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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE
LEGISLATION AMENDMENT BILL 2009**

EXPLANATORY MEMORANDUM

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

OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE LEGISLATION AMENDMENT BILL 2009

GENERAL OUTLINE

This Bill has three main elements. Firstly, to make some minor policy changes to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) arising from various reviews. These are:

- Providing an 'expedited' consultation process for the granting of an access authority to titles in adjoining offshore areas where the title holders have consented to the access.
- Changing the decision to declare a location from the Designated Authority (DA) to Joint Authority (JA).
- Changing the decision to grant scientific investigation consents (SIC) from the DA to the JA.
- Amending the Act to require notification of discovery of petroleum in a production license area, as is required for other titles and to extend the period of notification of discovery of petroleum from immediately to within 30 days from completion of the well that led to the discovery.
- Changing datum provisions to directly empower the DA to issue instruments to allow relabelling of title areas, blocks etc, using coordinates corresponding to the current datum rather than providing this power through regulations as occurs currently.
- Amending the Act to state in unequivocal terms that the fault element for duty of care offences is negligence and not intent.
- Removing the consent to operate a pipeline.
- Removing requirements for Data Management Plans.
- Clarifying titleholder's responsibility for matters within their control in relation to a drilling safety case.

Secondly, the Bill corrects omissions in and makes clarifications to the greenhouse gas provisions in the Act, which came into effect in November 2008.

Finally, the Bill makes a number of technical corrections including references to the Act in other legislation.

FINANCIAL IMPACT STATEMENT

The Bill includes minor policy and administrative changes which will not have any financial impact on the Australian Government Budget. The pipeline safety management levy is to be replaced with an equivalent safety case levy covering pipelines.

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 in the Bill will commence the day the Act receives Royal Assent.

Schedule 1 will commence the day after the Act receives Royal Assent except for Schedule 1, Parts 7 and 8 which will commence on 1 January 2010.

The commencement of Schedule 1, Parts 7 and 8 coincides with the start of the next levy year following Royal Assent. This will make for an easier transition for safety levy arrangements for pipelines. Safety levies are calculated annually at the start of each calendar year. From this date, pipelines will be largely regulated under the safety regime and this is also the appropriate time for the repeal of the provisions requiring a consent to operate a pipeline.

No provisions in this Bill will apply retrospectively.

Clause 3 - Schedules

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

Schedule 1 - Amendments

Item 1 - subsection 245(1)

This item includes in section 245 the same expedited consultation arrangements for the grant of an access authority in an adjoining offshore area as is already included in section 244 for consultation arrangements on the grant of an access authority in the offshore area of a single jurisdiction.

Where an exploration activity extends from one offshore area into another offshore area (e.g. from the offshore area of Western Australia into the offshore area of South Australia), section 245 currently stipulates that the DA into whose jurisdictional access is sought must carry out consultations, taking up to one month.

This item seeks to alleviate any time delays by allowing expedited consultation arrangements where the titleholders have consented to the access.

Item 2 - subsection 245(1)

This item allows that the amendment to subsection 245(1) only applies to applications for a petroleum access authority made after the commencement of this item.

Items 3-11 - Sections 95-96 and Part 2.2, Division 6

These items change the decision maker from the DA to the JA for the declaration of a location and in relation to nomination of blocks.

Currently Part 2.2, Division 6 (sections 128 to 133) provides the DA (i.e. the relevant State or Territory Minister) may require the nomination of blocks and may declare a location over the blocks containing a petroleum discovery. The nomination of blocks and the declaration of a location is a necessary step before an exploration company applies for a retention lease to retain title over a currently non-commercial discovery or applies for a production license to develop a commercial discovery. The decision to grant a retention lease or a production license lies with the JA (that is the Commonwealth Minister and the relevant State Minister).

Amendments to these sections are appropriate given the Commonwealth Minister's influence on the subsequent retention lease and production licence process.

Item 12 - Transitional

This item allows decisions of the DA, in relation to locations, made prior to the commencement of this item to remain valid.

Items 13-14 - Subsection 253(1) and subsection 254(1)

These items change the decision maker for setting conditions for a scientific investigation consent (SIC) and for granting a SIC from the DA to the JA.

Currently sections 251 to 254 provide for the DA to grant a SIC to authorise petroleum exploration operations carried out for scientific research purposes. The United Nations Convention on the Law of the Sea (UNCLOS) provides that all states have the right to conduct marine scientific research on the continental shelf with the consent of the relevant coastal state, which can include petroleum exploration operations. Given that SICs are in the Act to implement international obligations, it is appropriate that the Commonwealth Minister should have a role in granting the consent.

