s22

From: s22
Sent: Monday, 7 June 2021 2:23 PM
To: s22
Cc: s22 Illman, Marie
Subject: RE: Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 [JWS-DOCUMENTS.FID662] [SEC=OFFICIAL]

Good afternoon s22

Thank you for your email.

I am happy to arrange a time to discuss the change in control measure. We are available on Wednesday between 3-4pm if that is suitable? If so, I will send through a meeting invite.

Kind regards,

s22

Manager
Regulatory Reform
Offshore Resources Branch
Resources Division
Department of Industry, Science, Energy and Resources

OFFICIAL

From: s22]
Sent: Monday, 7 June 2021 1:49 PM
To: s22 @industry.gov.au>
Cc: s22
Subject: RE: Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 [JWS-DOCUMENTS.FID662]

Many thanks s22

Dear s22

Would you please available for a call or VC in the next few days, ideally say late afternoon Wednesday or sometime Thursday?

Alternatively, I can provide further details on the issues outlined below in written form in the first instance, but it would be very useful, I think, to have a discussion if possible.

Kind regards.

s22

From: s22]
Sent: Monday, 7 June 2021 11:06 AM
To: s22
Cc: s22 @industry.gov.au>
Subject: Re: Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 [JWS-DOCUMENTS.FID662]

You're right - I'll try again!

s22

Please note, I don't expect you to read this or respond to this email outside of work hours - I'd call if it's urgent.

> On 7 Jun 2021, at 11:15 am, s22 > wrote:
>
> Thanks s22
> On looking at this again today, I couldn't see the cc details (apologies on Friday I was in transit).
> Kind regards
> s22

s22

Website | LinkedIn

From: s22
Sent: Friday, 4 June 2021 3:50 PM
To: s22
Subject: Re: Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 [JWS-DOCUMENTS.FID662]

Hi s22

s22 (cc'ed) from Department of Industry would be happy to assist with your enquires on this bill in some detail.

Best regards
s22

Please note, I don't expect you to read this or respond to this email outside of work hours - I'd call if it's urgent.

On 4 Jun 2021, at 12:45 pm, s22 wrote:

HI s22

Hope all is well with you.

Sorry for the out-of-left field email, but I was hoping might be able to put me in touch with someone in the Department of Industry, Science, Energy and Resources who has carriage of the above Bill.

While the Bill is principally about decommissioning liabilities for offshore oil and gas it also contains new provisions about requiring approval for change in control of titleholders.

That is fine in principle but the provisions raise a number of practical issue due to the drafting of the change of control provisions:

- the threshold is set at 20% in line with the CA and FATA, but they have somewhat different policy underpinnings and in this context 20% will be over inclusive;
- there are no exceptions to the 20% rule, in contrast to CA and FATA which have a range of exceptions (for example money lending in FATA, custodians, rights issues, DRPs); and
- the drafting uses different concepts to CA and FATA, meaning titleholders have another inconsistent regime to understand and comply with.

The Bill's provisions are likely to have unintended and unexpected consequences – for example approvals will be required (or offences committed) for internal restructurings where there is no change in substance, for a shareholder being diluted from 21% to 19% because they did not participate in a capital raising (which could be involuntary), for a transaction undertaken on an overseas stock exchange for a multinational with a minor interest in an offshore title, for a secured creditor exercising security and possibly for the appointment of an administrator or liquidator.

Approvals could be required in the context of an accelerate pro rata rights issue where institutional investors have hours or at most days to consider whether to investment, and an approval required is unworkable (this is well-understood in the FATA context).

The Bill was introduced last week and I was hoping that on behalf of the Law Council I could bring these issues to the attention of the Department and the Minister's office, because I am not sure that the practical implications for ASX listed titleholders in particular have been appreciated. I have prepared a draft submission detailing the issues and the implications.

Unfortunately, while there was consultation on an ED in April, I was not aware of the ED and this only came to my attention a couple of days ago when my JWS colleagues were discussed the decommissioning aspects and I had a look at the EM and Bill as introduced to the House.

Some of the control issues were noted in the AMPLA and APPEA submissions on the ED but, as above, I am not sure the practical implications have been appreciated, particularly the absence of exceptions that appear in the CA and FATA or at least the means to create exceptions (CA and FATA have a regulation making power, and under the CA ASIC can give exemptions and modifications including on a class basis).

Kind regards

s22

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DRAFT SUBMISSION

Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 - Change in control provisions

This submission concerning the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021* is made by the Business Law Section of the Law Council of Australia (the **BLS**).

