

MONTARA COMMISSION OF INQUIRY

Submissions on behalf of the Department of Resources, Energy and Tourism on the Commissioner's Draft Preliminary Findings—Regulatory Regime

1 Introduction

- 1.1 In accordance with paragraph 5 of the Revised Practice Note 3—The Inquiry's Report, the Department of Resources, Energy and Tourism (**RET**) wishes to provide further information and submissions in relation to the Draft Preliminary Findings concerning the adequacy and effectiveness of the regulatory regime applicable to operations at the Montara Oilfield in relation to well integrity and safety.
- 1.2 The following comments on the Draft Preliminary Findings on the regulatory regime, contained in Chapter 3 of the Draft Report, should be read in conjunction with RET's earlier submission dated 14 January 2010, in response to the Commissioner's Call for Submissions and Issues Paper, in particular those responding to paragraphs 2, 3 and 4 of the Inquiry's Terms of Reference. These addressed, among other things, the history and background of offshore petroleum regulation in Australia and the current co-regulatory regime between the Commonwealth and the States and the Northern Territory (**NT**), which developed as a result of certain agreements including the Offshore Constitutional Settlement in 1979. The division of responsibilities between the Commonwealth and State and NT Governments under the current co-regulatory arrangements are also outlined in RET's earlier submission.¹ RET notes that this is the subject of consideration by the Commissioner in Chapter 3 of the Draft Report (**Chapter 3**).

2 The regulatory regime – specific comments

- 2.1 RET notes that the *Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996* (Cth), together with the *Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations 1993* (Cth) and the *Petroleum (Submerged Lands) (Diving Safety) Regulations 2002* (Cth), have been consolidated into, and repealed by, the *Offshore Petroleum (Safety) Regulations 2009* (Cth) (**Safety Regulations**), which commenced on 1 January 2010. These legislative changes follow the completion of a review undertaken by RET to consolidate and update the safety-related regulations under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGSA**).

¹ For the purposes of this submission, references to legislation and subordinate legislation are to those applicable in areas of Commonwealth jurisdiction.

- 2.2 Accordingly, in relation to sub-paragraph 21(a) of Chapter 3, the Commissioner may wish to note that whilst the previous regulations were current at the time of the Uncontrolled Release, these have since been repealed by the Safety Regulations (as has been done in later sections of Chapter 3, for example, paragraph 22.36, footnote 18 and paragraphs 49 and 51).
- 2.3 Further, RET notes that the *Petroleum (Submerged Lands) (Management of Environment Regulations) 1999* (Cth) (**Management of Environment Regulations**) have recently been amended to include greenhouse gas and have been renamed the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Environment Regulations**).² Accordingly, in relation to sub-paragraph 21(b) of Chapter 3, the Commissioner may wish to note that whilst the applicable regulations were known as the Management of Environment Regulations at the time of the Uncontrolled Release, these have since been renamed the Environment Regulations.
- 2.4 In relation to paragraph 31 of Chapter 3, RET submits that the instrument known as the Specific Requirements as to Offshore Petroleum Exploration and Production (the **Schedule of Specific Requirements**), was originally developed pursuant to the provisions of s 101 of the *Petroleum (Submerged Lands) Act 1967* (Cth) (**PSLA**). Section 101 established the power of a Designated Authority (**DA**) to issue directions with a status equivalent to regulations in relation to all matters about which regulations may be made.
- 2.5 As such, the Schedule of Specific Requirements has not been referenced in 'a specific list of minimum engineering standards' in the *Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004* (Cth) (**Well Operations Regulations**). The Well Operations Regulations contain references to 'sound engineering principles'. This is not a reference to the directions contained in the Schedule of Specific Requirements. Further, the Schedule of Specific Requirements, which contains prescriptive rules, pre-dates the commencement of the objective-based regulations in the Well Operations Regulations.
- 2.6 As noted in RET's earlier submission, the PSLA was repealed and replaced by the *Offshore Petroleum Act 2006* (Cth) (**OPA**), effective from 1 July 2008 (now the OPGGSA). A general power of DAs to give directions, comparable to s 101 of the PSLA, is now contained in s 574 of the OPGGSA. RET notes that the Commissioner makes reference to this power in paragraphs 22.21 and 22.23 of Chapter 3.
- 2.7 In RET's submission, s 574 of the OPGGSA (and formerly, s 101 of the PSLA), is the source of power to issue directions, including general directions such as those set out in the Schedule of Specific Requirements.

² These commenced on 17 December 2009.

3 The regulatory regime – general comments

- 3.1 In addition to the above specific comments, RET wishes to provide further background information on the shift in regulatory policy with respect to offshore petroleum operations from a prescriptive to an objective-based system. RET notes that this issue is relevant to the Commissioner's Terms of Reference and arises in the context of Chapter 3 of the Draft Report. As a general comment, RET considers that Chapter 3 accurately outlines the regulatory regime (subject to the specific comments outlined above), including its historical development and the shift from prescriptive to objective-based regulation.

