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## **Welcome to the General Policy Review Bulletin #2**

**December 2005**

### **Policy Issues Arising from the Rewrite of the *Petroleum (Submerged Lands) Act (1967)***

As foreshadowed in our General Policy Review Bulletin #1 of 12 September 2005, please find enclosed the list of policy review issues raised with the Department so far.

During the Pre AMPLA Conference Discussion in August 2005, Mr John Griffiths, General Manager Offshore Resources Branch, noted that the Department had undertaken to review the criminal law and penalty provisions of the Petroleum (Submerged Lands) Act. While this work has commenced, the Department is not, in priority terms, committed to the review of any other particular element of the offshore petroleum legislative regime. Determining the issues and priorities for review will therefore rest largely on the outcome of stakeholder consultations.

While this review will address issues arising from the Offshore Petroleum Bill and associated legislation, it will not encompass a review of the taxation and royalties regime, although it may address fees issues.

The attached document outlines the 48 issues which have been raised by stakeholders so far, but further items could still be added to this list.

We are interested in hearing your suggestions about:

1. Other policy issues, in addition to those on the attached list, which you consider merit review; and
2. What order of priority should be given to the individual issues set out in the attached list.

It should be pointed out that inclusion of an issue in the list is without prejudice to how the Australian Government sees the current policy framework and to the outcome of the review. On some issues, the eventual decision may be that the status quo should be maintained. In other cases, changes may be recommended and implemented.

We would appreciate receiving your comments by 17 February 2006.

## SUMMARY OF POLICY REVIEW CATALOGUE

### *Issues of definition*

#### 1. Definition of ‘construct’

Clause 6 of the Offshore Petroleum Bill currently includes the following definition: “*construct* includes place”.

The issue to be considered is whether the definition should become: “*construct* includes place, establish or locate”.

#### 2. Definition of ‘scientific investigation’

It is to be considered whether there should be a definition of ‘scientific investigation’ explaining what this could encompass. This is to be part of an across-the-board review of the scientific investigation consent provisions.

### *Generic issues*

#### 3. Administrative versus proprietary nature of the legislation

It is to be considered whether the Offshore Petroleum Bill should be made either fully administrative or fully proprietary in character.

#### 4. Relevance of the Offshore Petroleum legislation from a gas perspective

The Offshore Petroleum Bill is proposed to be tested from the perspective of “gas” as against “oil” issues and to ensure competitiveness against alternative regimes.

#### 5. Cash-bidding (general)

Given that the preferred policy is no longer to use cash bidding, consideration will be given to whether all cash bidding provisions should be removed from the Offshore Petroleum Bill.

#### 6. Criminal Law provisions

A comprehensive review of all penalty provisions in the Offshore Petroleum Bill will be carried out, and of the need for the defence set out in clause 309 to apply to an offence under clause 191, a non-strict liability offence.

#### 7. Multiple titleholders

It is to be considered whether rights and obligations under the Offshore Petroleum Bill are joint and several, and, whatever the finding, whether the legislation should make this point clear.

#### 8. Unitisation

In accordance with previous industry-government discussions, it is to be considered as to when property rights in common petroleum pools should be triggered or the rule of capture prevail and when the government should direct unitisation.

#### 9. Discretion in administrative decision making

It is to be considered whether the level of prescription in the Offshore Petroleum Bill is excessive and whether a significantly greater level of discretion in decision-making could be accorded to the regulators and, in particular, to the Joint Authority.

#### *Exploration permit issues*

#### 10. Rights conferred by an exploration permit vs re-gazetting of blocks

There is a general understanding that exploration permits are exclusive. It is to be considered whether there should be a specific provision to prevent the Joint Authority from re-gazetting, under clause 82 of the Offshore Petroleum Bill, blocks in relation to which a permit is already in force.

#### 11. Whether publicly available criteria should exist for determining whether a permit applicant is deserving of the offer of a permit.

