THIRTY-EIGHTH PARLIAMENT

REPORT 47

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

REPORT ON

PETROLEUM AND ENERGY LEGISLATION AMENDMENT BILL 2009

Presented by Hon Adele Farina MLC (Chairman)

April 2010

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:
17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)	Hon Liz Behjat MLC
Hon Nigel Hallett MLC (Deputy Chairman)	Hon Helen Bullock MLC

Staff as at the time of this inquiry:

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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

PETROLEUM AND ENERGY LEGISLATION AMENDMENT BILL 2009

RECOMMENDATIONS AND FINDINGS

1 The Committee's Recommendations and Findings are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council at the time of debate of the Bill:

- **whether Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* and Part 2, Division 2, of the *Petroleum Amendment Act 2007* have been proclaimed; and**
- **if not, of the proposed date of proclamation of those Parts and Division**.

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Recommendation 2: The Committee recommends that, in the event Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* and Part 2, Division 2, of the *Petroleum Amendment Act 2007* have not been proclaimed at the time of debate of the Bill, the responsible Minister confirm for the Legislative Council that in the event they are passed, the clauses of the Bill identified in Appendix 2 to this report will not be proclaimed prior to proclamation of Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* and Part 2, Division 2, of the *Petroleum Amendment Act 2007*.

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Recommendation 3: The Committee recommends that when a bill proposes amendments to a principal Act as if provisions of an earlier amending Act which have not come into operation had come into operation, the Bill and Second Reading Speech should clearly identify that circumstance for the information of the Parliament.

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Recommendation 4: The Committee recommends that subclauses 2(b) and (c) of the Bill be deleted from the Bill. This can be effected in the following manner.

Page 2, line 8 - To delete ";" and insert -

; and

Page 2, lines 9-13 - To delete the lines.

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Recommendation 5: The Committee recommends that when introducing a bill to the Legislative Council that proposes amendments with retrospective effect, the Executive provide an explanation for the proposal that those amendments have retrospective effect and advice as to whether the those amendments will adversely affect rights and liberties, or impose obligations, retrospectively.

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Recommendation 6: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council whether the amendments proposed by clauses 4(4)(d), 46, 67(3)(c) and 176(1)(d) the Bill will permit carbon dioxide storage under, on or over land subject to the Submerged Land Act and, if so, whether this is an intended policy outcome.

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Finding 1: The Committee finds that, in addition to enabling the storage of carbon dioxide under the PGER Act and transport of carbon dioxide under the Submerged Land Act and Pipelines Act for the purpose of storage of carbon dioxide under the PGER Act, the practical effect of the amendments proposed by subclauses 4(4)(d), 46, 67(3)(c) and 176(1)(d) of the Bill is to extend the rights of existing and future titleholders to, at least, exploration for and exploitation of carbon dioxide resources (including locating potential storage sites).

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Finding 2: The Committee finds that, on the basis of the evidence presented to it, that the additional practical effect of the Bill described in Finding 1 is unintended.

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Recommendation 7: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council of the Executive's proposed amendments to the Bill in light of Finding 1 and that the Legislative Council not debate clauses 4(4)(d), 46, 60(a), 67(3)(c) or 176(1)(d) of the Bill prior to receipt and consideration of that response.

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Finding 3: The Committee finds that, as currently drafted, in proposing clauses and subclauses 4(4)(d), 46, 60(a), 67(3)(c), 151 and 176(1)(d), the Bill does not have sufficient regard to Aboriginal tradition (FLP 10).

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Finding 4: The Committee finds that the interim regime to regulate carbon dioxide storage, proposed by subclauses 4(4)(d), 46, 60(a), 67(3)(c), 151 and 176(1)(d) of the Bill, is incomplete and will operate for an uncertain period of time.

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Recommendation 8: The Committee recommends that the Minister for Mines and Petroleum provide the Legislative Council with an explanation as to why the Bill proposes introduction of an interim regime for regulation of carbon dioxide storage in 2010.

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Recommendation 9: The Committee recommends that the Minister for Mines and Petroleum provide the Legislative Council with:

- **advice as to whether the government will proceed with the "*alternative procedure*" of an Indigenous Land Use Agreement to address consent of the traditional owners of land to the use of that land for storage of carbon dioxide;**
- **if so, an explanation of how that process will address consent to land use; and**
- **if not, how the government proposes resolving this issue.**

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Finding 5: The Committee finds that section 67(2) of the PGER Act, as amended by clause 46 of the Bill, is ambiguous and lacks clarity as to the distinction to be made between the circumstances in which an agreement will be required under section 67(1)(a) and the circumstances in which an approval will be required under section 67(2)(b) (FLP 11).

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Recommendation 10: The Committee recommends that the Minister for Mines and Petroleum explain to the Legislative Council:

- **why it is necessary to regulate some injection of carbon dioxide into a natural underground reservoir by agreement and some by approval;**
- **how the two circumstances are distinguished through the amendments proposed by clause 46 of the Bill; and**
- **the differences between "*agreements*" and "*approvals*".**

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Recommendation 11: The Committee recommends that the Minister for Mines and Petroleum identify for the Legislative Council:

- **the provisions of the PGER Act that provide the formal process for application for an approval under section 67(2)(b) of the PGER Act;**
- **the provisions of the PGER Act that stipulate that an approval granted under section 67(2)(b) is to be subject to conditions to cover the drilling, reservoir management, environmental and OSH aspects of the operation; and**
- **the regulations or guidelines that identify the conditions that are to be imposed in respect of drilling, reservoir management, environmental and OSH aspects of the operation.**

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Finding 6: The Committee finds that the amendments proposed by clauses 67(2), (5), and (6), 69, 70, 77(2), 115, 128, 129(1)(A), 130-135(1), 136, 137, 139-143, 150, 154(1), 156, 157, 160-165, 168 and 189 of the Bill, introducing the title of "*infrastructure licence*" to the Submerged Lands Act are (other than in respect of regulation of storage and transport of carbon dioxide) generally consistent with the uniform legislative scheme.

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Recommendation 12: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council:

- **whether there is a prospect of conflicting use arising by reason of an infrastructure licence and title being granted over the same area;**
- **if not, how this is avoided; and**
- **if so, of the legislative provision for resolution of any such conflict.**

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Recommendation 13: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council whether the Executive proposes to delete clauses 30 and 97 from the Bill. If so, this can be effected in the following manner.

Page 26, lines 3-6 - To delete the lines

Page 77, lines 1-4 - To delete the lines

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Finding 7: The Committee finds that the key principles of the legislative framework regulating a particular matter should be in primary, not subsidiary, legislation.

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Recommendation 14: The Committee recommends that the Minister for Mines and Petroleum explain the necessity for the "*key principles*" in respect of furnishing information in relation to a petroleum or geothermal energy resource discovery, and provision of that information to others, to be in subsidiary not primary legislation.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

PETROLEUM AND ENERGY LEGISLATION AMENDMENT BILL 2009

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2 REFERENCE

2.1 The Petroleum and Energy Legislation Amendment Bill 2009 (**Bill**) was introduced into the Legislative Council on 26 November 2009 by Hon Norman Moore MLC, Minister for Mines and Petroleum (**Minister**).[1]

2.2 Following its Second Reading Speech, the Bill stood referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) pursuant to Standing Order 230A, which requires the Committee to report to the Legislative Council within 30 days of referral. As a consequence of the summer recess, the reporting date was effectively the first scheduled sitting day of 2010, being 2 March 2010.

2.3 The Committee sought, and was granted, extensions of time to report on the Bill to 22 April 2010.[2]

3 INQUIRY

Advertisement

3.1 The Committee advertised its inquiry into the Bill in *The West Australian* of 5 December 2009 and invited submissions from stakeholders by letters dated 3, 8 and 18 December 2009 and 5 February 2010. A list of the stakeholders written to is **Appendix 1.** Details of the Committee's inquiry were also published on its website.

Supporting documents

3.2 The Minister provided the following supporting documents on 15 December 2009:

- The Offshore Constitutional Settlement 1979 (an intergovernmental agreement between the Commonwealth, all States and the Northern Territory) (**Offshore Settlement IGA**);

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1 Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 November 2009, p9858.

2 Hon Adele Farina MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 2 March 2010, p324 and Hon Adele Farina MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 March 2010, p3.

- the *Petroleum (Submerged Lands) Legislation Amendment Act (No. 1) 2000* (Cwlth);
- the *Petroleum (Submerged Lands) Legislation Amendment Act 2001* (Cwlth); and
- the *Petroleum (Submerged Lands) Amendment Act 2003* (Cwlth).

3.3 On inquiry from Committee staff, the Department of Mines and Petroleum (**DMP**) identified the following additional supporting documents on 21 January 2010:

- Ministerial Council for Minerals and Petroleum Resources (**MCMPR**) Communiqué dated 25 November 2005;
- MCMPR Australian Regulatory Guiding Principles for Carbon Capture and Geological Storage (**MCMPR CCS Principles**); and
- Council of Australian Governments (**COAG**) Communiqué dated 2 October 2008.

3.4 The Committee obtained copies of the additional supporting documents. It also identified the following supporting documents:

- MCMPR Final communiqué dated 1 September 2006;
- MCMPR communiqué dated 16 July 2008;
- MCMPR communiqué dated 9 July 2009; and
- MCMPR's Vision for Australia's Minerals and Petroleum Industry in 2025 and its Agenda for Achieving the Vision.

Submissions, Hearing and other evidence

Submissions and hearing

3.5 The Committee received submissions from the following entities:

- DMP; and
- DomGas Alliance.

3.6 The Committee held a hearing on 9 February 2010, attended by Mr Colin Harvey, Principal Legislation and Policy Officer, and Mr Eric Cormack, Project Officer, Business Support, both of the Petroleum Division of the DMP.

3.7 The Committee thanks those making submissions, and the witness, for their assistance in its inquiry. In particular, the Committee notes that Mr Harvey rescheduled travel to an interstate conference to attend the hearing.

Documents provided by DMP after hearing

3.8 The DMP took a number of questions on notice at the hearing. It provided the following documents after the hearing:

- The DMP written responses to questions not answered or taken on notice, dated 15 February 2010 (**DMP Written Response**);
- *Petroleum (Submerged Lands) (Data Management) Regulations 2004* (Cwlth);
- The DMP additional information in respect of written responses to questions not answered or taken on notice, dated 22 February 2010 (**DMP Additional Written Response**); and
- Guidelines for data submission required under Western Australian and Commonwealth Petroleum Legislation: Version 2 (2006).

Reviews

3.9 At the hearing the DMP provided the Committee with an extract from the Final Report of the Petroleum Submerged Lands Review Committee to the Australian and New Zealand Minerals and Energy Council on its *Review of the Petroleum (Submerged Lands) Legislation Against Competition Policy Principles*, dated August 2000.

3.10 DomGas Alliance provided the Committee with its reports:

- *Western Australia's Domestic Gas Security*, dated 2009; and
- *WA Domestic Gas Reservation: Giving the policy teeth*, dated December 2009.

3.11 The Committee identified the following relevant reviews of the uniform legislation:

- Report of the Parliament of Australia Senate Standing Committee on Economics on the: *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]*, dated September 2008 (**Senate Economics Committee Report**); and

- Research Report of the Commonwealth of Australia Productivity Commission on its *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, dated 30 April 2009 (**Productivity Commission Upstream Petroleum Report**).

4 OVERVIEW OF THE BILL AND VERSION OF PRINCIPAL ACTS AMENDED BY IT

Overview

4.1 The Bill amends the:

- *Petroleum (Submerged Lands) Act 1982* (**Submerged Lands Act**);
- *Petroleum and Geothermal Energy Resources Act 1967* (**PGER Act**);
- *Petroleum Pipelines Act 1969* (**Pipelines Act**);
- *Barrow Island Act 2003;*
- *Crimes at Sea Act 2000;*
- *National Gas Access (WA) Act 2009;*
- *Petroleum (Submerged Lands) Registration Fees Act 1982; and*
- *Worker's Compensation and Injury Management Act 1981*.

4.2 The amendments to the first three Acts are substantial, the amendments to the balance of the Acts are said to be consequential only.[3]

4.3 In summary, the Bill:

- alters various terms and provisions to reflect, it is said, the nomenclature of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cwlth)*.[4]
- introduces "*infrastructure licences*" as a new title available in State offshore areas;
- redefines petroleum, making "*carbon dioxide*" petroleum for the purposes of the Acts amended;

[3] Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, p1.

[4] Ibid, p13.

- reduces the number of reviews of commercial viability in respect of existing retention titles;
- alters the term of production licences and introduces the new title "*retention leases*" for holders of production licences;
- permits the Minister to rank bids for an exploration permit on the basis of criteria to be made publicly available and restricts the period of operation of exploration permits;
- deletes provisions requiring the holder of a title to advise the Minister of the composition of a deposit and amends the Minister's obligations to make such information publicly available;
- defines "*tight gas*" and imposes a minimum royalty of between 5 and 12.5% on projects that meet that definition;
- removes the requirement for the Minister's permission to drill a water well within 300 metres of another's title;
- enables environmental management plans to be regulated through regulations;
- deletes provisions allowing for payment of fees by way of instalment; and
- deletes provisions requiring persons to do things by way of an "*approved form*".

4.4 In its submission to the Productivity Commission Upstream Petroleum Report, the DMP advised that the Bill (then in draft):

> *covers the 'important common petroleum mining code amendments since 1994 to the State's three petroleum Acts ….*[5]

'Particular clause' report

4.5 The Bill comprises 147 pages. The Committee has identified particular issues, and areas where additional information is required, for report to the Legislative Council.

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5 Productivity Commission of Australia, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, April 2009, p105.

5 BILL AMENDS PRINCIPAL ACTS AS IF AMENDMENTS PROPOSED IN 2005 AND 2007, WHICH HAVE NOT COME INTO EFFECT, HAD COME INTO EFFECT

5.1 The Minister advised the Committee, by letter dated 11 December 2009, that:

> *there are some amendments in* [the Bill] *Parts 2 and 4 that require reading in the context of the Notes of the Acts 'Provisions that have not come into operation' at the end of both the* [PGER Act and Pipelines Act].[6]

5.2 In fact, the Bill amends the PGER Act and Pipelines Act as if:

- Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005*; and
- Part 2, Division 2 of the *Petroleum Amendment Act 2007*,

which at the time of the Committee's inquiry had not been proclaimed, had come into operation.

5.3 In summary, Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* propose the introduction of a new occupational, health and safety regime for the relevant principal Acts and Part 2, Division 2 of the *Petroleum Amendment Act 2007* proposes amendments for the regulation of geothermal energy resources in the on shore areas of the State.

Legislative Council not advised of relevance of unproclaimed provisions of amending Acts to the Bill

5.4 The Committee was concerned that neither the Bill nor the Second Reading Speech alerted the Legislative Council to the fact that its proposed amendments were not in accord with the PGER Act and Pipelines Act as in effect at the time of introduction of the Bill but required proclamation of other legislation. By way of contrast, the Committee noted that the Petroleum Amendment Bill 2007 stated in the heading to Part 2, Division 2: *"Amendments to the Act as amended by the Petroleum Legislation and Repeal Act 2005"*, thereby alerting the Parliament to the relevance of pending amendments to the PGER Act to the passage of that Bill.

5.5 The DMP's response to the Committee's question as to why the Bill did not identify its reliance on proclamation of pending amendments was:

> *I suppose I should say at the outset that the bill that we are talking about — the Petroleum and Energy Legislation Amendment Bill — has been underway for a considerable number of years; in fact it started its drafting life back in 2004. Since that time, it has been*

[6] Letter from Hon Norman Moore MLC, Minister for Mines and Petroleum, 11 December 2009, p1.

> *assigned a relatively low priority and its priority has been overridden by other pieces of legislation. It is unfortunate that, as we stand here today, the legislation is, when you look at it on the face, out of sequence. But the bill that was passed in 2007 was done in a slightly different style to the bill that we are considering.*[7]

5.6 Provision of information necessary for the Parliament to make a fully informed decision on whether to pass legislation presented by the Executive should not be dependent on drafting style.

5.7 The Committee acknowledges that on being advised of the difficulty in scrutinising the Bill against an unamended principal Act, the DMP promptly provided the Committee with versions of the Submerged Lands Act and PGER Act that incorporated the amendments that had not come into effect.

Commencement of the Bill if enacted

5.8 Clause 2 of the Bill provides that other than Part 1 (which contains only the formal title and commencement provisions and is to come into effect on assent) and clauses 187 and 190 (subclauses of which are proposed to have retrospective effect), the Bill will come into effect on proclamation.

5.9 In accordance with its previous practice when faced with a bill that is "*out of sequence*", the Committee has prepared its report on the basis that the relevant clauses of the Bill will not be proclaimed prior to proclamation of the relevant sections of the *Petroleum Legislation and Repeal Act 2005* and *Petroleum Amendment Act 2007.*

5.10 On request, the DMP provided the Committee with a schedule of the clauses of the Bill that propose an amendment to sections of the PGER Act or Pipelines Act that will be amended by provisions of the 2005 and 2007 amending Acts that had not come into effect. The schedule provided by the DMP is **Appendix 2**.

Whether relevant clauses of the Bill should be passed prior to proclamation of relevant sections of earlier amending Acts

5.11 The Committee was advised that the reason for delay in proclamation of the relevant pending amendments to the PGER, Submerged Lands and Pipelines Acts was due to the need to draft regulations giving the primary legislation effect.[8] The DMP advised that proclamation of the Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* was "*imminent*" and that proclamation of the relevant sections of that Act and

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7 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence,* 9 February 2010, p2.

8 Ibid, pp2 and 3.

Part 2, Division 2, of the *Petroleum Amendment Act 2007* was likely to occur in mid to late March 2010.[9]

5.12 So far as the Committee was able to determine, neither of Part 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* nor Part 2, Division 2, of the *Petroleum Amendment Act 2007* had occurred at 20 April 2010.

5.13 The Committee queried whether enactment of the Bill should await proclamation of the relevant sections of the *Petroleum Legislation and Repeal Act 2005* and *Petroleum Amendment Act 2007*. The DMP's response was:

> *That would probably be the ideal situation, but this bill was not drafted on that basis. It can stand alone in its own right because the occupational safety and health requirements are dealt within that as two separate acts, which I have previously mentioned.*[10]

Committee's recommendations

5.14 One of the functions of the Committee is to review the form and content of the statute book (term of reference 8.3(d)).

5.15 The Committee acknowledges that the Minister, without naming the particular Acts, drew its attention to the fact that unproclaimed sections of earlier Acts needed to be considered in scrutinising the Bill in the Minister's letter of 11 December 2009.

