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General

1.1 On 18 June 2008, the Minister for Resources and Energy, the Hon Martin Ferguson MP, introduced into the House of Representatives the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008, the purpose of which is to 'enable carbon dioxide to be stored safely and securely in geological storage formations deep underground in Australian offshore waters under Commonwealth jurisdiction'.[1] The Minister noted the potential importance of carbon capture and storage (CCS) in reducing Australia's greenhouse gas emissions.

1.2 The focus of the Bill is 'on the provision of access and property rights for greenhouse gas injection and storage activities in Commonwealth offshore waters and provides a management system for ensuring that storage is safe and secure'.[2] The Bill is also designed to balance the potential conflict of interest between the offshore petroleum industry and the greenhouse gas (GHG) storage industry in Commonwealth offshore waters. The Minister observed in his second reading speech that:

> The types of geological formations that have stored oil and gas and, in some cases, carbon dioxide for millions of years are the same or similar to the storage formations proposed for greenhouse gas storage. Petroleum and greenhouse gas operations are therefore likely to operate in similar regions. The amendments seek to balance the rights of this new storage industry with the rights of the petroleum industry in a manner that encourages investment in both industries. The proposed legislation recognises the need to:

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1 The Hon Martin Ferguson MP, *CPD*, House of Representatives, 18 June 2008, p. 5132.

2 The Hon Martin Ferguson MP, *CPD*, House of Representatives, 18 June 2008, p. 5133.

- provide greenhouse gas injection and storage proponents with the certainty needed to bring forward investment; and
- preserve pre-existing rights of the petroleum industry as far as is practicable to minimise sovereign risk to existing titleholders' investment in Australia's offshore resources.[3]

1.3 As part of the consultation process connected to the introduction of the Bill, the Minister asked the House of Representatives Standing Committee on Primary Industries and Resources to conduct an inquiry into the provisions of the draft Bill, specifically to ascertain whether the Bill:

> a) Establishes legal certainty for access and property rights for the injection and long-term storage of greenhouse gases (GHGs) in offshore Commonwealth waters;
>
> b) Provides a regulatory regime which will enable management of GHG injection and storage activities in a manner which responds to community and industry concerns;
>
> c) Provides a predictable and transparent system to manage the interaction between GHG injection and storage operators with pre-existing and co-existing rights, including, but not limited to, those of petroleum and fishing operators, should these come into conflict;
>
> d) Promotes certainty for investment in injection and storage activities; and
>
> e) Establishes a legislative framework that provides a model that could be adopted on a national basis.

1.4 The objective of the Bill is to provide an enabling framework for GHG storage in offshore Commonwealth waters. The Committee believes it meets this objective. It is designed to manage interactions between the petroleum industry and the GHG storage industry. With certain caveats, the Committee believes it meets this objective. More detailed examination of aspects of the Bill are provided in this and subsequent chapters.

1.5 The Committee believes that the Bill does establish an effective framework for access and property rights for the injection and long-term storage of greenhouse gases in offshore Commonwealth waters; although how the access and property rights provided for under the Bill

3 The Hon Martin Ferguson MP, *CPD*, House of Representatives, 18 June 2008, p. 5133.

actually operate will depend a great deal on the regulations and guidelines (yet to be issued), and practice over time.

1.6 The Committee also believes that the Bill does provide a regulatory regime which will enable management of GHG injection and storage activities in a manner which responds to community and industry concerns; however, both industry and the community have concerns about how this legislation will operate and these concerns will only be assuaged if both CCS and the legislation fulfil their potential.

1.7 The Committee is of the view that the Bill provides a predictable and transparent system to manage the interaction between GHG injection and storage operators and petroleum operators with pre-existing and co-existing rights, but has recommended a number of changes to defuse potential conflict and increase cooperation between those sectors.

1.8 The Committee believes that to the extent the Bill provides a legislative framework within which industry may operate, it provides some degree of certainty for investment in injection and storage activities, although the report highlights a number of industry concerns in this area. The Committee has made recommendations with a view to increasing levels of investment certainty.

1.9 The Committee believes that the Bill is unlikely to be adopted as the model for a national legislative framework in its entirety, although elements of the Bill may be suited to consistent application nationally. This is the start of a new industry. The Bill does what it is designed to do—namely, provide an enabling framework for GHG storage in Commonwealth offshore waters—and should be enacted on that basis.