Historical context

- 3.2 The shift in policy from prescriptive to objective-based models of regulation is not peculiar to the Australian offshore petroleum sector. Rather, the shift reflects the historical development in recent decades of goal-setting or performance-based regulatory approaches across many jurisdictions and industry sectors. In relation to safety legislation, the shift can be traced back to the report of Lord Robens in the United Kingdom (**UK**) in 1972, which recognised the limitations of prescriptive state-based regulation and recommended a shift towards 'a more effectively self-regulating system'.³
- 3.3 In its 2009 *Research Report— Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, the Productivity Commission noted that there have been two main drivers of this trend:

First, in industries subject to rapid technological change, prescriptive regulation is likely to become quickly outdated, potentially becoming counterproductive in achieving greater safety or efficiency. Second, particularly in the area of OHS, there has been acceptance that where governments attempt to specify (through prescriptive legislation) appropriate measures to minimise risk, the government effectively accepts the role of risk minimisation for itself. Governments generally, including in Australia, see responsibility for risk minimisation as residing with businesses [references omitted].⁴

Piper Alpha accident and the Cullen Report

- 3.4 A detailed consideration of objective-based approaches to offshore petroleum regulation first arose in the context of the accident in 1988 on the Piper Alpha drilling platform located in UK waters in the North Sea. The *Report of The Public Inquiry into the Piper Alpha Disaster*, delivered by the Hon Lord Cullen on 19 October 1990 (**Cullen Report**), found

³ *Report of the Committee on Safety and Health at Work 1970-1972*, HMSO, London, 1972, para 41.

⁴ Productivity Commission, *Research Report— Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009), p 37.

that the accident was caused by an explosion of a gas condensate leakage which had built up beneath the drilling platform. It also found that prior to the accident, a sector-wide set of regulations were applied to all platforms and were enforced by governmental inspection, and this policy did not allow for customisation of safety regulations to a particular type of platform. We note the reference in Chapter 3 of the Draft Report to the Cullen Report in paragraphs 24-27 (inclusive).

3.5 The key elements of the recommendations in the Cullen Report for a modern safety regime for offshore petroleum operations were:

- (1) adopting a formal safety assessment in the form of a safety case regime; and
- (2) shifting from a prescriptive model of regulation to a model based on 'goal-setting regulations'.

3.6 One of the major failures of the UK regulatory system identified in the Cullen Report was that it did not adopt a policy of risk-based analysis requiring offshore operators to identify operational hazards on their operations and demonstrate that their operations could be conducted safely. Although the occurrence of such potentially hazardous events as the Piper Alpha accident had been envisaged, the Cullen Report found that the operator of the platform did not require these to be assessed systematically and nor did the existing regulatory regime require this to occur.

3.7 In order to address this perceived shortcoming, the Cullen Report recommended that operators be required by regulation to carry out a formal safety assessment to demonstrate that risks had been identified and appropriate controls provided and that they should also be required to demonstrate this to a regulatory body. It was recommended that this formal safety assessment take the form of a 'safety case', which would be updated at regular intervals and on the occurrence of a major change of circumstances.⁵

3.8 In formulating these recommendations, the Cullen Report had regard to evidence before the Inquiry in relation to the use of the safety case regime in two existing regulatory contexts, namely, the UK onshore environment and the Norwegian offshore continental shelf. The style adopted for onshore regulation in the UK was to 'specify principles rather than solutions' and to 'encourage innovation on the one hand but be effective against lack of precaution on the other'.⁶ Similarly, the Norwegian model had a long-standing requirement for some form of risk evaluation, in the form of a 'concept safety evaluation', and favoured non-mandatory guidelines over prescriptive regulations.⁷

⁵ Cullen Report, Vol 2, Recommendations 1-13.

⁶ Ibid, Vol 2, p 266.

⁷ Ibid, Vol 2, p 279.

- 3.9 Another key element of the recommendations in the Cullen Report was that 'goal-setting regulations', which require certain objectives to be met using appropriate methods, be implemented on offshore platforms to replace the then existing regulations, which imposed prescriptive and detailed measures that had to be taken.⁸ Further, goal-setting regulations could be supplemented by guidance notes giving non-mandatory advice on one or more methods of achieving such objectives without prescribing any particular method as a minimum or as the measure to be taken in default of an acceptable alternative.⁹ It was also recommended that operators be encouraged to specify standards to be used by their company with a view to demonstrating compliance with goal-setting regulations.
- 3.10 The Cullen Report acknowledged that the replacement of the then existing sets of prescriptive regulations with goal-setting regulations would take considerable time to implement.¹⁰