5.16 However, the Committee considers that when a bill proposes amendments to a principal Act as if provisions of an earlier amending Act which have not come into operation had come into operation, the Bill and Second Reading Speech should clearly identify that circumstance for the information of the Parliament.

The Committee draws the attention of the Legislative Council to Appendix 2, which identifies clauses of the Bill that amend identified sections of the PGER Act and Pipelines Act as if:

- **Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005*; and**
- **Part 2, Division 2, of the *Petroleum Amendment Act 2007,***

which had not been proclaimed at the time of the Committee's inquiry, had in fact come into operation.

9 Ibid, p2.

10 Ibid.

Recommendation 1: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council at the time of debate of the Bill:

- **whether Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* and Part 2, Division 2, of the *Petroleum Amendment Act 2007* have been proclaimed; and**
- **if not, of the proposed date of proclamation of those Parts and Division**.

Recommendation 2: The Committee recommends that, in the event Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* and Part 2, Division 2, of the *Petroleum Amendment Act 2007* have not been proclaimed at the time of debate of the Bill, the responsible Minister confirm for the Legislative Council that in the event they are passed, the clauses of the Bill identified in Appendix 2 to this report will not be proclaimed prior to proclamation of Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* and Part 2, Division 2, of the *Petroleum Amendment Act 2007.*

Recommendation 3: The Committee recommends that when a bill proposes amendments to a principal Act as if provisions of an earlier amending Act which have not come into operation had come into operation, the Bill and Second Reading Speech should clearly identify that circumstance for the information of the Parliament.

6 UNIFORM LEGISLATION

Bill identified by the Executive as one to which Standing Order 230A applies

6.1 In contrast to a number of bills recently referred to the Committee, the Minister identified the Bill as one to which Standing Order 230A(1)(a) applies in the Second Reading Speech stating:

> *Under the terms of the 1979 Offshore Constitutional Settlement, the states and the Northern Territory agreed to maintain, as far as practicable, common principles, rules and practices in the regulation of petroleum exploration and production in state waters to those of the commonwealth. This is often referred to as the common mining code. Western Australia has pragmatically also adopted the common mining code for its onshore areas. The amendments to the state's petroleum legislation now proposed by this bill reflect as far as*

> *practicable changes made to the commonwealth's petroleum legislation in recent years.*[11]

6.2 The provision in the Bill for incorporating carbon dioxide within the definition of "*petroleum*" in the PGER Act, Submerged Lands Act and Pipelines Act is not part of the common mining code.[12]

6.3 However, at its meeting on 2 October 2008, COAG agreed that the jurisdictions:

> *will expedite the introduction of nationally-consistent regulation of carbon capture storage, including the geological storage of carbon dioxide,*[13]

and on 25 November 2005, MCMPR endorsed the *Australian Regulatory Guiding Principles for Carbon Capture and Geological Storage* (**CCS Principles**), which are aimed at achieving a nationally-consistent framework for carbon capture and storage.[14] The MCMPR resolution requires states to adopt the CCS Principles as a guide in the event that they legislate in respect of carbon capture and storage.[15]

6.4 The proposed amendment to the term "*petroleum*" to include "*carbon dioxide*" gives partial effect to the MCMPR and COAG intergovernmental agreements (Standing Order 230A(1)(a)).

Scrutiny of uniform legislation by the Western Australian Parliament

6.5 Since 1991 the Legislative Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.[16]

6.6 During the Thirty-Sixth Parliament until the establishment of the Standing Committee on Uniform Legislation and General Purposes, the scrutiny of uniform legislation fell within the terms of reference of the Standing Committee on Legislation. In November 2001, Standing Order 230A was amended to consolidate matters relevant to uniform

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11 Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 November 2009, p9858.

12 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p9.

13 COAG Communiqué, 2 October 2008, p2.

14 Commonwealth of Australia, Department of Resources, Energy and Tourism, webstite at http:///www.ret.gov.au/resources/carbon_capture_and_geological_storage/Pages/ccs_legislation.aspx, (viewed on 21 January 2010).

15 MCMPR Communiqué, 25 November 2005, p2.

16 For discussion on the history behind the scrutiny of uniform legislation in Western Australia and Standing Order 230A refer to Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report 2: The Work of the Committee during the First Session of the Thirty Sixth Parliament - May 1 2001 to August 9 2002*, August 2002, pp5-6.

legislation and to facilitate automatic referral of such bills to the Standing Committee on Uniform Legislation and General Purposes.

6.7 At the commencement of the Thirty-Seventh Parliament the Committee was established with essentially the same terms of reference as the Standing Committee on Uniform Legislation and General Purposes in respect of uniform legislation but with additional terms of reference in respect of statute review. The Committee was re-established on commencement of the Thirty-Eighth Parliament without alteration of its terms of reference.

National legislative schemes

6.8 In 1996 the Working Party of Representatives of Scrutiny Committees throughout Australia (**Working Party**) addressed the issue of national legislative schemes in a Position Paper entitled *Scrutiny of National Schemes of Legislation* (**1996 Position Paper**).

6.9 The 1996 Position Paper emphasised that the Working Party does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, it does question the mechanisms by which national legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.

6.10 A common difficulty with most national legislative schemes is that any proposed amendments may be met by an objection from the Executive that consistency with the legislative form agreed among the various Executive Governments is a 'given'. This objection has arisen in the Committee's scrutiny of the Bill.

6.11 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (Standing Order 230A(1)(b)), can take a number of structures. Nine different legislative structures, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability have been identified. The uniform legislative structures are summarised in **Appendix 3**. As the Committee has previously reported, these legislative structures are a summary only and do not cover the field of structures that uniform schemes or laws may take.[17]

6.12 The Bill is an example of the form of uniform legislation known as 'complementary or mirror legislation' (see Structure 2 in **Appendix 3**).

[17] See, for example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 44, *Criminal Code Amendment (Identity Crime) Bill 2009*, 2 March 2010, pp28-29.

Uniform scrutiny principles

6.13 The establishment of a Parliamentary Committee to scrutinise uniform legislation arose from the concern that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, bind a State Parliament to enact legislation giving effect to national uniform schemes or intergovernmental agreements.[18]

6.14 Due to the limited information available to the Parliament in respect of negotiations for a uniform scheme, the purpose of the Committee is not only to identify any provisions of uniform legislation that detract from the powers and privileges of Parliament but (to the extent necessary and possible within the limited time available for its inquiry) provide the Parliament with the rationale for, and practical effect of, the uniform legislation.

6.15 Related to the limited availability of information is the lack of opportunity for the Parliament to constructively review uniform legislation from a technical perspective.[19]

6.16 Following the recommendations of the 1996 Position Paper for adoption of uniform scrutiny principles, the various uniform legislation scrutiny committees in the different Australian jurisdictions have used essentially the same fundamental legislative scrutiny principles (**FLPs**) as a guide to answering the broader questions whether the legislation:

- has sufficient regard to the rights and liberties of individuals;
- allows delegation of power only in appropriate cases and to appropriate persons; and
- has sufficient regard to the powers and privileges of Parliament.

6.17 The FLPs are set out in **Appendix 4**.[20]

6.18 Particularly pertinent to this inquiry are:

- FLP 1 - *Are rights, freedoms or obligations dependent on administrative power only if sufficiently defined and subject to appropriate review?*

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18 See generally the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, August 2004.

19 Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 10, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, 31 August 1995, pvi.

20 Further background on the fundamental legislative scrutiny principles can be found in a report by the predecessor Committee, the Standing Committee on Uniform Legislation and General Purposes, *Report 23: The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, November 2004, pp4-9.

- FLP 3 - *Does the Bill allow delegation of administrative power only in appropriate cases and to appropriate persons? The matters to be deal with by regulation should not contain matters that should be in the Act not subsidiary legislation.*

- FLP 7 - *Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?*

- FLP 10 - *Does the Bill have sufficient regard to Aboriginal tradition and Island custom?*

- FLP 11 - *Is the Bill unambiguous and drafted in a sufficiently clear and precise way?*

- FLP 12 - *Does the Bill allow delegation of legislative power only in appropriate cases and to appropriate persons?*

- FLP 15 - *Does the Bill affect Parliamentary privilege in any manner?*

6.19 The FLPs may inter-relate. For example, in raising questions as to whether particular provisions of the Bill were drafted in a sufficiently clear way (FLP 11), the response of the DMP on occasion acknowledged that the drafting was unclear but asserted that the lack of clarity should be maintained for uniformity with equivalent Commonwealth provisions (FLP 15).[21]

7 BACKGROUND TO THE BILL

Offshore legislative arrangements

Territorial Sea and other offshore waters

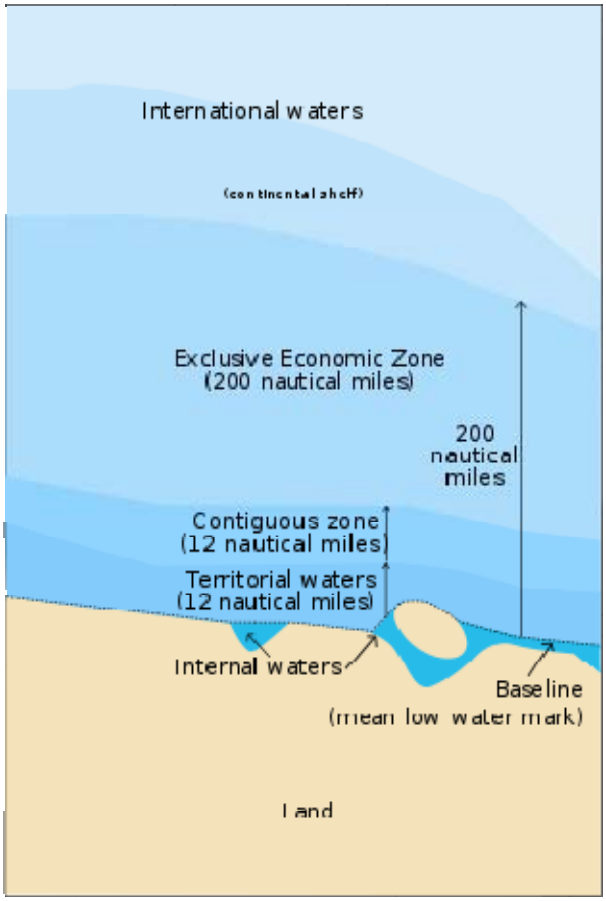
7.1 A series of four international Conventions was negotiated in 1958 to provide ground rules in respect of the competition for the resources of the sea. These established that

[21] On the question of the retention of a deeming provision in the definition of "*adjacent area*" (section 5(1) of the *Petroleum (Submerged Lands) Act 1982* - that the territorial sea is three nautical miles (when in fact it is twelve) - "*I think the answer to this goes back to the offshore constitutional settlement of 1979, which led ultimately, in 1982, to the drafting of the Petroleum (Submerged Lands) Act 1982. In the preamble to the 1982 legislation … it requires the states and territories to follow, as close as practicable, the rules, regulations and layout, basically, of the commonwealth legislation. Given the history of uncertainty as to the breadth of the territorial sea and the commonwealth's overarching mandate in offshore matters, it has always been seen to be prudent that the commonwealth drafting style has been adopted*". (Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p6).

a nation has full and exclusive sovereignty over its 'territorial sea'.[22] There are also, in extending distances from the shore and descending levels of sovereignty: a contiguous zone over which some control is permissible; an economic zone; and rights associated with the extent of the continental shelf.[23]

7.2 There may also be waters between the coast of a nation and the 'territorial sea baseline', from which 'baseline' the 'territorial sea', 'contiguous zone' and 'economic zone' are calculated. The territorial sea 'baseline' is generally the low-water mark (low-tide) but where there are bays, a peninsula or islands close to the coast, straight lines may be used to join appropriate points.[24]

7.3 The different areas of the waters surrounding a nation are illustrated below:



22 Article 2.3 of the United Nations Convention on the Law of the Sea 1982 provides: "*The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law*". There are some requirements in international law, for example, to recognise the right of innocent passage (Article 17 of United Nations Convention on the Law of the Sea 1982).

23 See Commonwealth of Australia, Attorney-General's Department website http://www.ag.gov.au/www.agd/agd.nsf/Page/InternationalLaw_AustraliasMaritimeBoundariesandZones, (viewed on 22 January 2010) for further explanation. See also Convention on the Continental Shelf 1958.

24 Convention on the Territorial Sea and Contiguous Zone 1958 and Convention on the Law of the Sea 1982.

7.4 Traditionally, the States asserted sovereignty over territorial waters of 3 nautical miles, as well as those waters falling between the coast and the territorial sea baseline. However, prior to 1975, there was considerable uncertainty surrounding the constitutional division of powers in respect of Australia's territorial sea.[25]

7.5 There was, until the 1982 United Nations Convention on the Law of the Sea, uncertainty in international law as to the breadth of the territorial sea. Article 3 of that Convention, (which came into effect in 1994) provides that a nation may claim a territorial sea of up to 12 nautical miles. Australia declared its territorial sea to be 12 miles in 1990.

1967 Agreement and constitutional uncertainty

7.6 The Commonwealth, the States and the Northern Territory entered into an agreement in 1967 in respect of the regulation of offshore petroleum resources (**1967 Agreement**),[26] which was intended to establish national offshore petroleum regulation regardless of which government had legislative power over the territorial sea of Australia[27] (at that time 3 nautical miles).

7.7 The 1967 Agreement resulted in the *Petroleum (Submerged Lands) Act 1967* (Cwlth) and mirror legislation in each State and the Northern Territory.[28] The 1967 Agreement agreed:

> *to the enactment by the Commonwealth and each State of a common petroleum mining code for the 'adjacent area' of each State to be administered by a 'Designated Authority'*.[29]

7.8 However, the Commonwealth was of the view that the constitutional uncertainty as to sovereignty required resolution.[30] In 1973 the Commonwealth asserted sovereignty over the continental shelf, territorial sea and internal waters outside state limits as at

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25 Commonwealth of Australia, Department of Industry, Science and Resources, Offshore Safety and Security, Petroleum and Electricity Division, Australian Offshore Petroleum Safety Case Review, *Future Arrangements for the Regulation of Offshore Petroleum Safety*, August 2001, p20.

26 'Agreement in relation to the Exploration for, and the Exploitation of, the Petroleum Resources and certain other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of certain other Submerged Land', (*Halsbury's Laws of Australia*, LexisNexis Butterworths online, (viewed on June 13 2005), paragraph 170-4010).

27 *Halsbury's Laws of Australia*, LexisNexis Butterworths online, (viewed on June 13 2005), paragraph 170-4010.

28 *Halsbury's Laws of Australia*, LexisNexis Butterworths online, (viewed on June 13 2005), paragraph 170-4010.

29 Commonwealth of Australia, Attorney-General's Department, *Offshore constitutional settlement: A milestone in co-operative federalism*, Australian Government Publishing Service, Canberra, 1980, pp2-4.

30 Ibid, p4.

1901 by enacting the *Seas and Submerged Lands Act 1973* (Cwlth).[31] The States challenged that assertion but, in 1975, the High Court upheld the Commonwealth's right to legislate in respect of those waters.[32] The States, nonetheless, retained some legislative rights.

7.9 As a result of the 1975 High Court decision, the 1967 Agreement, and the legislation giving that agreement effect, was reconsidered.

1979 Offshore Constitutional Settlement IGA

7.10 In June 1979 the Commonwealth, the States and the Northern Territory entered into the Offshore Settlement IGA. The Offshore Settlement IGA is not set out in one single document but is found in the legislation which implements it.[33] The Submerged Lands Act is the major piece of legislation implementing the agreement in Western Australia in so far as that intergovernmental agreement relates to petroleum and minerals.

7.11 The preamble to the Submerged Lands Act recites the Offshore Settlement IGA in so far as it relates to petroleum resources as follows:

- the Commonwealth's legislation is limited to petroleum resources in respect of lands that are beneath the waters beyond the outer limits of the territorial sea, "*being outer limits based, unless and until otherwise agreed, on the breadth of that sea being 3 nautical miles"*;
- the States and the Northern Territory legislation is to apply to petroleum resources of submerged land in the "*area adjacent to the State*" that is landward of the waters regulated by the Commonwealth; and
- the Commonwealth, States and the Northern Territory agree that they should try to maintain, so far as practicable, common principles, rules and practices in regulating and controlling the exploration for, and exploitation of, offshore petroleum beyond the baseline of Australia's territorial sea (known as the common mining code).[34]

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31 Ibid and *Halsbury's Laws of Australia*, Lexis Nexis Butterworths online, (viewed on 13 June 2005), paragraph 170-4010.

32 *New South Wales v the Commonwealth* (1975) 135 CLR 337 (known as the Seas and Submerged Lands Act case).

33 Letter from Hon Norman Moore MLC, Minister for Mines and Petroleum, 11 December 2009, Appendix p1.

34 Ibid, Appendix p2 and Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 November 2009, p9858.

7.12 Although Australia proclaimed its territorial sea to be 12 nautical miles in 1990,[35] the States' area of legislative power remains confined to the 3 nautical miles agreed in the Offshore Settlement IGA.

7.13 The Offshore Settlement IGA also confers power for the States to legislate outside the "*adjacent area*" in respect of port-type facilities and underground mining extending from land within the State and stipulates that regulation for offshore mining for minerals other than petroleum will be the same as that for petroleum.[36]

Amendments to the common mining code

7.14 The bulk of the Bill proposes amendments to reflect the following amending Acts in respect of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (as the principal Act is now known) (**Commonwealth Act**):

- the *Petroleum (Submerged Lands) Legislation Amendment Act (No. 1) 2000* (Cwlth);
- the *Petroleum (Submerged Lands) Legislation Amendment Act 2001* (Cwlth); and
- the *Petroleum (Submerged Lands) Amendment Act 2003* (Cwlth).

7.15 As reported above, the Bill has been in development for some years. The desire for uniformity with legislation passed by the Commonwealth some years previously appears to have led to the proposal that clauses 187(1), (2), (3), (4), (7), (9) and (10) and clauses 190(1), (2) and (6) have significant retrospective effect (see clause 2(b) and (c) of the Bill). This is discussed below.

Intergovernmental agreements in respect of carbon storage

7.16 The COAG and MCMPR intergovernmental agreements to expedite the introduction of nationally consistent legislation in respect of carbon storage, in accordance with the CCS Principles, have been noted above. The broader context for these intergovernmental agreements is the decisions by various Australian governments to impose a cost on carbon dioxide emissions and identification of Australia as having significant geographic potential for carbon dioxide sequestration.[37]

7.17 At the hearing, Mr Harvey explained:

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35 Under section 7 of the *Seas and Submerged Land Act 1973* (Cwlth), Australia's territorial sea is set by proclamation of the Governor General.