The use of the OPA platform

1.10 The decision to use the Offshore Petroleum Act as the platform for GHG storage was based on the technical similarities between petroleum exploration and extraction and GHG storage, and the need to manage the interactions between the two activities within a consistent framework. In evidence before the Committee, the Department of Resources, Energy and Tourism explained:

> Following consultation with relevant Commonwealth agencies, the Offshore Petroleum Act 2006, or the OPA, was identified as the most appropriate vehicle for implementation of a greenhouse gas injection and storage regime in Commonwealth waters. This was

> consistent with the MCMPR principle that existing legislation and regulation relating to assessment and approval processes for CCS be identified, modified and augmented where necessary—in other words, do not unnecessarily duplicate or add to existing legislation or make new legislation. Use of the OPA, which was endorsed by the MCMPR in December 2006, allows for the establishment of an effective regulatory framework for greenhouse gas injection and storage and ensures both the existing petroleum industry and the newly emerging greenhouse gas injection and storage industry can coexist in Commonwealth offshore waters.[4]

1.11 The decision to use the OPA as the platform for GHG storage legislation has received a mixed reception. In its submission, ExxonMobil endorsed the framework established by the Bill, but with certain caveats:

> ExxonMobil believes that the Bill establishes a framework that is suitable for adoption on a national basis by using a regulatory structure analogous to petroleum regulation in Australia. In particular, we note and support the intent of the provisions of the Bill designed to protect the rights of existing petroleum license holders. ExxonMobil retains concerns about some aspects of the Bill that may act as obstacles to establishing the investment and legal certainty required to enable broad, large scale deployment of CCS.[5]

1.12 Likewise, Chevron supported the use of the OPA model:

> The proposal to establish a series of title rights equivalent to those applied to the upstream petroleum industry provides an effective mechanism for providing property rights for carbon dioxide storage proponents and for the regulation of activities related to the storage of greenhouse gases. This property rights model has provided certainty for the oil and gas industry and is an appropriate model for the establishment of a greenhouse gas storage industry.[6]

1.13 Again, however, Chevron questioned the detail of the Bill and its potential impact on the oil and gas industries:

> Chevron is concerned that the title rights, both for the oil and gas industry and the greenhouse gas storage industry, granted post the proposed amendments will have less legal certainty than that

4 Mr John Hartwell, DRET, *Transcript of Evidence*, 15 July 2008, pp. 1–2.

5 ExxonMobil, Submission no. 6, p. 9.

6 Chevron, Submission no. 8, p. 2.

> currently enjoyed by the oil and gas industry. This arises as a consequence of the significant powers provided to the Minister to determine outcomes in the public interest where activities in the oil and gas industry (but potentially in other sectors) come into conflict.
>
> This erodes the certainty currently enjoyed by oil and gas explorers that having discovered a commercial resource they will be able to develop it. Neither the oil and gas explorers (with rights granted post-amendment) nor the greenhouse gas storage assessors (explorers) will enjoy this current level of certainty.[7]

1.14 In evidence before the Committee, Mr Noel Mullen, Deputy Chief Executive, Commercial and Corporate for APPEA, congratulated the Government on its groundbreaking legislation:

> APPEA strongly commends the work of the Minister for Resources and Energy, the Department of Resources, Energy and Tourism and the relevant parliamentary draftsman in preparing the bill we are considering this week. The legislation is truly groundbreaking and it will make Australia the first jurisdiction to develop a comprehensive framework for greenhouse gas injection activities.[8]

1.15 In its submission, Anglo Coal questioned the wisdom of basing legislation for GHG storage on the OPA—the result being an inherently biased piece of legislation:

> It is inescapable that the Bill was originally crafted at a time when the protection of existing petroleum interests was seen as the priority objective, and the reduction of Greenhouse gas emissions was a subordinate consideration. The Bill is heavily biased toward the protection of petroleum interests and, while it nominally makes CCS possible, it does not reflect a determination to make it happen.[9]

Model framework

1.16 While there is acceptance of the OPA model as the framework for the GHG storage legislation, the issue of whether the Bill provides a model framework for other jurisdictions is contested.

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7 Chevron, Submission no. 8, p. 3.