Regulatory policy development in the UK following the Cullen Report

- 3.11 In the UK, the *Offshore Installations (Safety Case) Regulations 1992 (UK) (1992 Regulations)* were introduced to implement central recommendations of the Cullen Report. They required operators and owners of offshore oil and gas installations to submit safety cases to the Health and Safety Executive (**HSE**) for acceptance as a condition of operating in UK waters.
- 3.12 While the 1992 Regulations proved successful in controlling major accident risks offshore, they were reviewed after ten years in operation, and revoked and replaced by the *Offshore Installations (Safety Case) Regulations 2005 (UK)* in order to keep pace with changes in the industry and improve regulatory processes.¹¹ The 2005 Regulations retain the safety case regime outlined in the Cullen Report and there is no fundamental change in approach from the 1992 Regulations.

⁸ Cullen Report, Vol 2, Recommendation 17.

⁹ Ibid, Vol 2, Recommendation 17(ii).

¹⁰ Ibid, Vol 2, p 373.

¹¹ Explanatory Notes and Regulatory Impact Statement to the *Offshore Installations (Safety Case) Regulations 2005 (UK)*.

Shift from prescriptive rules to objective-based regulations in Australia

- 3.13 As noted in paragraph 27 of Chapter 3, in response to the Piper Alpha accident, the Commonwealth Minister for Resources immediately established a tripartite Consultative Committee on Safety in the Offshore Petroleum Industry (**Consultative Committee**) to advise the Commonwealth Government on safety issues relevant to Australia. In 1991, the Consultative Committee recommended that key outcomes of the Cullen Report be implemented, and in particular that:
- (1) the safety case regime be adopted in Australia; and
 - (2) new performance-based regulations replace the existing prescriptive safety rules contained in the PSLA.
- 3.14 In 1992, a new Schedule 7—Occupational Health and Safety was inserted into the PSLA to require the development of safety cases for all offshore petroleum facilities.¹² The *Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations 1993* (Cth) (now incorporated into the Safety Regulations) were subsequently introduced and provided for advice, investigation and inquiries into ‘dangerous occurrences’.
- 3.15 In 1994, the then Australian and New Zealand Minerals and Energy Council (**ANZMEC**) Sub-committee on Upstream Petroleum agreed that the prescriptive rules contained in the Schedule of Specific Requirements be converted into objective-based regulations under the PSLA. It was also agreed that the Schedule of Specific Requirements be consolidated into regulations in tranches with the safety-related regulations being prepared first. As the clauses of the Schedule of Specific Requirements were replaced by regulations, they would be removed from the Schedule of Specific Requirements with the eventual aim of revoking the Schedule of Specific Requirements altogether.
- 3.16 By 1996, the safety case regime had been fully implemented in Australia with the introduction of the *Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996* (Cth) (**Management of Safety Regulations**, now incorporated into the Safety Regulations). The Management of Safety Regulations replaced the prescriptive provisions applied through the Schedule of Specific Requirements with objective-based regulations.¹³
- 3.17 The objectives of the Management of Safety Regulations were to minimise risks to personnel associated with petroleum operations under the PSLA primarily through a safety case prepared by an operator of an offshore petroleum facility which described the means

¹² *Petroleum (Submerged Lands) Amendment Act 1992* (Cth) (the provisions of the Act commenced on 24 June 1993).

¹³ Explanatory Statement, Management of Safety Regulations.

of identifying safety hazards related to the facility and then ensuring these were eliminated or reduced to as low as is reasonably practicable.¹⁴ The Management of Safety Regulations required the operator to operate in accordance with the safety case, once accepted by the DA who would then continually review the safety performance of the operator through statistical analysis of incidents and on-site audits to ensure compliance. The Management of Safety Regulations also required effective consultation with, and participation of, personnel in the development and operation of safety cases as well as their cooperation in the ongoing application of the safety case. Further, a safety case was required to be revised every 5 years or earlier if major structural or safety management changes occurred.

- 3.18 On 2 February 1998, the Commonwealth Government released a *Minerals and Petroleum Resources Policy Statement (1998 Resources Statement)*, in which it committed to 'replace prescriptive regulatory directions' in the Schedule of Specific Requirements issued under the PSLA with 'co-regulatory objective-based regulations, as already done with safety regulation'.¹⁵
- 3.19 Consistent with the 1998 Resources Statement, the Management of Environment Regulations (now the Environment Regulations) were introduced to provide an objective-based regime for the management of environmental performance for Australian offshore petroleum exploration and production activities. Previously, environmental performance had been addressed primarily through specific clauses of the Schedule of Specific Requirements. These were, of course, prescriptive in nature, and did not encourage continuous improvement, or industry to adopt best practice environmental management practices and technologies to ensure that high standards of environmental performance were maintained.¹⁶
- 3.20 Further to the Management of Safety Regulations and the Management of Environment Regulations, and consistent with the Commonwealth Government's policy commitment to establish co-regulatory, objective-based regulations, objective-based systems for regulation of offshore petroleum pipelines and data management schemes were introduced through the following subordinate legislation:
- (1) *Petroleum (Submerged Lands) (Pipelines) Regulations 2001* (Cth)
 - (2) *Petroleum (Submerged Lands) (Data Management) Regulations 2004* (Cth) (**Data Management Regulations**)

¹⁴ Ibid.