36 Commonwealth of Australia, Attorney-General's Department, *Offshore constitutional settlement: A milestone in co-operative federalism*, Australian Government Publishing Service, Canberra, 1980, p6.

37 Global CCS Institute .*Strategic Analysis of the Global Status of Carbon Capture and Storage Report No. 3: Country Studies Australia*, p5.

> *There has been a bit of an interchange in definitions over the last five years from what started out to be carbon capture and storage or sequestration; now the commonly used term tends to be greenhouse gas storage.*[38]

Uniform legislative scheme

7.18 The Commonwealth enacted greenhouse gas storage legislation in 2008 by adding an additional Chapter to its *Offshore Petroleum (Submerged Lands) Act 2006,* and retitling that Act the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. Section 7 of the Commonwealth Act defines a "*greenhouse gas substance*" to include carbon dioxide and Chapters 3, 5 and 8 provide a framework for granting of greenhouse gas titles that is separate from the provisions regulating petroleum.

7.19 South Australia also regulates carbon dioxide storage in its petroleum legislation. The *Petroleum (Miscellaneous) Amendment Act 2009* amended its *Petroleum and Geothermal Energy Act 2000* (SA) to add "*carbon dioxide*" to the "*regulated substances*" for the purposes of that Act. It does not, however, define "*petroleum"* to include "*carbon dioxide*".

7.20 Victoria and Queensland have enacted stand alone legislation, respectively: the *Greenhouse Gas Geological Sequestration Act 2008* and *Greenhouse Gas Storage Act 2009.*

7.21 The Commonwealth Minister for Resources and Energy announced on 27 March 2009 the release of ten offshore areas under the jurisdiction of the Commonwealth Government for the exploration of potential greenhouse gas storage areas. Included in these release areas were two areas within the Vlaming Sub-basin off Perth in Western Australia, which were intended to be administered under the Commonwealth Act.[39]

7.22 However, the Commonwealth legislative framework to enable the greenhouse gas regime to commence was not complete at 9 February 2010:

> *Work is still underway in the commonwealth arena on this issue* [subsidiary legislation] *even though they have passed amendments to their overarching legislation and even though they have released acreage for bids for greenhouse gas storage. The reality is that there*

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38 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p8.

39 Global CCS Institute .*Strategic Analysis of the Global Status of Carbon Capture and Storage Report No. 3: Country Studies Australia*, p15.

> *is a tremendous amount of work to be done in this area to actually enable the regime to commence.*[40]

Bill introduces interim legislative regime

7.23 The Second Reading Speech to the Bill advises that the:

> *amendments in the bill will enable the disposal of carbon dioxide underground pending development of Western Australia's comprehensive onshore greenhouse gas storage legislation … to allow licensing of pipelines transporting CO_2.*[41]

7.24 The Executive intends to introduce "*the detailed legislation*" for a "*comprehensive legislative regime for the storage of greenhouse gas*" in late 2010.

Overview of Principal Acts amended by the Bill

The Petroleum (Submerged Lands) Act 1982

7.25 The Submerged Lands Act gives effect to the Offshore Settlement IGA by regulating the exploration and recovery of petroleum within the "*adjacent area*" and providing for administration of "*the Commonwealth adjacent area*". There are also provisions in respect of the administration of the "*offshore area*" by the Joint Authority (Part II). The amendments of these terms proposed by the Bill are discussed below.

7.26 The Submerged Lands Act prohibits:

- exploration for petroleum in the adjacent area without a permit, retention lease or licence (section 19);
- recovery of petroleum in the adjacent area without a licence (section 39); and
- construction of a pipeline in the adjacent area without a pipeline licence (section 60).

7.27 It also provides for grant of a special prospecting authority (section 111), which confers shorter exploration rights than an exploration permit, and for the holder of a title to apply for an access authority (section 112), either to enter part of the adjacent area that does not comprise the title, or to enter the "*adjacent area*" if the title is

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40 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p8.

41 Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 November 2009, pp 9858-59.

outside that area, for the purpose of exploration operations or operations related to the recovery of petroleum from the title area.

7.28 The Submerged Lands Act provides processes for: applications for titles; the Minister to refuse or grant titles with conditions; period of operation of titles; cancellation, surrender and renewal of titles; registration and public notification of titles; fees and royalties as well as provisions relating to record-keeping and publication of information in respect of titles and other matters.

7.29 Applications, grants, surrenders etcetera in respect of titles are made in respect of a "*block*" or "*blocks*". Blocks are determined using the mechanism of graticulation of the Earth's surface. That is, the Earth's surface is divided into sections on the basis that the Earth is divided by meridians of 5 minutes (or multiple of 5 minutes) of longitude from the meridian of Greenwich and by parallels of latitude that are 5 minutes (or multiple of 5 minutes) of latitude from the equator. A graticular 'section', or part of a graticular section, that is within the "*adjacent area*" constitutes a "*block*" for the purposes of the Submerged Lands Act (section 17).

7.30 The Submerged Lands Act also regulates occupational safety and health in the adjacent area by conferring powers on the National Offshore Petroleum Safety Authority, established under Commonwealth legislation, in respect of "*offshore petroleum operations*" generally. The Submerged Lands Act Schedule 5 also contains 62 pages of occupational safety and health regulation.

Petroleum and Geothermal Energy Resources Act 1967

7.31 The title of the PGER Act has been amended to indicate that the unproclaimed provisions of the *Petroleum Legislation Amendment Act 2007* will, when proclaimed, introduce provisions regulating geothermal energy. At present, the PGER Act regulates the exploration and recovery of petroleum only in that part of the State that is not comprised in the "*adjacent area*" as defined in the Submerged Lands Act (section 26).

7.32 The PGER Act provisions in respect of graticulation blocks, types of titles and rights conferred are largely the same as those for the Submerged Lands Act. There are differences in provisions resolving the application of petroleum and geothermal titles over the same blocks (Division 3A, Part III) and in recognition of other land tenure and usage (for example, pastoral leases).

7.33 There is one additional title in the PGER Act, that of "*drilling reservation*". These titles are issued in the division dealing with exploration and authorise drilling a "*well*", being a hole in the Earth's crust. (Sections 43A, 43D and 5)

7.34 The PGER Act does not currently regulate occupational safety and health. Part 2, Division 2, of the *Petroleum Legislation Amendment and Repeal Act 2005*, which will

insert a schedule into the PGER Act to deal with occupational safety and health has not yet become operative.

Petroleum Pipelines Act 1969

7.35 The Pipelines Act regulates the construction, operation and maintenance of pipelines for conveyance of petroleum. There is no provision stating the area/land in respect of which the Act applies. It, therefore, operates over all land vested in the State, which includes the submerged lands subject to the PGER Act.

7.36 A person is not to construct, alter or operate a pipeline without a licence (section 6), which is issued by the Minister.[42] The Pipelines Act does not use the concept of graticulation or blocks. Licences are issued in respect of land described in the licence.

7.37 The Minister can authorise entry onto land for the purposes of survey and other matters in respect of a proposed pipeline (section 7). The Governor or a public authority, may also grant easements, leases or licences in respect of land owned by the public authority for the purposes of construction, maintenance and operation of a pipeline (sections 16 and 17).

7.38 A person may serve a licensee of a pipeline with a request to transport petroleum. The Minister may intervene to give directions in the event agreement on transport cannot be reached (section 21).

7.39 The Pipelines Act contains provision relating to the grant, renewal, variation, registration, cancellation etcetera of licences as well as the manner of construction and operation of pipelines.

7.40 There does not appear to be any provision in the Pipelines Act relating to geothermal energy.

8 CLAUSES 2(1)(b) AND (c) OF THE BILL - PROPOSED RETROSPECTIVE EFFECT (FLP 7)

Clauses in context

Clause 2(1)(b) -Subclauses of clause 187 deemed to come into operation on 20 May 2002

8.1 Clause 2(1)(b) of the Bill provides that clause 187, other than subclauses (5), (6), (8) and (9), is deemed to come into operation on 20 May 2002 - some eight years prior to Parliament's consideration of the Bill.

8.2 Subclauses 187(1-4), (7), (10) and (11) of the Bill amend clauses 1, 10 and 14 of Schedule 1, and the description of an area indicated on the "*indicative map*" that is

[42] Section 10 of the *Petroleum Pipelines Act 1969.*

Appendix 1, of the *Crimes at Sea Act 2000* to delete the definition of, and reference to, "*Area A of the Zone of Cooperation*" - which has the same meaning as in the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* (Cwlth) - and substitute a definition of, and references to, the "*Joint Petroleum Development Area*" - which has the same meaning as in the *Petroleum (Timor Sea Treaty) Act 2003* (Cwlth).

8.3 The long title of the *Crimes at Sea Act 2000* states that it is:

> *An Act to give effect to a cooperative scheme for dealing with crimes at sea, to repeal the Crimes (Offences at Sea) Act 1979, to amend the Off-shore (Application of Laws) Act 1982, and for other purposes,*

and the preamble states:

> *Under the scheme, the criminal law of each State is to apply in the area adjacent to the State —*
>
> > *(a) for a distance of 12 nautical miles from the baseline for the State — by force of the law of the State; and*
> >
> > *(b) beyond 12 nautical miles up to a distance of 200 nautical miles from the baseline for the State or the outer limit of the continental shelf (whichever is the greater distance) — by force of the law of the Commonwealth.*

8.4 Schedule 1 sets out the cooperative scheme recited in the preamble to the *Crimes at Sea Act 2000* and gives that scheme legal effect. Clause 10 of Schedule 1 provides:

> *This scheme does not apply to Area A of the Zone of Cooperation.*

8.5 Clause 16 of Schedule 1 describes the "*indicative map*" that is Appendix 1 as follow:

> *Indicative map*
>
> *(1) A map showing the various areas that are relevant to this scheme appears in Appendix 1 to this scheme.*
>
> *(2) The map is intended to be indicative only. The provisions of this scheme and of the body of this Act prevail over the map if there is any inconsistency.*

Clause 2(1)(c) - Subclauses of clause 190 deemed to come into operation on 22 December 2004

8.6 Clause 2(1)(c) of the Bill provides that clause 190, other than subclauses (3), (4), (5), (7) and (8), is deemed to come into operation on 22 December 2004 - some five and a half years prior to Parliament's consideration of the Bill.

8.7 Subclauses 190(1), (2), and (6) of the Bill amend clauses 1 and 6 of Schedule 6 of the *Workers' Compensation and Injury Management Act 1981* to insert a definition of "*Joint Petroleum Development Area*" in the same terms as that used in clause 187 of the Bill and to replace a reference to "*Area A of the Zone of Cooperation*" with the "*Joint Petroleum Development Area*".[43]

8.8 Section 20 of the *Workers' Compensation and Injury Management Act 1981* applies the State's workers' compensation legislation to "*adjacent areas*" as defined in Schedule 6.[44] Schedule 6 defines the adjacent area of Western Australia and the Northern Territory by exclusion of "*Area A of the Zone of Cooperation*".

Inadequate explanatory materials

Inadequate explanatory material in respect of clauses 2(1)(b) and 187

8.9 The Second Reading Speech does not provide an explanation for these amendments. The Explanatory Memorandum states in respect of clause 187:

> *This clause consequentially replaces the definition "area A of the Zone of Co-operation"* [sic] *with the "Joint Petroleum Development Area" and replaces references to the repealed Commonwealth Petroleum (Submerged Lands) Act 1967 with the Commonwealth's Offshore Petroleum and Greenhouse Gas Storage Act 2006.*[45]
>
> (The latter amendments are not retrospective.)

8.10 An equivalent explanation is provided in respect of clause 190.[46]

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43 The term "*Area A of the Zone of Cooperation*" is not defined in the *Workers' Compensation and Injury Management Act 1981*.

44 Section 20 of the *Workers' Compensation and Injury Management Act 1981* provides: "*(1) In this section — **State**, in a geographical sense, includes a State's relevant adjacent area as described in Schedule 6. (2) Compensation under this Act is only payable in respect of employment that is connected with this State. (3) The fact that a worker is outside this State when the injury occurs does not prevent compensation being payable under this Act in respect of employment that is connected with this State…*".

45 Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, p29.

46 Ibid.

8.11 This "*explanation*" provides no information as to the purpose or effect of the relevant subclauses of clause 187 and 190: It is a description of the amendment, not an explanation of it.

8.12 Neither the Second Reading Speech, nor the Explanatory Memorandum to the Bill, provides an explanation for the significant retrospective operation of these provisions.

Explanation provided to the Committee

8.13 The Committee sought an explanation for replacement of "*Area A of the Zone of Co-operation*" with "*Joint Petroleum Development Area*", the practical effect of the amendments proposed by clause 187 and the reason for their significant retrospective effect at the hearing.

8.14 The DMP advised that the term "*Zone of Cooperation*" was "*what used to be known as the Timor Gap*" and that it arose out of the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* (Cwlth). Following the independence of East Timor, the area has been known as the "*Joint Petroleum Development Area*" as the result of an agreement between Australia and East Timor.[47]

8.15 The DMP was not able to provide information as to the reason for the proposed retrospective effect of this subclauses:

> *The retrospective effect of the two clauses is uncertain, and we would have to research further to find out why, but it is based on the commonwealth model,*

which, it was suggested, also had retrospective effect.[48]

8.16 The Committee notes that in the event "*Area A of the Zone of Co-operation*" and the "*Joint Petroleum Development Area*" describe the same area, the retrospectivity of the proposed amendments might have no practical effect. However, in answer to the question of whether there had been any change in the size of the area excluded, the DMP advised, referring to maps which are **Appendices 5 (2001 Map)** and **6 (2010 Map)**:

> *The area has changed in size. In January 2001, for areas C, A and B, C was the Indonesian area, A was the area jointly administered and B was the Australian area. What has happened following East Timor independence, is that the area B now no longer exists because it has*

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47 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p3.

48 "[T]*here is nothing in our files that reveals as to why the commonwealth went in that direction at that time*": Mr Colin Harvey, Principal Legislation and Policy Officer, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p4.

> *been absorbed into the Australian area, and what is shown* [on the 2010 Map] *is the compilation of areas A and C. …*
>
> *C was Indonesian … it is now, presumably, East Timorese.*
>
> *….*
>
> ***The CHAIRMAN**: … Does the retrospective application of these provisions have potential to adversely affect persons' rights or interests, or subject persons to prosecution?*
>
> ***Mr Harvey**: I would have to take that question on notice as well, I am afraid.*[49]

8.17 The DMP's Written Response clarifies that the Joint Petroleum Development Area comprises Area A of the Zone of Cooperation alone, with Areas B and C now no longer existing, having respectively falling within the exclusive jurisdiction of Australia and Timor Leste.

8.18 The Committee has identified the Commonwealth legislation changing the name/area from Area A of the Zone of Co-operation to the Joint Petroleum Development Area as the *Petroleum (Timor Sea Treaty) (Consequential Amendments) Act 2003* (Cwlth).

8.19 The DMP's Written Response states that it is proposed that the relevant amendments have retrospective effect to "*ensure a seamless transition across Australia to avoid any inconsistencies*".[50] Parts of the *Petroleum (Timor Sea Treaty) (Consequential Amendments) Act 2003* (Cwlth) are to take effect from 20 May 2002. However, the period of retrospectivity is obviously far less in respect of that legislation.

8.20 On the question of whether making the relevant amendments apply retrospectively would have potential to adversely affect a person's rights or interests or subject a person to prosecution, the DMP Written Response states:

> *It is uncertain if the changes to reflect the correct title of the Joint Petroleum Development Area will have any adverse effects.*[51]

8.21 The Committee asked what consequences would flow if clauses 187 and 190 of the Bill were not enacted with retrospective effect. The DMP Written Response stated:

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49 Mr Colin Harvey, Principal Legislation and Policy Officer, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p5.

50 Written Response to questions not answered or taken on notice, Department of Mines and Petroleum, 15 February 2010, p3.

51 Ibid p4.

> *There would be inconsistent references to the Joint Petroleum Development Area.*[52]

Committee's conclusions and recommendations

8.22 The question of application of the State's criminal and workers' compensation laws is a matter of considerable importance, creating rights and obligations and involving risk of prosecution.

8.23 The Legislative Council is asked to pass clauses of the Bill providing for significant retrospective effect in the circumstances that:

- the only explanation given for retrospectivity is to achieve retrospective consistency in 2010 with Commonwealth legislation enacted in 2003;
- no substantive detriment is identified in the event of enactment without retrospective effect; and
- it is uncertain whether any person's rights or obligations will be adversely affected or whether a person will be retrospectively exposed to a risk of prosecution, as a consequence of the proposed amendments having retrospective effect.

8.24 It is, in the Committee's opinion, unsatisfactory that the Explanatory Materials presented to Parliament in respect of the Bill provided no information as to the purpose, or consequence, of the proposal that the relevant amendments have retrospective effect. It is an important principle of rule of law that legislation should not have retrospective effect: a citizen is entitled to know the legislation impacting on decision, actions or inactions at the time that they occur.

8.25 The Legislative Council has a long history of passing legislation with retrospective effect only when a cogent case has been made for that necessity, which case must address any prospect of adverse affect on persons. This should be recognised by the Executive when providing materials explaining legislation to the Legislative Council.

8.26 The Committee recommends that the Legislative Council give consideration to amending the Bill to delete subclauses 2(b) and (c).

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52 Ibid.

Recommendation 4: The Committee recommends that subclauses 2(b) and (c) of the Bill be deleted from the Bill. This can be effected in the following manner.

Page 2, line 8 - To delete ";" and insert -

; and

Page 2, lines 9-13 - To delete the lines.

Recommendation 5: The Committee recommends that when introducing a bill to the Legislative Council that proposes amendments with retrospective effect, the Executive provide an explanation for the proposal that those amendments have retrospective effect and advice as to whether the those amendments will adversely affect rights and liberties, or impose obligations, retrospectively.

9 CLAUSES AND SUBCLAUSES 4(4)(d), 46, 60(a), 67(3)(c), 151, 159, 168 AND 176(1)(d) OF THE BILL - AMENDMENT OF DEFINITION OF "*PETROLEUM*" TO INCLUDE "*CARBON DIOXIDE*" AND RELATED AMENDMENTS

Introduction

Amendments

9.1 Subclauses 4(4)(d), 67(3)(c) and 176(1)(d) of the Bill respectively amend the definition of "*petroleum*" in the PGER Act, Submerged Lands Act and Pipelines Act to add a subclause providing that where used in those Acts, "*petroleum*" includes "*carbon dioxide*". "*Petroleum*" is currently defined to be any "*naturally occurring hydrocarbon*" or mixture of one or more hydrocarbons with a number of specified gases that include carbon dioxide.