We wish to raise a number of issues with the Bill that we consider will give rise to unintended and commercially inconvenient consequence.

At the outset we should state that we fully support the underlying intent of the change in control provisions, namely that a change in control of a title holder should be subject to approval in the same way as a transfer of an interest in a title. However, the Bill as drafted will likely be over-inclusive in its reach as well as leading to what might regarded as technical breaches that do not offend the spirit or policy intent of the Bill.

If nothing else, we strongly recommend that some facility for the making of regulations to provide for exceptions, or some other power to grant exemptions on a class basis, is included in the Bill before it is passed.

1. Problems with the change in control provisions

566B Meaning of control and change in control of registered holder

*(1) A person **controls** the registered holder of a title if the person (whether alone or together with one or more other persons the person acts jointly with):*

(a) holds the power to exercise, or control the exercise of, 20% or more of the voting rights in the registered holder; or

(b) holds, or holds an interest in, 20% or more of the issued securities in the registered holder.

*(2) A person **acts jointly with** another person if the person acts or is accustomed to acting in agreement with, or in accordance with the wishes of, the other person.*

(3) The regulations may prescribe a different percentage, or different percentages, to the percentage specified in paragraph (1)(a) or (b).

*(4) There is a **change in control** of a registered holder of a title if:*

*(a) one or more persons (an **original controller**) control the registered holder of a title at a particular time; and*

(b) either:

(i) one or more other persons begin to control the registered holder (whether alone or together with one or more other persons the person acts jointly with) after that time; or

(ii) an original controller (whether alone or together with one or more other persons the person acts jointly with) ceases to control the registered holder after that time.

What this means:

A person who holds or controls shares in the holder of any offshore petroleum title will be in breach of the Act (as amended by the Bill) if:

- they acquire more than 20% of the title holder or a holding company, even if that does not confer actual effective control;

- their holding goes over 20% due to a buy back or capital reduction (that is, they don't actually do anything);

- their holding goes over 20% if they take up their share under a pro rata rights offer but not all the other shareholders take up their shares (and the holder won't know this at the time of making the decision to take up their pro rata shares);

- their holding if above 20% goes under 20% even if involuntarily, for example a 21% holder is diluted because they did not take up their pro rata share in a rights offer or the company does a placement or a convertible security is converted and the holder is simply diluted

The above example will also apply to a holding in a company that holds more than 20% of a title holder. And a company that holds more than 20% of a company that holds more than 20% of a title holder. And so on.

Why this is a problem:

The control threshold in the Bill is triggered at 20%. This is the threshold for Chapter 6 of the Corporations Act (**CA**) and Foreign Acquisitions and Takeovers Act (**FATA**) but there are different policy underpinnings for those pieces of legislation.[1]

It is possible that a person will have effective control at 20.01% but in practice, with a public company, this is not likely, especially if there are other larger holders.[2]

The CA and FATA thresholds are prophylactic and the CA does not prohibit acquisitions above 20% but simply regulates the procedures by which they must by undertaken. Indeed the CA contains many exceptions such as rights issues, the 3% creep, takeover bids. The FATA has an exception for rights issues.

Neither the CA nor FATA regulate cessation of control.

We also observe that setting the threshold at 20% may actually be **under-inclusive** because the change of control at 20% may not be actual, but the authority will need to exercise its discretion having regard to the circumstances at that time. If the person in question then moves to take actual control, no further discretion with remain to be exercised.

The Bill's control threshold should not be set at 20%, but rather use a concept of effective control, and have a deeming provision that over 50% of the votes or the practical ability to appoint a majority of the board members of the titleholder is deemed to be effective control. If the Bill's objective is to treat transfer of interest in a titleholder

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[1] Under the Corporations Act, 20% is the bright line test under which it is accept that control cannot be exercised, and to acquire more than 20% one of the exempted methods of acquisition must be followed. In the UK, the City Code uses a 30% threshold to trigger a "follow on bid" so that anyone acquiring over 30% must make an offer for the balance. The 30% threshold is based on the view that 30% is the test for effective control in a widely held company, but noting that there is no prohibition, just a trigger. The policy drivers for FATA are different again and the 20% threshold deliberately captures many acquisitions that in no sense confer actual or effective control. Indeed, in some cases a lower threshold triggers FATA's application when coupled with other features such as the right to appoint a director.