¹⁵ Commonwealth, *Minerals and Petroleum Resources Policy Statement*, p 20.

¹⁶ Explanatory Statement, *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth). As noted above, the Regulations are now known as the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth).

3.21 A further tranche of objective-based regulations for offshore petroleum well activities was introduced through the Well Operations Regulations in 2004. Again, offshore well activities were previously regulated through the requirements of the Schedule of Specific Requirements. These were prescriptive in nature and limited flexibility within the petroleum industry to respond to changes in circumstances or technology.¹⁷

3.22 According to the Explanatory Statement to the Well Operations Regulations:

The objective-based regulation of well operations allow for well activity arrangements to be changed in response to improved technologies and other circumstances while adhering to the key legislative principles. An essential part of this flexibility is the development of an agreed Well Operations Management Plan (WOMP) that specifies acceptable methods of conducting well operations in accordance with sound engineering principles and good oil-field practice. In this case, it requires a company to identify potential hazards and risks to the integrity of its well activities and consequently implement measures to remove or control those hazards and reduce the risks. This is consistent with international best practice for petroleum regulation.

3.23 RET developed and published the document *Guidelines for Offshore Well Operations (Well Operations Guidelines)* to provide assistance to the industry in fulfilling its regulatory responsibilities under the Well Operations Regulations. These are administrative guidelines outlining the process leading to the conduct of offshore well activities in compliance with the Well Operations Regulations. These guidelines are designed to facilitate industry's understanding of its obligations and requirements and provide non-mandatory guidance to companies preparing a WOMP for acceptance by a DA.¹⁸ This approach can be traced back to the recommendations in the Cullen Report favouring goal-setting regulations supplemented by guidance notes giving non-mandatory advice on methods of achieving regulatory objectives contained in legislation.

3.24 Under the Well Operations Regulations, the enforcement function of the DA shifted to place greater emphasis on auditing compared with on-site inspection. The WOMP is intended to provide a description of the design, construction and management of proposed well activities and a plan for managing risks identified for those activities. Therefore, the DAs can examine and scrutinise the relevant well activities in the process of acceptance of the WOMP and through subsequent auditing, without sending regulators for frequent on-site inspections. The Well Operations Regulations envisage that, following approval of a

¹⁷ Explanatory Statement, *Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004* (Cth).

¹⁸ Explanatory Statement, *Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004* (Cth), Attachment B—Regulatory Impact Statement.

WOMP, regulators will conduct audits through meetings and interviews with petroleum operators and examination of relevant documentation.

3.25 RET notes that other benefits identified as arising from objective-based regulation of well operations include:

- (1) Streamlined regulatory process;
- (2) Parliamentary scrutiny, as the Regulations and subsequent amendments requires Executive Council approval and tabling in Parliament;
- (3) Improved well integrity outcomes, because industry has more flexibility to adopt innovative technologies; and
- (4) Responsive to industry and community demands for best practice well operations management and continuous improvement in all aspects of a company's well operational performance.

Developments in offshore safety arrangements

3.26 In relation to safety, the 1998 Resources Statement noted the shift in offshore safety arrangements:

*to a co-regulatory regime based on the concept of the 'safety case'. This requires a company to develop for each of its facilities a documented set of systems and procedures against which the company can be audited. Operators may then institute and continuously refine safety arrangements which best meet the needs of industry, while minimising the need for direct regulation.*¹⁹

3.27 The 1998 Resources Statement also committed the Commonwealth Government to 'look for opportunities to further improve Australia's offshore safety record by commissioning an independent evaluation of all aspects of Australia's safety case regime' and 'pursue through ANZMEC the scope for broader application of the "safety case approach" in the resources sector'.²⁰

3.28 Accordingly, in 1999 the Commonwealth Government commissioned an Independent Review Team (**IRT**) of offshore safety experts to evaluate Australian offshore legal and administrative arrangements relating to safety. The IRT conducted a comprehensive review of the objective-based safety case regime over the six years that it had been in operation in the Australian offshore petroleum industry (since the commencement of the Management of Safety Regulations in 1996). At the time of the review, the States and NT carried out day

¹⁹ Commonwealth, *Minerals and Petroleum Resources Policy Statement*, p 20.