9.2 The DMP asserts that it is arguable that carbon dioxide alone falls within the current definition of "*petroleum*" and, therefore, that the amendment clarifies an ambiguity.[53] The Committee does not find that assertion persuasive.

9.3 Clause 46 amends section 67 of the PGER Act, which provides that a person is not to inject petroleum (and, it is proposed by subclause 4(4)(d) of the Bill, carbon dioxide) into a natural underground reservoir:

[53] Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p9.

- "*for the purpose of storage and subsequent recovery*" - other than in accordance with an agreement made under section 67; or

- "*for a purpose other than storage and subsequent recovery*" - without the approval of the Minister,

by deleting the phrase "*of storage and*" (subsequent recovery) wherever it is and substituting the phrase "*of storage for*" (subsequent recovery).

9.4 Clause 60(a) of the Bill amends section 153(2) of the PGER Act to insert a new subsection (ca). The amended section 153(2) will read:

> *(2) In particular, but without limiting the generality of subsection (1), the regulations may make provision for securing, regulating, controlling or restricting all or any of the following matters —*
>
> …
>
> *(ca) agreements and approvals under section 67 and the injection, storage and subsequent recovery of petroleum under such an agreement or the injection of petroleum under such an approval; …*

9.5 The following clauses of the Bill amend the Submerged Lands Act to allow regulations to be made in relation to the storage of "*petroleum*" (which includes carbon dioxide) but there do not appear to be equivalent amendments to the PGER Act. It can be seen that proposed section 153(2)(ca) is far less specific than the provisions proposed for the Submerged Lands Act:

- clause 151 - amends section 115 of the Submerged Lands Act to allow the Minister or an inspector direct a person to give information in respect of operations relating to the processing, storage or preparation of petroleum for transport;

- clause 159 - amends section 126 of the Submerged Lands Act to empower an inspector to have access to areas being used in connection with the storage of petroleum; and

- clause 168 - amends section 152 of the Submerged Lands Act to apply the obligation to maintain in good condition and repair all structures, equipment and other property to operations relating to the processing or storage of petroleum.

9.6 The Explanatory Memorandum explains some of these amendments by reference to the introduction of infrastructure licences (see Part 9 below for discussion of infrastructure licences) but by reason of the definition of "*petroleum*", they also relate to carbon storage.

Process for carbon dioxide storage and transport

9.7 Before commenting on the proposed legislative framework for carbon dioxide storage, the Committee notes the description of the process of carbon dioxide storage and transport given in the Senate Economics Committee Report:

> *2.2 Typically, carbon capture and storage has three stages:*
>
> - *capturing CO_2 from fuel and industrial processing and electricity generation plants and compressing into a fluid or supercritical state;*
> - *transporting the CO_2 by pipeline or tanker; and,*
> - *injecting the CO_2 into a suitable geological formation for long-term isolation from the atmosphere.*
>
> *2.3 CO_2 can be stored underground in geological formations (onshore and under seabeds) such as deep saline aquifers, depleted oil and gas reservoirs or unminable coal seams. 85 per cent of the world's storage potential is said to be in deep saline aquifers.* [The Senate Economics Committee Report footnotes "*Monash Energy, Submission 3, fact sheet*".] *However, in Australia, oil and gas basins are also considered to have substantial potential for geological storage.*
>
> *2.4 For most applications, the CO_2 has to be captured and separated, then transported from its source to a compression plant in preparation for injection and storage. The CO_2 is then injected as a dense, liquid-like, supercritical fluid into reservoirs. The CO_2 sits in the microscopic spaces between grains in the sandstone and is trapped by the impermeable rock, or mudstone, which acts as a seal or 'lid'. Generally, the storage needs to be at least one kilometre below the surface so that the pressure, and temperature, is sufficient to maintain the CO_2 as a supercritical fluid.*[54]

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[54] Parliament of Australia Senate Standing Committee on Economics Report on the: *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]*, September 2008, p7.

9.8 On carbon capture and storage, the Productivity Commission Upstream Petroleum Report said:

> *Emerging issues include carbon capture and storage (CCS), greenhouse and energy consumption reporting, the proposed carbon pollution reduction scheme, and decommissioning of petroleum facilities. In order to establish a consistent framework for CCS regulation, the Australian and the State and Territory Governments have developed and apparently agreed on a common set of guiding principles. Despite this, each State and Territory now appears to be developing their own (differing) detailed CCS legislation, in some cases citing further principles that they consider important in their jurisdiction. Participants have expressed concern about the developing inconsistencies in CCS requirements. State and Territory Governments should mirror amendments resulting from the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 in coastal waters, and consider implementing a nationally consistent framework for onshore carbon capture and storage.*[55]

Whether amendments will permit carbon dioxide storage under the Submerged Lands Act

9.9 The Explanatory Memorandum states that the redefinition of petroleum to include carbon dioxide "*as a separate element*" is required: in respect of the PGER Act and Submerged Lands Act "*to enable disposal of carbon dioxide underground*";[56] and, in respect of the Pipelines Act, to enable carbon dioxide to be transported for disposal underground.[57] The Second Reading Speech, however, states that the amendments to the PGER Act are to enable storage; whereas those to the Submerged Lands Act and Pipelines Act are merely to enable transport.

9.10 The DMP explained the effect of these amendments as follows:

> *it was seen as beneficial to define* [carbon dioxide] *separately to clearly provide for storage, which is what the section 67 amendments to the Petroleum and Geothermal Energy Resources Act would have done, or by the companion amendments in the Petroleum (Submerged Lands) Act 1982 and the Pipelines Act, where we would be allowing transport not only through the state's territorial sea and, as we examined earlier in this discussion, internal waters, but also onshore through the Petroleum Pipelines Act pipelines. So it is a two-part*

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55 Commonwealth of Australia, Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, April 2009, pxxxi.

56 Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, pp 2 and 12.

57 Ibid, p27.

> *amendment, the section 67 allowing for storage and also you have to provide for the transport because it might be very close or it might have to be piped over a few kilometres, so you need to have a pipeline licensed to carry carbon dioxide.*[58]

9.11 The DMP **identified the policy intent** of these amendments as being to enable "*onshore*" carbon dioxide storage.[59]

9.12 The Explanatory Memorandum, however, explains that the introduction of infrastructure licences to the Submerged Lands Act (see Part 10 below) will:

> *accommodate the remote control of production facilities in a production licence area or activities associated with the processing, storage or preparation for transport of petroleum* [that is, carbon dioxide] *recovered in any place.*[60]

9.13 There is, therefore, some ambiguity as to whether the Bill is intended to authorise carbon dioxide storage under, on or over land subject to the Submerged Lands Act. This may be relevant to the question of whether the Bill has the intended practical effect. (The Committee's findings on practical effect are set out below.)

Recommendation 6: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council whether the amendments proposed by clauses 4(4)(d), 46, 67(3)(c) and 176(1)(d) the Bill will permit carbon dioxide storage under, on or over land subject to the Submerged Land Act and, if so, whether this is an intended policy outcome.

Practical effect of the change in definition is more far-reaching than the identified intent

9.14 The Committee queried whether an amendment requiring "*carbon dioxide*" to be read every time the word "*petroleum*" was used in the relevant Acts had more far-reaching consequences than simply permitting carbon dioxide storage and transport for the purpose of storage:

> ***The CHAIRMAN****: Does the change in the definition not enable a wider range of activities? For example, will all the rights that a petroleum licence, an exploration permit or a pipeline licence confer*

58 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p9.

59 Ibid, p10.

60 Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, p19.

> *in respect of petroleum now apply to carbon dioxide? And will this amendment allow exploration for and retention of title over suitable carbon storage sites in addition to the use of already identified sites?*[61]

9.15 The DMP's response was:

> ***Mr Harvey**: Yes, that is correct, but the activities providing for storage could only be done under section 67. In other words, it is not intended to be a regime for the release of acreage for exploration for storage sites. It is not intended to be a mechanism to test sites. Any storage, recovery or permanent storage — geosequestration — has to be handled under section 67.*
>
> ***The CHAIRMAN**: I suppose the issue for the committee is that what we are suggesting may not be intended, but it in fact occurs by the mere change in the definition of "petroleum" to be extended to include carbon dioxide, whether it is intended or not.*
>
> ***Mr Harvey**: I suppose it could be construed that way, yes.*[62]

9.16 The DMP Written Response was:

> *Preliminary legal advice supports the Committee's suggestion that the proposed amendment to the section 5 definition of "petroleum"* [the relevant section of the PGER Act] *has a generally extending effect in respect of existing and future rights of tenement holders, at least in respect of exploration for and exploitation of carbon dioxide within relevant tenements.*[63]

9.17 It appears to the Committee that the "*generally extending effect*" of the proposed amendments applies also to the Submerged Lands Act and Pipelines Act.

9.18 The DMP Written Response to the question of whether the amendments confer additional rights on existing titleholders was:

> *Preliminary legal advice on this issue supports the notion that the amendment could as an unintended consequence confer additional rights on existing titleholders. The intention of the amendments was limited to facilitating the use of the existing section 67 platform to*

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61 Hon Adele Farina MLC, Department of Mines and Petroleum hearing, *Transcript of Evidence*, 9 February 2010, p10.

62 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p10.

63 The DMP written responses to questions not answered or taken on notice, dated 15 February 2010, p5.

> *regulate the geosequestration (underground storage) of carbon dioxide.*[64]

9.19 The Committee queried how applications for title over land already subject to a title would be dealt with. Relevant to this how any disputes and conflicts would be resolved:

> ***The CHAIRMAN**: How will applications for petroleum titles be dealt with where there is an existing approval for use of the block for carbon storage purposes, and please identify the provisions of the relevant acts that would resolve this question.*
>
> ***Mr Harvey**: There are no provisions in the legislation that would resolve this question because it was not envisaged that an approval for carbon storage purposes could operate independently of a petroleum title.*[65]

Finding 1: The Committee finds that, in addition to enabling the storage of carbon dioxide under the PGER Act and transport of carbon dioxide under the Submerged Land Act and Pipelines Act for the purpose of storage of carbon dioxide under the PGER Act, the practical effect of the amendments proposed by subclauses 4(4)(d), 46, 67(3)(c) and 176(1)(d) of the Bill is to extend the rights of existing and future titleholders to, at least, exploration for and exploitation of carbon dioxide resources (including locating potential storage sites).

Finding 2: The Committee finds that, on the basis of the evidence presented to it, that the additional practical effect of the Bill described in Finding 1 is unintended.

Possible amendment to the Bill

9.20 The DMP's Written Response suggested that the Executive is contemplating an amendment of the Bill to confine its practical effect to that intended. It stated that the policy intent:

> *would be better achieved by the expanded definition of "petroleum" being applied specifically for the purposes of section 67 by means of*

64 Ibid, p5.

65 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p14.

> *an amendment to section 67 itself (rather than as a general amendment to … section 5 of the Act).*[66]

9.21 However, it was noted that the definition would also need to apply to proposed section 153(2)(ca) (clause 60(a) of the Bill) and "*most likely*" some other subparagraphs of section 153 (which provides generally for regulations). The DMP was of the view that this might also be achieved through further amendment of section 67 of the PGER Act but that that approach needed further consideration in light of all the references to "*petroleum*" in the PGER Act.[67]

9.22 Given the DMP's caution as to the consequences of its proposed solution to the issue raised by the Committee (which the Committee considers reasonable in light of the complexity of the PGER Act), and the fact that amendment of the Submerged Land Act and Pipelines Act is also likely to be required, the Committee has not itself proposed an amendment to the relevant clauses of the Bill.

9.23 Instead, the Committee recommends that the Minister advise the Legislative Council of its legislative response to the unintended, extended effect of the proposed amendment to the definition of "*petroleum*" in the various Acts and that the Legislative Council not pass the relevant clauses of the Bill prior to consideration of that response. (As seen below, there are other fundamental scrutiny issues with the proposed amendments and the cumulative result is that the Committee has reached the conclusion that these amendments should not be enacted as currently drafted.)

Recommendation 7: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council of the Executive's proposed amendments to the Bill in light of Finding 1 and that the Legislative Council not debate clauses 4(4)(d), 46, 60(a), 67(3)(c) or 176(1)(d) of the Bill prior to receipt and consideration of that response.

Inconsistency with the common mining code and MCMPR agreement re MCMPR CCS Principles

MCMPR agreement re CCS Principles

9.24 The MCMPR agreement of 25 November 2005 requires jurisdictions implementing carbon storage legislation to do so in a nationally-consistent way and in accordance with the MCMPR CCP Principles.[68] In summary, the MCMPR CCS Principles stipulate that:

66 The DMP written responses to questions not answered or taken on notice, dated 15 February 2010, p5.

67 Ibid.

68 MCMPR Communique 25 November 2005, p 2.

- assessments and approvals are to be in accord with agreed national protocols and guidelines;

- rights should be based on established legislative and regulatory arrangements and should be certain;

- regulation should provide for monitoring, verification and a framework for establishing the quantity, composition and location of gas stored and transported and methods for ascertaining leakage; and

- regulation should recognise the potential for post-closure liabilities.

9.25 The MCMPR CCS Principles emphasise that:

> *A guiding framework should take account of existing principles in regulation relating to ecologically sustainable development; occupational health and safety and the general principles of good regulation, all of which have been previously agreed by the COAG. A guiding framework for CCS also needs to be consistent with Australia's obligations under international law.*[69]

9.26 On Assessments and Approvals, the MCMPR CCS Principles state:

> *Under existing arrangements, to gain approval for a major project, an environmental impact assessment process and adherence to relevant occupational health and safety legislation is required. As part of this process, conditions are usually applied to the project.*
>
> *These processes are important to ensure the rights and responsibilities of commercial parties and interests of communities, environment protection and safety (both public safety and occupational health and safety) are addressed.*
>
> *Current scientific understanding indicates that site selection is the key to minimising risks. With appropriate site selection and effective monitoring and verification, the probability of leakage is understood, on the basis of current scientific knowledge, to be very low. However, the potential scale of costs for remediation, in the case of leakage, could be high.*

[69] *Australian Regulatory Guiding Principles for Carbon Capture and Geological Storage*. 25 November 2005, p7,

> *Given that CCS is an evolving technology, it is important to recognise that assessment and approvals processes will deal with all stages of a project and incorporate leading practice.*[70]

9.27 COAG ecologically sustainable development principles include:

> *decisions and actions should provide for broad community involvement on issues which affect them.*[71]

9.28 Section 287 of the Commonwealth Act provides a "*simplified outline*" of Chapter 3:

> *This Chapter provides for the grant of the following titles:*
>
> *(a) a greenhouse gas assessment permit (see Part 3.2);*
>
> *(b) a greenhouse gas holding lease (see Part 3.3);*
>
> *(c) a greenhouse gas injection licence (see Part 3.4);*
>
> *(d) a greenhouse gas search authority (see Part 3.5);*
>
> *(e) a greenhouse gas special authority (see Part 3.6).*
>
> • *A greenhouse gas assessment permit authorises the permitee to explore in the permit area for potential greenhouse gas storage formations and potential greenhouse gas injection sites.*
>
> • *If an eligible greenhouse gas storage formation is identified in a greenhouse gas permit area, the responsible Commonwealth Minister may declare that the formation is an identified greenhouse gas storage formation.*
>
> • *After the declaration of an identified greenhouse gas storage formation in a greenhouse gas permit area, the permitee may apply for a greenhouse gas holding lease or a greenhouse gas injection licence.*
>
> • *A greenhouse gas holding lease is granted if the applicant is not currently in a position to inject and store a greenhouse gas substance, but is likely to be in such a position within 15 years. The lessee may apply for a greenhouse gas injection licence.*

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70 Ibid, 22.

71 COAG ecologically sustainable development principles p11.

> • *A greenhouse gas injection licence authorises the licensee to carry out greenhouse gas injection and storage operations in the licence area.*
>
> • *A greenhouse gas search authority authorises the holder to carry on operations in the authority area relating to the exploration for potential greenhouse gas storage formations or potential greenhouse gas injection sites (but not to make a well).*
>
> • *A greenhouse gas special authority authorises the holder to carry on certain greenhouse gas-related operations in the authority area (but not to make a well).*
>
> • *Part 3.7 provides for the grant of greenhouse gas research consents. A greenhouse gas research consent authorises the holder to carry on greenhouse gas-related operations in the course of a scientific investigation.*

9.29 The Commonwealth Act has a labyrinth of provisions, referring to regulations, to establish eligible greenhouse gas storage facilities.

9.30 The Second Reading Speech to the *Petroleum (Miscellaneous) Amendment Act 2009* (SA), identified the legislative requirements of the CCS Principles as follows:

> *In respect of gas storage provisions, such provisions have been strengthened through the introduction of compatible gas storage tenements. These tenements authorise exploration for gas storage resources and subsequent storage of greenhouse gases, as well as the temporary storage of regulated gases for production and use at a later date (to foster security of gas supplies).*
>
> *No royalty will be payable for the storage of gas. These provisions ensure that the MCMPR Australian regulatory guiding principles for carbon dioxide capture and storage are explicitly addressed in South Australia and are consistent with the Environmental Guidelines for Carbon Dioxide Capture and Geological Storage 2008.*[72]

9.31 The *Greenhouse Gas Geological Sequestration Act 2008* (Vic) has 323 provisions. The *Greenhouse Gas Storage Act 2009* (Qld) is 450 pages long.

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[72] Hon A Koutsantonis, Minister for Correctional Affairs, South Australia, House of Assembly, *Parliamentary Debates (Hansard)*, 15 July 2009, p3542-3.

9.32 The amendments proposed by the Bill are not consistent with the MCMPR agreement in respect of the CCS Principles or with the COAG agreement for nationally consistent regulation.

9.33 As noted in Part 6 above, none of the Commonwealth Act or legislation of the other States defines "*petroleum*" to include carbon dioxide when not mixed with a hydrocarbon.

9.34 The DMP agreed that the amendments proposed by clauses 4(4), 67(3) and 176(1) of the Bill were inconsistent with the common mining code.[73]

Inconsistency explained on the basis of interim nature of proposed amendments

9.35 The Second Reading Speech advised that the amendments proposed by the Bill were interim only pending development of Western Australia's "*comprehensive onshore greenhouse gas storage legislation*".[74] In acknowledging that the proposed amendments were not consistent with the common mining code, the DMP referred to the interim nature of the regime:

> *The amendments that we hope to get underway and get into Parliament later in the year will obviously comprehensively address the greenhouse gas elements of the legislation.*[75]

9.36 The DMP anticipates that legislation will follow, as far as practicable, the Commonwealth model:

> *The new legislation proposed for the WA onshore greenhouse gas storage will largely follow the model used in the commonwealth greenhouse gas storage legislation. … As for petroleum, given the complex technical nature of the greenhouse gas storage industry, which we anticipate will largely follow the activities that are carried out under petroleum exploration and production, there will be many matters, as there are for petroleum, that will have to be covered in regulations. These regulations will either follow the petroleum model or they will be new regulations or they will amend existing petroleum regulations.*[76]

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73 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p9.

