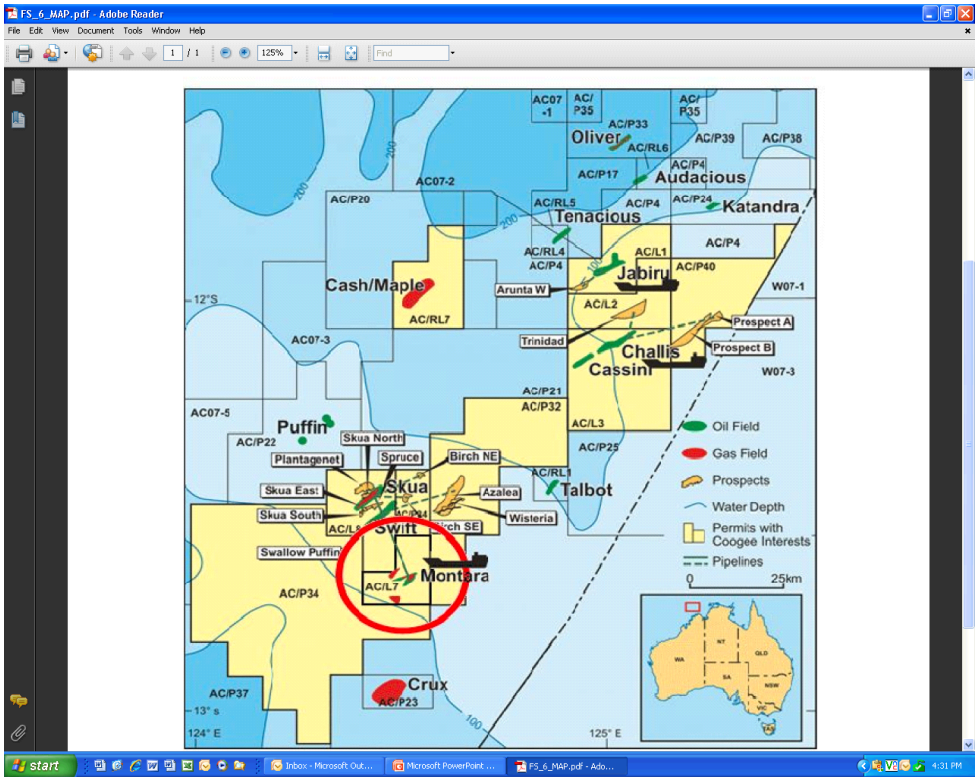
Licence breach and cancellation under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), if acting for PTTEPAA in respect of the Montara oil spill



by Marylou Potts Pty Ltd
8 May 2011

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Executive summary

This paper sets out a framework of possible actions that may be instigated by PTTEPAA as a consequence of receiving a notice pursuant to s276 (**s276 notice**) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (**OPGGSA** or **Act**)*. Without a copy of that s276 notice only an overview of possible actions can be provided. Any legal action will begin with a review of the s276 notice to determine whether it complies with the provisions of the Act.

If the s276 notice is compliant with the provisions of s276 of the Act, PTTEPAA must make its written submission within the time frame set out in the s276 notice.

Thereafter, the JA must consider that submission (276(3) of the Act) and must take into account the actions of PTTEPAA (s275(2) of the Act) before deciding to cancel the licence.

If the JA then decides to cancel the licence, PTTEPAA should consider making an application to the AAT to have the JA's decision set aside on the basis that, objectively, there is a preferable decision. The success of any application to the Administrative Appeals Tribunal (**AAT**) under the AAT Act is dependent upon whether it can be shown objectively that there is a preferable decision.

If the s276 notice is defective, PTTEPAA may make an application under the Administrative Decisions Judicial Review Act (**ADJR Act**) to have the conduct engaged in for the purpose of making a decision reviewed.

Provided PTEEPAA is successful in its application under the ADJR Act, and provided the JA has rectified its s276 notice, PTTEPAA may make its written submission under s276 of the Act. If the JA then proceeds to cancel the licence, PTTEPAA may, as set out above, make application to the AAT on the same basis as set out above.

In summary, it is incumbent upon PTTEPAA to ensure that its submission under s276(2) to the JA, or, its application to the AAT (should the JA subsequently decide to cancel the licence), convince the JA or AAT, as the case may be, that there is a preferable decision to be made. In the AAT it should seek to set aside the decision of the JA to cancel and have the AAT remit the matter for reconsideration in accordance with recommendations that the Commonwealth and PTTEPAA enter into an agreement to implement the "worlds best practices" set out in the Montara Action Plan[1] and the additional actions recommended in the Noetic Solutions Pty Ltd Report[2].