²⁰ *Ibid.*

to day offshore petroleum safety regulation using a combination of the safety case approach and prescriptive legislative rules.

- 3.29 The findings and recommendations of the IRT, together with stakeholders' responses and the Commonwealth's preferred option for future offshore safety regulation, were set out in *Future Arrangements for Regulation of Offshore Petroleum Safety*, released in 2001 (**Future Arrangements Report**).²¹ In summary, the Future Arrangements Report recommended that offshore safety legislation be revised and that the regulatory system be restructured through the establishment of a national petroleum safety regulatory authority.
- 3.30 On 13 September 2002, the Ministerial Council on Mineral and Petroleum Resources (**MCMPR**)²² agreed to the formation of an independent national offshore safety authority, now the National Offshore Petroleum Safety Authority (**NOPSA**). It was agreed at this MCMPR meeting that the NOPSA would not only regulate Commonwealth waters, as the IRT recommended, but regulate both Commonwealth and State/NT waters.²³ RET notes that NOPSA commenced operations from 1 January 2005.
- 3.31 Notwithstanding the change in responsibility for offshore safety regulation, RET notes that the safety case assessment process under the Management of Safety Regulations (now the Safety Regulations) continues to apply in the offshore petroleum sector. NOPSA assesses the operator arrangements in its decision to accept or reject the safety case. Once a safety case is accepted by NOPSA, the risk management commitments made by the operator must be complied with. These commitments are then verified by NOPSA during inspections of facilities.

Institutional reforms

- 3.32 RET notes with interest, the Draft Preliminary Findings in Chapter 3 in relation to institutional reforms to the regulatory regime, in particular, the Commissioner's draft recommendation that a single independent regulatory body be established to look after safety, as a primary objective, as well as well integrity, environmental approvals and resource management. RET notes the Commissioner's Draft Preliminary Findings that this could be achieved by combining the roles of a National Offshore Petroleum Regulator (**NOPR**)—the establishment of which was recommended by the Productivity Commission in June 2009—and NOPSA.

²¹ This document is available for download on the website of the National Offshore Petroleum Safety Authority: http://www.nopsa.gov.au/downloads/Future_Arrangements_for_regulating_Offshore_Petroleum_Safety.pdf.

²² The MCMPR was established by the Council of Australian Governments in June 2001 to subsume the minerals and upstream petroleum component of the former ANZMEC.

²³ MCMPR 2 Communiqué, 13 September 2002:

http://www.ret.gov.au/resources/Documents/mcmpr/Final_Communique_MCMPR2_13_Sept_2002.pdf

- 3.33 On 17 May 2010, in his key note address at the Australian Petroleum Production & Exploration Association Ltd (APPEA) 2010 Conference and Exhibition, the Commonwealth Minister stated that:

...consistent with industry's view, the safety of people, the integrity of facilities, the protection of the environment, and day to day operations must be regulated in an integrated way, with resource management issues regulated separately.

- 3.34 In accordance with the views of its Minister, RET endorses the move towards establishing a NOPR with responsibility for the safety of people, the integrity of facilities (including wells and pipelines), the protection of the environment and day-to-day reservoir operations. However, RET is highly attuned to the need to ensure that any future institutional reform avoids any unnecessary conflicts in regulatory objectives within agencies. To avoid these potential conflicts, RET believes it is appropriate to separate the allocation and management of resource titles (e.g. the granting of petroleum exploration permits, licences and retention leases) from the regulation of safety, the environment and day-to-day reservoir operations. The allocation and management of resource titles, which are Ministerial decisions, often involve significant policy input as well as consideration of resource management issues (e.g. assessment of exploration work program bids, field development options, commercial viability of fields, extent of field locations and boundaries, etc). Accordingly, RET believes the Commissioner's recommendations could be clarified by replacing "resource management" with "day-to-day reservoir operations" without changing our understanding of the Commissioner's intent.

- 3.35 RET also notes that the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (Cth) (the **Bill**), which is presently before the Senate, introduces amendments to the OPGGSA to augment the functions of NOPSA to include regulatory oversight of non-occupational health and safety structural integrity for offshore facilities, wells and well-related equipment. If the Bill is passed in its current form,²⁴ NOPSA will immediately assume an oversight role in relation to the structural integrity aspects of offshore facilities.²⁵

International perspectives

- 3.36 RET notes the Commissioner's comments in paragraph 65 of Chapter 3 with respect to the level of prescription in offshore petroleum regulation in other comparable countries. By way

²⁴ On 23 April 2010, the Senate Economics Legislation Committee recommended that the Senate pass the Bill in its current form.