Item 15 - Transitional

This item allows decisions of the DA, in relation to a scientific investigation consent, made prior to the commencement of this item to remain valid.

Item 16 - Clause 41, Schedule 6

This item amends clause 41 of Schedule 6 so that it extends clause 89 of Schedule 3 to cover 'omitted offences' (i.e. offences against regulations set out or prescribed for the purposes of section 140H(2) of the repealed *Petroleum (Submerged Lands) Act 1967* (PSLA) as in force during the period beginning on 1 January 2005 and ending immediately before the commencement of the Act. This amendment will ensure that the National Offshore Petroleum Safety Authority (NOPSA) or an occupational health and safety (OHS) inspector is not prevented from instituting proceedings for omitted

offences after the transition from the *PSLA* to the Act. The Act received Royal Assent on 29 March 2006 and on 24 June 2008 was proclaimed to commence from 1 July 2008.

Item 17 - Subsection 284(1)

This item extends notification of discovery of petroleum to cover a petroleum production licence area. Notification of discovery is already required for an exploration permit area or a retention lease area.

By adding this requirement for petroleum production licence areas it is intended to capture knowledge of discrete accumulations and not incremental accumulations.

Item 18 - Subsections 284(2) and (3)

This item repeals the provisions to notify a discovery immediately and to provide a written notice within 3 days. The item sets the period for notification of a discovery to 30 days from the completion of the well that resulted in the discovery.

At 30 days the petroleum company has a more detailed knowledge of what has been located and of whether it may be commercial.

This amendment will result in a less onerous process for companies compared to the current process requiring immediate notification of a discovery.

Item 19 - Subsection 284(4)

This item amends subsection 284(4) to remove the reference to subsection 284(3) which is repealed by Item 18.

Item 20 - Paragraph 284(5)(a)

This item removes the reference to subsection 284(3).

Item 21 - Subsections 452(2) and (3)

Section 452 sets out requirements for the notification of discovery of petroleum in a greenhouse gas assessment permit area, a greenhouse gas holding lease area or a greenhouse gas injection licence area.

This item amends section 452 by repealing subsections 452(2) and (3) and substituting a new subsection 452(2). The requirements for immediate notification of discovery and for a written report within 3 days are removed and replaced by the requirement to notify the responsible Commonwealth Minister within 30 days.

Item 22 - Subsection 452(4)

This Item amends the reference in Subsection 452(4) to subsection 452(2) only.

Item 23 - Paragraph 452(5)(a)

This removes the reference to subsection 452(3) from paragraph 452(5)(a).

Item 24 - Section 42

This item includes greenhouse gas titles in the table of titles and instruments that may be annotated with a reference to the current datum.

Items 25-26 - Section 42

These items add a new note at the end of the table stating that a grant of a greenhouse gas holding lease may be a grant by way of a renewal.

Item 27 - Subsection 43(1)

This item includes greenhouse gas titles in the table of titles or instruments that may be described by the previous datum.

Item 28 - Sections 44 and 45

This item moves the authorisation from regulations directly into the Act to allow the DA to issue an instrument to vary petroleum titles and instruments, greenhouse gas titles and instruments, applications for petroleum titles and applications for greenhouse gas titles by relabelling them using coordinates based on the current datum.

Item 29 - Chapter 4, Part 4.2

This item adds a new section to allow the DA to make a notation in the Register about the applicable datum for a petroleum title, petroleum special prospecting authority, notice or instrument. When a new Datum is gazetted there can be considerable work in relabelling titles with new coordinates. This item allows the DA to make a notation in the Register rather than necessarily issuing an instrument as set out in Sections 44-45 for every change.

Item 30 - Chapter 5, Part 5.2

This item adds a new section to allow the responsible Commonwealth Minister to make a notation in the Register about the applicable datum for a greenhouse gas title, greenhouse gas search authority, notice or instrument (see item 29).

Item 31 - Transitional

This item allows variations, in relation to datum made to titles before the commencement of this item, to remain valid.

Items 32-33 - Paragraph 683(d) and Section 688

These items remove references to the pipeline safety management plan levy. After the commencement of these items the levy raised on pipelines will be known as a safety case levy.

Item 34 - Application

This item provides for paragraph 683(d) and Section 688 to continue to apply in relation to pipeline safety management plan levy imposed and late payment penalty in relation to levy imposed as if the amendments in items 32 and 33 had not been made.