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[1] A summary of which is set out in Coogee Resources website at http://esp.gewru.com/download/files/12414/1277745/PTTEP%20AA%20Media%20statement%20241110.pdf

[2] Noetic Solutions Report Review of PTTEPAA's Response to the Montara Blowout http://www.ret.gov.au/Department/Documents/MIR/Montara-Response-Review.pdf

Scenario

1. Advice

PTTEPAA has requested advice with respect to the Minister, as Joint Authority's (**JA**), issue to it of a s276 notice which sets out the Minister's intention to cancel PTTEPAA's Montara production licence.

2. Facts

2.1 The facts relating to the PTTEPAA's Montara blowout and the subsequent actions of the Government and PTTEPAA and its parent PTTEP are set out in Schedule 1.

2.2 For the purpose of this paper all the actual facts are taken into account with the exception of the executed Deed between PTTE and the Commonwealth dated 22 February 2011 and paragraphs 15-18 of the Statement of Minister Ferguson on 4 Feb 2011.

2.3 It is more than probable that the JA has good grounds[3] to argue that:

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3 In order to issue a s276 notice to cancel the title, the JA must show a ground for cancellation under s274 OPGGSA. The grounds for cancellation are set out in s274 of the Act and are that PTTEPAA has not: (a) complied with a condition of the licence. There is only one condition of PTTEPAA's licence which is to continue to appraise and explore for any additional recoverable petroleum. This would not appear to be the issue; (b) complied with a direction given to PTTEPAA by the DA or the JA under chapter 2, 6 or Part 7.1. No direction has been given to PTTEPAA; (c) complied with a condition of: (i) Chapter 2 Regulation of activities relating to petroleum. This is not apparently relevant; (ii) Chapter 4 Registration of transfers or and dealings in petroleum titles. This is not apparently relevant; (iii) Chapter 6 Administration: Section 569(1) requires the titleholder to (a) carry out all petroleum exploration and recovery operations in a licence area "in a proper and workmanlike manner and in accordance with good oilfield practice". Further, s569(1)(c) the licence holder must control the flow and prevent the waste and escape in the licence area of petroleum; and (d) prevent the escape, in the area or any mixture of water or drilling fluid with petroleum or

(i) there has been a breach of s569(b) of the Act given the MCI Report Findings that PTTEPAA had failed to carry out all petroleum recovery operations in the licence area in a proper and workmanlike manner and in accordance with good oilfield practice[4];

(ii) there has been a breach of s569(c) of the Act given the MCI Report Finding that PTTEPAA failed to control the flow, and prevent the waste or escape in the licence area of petroleum or water[5]; and

(iii) possibly there has also been a breach of s569(d) of the Act given that the MCI Report Finding that PTTEPAA failed to prevent the escape of any mixture of water or drilling fluid with petroleum or water[6].

2.4 Section 569(6) of the Act provides that "a person commits an offence if: (a) the person is subject to the requirement under subsection (1); and (b) the person engages in conduct; and (c) the person's conduct breaches the requirement. Under s569(6A) an offence against subsection (6) is an offence of strict liability.

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any other matter. This is relevant; (iv) Part 7.1 Data management and gathering of information. This is not relevant; (v) Regulations; or (d) paid an amount. This is not relevant.

[4] See Schedule 1, para 3.4

[5] Acknowledged by the Minister in his statement dated 4 February 2011 at para 1.

[6] See Schedule 1 para 1.5.

2.5 Given these circumstances it would be inadvisable, due to the lack of likelihood of success, to dispute any of these findings.

2.6 Further, it is more than likely given PTTEPAA's conduct outlined in the MCI Report, that the defence set out in s569(7) of the Act will not be available to PTTEPAA. That is, the MCI Report found that PTTEPAA did not take all reasonable steps to comply with paragraphs (b), (c) and (d) of item 1 of s569(1) of the Act. The MCI Report found that there was systemic problems which afflicted PTTEPAA as set out in para 7.11 of the MCI Report and findings 91 and 92 and the conclusions in paras 7.30 and 7.31, Findings 94 and 95 that "PTTEPAA's own investigations into the circumstances and likely causes of the Blowout were manifestly deficient and this was irresponsible and inexcusable". At para 7.48 the Commissioner notes:

> *The egregious failure of PTTEPAA to come to grips with the circumstances and likely causes of the Blowout cannot be regarded as a matter of little significance … It resulted in PTTEPAA, on numerous occasions giving false and misleading information to various officials.*[7]

[7] Montara Commission of Inquiry Report 2010

2.7 However, despite the fact that PTTEPAA may not have acted in its best interests over the 6 month period following the blowout[8], it has subsequently shown itself to have:

(a) properly addressed the issues which led to the Montara blowout[9];

(b) developed a comprehensive Action Plan to achieve a governance framework consistent with best industry practice which has been commented on favourably by both the Commissioner and Independent experts, Noetic Solutions Pty Ltd[10]; and

(c) co-operated fully with both Government and Industry in developing that Action Plan and has shown itself to continue to so act.[11]

2.8 Given this later conduct, it is most advisable that PTTEPAA demonstrate that it has satisfied the provisions of s275(2) of the Act which may sway the JA to exercise his discretion not to cancel PTTEPAA's licence.

