Australian Government

Department of Climate Change, Energy, the Environment and Water

Consultation Paper

Regulations under the *Offshore Electricity Infrastructure Act 2021*

Cataloguing data

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Acknowledgement of Country

The Department recognises the First Peoples of this nation and their ongoing connection to culture and country. We acknowledge Aboriginal and Torres Strait Islander Peoples as the Traditional Owners, Custodians and Lore Keepers of the world's oldest living culture and pay respects to their Elders past, present and emerging.

Table of acronyms and definitions

Term	Acronym
Department of Climate Change, Energy, the Environment and Water	Department
Diving safety management system	DSMS
Environment Protection and Biodiversity Conservation Act 1999 (Cth)	EPBC Act
Minister for Climate Change and Energy	Minister
Offshore electricity infrastructure	OEI
Offshore Electricity Infrastructure Act 2021 (Cth)	OEI Act
Offshore Electricity Infrastructure Amendment Regulations 2024	Proposed Regulations
Offshore Electricity Infrastructure Regulations 2022 (Cth)	OEI Regulations
Offshore Infrastructure Registrar	Registrar
Offshore Infrastructure Regulator	Regulator
Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024	OPGGS Bill
Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 (Cth)	OPGGS Safety Regulations
Person conducting a business or undertaking	PCBU
Work health and safety	WHS
Work Health and Safety Act 2011 (Cth)	WHS Act
Work Health and Safety Regulations 2011 (Cth)	WHS Regulations

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Introduction

The Australian Government is building a framework to establish an offshore renewable energy industry to support the emissions target of net zero by 2050. An offshore renewable energy industry will reduce emissions from the electricity sector, while contributing to energy security, reliability and affordability. The development of the offshore renewable energy industry also benefits Australia's national interest, with the creation of new jobs, regional development, and significant investment in Australia's coastal economies.

To enable the development of a new offshore renewable energy industry in Australia, the Government has declared areas for development off Gippsland, Victoria, in the Pacific Ocean off Hunter, New South Wales and in the Southern Ocean off Victoria. Industry has been invited to apply for feasibility licences in these declared areas. Assessment of other proposed areas in the Pacific Ocean off Illawarra, New South Wales, in the Bass Strait off Northern Tasmania and in the Indian Ocean off Bunbury, Western Australia is ongoing.

The *Offshore Electricity Infrastructure Act 2021* (OEI Act) puts in place a regulatory framework for the construction, installation, commissioning, operation, maintenance, and decommissioning of offshore electricity infrastructure (OEI). The OEI Act operates in the Commonwealth offshore area, starting from three nautical miles from the coast and extending to the boundary of Australia's exclusive economic zone (coastal waters within three nautical miles of the shore remain the responsibility of state and Northern Territory governments).

The OEI Act operates alongside existing legislation including the *Native Title Act 1993*, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the *Underwater Cultural Heritage Act 2018*, the *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Navigation Act 2012.* These existing laws aim to protect people's rights and safety, the environment, and heritage. The OEI Act applies, and modifies as necessary, the provisions of the Commonwealth *Work Health and Safety Act 2011* (WHS Act).

The Australian Government seeks to strike a balance between all marine users. Under the OEI Act, activities must be carried out in a way that does not unreasonably interfere with other activities being carried out in the licence area.

The OEI Act allows for a range of matters to be addressed in regulations. On 22 October 2022, the first set of regulations made under the OEI Act came into force (the *Offshore Electricity Infrastructure Regulations 2022* (OEI Regulations)). The OEI Regulations set out a range of matters crucial for the OEI framework to become operational, including the licensing scheme, data provisions, arrangements for pre-existing infrastructure, and the application of fees and levies.

The proposed Regulations are the next set of regulations, currently known as the (draft) *Offshore Electricity Infrastructure Amendment Regulations 2024.* The proposed Regulations will prescribe regulations that will guide licence holders once they have received an OEI licence.

Objective

This paper describes the proposed Regulations and its intended effects. It also seeks feedback on the proposed Regulations from the community and industry to the Department of Climate Change, Energy, the Environment and Water (the Department).

The proposed Regulations include arrangements for:

- management plans;
- a design notification scheme;
- the provision of financial security;
- safety zones and protection zones;
- work health and safety (WHS);
- infrastructure integrity and environmental obligations;
- record-keeping; and
- fees in relation to the above.

These topics are discussed in this paper. There are also questions to assist stakeholders in providing feedback to the Department. Feedback will help inform the final proposed Regulations.

Timing and outcomes

The Department expects to make the proposed Regulations in mid-late 2024. This timing will allow all OEI licence holders to progress work within their licence areas by the end of 2024.

Call for submissions

The Department invites written feedback through the Department's 'Have Your Say' portal. Please ensure feedback responds to the questions in this paper or matters covered by the proposed Regulations. Please include reasoning for your objection or support to assist the Department's consideration of your feedback.

The Department may publish part or all of your submissions. If appropriate, the Department may decide not to publish your submission, or may redact parts of your submission if published.

If you do not want your submission published, please request that it remain confidential. Please refer to the Department's privacy policy to find out more.[1]

[1] Department of Climate Change, Energy, the Environment and Water, *Privacy Policy* (Web Page, accessed 20 March 2024).