Item 35 - Subsections 210(3), (4), (5) and (6)

This item removes the requirement for the consent of the DA for a person to start operating a pipeline or to recommence operating a pipeline after a period of discontinuance.

From 1 January 2010, when the pipeline safety management plan levy for pipelines will be replaced by a safety case levy for pipelines, NOPSA will have an increased role in the regulation of pipelines. The DA will retain responsibility for pipeline licensing matters and the environmental regulation of pipelines.

Under this future regime, requiring a consent to commence operation of a pipeline would be duplicative and would add to compliance costs. Commencement of operations for a licensed pipeline will require acceptance of a safety case by NOPSA and acceptance of an environment plan by the DA.

Item 36 - Subsections 210(7) and (8)

As the previous item repeals subsections 210(3) and (5), this item removes reference to them in subsections 210(7) and (8).

Item 37 - Subsection 210(9)

This item removes subsection 210(9) which refers to provisions removed by Item 35.

Item 38 - Subsections 698(2), (3) and (4)

This item removes the requirement for a data management plan for petroleum titles.

The collection of data and samples is very important both as an aid to ensure the resource is being effectively managed and to provide to prospective exploration companies to encourage exploration of Australia's offshore areas. However, it is sufficient to require the data to be collected, stored and provided as set out in regulations without requiring a plan to state how the data is going to be collected, stored and provided.

Item 39 - Subsections 724(2), (3) and (4)

This item removes the requirement for a data management plan for greenhouse gas titles. See item 38.

Item 40 - Transitional

This item permits the continuance of data management plans already in force. It allows variation to those plans but does not permit renewal of the plans.

Items 41-49 - Schedule 3, Clauses 9-15 and Clause 13A

These items make negligence the fault element of the Criminal Code that applies in Clauses 9-15 and the new Clause 13A of Schedule 3 to the conduct and result elements of the occupational health and safety (OHS) duties offence provisions. As a consequence, absolute liability will apply to the element that a person is subject to an OHS requirement.

The first element of each relevant OHS clause is (a) the person is subject to a requirement under subclause (1).

This element attracts absolute liability because it is a 'jurisdictional element'. A jurisdictional element is essentially a precondition of the offence. The person's state of mind with respect to that element has little, if any, bearing on their culpability. It is sufficient that a person is subject to a requirement under subclause (1) rather than that they knew they were subject to a requirement.

The other elements are (b) the person omits to do an act; and (c) the omission breaches the requirement. For each of these the fault element is negligence.

Negligence is a commonly used fault element in occupational health and safety matters. This is consistent with the criminal prosecution provisions of the *Occupational Health and Safety Act 1991* and provides a more enforceable regime. Penalty provisions already set out in Clauses 9-15 and those in the new clause 13A are also consistent with the *Therapeutic Goods Act 1989*.

If intent were the fault element, having to require a prosecutor to prove that a person to whom the OHS clauses apply intended to omit to do an act would significantly reduce the likelihood of a conviction for OHS offences. This would frustrate the aims of the legislation.

The Senate Standing Committee For the Scrutiny of Bills, Sixth Report of 2002 and A Guide To Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, 2004 have been considered in the revision of these clauses. The Attorney-General's Department was also consulted.

Item 47 - Clause 13A of Schedule 3

This item adds a new clause setting out that a titleholder has responsibility in relation to the design of a facility to ensure that it is safe and without risk to health. The same penalty provisions apply as set out in Items 41-46 and 48-49.

The responsibility for the design of the facility has always been the titleholder's. Since the introduction of amendments to the safety regime associated with the creation of NOPSA, only the facility operator could be prosecuted in the event of a breach of a drilling safety case (see *Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996*). For drilling activities this is the drilling contractor. Similarly, the general duties under the work safety provisions of the Act rest with operators and employers (Schedule 3, Part 2).

In the event of an OHS incident, this amendment will permit NOPSA to seek prosecution of a titleholder in the event there is a failure in well design. Wells are defined in the Act to be part of a facility (see Schedule 3, Clause 4).

This amendment allows titleholders to be held responsible where they have contributed to the unsafe situation but it is not intended that it will shift responsibility from facility operators when they are at fault.

Items 50-51 - Subsections 6(3) and (4)

These items provide revised maps showing Australia's offshore areas, which include the findings of the United Nations Commission on the Limits of the Continental Shelf in April 2008 confirming the location of the outer limit of Australia's continental shelf in nine distinct marine regions and Australia's entitlement to large areas of continental shelf beyond 200 nautical miles.