The Offshore Petroleum Bill provides that, in determining which applicant is *most* deserving of the grant of an exploration permit, the Joint Authority must have regard to criteria made publicly available by the Joint Authority. However, the Joint Authority may exclude from the ranking any applicant who, in the Joint Authority's opinion, is not deserving of the grant of the exploration permit. This assessment is not currently required to be the subject of publicly available criteria. It is to be considered whether provision for such criteria should be included in the Act.

#### 12. Grant of cash-bid exploration permit

If provision for cash bidding is not done away with altogether under item 3, it is to be considered whether clause 90 of the Offshore Petroleum Bill should be changed from "the Joint Authority *may* give an offer document" to "the Joint Authority *must* give an offer document" to an applicant as set out in subclause 90(3). It is also to be considered whether, under item 4 of subclause 90(3), there should be reference to the technical expertise of the applicants as the criterion that would decide between two or more applicants specifying the equal highest amount as a cash bid.

#### 13. Exploration permits on 'reconnaissance' permit terms

Allow for compulsory surrender of part (up to 30 percent) of an exploration permit where the permit has been awarded on the basis of 'reconnaissance' permit terms.

### ***Location issues***

#### 14. Nomination of blocks as a location

The Designated Authority has power to nominate a location if the permittee over a discovery block does not do so and that declaration sets the clock ticking for the permittee to apply for a production licence. If the matter were overlooked by the company because of a clerical omission, the block could be lost. It is to be considered whether locations should be replaced by incremental consents under a single title and, whether, for gaining a production licence, express recognition should be given to an applicant's administrative law rights.

#### 15. Declaration of a location

Having regard to the Joint Authority's role in the process of obtaining a retention lease or a production licence, it is to be considered whether the Commonwealth Minister (through the Joint Authority) should have a role in the process of declaring a location.

### ***Retention lease issues***

#### 16. Application for a retention lease by the holder of a fixed-term production licence

It is to be considered whether there should be provision for a fixed-term production licensee to apply for a retention lease.

#### 17. Revocation of retention leases

Given that, under paragraph 134(1)(b)(ii) of the Offshore Petroleum Bill, a third party may make a submission about whether a retention lease should be revoked, it is to be considered whether there should be provision for the lessee to be provided with a copy of any such submission at the same time as, or promptly after receipt by, the Joint Authority.

#### 18. Surrender or cancellation of a retention lease

Consideration will be given to the fact that no surrender of a retention lease is possible unless the lease is surrendered in respect of all blocks in the lease area. Likewise, if a retention lease is to be the subject of a cancellation, it must be cancelled in respect of all blocks. Neither applies to exploration permits or production licences, which may be surrendered or cancelled in respect of all blocks or only of some block(s) in the title area.

19. Defining “commercial viability”

In the retention lease provisions, it is to be considered whether “commercial viability” requires defining, for example to take account of deliberate choices of the applicant or lessee in respect of other projects (ie choices that tend to shift commercial viability away from the resources that are, or would be, held under the lease), or to take account of the capacity of a single LNG plant.

***Production issues***

20. Application for a production licence by a lessee

Clause 144 of the Offshore Petroleum Bill provides that, when a retention lessee applies for a production licence, the application must be accompanied by details of the applicant’s proposals for work and expenditure in relation to the area comprised in the block or blocks specified in the application. As a first application for a production licence may now be made only for a life-of-field licence, it is to be considered whether this wording should be more specific. One relevant issue arises if the applicant’s proposed work program includes no production in the first 5 years of the licence term. This would currently not preclude the licence being granted but the Joint Authority would have to consider licence termination at the end of those 5 years.

21. Exploration permit or retention lease transferred - transferee to be treated as applicant for production licence

Under clause 149 of the Offshore Petroleum Bill, where an exploration permit or retention lease has been transferred while a production licence application is pending, the transferee is to be treated as the applicant. Premised on the transferee wanting to proceed with a production operation on the basis of a different development concept or plan than the previous permittee or lessee, it is to be considered whether the transferee should have some right to vary or withdraw the licence application or obtain a variation of the granted licence, over and above what would have existed had the transfer not occurred.