74 Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 November 2009, p9858.

75 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p9.

76 Ibid, p8.

9.37 As noted above, the framework for greenhouse gas storage was introduced to the Commonwealth Act in 2006 but has not been implemented due to the need to formulate regulations. The DMP advised that it was taking a large role in working with the Commonwealth to develop the necessary regulations. It, therefore, has a good grasp of the issues that have arisen:

> *The required regulations - this again reflects the complexity of the petroleum industry and the fledgling greenhouse gas storage industry — will have to cover such areas as occupational safety and health; resource management, which is all about appraisal of the storage space; drilling; environment; and data management matters. All of those are alluded to in the overarching legislation, but the sheer detail and bulk of them can only be accommodated in regulations.*[77]

9.38 This evidence as to the complexity of regulation of carbon dioxide storage raises questions under FLP 3 and 12 as to the proposed interim regulation by way of agreement or Ministerial approval. These are discussed below.

9.39 The Committee accepts that the current intent of the Executive is to introduce comprehensive legislation to the Parliament by the end of the year.

9.40 However, the DMP advised that the greenhouse gas storage legislation had been under development for some years (since 2004)[78] and was at the stage of regulatory impact assessment prior to seeking cabinet approval for drafting[79] and, on the state of development of the Commonwealth regulations, the evidence of the DMP was:

> *The reality is that there is a tremendous amount of work to be done in this area to actually enable the regime to commence*.[80]

9.41 The Committee observes that Parts 2 and 3 of the *Petroleum Legislation and Repeal Act 2005* and Part 2, Division 2 of the *Petroleum Amendment Act 2007*, passed some years ago, have yet to come into effect due to the need to draft supporting regulations.

9.42 In these circumstances, the Committee is unable to determine the period over which the proposed amendments will operate.

Some issues arising in carbon dioxide storage regulation - long term effects uncertain and no consultation with landowners/third parties in respect of changed usage

9.43 Suitable carbon storage sites must meet five criteria:

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77 Ibid, p8.

78 Ibid, p2.

79 Ibid, p8.

80 Ibid.

- storage capacity (volume);
- injectivity (reservoir quality);
- containment (trapping style and integrity);
- site details (distance from potential source); and
- existing natural resource (conflict of resources).[81]

9.44 The MCMPR CCS Principles state:

> *Technically, individual elements of CCS are well understood through international and domestic experience, however, geological storage of CCS streams over the long term has not been demonstrated. As with any large scale industrial process, there are environmental and health and safety issues (both occupational and public safety) associated with CCS. However, experience with some facets of CCS technology indicates that, with appropriate safeguards, these can be managed.*

9.45 The Senate Economics Committee Report states:

> *In requesting the bills be referred to the Economics Committee, the Selection of Bills Committee was particularly concerned that the bill shifts liability for leakage of CO_2 from geological storage from the large greenhouse gas emitters to the public:*
>
> *The long-term cost of unforseen leakage of carbon dioxide from geological storage could be very substantial. This legislation shifts the liability for such leakage from the large greenhouse gas emitters who may use geological storage, to the public. Given the uncertainty about the permanence of geological storage the Senate needs to carefully consider these liability risks.*[82]

9.46 The Committee draws the uncertainty as to the permanence of geological storage of carbon dioxide to the attention of the Legislative Council. In the Committee's opinion, this uncertainty militates against legislating for an ad hoc regime.

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81 March C and Scott A , *Review of the Carbon Dioxide and Injection and storage Potential of the Denison Trough, Queensland* , Geoscience Australia, Canberra, 2005, p4.

82 Parliament of Australia Senate Standing Committee on Economics Report on the: *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]; Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008 [Provisions]*, September 2008, p1.

9.47 At the hearing, the Committee queried how the environmental implications of permitting carbon dioxide storage at a particular site would be addressed. It was provided with the following information:

> ***The CHAIRMAN****: So how were the environmental considerations dealt with in the approval process? Do you require a separate process of approval with the EPA?*
>
> ***Mr Harvey****: There is a memorandum of understanding between the EPA and the Department of Mines and Petroleum. The department has its own environmental assessment branch, and operational activities up to a certain level, unless they trigger a referral under the EPA act, are dealt with in-house. But — and I can only speak from petroleum experience here — where it goes beyond that, then the matter is referred to the EPA, if indeed it has not already been referred to the EPA by the proponent. That is the way that pragmatically it has been worked for the last 10 years or so.*
>
> ***The CHAIRMAN****: And so where those environmental considerations are dealt with in-house, is there a public review or comment period incorporated in that process or is it completely dealt with in-house?*
>
> ***Mr Harvey****: It would be dealt with in-house providing the operational activities were not affecting any aspect of the conservation estate, and it is carried out in accordance with the guidelines of the MOU.*[83]

9.48 This answer did not advise of any public review or opportunity for comment.

9.49 A related question is the matter of native title. The following explanation was given of the DMP's approach to native title issues and the proposed amendments allowing carbon dioxide storage. The Committee notes that the approach taken by the DMP would also have application to other land titles holders/third parties who might wish to object to carbon dioxide storage:

> ***Mr Harvey****: It was envisaged that native title would not arise as an issue as the storage operations would only occur in conjunction with an existing petroleum licence. It is acknowledged that this is intended to be an interim regime in advance of the detailed greenhouse gas storage legislation requirements. The issue of native title and greenhouse gas storage legislation is actually a matter that is on the*

83 Mr Colin Harvey, Principal Legislation and Policy Officer, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p12.

agenda of the meeting in Canberra to be discussed, because different jurisdictions around the country have adopted different approaches.

***The CHAIRMAN**: So are you saying that where native title considerations have been completed and approval has been given for petroleum mining, that would include the storage of carbon dioxide, whether or not the Aboriginal group were aware that it included carbon dioxide at the time they gave their approval or their consent for the petroleum activities to occur?*

***Mr Harvey**: The only two instances where the section 67 provisions have been used for the storage of natural gas relate to titles — production licences — that predate the introduction of native title legislation. So in the absence of any titles or agreements to store carbon dioxide, I cannot give any precedence or examples, other than that we would only be considering these types of activities over an existing title now. If it is a new title, then that new title and its activities, which would be included in carbon dioxide storage, would presumably have to go to the native title process just like all the mining and petroleum titles do, and geothermal.*

***The CHAIRMAN**: But if it is over an existing title where consent may have been issued on the basis of the old definition of petroleum, and you have now changed the definition of petroleum, surely there should be an option to go back, depending on the way the native title consent has been have been in the minds at the time the approval was given that it would include carbon storage as well.*

…

***The CHAIRMAN**: I am happy if you want to take that question on notice and reply.*

***Mr Harvey**: I will take that question on notice.*[84]

9.50 The DMP Written Response states:

The Native Title Act 1993 is silent on injection of petroleum or gas in the definition of "mine". Given the responses to 4.3.2 and 4.3.4 above [that the amendments have a wider effect than intended in conferring rights on holders of existing titleholder] and the unintended consequences of the amendments, alternative procedures to the right to negotiate future act process would require

[84] Ibid, pp12-13.

> *development. The obvious choice would be an alternative procedures Indigenous Land Use Agreement, which could cater for the injection aspects of petroleum, for activities which are outside the remit of the Native Title Act.*[85]

9.51 The Committee finds that, as currently drafted, the Bill has insufficient regard to Aboriginal tradition (FLP 10). The Committee notes that the suggestion by the DMP is not an advice that the Executive will proceed with the "*alternative procedure*" of an Indigenous Land Use Agreement.

Finding 3: The Committee finds that, as currently drafted, in proposing clauses and subclauses 4(4)(d), 46, 60(a), 67(3)(c), 151 and 176(1)(d), the Bill does not have sufficient regard to Aboriginal tradition (FLP 10).

Finding 4: The Committee finds that the interim regime to regulate carbon dioxide storage, proposed by subclauses 4(4)(d), 46, 60(a), 67(3)(c), 151 and 176(1)(d) of the Bill, is incomplete and will operate for an uncertain period of time.

Need for interim regime

9.52 Neither the Second Reading Speech nor the Explanatory Memorandum to the Bill identify the need for an interim regime for carbon dioxide storage.

9.53 The evidence of the DMP was that provision for an interim regime relates to the time that the Bill has been awaiting introduction to Parliament:

> *I can only say that these amendments commenced gestation in advance of the commonwealth legislation. There were a lot of other projects and considerations swirling around most notably the Gorgon project on Barrow Island. So whilst we were participating in the development of the commonwealth legislation, we had to think how we would address it if a developer wanted to do something, and it usually occurs within a very short time frame. So that is what these amendments were intended to provide.*[86]

9.54 In the event, the carbon dioxide storage in respect of the Gorgon project was addressed in the *Barrow Island Act 2003*.

9.55 On the question of a current need for an interim regime, the evidence was:

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85 The DMP written responses to questions not answered or taken on notice, dated 15 February 2010, p7.

86 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p9.

> ***Mr Harvey**: As it stands at the moment, there are some projects that are interested in using that mechanism, but I think it would be true to say that most proponents would prefer to see the full comprehensive regime used for carbon capture storage.*
>
> ***The CHAIRMAN**: … Are you saying that people are not overly concerned about an interim regime being established?*
>
> ***Mr Harvey**: There are some projects that, given their time frame, might look to it because there is simply nothing else in Western Australia, but ultimately I think everybody would prefer the comprehensive regime that is being developed for introduction later this year.*
>
> ***The CHAIRMAN**: So there is not likely to be any detriment that would occur if we do not have an interim regime, given that there does not appear to be anybody who is likely to be needing to make use of it during that period?*
>
> ***Mr Harvey**: Certainly nobody has applied; they cannot, because the amendments are not in place. In the absence of anything else — this is a question that arises later in the paper — we have consulted on this and people have been interested in it, but at the moment there is nobody banging on the door saying, "Yes, we would use it the moment it's in place."*[87]

9.56 The Committee recommends that the Minister provide the Legislative Council with an explanation as to why the Bill proposes introduction of an interim regime for regulation of carbon dioxide storage in 2010.

Recommendation 8: The Committee recommends that the Minister for Mines and Petroleum provide the Legislative Council with an explanation as to why the Bill proposes introduction of an interim regime for regulation of carbon dioxide storage in 2010.

[87] Ibid, p10.

Recommendation 9: The Committee recommends that the Minister for Mines and Petroleum provide the Legislative Council with:

- **advice as to whether the government will proceed with the "*alternative procedure*" of an Indigenous Land Use Agreement to address consent of the traditional owners of land to the use of that land for storage of carbon dioxide;**
- **if so, an explanation of how that process will address consent to land use; and**
- **if not, how the government proposes resolving this issue.**

Regulation of carbon dioxide storage by way of Ministerial approval or agreement

Introduction

9.57 Clause 46 of the Bill amends section 67 of the PGER Act as follows:

> *(1) A person shall not inject petroleum into a natural underground reservoir —*
>
> > *(a) for the purpose of storage for ~~storage and~~ subsequent recovery other than in accordance with an agreement made under this section; or*
> >
> > *(b) for a purpose other than storage for ~~storage and~~ subsequent recovery without the approval of the Minister.*
> >
> > *Penalty: $10 000.*
>
> *(2) Where a person wishes to inject petroleum into a natural underground reservoir, the person shall apply in writing to the Minister who may reject the application or may —*
>
> > *(a) where the Minister is of the opinion the injection is for the purpose of storage for ~~storage and~~ subsequent recovery, require the applicant to enter into an agreement with the Minister as to the injection, storage and subsequent recovery of that petroleum; or*

> *(b) where the Minister is of the opinion the injection is for a purpose other than of storage for ~~storage and~~ subsequent recovery, approve the application.*
>
> *(3) An agreement under subsection (2)(a) —*
>
> *(a) shall specify the details of the methods to be used for the injection, storage and subsequent recovery of the petroleum; and*
>
> *(b) may specify —*
>
> *(i) whether or not royalty under this Act or the Petroleum (Submerged Lands) Act 1982 in respect of that petroleum by reason of the initial recovery is to be paid; and*
>
> *(ii) such conditions, restrictions and other matters as the Minister thinks fit.*
>
> *(4) This section does not apply to carbon dioxide to which the Barrow Island Act 2003 section 13 applies.*

9.58 The DMP advises that: "*Any storage, recovery or permanent storage — geosequestration — has to be handled under section 67"* and that carbon dioxide may be disposed of underground for "*enhanced oil recovery purposes*" as well as geosequestration.[88]

Distinction between storage for subsequent recovery and storage for other purposes not clear

9.59 It was not apparent to the Committee on reading the PGER Act what purpose was achieved by the replacement of "*storage and*" with "*storage for*" in section 67 of the PGER Act. The DMP advised that the change in term:

> *assists in clarifying the two potential types of storage — that is, the one for recovery and the one for permanent storage.*[89]

9.60 However, the evidence continued:

> *Carbon dioxide **storage for recovery** could occur for **either recovery or permanent storage**. At this stage of the development of the industry both options needed to be catered for,*[90]

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88 Ibid.

89 Ibid, p11.

(Committee's emphasis)

which suggests that, in fact, there is no clarity in the distinction between the circumstances in which section 67(2)(a) will require an "*agreement*" with the Minister and section 67(2)(b) will require an "*approval*" by the Minister.

9.61 Clause 60(a) of the Bill proposes an amendment to the regulation-making power in section 153 pf the PGER Act to provide for regulations in respect of both agreements and approvals under section 67 and the:

> *injection, storage and subsequent recovery of petroleum under such an agreement or the injection of petroleum under such an approval.*

9.62 The Committee is of the view that section 67(2) of the PGER Act, as amended by clause 46 of the Bill, is ambiguous and lacks clarity in the distinction made (FLP 11). This is illustrated by the evidence as to whether carbon dioxide storage will be dealt with by way of agreement or approval.

Finding 5: The Committee finds that section 67(2) of the PGER Act, as amended by clause 46 of the Bill, is ambiguous and lacks clarity as to the distinction to be made between the circumstances in which an agreement will be required under section 67(1)(a) and the circumstances in which an approval will be required under section 67(2)(b) (FLP 11).

Whether agreement or approval required

9.63 As section 67(3) of the PGER Act provides in primary legislation for matters to be specified in an agreement - in particular methods to be used for injection, storage and subsequent recovery of petroleum (carbon dioxide) - and the regulation of "*approvals*" is left to the subsidiary realm, the legislative framework for regulation of "*approvals*" is less rigorous than that applying to "*agreements"*.

9.64 Noting that section 67(2) of the PGER Act distinguishes between storage for recovery and storage for other purposes, the Committee queried the circumstances under which an "*agreement*" for storage of carbon dioxide would be required rather than "*approval*" of that activity. The DMP responded:

> *The way it is currently drafted, the carbon dioxide storage will fall under the second provision.* [That is, an approval.]

[90] Ibid.

…

***Mr Harvey**: I think in the drafting of this section there was really no distinction between the two. An approval has to have conditions attached to it. An agreement is a record of that approval, but traditionally in approval of petroleum operations, that approval is not just a simple yes or no. It has quite often — I am using a petroleum background here — an extensive suite of operational approvals that will be attached to that approval document. The same sorts of conditions have been used in the agreements, for the two of them, for underground storage of natural gas. So in hindsight maybe we should use a different word. I am sorry, maybe we should have used "agreement" rather than "approval".*

***The CHAIRMAN**: In subsection 2(b)—sorry?*

***Mr Harvey**: Yes.*

***The CHAIRMAN**: In view of what you have just said, would you consider whether an amendment is actually required?*

***Mr Harvey**: I think, given the line of questioning, that is certainly something we need to consider.*[91]

9.65 The DMP Written Response also stated:

Yes, it is agreed that carbon dioxide storage not for recovery would require "approval" under s.67(2)(b).

…

It is considered that amendments be made to:

- *S. 67(1)(b) - to substitute "an agreement made under this section" for "the approval".*
- *S. 67(2)(b) - to substitute "enter into an agreement with the Minister" for "approve the application".*
- *S. 67(3) - include a reference to (2)(b) following the reference to (2)(a) in the first line.*

Such an approach would assist in clarifying the requirements of the process of storage of petroleum other than storage for

[91] Ibid, pp11-12.

> *subsequent recovery by using ministerial agreement rather than "approval".* [92]

9.66 However, the later DMP Additional Written Response stated that the amendments proposed in the DMP Written Response were "*not required*". The reason given was:

> *In s.67(1)(a) the use of the term 'agreement' rather than 'approval' was to cover the requirements of the unique nature of underground gas storage projects where it would require an arrangement similar to a contract between the Minister and the parties involved in gas storage.*
>
> *An agreement was the more appropriate mechanism for gas storage given the unique variables including the origin and ownership of the gas, the specifications (quality) of the gas and royalty issues. The use of the term agreement allows for more flexibility beyond the more conventional approvals process.*
>
> *The approval mechanism in s.67(1)(b) is, as stated in the responses at the 9 February session similar to any other petroleum approval, subject to conditions to cover the drilling, reservoir management, environmental and OSH aspects of the operation.*[93]

9.67 It is not apparent to the Committee where the legislative requirement for these conditions arises. As noted above, section 67(3) of the PGER Act imposes requirements in respect of agreements, not approvals. Sections 75, 78 and 79 of the PGER Act empower the Minister to require an applicant for approval of a transfer or dealing to provide information relevant to that approval. It is not, however, clear to the Committee that these sections apply to an approval sought under section 67(2)(b) of the PGER Act. The requirement for a suite of operational approvals appears to be administrative only, rather than a legislative prescription.

9.68 Ministerial "*approval*" is used in the PGER Act for the following purposes:

- section 14 - to confer authority to enter onto land the subject of a title to break the soil, erect electricity post, erect tramways and for any other public purpose;
- section 62A - to approve geothermal recovery plans;
- section 72 - transfer of titles; and

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92 The DMP written responses to questions not answered or taken on notice, dated 15 February 2010, pp6-7.

93 The DMP additional information in respect of written responses to questions not answered or taken on notice, dated 22 February 2010, p2.

- section 75 - creation of interests in titles.