Discussion topics

Management plans

An OEI licence holder seeking to construct, install, commission, operate, maintain or decommission OEI must have an approved management plan in place.[2] A management plan sets out:

- the OEI activities a licence holder intends to undertake for an offshore renewable energy project;
- how a licence holder intends to comply with their obligations under relevant legislation (such as the OEI Act, OEI Regulations and the EPBC Act) while undertaking these activities; and
- how a licence holder proposes to manage work health and safety and infrastructure integrity risks associated with activities proposed to be carried out under an OEI licence.

A management plan is a legally enforceable document under the OEI Act,[3] and provides a basis for the Regulator to have oversight of projects and to monitor and enforce compliance with approved management plans.

The OEI Act sets out certain matters that a management plan must address.[4] The proposed Regulations prescribe the remaining details around management plans. These include:

- the application process for approval of a management plan or revision of a management plan;
- the Regulator's process for approving or refusing to approve a management plan;
- consultation requirements by licence holders when preparing a management plan;
- ongoing stakeholder engagement requirements throughout the life of an OEI project; and
- management plan summaries for public release on the Regulator's website.

Management plan applications and revisions

Subdivisions A, B and C of Division 2 of Part 3 of the proposed Regulations cover the making of applications to the Regulator for the approval of management plans. Management plan applications will be made using a manner and form that will be approved by the Regulator and published on the Regulator's website.[5]

Licence holders may apply to the Regulator for approval of an initial management plan.[6] Once the Regulator has approved the management plan, the licence holder may apply to revise the management

[2] See sections 31, 40, 50 and 59 of the OEI Act.

[3] See section 121 of the OEI Act.

[4] See section 115 of the OEI Act.

[5] See subsection 47(1) and section 49 of the proposed Regulations.

[6] See section 46 of the proposed Regulations.

plan as necessary.[7] Licence holders will be required to apply to revise their management plan in the following circumstances:

- if directed to do so by the Regulator;[8]
- in certain circumstances where a revision would be appropriate (for example, where licence activities will significantly change or where new risks or hazards relating to the project are identified);[9] or
- every 5 years after the approval of a management plan (or a revised management plan) takes effect.[10]

Question 1:

Are the revision triggers listed in subsection 53(2) of the proposed Regulations appropriate? Are there any triggers that should be added or removed?

Question 2:

Is 5 years appropriate for a periodic review? If not, what period of time do you consider is more appropriate?

Consultation

It is important that licence holders consult appropriately with persons, organisations, communities and groups before licence activities commence and during the operation of those activities. Open and timely consultation will help build social licence for the OEI industry by enabling consultees to be heard and to provide opportunities for the benefits of the industry to be shared. It will also provide for better outcomes with respect to WHS, infrastructure integrity and environmental management.

Under the OEI framework, the public has several opportunities to contribute to decision-making. This begins during the declaration process, which is subject to a minimum 60-day public consultation. Following this, the Minister may declare an area suitable for OEI projects.[11]

In addition, OEI projects need environmental approvals under the EPBC Act. Under the EPBC Act, the public are invited to comment on project proposals. This provides the public with details about proposed OEI projects so they can comment on potential environmental impacts prior to approval by the Minister for the Environment.

The proposed Regulations provide another opportunity for consultation. When preparing a management plan, licence holders must consult with persons, organisations, communities and groups who may be affected by the activities to be carried out under a licence or are connected in some way

[7] See section 48 of the proposed Regulations.

[8] See section 50 of the proposed Regulations.

[9] See section 53 of the proposed Regulations.

[10] See section 52A of the proposed Regulations.

[11] See section 18 of the OEI Act.

to the licence areas. Additionally, licence holders must describe a 'stakeholder engagement strategy' in their management plans, which explains how the licence holder will consult on an ongoing basis throughout the project (discussed further below).

The proposed Regulations require licence holders to consult in the following circumstances:

- before applying to the Regulator for initial approval of a management plan;[12]
- if required by the Regulator while the Regulator considers a management plan approval application (either initial or revised);[13]
- if included in a direction by the Regulator to revise a management plan and prepare a plan revision approval application;[14]
- on an ongoing basis while a management plan is in effect, as set out in a licence holder's stakeholder engagement strategy.[15]

These circumstances will allow the Regulator to:

- have oversight over consultation occurring throughout the project;
- be satisfied that consultation requirements have been met; and
- be satisfied that ongoing consultation as set out in the stakeholder engagement strategy is and remains appropriate.

Subdivision D of Division 2 of Part 3 of the proposed Regulations (commencing at section 55) sets out the requirements for consultation unless it is otherwise specified by the Regulator in a direction or notice. Subdivision D consultation is required prior to applying for an initial management plan. For revision applications, Subdivision D consultation is only necessary if directed or required by the Regulator.

The following sections are in Subdivision D of Division 2 of Part 3 of the proposed Regulations:

- **Subject matter of consultation** (section 56): Licence holders must consult on all the activities that will be carried out under their licence. Where consultation is being carried out under a direction or notice, the direction or notice may specify the scope of consultation required. In either circumstance, the Regulator will consider the stage that an OEI project is at,[16] meaning that consultation might be undertaken on the detailed elements of activities that are current or will soon commence, while information around future activities might be consulted on at a higher level, with detailed consultation to follow at the appropriate time.

[12] See subsection 47(2) of the proposed Regulations.

[13] See subsection 63(1) of the proposed Regulations.

[14] See subsection 50(3) of the proposed Regulations.

[15] See section 76 of the proposed Regulations.