[2] 20% will only generally confer effective control if the balance of the shares are very widely held. We acknowledge that the Department wishes to regulate direct holders of shares in titleholder who may have less than 50%, for example in a titleholder that was a joint venture company. However, this is actually a different objective to seeking to regulate changes of control, because (for example) if three shareholders each held 33.3% of the shares none of them would have control of the titleholder as that concept is commonly understood. And that may be a worthy objective, but it does not, in our submission, justify regulating all indirect holders of more than 20% no matter

or a company with effective control of a titleholder in the same way as the transfer of a title, the Bill should seek to do that directly.

The Bill does not contain any exceptions or the mechanism to create exceptions. The CA has a regulation making power and an exemption and modification power conferred on ASIC that has been used to grant both specific and class relief under Chapter 6 of the CA. The FATA has a regulation making power.

Just by way of example, a purely internal restructure of a multinational group that holds offshore titles in Australia taking place entirely offshore to insert a new intermediate holding company would require approval. This is nonsensical where there is no change in substance.

Also, it will simply not be practical to obtain approval for a shareholder in an ASX listed company who goes over or drops under 20% because of a rights offer made to all shareholders. Institutional shareholders have a matter of hours or a best days to decide whether to accept their entitlement in an accelerated rights offer. There is simply no way an approval could be obtained in these circumstances.

This may present a major impediment to publicly listed direct or indirect title holders raising capital if they have major shareholders at around 20%.

And it would be inequitable that a major shareholder sitting at just above 20% who simply deciles not to take up an entitlement because they thought it was not a good investment could be subject to a penalty.[3]

The Bill should be amended to contain or contemplate exceptions.

The Bill uses bespoke concepts that do not reflect either the CA or FATA. This creates a further regulatory regime that must be navigated by titleholders, acquirers and their advisers, but does not, in our submission, reflect any sound policy rationale.

The Bill should be amended to reflect the CA concepts of "voting power", "relevant interest" and "associate" so that the regulatory regime is simpler and more consistent with the CA Regimes.

The Bill (at clause 566Z) has an infinite interest tracing provision at a 20% threshold. That is, interests can be traced up a chain of ownership if equity interests of 20% or more are held. Such tracing can occur an unlimited number of times.

This is likely to be unworkable in practice and result in unintended and inconvenient consequences. While it is possible (although unlikely) that a direct 20.01% interest will confer effective control, the acquisition of an indirect 0.8% economic interest constituted by a 20% holding in company A that has a 20% holding in company B that has a 20% interest in a title holder would trigger the requirement for a change in control approval.

While it is true that control can be exercised through chains of ownership, the CA only allows the 20% deemed control rule to be used once (see section 608(3)).

An unlimited tracing rule would make sense if it was set at the effective control level, as is the case for section 608(3)(b) of the CA – which enables infinite tracing where there is actual or effective control.

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[3] The qualification in clause 566N(4) of the Bill concerning knowledge does not necessarily assist because the shareholder will become aware that they have ceased to control or begun to control because that consequence of their action or inaction may well be evident. Moreover, and unfairly, the defendant will bear an onus of proof to show their innocence.

The Bill's tracing provision appears to be based on the FATA provisions (section 19 of FATA) but at least section 19 of FATA has an exception in section 19(3) that has important practical effect. Moreover, FATA has a number of practically important exceptions, for example for money lending agreements (the exercise of security could readily cause an acquisition of control by a secured creditor under the Bill), foreign custodians who hold merely legal title to securities, for rights issues, and DRPs. Or the appointment of a liquidator or administrator to an insolvent company that holds an interest in an offshore title would seem to involve the acquisition of control.[4]

The Bill has none of these exceptions, and no facility for introducing them.

But more importantly, the policy foundations of FATA and the Bill are quite different. The approach in FATA needs to be more precautionary and setting a threshold at 20% and having extensive tracing rules makes more sense for matters involving the national interest, including national security. But the policy drivers for approval of changes of control of titleholders are, in our submission, more limited and should be centred around financial capacity and proper governance – matters that will not likely to be affected by a 21% holder in a chain of holdings.

Moreover, the policy about approval for ceasing to have control is quite different and setting the threshold at 20% with infinite tracing provisions will certainly catch transactions that have no relevance to the policy objectives underlying the Bill, being primarily financial capacity or assurance and governance.

The Bill will impose compliance costs and impediments to economically sensible and beneficial transactions with no policy benefit.

The Bill should be amended so that the tracing provisions operate in a proportionate manner, and are based on effective control.