8 Mr Noel Mullen, APPEA, *Transcript of Evidence,* 18 July 2008, p. 19.

9 Anglo Coal, Submission no. 24, p. 1.

1.17 In its submission, BP accepted the bill as a model that could be adopted on a national basis, stating 'We believe that the Bill is acceptable in this regard and encourage the States to mirror this legislation'.[10]

1.18 Chevron also supported the Bill as a model for other jurisdictions:

> Chevron supports the adoption of a nationally consistent approach to the regulation of greenhouse gas storage. It is in the longer term interests of the emergent greenhouse gas storage industry to have a consistent set of legislative arrangements across all Australian Governments as opposed to different approaches in different jurisdictions. Subject to Chevron's concerns identified in this submission, Chevron would support the States and Territories developing legislation that mirrors the approach being adopted by the Commonwealth.
>
> Chevron notes that the legislative package is potentially one of the most advanced attempts by any jurisdiction to legislate title rights for the establishment of a greenhouse storage industry. As such it provides a model for other international jurisdictions where subsurface rights are regulated in much the same manner as Australia.[11]

1.19 In their submission, however, the Australian Coal Association and Minerals Council of Australia argued that:

> Whether the Bill establishes a legislative framework that provides a model that could be adopted on a national basis cannot be determined at this time, given various jurisdictions are still considering their own legislative responses. National consistency is imperative, however the Bill as a model for adoption on a national basis is not supported as it stands given the concerns raised in response to previous terms of reference, which have the potential to be magnified in relation to onshore GHGS operations.[12]

1.20 The Australian Network of Environmental Defender's Offices (ANEDO) rejected the bill as model legislation, 'due to the inadequacies of the "regulatory regime"…Until the suggested appropriate amendments are made, the Bill will remain as an inappropriate means to effectively and responsibly regulate the CCS process'.[13] In evidence before the Committee, Ms Rachel Walmsley, Policy Director for the Environmental

10 BP, Submission no. 12, p. 3.

11 Chevron, Submission no. 8, p. 7.

12 ACA/MCA, Submission no. 27, p. 11.

13 ANEDO, Submission no. 14, p. 19.

Defender's Office New South Wales, highlighted what ANEDO saw as the shortcomings of the Bill as a potential framework:

> At the moment, as we see it, it is not a nationally appropriate model until it has the safeguards in place. As you can see from our submission, it is things like having objectives—that everything under the act is in accordance with the principles of ESD, you have the committee in place, and you have time frames. As I said in the opening statement, an awful lot of detail has been left to regulations, and those details are things like how the environmental impact assessment will work, the monitoring and evaluation, the public interest tests—a whole lot of the meat of how this is going to work we have not seen any detail of yet. It is very hard to be able to say, 'Yes, this bill should be nationally adopted,' when we have not seen the detail of how it is going to work. It could be strengthened by being clearer about property rights, developing this fund, developing an expert committee, just making sure that the architecture is up and running—like a publicly accessible CCS register to enhance transparency—and having more detail around the mandatory reporting. Before we can say this is going to be a nationally appropriate scheme we would need to see more detail; it is of concern to us that so much detail has been left to regulations that we have not seen.[14]

1.21 In its submission, WWF stated that while it supported the creation of a national framework, the Bill as drafted did not provide a suitable model for nationally consistent legislation:

> WWF supports the development of national legislation and the creation of a national task force to facilitate its development. WWF notes that national legislation could be either legislation enacted by the Commonwealth Parliament or legislation enacted by one of the states or territories and adopted by the others (as, for example, has been done in the case of corporate and consumer credit laws). At the very least State and Federal legislation should be consistent.
>
> Unless the current inadequacies highlighted through this submission are addressed, WWF believes that the Bill in its current form is not suitable as a model to be adopted on a national basis.[15]

14 Ms Rachel Walmsley, ANEDO, *Transcript of Evidence*, 16 July 2008, pp. 50–1.

15 WWF, Submission no. 21, p. 9.

National Consistency

1.22 Significantly, from the point of view of national consistency, the Bill as model legislation has received little support from State Governments. In its submission, the Victorian Government rejected the Bill as a legislative model:

> The Victorian Government considers that the Bill does not provide a framework which could be adopted on a national basis, as:
>
> - The considerations for managing such things as the co-existence of CCS and petroleum activities are practically different in an onshore and offshore context.
> - The Bill would provide existing petroleum rights holders with unwarranted monopoly rights, effectively delaying the development of a viable commercial CCS industry for Victoria.
> - The proposed 'impact test' does not operate in a manner which promotes investment in CCS. Put differently, a CCS proponent is always to be measured against a petroleum operator, in determining whether a CCS activity can be approved, and how such test is to be applied is not clear.[16]

1.23 In evidence before the Committee, Ms Kellie Caught, Climate Change Policy Manager for WWF-Australia, highlighted her organisation's preference for the model for legislation being developed in Victoria:

> We have not seen the final legislation from the Victorian government; what they did was put out a discussion paper in which they basically said what their preferred position would be and asked for feedback. Given that some of the things they flagged included objectives, guiding principles, a definition of 'public interest' and clearer guidelines around environmental risks—and also, on the liability issue, they flagged the possibility of that liability being eventually transferred to the state—their preferred model, the model they had in their discussion paper, certainly meets a lot more of our criteria than the current draft national legislation meets.[17]

1.24 The South Australian Government's response to the Bill was also less than a fulsome endorsement:

> As you are aware the Department of Primary Industries and Resources SA (PIRSA) has been in consultation with the Department of Resources, Energy and Tourism throughout the

16 Victorian Government, Submission. no. 16, p. 12.

17 Ms Kellie Caught, WWF, *Transcript of Evidence*, 16 July 2008, p. 58.

> development of this legislation. As a result of this consultation, South Australia has chosen not to make a further detailed submission to the committee. However I do advise that notwithstanding South Australia's support for this Commonwealth Amendment Bill, South Australia maintains some concerns regarding the complexity of this legislation and the Commonwealth's suggested implementation of the objective-based regulatory principles espoused in the Ministerial Council on Ministerial Petroleum Resources (MCMPR) *Regulatory Guiding Principles for Carbon Capture and Geological Storage.*
>
> As a result, South Australia has chosen to approach the concept of "mirror legislation" across all jurisdictions with caution and is not supportive of any motion for "mirror legislation" across onshore and offshore jurisdictions. Accordingly, at the forthcoming MCMPR meeting in Darwin on 16 July 2008 in its support of the draft legislation, South Australia will only support the application of national guiding principles for the regulation and management of Carbon Capture and Storage (CCS), namely those already endorsed by the MCMPR *(The Australian Regulatory Guiding Principles for Carbon Capture and Geological Storage).*[18]

1.25 In its submission, Santos indicated that the framework for GHG storage being developed in South Australia had departed from the provisions of the draft Bill in a number of important areas, and that Santos supported the South Australian legislative model:

> Santos is working closely with South Australian regulators in the development of their comprehensive CCS legislative model. The principles of the current and proposed South Australian model provide an efficient framework for CCS. In particular, in recognition of invested capital and built capacity, Santos supports the following principles that are included in the South Australian model:
>
> - No concurrent CCS titles can be granted over a pre-existing exploration, production, or retention title.
> - Pre-existing petroleum title holders are given priority for a CCS title.
> - Ministerial discretion is limited with all matters referred to the regulatory body in the first instance.

18 South Australian Government, Submission no. 20, p. 1.

- Express recognition of the continuing rights of all petroleum title holders to use exogenous as well as indigenous greenhouse gases for purposes of EHR and storage.
- Third party access is by way of commercial agreement, not as a result of Ministerial discretion.[19]

1.26 In its submission, the Western Australian Department of Industry and Resources indicated that it was not committed to the model presented in the Bill, and that it was aware of alternative frameworks being developed in South Australia and Queensland:

> While the Department of Industry and Resources supports the intent of the Bill, it is premature to comment on whether it provides a model for the development of GHG policy and legislation nationally. The Department of Industry and Resources would also refer to the policies and legislative frameworks being developed by the Queensland and Victorian governments principally because they address onshore and offshore GHG matters.[20]

1.27 The submission highlighted a number of key issues, especially around the exclusion of States from the formal framework of the GHG storage aspects of the Commonwealth legislation:

> Despite the concerns raised above, the GHG amendments appear to establish a legislative framework that, with consideration, will provide a model that could be adopted on a national basis. In keeping with the requirements of the OCS, WA will reflect, as far as practicable, the intent of the GHG amendments to the State's *Petroleum (Submerged Lands) Act 1982* or other legislation it deems appropriate for GHG capture and storage.
>
> Unlike the amendments required for the implementation of the NOPSA arrangements in 2004, achieving direct alignment between the Commonwealth and the States petroleum submerged lands Acts have been severed with the commencement of the OPA.
>
> In contrast to the Commonwealth approach, State GHG legislation will have to recognise and address the potential for cross-jurisdictional or trans-boundary storage from onshore areas to the designated waters area covered by the WA petroleum submerged lands legislation. This may also be the case in other jurisdictions.[21]

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19 Santos, Submission no. 22, p. 3.