9.69 None of these seem analogous to the section 67 power. In fact, the storage of carbon dioxide seems to fit more comfortably within the "*unique nature of underground gas storage projects*" that were deemed to be appropriately subject to an agreement.

9.70 The DMP evidence was that no approval process had been determined but that it would mirror the process for an agreement:

> ***The Chairman****: What is the process for applying for ministerial approval?*
>
> ***Mr Harvey****: Given the lack of any concrete examples, the process for applying for a ministerial approval has not been developed beyond the need for the applicant to apply to the minister and follow the same process as for an agreement. It would follow the same process that all approvals for petroleum operations are subject to; and that is the application of relevant conditions for those operations. And they would cover, for example, environmental or safety matters that were relevant to the activity at that particular point.*[94]

9.71 There does not appear to be any formal process in the PGER Act for applying for an approval from the Minister under section 67(2)(b). The application is to be made in writing and, unlike applications for titles, there is no statement as to the information that must be provided (or may be requested) or the conditions that may be imposed.

9.72 The Committee is of the view that the DMP Additional Written Response does not adequately explain the shift from the original evidence, and DMP Written Response advice, that it was not intended that carbon dioxide storage be regulated by way of approval, which appears to have a less rigorous legislative framework than agreements.

9.73 However, the Committee also notes that the evidence of the DMP is that approvals and agreements under section 67(2) of the PGER Act are treated as having the same requirements from a practical perspective.

9.74 The evidence does not disclose any coherent intention in the distinction between agreements and approvals and the provision for both in regulating storage of carbon dioxide.

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94 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p12.

Recommendation 10: The Committee recommends that the Minister for Mines and Petroleum explain to the Legislative Council:

- **why it is necessary to regulate some injection of carbon dioxide into a natural underground reservoir by agreement and some by approval;**
- **how the two circumstances are distinguished through the amendments proposed by clause 46 of the Bill; and**
- **the differences between "*agreements*" and "*approvals*".**

Recommendation 11: The Committee recommends that the Minister for Mines and Petroleum identify for the Legislative Council:

- **the provisions of the PGER Act that provide the formal process for application for an approval under section 67(2)(b) of the PGER Act;**
- **the provisions of the PGER Act that stipulate that an approval granted under section 67(2)(b) is to be subject to conditions to cover the drilling, reservoir management, environmental and OSH aspects of the operation; and**
- **the regulations or guidelines that identify the conditions that are to be imposed in respect of drilling, reservoir management, environmental and OSH aspects of the operation.**

10 CLAUSES 67(2), (5), AND (6), 69, 70, 77(2), 115, 128, 129(1)(a), 130-135(1), 136, 137, 139-143 150, 154(1), 156, 157, 160-165, 168 AND 189 OF THE BILL - INFRASTRUCTURE LICENCES

Introduction

10.1 Clause 115 of the Bill introduces a new division, Division 3, to Part III of the Submerged Lands Act regulating "*infrastructure licences*". Division 3 will consist of sections 60A to 60J. The Explanatory Memorandum explains that an infrastructure licence will:

> *accommodate the remote control of production facilities in a production licence area or activities associated with the processing,*

> *storage or preparation for transport of petroleum recovered in any place.*[95]

10.2 THE DMP explained the wider range of activities envisaged as falling within the ambit of an infrastructure licence at the hearing:

> *Most typically, an infrastructure licence would be a plant that is engaged in some way in handling or processing recovered petroleum, but which, for technical or economic reasons, is situated outside the production licence area in which petroleum is being recovered. These technical or economic reasons could include the possibility that the facility is servicing more than one production platform, or that it is a recycled structure previously used for some other purpose. The technical reason why you would need an infrastructure licence may simply be that the depth of water is so great that a conventional platform could not be used, whereas you may have the lucky geological chance of having an area that is relatively shallow in the sea, where it is much more suitable to site a production facility. That is one of the main reasons why this was introduced ….*
>
> *It could also be used for the remote control of facilities, or structures, used for recovering petroleum, and it could even be as small as a monopod, which is a very small platform with a single platform underneath it. Such a facility might accommodate personnel or might merely house computer or other hardware to control pumping activity at the production facilities. Infrastructure licences would not cover pipelines, pumping stations, tank stations or valve stations, as all these can be constructed, operated and, indeed, licensed under pipeline licences.*[96]

10.3 The new title reflects introduction of that title into the common mining code by the *Petroleum (Submerged Lands) Act (No. 1) 2000* (Cwlth). There is no equivalent licence proposed for the PGER Act. The Second Reading Speech explains this omission on that basis that: "*other forms of land tenure are available onshore*".[97]

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95 Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, p19.

96 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p15.

97 Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 November 2009, p9858.

Summary of provisions

Provisions

10.4 Proposed section 60A (clause 115 of the Bill) provides a person is not to begin or continue the construction, alteration or reconstruction of any infrastructure facility, or operate an infrastructure facility, without a licence (or as otherwise permitted by Part III).[98]

10.5 Clause 69 of the Bill introduces section 6B, which will state:

> *6B. Infrastructure facilities*
>
> *(1) In this Act —*
>
> **infrastructure facilities** *means facilities for engaging in any of the activities mentioned in subsection (2), being —*
>
> *(a) facilities that are resting on the seabed; or*
>
> *(b) facilities (including facilities that are floating) that are fixed or connected to the seabed; or*
>
> *(c) facilities that are attached or tethered to facilities referred to in paragraph (a) or (b).*
>
> *(2) The activities referred to in subsection (1) are the following —*
>
> *(a) remote control of facilities used for the recovery of petroleum in a licence area;*
>
> *(b) processing petroleum recovered in any place, including —*
>
> *(i) converting petroleum into another form by physical or chemical means or both (for example, converting it into liquefied natural gas or methanol); and*
>
> *(ii) partial processing of petroleum (for example, by the removal of water);*

[98] The penalty for breach is the same as that imposed in respect of the requirement for other titles.

> *(c) storing petroleum before it is transported to another place;*
>
> *(d) preparing petroleum (for example, by operations such as pumping or compressing) for transport to another place;*
>
> *(e) activities related to any of the above,*
>
> *but, except as mentioned in paragraph (a), do not include engaging in the exploration for, or recovery of, petroleum.*

10.6 "*Facility*" is widely defined in Schedule 5 to the Submerged Lands Act and includes vessels and structures located in the adjacent area that are being prepared for use for the noted purposes.

10.7 The legislative structure for infrastructure licences titles is similar to that for existing titles.[99] However, unlike other titles granted under the Submerged Lands Act:

- the opportunity to make an application is not dependant on advertisement of availability of the title by the Minister or possession of another title; and
- applications are made and granted in respect of a described place (this is not a defined term), not "*blocks*".

10.8 THE DMP explained the use of the term "*place*", rather than "*block*":

> *The holder of an infrastructure licence has rights to construct and operate infrastructure facilities in the petroleum infrastructure licence area. The licence area is defined as a place; that is, it does not cover a whole block or blocks — and these are graticular blocks … In other words, the area for the infrastructure licence only needs to extend around the structure that you are actually licensing. It does not have to have any superfluous area.*[100]

10.9 An application is made to the Minister, who first notifies the applicant that he is prepared to grant the title on specified conditions. On receipt to that notification, the applicant may require the Minister to make the grant or reject the offer. An infrastructure licence may be granted over land that is subject to another title, including another infrastructure licence and a pipeline licence under the Pipelines Act (proposed section 60D).

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99 See, for example, Part III, Division 3 - Production licences for petroleum - of the *Petroleum (Submerged Lands) Act 1982*.

100 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p15.

10.10 If an application involves a 'place' the subject of another title, the Minister "*shall not*" inform the applicant for the infrastructure licence that the Minister is prepared to grant the licence unless the registered holder of the other title has been given one month's notice of the intention to grant the licence. The Minister must also have served notice of preparation to grant an infrastructure licence on such other persons as the Minister thinks fit.[101] The notice is to specify a date on or before which the person may submit in writing any matters that the person wishes the Minister to consider.[102]

10.11 An infrastructure licence is subject to such conditions "*as the Minister thinks fit*" (proposed section 60I) and may be varied on application of the titleholder (proposed section 60J). THE DMP's evidence as to conditions was:

> *The mention in subclause (2) of these rights also being subject to this act and the regulations refers to a number of processes that need to be gone through before the construction and operation of an infrastructure licence may occur. For example, the submission of a safety case would be a very important step in the construction of an infrastructure facility.*[103]

10.12 The licence is granted for an indefinite time (proposed section 60G)[104] but may be cancelled by the Minister in the event construction work has not been carried out, and the facility has not been used, at any time during a continuous five year period (disregarding any period during which works could not be carried out for reasons beyond the titleholder's control) (proposed section 60H). It may also be cancelled for failure to comply with: a condition, Minister's direction, the relevant Part of the Act or the regulations; or for failure to pay monies payable (section 105, as amended by clause 143).

10.13 An infrastructure licence holder may apply to the Minister for consent to surrender of an infrastructure licence (clause 142 amends section 104 to this effect). An infrastructure licence may only be surrendered in whole, whereas other titles may be surrendered in part (section 104(5)(ba), as amended by clause 142).

10.14 Clause 129 of the Bill amends sections 74J and 76 of the Submerged Lands Act to allow registration of infrastructure titles and the provisions in respect of transfer and

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101 There is a question as to whether persons, such as the Minister for environment, should be specified but this provision is consistent with equivalent provisions in respect of other titles and the Commonwealth Act.

102 The notice provisions do not apply in respect of the registered titleholder in the event of consent. (Section 60C)

103 Mr Colin Harvey, Principal Legislation and Policy Officer, Department of Mines and Petroleum, *Transcript of Evidence,* 9 February 2010, p15.

104 Clause 115 of the Petroleum and Energy Legislation Amendment Bill 2009.

dealings in titles apply by reason of the amendment to section 74J including "*infrastructure licence*" in "*title*" for the purposes of the relevant Division.

10.15 Various other clauses of the Bill amend existing provisions relating to: titles coming into effect on gazettal; time for commencement of work; exemption from stamp duty; work practices; insurance; Minister's ability to issue directions to registered titleholder; requirement not to interfere with other persons rights; compensation to native titleholders; offences etc to apply to infrastructure licences.

10.16 Clause 189 of the Bill inserts "*infrastructure licence*" into the *Petroleum (Submerged Lands) Registration Fees Act 1982* as a title in respect of which fees may be prescribed on entry in the Register and clause 162 inserts section 141A, which imposes an obligation to pay the fees imposed under section 152 of the Submerged Lands Act in respect of an infrastructure licence.

10.17 Clause 168 of the Bill amends the general regulation-making power of the Submerged Act (section 152) to confer specific power to make regulations "*securing, regulating, controlling or restricting*":

- the construction, maintenance, operation or use of "*facilities*";
- maintaining in "*good condition and repair*" structures, equipment and other property used in connection with operations relating to the recovery, processing, storage and transport of petroleum; and
- the removal of the things set out above.

Whether consistent with common mining code

10.18 The Commonwealth Act has a different definition of "*infrastructure facility*". That definition is **Appendix 7.** Because "*facility*" is defined in the Submerged Lands Act to be a "*vessel or structure*",[105] the difference is the term "*installation*". "*Installation*" is not defined in the Commonwealth Act.

10.19 The rights conferred by an infrastructure licence under the Commonwealth Act are more specific. The Submerged Lands Act confers a general right to "*construct and operate infrastructure facilities in the infrastructure area*" (proposed section 60F(1)): the Commonwealth Act confers a right to conduct the "*activity specified in the licence*" (section 194).

10.20 As reported in Part 8 above, carbon dioxide storage and transport under the Submerged Lands Act is not consistent with the greenhouse gas provisions of the Commonwealth Act. This inconsistency is reflected in the provisions applying to

[105] Via section 4 and clauses 3 and 4 of Schedule 5.

infrastructure licences - under the Commonwealth Act a separate title is necessary for an infrastructure licence in respect of greenhouse gases; under the State Act carbon dioxide is included in petroleum titles.

10.21 Section 195 of the Commonwealth Act, which deals with conditions for an infrastructure licence, contains the following subsection which does not appear to be part of the proposed amendments to the Submerged Lands Act:

> *(4) The regulations may establish a regime for third party access to services provided by means of the use of an infrastructure facility that is for engaging in any of the activities to which subsection 15(3) applies.*

Subsection 15(3) of the Commonwealth Act describes greenhouse gas activities.

10.22 Section 197 of the Commonwealth Act, which deals with termination of an infrastructure licence after 5 years without activity has an additional subsection to that proposed by section 60H:

> *(4) For the purposes of subsection (3), the depletion of recoverable petroleum is not a circumstance beyond the licensee's control.*

10.23 The Bill also does not propose equivalents to provisions of section 200 and 262 of the Commonwealth Act referring to decision of the Joint Authority. These sections are **Appendix 7**.

10.24 The Committee has concluded that the proposed amendments are generally consistent with the common mining code.

Finding 6: The Committee finds that the amendments proposed by clauses 67(2), (5), and (6), 69, 70, 77(2), 115, 128, 129(1)(A), 130-135(1), 136, 137, 139-143, 150, 154(1), 156, 157, 160-165, 168 and 189 of the Bill, introducing the title of "*infrastructure licence*" to the Submerged Lands Act are (other than in respect of regulation of storage and transport of carbon dioxide) generally consistent with the uniform legislative scheme.

Activities that will require an infrastructure licence when in possession of other titles

10.25 Proposed sections 6B (clause 69 of the Bill) and 60F (clause 115 of the Bill) preserve titleholders rights to carry on activities that may be carried out under certain titles without additional need for an infrastructure licence but section 60D (clause 115 of the Bill), which requires the Minister to notify titleholders of an application for an

infrastructure licence, states that there is no need to give that notice when the applicant is the registered holder of the other title. This suggested to the Committee that there are infrastructure activities that will require a person having a current title to obtain an infrastructure licence in respect of area falling within the existing title.

10.26 In respect of the Commonwealth Act, the Productivity Commission Upstream Petroleum Report states:

> *an infrastructure licence only applies for activities that cannot be covered by a production licence*.[106]

10.27 The DMP advised:

> *It is conceivable that the rights conferred under an infrastructure licence could go beyond what is permitted under a production licence. The construction and operation of petroleum to methanol conversion plants is one possible example of such a right. The rights are subject to conditions, and these conditions would be entered on the infrastructure licence instrument.*[107]

Transitional provisions seen as unnecessary

10.28 The DMP advised that transitional provisions were considered unnecessary as:

> *The only activities affected relate to production and limited processing, which are carried out under a petroleum production licence. …*
>
> *Transitional provisions are not required because the infrastructure licence, or title, is not replacing any petroleum title type. It is a new type of title that could be required in addition to a production licence — this was an important part in the development of the commonwealth's legislation, although we have yet to see it occur — and it could be applied for by a third party interested only in the construction and operation of an at-sea processing plant. That would be a company other than a petroleum company that was just interested in, basically, industrial or chemical processing. This type of licence would allow that to occur.*[108]

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106 Productivity Commission of Australia, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, April 2009, p78.

107 Mr Colin Harvey, Principal Legislation and Policy Officer, Department of Mines and Petroleum, *Transcript of Evidence*, 9 February 2010, p15.

108 Ibid, pp15-6.

Issues arising

Whether there is a mechanism for resolving disputes arising in the life of co-existant titles

10.29 The provisions proposed by the Bill do not appear to satisfactorily resolve the situation where infrastructure licences and other titles may operate over the same area.

10.30 Proposed sections 60C and 60D - requiring notification of other titleholders and an opportunity for submission - mirror those relating to access authorities, which may also be granted over existing titles (section 112 of the Submerged Lands Act). However, an access authority is granted for a far more limited purpose and time.

10.31 With indefinite infrastructure licences, there may be issues arising and need for adjustment over the lives of the respective titles. There may be situations in which the needs of titleholders conflict - for example, exploration may be planned in an area where a facility is to be placed and operated.

10.32 Other issues may also arise - for example, it may become apparent during the term of the infrastructure licence that the environmental impacts were underestimated or not identified at commencement.

10.33 In light of the indefinite nature of infrastructure licences, and the limited circumstances in which they can be cancelled, a question arises as to whether the Minister/another titleholder should have power to vary/apply for a variation.

10.34 Section 72 of the Submerged Act provides a power for the Minister to vary a pipeline licence granted under that Act at the request of a Minister of the State or Commonwealth if the Minister considers that it is in the public interest.

Recommendation 12: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council:

- **whether there is a prospect of conflicting use arising by reason of an infrastructure licence and title being granted over the same area;**
- **if not, how this is avoided; and**
- **if so, of the legislative provision for resolution of any such conflict.**

11 CLAUSES 25 -31 AND 95 - 99 OF THE BILL: AMENDMENTS IN RESPECT OF RETENTION LEASES

Introduction

Current provisions for retention titles

11.1 The PGER Act and Submerged Lands Act both currently provide for the holder of:

- a petroleum/geothermal exploration permit granted under the PGER Act;
- a petroleum drilling reservation granted under the PGER Act; or
- a petroleum exploration permit granted under the Submerged Lands Act,

to apply for grant of a retention lease over one or more blocks comprising a "*location*"[109] (section 48A of the PGER Act and section 38A of the Submerged Lands Act).

11.2 A retention lease enables the titleholder to retain title over the relevant area without fulfilling the conditions of the original title in the event the Minister is satisfied that recovery of an identified petroleum pool is not commercially viable but is likely to become so within 15 years.[110] While a retention lease is in force, it confers exploration rights.[111] A retention lease remains in force for five years[112] and may be renewed from time to time.[113]

11.3 Section 38H of the Submerged Lands Act, and section 48H of the PGER Act, provide that a retention lease is subject to the condition that the lessee will re-evaluate the commercial viability of the production of petroleum when served with a notice by the Minister and inform the Minister of the results of that re-evaluation. The Minister is currently permitted to give two notices during the term of the lease.

11.4 A retention lease may be renewed. Renewal is subject to the same criteria as grant. There is an additional criterion that conditions and the regulations have been complied (unless the Minister is of the view that exceptional circumstances justify the renewal

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109 A "*location*" is a block within the title area of the permit of reservation in respect of which a petroleum pool has been identified and that has been declared by the Minister to be a "*location*" by notice published in the *Gazette*. (Sections 5, 46 and 47 of the *Petroleum and Geothermal Energy Resources Act 1967* sections and 4, 36 and 37 of the *Petroleum (Submerged Lands) Act 1982*).

110 Where the Minister is satisfied that recovery of petroleum from the area is not, at the time of the application for the retention lease, commercially viable but is likely to become commercially viable within 15 years, the Minister "*shall*" inform the applicant of preparedness to grant the lease. (Section 38B(1) of the *Petroleum (Submerged Lands) Act 1982*).