²⁵ It should be noted, however, that regulations will provide a more detailed delineation of NOPSA's new functions between NOPSA and Designated Authorities relating to resource security and resource management, which may also have a structural integrity aspect (see Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010* (Cth), p 3).

of further background, RET notes that the regulation of petroleum operations in other jurisdictions falls broadly under three systems, namely:

- (1) sector-specific legislative systems—with legislation predetermining conditions under which the rights to explore for and exploit petroleum resources are granted by means of standard licences or leases, including royalty taxes and other payments to be made by licensees or lessees (broadly speaking, this system has been adopted in Australia and comparable jurisdictions such as Canada and the United States);
- (2) negotiation-based systems—with the government granting the rights to explore for and exploit petroleum resources on the basis of individually negotiated agreements with petroleum businesses in the absence of comprehensive petroleum legislation (used in Saudi Arabia and some other Middle East countries as well as Papua New Guinea);
- (3) a hybrid system—with general legislation setting out certain provisions and minimum standards or conditions for the grant of rights to explore for and exploit petroleum resources, but also providing for certain important matters to be settled by negotiation between government and individual businesses (adopted in The Netherlands, New Zealand, Norway and the UK).

3.37 In relation to the nature of the duties imposed on operators by legislation, most comparable jurisdictions adopt some form of performance-based or goal-setting requirements, as set out in the following table:

Canada	Primarily prescriptive regulations; however, the Chief Safety Officer and Chief Conservation Officer may, subject to certain criteria, authorize the use of equipment, methods, measures, or standards in lieu of any required by regulation, or grant an exemption from any regulatory requirement in respect of equipment, methods, measures, or standards.
The Netherlands	Hybrid regulatory approach; combination of prescriptive and goal-setting legislation and goal-setting with use of industry standards.
New Zealand	General duty to take all practicable steps to ensure safety at work. Primarily goal setting legislation. There are also some prescriptive requirements with respect to offshore installations.

Norway	Acts, Royal Decrees and Regulations. These formulate requirements in a goal setting fashion. The requirements are extensively substantiated by referencing recognised national and international standards. All companies have a general duty to ensure compliance with statutory rules and regulations as well as their own, set requirements for their activities. The supervisory activities of the PSA do not exempt the duty holders of this duty.
United Kingdom	Primarily goal setting legislation setting the required standards
United States	Hybrid regulatory approach; prescriptive regulations including 96 industry standards; performance objectives can be achieved by alternate means with approval of the Mineral Management Service.

Source: International Regulators Forum²⁶

3.38 The Minerals Management Service (**MMS**) in the US Department of the Interior currently has regulatory responsibility for offshore oil and petroleum resources on the US outer continental shelf. The MMS regulates all aspects of offshore resources including acreage release, resource management, environmental management, and integrity and safety management. The regulatory environment is primarily prescriptive, with some scope for approval of more performance-based requirements such as management plans and safety cases. In relation to safety, the:

*MMS has five inspection teams in the Gulf of Mexico and several others working across other regions. Each team consists of a manager, a drilling engineer, a production engineer, a workover engineer, an environmental regulator and a supervisory inspector. Overall, the organisation has around 50 offshore inspectors with two-three participating in each audit. Regulation requires audits to be carried out once per year per facility, however, the MMS is now transitioning to a more risk-based, rather than calendar-based approach to auditing.*²⁷

3.39 Despite this more prescriptive approach, the recent explosion and loss of life on a drilling rig, Deepwater Horizon, in the Gulf of Mexico in the United States on 20 April 2010, highlights the complexities involved in determining the best form of regulation to minimise unnecessary risk especially the risk of a major accident or disaster. In response to the

²⁶ The International Regulators Forum (**IRF**) is a group of nine regulators of health and safety in the offshore upstream oil and gas industry (<http://www.irfoffshoresafety.com>). NOPSA represents Australia at the IRF.

²⁷ Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation—Better practice and the effectiveness of the National Offshore Petroleum Safety Authority* (2009), p 177.

Deepwater Horizon incident, the US Government has formed a joint investigation to develop conclusions and recommendations. RET will closely examine the findings of the joint investigation once its report is made public.

3.40 In addition, the Deepwater Horizon incident serves to illustrate the difficulties in obtaining the appropriate balance with respect to institutional arrangements and the division of regulatory responsibilities for offshore petroleum regulation. The structure and responsibilities of the MMS, which currently regulates all aspects of the offshore petroleum industry, is now the subject of broad-ranging reforms as a result of the Deepwater Horizon incident. On 19 May 2010, the Secretary of the Interior, Ken Salazar, signed a Secretarial Order that will lead to the division of the MMS into the following three independent agencies:²⁸

- (1) Bureau of Ocean Energy Management, which will exercise the conventional (e.g. oil and gas) and renewable energy-related management functions of the MMS, including activities involving resource evaluation, planning and leasing;
- (2) Bureau of Safety and Environmental Enforcement, which will exercise the safety and environmental enforcement functions of the MMS, including the authority to inspect, investigate, summon witnesses and produce evidence, levy penalties, cancel or suspend activities, and oversee safety, response, and removal preparedness; and
- (3) Office of National Resources Revenue, which will exercise the royalty management functions of the MMS including royalty and revenue collection, distribution, auditing and compliance, investigation and enforcement, and asset management for both onshore and offshore activities

3.41 According to the US Government, the purpose of these reforms is to divide the MMS' three 'conflicting missions' and ensure that there is no conflict, real or perceived, with respect to its functions.