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[8] See Findings 96-100 of the MCI Report pp 340-1

[9] Noetic Solutions Report Review of PTTEPAA's Response to the Montara Blowout, at Para 4.4 p33

[10] Noetic Solutions Report Review of PTTEPAA's Response to the Montara Blowout

[11] Noetic Solutions Report Review of PTTEPAA's Response to the Montara Blowout para 7 Executive summary p iv

3. Compliant s276 notice

3.1 The notable deficiency in the facts relates to whether the s276 notice complies with the requirements set out in s276 of the Act. PTTEPAA is requested to provide to us a copy of that notice. In the meantime and as a consequence, this advice will set out the actions that could be taken if the notice complies with s276 and those if it does not.

3.2 If the s276 notice does comply with the provisions of the Act, the notice will have been written, be given to PTTEPAA, give at least 30 days notice of the JA's intention to make the decision, set out the details of the decision proposed, provide the reasons for the proposal and invite PTTEPAA to make a written submission within the time limit set out in the notice[12].

4. PTTEPAA's submission

4.1 The JA must invite PTTEPAA to make a written submission to the JA about its proposal to cancel within the time limit set out in the notice. Pursuant to s276(3) of the Act, the JA must take into account that submission in deciding whether to make the decision to cancel.

[12] s276(2)(c) of the Act

4.2 If PTTEPAA is in agreement with our comment in para 2.5, in our view its submission should focus on and set out in detail the action taken by PTTEPAA:

(a) to remove the ground of cancellation; or

(b) to prevent the recurrence of similar grounds,

as these are the matters which must be taken into account[13] by the JA in his exercise of the power to cancel the licence under s275(1) and which make allowance for PTTEPAA's actions after a strict liability breach. Further, an emphasis that the Montara Action Plan and the additional recommendations of the Noetic Solutions Report allow the implementation of a new world's best practice regime which could have a beneficial effect on the industry as a whole. PTTEPAA's argument is essentially that here is an opportunity to up the standard and monitor if it works. Cancelling the licence would mean that to implement this new standard all the ground work would need to be done again on another licence holder's tenement which would be costly and waste all the work done to date from August 2009 to March 2011 to turn PTTEPAA's and the governments practices around.

[13] These are the requirements of s275(2) of the Act.

PTTEPAA would also be well advised to undertake to implement these actions in all its activities in Australian waters[14] and have its parent, PTTEP undertake to provide an unconditional and irrevocable guarantee to the Australian Government that PTTEPAA would undertake those actions. The Ministers statement dated 24 November 2010 at para 23 underpins this suggestion.

> *I believe a review of PTTEPAA's licence to operate which was restricted to its operations in the Montara field would, in these circumstances , be insufficient.*

4.3 We recommend that PTEPAA's submission to the JA include:

(a) the Montara Action Plan and the consultation and consequent actions of PTTEPAA had both with the Government and independent consultants appointed by Government;

(b) the actions of PTTEPAA implementing that Action Plan;

(c) the findings of the MCI that PTTEPAA has expended considerable time and effort devising that Action Plan;

(d) the findings of Geoscience Australia concerning the actions taken to "ensure the integrity of the well had been undertaken

[14] Minister's Statement dated 24 November 2010 paragraph 23 and Minister's Statement dated 4 February 2011 paragraph 6.

and completed and that the AGR verification report provides appropriate assurance that the barriers are competent"[15];

(e) the findings of Noetic Solutions Pty Ltd concerning the Action Plan set out in its executive summary and governance review;

(f) references to the paragraphs favourable to PTTEPAA's actions in the Minister's statements of 24 November 2010 and 4 February 2011[16];

(g) the satisfactory clean up of the spill and payment of all associated costs;

(h) undertakings to:

(i) implement the Action Plan;

(ii) fund and implement the 5 year environmental monitoring plan in cooperation with DSEWPaC[17]; and

(iii) implement the additional actions as required by the independent review by Noetic Solutions Pty Ltd; and

[15] Minister's Statement dated 24 November 2010 paragraph 20.
[16] Paragraphs 12, 13 of the Ministers statements dated 4 February 2010, and Paragraph 20 Minister's Statement dated 24 November 2010.
[17] See para 6.2 of Schedule 1.