111 Section 38C of the *Petroleum (Submerged Lands) Act 1982*.

112 Section 38D of the *Petroleum (Submerged Lands) Act 1982*.

113 Section 38F of the *Petroleum (Submerged Lands) Act 1982*.

notwithstanding non-compliance).[114] The Minister is not to refuse to grant a renewal unless the lessee has been given one month's notice of that intention, giving particulars of the reason and an opportunity to make submissions. Notice and opportunity for submissions must also be given to such other persons as the Minister thinks fit.[115]

11.5 In the event the reason for refusal of renewal of a retention lease is that the Minister is not satisfied that recovery is not commercially viable, the lease continues for 12 months and there is a further 12 months for an application for a production licence to be made.

11.6 If a lessee has been given a notice under section 38H, the lessee has not applied for renewal of the lease and the Minister, after considering the result of the re-evaluation, is of the opinion that recovery of petroleum is commercially viable, the Minister is to inform the lessee (and any other person the Minister thinks appropriate) of that opinion and an intention to cancel the lease. After consideration of any response, the Minister may cancel the retention lease.[116]

11.7 Clauses 30 and 97 of the Bill respectively amend section 48H of the PGER Act and section 38H of the Submerged Lands Act to reduce to one the number of notices for re-evaluation the Minister may issue to the holder of a retention lease. The EM advises that:

> *This amendment is based on national competition policy reviews of the petroleum legislation that concluded that two re-evaluation notices were likely to impose additional costs to the titleholder. Aligns with the common mining code.*[117]

Productivity Commission Upstream Petroleum Report

11.8 On the number of reviews of the commercial viability of petroleum and upstream gas resources held under retention leases, the Productivity Commission Upstream Petroleum Report stated:

> *A particularly vexed issue is that of retention leases. Retention leases attempt to balance the need to give explorers some certainty of title over discoveries against the desire of governments to encourage development of oil and gas reserves. Retention leases are not awarded or renewed if a discovery is deemed to be commercial. In*

114 Section 38G of the *Petroleum (Submerged Lands) Act 1982.*

115 Ibid.

116 Section 38E of the *Petroleum (Submerged Lands) Act 1982.*

117 Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, p6.

> *this case, the lease holder must commence production or sell the lease to a company that will.*
>
> *There has been some pressure to make commerciality tests more rigorous, especially for gas reserves, in order to increase domestic gas supplies. In the extreme, lease holders might be compelled to commence production or lose the resource title, regardless of differing views about commerciality (a strict 'use it or lose it' test).*
>
> *Yet various reviews have not found any significant market failure justifying action to compel lease holders to sell or develop gas reserves — for example, competition was found adequate to ensure that individual businesses do not have an incentive to hoard reserves in order to influence prices. So it could be expected that companies generally will develop or on-sell their discoveries when they see the prospect of an adequate commercial return.*
>
> *In the Commission's assessment, to minimise unnecessary regulatory burdens arising from the retention lease renewal process, and the commerciality test in particular, governments should clearly articulate the criteria they will apply and demonstrate how application of these criteria will promote the public interest.*[118]

11.9 There does not appear to be any recommendation that the reviews of commercial viability be reduced.

Balance of the clauses

11.10 The balance of the clauses implement changes to the PGER Act and Submerged Lands Act to reflect the common mining code.

11.11 Clauses 26 and 94, for example, respectively amend sections 48B of the PGER Act and 38B of the Submerged Lands Act to require the Minister to refuse to grant a retention lease in the event that the Minister is not satisfied in respect of one of the blocks the subject of the application (previously the blocks were to be considered as a whole), that the block contains a petroleum or geothermal resource or that recovery is not commercially viable or is not likely to become so within 15 years.

Practical effect of clauses 30 and 97

11.12 The practical effect o clauses 30 and 97 is that there is less opportunity for the Minister to re-evaluate the commercial viability of a resource and cancel the retention

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[118] Productivity Commission of Australia, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, April 2009, pp xxiix-ix.

lease in the event an unsatisfactory response is received to the view that recovery of the petroleum is commercially viable.

Submission

11.13 The proposed reduction in the number of re-evaluation notices that may be issued during the term of a renewal lease was the only aspect of the Bill to be addressed by a submission. DomGas opposed that amendment on the basis that:

> *The amendments significantly reduce regulatory scrutiny and enforcement of petroleum retention leases. This could only contribute to the State's worsening gas shortage by making it easier for major gas producers to warehouse resources that might otherwise supply the local economy.*[119]

DMP response

11.14 DomGas' submission was put to the DMP at the hearing. the response was;

> ***Mr Harvey**: The issues raised in the submission on the practical effect of the proposed amendment are unresolved at the national level, and they may indeed, pending the outcome of various reviews, require further amendments to the commonwealth legislation. Without entering into the current policy issues raised in the submission, it is considered that, as this issue is unresolved and that the model commonwealth amendment was actually passed in 2001 as a result of the 2000 national competition policy review, it would be prudent to defer these amendments.*[120]

Reference to review in Second Reading Speech

11.15 The DMP explained the advice in the Second Reading Speech as to review recommendations in respect of re-evaluation as referring to the *Review of the Petroleum (Submerged Lands) Legislation Against Competition Policy Principles,* a final report to the Australian and New Zealand Minerals and Energy Council by the review committee, dated August 2000. THE DMP continued:

> *Because of the uniform nature of the legislation, the ANZMEC committee, or subcommittee as it then was, reviewed both the commonwealth legislation, as it then was the Petroleum (Submerged Lands) Act 1967, together with the petroleum (submerged lands) acts*

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119 Submission No 2 from Mr Tony Peterson, Chairman, DomGas Alliance, 19 January 2010, p1.

120 Mr Colin Harvey, Principal Legislation and Policy Officer, Petroleum and Environment Division, Department of Mines and Petroleum, *Transcript of Evidence,* 9 February 2010, pp16-7.

> *1982, because there was one for each state and territory. It was a combined review. It was that review at page 29 through to 35 that concluded that the legislation should be amended so that the regulator may request a re-evaluation of the commerciality of a discovery no more than once during the term of the lease rather than the twice as at present. The commonwealth put through that amendment in 2001, I believe.*[121]

Committee's conclusion

11.16 The number of re-evaluation notices that may be issued by the Minister during the legislatively prescribed term of a retention lease may be a matter of policy.

11.17 However, the Committee notes the DMP view that: "*it would be prudent to defer these amendments*". This is a matter that requires clarification.

Recommendation 13: The Committee recommends that the Minister for Mines and Petroleum advise the Legislative Council whether the Executive proposes to delete clauses 30 and 97 from the Bill. If so, this can be effected in the following manner.

Page 26, lines 3-6 - To delete the lines

Page 77, lines 1-4 - To delete the lines

12 CLAUSES 28, 42-45, 95 AND 110-113: RETENTION LEASES AND INDEFINITE TERMS FOR PRODUCTION LICENCES

Introduction

12.1 Clauses 28 and 95 of the Bill respectively propose introduction of retention leases for:

- petroleum and geothermal production licences - PGER Act; and
- petroleum production licences - Submerged Lands Act.

12.2 Clauses 42 and 110 of the Respectively propose amendments to section 63 of the PGER Act and 53 of the Submerged Lands Act to increase the term of a production licence from 21 years, with a first renewal of 21 years and a second renewal of a period not exceeding 21 years, to an indefinite term. They also permit the second renewal to be for an indefinite term.

12.3 A production licence authorise recovery of (and some exploration for) petroleum/geothermal energy.

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121 Ibid, p17.

Retention leases

Provisions

12.4 Clauses 28 and 95 propose identical sections, numbered 48CA to 48CC in the PGER Act and 38CA to 38CC in the Submerged Act, providing;

- 38CA/48CA - that if a production licence is in force and no operations for recovery are being carried on in respect of an area in which petroleum has been found, the licencee may apply (within five years of the licence being granted or within five years of the last day on which recovery operations were carried on) to the Minister for grant of a retention lease over the unused area. The application is to be accompanied by details of the commercial viability of the recovery of petroleum/thermal energy;

- 38CB/48CB - if the Minister has been provided with the information required, and is satisfied that recovery of petroleum/geothermal energy from the unused area if not commercially viable but is likely to become so in the next 15 years, is to give the applicant notice of an intention to grant the lease subject to conditions (which are summarised in the notice). The applicant must then request the grant in writing. On grant of a retention lease, the production licence ceases to have force; and

- Section 38CC/48CC - place a transferee in the position of an applicant in the event of a transfer while the Minister is deciding whether to grant a lease.

12.5 The provisions that apply to retention leases generally, such as direction to re-evaluate the commercial viability and provision for renewal, apply to such retention leases issued in respect of production licences.

Explanation

12.6 The Explanatory Memorandum identifies the clauses as relating to each other but provides no explanation beyond "*Aligns with the common mining code*".[122] The Second Reading Speech also identifies the extension of the term of the production licence but does not explain it.[123]

DMP Written Response

12.7 The Committee provided THE DMP with a number of questions in relation to these amendments. The DMP Written Response to those questions is **Appendix 8**.

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122 Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 26 November 2009, p9858.

123 Ibid.

13 CLAUSES 22, 23, 31, 53, 54, 55, 59, 64(1), 90, 91, 98, 99, 152, 155 AND 166: REGULATION OF INFORMATION MADE PUBLICLY AVAILABLE MOVED FROM ACTS TO REGULATIONS

Provisions of the principal Acts and the Bill

13.1 Section 48J of the PGER Act imposes an obligation on the holder of a petroleum lease to advise the Minister of the discovery of petroleum/geothermal energy resource and for the Minister to require certain information in respect of that discovery. Sections 34 and 38J of the Submerged Lands Act impose the same obligation on the holder of a permit or lease. Clauses 31, 90 and 98 of the Bill propose deletion of the Minister's power to request detail of the discovery.

13.2 Sections 44(2), (2a) and (3) of the PGER Act currently provides that where petroleum is discovered in a petroleum/geothermal permit area or petroleum/geothermal drilling reservation, the Minister may require the holder of the title to provide information in respect of:

- the chemical composition and physical properties of the petroleum/geothermal energy resource;
- the nature of the strata in which the petroleum/geothermal energy resource occurs; and
- any other matter relating to the discovery.

13.3 Sections 35 and 38K of the Submerged Lands Act impose the same obligation in respect of permits and leases.

13.4 Clauses 22, 91 and 99 of the Bill propose deletion of sections 44(2), (2a) and (3) of the PGER Act and sections 35 and 38K of the Submerged Lands Act.

13.5 Section 45 of the PGER Act currently provides the Minister with power to require the holder of a title to undertake such things as the Minister specifies to determine the chemical and physical properties, and quantity of, a discovery of petroleum/geothermal energy. Clause 23 of the Bill proposes deletion of this section of the PGER Act.

13.6 Section 112 of the PGER Act currently provides that the Minister may make available to another State Minister nay information provided to the Minister under that section and any cores, cuttings or samples that have been furnished to the Minister. The Minister may also make publicly known information provided on an application for a title (or to renew a title) or make certain information provided to the Minister known to an applicant for a title. Section 112 comprises some 7 pages and contains detailed provisions as to the circumstances in which information provided to the Minister in respect of petroleum and geothermal energy resources may be made known to

particular persons and the public. Section 118 of the Submerged Lands Act is in essentially the same terms.

13.7 Clauses 53 and 152 of the Bill propose deletion of section 112 of the PGER Act and section 118 of the Submerged Lands Act.

13.8 Section 114 of the PGER Act provides that the Minister may require a titleholder to carry out a survey of a well, structure or equipment and provide the Minister with specified information. Clause 54 of the bill proposes deletion of this section.

13.9 Clauses 55 and 155 of the Bill respectively insert into the PGER Act and Submerged Lands Act power, in proposed sections 116A and 123A, for regulations to "*make provision for and in relation to*":

> *(1)(b) the collection and retention of cores, cuttings and samples in connection with those operations; and*
>
> *(c) the giving to the Minister, **or a specified person**, of reports, returns, other documents, cores cuttings and samples in connection with those operations.*
>
> (Committee's emphasis)

13.10 Clauses 59 and 166 of the Bill respectively insert new Parts IVA - "*Release of information*" into the PGER Act and Submerged Lands Act.

13.11 Part IVA comprises sections 150A to 150G (PGER Act) and Parts 152A to 152G (submerged Lands Act). Sections 150B and 150C (152B and 152C) provide that the Minister shall not make information contained in an application for a title or in respect of a discovery, or samples, publicly known or available to a person (other than another Minister or Minister of another jurisdiction) except in accordance with regulations.

Practical effect

13.12 The practical effect of clauses 22, 23, 31, 53, 54, 55, 59, 64(1), 90, 91, 98, 99, 152, 155 and 166 of the Bill is to transfer regulation of the information to be provided to the Minister in respect of a petroleum and geothermal energy resources, and the making of that information available to the public, industry and other Ministers/Ministers of other jurisdictions from primary to subsidiary legislation.

13.13 Proposed sections 116A (PGER Act) and 123A (Submerged Lands Act) also propose that regulations may require the provision of information to "*specified persons*", rather than the Minister.

Explanation

13.14 The Explanatory Memorandum states in respect of clauses 55 and 155, that the regulation-making power is "*consistent with the move to objective-based regulations*" and that:

> *much of the information and material collected will eventually become publicly available and useful to petroleum and geothermal exploration companies with a future interest in the same area … Aligns with the common mining code.*[124]

13.15 Clauses 59 and 166 are said to "simplify" the provisions in respect of release of information by:

> *enabling the requirements for confidentiality for information and samples to be set by regulation. Aligns with common mining code.*[125]

13.16 Deletion of the Minister's power to require certain information, and require a titleholder to take steps to obtain information, and transfer of regulation to subsidiary legislation are 'explained':

> *these matters are more appropriately covered in regulations.*[126]

"Specified person"

13.17 The Committee enquired as to the significance of information being required to be provided to a "*specified person*", rather than the Minister. The DMP Additional Written Response advises that:

> *the term "specified person" refers to the persons who in reality receive the data (reports, drill cores and tapers) as listed at p.3 of the Guidelines for Data Submission under WA & Commonwealth Legislation …*
>
> *It satisfies the practicalities of doing business rather than having the "Minister" as the receiving point for bulky and heavy items. In WA, for example, the data is received and managed within the Geological Survey while the DA* [Designated Authority - stated to be the State Minister] *is in a separate part of the department. This also enables Geoscience Australia to be a receiving point for data that satisfies the data submission requirements. An example here are seismic field*

124 Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, pp9 and 24.

125 Explanatory Memorandum to the Petroleum and Energy Legislation Amendment Bill 2009, pp10 and 26.

126 Ibid.

> *tapes; they are only submitted to Geoscience Australia and not to the DA although the DAs are informed of submission.*[127]
>
> (DMP emphasis)

13.18 The DMP Additional Written Response states that the use of the term "*specified person*" does not indicate a transfer in discretion as to information required from the Minister to a "*specified person*".[128]

Transfer from Act to regulations not fully explained

13.19 The Committee queried why it was more "*appropriate*" for matters previously grounded in the relevant Acts to be relegated to the administrative realm. The DMP Written Response stated:

> *The matters covered by this question are technical in nature and could include, for example, but not be limited to, chemical composition, physical properties, depth, temperature and reservoir pressure. In a technical piece of legislation covering an extremely technical and complex industry, it has long been considered in the Commonwealth model legislation that there matters do belong in regulations. This is especially so given the constantly changing technical requirements of the petroleum industry.*[129]

13.20 This explains the need for detail in regulations, but does not explain deletion of the relevant sections of the principal Acts. The sections that it is proposed to delete do not, so far as the Committee has been able to determine, preclude the making of regulations in respect of the detail of the information/activities that may be required by the Minister. The DMP Written Response points to section 152 of the PGER Act as containing regulation-making powers "*complementing*" proposed section 116A.[130]

13.21 The Committee notes that the relevant parts of section 116A (set out in paragraph 12.9 above) are in the same terms as the sections proposed to be deleted by the Bill: they do not provide any additional detail.

13.22 Proposed sections 116A and 123A state that regulations may "*provide for*" the stipulated matters, rather than the matters are to be "*prescribed*". As the Committee has previously reported, use of the term "*provide for*" in a regulation-making power

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127 The DMP additional information in respect of written responses to questions not answered or taken on notice, dated 22 February 2010, p3.

128 Ibid, p3.

129 Written Response to questions not answered or taken on notice, Department of Mines and Petroleum, 15 February 2010, p10.

130 Ibid.

has potential for regulations to be made "*providing for*" the requirements to determined administratively. For example, a regulation stating that the title holder is to furnish such information as the Director General determines. Whether such a regulation would be authorised is a matter to be determined in considering the relevant Act as a whole. However, use of the "*provide for*" creates an ambiguity as to how much regulation will actually be in the regulations subjected to Parliamentary scrutiny.

13.23 The DMP Written Response explanation for use of the term "*provide for*" in the regulation-making power is:

> *In petroleum legislation the overall trend since the 1990s has been to move from a prescriptive to an objective or outcomes based form of regulation. … This allows for the development in the new regulations proposed under section 116A for changes in response to technology and circumstance, as long as key principles are adhered to.*[131]

13.24 It is the Committee's view that the "*key principles*" of the legislative framework for regulation should be located in the Act, with regulations providing the detail and flexibility to adapt to changing circumstance. Where subsidiary legislation provides the "*key principles*" only, the obligations imposed on persons are not subject to the scrutiny of the Parliament.

Finding 7: The Committee finds that the key principles of the legislative framework regulating a particular matter should be in primary, not subsidiary, legislation.

Recommendation 14: The Committee recommends that the Minister for Mines and Petroleum explain the necessity for the "*key principles*" in respect of furnishing information in relation to a petroleum or geothermal energy resource discovery, and provision of that information to others, to be in subsidiary not primary legislation.

Information to be made publicly available

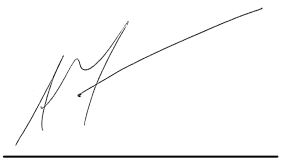
13.25 The Committee enquired whether the terms of proposed sections 150A to 150G of the PGER Act and 152A to 152G of the Submerged Lands Act (clauses 59 and 166 of the Bill) had the potential to reduce the publicly available information. The DMP Written

131 Written Response to questions not answered or taken on notice, Department of Mines and Petroleum, 15 February 2010, p11.