22. Application for cash-bid production licence over surrendered blocks or similar blocks

If provision for cash bidding is not done away with altogether under item 3, it is to be considered whether only one block at a time should be offered for cash-bidding for a production licence under the procedure set out in clause 150 of the Offshore Petroleum Bill, or whether multiple blocks could be the subject of the one offer and thereby become the licence area of one awarded licence.

23. Offer documents

It is to be considered whether, before an offer document for a production licence is issued, there should be an obligatory step of consultation between the Joint Authority and the applicant about the conditions subject to which the licence would be offered. It is also to be considered whether, for accepting the offer of a licence within the statutory period set out in clause 224 of the Offshore Petroleum Bill, express

recognition should be given to the applicant's administrative law rights. For instance, this would be to address the possibility that an inadvertent error might be the cause of the offer not being accepted during the statutory period.

24. Termination of a life-of-field production licence if no recovery operations for five years

It is to be considered whether the reference at the end of subclause 140(3) of the Offshore Petroleum Bill should be to "...circumstances beyond the licensee's *reasonable* control" rather than to "...circumstances beyond the licensee's control." This will include addressing the specific issue of whether lengthy unitisation negotiations under clause 163 and consequent construction of unit facilities would be "circumstances beyond the licensee's control", effectively extending the 5 year period during which production must normally occur to ensure no possibility of licence termination.

25. Grant of production licence

It is to be considered whether provisions should be included requiring the Joint Authority to grant a production licence or make a decision within a certain period of a production licence application having been lodged.

26. Directions to recover petroleum

Under clause 161 of the Offshore Petroleum Bill, it is to be considered whether the concept of "recoverable petroleum" should be rewritten as "economically recoverable petroleum". It is also to be considered whether the open-ended discretionary powers in clauses 161 and 162 to direct recovery of petroleum and the rate of recovery should be curtailed so as not to oblige any licensee of a current production facility to expend more funds on investment.

### ***Infrastructure licence issue***

27. Uses of infrastructure licence area

Clause 13 of the Offshore Petroleum Bill does not permit the drilling of an inclined well from an infrastructure licence area into an adjoining production licence area. It is to be considered whether this should be allowed, a consequence of which would be the addition of "infrastructure licence" to the definition of "title" in clause 32.

### ***Pipeline issues***

28. Common carrier provision

Given that the concept of a common carrier is derived from an old area of law, the easy translation of which into a provision covering activities such as pipeline conveyance of petroleum has been questioned, the scope and meaning of the common carrier provision in clause 192 of the Offshore Petroleum Bill will be reviewed.

29. Ceasing to operate a pipeline without consent

Given that the matter of unapproved decommissioning of a pipeline is addressed in Petroleum (Submerged Lands) (Pipeline) Regulation 19, with a 50 penalty unit penalty, consideration will be given to the role and importance of clause 193 of the Offshore Petroleum Bill, which deals with ceasing to operate a pipeline without consent, an offence carrying a 5 year imprisonment penalty.

30. Reservation of blocks: issue for pipelines

Under clause 242 of the Offshore Petroleum Bill, if a pipeline licence is in force and no construction has yet occurred under it but the approved route of the pipeline transects a block which is then reserved under this clause, the reservation would not prevent the pipeline from being built in that block. This policy is to be reviewed

*Other title issues*

31. Seeking further information about an application for a special prospecting authority, access authority or scientific investigation consent

It is to be considered whether the Designated Authority should have a right to request an applicant for any one of these titles to provide further information.

32. Access authority provisions

Clauses 209 and 212 of the Offshore Petroleum Bill stipulate a rigid consultation procedure if an area over which an access authority application or variation application has been lodged is the subject of an existing title held by someone else and the area of interest lies in a different offshore area than the area of the existing title held by the applicant. Consideration is to be given to making the consultation procedure capable of being by-passed if the other titleholder has given written consent to the grant or variation of the access authority. This would be similar to what applies under paragraphs 208(1)(d) and 211(1)(e) if the area of interest lies within the same offshore area as does the area of the existing title held by the applicant.