²⁸ Secretarial Order No 3299 available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475> accessed on 21 May 2010.

**Comments on behalf of the Department of Resources, Energy and Tourism in
response to a matter raised by the Commissioner on Day 20 of the public hearings
concerning the Schedule of Specific Requirements**

4 Schedule of Specific Requirements

- 4.1 In this section, RET sets out some background information with respect to the operation and currency of the Schedule of Specific Requirements by way of response to the observations made by the Commissioner on Day 20 of the Inquiry's public hearings (see pp 2219-2220 of the Transcript). It does not constitute comment or submission in relation to any of the Commissioner's Draft Preliminary Findings.
- 4.2 Historically, the Schedule Specific Requirements supplemented the regulatory framework under the PSLA and contained general directions, issued under s 101, to all persons involved in offshore operations to comply with a set of prescriptive rules. In administrative practice, however, the variety of technical issues in relation to which directions are given to petroleum operators has diminished from when the original PSLA was passed consistent with the shift from prescriptive rules-based regulation to objective-based regulations under the OPGGSA, as outlined above.
- 4.3 In relation to the issuing of directions, RET notes that under the current co-regulatory regime, this power is conferred on a DA (consisting of the relevant State or Territory Minister), and not the Joint Authority (comprising the State or Territory Minister and the responsible Commonwealth Minister) (s 574(2), OPGGSA).²⁹ The Commonwealth (in its capacity as member of the Joint Authority) has no statutory power to issue directions, including directions revoking clauses of the Schedule of Specific Requirements.³⁰
- 4.4 Over the past decade, the process of moving from the prescriptive directions under the Schedule of Specific Requirements to objective-based regulations has been overseen by the Upstream Petroleum Subcommittee (**UPS**)³¹ of the MCMPR, consisting of the Commonwealth Minister for Resources, Energy and Tourism and State and Territory Ministers with responsibility for minerals and petroleum. Representatives of the Commonwealth and the State and Northern Territory DAs are represented on the UPS.

²⁹ Except for directions of a standing or permanent nature, which must be given with the approval of the Joint Authority (s 574(5), OPGGSA).

³⁰ RET notes that the Commonwealth Minister, in his capacity as DA in respect of an offshore area (for example, offshore areas of external Territories), would have power to issue directions under s 574 of the OPGGSA. As the Commissioner is aware, in relation to the offshore area of the Territory of Ashmore and Cartier Islands, the Minister had delegated his powers and functions as DA to the Northern Territory.

³¹ Now titled the Upstream Petroleum and Geothermal Subcommittee.

- 4.5 In order to avoid duplicating matters dealt with by the objective-based regulations, the UPS has sought to coordinate the revocation of redundant clauses of the Schedule of Specific Requirements, commencing shortly after the commencement of Well Operations Regulations on 8 December 2004.³²
- 4.6 In February 2005, RET's representative on the UPS circulated an out-of-session paper for comment by UPS members, which proposed a number of revocations to the Schedule of Specific Requirements. These revocations were the subject of consideration by the UPS at its meetings on 14 April 2005 and 18-19 August 2005.
- 4.7 At the meeting on 18-19 August 2005, the UPS agreed to the revocation of certain clauses of the Schedule of Specific Requirements adequately covered by the regulations, including clauses relating to safety and environment. The UPS also agreed that clauses relating to data management and well operations would be revoked following the expiration of the transitional periods under the Data Management Regulations and the Well Operations Regulations (in June 2006 and December 2006 respectively). Finally, it was agreed that remaining clauses of the Schedule of Specific Requirements relating to resource management be retained pending the introduction of objective-based resource management regulations.
- 4.8 RET notes that the project to consolidate objective-based resource management regulations under OPGGSA and revoke all remaining clauses of the Schedule of Specific Requirements is expected to be completed in 2010. It is expected that the Schedule of Specific Requirements will be completely revoked and removed from the RET website once this occurs.
- 4.9 In October 2005, RET circulated a further out-of-session paper for comment by UPS members seeking agreement to revoke additional clauses of the Schedule of Specific Requirements that were adequately covered following amendments to the Management of Environment Regulations.³³
- 4.10 In February 2006, a further out-of-session paper was circulated to UPS members following a review by RET that found that additional clauses of the Schedule of Specific Requirements were adequately covered by the Data Management Regulations, Well Operations Regulations, Management of Safety Regulations and/or the Well Operations

³² The Well Operations Regulations commenced on 8 December 2004.