(iv) fund and implement a complete audit of all PTTEPAA's activities in Australia to ensure well integrity and undertake this audit on a yearly basis.

4.5 If, following:

(a) PTTEPAA's written submission under s276(2) of the Act;

(b) the JA's consideration of that submission required under s276(3); and

(c) the JA's consideration of PTTEPAA's action to remove the ground and prevent the recurrence under s275(2) of the Act,

the JA then makes a decision to cancel the licence under s275(1) of the Act, PTTEPAA may consider its rights of recourse to the AAT[18] for review of a reviewable Ministerial decision[19] pursuant to s747 of the Act.

5. The AAT – a preferable decision

[18] Lexis nexis Administrative Appeals Tribunal [120] ff . s25 AAT Act the OPGGSA confers jurisdiction under s 747, a "decision has been taken, and that decision is taken under an enactment, the OPGGSA. The decision to cancel falls within s3 of the AAT Act and additionally in s3(3) as the making of a determination. Section 27 AAT Act requires that PTTEPAA have interests which are affected. The cancellation of the licence is an interest which is affected.
http://www.lexisnexis.com.ezproxy.lib.uts.edu.au/au/legal/results/pubTreeViewDoc.do?nodeId=TAABAABAAW&pubTreeWidth=23%25

19 A "reviewable Ministerial decision" defined in s745 of the Act.

5.1 The AAT has the power under s43 of the Administrative Appeals Tribunal Act (**AAT Act**) to:

(a) affirm the decision;

(b) vary the decision;

(c) set aside the decision and:

(i) make a decision in substitution for the decision so set aside; or

(ii) remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

The obligation of the AAT is to satisfy itself whether a decision was objectively the right one to be made[20]. This has sometimes been referred to as the "correct and preferable decision"[21].

5.2 PTTEPAA would be seeking to have the AAT set aside[22] the decision to cancel the licence on the basis that the preferable decision is to allow the licence to stand and:

[20] *Drake v Minister for Immigration Affairs and Ethnic Affairs* (1979) 24 ALR 577. The AAT does not have to find something wrong with the decision, nor especially focus on the reasons for the decision, what is most important is "the duty of the Tribunal is to satisfy itself whether a decision in respect of which an application for review is duly instituted is a decision which in its view, was objectively, the right one to be made". Smithers J in *Drake* at 599.
21 Pearce 2007 at para 9.13.

(a) PTTEPAA to implement the new world's best practice regime which is set out in its Montara Action Plan and additional actions recommended in the Noetic Report, devised with the hindsight of the MCI Report, the Deepwater Horizon Report to the President and extensive consultation with government and independent experts to ensure that it is "world's best practice".

(b) recommend that PTTEPAA undertake to the Government, by deed poll or the like, to comply with its undertakings set out in its submission[23].

5.3 PTTEPAA should also make an application to the ATT for a stay of the Minister's decision under s41 of the AAT Act[24] pending the ATT hearing.

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22 The standard of proof relevant to the AAT is that the facts must be established on the balance of probabilities: *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139.

23 It is odd that the OPGGSA does not empower the Minister in these circumstances to vary the Licence conditions. Section 162 of the Act appears to only contemplate the imposition of conditions at the licence granting stage. Possibly such a provision would be considered adversely by the international oil industry? Query whether PTTEPAA and the Commonwealth could agree subsequently to further conditions outside the licence. Presumeably they can. Possibly the simplest solution is for PTTEPAA to execute a deed poll in favour of the Commonwealth to undertake to do those things set out in its submission should the licence be reinstated. It would be preferable if PTTEP itself and on behalf of all its subsidiaries entered such a deed with respect to operations in Australian waters.

24 An application for review at the AAT does not affect the operation of the decision or prevent the taking of action to implement it. Under s41(4) the JA must be given the opportunity to make a submission in relation to the application. The AAT has to make a decision based on the conflicting considerations of the hardship to PTTEPAA of the likely adverse affect on its business and employees and contractors as well as the significant capital investment that it has already made not simply to conduct petroleum production operations but to implement the changes required by the MCI Report and the activities demanded by the government, against the danger to the public interest if PTTEPAA were allowed to continue to operate under the licence. Given the Noetic Report, Geoscience's audit and the changes already implemented presumeably there is now little danger to the public interest and the stay would be granted. See *Re Commins and Civil Aviation Safety Authority* (2004) 86 ALD 637. Note that the Minister may take into account the public interest under s 779 of the Act

5.4 In the alternative, should the AAT not wish to reinstate the licence to PTTEPAA, that the AAT make a direction[25]:

(a) that PTTEPAA dispose of its licence to a third party. It should however be noted that the power to make such a direction to dispose has issues particularly as to whether the DA has the power to direct PTTEPAA to dispose.[26]

(b) alternatively, that the ATT stay the decision of the JA for a specified period and recommend to the JA that PTTEPAA be allowed to dispose of the licence and:

(i) if the licence is not disposed of within that time, to affirm the decision of the JA; or

(ii) if the licence is disposed of within that time, to set aside the decision of the JA.