It is also to be considered whether there is any inequity in the holder of a special prospecting authority having to be consulted in connection with an access authority application or variation application affecting the block(s) over which the special prospecting authority is held, when a special prospecting authority holder does not need to be consulted if an application is made for another special prospecting authority affecting the same block(s).

33. Scientific investigation consent provisions

An across-the-board review of scientific investigation consent provisions is to be carried out. In view of United Nations Convention on the Law of the Sea obligations, as one specific issue, it is to be considered whether a policy change should be made so that a scientific investigation consent cannot to be refused by the Designated Authority without the consent of the Joint Authority.

### *Transfer and dealing registration issues*

#### 34. Dealing- series of debentures

Clause 252 of the Offshore Petroleum Bill provides that, if a dealing forms a part of the issue of a series of debentures, all of the dealings constituting the issue of that series of debentures are taken to be one dealing. The rationale for this is to be reviewed.

#### 35. Dealings related to existing titles

It is to be considered whether provision should be added for each dealing related to a permit to be automatically registered against any derivative title for a nominal fee.

#### 36. Registration of dealings - evidentiary provisions (function and purposes of the register)

The function and purpose of the Register under clause 253 of the Offshore Petroleum Bill, as well as the process of registering dealings, are to be comprehensively reviewed, with the most notable issues for attention being as follows.

It is to be considered whether dealings approval and registration, as well as the related “of no force” provisions, should be repealed altogether.

Assuming the above suggestion is resolved in the negative, it is to be considered whether all the types of dealings listed in clause 269 of the Offshore Petroleum Bill should continue to be ones to which the approval and registration regime applies. As a specific issue, items 4 and 5 of the table under clause 269 describe dealings in the general nature of an overriding royalty interest, a production payment, a net profits interest or a carried interest. The bounds of what is to be caught by items 4 and 5 are to be reviewed, if necessary with a view to redrafting either or both items, or redrafting item 4 and omitting item 5, so as to eliminate possible unintended effects.

Consideration will additionally be given to clarifying the date of effect of a dealing, ie whether it is effective only from the date that it is registered under the Offshore Petroleum Bill, or whether there is a “relation back” effect, so that upon a dealing being approved and registered, the instrument and those dealings operate in accordance with their terms, establishing rights and obligations from an earlier point in time.

Where an instrument evidences a number of dealings in relation to a title, consideration will also be given to clarifying whether or not a dealing which is evidenced in the instrument but not mentioned in the application is in fact approved or deemed to be approved as part of the process of approval and registration.



It is to be considered whether the Register should be upgraded to function as a Torrens title type indefeasible title system. The benefits of incorporating in such a model the current provisional registration provisions will also be considered, as well as a caveat system and a requirement that mortgages and charges over petroleum titles be registered.

It is to be considered whether a 'change of control' regime should be introduced to prevent the sale of shares in a company enabling uncontrolled change of effective ownership (thereby by-passing the legislative discretion under the Act to approve or reject a transfer application).

Where a dealing relates to more than one title, it is to be considered whether, under clause 271, it should continue to be necessary to make a separate application to the Designated Authority for approval of the dealing in so far as it relates to each title.

37. Clarification that a Designated Authority's discretion about the time limit applicable to approval of transfers and dealings is not restricted to a 90 day period

It is to be considered whether there is a need to clarify the Designated Authority's discretion set out in clauses 259, 273 and 284 to allow a longer period than 90 days for making an application if there are sufficient grounds. Specifically, it is to be considered whether to make explicit that, if an industry-member has failed to make the application in question within 90 days of the date of contract of transfer or dealing, a special dispensation could be obtained from the Designated Authority even after the 90 day period has elapsed.