Response is that the provisions encourage dissemination of information.[132] The DMP Written Response also stated:

> *While the vast majority of information supplied by industry is non controversial in this aspect, the legislation has to cater for exceptions such as:*
>
> - *commercial in confidence*
> - *Trade secrets*
> - *Non-public financial records*
> - *Resumes of personnel in applications for titles*
>
> *Where the Regulations allow release of data, they will generally impose some period of delay on their public availability. Seismic survey companies, which draw their income from selling data to petroleum explorers, are particularly reliant on this period of confidentiality.*
>
> …
>
> *This is the system that has worked well under the model commonwealth legislation. The Commonwealth's current regulations covering this matter, the Petroleum (Submerged Lands) (Data Management) Regulations 2004 will provide the model for the development of the WA regulations. Part 6, Divisions 1 and 2 of these regulations covers the release of information.*[133]

13.26 The Committee draws the *Petroleum (Submerged Lands) (Data Management) Regulations 2004* (Cwlth) to the attention of the House.



Hon Adele Farina MLC
Chairman
22 April 2010

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132 Written Response to questions not answered or taken on notice, Department of Mines and Petroleum, 15 February 2010, p12.

133 Ibid.

APPENDIX 1

LIST OF STAKEHOLDERS

APPENDIX 1

LIST OF STAKEHOLDERS

Ms Belinda Robinson, Chief Executive, Australian Petroleum Production and Exploration Association Ltd

Mr David Marsh, President, WA Branch AMPLA Ltd

Mr Tony Petersen, Chairman, DomGas Alliance

Ms Jane Cutler, Chief Executive Officer, National Offshore Petroleum Safety Authority

Ms Regina Flugge, Executive Officer, Chamber of Minerals and Energy

Mr David Price, Executive Director, The Law Society of WA

Mr Nathan Taylor, Manager Business Policy, Chamber of Commerce and Industry WA

Mr Richard Sellers, Director General, Department of Mines and Petroleum

Mr Keiran McNamara, Director General, Department of Environment and Conservation

Mr Peter Robertston, State Coordinator, The Wilderness Society Western Australia

Ms Patricia Barblett AM, Acting Chair, Conservation Commission of Western Australia

Dr Hannes Schoombee, Convenor, Environmental Defender's Office WA (Inc)

Professor David Harries, President, Conservation Council of Western Australia

Ms Cheryl Cartwright, Chief Executive, Australian Pipeline Industry Association

APPENDIX 2

CLAUSES OF THE BILL THAT AMEND SECTIONS OF THE PRINCIPAL ACTS AS AMENDED BY SECTIONS OF ACTS NOT PROCLAIMED

APPENDIX 2

CLAUSES OF THE BILL THAT AMEND SECTIONS OF THE PRINCIPAL ACTS AS AMENDED BY SECTIONS OF ACTS NOT PROCLAIMED

The schedule for the *Petroleum and Geothermal Resources Energy Act 1967 and the Petroleum Pipelines Act 1969 is provided below.*

Amending provision (Petroleum and Energy Legislation Amendment Bill 2009)	*Amended provision*	*Amending provision not yet in effect*
cl. 4(2)	*PGERA s. 5(1) def. of **listed OSH law***	*PLARA s. 4*
cl. 4(3)	*PGERA s. 5(1) def. of **operator***	*PLARA s. 4* *PAA s. 85(c)-(i)*
cl. 4(5)	*PGERA s. 5(1) def. of **petroleum operation***	*PLARA s. 4*
cl. 53	*PGERA s. 112*	*PLARA s.16(2)*
cl. 60	*PGERA s. 153(2)*	*PLARA s. 15(1)* *PAA s. 87*
cl. 62	*PGERA Sch. 1*	*PLARA s. 17* *PAA s 86, s. 87*
cl. 64(8)	*PGERA s. 91*	*PLARA s. 7*
cl. 64(13)	*PGERA s. 118*	*PLARA s. 9*
cl. 64(14)	*PGERA s. 119*	*PLARA s. 10*
cl. 182	*PPA s. 61*	*PLARA s. 24, s. 31*
cl. 183(2)	*PPA s. 67(1c)*	*PLARA s. 30(2)*
cl. 184	*PPA Sch. 1*	*PLARA s. 32*

The following abbreviations are used:
***PAA** for the Petroleum Amendment Act 2007*
***PGERA** for the Petroleum and Geothermal Energy Resources Act 1967*
***PLARA** for the Petroleum Legislation Amendment and Repeal Act 2005*
***PPA** for the Petroleum Pipelines Act 1969*

APPENDIX 3

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 4

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLE

APPENDIX 4

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLE

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

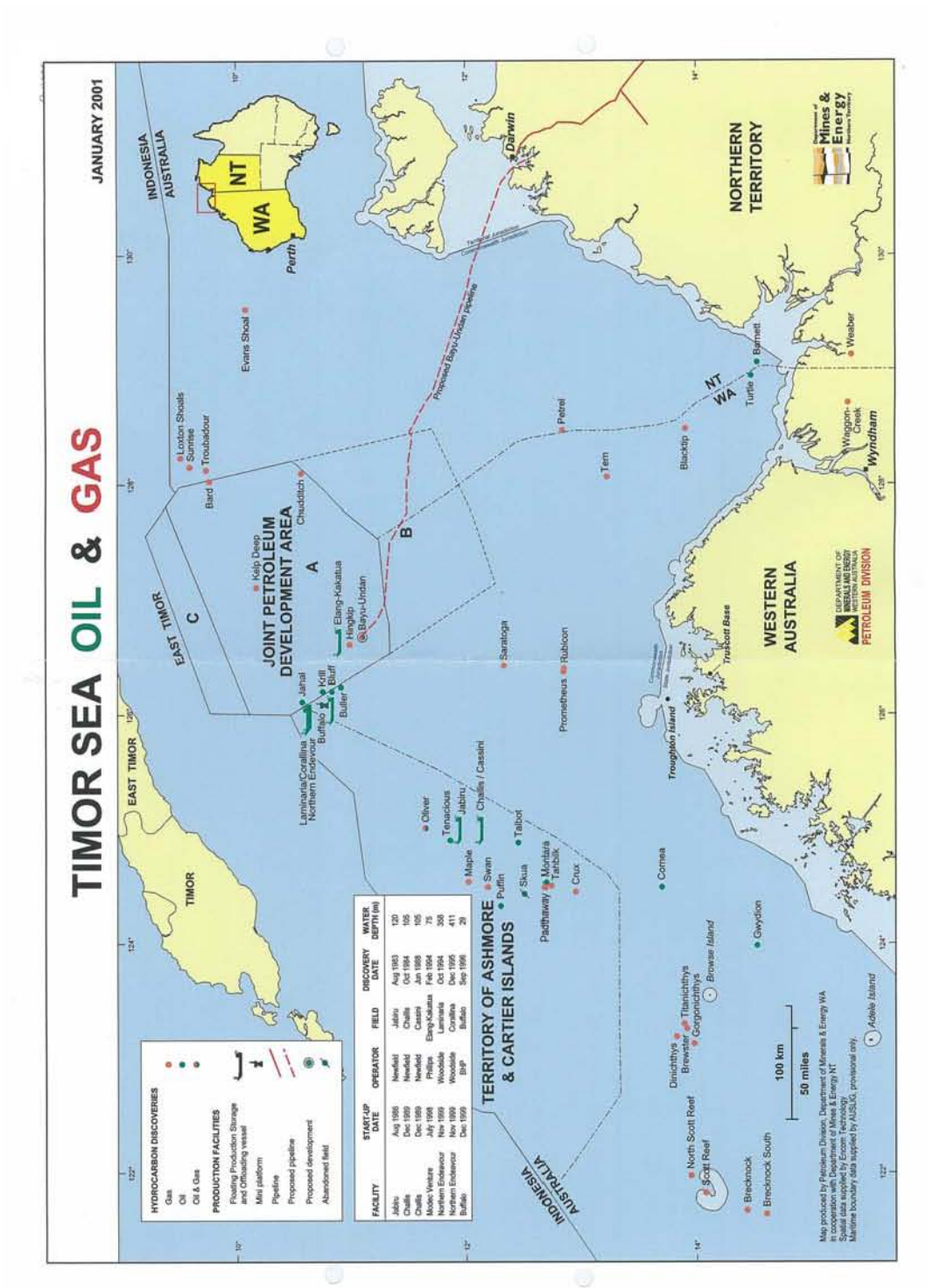
12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 5

TIMOR SEA OIL AND GAS - JANUARY 2001

APPENDIX 5

TIMOR SEA OIL AND GAS - JANUARY 2001

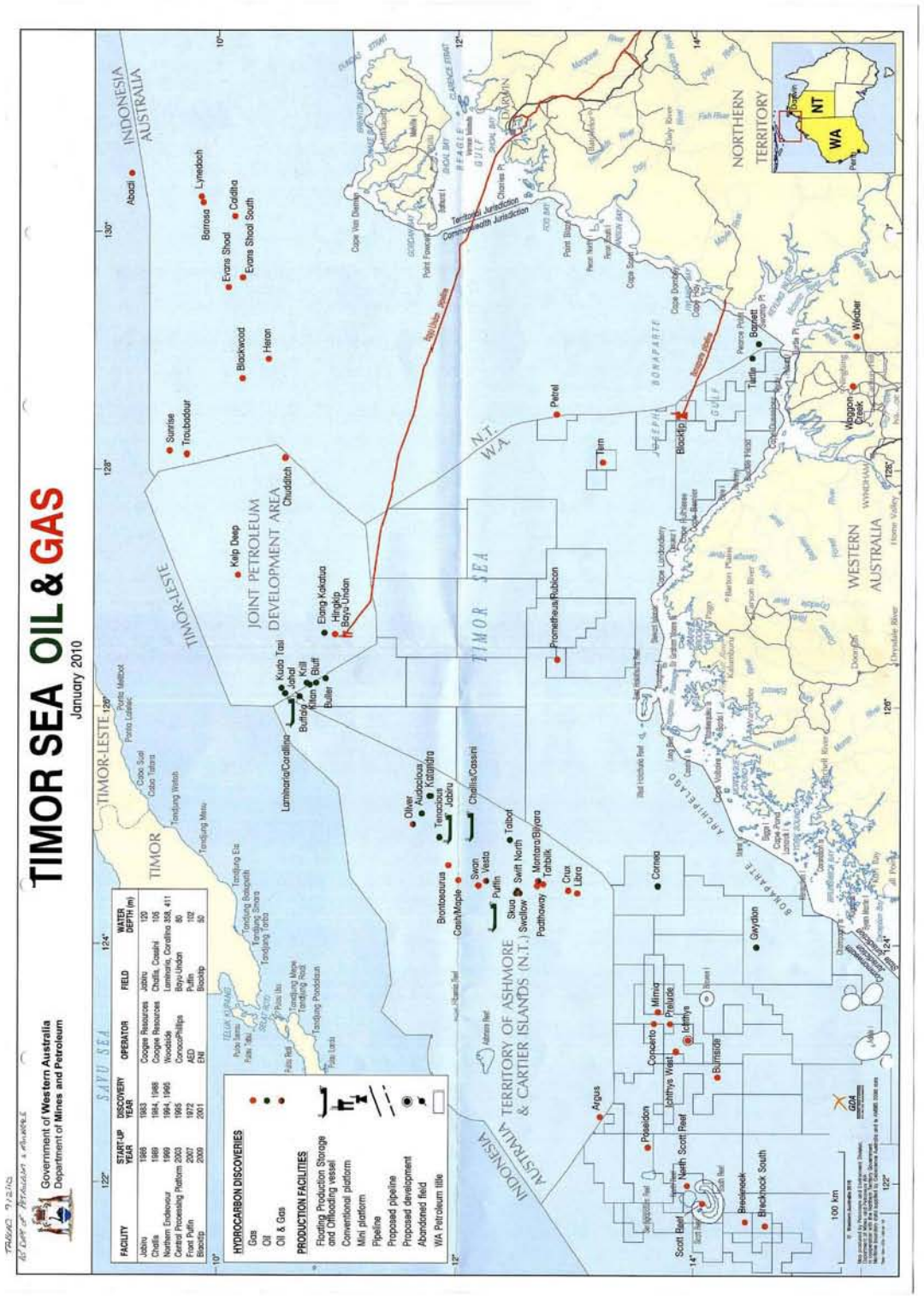


APPENDIX 6

TIMOR SEA OIL AND GAS - JANUARY 2010

APPENDIX 6

TIMOR SEA OIL AND GAS - JANUARY 2010



APPENDIX 7

OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE ACT 2006

APPENDIX 7

OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE ACT 2006

OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE ACT 2006 - SECT 15

Infrastructure facilities

Definition

(1) For the purposes of this Act, an ***infrastructure facility*** is a facility, structure or installation for engaging in any of the activities to which subsection (2) or (3) applies, so long as:

(a) the facility, structure or installation rests on the seabed; or

(b) the facility, structure or installation is fixed or connected to the seabed (whether or not the facility is floating); or

(c) the facility, structure or installation is attached or tethered to a facility, structure or installation referred to in paragraph (a) or (b).

Petroleum activities

(2) This subsection applies to the following activities:

(a) remote control of facilities, structures or installations used to recover petroleum in a petroleum production licence area;

(b) processing petroleum recovered in any place, including:

(i) converting petroleum into another form by physical or chemical means, or both (for example, converting it into liquefied natural gas or methanol); and

(ii) partial processing of petroleum (for example, by removing water);

(c) storing petroleum before it is transported to another place;

(d) preparing petroleum for transport to another place (for example, pumping or compressing);

(e) activities related to any of the above;

but, except as mentioned in paragraph (a), this subsection does not apply to exploring for, or recovering, petroleum.

Greenhouse gas activities

(3) This subsection applies to the following activities:

(a) activities preparatory to injecting a greenhouse gas substance into an identified

greenhouse gas storage formation (for example, controlling the flow of a greenhouse gas substance into the relevant well);

(b) preparing a greenhouse gas substance for injection into an identified greenhouse gas storage formation (for example, pumping, processing or compressing);

(c) preparing a greenhouse gas substance for transport to another place (for example, pumping or compressing);

(d) storing a greenhouse gas substance before it is:

(i) transported to another place; or

(ii) injected into an identified greenhouse gas storage formation; or

(iii) subjected to any other activity at a facility, structure or installation;

(e) monitoring the behaviour of a greenhouse gas substance stored in an identified greenhouse gas storage formation;

(f) remote control of facilities, structures or installations used to:

(i) inject a greenhouse gas substance into an identified greenhouse gas storage formation; or

(ii) store a greenhouse gas substance in an identified greenhouse gas storage formation; or

(iii) do anything mentioned in any of the above paragraphs;

(g) activities related to any of the above.

(4) For the purposes of subsection (3), the injection of a greenhouse gas substance into an identified greenhouse gas storage formation is taken to take place at the top of the relevant well.

APPENDIX 8

DEPARTMENT OF MINES AND PETROLEUM, ANSWERS REGARDING RETENTION LEASES FOR PRODUCTION LICENCES

APPENDIX 8

DEPARTMENT OF MINES AND PETROLEUM, ANSWERS REGARDING RETENTION LEASES FOR PRODUCTION LICENCES

ADDITIONAL QUESTIONS PROVIDED TO DMP IN THE STANDING COMMITTEE'S LETTER OF 8 FEBRUARY (All Taken On Notice)

RETENTION LEASE FOR PRODUCTION LICENCES

Q 1. What is the practical effect of the amendments proposed by clauses 28, 42, 43, 53, 110 and 111 of the Bill?

- **How is the situation where recovery is non commercial dealt with under the current legislation?**

Response - Under the current legislation, production licences are granted for a term of 21 years with the rights of renewal for a further 21 year term. A second renewal is subject to the Minister determining the term for a period up to, but not exceeding 21 years. This last period would be dependent on the likely remaining life of the field after a total of 42 years of production.

It is only at this latter stage that with the length of renewal at the Minister's discretion that any real pressure could be used to encourage exploration. However, the commercial driver of the price of oil and gas have served to encourage further exploration leading reappraisal of existing fields together with improved seismic and improvements in drilling and recovery technology. This has been the case for the State's production licences in the waters of the North West Shelf and onshore in the northern Perth Basin.

- **What practical differences are introduced by the amendments proposed by the Bill?**

Response - The practical differences introduced by the amendments are that rather than allowing a non commercially producing production licence continuing force for its full 21 year term and then being renewed for its further 21 years, that there is a mechanism to allow for the transition to a retention lease. The grant of a new retention lease would include as a condition of the title a year-by-year work program for the five year term of the lease. Retention leases are also granted on the basis that the fields will become commercial within a 15 year timeframe.

- **Why are these amendments necessary?**

Response - As part of the common petroleum mining code amendments following the Commonwealth model, the amendments are necessary to complement the proposed change to the term of a production licence from 21 years to an indefinite term linked to the producing life of the field. Indefinite terms were introduced into the Commonwealth model legislation to cater for the long term nature of LNG contracts required to support natural gas projects.

The move to an indefinite term for petroleum production licences required a mechanism to allow for transition to a retention lease, or if the holder of the production licence had gone beyond the 5 year period of grace allowed for in the amendments, for the termination of the production licence. This latter provision is discussed in the response below to question 2.

Q 2. Proposed section 64A for the PGER Act (and section 54A for the Submerged Lands Act) requires the Minister to give one month's notice of intention to cancel a production licence for lack of recovery operations. This appears to assume an opportunity to respond.

- **Is this correct?**

Response Yes this is correct and assumes that the holder of the production licence has done nothing during the 5 year application period mentioned in the response to the following question.

- **If so, where is provision made for the licensee to make submission; and for the Minister to consider those submissions prior to reaching a decision to cancel?**

Response - The proposed termination provisions follow the five year application period for a production licensee to apply for a retention lease allowed for in the new Petroleum and Geothermal Energy Resources Act 1967 section 48CA in clause 28 of the Bill. The 5 year application period is defined in section 48CA (7). In the highly unlikely event that the holder of the production licence has not applied for a retention lease during this 5 year period, then there is one last chance during the one month's notice under section 64 to provide the Minister with reasons not to terminate the licence.

All of these provisions are also proposed for the amendments to the Petroleum (Submerged Lands) Act 1982 and follow the provisions of the Commonwealth model legislation.

Q 3. As sections 38C, of the Submerged Lands Act and 48C of the PGER Act only confer exploration rights:

- **What is to occur in the event recovery becomes in the licencee's view commercially viable with in the five year period of the retention lease?**

If in the lessee's view recovery becomes commercially viable within the 5 year period of the retention lease, the lessee has the right to apply while a lease is in force for a new production licence under the existing provisions of section 50A of the Petroleum and Geothermal Energy Resources Act 1967 and section 40A of the Petroleum (Submerged Lands) Act 1982.