[16] See paragraph 66(2)(c) of the proposed Regulations.

- **Who must be consulted** (section 57): Licence holders must make reasonable efforts to consult a range of persons, including relevant Government departments; other licence holders with overlapping licence areas; First Nations groups with native title rights and interests[17] or sea country in the licence area; communities located near the licence area and who may be affected by the licence activities; recreational fishers; and any person or organisation carrying out commercial activities in or near the licence area that might directly interact with the licence holder's activities. Consultation may be carried out with representative bodies where appropriate to reduce any burden on individuals and smaller community groups.[18]

- **Manner of consultation** (section 58): Licence holders must give the persons, organisations, communities and groups who are consulted sufficient information to allow an informed assessment of any potential effects that the activities may have on them, and must allow them a reasonable period of time for consultation. Licence holders will not be expected to disclose information that is commercially sensitive.

Licence holders will need to report the process and outcomes of consultation carried out in their management plan.[19] This must include summarising and assessing any claims raised by those consulted about potential adverse impacts and committing to measures to address these impacts where necessary.

In addition to the management plan, licence holders must prepare stakeholder engagement strategies.[20] The stakeholder engagement strategy should address how the licence holder will engage with stakeholders on an ongoing basis over the life of an OEI project. The stakeholder engagement strategy will be separate to the management plan but must be described in the management plan. The Regulator cannot approve the management plan unless the stakeholder engagement strategy would reasonably likely provide for ongoing engagement with stakeholders in relation to the licence activities.

The description of the stakeholder engagement strategy in the management plan must include at a minimum:

- a list of the persons, organisations, communities and groups identified to be consulted;
- the process that the licence holder used to identify persons, organisations, communities and groups to consult, and the process to be used to identify stakeholders in the future;
- a summary of any claims raised about any adverse impacts that changes in the licence activities might have on stakeholders consulted;
- the licence holder's assessment of the merits of the claim, and a statement of whether the licence holder considers the claim to have reasonable merit;
- for each claim with reasonable merit, include details of the measures to be implemented to address the claim and how those measures will be effective;

[17] As defined in the *Native Title Act 1993*.

[18] See subsection 57(3) of the proposed Regulations.

[19] See section 75 of the proposed Regulations.

[20] See section 76 of the proposed Regulations.

- the licence holder's continued engagement and complaint management procedure;
- how the stakeholder engagement strategy will be updated and kept current including identifying new stakeholders.

The licence holder must consult in accordance with their stakeholder engagement strategy. A stakeholder engagement strategy provides flexibility for licence holders to tailor their consultation to the stakeholders identified. For example, there may be times in a project (such as during construction) where frequent consultation is required with a particular co-user to ensure activities can be undertaken in a coordinated and safe way. This level of consultation may not be required at other times during the project.

When a management plan is revised, the licence holder will review the description of the stakeholder engagement strategy and update it as necessary. This may include, for example, setting out whether the licence holder has identified any new stakeholders and how any impacts on those stakeholders will be addressed.

Question 3:

The Australian Government encourages the co-use of the offshore marine environment and ongoing collaboration between OEI licence holders and persons, communities, organisations and groups affected by licence activities. Licence holders should be required to consult meaningfully with them. At the same time, consultation requirements must be practical and capable of being implemented by licence holders.

Is the consultation process provided in the proposed Regulations appropriate? What changes (if any) do you recommend?

You should consider the following questions in drafting your response:

a. Is it appropriate for licence holders to consult representatives and representative bodies where these bodies could reasonably be regarded as representing the interests of individual persons, organisations, groups or communities?

b. Is it appropriate for the same consultation requirements to apply to all types of projects (for example, for research and demonstration projects compared to commercial projects)? If not, what changes do you recommend?

c. Do you consider the proposed stakeholder engagement strategy described in the management plan, but separate to the management plan, to be adequately flexible and appropriate? If not, why, and what might be an alternative approach?

d. Do you agree with the list of information that must be described in the management plan in relation to the stakeholder engagement strategy? Should any other matters be described?

Content requirements

Division 4 of Part 3 of the proposed Regulations prescribes the content that management plans must address. These are:

- Details of how licence activities will be conducted (section 74).
- Consultation and stakeholder engagement (sections 75 and 76).
- A description of the licence holder's management system (section 77).
- Notification requirements (section 78).
- Compliance with licence conditions (section 79).
- Environmental management obligations under the EPBC Act (section 80).
- Design notification (section 81).
- List and details of certain structures, equipment and property (section 82).
- Decommissioning and removal of structures, equipment and property and remediation of licence area (sections 83-85).
- Emergency management (section 86).
- Financial security (sections 87 and 88).
- Record-keeping (section 89).
- Work health and safety (section 90).

A management plan may address a matter by adopting or referring to material from another document.[21] This extends to other management plans: one management plan may incorporate material from another management plan, provided that both management plans are connected to the same licence holder and the management plan from which material is being incorporated is for an existing licence. Where a management plan adopts or refers to material from another document, and that other document changes, the management plan may need to be revised in response to the change.[22]

There will only be one management plan in force for the life of each licence. However, that management plan will need to be periodically revised for various reasons. Noting that the duration of a licence may be long, and a management plan will need to span across various phases in the project lifecycle, a management plan only needs to address a matter to the extent possible based on the stage of the OEI project. If a management plan cannot fully address a matter, that matter can be more fully addressed at a later stage of the project.[23]

Question 4:

Are the content requirements for a management plan listed in Division 4 of Part 2 of the proposed Regulations appropriate? Are there any other matters that should or should not be addressed?