³³ *Petroleum (Submerged Lands) (Management of Environment) Amendment Regulations 2005 (No. 1)* (Cth). These amendments, which commenced 19 December 2005, followed a comprehensive review undertaken by RET in 2004-05 after 5 years of operation of the Management of Environment Regulations. RET's review examined the effectiveness and efficiency of the operation of the Management of Environment Regulations, identified significant problems in the Regulations, considered remedies or alternate means of achieving objective-based regulations for the identified problems and examined mechanisms for achieving increased efficiencies.

Guidelines, and could therefore be revoked. These revocations were agreed to through an out-of-session decision of the UPS in February/March 2006.

- 4.11 While the UPS has provided a forum for DAs to coordinate and agree to revocations of redundant clauses of the Schedule of Specific Requirements, RET notes that the actual giving effect to these revocations requires the relevant State/NT DA to issue written directions to individual operators revoking the relevant clauses of the Schedule of Specific Requirements. As explained in paragraph 4.3 above, the Commonwealth has no statutory power to make these revocations. Nonetheless, RET has a process in place to assist DAs to give effect to UPS decisions to revoke clauses of the Schedule of Specific Requirements. RET writes to each DA setting out the steps that they need to undertake to give effect to these revocations, namely, issuing written directions under OPGGSA to individual operators revoking the relevant clauses. For each tranche of revocations, RET provides DAs with template directions and template covering letters to be issued and sent to individual operators.
- 4.12 Ultimately, it is for the individual DA to give effect to these revocations and RET has no control over when these occur. There is no legislative or administrative mechanism by which RET can inform itself whether or not each DA has given effect to the revocations agreed to by the UPS. Therefore, while RET has agreed to host a version of the Schedule of Specific Requirements on its website, it is not in a position to guarantee that this version contains all clauses of the Schedule of Specific Requirements that may apply in Commonwealth adjacent waters of each State or Territory. For this reason, RET decided to defer publishing a revision of the November 2005 version of the Schedule of Specific Requirements on its website, until such time as each DA confirmed that the relevant revocations had been made. To date this has not occurred, although RET has initiated a process to facilitate this, which is outlined in more detail below. In the meantime it is RET's view that it is necessary to ensure that operators are able to access those clauses of the Schedule of Specific Requirements that are yet to be revoked by each DA, until the revocation of relevant clauses are undertaken by all the DA's notwithstanding that the UPS has agreed that they should be removed
- 4.13 Notwithstanding these legislative and administrative constraints, RET agrees that there is a need to expedite the process to remove redundant clauses of the Schedule of Specific Requirements, and then revoke it entirely once the resource management regulations are introduced.
- 4.14 In response to the Commissioner's comments on Day 20 of the public hearings, RET prepared an updated draft of the Schedule of Specific Requirements, which sought to reflect revocations agreed to by the UPS since 2005 and made by the relevant DAs. The proposed updated Schedule was circulated by email to members of the UPS on 23 April

2010. RET sought agreement from UPS members to the changes proposed in the updated Schedule to enable an accurate version to be uploaded to RET's website as soon as possible. However, as each of the DAs were at varying stages of giving effect to the various revocations agreed to by the UPS since 2005 (with some jurisdictions having given effect to none of these revocations), no consensus was able to be reached as to the changes that needed to be made to the version of the Schedule hosted on the RET website.

- 4.15 In RET's submission, the above illustrates the challenges posed by the unique structure of offshore petroleum regulation in Australia and some of the inconsistencies that can arise between the States and the NT. In this regard, RET agrees with the Commissioner's observations about these matters in paragraph 16 of Chapter 3.
- 4.16 On 17 May 2010, RET released an updated version of the Schedule of Specific Requirements that reflects, to the greatest extent possible, the revocations agreed since the publication of the November 2005 version. However, in view of the fact that agreement could not be reached with the State and Territory DAs through the UPS, and that there continues to be inconsistency in relation to the clauses of the Schedule of Specific Requirements that have been revoked in each jurisdiction, RET has included an appropriate annotation on the first page of the version published on its website. This advises readers that as some DAs are yet to revoke the relevant clauses, to ensure complete coverage and compliance in their jurisdiction, operators should contact the relevant DA in their jurisdiction to confirm precisely which clauses of the Schedule of Specific Requirements continue to apply.³⁴

³⁴ Available at <http://www.ret.gov.au/resources/Documents/Upstream%20Petroleum/OPGGSA%20Schedule%20of%20Specific%20Requirements%20100507.pdf> accessed on 21 May 2010.