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[25] The AAT may exercise all the powers of the decision maker, so it may exercise not only the power upon which the decision maker relied but also any relevant power or discretion conferred on the decision maker by the enactment re *Control Investments and Australian Broadcasting Tribunal (no2)* (1981) 3 ALD 88. See Pearce 2007 at 9.14.

[26] The powers of the DA to make directions are set out in Division 2 Chapter 6 of the Act, in particular s574(2) The DA may, by written notice given to the registered holder of a title, give the registered holder a direction as to any matter in relation to which the regulations may be made. Section 781 of the Act provides The GG may make regulations prescribing matters (a) required or permitted by this Act..; or (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act. These are very broad powers. However the Regulations are very specific. It is arguable that the DA does not have sufficient direction making power to direct PTTEPAA to dispose as such the AAT is similarly limited. s*SZIAI v Minister for Immigration and Citizenship* (2008) 104 ALD 22 ; [2008] FCA 1372, followed by Dhanoa v Minister for Immigration and Citizenship and anor (2009) 109 ALD 373. Note also s162(7) limiting the conditions of the licence.

5.5 Where the s276 notice is compliant PTTEPAA could, before making its written submission under s276(2), make an application pursuant to s16(2) of the ADJR Act. However, any action by PTTEPAA under the ADJR Act, where on its face the s276 notice is compliant, may be otiose.[27]

6. Defective s276 notice – judicial review under the ADJR Act

6.1 If the s276 notice is defective in any way, particularly if it does not set out the reasons for the proposal as required under s276(2)(b) of the Act or invite PTTEPAA to make a written submission in response under s276(2)(c) of the Act, PTTEPAA may apply under s6(1)(a),(b) and (e) of the ADJR Act to have the proposal reviewed under s768(5) of the OPGGSA.

6.2 Under s16(2) of the ADJR Act the court has the power to make either or both of the following orders:

(a) make an order declaring the rights of the parties; or

[27] It is worth noting that the court may refuse to grant an application where the s276 notice requirements have been complied with and PTTEPAA has not responded with its submission in reply. Further, the ADJR Act does not authorise the court to review the merits of the decision, nor does it empower the court to substitute its own decision for that of the administrator. As a consequence, provided the s276 notice complies with the Act, an application under the ADJR Act may be otiose. Further, the court is likely to reject the application if there is a possibility of a subsequent review on the merits in the AAT: *Anderson v Commissioner for Employees Compensation* (1986) 12 ALD 612. Als see s10(2)(b)(ii) ADJR Act.

(b) an order directing any of the parties to do or refrain from doing and act or thing which the court considers necessary to do justice between the parties.

6.3 The grounds for review of conduct related to making decisions in s6 the ADJR Act most likely to arise are:

(a) breach of the rules of natural justice, in particular, the hearing rule under s6(1)(a) of the ADJR Act. In that the JA has failed to exercise procedural fairness by failing to comply with s276 of the Act.

(b) that the procedures that are required by law to be observed in respect of the conduct have not been observed (s6(1)(b) of the ADJR Act). Namely that the JA has not complied with the provisions of s276 of the Act.

(c) the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made (s6(1)(e) of the ADJR Act). Section 6(2) of the ADJR Act gives some guidance as to what is included in this ground. Here PTTEPAA could argue that:

(i) under s6(2)(b) of the ADJR Act, the decision failed to take account of a relevant consideration that it will be bound to take into account under s275(2) of the Act in its decision to cancel namely that PTTEPAA had satisfied s275(2) of the Act as PTTEPAA:

(A) had removed the ground of cancellation. The spill had been cleaned up, the wellhead had been secured and checked and new governance procedures had been set out in the Montara Action Plan that were currently being implemented; and

(B) had implemented procedures to prevent the recurrence of similar grounds. PTTEPAA is implementing the Montara Action Plan in consultation with experts and government in order to ensure that its work practices were world's best practice; and

(ii) the decision was contrary to the policy expressed by the Minister in his statements of 4 February 2011 and 24 November 2010[28] together with the fact that in the history of the Commonwealth petroleum legislation there has