[21] See section 91 of the proposed Regulations.

[22] See paragraph 53(2)(h) of the proposed Regulations.

[23] See paragraphs 53(2)(i) and 66(2)(c) and section 67 of the proposed Regulations.

Approval or refusal of management plan

The Regulator will have 90 days to make a decision after receiving a management plan application.[24] The decision must be to either approve or refuse to approve the management plan. The Regulator can extend the decision period if necessary, by giving written notice to the licence holder.

The Regulator can require the licence holder to give further information, or to amend and resubmit the plan.[25] These requests, and the time taken for licence holders to respond, can extend the assessment timeframe.

Subdivision C of Division 3 of Part 2 of the proposed Regulations sets out the provisions for approving or refusing to approve a management plan. The Regulator may only approve a management plan if satisfied that certain matters have been addressed. These include, amongst other matters:[26]

- the management plan addresses all of the necessary content requirements;
- the licence holder has provided any necessary financial security;
- the licence holder has conducted any necessary consultation;
- the licence holder has complied with any relevant design notification requirements.

The Regulator may refuse to approve a management plan if these matters have not been addressed.[27] The Regulator may also refuse to approve a management plan if the licence holder does not comply with certain directions or a notice given by the Regulator in relation to the application, namely:

- a direction to provide further information;[28]
- a direction to amend and resubmit the management plan;[29]
- a notice requiring the licence holder to carry out consultation.[30]

Before refusing to approve a management plan, the Regulator must provide written notice to the licence holder of the proposed refusal, set out the reasons, and allow the licence holder to make a submission, which the Regulator must consider when reaching its final decision.[31]

Management plan summaries

Subdivision D of Division 3 of Part 2 of the proposed Regulations requires licence holders to prepare summaries of approved management plans to the satisfaction of the Regulator. The Regulator will then

[24] See section 60 of the proposed Regulations.

[25] See sections 61 and 62 of the proposed Regulations.

[26] See section 66 of the proposed Regulations.

[27] See section 68 of the proposed Regulations.

[28] See section 61 of the proposed Regulations.

[29] See section 62 of the proposed Regulations.

[30] See section 63 of the proposed Regulations.

[31] See section 69 of the proposed Regulations.

publish these summaries on its website, with the aim of ensuring the public has access to accurate information on OEI projects.

A management plan summary will not have to address everything in a management plan, but only the matters listed in section 71. Licence holders will not be expected to disclose information that is commercially sensitive.

Question 5:

There is strong public interest in enabling public access to relevant and reliable information on OEI projects. Are management plan summaries an efficient and effective way to make information available to the community? If not, what are your concerns and how can they be addressed?

Question 6:

Do you think the alternative approaches of publishing management plans in full (with necessary redactions), or requiring licence holders to publish management plans themselves is more efficient or appropriate than the current approach in the proposed Regulations?

Question 7:

Is the list of matters that must be included in a management plan summary in section 71 of the proposed Regulations appropriate? If not, why?

Design notification scheme

Division 5 of Part 2 of the proposed Regulations establishes a design notification scheme. The intention of this scheme is to allow the Regulator to provide feedback to the licence holder on certain OEI projects before the licence holder submits a management plan application. This will help ensure that best practice safety, integrity and environmental management principles are built into project designs from the earliest stage.

The design notification scheme is not a regulatory decision point or approval document but is a process to provide early engagement with the Regulator on the design of an OEI project. Decisions critical to the management of safety, infrastructure integrity and environmental risks are often made early in the lifecycle of large-scale infrastructure projects. Once the licence holder proceeds to the stage of submitting a management plan, it may be impractical or too costly to make significant changes to the overall layout and design of the project. The scheme will enable industry to engage early with the Regulator on design and concept-selection matters and will encourage consideration of alternative concepts that may provide for improved safety, infrastructure integrity and environmental outcomes prior to construction commencing.

The design notification scheme will only apply to transmission and infrastructure licences and commercial licences. These are the projects that the Regulator will most likely want to provide specific feedback on, given the extended design life for such infrastructure and experiences with the infrastructure from international markets. The infrastructure likely to be used in feasibility licences and research and demonstration licences will be smaller in scale and more short-term in nature, making a design notification process of less benefit for these licence types.

For transmission and infrastructure licences and commercial licences, a design notification must be given to the Regulator before the licence holder applies for approval of an initial management plan.[32] Design notifications will be made using a manner and form that will be approved by the Regulator and published on the Regulator's website.[33] A design notification will need to address the matters prescribed in subsection 93(2) of the proposed Regulations, which include:

- the layout and location of licence infrastructure;
- environmental characteristics at the location of the infrastructure;
- how the infrastructure will be constructed, operated, maintained and removed;
- significant risks and hazards associated with the above and measures to address them;
- the design process used to select the infrastructure.

Once a design notification has been given, the Regulator will consider it and provide feedback within 60 days.[34] The licence holder must then address this feedback in any management plan subsequently given to the Regulator for approval.[35] If the project later changes in a way that makes it inconsistent with the design notification that was given, the licence holder must also explain in the management plan why this has occurred. Inconsistency with a design notification is something that the Regulator may consider in deciding whether to approve a management plan.[36]

Question 8:

Is the list of matters that must be included in a design notification in subsection 93(2) of the proposed Regulations appropriate? Do you think any other matters should be addressed?