20 Department of Industry and Resources, Western Australia, Submission no. 17, p. 8.

21 Department of Industry and Resources, Western Australia, Submission no. 17, p. 8.

Committee conclusions

1.28 It is evident to the Committee from this discussion, and aspects of the Bill which will be addressed in subsequent chapters, that the question of whether the framework presented in the draft bill is appropriate and workable is a vexed one. Certainly, there is a lack of consensus as to whether the OPA is the correct basis for legislation on GHG storage in offshore areas, and even less consensus on the question of whether the Bill as drafted provides an appropriate legislative model. Numerous concerns have been presented about the detail of the Bill, as might be expected, and these will be addressed in this and subsequent chapters.

1.29 On balance the Committee agrees that the OPA is the appropriate platform for GHG storage legislation. The Committee agrees with the stance of the Government that the similarities and synergies in the petroleum and GHG storage industries make common legislation appropriate. There are, however, differences between the two industries which must be taken into account. Moreover, these differences are a source of potential conflict which may delay investment in GHG storage. Finding mechanisms for active cooperation between the petroleum and GHG storage industries will be vital to the working of the legislation.

1.30 From the evidence received, it is clear that achieving a nationally consistent framework will require further work between the Commonwealth and the States. A number of State Governments are making progress on the development of GHG storage legislation that is designed to fit their own pre-existing legislative framework. Moreover, it is evident that a number of industry and community groups prefer the legislative frameworks being developed in the States. The best hope would appear to be that active cooperation between different levels of government and industry may be achieved despite legislative differences.

Objectives

1.31 Another criticism of the bill raised in a number of submissions was its failure to define objectives and, thus, clarify the purpose of the bill, especially in defining the relationship between the petroleum industry and GHG storage. In evidence before the Committee, Mr Roger Bounds, Project Director for Monash Energy, highlighted the absence of an objects clause and the consequent need for greater clarity in other sections of the bill:

> In drafting the bill, the government has made a choice not to include an objects clause. As a consequence, it is difficult for us to find evidence that this bill goes to the heart of enabling CCS, rather than trying to reach some balance or in fact protect the interests of incumbents. As a consequence, we would like to see the public interest test clearly bring out that it is in the public interest to facilitate CCS.[22]

1.32 In their submission, the Australian Coal Association and Minerals Council of Australia urged the inclusion of an objects clause:

> The Bill should make provision for an **objects clause** to be included in the OPA, such as objects to include a certain, transparent, effective and efficient regulatory system for GHGS titles and operations, a contribution to emission reduction, and an effective basis for the sustainability of emissions-intensive and fossil fuel industries (as well as appropriate objects for petroleum operations).[23]

1.33 The Australian Coal Association and Minerals Council of Australia proposed the following, 'accompanied by appropriate object provisions for petroleum':

> *The objects of this Act are:*
>
> *(a) to create a certain, transparent, effective and efficient regulatory system for the carrying out of exploration for potential greenhouse gas storage formations and the injection and storage of greenhouse gas substances;*
>
> *(b) to contribute to Australia's international obligations in relation to the reduction in emissions of greenhouse gases;*
>
> *(c) to create an effective basis for sustainability, consistent with a reduction of emissions of greenhouse gases, for Australia's:*
>
> *(i) emissions-intensive industries; and*
>
> *(ii) fossil fuel industries.*[24]

1.34 Anglo Coal also recommended 'a clear statement of objectives, including the facilitation of CCS, to help establish balance between petroleum interests and the facilitation of storage'.[25]

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22 Mr Roger Bounds, Monash Energy, *Transcript of Evidence*, 15 July 2008, pp. 51–2.

23 ACA/MCA, Submission no. 27, p. 6.

24 ACA/MCA, Submission no. 27, p. 15.

25 Anglo Coal, Submission no. 24, p. 1.

1.35 Anglo Coal's submission stated:

> The Draft Bill fails to provide a clear basis for determination of conflicts arising in the event of competing petroleum and CCS priorities. As experience in Australia and elsewhere suggests, this is not a matter that should be left to Regulation.
>
> There has always been an inherent risk that incorporating CCS regulation into existing petroleum legislation would tend to subordinate the facilitation of CCS and the reduction of Greenhouse Gas emissions to the interests of petroleum exploration and production - as we noted in 2006 *"While accepting that CCS is best dealt with by amending petroleum legislation administered by the petroleum regulator, care will need to be taken to ensure that in the process the rights of CCS tenement holders are not subordinated to those of petroleum tenement holders."*
>
> That subordination tendency has clearly been evident [in] the development of the Draft Bill, and in addition to now amending its provisions to more adequately provide for Ministerial determination based on national interest, to provide a level playing field for overlapping tenement holders, and to actively facilitate co-development agreements, we submit that the Bill should also include a clear statement of its objectives for both petroleum and storage regulation.[26]

