the "polluter pays" principle which has come into focus since the uncontrolled release of oil and gas from the Montara Wellhead Platform following a blowout in August 2009. This incident led to a Commission of Inquiry investigating the failings at the platform and the report from that inquiry called for, among other things, amendments to the Act and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Regulations).

This Briefing considers the practical effect of the requirement for financial assurance and environmental monitoring for petroleum titleholders in Commonwealth waters. Our Briefing released on 12 December 2013 (http://www.hfw.com/Offshore-petroleum-industry-December-2013) details other significant proposed changes to the Regulations arising from both the Montara Report and the Federal Government's proposed streamlining of offshore environmental approvals.

Financial assurance

Previously, petroleum titleholders only needed to hold insurance when directed to do so by the responsible Commonwealth Minister. Amendments to the Act now require every titleholder to hold sufficient financial assurance to ensure they can meet the costs and liabilities related to their petroleum activities. The amendments have also granted NOPSEMA the power to make compliance with the financial assurance requirement a condition of granting approval for an environment plan for a petroleum activity.

NOPSEMA has indicated that it does not intend to consider the sufficiency of financial assurance for existing environmental plans unless the titleholder applies for a revision of those plans. However, as revisions of environmental plans are required every five years, the requirement for financial assurance will eventually affect all titleholders.

The amendments to the Act do not provide any guidance as to the amount of financial assurance required, nor do they limit the form that the financial assurance may take. However, the amendments stipulate that the following are forms of financial assurance that may be acceptable, either individually or combined: insurance; self insurance; a bond; the deposit of an amount as security with a financial institution; an indemnity or other surety; a letter of credit from a financial institution; a parent company guarantee; and/or a mortgage.

In October 2013, NOPSEMA issued a policy statement and exposure draft of the Regulations setting out a process for evaluating financial sufficiency. However, these amendments to the Regulations are not expected to come into force until late 2014 at the earliest. In summary, the proposed Regulations require the titleholder, when submitting an environmental plan or a proposed revision of an environmental plan, to give NOPSEMA adequate information that will:

- Identify the potential incident, operational response measures and reasonably credible worst case consequences which will result in the highest costs, expenses and liabilities to the titleholder;
- Quantify the potential costs, expenses and liabilities that will arise from the identified operational response measures and from addressing the environmental consequences of the identified scenario;
- Provide details of the methods used to quantify costs and evidence that financial assurance is sufficient; and
- Demonstrate that financial assurance is held in a form that will be accessible in the event of an environmental incident arising from the petroleum activity.

Under the proposed Regulations, NOPSEMA will be empowered to issue a notice requiring the provision of further information. However, neither the draft amendments to the Regulations, nor the policy statement, set out the criteria NOPSEMA will apply in assessing the sufficiency of the financial assurance.

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Environmental monitoring

The amendments to the Act require titleholders to monitor emissions and discharges into the environment for the life of any petroleum activity. Further, in the event of an escape of petroleum, the titleholder will be under an obligation to *"carry out environmental monitoring of the impact of the escape on the environment"* in accordance with the applicable NOPSEMA approved environmental plan. This obligation is in addition to the titleholder's obligations to take all reasonably practicable steps to eliminate or control any escape of petroleum, and clean up and remediate any damage to the environment that results from any escape. If the titleholder fails in any of these duties, NOPSEMA may step in and perform them at the titleholder's expense (or request the Australian Maritime Safety Authority (AMSA) to do so).

On a practical level, the amendments to the Act do not specify what titleholders are required to do in order to satisfy their obligation to carry out environmental monitoring. However, it is clear that the cost of scientific monitoring is to be borne by the titleholder. The Montara Report described scientific monitoring as monitoring which relates to non-operational issues and includes short-term environmental damage




assessments, longer term damage assessments (including recovery), and all post-spill monitoring activities.

A draft information paper on "Operational and Scientific Monitoring Programs" (OSMP), issued by NOPSEMA in December 2012 to address the Montara Report's recommendations, is the only guidance currently available on what environmental monitoring obligations for environmental plans entail. The information paper sets out the factors that, in NOPSEMA's view, a titleholder should take into account in designing an OSMP which is fit for purpose. The factors include matters which clearly fall within the scope of post-spill scientific monitoring of environmental impacts such as monitoring of water and sediment quality, fish, seabed flora and fauna and marine wildlife. However, the factors go beyond obvious post-spill scientific monitoring of the environment. For example:

- NOPSEMA suggests that an OSMP should provide for detailed baseline studies and data collection to be carried out prior to a spill occurring and be designed to assess seasonal and daily changes so these natural changes can be distinguished from changes resulting from a spill;
- An OSMP may need to provide for scientific monitoring of the social impacts of a spill such as effects on indigenous, tourism, heritage, fisheries, recreational, economic or other human activities. These wide range of factors are captured as the definition of "environment" in the Regulations and includes the social, economic and cultural features of an ecosystem.

Importantly, the draft information paper states that environmental monitoring can only be terminated if the titleholder can demonstrate that environmental values, ecological structures and ecological functions have been fully restored, either naturally or through active management intervention. Due to the high degree of scientific uncertainty surrounding such oil spill events, environmental monitoring may be required for a significant period of time.

In the event of an incident, where a titleholder does not already have an OSMP in place, the titleholder may be able to comply with its monitoring obligation by consulting with NOPSEMA on a proposal for monitoring the environmental impacts of the escaped petroleum, taking into account the factors raised in the draft information paper.

It is important to note that NOPSEMA's functions are regulatory in nature. In the event of an escape of petroleum arising from the activities of an offshore facility, the relevant government agency responsible for combating any escape is AMSA. Consequently, titleholders will be required to liaise predominantly with AMSA throughout the response to any such incident.

Contractual indemnities

The Act and Regulations focus entirely upon the titleholder's obligations which are primary and non-delegable. Whether, and to what extent, a titleholder will have any rights of claim or indemnity from others who may have caused or contributed to a spill will be dependent upon contractual risk allocation. Commonly, rig contracts and offshore support vessel charters specifically allocate risk and indemnities in relation to pollution clean up costs and other pollution liabilities. Frequently, contractor's/service provider's liabilities are capped in any event. In practice, any existing risk and indemnity allocations will not be affected by these changes. However, the monitoring obligations may add to the potential liabilities in the sense that the cost of protracted monitoring in the aftermath of a spill would form part of the clean up costs and therefore be a potential exposure which is not easily assessable or quantifiable in advance.

Next steps

Whilst the Act now requires that petroleum titleholders maintain sufficient financial assurance, it is understood that the amendments to the Regulations, which will incorporate the financial assurance requirements, are likely to be subject to further public consultation. Copies of the relevant documents are available through a link on NOPSEMA's website (http://www.nopsema.gov.au).

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