Question 9:

The design notification scheme only applies to transmission and infrastructure licences and commercial licences. Should the design notification scheme be extended to all licence types, so that it would also include feasibility licences and research and demonstration licences? If yes, should it be mandatory or voluntary for these other licence types? Please outline your reasoning.

Financial security

The OEI Act requires licence holders with a management plan in place to provide financial security to the Commonwealth. The financial security must be sufficient to cover certain costs, expenses, liabilities and debts, including those that might arise in relation to decommissioning of infrastructure, removal of property and remediation of the licence area.[37] Should a licence holder be unable or unwilling to meet these costs, expenses, and liabilities (including those that are unexpected or unforeseen), it is

[32] See subsection 47(3), paragraph 66(1)(d) and section 92 of the proposed Regulations.

[33] See subsection 93(1) of the proposed Regulations.

[34] See section 94 of the proposed Regulations.

[35] See section 81 of the proposed Regulations.

[36] See paragraph 66(2)(e) of the proposed Regulations.

[37] See subsections 117(1) and 119(2) of the OEI Act.

intended the financial security provided by licence holders will be drawn on, rather than costs being passed on to the taxpayer.

The operational details around financial security will be prescribed in the proposed Regulations. This will include processes for:

- determining the amount of financial security required;
- determining the form in which financial security will be provided;
- determining when financial security will be provided; and
- varying the amount of financial security provided.

The proposed Regulations will also articulate a process for the Commonwealth to recover debts, costs, expenses and liabilities in certain circumstances from the financial security provided by licence holders.

Amount of financial security

As noted above, licence holders must provide financial security to the Commonwealth sufficient to cover any costs, expenses or liabilities that might be incurred by the Commonwealth in relation to decommissioning, removal of property and remediation. It will be up to licence holders to calculate an amount of financial security that will satisfy this requirement.

Licence holders will need to set out, in the management plan, the method used to calculate a sufficient amount,[38] which will need to identify and quantify certain minimum costs, expenses and liabilities.[39] This may include developing bespoke estimation tools or using methods developed for use in other countries. Licence holders will need to consider the possibility of costs, expenses and liabilities arising outside their licence area (for example, for emergency situations or for situations where there is a need to rectify environmental damage).

Licence holders will need to demonstrate in the management plan that the calculation method has been verified.[40] The type of verification used should be commensurate to the scale and complexity of the calculation method, the amount of financial security calculated and the nature of the underlying project. It could range from internal review (for simple methods and small amounts) through to a specialist third-party verification by an independent and competent verification body (for larger projects). If the calculation method or verification of the method is inadequate, the Regulator may require improvements before approving the management plan.[41]

[38] See paragraph 87(2)(a) of the proposed Regulations.

[39] See subsections 87(3) and (4) of the proposed Regulations.

[40] See paragraph 87(2)(b) of the proposed Regulations.

[41] See paragraph 87(5)(a) of the proposed Regulations.

Question 10:

Licence holders will be required to provide verification of the method they have chosen for calculating the amount of financial security to be provided to the Commonwealth. What approaches to verification would be appropriate?

You should consider the following questions in drafting your response:

a. Should a certain level or standard for verification be prescribed? Why or why not?

b. Should independent third-party verification be required in all cases, or is it appropriate to allow verification to match the scale of a project?

Form of financial security

While licence holders will generally have discretion to choose the form in which they will provide their financial security, they will need to comply with sections 102 and 103 of the proposed Regulations in doing so. The following principles are important here:

- Subsection 102(1) prescribes certain arrangements that "may" be treated as financial security for the purposes of the OEI Act. These comprise amounts directly given to the Commonwealth, amounts held in a third-party bank account, a credit facility, a bank guarantee or an insurance policy. An arrangement of this nature is likely to be considered an acceptable form of financial security in most circumstances, although there may still be particular circumstances in which one or more of these arrangements are not considered an acceptable form of financial security.[42] The list in subsection 102(1) is not intended to be exhaustive, and it is possible that an arrangement not mentioned in subsection 102(1) may be in a form of financial security as determined by the Minister and as required by the Regulator.[43]
- Subsection 103(1) prescribes certain arrangements that are not to be treated as financial security for the purposes of the OEI Act. These comprise self-insurance (i.e., covering costs from cashflow), a trust with the Commonwealth as beneficiary and a guarantee provided by a related company. There will be no circumstances in which any of these arrangements will be considered an acceptable form of financial security by the Commonwealth.
- Subsection 103(2) prescribes some minimum characteristics that an acceptable form of financial security must possess. An arrangement will not be treated as financial security if the terms of the arrangement are unclear, if it is not highly certain that the Commonwealth will be able to recover amounts under the arrangement when required, or if people other than the Commonwealth are not restricted from recovering amounts under the arrangement.

The Regulator will be responsible for determining whether a proposed arrangement is an acceptable form of financial security, subject to the Commonwealth representative's acceptance of the terms and conditions in the form offered. If necessary, the Minister may also formally determine that financial

[42] See, for example, subsection 103(2) of the proposed Regulations.

[43] See Note 1 in section 102 and section 97 of the proposed Regulations.

security must be provided in a particular form.[44] Decisions made by the Regulator or the Minister on acceptable forms of financial security cannot be contrary to sections 102 and 103 of the proposed Regulations.