[28] There is strong argument that the publication of a policy release gives rise to an obligation to afford an opportunity to make submissions to a person affected by a decision to depart from the policies expressed in that release. LexisNexis [15.4.0115] *Kioa v West* (1985) 159 CLR 550 in this case the policy was not to approve applications. In this case the policy is not to cancel licences.

never been a cancellation of a petroleum production licence.[29]

(iii) under s6(2)(g) of the ADJR Act, that the decision is "*so unreasonable that no reasonable decision maker could ever have come to it*"[30]. Given that there is nothing more that PTTEPAA could do to rectify the situation and that the JA is bound to take into account what PTTEPAA has done and what it intends to do, and that that action has satisfied s275(2) of the Act and been signed off by independent experts Noetic Solutions Pty Ltd, a decision by the JA to cancel the licence would be unreasonable.[31]

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[29] Legislative history of the OPGGSA formerly called Petroleum Offshore Act 2006 enacted after the repeal of the Petroleum (Submerged Lands) Act 1967 (**PSLA**) which was repealed in full by the Offshore Petrolem (Repeals and Consequential Amendments Act 2006. The equivalent section to s276 of the OPGGSA in the PSLA is s105. A search of the case law concerning s105 of the PSLA reveals that there is only one case that refers to s105 of the PSLA, which is full federal court decision of Cth v WMC (1996) 67 FCR 153. This decision was later reversed in the High Court and s105 was not under consideration.

Section 779 of the Act provides that the Minister may have regard to the public interest in making a decision. According, to s43(6) of the AAT Act, so may the AAT. In *Kioa v West* (1985) 159 CLR 550 and *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 the High Court suggests that established administrative practices may give rise to obligations of procedural fairness. Further departure from that policy should only be made with good reason See *Re Australian Metals Holdings Pty Ltd and ASC (1995) 15 ACS*

Paragraphs 20, 21, 22, 23, 24, 25, 26 of the Ministers statements dated 4 February 2010, and Paragraph 7, 8, 9, 10, 11. This policy is also in line with the policy expressed by the Commission in the Deepwater Horizon Report to the President in Chapter 10 at p 299.

[30] A challenge of the decision of the JA on the basis of the *Wednesbury* principle established in the UK case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. There is overlap with the grounds of review at common law, in this case, irrationality.

In *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 Mason J held a ground on which a decision may be set aside is where the decision maker has "failed to give adequate weight to a relevant factor of greater importance, or has given excessive weight to a relevant factor of no great importance" is that the decision is manifestly unreasonable in the *Wednesbury* sense. In *FCT v McCabe* (1990) 26 FCR 431 it was held that a strong case was necessary to upset a factual finding.

[31] The Wednesbury unreasonableness action is often described as a last resort application and its satisfaction difficult to prove. Note Aronson 2009 pp 367-378.

(iv) affected the legitimate expectations of PTTEPAA that the licence would continue by virtue of all the work done from August 2009 until now to rectify it's practices.[32]

7. Other considerations?

It is unlikely the lawful cancellation of a licence could be considered to fall within the provisions of s780 of the Act given the distinguishable facts and the High Court's decision in *Commonwealth v Western Mining Corporation Resources Ltd* (1998) 194 CLR 1. In that case it was held that the

> *statutory modification or extinguishment of a permit is not an acquisition of property by the Commonwealth, for the Commonwealth was under no liability reciprocal to the permit or interest and acquires no benefit by the modification or extinguishment.*[33]

Conclusion

[32] There are difficulties with this argument See LexisNexis [15.4.0110] footnote 10 that Brennan J in Kioa v West (1985) 159 CLR 550 at 617 considered the concept of legitimate expection was uncertain and its primary function was to indicate that procedural fairness extended to protect interests other than legal rights."

[33] *Commonwealth v Western Mining Corporation Resources Ltd (1998) 194 CLR 1* Brennan CJ at para 24. Toohey J took a wider view in dissent acknowledging the indirect benefit had by the Commonwealth as a consequence if the modification as it "freed the commonwealth to deal with this right. It also enabled the Commonwealth to enter into treaty arrangements to its financial benefit and towards resolution of the ongoing dispute with Indonesia as to sovereign riughts in the Timor Gap." At para 57.