1.36 In its submission, ANEDO also argued for an objects clause, including the principles of ecologically sustainable development:

> The Bill contains no specified additional objects. There is no requirement for GHG injection and storage operations to be consistent with the principles of ecologically sustainable development (ESD), or recognise community concerns. CCS is by no means a proven method through which to permanently store GHGs; this reality alone provides sufficient cause for the Bill to contain the principles of ESD.[27]

Committee conclusions

1.37 The Committee supports the inclusion of an objects clause within the Bill as a way of clarifying its purpose and giving guidance both to the Government and industry in the operation of the legislation. The

26 Anglo Coal, Submission no. 24, p. 4.

27 ANEDO, Submission no. 14, p. 10.

Committee believes that the twin objectives set out in the Minister's second reading speech provide the necessary content for an objects clause, namely that the Bill:

- provide greenhouse gas injection and storage proponents with the certainty needed to bring forward investment; and
- preserve pre-existing rights of the petroleum industry as far as is practicable to minimise sovereign risk to existing titleholders' investment in Australia's offshore resources.[28]

1.38 The Committee, while sympathetic to the principles of ecologically sustainable development, does not support including said principles in enabling legislation of this type, environmental regulation of GHG storage being the role of other legislation.

Recommendation 1

1.39 **The Committee recommends the inclusion within the Bill of an objects clause, providing that the legislation:**

- **provide greenhouse gas injection and storage proponents with the certainty needed to bring forward investment; and**
- **preserve pre-existing rights of the petroleum industry as far as is practicable to minimise sovereign risk to existing titleholders' investment in Australia's offshore resources.**

Administrative model

1.40 Two significant issues have been raised about the administrative model provided for in the Bill. Under the OPA, administrative authority resides with the Joint Authority (JA), with delegations to a Designated Authority (DA), the Joint Authority consisting of responsible State and Commonwealth Ministers in any given jurisdiction, and the Designated Authority being any subordinate organisation delegated with the administration of given tasks. Under the bill, while petroleum operations will remain subject to JA/DA administration, the responsible Commonwealth Minister (RCM) has sole responsibility for GHG storage operations, and authority over the approval of petroleum operations where they may impact on GHG storage operations. Moreover, the

28 The Hon Martin Ferguson MP, *CPD*, House of Representatives, 18 June 2008, p. 5133.

responsible Commonwealth Minister has wide discretionary powers over a range of matters covered by the Bill. These discretionary powers are largely undefined in the detail of the Bill. Both these issues have caused some concern to those presenting evidence to the Committee.

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1.41 The change to the administrative model proposed under the Bill has caused concern from a range of sources. From the perspective of the petroleum industry, the role of the responsible Commonwealth Minister provides an additional layer of bureaucracy in seeking approvals for petroleum related activities and may act as a disincentive to investment.[29] Elaborating on industry concerns, Ms Elizabeth Clydsdale, Offshore Development Approvals Coordinator, Woodside Energy, stated:

> Yes. We would most likely prefer joint-authority administration of this act, as it is very similar to the petroleum administration that is currently in place, which has a joint authority with a state member and a Commonwealth member. One reason is that, where there may be competing rights, you would have the same authority or body making the decision. We believe it would be difficult for the joint authority to act on the petroleum rights but for a different body—singularly, the Commonwealth minister—to act on the greenhouse gas storage rights. So, simply, we believe it should be the same administrative body. The other issue with having the administration by the Commonwealth minister is that, when a title is a declared title and key petroleum operations have to be approved by the Commonwealth minister, it adds an extra level of approvals, so it would extend the approval process. So, as we understand it, we would have to get our usual approvals from the designated authority to, say, drill a well, but if it were a declared title another approval would have to be gained through the Commonwealth minister.[30]

1.42 Looking at the issue from the perspective of GHG storage, Monash Energy was also concerned at the administrative complexity of the RCM model:

> The mechanism under the OPA for considering the grant of petroleum titles and the exercise of associated discretion is