The proposed Regulations leave open the possibility of using multiple forms of financial security. For example, a licence holder might propose to provide one part of their financial security as a direct payment to the Commonwealth, and the other part in the form of a bank guarantee. It will be up to the Regulator (and, if necessary, the Minister) to determine, on a case-by-case basis, whether the combination of forms of financial security proposed is acceptable.

Question 11:

Subsection 102(1) of the proposed Regulations outlines a list of arrangements that may be treated as financial security. Is this list sufficient and appropriate? Are there any other arrangements that should be included in this list?

Question 12:

The list of arrangements that may be treated as financial security in subsection 102(1) of the proposed Regulations uses the term "financial institution". The proposed Regulations define the term "financial institution" as "a corporation that is an authorised deposit-taking institution (ADI) for the purposes of the *Banking Act 1959*". Is this an appropriate definition? Is there another definition that would be more appropriate?

Question 13:

Is the list of arrangements that may not be treated as financial security in subsection 103(1) of the proposed Regulations appropriate? Are there any other arrangements that should be excluded?

Question 14:

Subsection 103(2) of the proposed Regulations prescribes minimum characteristics that an acceptable form of financial security must possess. Do you believe these prescribed minimum characteristics are appropriate? Are there any other characteristics that should be included?

Question 15:

Should the Commonwealth restrict eligible financial institutions to those that meet certain credit rating requirements?

Provision of financial security

Once licence holders have determined an amount and form of financial security, and assuming the Regulator is satisfied that the arrangements described in the management plan are appropriate, the financial security will need to be provided to the Commonwealth before any infrastructure is constructed or installed in the licence area.

[44] See paragraphs 53(2)(k), 87(2)(e) and 87(5)(b) and section 97 of the proposed Regulations.

In simple cases this will involve depositing money with the Commonwealth. In more complex cases (for example, where the financial security involves a financial instrument, such as a bank guarantee), the licence holder will need to agree to terms and execute legal arrangements with the Commonwealth as part of establishing the financial security. A licence holder may use multiple forms to achieve financial security over the life of the offshore infrastructure project.

Licence holders will be permitted to defer the provision of some amounts of financial security until just before the licence infrastructure relating to those amounts is constructed or installed.[45] Licence holders who wish to do so will need to set out a timetable for the provision of the deferred amounts in their management plan. They will also need to commit to not constructing or installing licence infrastructure until any deferred amounts relating to that infrastructure have been provided. Without the ability to defer some amounts, licence holders might be required to provide the full amount of financial security for their project years before any construction commences, which is both unnecessary and potentially commercially unviable.

Varying the amount of financial security

It is expected that the amount of financial security that is required to be provided may increase at various points over the course of an OEI project. For example, a licence holder might propose to add additional infrastructure into the licence area, or unexpected damage to existing infrastructure might increase estimated decommissioning and removal costs. If a licence holder becomes aware that the amount of financial security required to be provided has increased, they must apply to revise their management plan to account for this increase as soon as reasonably practicable.[46] Note that this requirement will only trigger when the overall amount of financial security that is required to be provided increases. It will not ordinarily trigger when an amount that has been deferred under a timetable (as mentioned in the previous section) becomes due, as this situation reflects the provision of an existing amount of financial security rather than an increase in that amount.

Similarly, the amount of financial security that is required to be provided may decrease for various reasons. If this happens, a licence holder may apply to revise their management plan to address the necessary change in financial security. The licence holder must include, in the revised plan, evidence that the amount of financial security they have provided exceeds the amount that needs to be provided under their approved calculation method.[47] If the Regulator is satisfied with the provided evidence it can approve the revised management plan.[48] The Minister may then approve a reduction in the amount of financial security provided by the licence holder.[49]

[45] See paragraphs 87(2)(f) and 87(5)(c) and section 98 of the proposed Regulations. Note this does not mean that the licence holder is able to defer provision of all financial security until a later stage, only some amounts, as set out in the financial security timetable.

[46] See paragraph 53(2)(l) of the proposed Regulations.

[47] See subparagraph 88(1)(a)(ii) and paragraph 88(1)(b) of the proposed Regulations.

[48] See subsection 88(2) of the proposed Regulations.

[49] See section 100 of the proposed Regulations.

There will also be occasions on which an amount of financial security ceases to be required altogether, because there will be no further costs, expenses or liabilities in relation to the particular decommissioning, removal of property or remediation activities for which the amount was provided. In this circumstance, a licence holder may again apply to revise their management plan to address the necessary change in financial security. The licence holder must include, in the revised plan, evidence that no further costs, expenses or liabilities are likely to arise in relation to an amount of financial security they have provided.[50] If the Regulator is satisfied with the provided evidence it can approve the revised management plan.[51] The Minister may then determine that the amount of financial security is no longer required to be provided by the licence holder.[52]

It should be noted that financial security cannot be reduced other than in accordance with the processes outlined above.[53] Licence holders may provide additional financial security (that is, outside of the timetable process mentioned in the previous section) at any time, but it is expected that any such increases will be accompanied or followed by a management plan revision to appropriately document the change.

Question 16:

Once an amount of financial security has been provided, it may only be adjusted (either upwards or downwards) through a revision to the relevant management plan, submitted to and approved by the Regulator. Is the revision of a management plan the appropriate process for managing changes to the provided amount of financial security, or should security adjustments be administered through a separate process?