Item 52 - Schedule 3, *Administrative Decisions (Judicial Review) Act 1977*

This item adds the Western Australian (WA) mirror legislation to the Act to Schedule 3. The legislation of other States and the Northern Territory has already been listed in that Schedule.

Item 53 - Subsection 21(7A)

This item adds a new subsection to remove possible confusion between the requirements to identify an eligible greenhouse gas formation under section 21 and the requirements in subsection 388(8) requiring the responsible Commonwealth Minister to make a decision on an application for a site closing certificate within five years of the application being made. Section 21 requires an estimate of the earliest time the responsible Commonwealth Minister would be in a position to issue a site closing certificate. If this is taken to be a maximum of five years specified in subsection 388(8) it may lead to the identification of smaller than optimum storage formation areas. The new subsection will make it clear that such an estimate is to be made disregarding the maximum five year period set in subsection 388(8).

Item 54 - Paragraph 297(1)(b)

This item replaces the phrase "greenhouse gas holding lease over the block" with "greenhouse gas holding lease, or a greenhouse gas injection licence, over the block", removing some ambiguities in the Act in relation to the release of areas for greenhouse gas assessment. This will give effect to the intent of the policy approach that petroleum retention lessees and production licensees are given at least 60 days notice of the intention to release an area covering their lease or licence for greenhouse gas assessment.

Item 55 - Paragraph 297(3)(b)

This item inserts the words 'the day before' into the text to remove an inconsistency relating to the timing for release of areas for greenhouse gas assessment following the end of the 60 day notice period. Current text provides for the end of the notice period to be at the end of a nominated day, while release could be done at any time on that same day, including before the end of the notice period. The amendment, therefore, will require that release cannot occur until the day after the 60 day notice period is completed.

Item 56 - Paragraph 297(3)(d)

This item adds the words "or licensee" to the text, making it consistent with paragraph 297(3)(a). Without this amendment, the text is ambiguous because other parts of the Act make it clear that a production licensee can only apply for a greenhouse gas injection licence and not a greenhouse gas holding lease.

Item 57 - Paragraph 304(1)(b)

This item inserts missing commas which are needed to ensure clarity.

Item 58 - Paragraph 304(3)(b)

This item inserts the words 'the day before' into the text to remove an inconsistency relating to the timing for release of areas for greenhouse gas assessment following the end of the 60 day notice period. The amendment will require that release cannot occur until the day after the 60 day notice period is completed.

Item 59 - Paragraph 304(3)(d)

This item adds the words "or licensee" to the text, making it consistent with paragraph 304(3)(a).

Items 60 and 61 - Subsection 358(8) and 358(8A)

These items remove an inconsistency in the Act, in respect of a greenhouse gas injection licence awarded to a petroleum production licence holder. The *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008*, as originally introduced into the Senate, specified that an injection licence could only be granted to a production licensee in respect of greenhouse gases derived from the production

licence in question. An amendment in the Senate added a paragraph extending these rights to include greenhouse gases from any source, provided that some of it is obtained as a by-product of petroleum recovery and subject to the responsible Commonwealth Minister being satisfied that the grant of the licence is in the public interest. The relevant paragraph appears in 370(c) of the Act.

However, Section 358 of the Act, dealing with conditions of injection licences, stipulates in subsection 8 that an injection licence granted to a production licence holder can only source greenhouse from the production licence and makes no provision for the circumstances covered by the amendment to the Act made in the Senate. The amended subsection 358(8) and the new subsection 358(8A) will remove this inconsistency, so that the amendments passed in the Senate have effect.

Item 62 - Subsection 374(4)

This item adds a new subclause to allow a variation of conditions to a greenhouse gas injection licence granted to a production licence, consistent with subsection 370(c). The extension of the rights of petroleum production licensees, as specified in section 370(c), has created two classes of injection licences granted to petroleum production licensees, without any capacity to convert from one type of licence to another, and without the difference in greenhouse gas source requirements necessarily having any continuing policy rationale. The new sub-clause allows the responsible Commonwealth Minister to vary the more restrictive greenhouse gas source requirement to the less restrictive source requirement, provided the variation is in the public interest.

Item 63 - Subsections 222(2) and (5)

This item corrects an error in these subsections and sets out minor changes to headings in subsection 132(1) and sections 297, 304 and 346.

Item 64 - Schedule 6, Subclauses 36(2) and (4)

This item corrects a reference to a subsection with reference to a subclause.

Items 65-68 - Related Acts

These items amend the Acts set out to correct a reference to the interpretation section from a reference to section 6 to a reference to section 7. This has arisen through renumbering of the Act.