29 APPEA, Submission no. 29, p. 26.

30 Ms Elizabeth Clydsdale, Woodside Energy, *Transcript of Evidence*, 16 July 2008, p. 23.

> exercised by the Joint Authority. This structure in respect of petroleum titles has a known record and facilitates cooperation between the Commonwealth and the relevant State or Territory.
>
> The proposed mechanism in respect of greenhouse gas titles is for powers and discretion to be exercised by the Responsible Commonwealth Minister. It is presently expected that prospective acreage for greenhouse gas injection and storage will be in locations proximate to and/or under/overlying existing petroleum titles. Monash Energy is concerned about the potential for complexity in decision making that may arise from the division of powers and discretion between a Joint Authority, in respect of petroleum titles, and the Responsible Commonwealth Minister, in respect of greenhouse gas titles. The division is an unnecessary complication that can only derogate from smooth decision making and a level of predictability, being one of the desired outcomes noted in the Standing Committee's Terms of Reference.[31]

1.43 Monash recommended designating 'the Joint Authority as the responsible decision making and administration body in respect of both petroleum titles under the OPA and greenhouse gas titles under the Bill'.[32]

1.44 State Governments were also unhappy with the transfer of authority to the RCM. In its submission, the Victorian Government stated:

> In recent years there has been a progressive shift in administrative authority under the *Offshore Petroleum Act 2006* to the State, and to industry, while retaining some clearly defined Commonwealth involvement in technical or policy issues which have national implications.
>
> The Bill does not seek to replicate this blend of State and Commonwealth decision making authority. As a result, there is an inherent lack of 'balance' in the CCS decision making process, when viewed against the petroleum equivalent Joint Authority/Designated Authority regime.
>
> Power in respect to CCS decision making resides solely in the Commonwealth, with no State delegation or representation. As there is no requirement for the Commonwealth to seek State input in the decision making process, no mechanism will exist for the State's interests to be heard, and accordingly, the Bill fails to offer

31 Monash Energy, Submission no. 13, p. 11.

32 Monash Energy, Submission no. 13, p. 11.

> protection to Victoria's petroleum and non-petroleum entitlements and resources.[33]

1.45 Likewise, the Western Australian Department of Industry and Resources, in its submission, argued for the application of the JA/DA administrative model to GHG storage operations:

> While it is important that interests of each industry be protected, the fact that the Designated Authority can approve petroleum operations which may be overridden by the Responsible Commonwealth Minister could create administrative difficulties. It even appears that when the Responsible Commonwealth Minister is declaring a petroleum title as being a risk to GHG operations, this Minister is not obliged to inform the Designated Authority. This could be avoided if GHG approvals conformed to the Joint Authority and Designated Authority approval system.[34]

Ministerial discretion

1.46 One of the concerns with the RCM model is the level of ministerial discretion allowed for under the Bill. In its submission, Santos questioned the need for such wide discretionary powers and raised concerns about the administrative burden this might create:

> The level of Ministerial discretions contemplated in the Bill is expansive when compared, for example, to the petroleum regime in the *Offshore Petroleum Act 2006* (OPA).
>
> While some of the discretions may be clarified by future regulations and guidelines, the intent of such power in the Bill seems unwarranted and requires clarification.
>
> While the discretions must be exercised lawfully and for a proper purpose and are subject to review in accordance with traditional administrative law principles, the uncertainty associated with them could act as a disincentive for both investments in future petroleum operations and in CCS operations.
>
> The discretions create a further level of administrative burden for holders of petroleum titles, who are already subject to the administration of the Joint Authority.[35]

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33 Victorian Government, Submission no. 16, p. 9.

34 Department of Industry and Resources, Western Australia, Submission no. 17, p. 6.

35 Santos, Submission no. 22, p. 2.

1.47 ANEDO was principally concerned with the lack of transparency and opportunities for community and stakeholder input into RCM decision making processes:

> ANEDO submits that in the regulatory regime proposed by the Bill, there is a distinct absence of public participation, transparency, and accountability throughout the entire CCS process. Additionally, the Bill provides minimal appropriate mandatory considerations that need to be taken into account by the Minister when granting rights associated with the entire CCS process, from the Greenhouse Gas Acreage Releases, to the granting of a Site Closing Certificate. This is particularly apparent throughout the issuing of greenhouse gas assessment permits, greenhouse gas injection licenses, and site closing certificates.[36]

1.48 In its submission, Monash Energy also highlighted the increased scope for ministerial discretion provided under the bill and expressed some concern over how this might be exercised:

> The Commonwealth petroleum legislation has traditionally vested significant discretionary power in the Joint Authority and ultimately in the relevant Commonwealth Minister. Apart from work bid competition between parties to secure an exploration permit, the exercise of this discretion does not generally involve other parties. However, the introduction of the greenhouse gas storage regime contemplated by the Bill significantly expands upon the scope of discretion. The expanded areas of discretion are in sensitive areas of decision making which involve interaction between petroleum activities and greenhouse gas activities which involve rights and interests of competing parties.
>
> The exercise of discretion by the Responsible Commonwealth Minister (Minister) under the Bill is partly guided by having regard to the public interest, but this is only for limited purposes. The Bill fails to provide clarity on what the Minister might have regard to in the exercise of his or her wide discretionary powers. This could be achieved in a number of ways, including the provision of specified criteria and broadening the application [of] a public interest test. The Bill also fails to provide any mechanism to which the Minister could have reference so as to assist the exercise of that discretion.[37]

36 ANEDO, Submission no. 14, p. 13.

37 Monash Energy, Submission no. 13, p. 9.

1.49 In evidence before the Committee, Mr Bounds argued for ministerial discretion, but with explicit avenues provided for consultation and advice:

> We welcome the ministerial discretion which is brought out in the bill, but we think that that ministerial discretion would probably be strengthened by the introduction of some clear advisory role for an external body and that he or she could rely upon that technical advice. We think that there are agencies within the government that are capable of providing that advice and that that should be brought out.[38]

1.50 Monash Energy's submission recommended that the 'exercise of Ministerial discretion should be clarified and a mechanism established under the Bill where the Minister may have access to advice in the areas which call for the exercise of his or her discretion'.[39]

1.51 In its submission, APPEA questioned the scope of ministerial discretion in the absence of regulations and guidelines, and expressed concern at the lack of an appeal process:

> …while APPEA is…supportive of the overall framework provided for by the Bill, the wide discretion for the responsible Commonwealth Minister in a range of matters and the fact that the Bill does not provide explicit definitions in a number of crucial areas (most importantly public interest and significant impact) means that the development and release for consultation of the relevant regulations and guidelines that will underpin the Bill must be undertaken as a matter of urgency.
>
> In addition, given the breadth of the Ministerial discretions, and if the regulations do not ultimately provide sufficient definition of key tests to make clear the criteria and scope of the Minister's decision, APPEA considers that inclusion of a right to a merits-based appeal of a Ministerial decision would be warranted. The Bill provides no opportunity for a merits-based appeal from a Ministerial decision with respect to whether there is, for example, a "significant adverse impact". The only relief is by way of judicial review where the onus will be on the claimant for relief to show that the Minister's decision was either unlawful or reached unlawfully.[40]

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38 Mr Roger Bounds, Monash Energy, *Transcript of Evidence*, 15 July 2008, p. 52.

39 Monash Energy, Submission no. 13, p. 10.

40 APPEA, Submission no. 29, p. 16.

1.52 BP welcomed the flexibility provided by ministerial discretion but urged the publication of regulations and guidelines to provide clarity on the exercise of that discretion. In evidence before the Committee, Dr Fiona Wild, Environmental Affairs Adviser, BP Australia, stated:

> …in a number of areas we are advocating that greater ministerial discretion be included in the bill. This is because of the flexibility required to adapt to the development of an emerging industry. However, to provide this wide discretion, exacerbating uncertainty for investors, we strongly advocate that the minister publish not only regulations but also clear policy guidelines on how he intends to exercise his discretion. Thus, the flexibility in the bill would be balanced by certainty in its implementation.[41]

Committee conclusions

1.53 While acknowledging the concerns of various stakeholders about the administrative framework provided for in the Bill, the Committee is of the view that, subject to the changes recommended in succeeding chapters of the report, the administrative framework provided in the Bill should remain.

1.54 The Committee is of the view that the regulation and administration of a new industry like GHG storage needs a regulatory regime that is simple, centralised and flexible, because there is still much to learn in terms of appropriate management and best practice. The Committee is satisfied that the Bill provides this.

1.55 Nonetheless, it is clear from the evidence provided that the administration of the legislation will necessarily involve a high level of communication and coordination between governments and with stakeholders. The clear identification of pathways for communication and advice is essential.

1.56 The Committee is, therefore, of the view that a centralised authority is essential in the early phases of the offshore GHG storage industry, but that the development of industry and regulatory practices will see ongoing refinement of the system of administration, including intergovernmental roles and responsibilities.

41 Dr Fiona Wild, BP, *Transcript of Evidence*, 18 July 2008, p. 3.

Recommendation 2

1.57 **The Committee recommends that the responsible Commonwealth Minister utilise established formal consultation pathways to consult with State Governments, industry and environmental organisations, with a view to achieving national consistency in the administration of GHG storage legislation.**