A decision to cancel the petroleum production licence would be a first in Australia. Clearly, the circumstances are serious. Certainly the MCI Report indicated that the issue was not just with PTTEPAA but included that of the government. Action on both sides is necessary. From PTTEPAA's and its parent PTTEP's perspective what is necessary is the provision of assurance to the JA, and possibly the AAT, that it now can and will exercise good oilfield work practices in all its activities in Australian waters. The advice in Noetic Report is that:

> *the success of PTTEPAA's program of change will depend entirely on the quality of its execution ... [Any success will also require the government's] ongoing oversight to ensure that PTTEPAA successfully implements its planned change initiatives and addresses its shortcomings effectively. This follow up, if conducted over a period of 18 months, should provide sufficient assurance to the Australian Government that PTTEPAA has taken all reasonable steps to meet good industry practice requirements.*

The recommendation of this advice is that this will be PTTEPAA's strongest argument and most credible argument to retain its petroleum production licence.

Schedule 1 Montara blowout facts[34]

1. The Blowout

1.1 On 21 August 2009 an oil spill was detected in the Timor Sea coming from the Montara wellhead platform on production licence AC/L7 held by PTTEPAA. Some of the oil crossed into Indonesia's Exclusive Economic Zone.

1.2 On 14 September 2009 the relief well was commenced.

1.3 On 1 November 2009 the West Triton rig intercepted the leaking well, a fire started on the West Atlas rig and 69 personnel were successfully rescued.

1.4 On 3 November 2009 the leak was contained by successful well-kill operations and the fire was extinguished.

1.5 A boom and skimmer vessel was deployed and 844,000 litres of oil and water mix were recovered of which 493,000 litres were oil. The PTTEP costs of the clean up are estimated in the range of US$319m and no oil has been found to have reached either the coast of Australia or Indonesia.

1.6 This was Australia's third largest oil spill.[35]

2. Amendment OPGGSA

On 8 October 2009 the Commonwealth assented to an urgent amendment to the Act[36] to insert *Part 9.10A Inquiries into significant offshore incidents* in order to provide the Minister with general power to investigate the likely causes of the incident and make recommendations to the Government on how to prevent future incidents[37].

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[34] These facts have been largely gleaned from a presentation given by Reid P 2011 *Montara oil Spill – Likely Consequences for Australian Offshore Petroleum Industry Presentation to PESA 8 March 2011*, also presented on 3 March 2011 to Masters students at Sydney University participating in the Principles of Oil and Gas course coordinated by Prof. Terrence Daintith. I would like to express my thanks to Peter Reid for forwarding to me this presentation.

[35] Noetic Solutions Pty Ltd 2010 *Report: Review of PTTEP Australiasia's Response to the Montara Blowout* Executive Summary p.iv.

36 Commonwealth Act 102 of 2009 *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Act 2009 (Cth)*

[37] see http://www.ret.gov.au/Department/responses/montara/Pages/MontaraInquiryResponse.aspx Ministerial statement

3. Montara Commission of Inquiry (MCI)

3.1 On 5 November 2009 the MCI was established, which undertook 4 weeks of public hearings and received more than 180 submissions.

3.2 On 18 June 2010 Commissioner Borthwick AO PSM presented his MCI Report to the Minister containing 100 findings, and 105 recommendations.

3.3 The recommendations[38] of the MCI Report include:

Recommendation 101 states that a the Minister "should … under take a review of PTTEPAA's permit and licence to operate the Montara field.

Recommendation 102 provides "for the purposes of that review, the minister should issue a show cause notice to PTTEPAA under s276 of the OPGGSA.

Recommendation 103 suggests that in carrying out the review of PTTEPAA's permit and licence, "the Minister should have regard to this report, (i) particularly the findings set out in this chapter [8]; and (ii) the extent to which PTTEPAA has implemented the Action Plan submitted to the Inquiry, or otherwise addressed the matters canvassed in this Report".

3.4 The significant findings[39] Chapter 8 of the MCI Report include:

Finding 1 of the MCI Report provides "A direct and proximate cause of the Blowout was the defective installation by PTTEPAA of a cemented shoe in the 95/8" casing of the H1 Well on 7 March 2009."

Finding 3 "the pumping back … was contrary to sensible oilfield practice, and led to a so-called wet shoe .. [which] lacked integrity as a barrier."

Finding 9 provides that it was a direct and proximate cause of the blowout that no test was carried out on the cemented casting shoe.

Finding 10 provides that this failure was contrary to sensible oilfield practice.

Finding 16 provides it was a direct and proximate cause of the blowout included the failure to install a PCCC on the 13 3/8" casing string of the H1 Well. This was intended to act as a second barrier against blowout.

Finding 17 states "the non-installation of the PCCC on the 13 3/8" casing string of the H1 Well was contrary to sensible oilfield practice

[38] MCI Report 2010 p342
[39] MCI Report 2010 p343 +

Finding 20 provides it was a direct and proximate cause of the blowout to remove, and not re-install the PCCC on the 9 5/8" casing string of the H1 Well.