38. Strict compliance with application provisions not necessary

Under clause 278 of the Offshore Petroleum Bill, the approval of a dealing, or the making of an entry in the Register in relation to a dealing, is not made ineffective because of any failure to comply, in relation to the application for approval of the dealing, with the requirements of Part 3.6. Consideration will be given to whether this concession should remain, and, if it does, whether it should apply equally to a failure by a party to a dealing or a failure by the Designated Authority.

39. Registration Fees Act- amounts prescribed by regulation etc

It is to be considered whether an upper limit should be set in the Act for the prescribed amounts in the Registration Fees Act. As an alternative, it is to be considered whether a new provision could be inserted merely stating that these amounts cannot increase by more than the consumer price index.

Where the ad valorem calculation operates, it is to be considered whether the valuation that determines the level of registration fee payable must have both an upstream and a downstream component, or whether the valuation could be restricted to the upstream component.

Given that the valuation process, once initiated, can lead to delays in enabling the transaction being registered to come into force, it is to be considered whether there could be a way of limiting the length of any such delay.

40. Making explicit the Designated Authority's right to revise a registration fee determination given to an applicant for registration of a transfer or a dealing

It is to be considered whether to specifically insert this power into the Offshore Petroleum Bill, regardless of whether a reading of the Acts Interpretation Act would lead one to postulate that the power already exists.

41. Creation of an appropriation for a refund of a registration fee already paid

It is to be considered whether section 28 of the *Financial Management and Accountability Act 1997* is an adequate provision to deal with cases where a registration fee needs to be refunded, in whole or in part, or whether a specific appropriation should be set up under the Offshore Petroleum Bill for refunds of registration fees.

#### ***Miscellaneous administrative issues***

42. Variation, suspension and exemption

It is to be considered whether variations of permits and leases should be gazetted in the same way as is done for other titles under subclause 227(4) of the Offshore Petroleum Bill. It is also to be considered whether gazettal should likewise apply to suspensions and exemptions.

43. Combining adjoining retention leases or production licences

It is to be considered whether the Offshore Petroleum Bill should enable two or more retention leases or production licences covering adjoining blocks to be combined into the one title.

44. General power to give directions

It is to be considered whether, under subclause 305(5) of the Offshore Petroleum Bill, the validity of a direction should continue to be unaffected by a failure by the Designated Authority to obtain the approval of the Joint Authority before issuing a direction of a standing or permanent nature.

It is to be considered whether, under subclause 305(6) of the Bill, a direction under the clause should continue to have effect and be binding on recipients despite anything in the regulations or the applied provisions.

45. Area to be avoided

It is to be considered whether there is a continuing need for the area to be avoided provisions under Part 4.5 of the Offshore Petroleum Bill.

46. Protection of confidentiality

It is to be considered whether an express mention of State/Northern Territory public servants needs to be inserted into clauses 422 and 423 of the Offshore Petroleum Bill with a view to imposing a penalty regime on them for disclosing information or giving access to a petroleum mining sample in contravention of the Act or regulations.

47. Service of documents on two or more registered holders of a title

It is to be considered whether nominations by multiple titleholders under clause 441 of the Offshore Petroleum Bill for the purpose of service of any document should be entered in the Register as a matter of course.

48. Whether the Offshore Petroleum Bill or Fees Bills should provide that some regulations should always commence after the Parliamentary disallowance period

This issue is to be considered in the context of the imposition of any form of taxation or levy by regulation, eg under clause 399 of the Offshore Petroleum Bill, where the regulation takes effect as soon as it is made, and, if it were disapproved of by Parliament, might not be disallowed for many sitting days thereafter. In the meantime, the tax or levy would have been validly levied and could not be refunded without further Parliamentary intervention.

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## **Update on Offshore Petroleum Bill**

The Bill has been passed by the House of Representatives and is still to be debated in the Senate. This debate will take place some time in the new year.

I look forward to receiving your comments and suggestions. Please contact me should you have any questions regarding the above.

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This occasional newsletter was prepared by the Resources Division, of the Department of Resources, Energy and Tourism.