

NEW AUSTRALIAN GUIDELINE ON OFFSHORE DECOMMISSIONING

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Legal Briefings - By **Stuart Barrymore and Alexander Butler**

On 17 January 2018, the Department of Industry, Innovation and Science (Department) released its guideline on the application of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGSA**) to the decommissioning of offshore petroleum infrastructure in Commonwealth waters (**Guideline**).¹

In light of the increasing number of major offshore projects entering into or nearing the decommissioning stage, the Guideline provides a timely confirmation of the Department's view on the current regulatory framework.

The release of this Guideline is an intermediate step ahead of the Department's discussion paper that will review the policy and regulatory framework for decommissioning in Commonwealth waters expected later this year (**2018 Review**).

KEY TAKEAWAYS

We have previously analysed and commented on the current Commonwealth decommissioning regime and the views expressed in the Guideline are largely consistent with our views.²

The Guideline presents the position that the government has more than adequate discretions and powers to properly administer offshore petroleum decommissioning under the OPGGSA, associated regulations and other Commonwealth laws. Mention is made of the panoply of powers available to the Commonwealth including powers to issue directions and remedial directions as required.³

The key takeaways from the Guideline follow:

- **Early planning is important** - the Guideline encourages titleholders to plan for decommissioning as part of their overall field development strategy. Although there is no express requirement to include decommissioning in a field development plan, its inclusion in such a plan will reduce the risk of uncertainty as to the content of the decommissioning works for a facility.
- **Base case is complete removal** - the default decommissioning requirement is the complete removal of all infrastructure and the plugging and abandoning of the wells.
- **Less than complete removal is possible** - titleholders may leave some material in-situ or offshore by demonstrating to the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) that the “alternative approach delivers equal or better environmental, safety and well integrity outcomes compared to complete removal”.
- **ALARP** - in assessing the decommissioning options, a titleholder must persuade NOPSEMA that environmental and well integrity risks have been reduced to levels that are “as low as reasonably practicable” (**ALARP**). Further, the Guideline states that if arrangements other than complete removal will reduce environmental impacts and risks to a level that is ALARP, then leaving that property in place will be an arrangement “satisfactory to NOPSEMA” in relation to that property. This is the test to be met before the Joint Authority can consent to a surrender under s 270 of the OPGGSA.
- **Surrender is the final step** - decommissioning work must be completed while the title is in force and surrender of the title only occurs after the completion of the decommissioning program. Once surrendered, the Guideline confirms that the title area becomes vacant acreage, suggesting (while not expressly stating) that the titleholder will not retain any residual liability once the Joint Authority has given its consent to the surrender of the title under the OPGGSA. This is consistent with our previous analysis of titleholder liability.

NEXT STEPS

The Department’s continued engagement with the area of decommissioning is welcome and the Guideline provides some useful certainty to industry as to how it will regulate decommissioning in Commonwealth waters.

The Guideline provides helpful clarifications in a number of areas and much welcome detail on the regulatory approval process.⁴ The 2018 Review is however the “main game” and unsurprisingly the Guideline does not address a number of the issues that we expect to receive extensive treatment in the 2018 Review. We highlight some of these points below.

- **Former titleholder liability** - an issue that has been debated is the extent to which “former titleholders” can be liable and in what situations. The Guideline simply refers to the general descriptions in the OPGGSA noting that the regulator may be able to issue directions to a former titleholder. It does not further define who that person might be or if such directions can be given concurrently with directions to current titleholders.
- **Rigs-to-Reef** - a good deal of scientific analysis is underway to assess the viability of a rigs-to-reef solution. The establishment of artificial reefs is only briefly discussed in the Guideline in the context of sea dumping. Whilst the concept is popular with a number of sectors, e.g recreational fishing communities, it remains to be seen whether there will be significant application of the rigs-to-reef abandonment solution in Australia due to the depths of the waters in which many of the installations lie and the uncertainty associated with ongoing monitoring obligations.
- **Sea Dumping** - interestingly the guideline stipulates that a permit is required under the *Environmental Protection (Sea Dumping) Act 1981 (Cth)* (**Sea Dumping Act**) for “any proposal to ...abandon infrastructure in-situ”. This seems to represent an extension of the base position under international law pursuant to which the Sea Dumping Act was enacted.⁵ We are aware of situations where infrastructure was left in-situ in the location where it was originally placed and did not require a permit under the Sea Dumping Act and this is consistent with the Protocol. It is likely that this issue will be considered in more depth in the 2018 Review.
- **Interdepartmental liaison** - the Guideline makes it clear that the OPGGSA and related regulations principally regulate decommissioning of offshore infrastructure, which is primarily administered by the National Offshore Petroleum Titles Administrator (**NOPTA**) and NOPSEMA. The Sea Dumping Act is administered by the Department of the Environment and Energy. The Guideline does not touch on how these departments will liaise in relation to the various assessments of a titleholder’s proposal. Theoretically, inconsistent outcomes could be created and it would be desirable to investigate guidance that allows for the approval processes to operate harmoniously.⁶ In that regard, we note that most offshore petroleum activities including decommissioning are no longer regulated under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*. Possibly similar efficiencies may be gained by having NOPSEMA regulate any associated sea dumping activities as part of its assessment of the broader decommissioning operation. The 2018 Review may consider whether it is sensible for NOPSEMA to carry out that assessment as part of the relevant environmental plan/authorisation process.

ENDNOTES

1. Department of Industry, Innovation and Science, *Offshore Petroleum Decommissioning Guideline*, 17 January 2018.
2. For further reading see: Stuart Barrymore and Alexander Butler, 'Decommissioning Facilities in Australia's Offshore Areas - whose responsibility?' [2015] *AMPLA Yearbook* 363; Stuart Barrymore, 'Decommissioning of Australia's Oil and Gas Facilities in the 21st Century' (2017) 52(2) *The APPEA Journal* 397.
3. It is our understanding that the directory powers under sections 586 and 587 of the OPGGSA have never been exercised.
4. See Department of Industry, Innovation and Science, *Offshore Petroleum Decommissioning Guideline*, 17 January 2018, part 4.
5. Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, opened for signature 7 November 1996, 36 ILM 1 (entered into force 24 March 2006).
6. As State and Territory approvals will need to be considered, coordination with those relevant agencies to achieve a consistent approach is desirable.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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