2. Problems with the revocation of approval provisions

566J Revocation of approval

Revocation

(1) The Titles Administrator may revoke an approval of a change in control of a registered holder of a title in the approval period for the change in control if:

(a) there is a change in the circumstances of a person who is approved to:

(i) begin to control the registered holder; or

(ii) cease to control the registered holder; and

(b) the Titles Administrator considers it appropriate to revoke the approval.

Notice of revocation

(2) If the Titles Administrator revokes an approval of a change in control, the Titles Administrator must give written notice of the revocation to the person given notice of the approval of the change in control.

What this means:

[4] This might result in the unfortunate consequence that an administrator or liquidator might refuse to be appointed because they would immediately be in breach of the Act as amended by the Bill, with no means of overcoming that consequence.

A person who has been approved for a change in control can have that approval revoked if there is a change in circumstances. This can occur during the approval period but after the change of control has occurred or after a person is legally committed to effect a change in control.

Why this is a problem:

Such a revocation could be made after the event, or when a person is fully committed to acquiring shares under a takeover or scheme of arrangement or private treaty acquisition.

This is inherently unfair and, in our submission, offends basic rule of law principles.[5]

Transactions cannot be practically structured so that they do not complete until the last moment of the approval period.

The Bill should be amended so that an approval cannot be revoked once it has been relied upon or a person is legally committed to implement the change in control transaction in reliance on an approval.

DRAFT 16 June 2021

[5] Clause 566T of the Bill also precludes reliance on the privilege against self-incrimination in the context of the investigation powers to be conferred by the Bill. This is also offensive to basic rule of law and human rights principles.

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23 April 2021

Private and confidential – commercial in confidence

MACQUARIE

Offshore Resources Branch
Department of Industry, Science, Energy and Resources
offshore.policy@industry.gov.au

Dear Sir / Madam

Consultation on the Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021

Thank for the opportunity to provide feedback on the exposure draft of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 (the ***Bill***). The Bill follows recommendations made in the Department of Industry, Science, Energy and Resources' consultation paper on Australia's offshore decommissioning framework. It proposes significant changes to Australia's offshore oil and gas regulatory framework.

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While Macquarie develops, owns and finances a major global and Australian renewable energy portfolio, we recognise the need for energy security in Australia and, in this regard, the critical role that affordable gas plays as part of an orderly and well-planned energy transition for continued industry, jobs, communities and wellbeing in Australia.

External context

We understand the public interest imperative in ensuring that decommissioning of offshore oil and gas assets occurs responsibly and without the need for government support. We support a more fulsome regime with respect to offshore decommissioning and welcome the intent to increase the certainty for all stakeholders.

s22

There are however, aspects of this Bill which, in our view, will significantly increase uncertainty for stakeholders and result in reduced capital being invested into the sector, thereby increasing energy prices and reducing energy security over the important energy transition period.

Our comments also take into account the backdrop of an increasingly uncertain time for traditional energy participants, in particular:

- The International Oil Companies (***IOCs***), which have historically been very active in Australia and have been instrumental in developing our offshore resources, refineries and associated key infrastructure. The IOCs are evolving their strategies, operating with global capital constraints and must be selective in where they apply new capital. Australia is one of many jurisdictions in which they operate.
- IOCs and our Australian-listed energy companies are themselves (to different degrees) undergoing transformation within the energy transition and are facing longer-term uncertainties around commodity pricing, ongoing pressure to invest in renewables, pay dividends and return capital to shareholders, thus putting further pressure on investment in traditional energy.
- Alternative fuel and energy storage (whether batteries, hydrogen or other), while developing, still have a long way to go in terms of competitive pricing and scale in Australia.
- Increased ESG focus and positioning is likely to reduce access to capital in the oil and gas sector generally.

Key areas of concern

Retrospective application and impact on investor confidence

We understand this Bill is intended to apply retrospectively. This is particularly difficult given that the proposed changes seem to pierce the corporate veil in removing the limited liability protection of incorporation, a long-established common law principle in Australian corporate law. This means:

- Any party who has ever held an interest in a petroleum project and that party's shareholders can potentially be held liable for the remediation of that project at some point in the future.
- It becomes irrelevant that party may have transferred the licence in a responsible way, worked closely with NOPSEMA to secure approvals, and accepted a valuation discount to ensure a clean transfer of title to an investment grade party.
- It could negatively impact financial assurance for those parties in the future.

Given the long-term nature of these projects, this becomes a significant and, arguably, disproportionate risk unreasonably placed on former titleholders and related persons. This risk is heightened due to the broad discretionary powers given to the Minister or NOPSEMA under the Bill to issue remedial directions to other persons who financially benefited from the operations authorised by the permit, lease or licence or who was in a position to influence the way in which the titleholder complied with its obligations under the Act.