Recovering amounts from financial security

Once a financial security is in place for a licence, the Commonwealth may, in certain circumstances, draw upon the security to recover debts, costs, expenses or liabilities connected with that licence.

Section 104 of the proposed Regulations governs the recovery of debts. Under this provision, the Commonwealth may recover a debt from a financial security if:

- the debt is owed to the Commonwealth or the Regulator and is owed by the licence holder who provided the financial security;
- the debt relates to the licence for which the financial security was provided;
- the debt has been due and payable for at least 60 days;
- the Minister is satisfied that the debt is unlikely to be paid within a reasonable time; and
- the Minister is satisfied that recovering the debt from the financial security is likely to be more economical than recovering the debt through other means (e.g. legal proceedings).

[50] See subparagraph 88(1)(a)(i) and paragraph 88(1)(b) of the proposed Regulations.

[51] See subsection 88(2) of the proposed Regulations.

[52] See section 99 of the proposed Regulations.

[53] See section 101 of the proposed Regulations.

Section 105 of the proposed Regulations governs the recovery of costs, expenses and liabilities. Under this provision, the Commonwealth may recover a cost, expense or liability from a financial security if:

- the cost, expense or liability is reasonably incurred by the Commonwealth or the Regulator as a result of an act or omission of the licence holder who provided the financial security;
- the cost, expense or liability relates to the licence for which the financial security was provided;
- the cost, expense or liability is one of those set out in the table in subsection 105(2) (these generally comprise costs, expenses or liabilities incurred as a result of a licence holder failing to comply with a statutory obligation or otherwise adequately carry out licence activities);
- the cost, expense or liability is not a debt that could be recovered under section 104;
- the cost, expense or liability was incurred at least 60 days ago;
- the Minister is satisfied that, without the use of section 105, the cost, expense or liability is unlikely to be recovered within a reasonable time;
- the Minister is satisfied that recovering the cost, expense or liability from the financial security is likely to be more economical than recovering the cost, expense or liability through other means; and
- the Minister is satisfied that the cost, expense or liability was reasonably foreseeable by the licence holder.

Safety zones and protection zones

The OEI Act provides for safety zones and protection zones to be established around OEI.[54] It is the role of the Regulator to review applications and determine safety and protection zones. These zones are designed for the safety of workers and other users of the marine environment and to protect OEI from damage from other marine users.

A safety zone is a specified area around eligible infrastructure[55] (to a maximum of 500 metres[56]) that would prohibit certain vessels from entering or being present in that area without the written consent of the Regulator. Access will likely vary during the different phases of construction, operation, maintenance and decommissioning to minimise risks to the safety of works and other users. During the construction and decommissioning phases access is likely to be more restricted due to higher volumes of vessels in operation undertaking work. During operations more limited exclusions are anticipated.

A protection zone is a longer term, specified area around OEI (to a maximum of 1,852 metres on each side[57], equivalent to one nautical mile) in which certain activities may be restricted or prohibited. Protection zones are intended to protect OEI from activities that pose a risk to damaging infrastructure, rather than restricting access. It is expected that protection zones will most commonly be used to protect OEI cables from damage (for example by prohibiting anchoring). The concept of protection

[54] See Divisions 3 and 4 of Part 3 of Chapter 4 of the OEI Act.

[55] 'Eligible safety zone infrastructure' is defined in section 136(1) of the OEI Act.

[56] See subsection 136(5) of the OEI Act.

[57] See section 120 of the proposed Regulations.

zones is well-established under other frameworks for the protection of submarine cables, and the area is generally 1,852 metres.[58] Protection zones will likely last for the life of the offshore wind farm.

It is intended that access and transit through OEI licence areas by other marine users would not be restricted any more than is necessary to ensure safety of navigation and operations, and the protection of assets. This is consistent with the principle of shared use of the marine environment. Safety and protection zones cannot take effect until installation of the relevant infrastructure is likely to begin.[59]

It is intended that marine vessels will be able to travel within any wind farm area, similar to offshore wind regulatory models used in countries such as the United Kingdom (UK) and Denmark. Offshore wind farms in UK waters commonly have wind turbines spaced from 1,000 metres to more than 3,000 metres apart. Typically, in those jurisdictions a safety zone of 50 metres is established, where fishing vessels cannot enter around wind turbines and other pieces of offshore renewable energy infrastructure, during their normal operations.

It is the responsibility of the safety or protection zone applicant to provide the Regulator sufficient information to make its decision, including details of the consultation undertaken with other marine users. The Regulator will not determine a safety or protection zone unless it is satisfied with the information provided by an applicant, including any necessary consultation with other marine users.

Safety zone determinations are notifiable instruments and protection zone determinations are legislative instruments. Both types of determinations are likely to be of public interest and will be published on the Federal Register of Legislation to ensure they remain publicly accessible over a long period of time. Protection zones are likely to exist for a longer period and, as legislative instruments, will have further processes for the Parliament to provide additional scrutiny and stop operation of the instrument if deemed necessary. Once registered, both types of determinations are enforceable.

Safety zones

Safety zones are determined by the Regulator.[60] The OEI Act provides that the Regulator may make, vary or revoke a safety zone determination on its own initiative.[61] Persons can apply to the Regulator to request that the Regulator makes, varies or revokes a safety zone determination.[62] Under the relevant provisions:

- There will be a broad scope for making safety zone applications. Since safety zones have the potential to restrict marine access rights, it is appropriate to provide a mechanism for persons to apply to the Regulator to make or review safety zone decisions. However, in recognition of the fact that the primary purpose of safety zones is to protect licence infrastructure, the

[58] See Schedule 3A to the *Telecommunications Act 1997*.