Finding 20 states that the removal, and not re-installation the PCCC on the 9 5/8" casing string of the H1 Well was contrary to sensible oil field practice.

4. Montara Action Plan

As a result of revewing a draft report of the MCI[40], PTTEP, the parent company of PTTEPAA, released the Montara Action Plan. The action plan was "developed to comprehensively address the technical and governance issues identified by the Commissioner and has application across all PTTEP's operations in Australia"[41].

5. Independent review of the MCI Report commissioned

On 6 September 2010[42] the Minister commissioned an independent review of the Montara Action Plan that PTTEPAA submitted to the MCI for the purpose of determining whether the Montara Action Plan would meet industry best practice.

6. PTTEPAA's and the Minister's actions

6.1 PTTEPAA has since covered its commitment to the Australian Government to cover the costs associated with the spill clean-up operations.[43]

6.2 PTTEPAA agreed to fund a 5 year environmental monitoring plan in co-operation with the Commonwealth Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC).[44]

6.3 On 24 November 2010 the Minister for Resources and Energy, Martin Ferguson AM MP, released the Report of the Montara Commission of Inquiry (**MCI**) and the draft government response to that report. The MCI determined that the source of the blowout was the result of the primary well control barrier failing and concluded that PTEPPA did not

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[40] Noetic Solutions Pty Ltd 2010 *Report: Review of PTTEP Australiasia's Response to the Montara Blowout* Executive Summary p.iv.
[41] Statement of the minister of Resources dated 24 November 2010 paragraph 24
[42] This date was set out in the Minister for Resources Statement dated 24 November 2010 para 24.
[43] http://www.coogeeresources.com.au/uploads/PTTEPAA%20media%20statement%204%20February%202011.pdf.pdf
[44] http://www.coogeeresources.com.au/uploads/PTTEPAA%20media%20statement%204%20February%202011.pdf.pdf

observe good oilfield practice. The MCI Report provided that if, the Minister considered that PTTEPAA had contravened the OPGGSA, it is recommended that the Minister give consideration to exercise the power of cancellation conferred by s275 of the OPGGSA. The MCI Report also noted "Indeed, the Inquiry notes that PTTEPAA has expended considerable time and effort devising an Action Plan".[45]

6.4 On 24 November 2010 PTTEPAA released a Media Statement acknowledging the deficiencies identified in the Commission of Inquiry's final report and stating that it is implementing a nine point Action Plan which is embedding the highest standards of oil field practice and safety in its operations.[46]

6.5 In June 2010 a prosecution brief has been referred to the Commonwealth Director of Public Prosecutions on the Montara blowout and whether the occupational health and safety laws were contravened.[47]

7. Independent review of the MCI Report completed

7.1 In November 2010 Noetic Solutions completed its *Report: Review of PTTEP Australiasia's Response to the Montara Blowout* which concluded

> *Noetic is satisfied that PTTEPAA has a plan that effectively responds to the issues raised in the MCI and importantly the plan sets the company on the path to achieving industry standards for good oilfield practice and good governance. However the success of PTTEPAA's program for change will depend entirely on the quality of execution.*[48]

7.2 On 4th February 2011 the Commonwealth Minister for Resources and Energy, released the report of the independent review of PTTEP Australiasia (Ashmore Cartier) Pty Ltd (PTTEPAA) Montara Action Plan by Noetic Solutions Pty Ltd.

7.3 All operational personnel including the CEO of PTTEPAA have been since been replaced.

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[45] MCI Report 2010 para 7.9

[46] http://www.coogeeresources.com.au/uploads/PTTEPAA%20media%20statement%204%20February%202011.pdf.pdf

[47] NOPSA Offshore Health and Safety Report http://www.nopsa.gov.au/document/Report%20-%20NOPSA%20Offshore%20Health%20and%20Safety%20Performance%20Report%20June%202010.pdf

[48] Noetic Solutions Pty Ltd 2010 *Report: Review of PTTEP Australiasia's Response to the Montara Blowout* Executive Summary p.iv and v.

8. Facts for the purposes of this paper

8.1 *[49]Following the Montara incident, Minister was unsatisfied with the Action Plan produced by PTTEP to improve practice of PTTEPAA, its subsidiary.*

8.2 *As a consequence the Minister, as Joint Authority, issued a notice under s276 Offshore Petroleum and Greenhouse Gas Storage Act (**Act**) (**show cause notice**) of his intention to cancel PTTEPAA's Montara Production licence.*

8.3 *The Minister has not offered PTTEPAA the option of disposing of its Montara interests as an alternative to cancellation.*

[49] Facts for the purpose of this paper assumed to be taken on 4 March 2011.

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