While it is understood that the policy intent is to ensure the accountability of past titleholders, we believe it is unreasonable to apply that accountability to historic transactions. In instances where the transaction has already completed under approved

provisions, there is not now the ability or opportunity for the transferor of the titles to implement appropriate risk management strategies to manage the eventual remediation.

We would suggest the proposed new trailing liability regime only apply to transfers of titles that occur after the effective date of the legislation or some other future date that the Government deems appropriate. This would be a reasonable and fairer approach as, in the future, we would expect that parties who wish to divest licences or titles, will manage the more onerous look-back by negotiating extensive security and reporting regimes (such as those which have occurred in the North Sea). These risk management tools may extend to include (not exhaustive):

- consents from historic titleholders on future developments undertaken by future titleholders;
- future consent may include the need to post further security arrangements in favour of previous titleholders;
- acquisition / investment in long-term flexible insurance and other security arrangements in case of default of future titleholders; and
- greater access to information from future titleholders so risk can be monitored and potentially mitigated ahead of time.

We would expect these to be put in place even when the title is transferred to an entity of some substance given the potentially very long duration of the obligations. We anticipate that in some circumstances, vendors may choose to retain all future decommissioning liabilities, as this may be the best risk weighted, cost effective way, of managing the risk.

Clearly, for historic transactions, reopening sales documentation to obtain that security is not open to titleholders who relied on the legislative regime and approvals of the Regulator that were in force and relevant at the time of transfer.

Order of priority

It is hard to discern from the exposure draft the order of priority in which action will be taken.

We suggest the trailing liability provisions should be explicit in stating that action should first be taken against the existing titleholder (or the last titleholder if the authority is no longer in force) and then its related bodies corporate. It should only be if the existing titleholder (and then its related bodies corporate) does not have the financial ability to comply with its remedial obligations that NOPSEMA or the Minister should be entitled to start searching for other persons to meet these obligations.

We suggest a clear order of priority needs to be established within the legislation itself, as well as a commitment to pursue each entity to the fullest extent possible before turning to the next party, to provide surety to the market that NOPSEMA and the Minister are obliged to follow due process. Not only would this result in an alignment between redress and the party with greatest accountability and ability to influence outcomes, it also mitigates the risk of discretion being used to issue the direction to the party with the greatest capacity to pay. Not doing so would likely discourage entities of substance investing in the sector and significantly limit future investment in the sector and its projects.

Broad Discretion

We note that the Bill introduces a concept of being able to direct a petroleum remedial direction in sections 586, 586A, 587 and 587A to any person who falls within the categories identified (with similar provisions for GHG).

However, the language is sufficiently broad that it could have unintended consequences and capture both secured and unsecured financiers, offtakers, operators, employees, royalty holders and even professional advisors, all of whom gain a financial benefit and/or contractually have degrees of influence over the operations of a titleholder. Where a broad discretion like this applies, we would suggest that it be more tightly defined to avoid impacting on funding and other commercial activities.

Other Considerations

There are other matters that the Government could consider in amending this Bill:

- Create incentives for re-use of infrastructure – as Australia embraces energy transition, substantial assets subject to this Bill can be re-used or repurposed. This would not only reduce the carbon footprint and economic waste caused by duplication but may encourage new technologies and the opportunity for innovation to flourish. For example, where there are credible plans for carbon capture and storage, these should impact on the level of decommissioning security required to provide sufficient certainty to ensure that the industry attracts ongoing funding.
- We expect that on approving transfer of title, the Regulator may require certain security mechanisms. In creating appropriate security mechanisms issues such as duration of title, commodity values, fluctuations in commodity prices and foreign exchange all need to be considered as they play a key role in effective and sensible security structures. We understand that in the North Sea structures, the way in which these security mechanisms have sometimes been applied has hampered the ability to source funding and manage working capital and hence limit the scope of potential new equity into the sector. We think there are ways to deal with these issues which are worth exploring pre-emptively, with some guidance given on what might be expected. Without some certainty, potential new capital is unlikely to be invested while these material implications for value remain unclear.

We appreciate the opportunity to make this submission. Again, we wish to reiterate that we are extremely supportive of the Government seeking to provide long-term clarity to the industry and would welcome the opportunity for further engagement to clarify and expand the feedback contained in our submission.

Yours faithfully
Macquarie Capital (Australia) Limited

Co-Head of Macquarie Capital, ANZ
Macquarie Capital