

POLLUTER PAYS: FINANCIAL ASSURANCE AND REGULATORY COMPLIANCE REQUIREMENTS FOR THE AUSTRALIAN OFFSHORE PETROLEUM INDUSTRY

The Australian Government's reforms to the offshore petroleum industry continue with the commencement of new regulations to implement 'financial assurance' requirements and amendments to the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (Act) to provide for the new regulatory compliance regime.

The Australian Government is also currently undertaking a high-level strategic review of the framework governing oil and gas resource management in Commonwealth waters. The review seeks to identify ways to improve the framework's clarity and flexibility and reduce regulatory compliance costs, with the aim of supporting commercial investment in the industry. Submissions are open until 6 February 2015 and the consultation paper can be found here: www.industry.gov.au.

Financial assurance

As of 1 January 2015, the National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA) must be 'reasonably

satisfied' that a titleholder is compliant with the 'financial assurance' requirements of the Act as a prior condition for acceptance of a new environment plan or a revised environment plan. This change is effected by amendments to the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Environment Regulations) and is another component of the 'polluter pays' amendments to the Act (our previous Briefing can be found here: <http://www.hfw.com/Polluter-pays-January-2014>).

'Financial assurance' means the titleholder must have the capacity to meet all costs, expenses and liabilities related to the petroleum activity, including remediation expenses relating to an oil pollution event. Scenarios involving the most expensive unplanned event and the most significant negative consequences of that event are used to set the quantum for financial assurance. The requirement for financial assurance obligations has replaced the previous obligation in section 571 of the Act to maintain insurance and applies to environment plans or revised plans submitted after 1 January 2015.



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Under the Environment Regulations, NOPSEMA will be prohibited from accepting an environment plan or proposed revision of an environment plan unless it is 'reasonably satisfied' that the titleholder is compliant with the financial assurance obligations under the Act in relation to the petroleum activity and that compliance is in a form acceptable to NOPSEMA. NOPSEMA may also, under specific conditions, withdraw its acceptance of an environment plan if the titleholder fails to comply with its ongoing financial assurance obligation.

The issue of what amounts to NOPSEMA being 'reasonably satisfied' remains to be seen as although guidelines exist there is no prescribed standard as to what is reasonably satisfactory. NOPSEMA will however, need to identify the evidence upon which its decisions are based.

NOPSEMA's Financial Assurance for Petroleum Titles Guideline provides a process for demonstrating compliance which involves titleholders:

1. Determining the liabilities and costs that may occur from petroleum activities under the title, utilising procedures developed by the Australian Petroleum Production and Exploration Association (APPEA) or another endorsed process. APPEA's method was endorsed by NOPSEMA on 9 December 2014, subject to a 12 month review.
2. Identifying the forms of financial assurance that can be utilised and ensuring that they will be accessible in the event of an incident connected with a petroleum activity.
3. Providing a Financial Assurance Declaration to NOPSEMA. One Financial Assurance Declaration can potentially be applied to multiple activities and multiple environmental plan submissions for those titles.
4. Providing a Financial Assurance Confirmation to NOPSEMA when submitting a new or revised environment plan. A Financial Assurance Confirmation is an attestation by the titleholder that suitable declarations have been submitted to NOPSEMA for activities under all the titles to which the environmental plan relates. Failure to provide a Financial Assurance Confirmation will prevent NOPSEMA from accepting an environment plan.

NOPSEMA is entitled to recover costs for its assessment of whether or not a titleholder is compliant with its financial assurance obligations.

Compliance regime

A range of new regulatory compliance measures under the Act commenced on 1 October 2014. These measures

provide NOPSEMA with additional monitoring, investigation and enforcement powers and represent further progress in the Australian Government's implementation of recommendations from the Final Government Response to the Montara Commission of Inquiry.

Inspectors: The creation of a single class of 'NOPSEMA Inspector' provides greater clarity and removes inconsistencies between the various powers of the former categories of Inspector. NOPSEMA inspectors can now use monitoring and investigation powers to investigate compliance under the Act with a warrant (including the seizure of evidence). Inspectors can also now monitor compliance with OHS obligations and environmental management laws without a warrant at offshore facilities and at onshore regulated premises.

To monitor titleholder compliance, NOPSEMA Inspectors may generally interview representatives, undertake tests, take photographs and videos. The Act now provides for a post-inspection Petroleum Environmental Inspection Report. The report is issued to the titleholder and will include the Inspector's conclusions along with any recommendations. Titleholders must detail proposed actions that will be taken in response to the recommendations within a specified timeframe.

Civil penalty regime: A new civil penalty regime increases NOPSEMA's enforcement options by allowing NOPSEMA to apply to either the Federal or Supreme Court for an order that a person has breached a civil penalty provision. The Court may then issue an order requiring the person to pay a pecuniary penalty. As it is a civil penalty regime, proof is required on the balance of probabilities. The new civil penalties for environmental offences are significant and include a maximum penalty of AUS\$1.91 million for a body corporate that fails



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to follow a significant incident direction from NOPSEMA. Additionally, a daily penalty up to 10% of the maximum civil penalty may also apply in the event of extended non-compliance.

Criminal penalty regime: A new level of fault-based offences has been introduced. The offence of intentionally breaching a direction from NOPSEMA related to a significant offshore petroleum incident or to a remedial direction attracts a maximum penalty of AUS\$1.7 million for a body corporate or AUS\$340,000 and/or five years imprisonment for an individual.

Publicity orders: Court imposed adverse publicity orders have also been implemented. If a body corporate is found liable for either a criminal offence or civil penalty provision, the Court can require it to take actions to publicise (or notify) persons of the offence, its effects, the penalty and any other related matter.

OHS offences: Two new levels of OHS offences have been introduced; reckless breach of duty and negligent breach of duty, with maximum penalties for a body corporate of AUS\$2.97 million and AUS\$1.5 million respectively. The new regime and increased penalties now align with those relevant to onshore safety (under the Work Health and Safety Act 2011 (Cth)).

Environmental notices: NOPSEMA can now issue environmental improvement notices and environmental prohibition notices which can require titleholders to permit inspection and testing at a site to occur and to take or refrain from specific actions to enable the removal of significant threats to the environment. NOPSEMA must publish all prohibition and improvement notices on the NOPSEMA website within 21 days of the issue of the notice (unless subject to appeal).

Offshore Petroleum Resource Management Review

The Australian Government is currently seeking industry views on impediments to business activity and options to improve the resource management framework for both the exploration and production lifecycle. The framework is principally defined under the Act and in the subsidiary Resource Management and Administration regulations. The consultation paper is an opportunity for industry participants to engage with the strategic review in its initial phase. An interim report will follow the consultation paper in March 2015 with a final report being delivered to the Commonwealth Minister for Industry by 30 June 2015.

Next steps

Industry participants need to thoroughly understand their financial assurance requirements to ensure that compliance does not cause a delay to any potential projects or existing projects (i.e. environment plans are required to be revised every five years).

The changes to the regulatory compliance regime are significant. Industry participants should consider reviewing their risk management procedures to incorporate the changes to NOPSEMA's monitoring, investigation and enforcement powers.



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