[59] See subsections 138(2) and 146(2) of the OEI Act.

[60] See subsection 136(2) of the OEI Act.

[61] See paragraph 137(1)(a) of the OEI Act. The power to vary or revoke a safety zone determination is provided by subsection 33(3) of the *Acts Interpretation Act 1901*.

[62] See section 110 of the proposed Regulations.

Regulator will consult with licence holders if a safety zone application is made in relation to their licence area by a third party.[63]

- Safety zone applications will be made using a manner and form that will be approved by the Regulator and published on the Regulator's website.[64]
- After receiving a safety zone application, the Regulator will have 90 days to decide whether to approve or refuse to approve the application.[65] This decision period may be extended by written notice if necessary.
- The Regulator may request further information if necessary, when considering a safety zone application.[66]
- If the Regulator proposes to refuse to approve a safety zone application, it must provide reasons to the applicant and allow the applicant to make a submission, which it must take into account in reaching its final decision.[67]

Question 17:

Are the procedures for applying for a safety zone appropriate? If not, why?

Question 18:

Section 113 of the proposed Regulations requires the Regulator to notify a licence holder if a safety zone application is made in relation to the licence holder's licence area by a third party. Broadly, do you have any concerns with this arrangement?

Protection zones

Protection zones are determined by the Regulator.[68] The OEI Act provides that the Regulator may make, vary or revoke a protection zone determination on its own initiative.[69] The proposed Regulations create a further process to allow persons to apply to the Regulator to request that the Regulator makes, varies or revokes a protection zone determination.[70] Under the relevant provisions:

- There will be a broad scope for making protection zone applications. Since protection zones have the potential to restrict or prohibit activities, it is appropriate to provide a mechanism for persons to apply to the Regulator to make or review protection zone decisions. However,

[63] See section 113 of the proposed Regulations.

[64] See sections 111 and 112 of the proposed Regulations.

[65] See section 115 of the proposed Regulations.

[66] See section 114 of the proposed Regulations.

[67] See section 117 of the proposed Regulations.

[68] See subsection 142(1) of the OEI Act.

[69] See paragraph 143(1)(a) of the OEI Act. The power to vary or revoke a protection zone determination is provided by subsection 33(3) of the *Acts Interpretation Act 1901*.

[70] See section 123 of the proposed Regulations.

licence holders will need to be consulted if a protection zone application is made in relation to their licence area by a third party.[71]

- Protection zone applications will be made using a manner and form that will be approved by the Regulator and published on the Regulator's website.[72]
- After receiving a protection zone application, the Regulator will have 90 days to decide whether to approve or refuse to approve the application.[73] This decision period may be extended by written notice if necessary.
- The Regulator may request further information if necessary, when considering a protection zone application.[74]
- If the Regulator proposes to refuse to approve a protection zone application, it must provide reasons to the applicant and allow the applicant to make a submission, which it must take into account in reaching its final decision.[75]

Question 19:

Are the procedures around applying for a protection zone appropriate? If not, why?

Question 20:

Section 126 of the proposed Regulations requires the Regulator to notify a licence holder if a protection zone application is made in relation to the licence holder's licence area by a third party. Broadly, do you have any concerns with this arrangement?

Question 21:

Section 120 of the proposed Regulations provides that the maximum area for a protection zone is 1,852 metres on each side around the infrastructure it will protect. The size of the zone will be minimised to the extent practicable and will be case-specific.

Is 1,852 metres around each side of infrastructure an appropriate maximum size for a protection zone, considering that a protection zone may potentially prohibit or restrict the activities of other marine users? If not, what size would you consider appropriate?

Question 22:

Under sections 144 and 145 of the OEI Act, the OEI Regulations may prescribe additional prohibited or restricted activities in a protection zone.

The proposed Regulations do not prescribe any additional activities. Do you consider any specific activities should be prescribed under the proposed Regulations?

[71] See section 126 of the proposed Regulations.

[72] See sections 124 and 125 of the proposed Regulations.

[73] See section 127 of the proposed Regulations.

[74] See section 128 of the proposed Regulations.

[75] See section 130 of the proposed Regulations.

Work health and safety

At the Commonwealth level, work health and safety is primarily managed through the WHS Act and the *Work Health and Safety Regulations 2011* (WHS Regulations). As specified in the OEI Act, the WHS Act applies generally to OEI work, with some limited modifications to reflect the unique offshore environment.[76] The WHS Regulations can apply to OEI work, but only to the extent specified in the OEI Regulations.[77] Part 7 of the proposed Regulations sets out, for this purpose, the application of the WHS Regulations to OEI work. The WHS Act and WHS Regulations are not the only WHS laws covering OEI activities. Depending on the circumstances, OEI activities may also be subject to State and Territory WHS laws, as well as specialised Commonwealth marine and aviation WHS regimes.

In keeping with the decision to apply the WHS Act to OEI work with only limited modifications, it is intended the WHS Regulations will apply with as few changes as possible. Section 133 of the proposed Regulations provides that the WHS Regulations will apply generally in the OEI context, subject only to the modifications set out in the items provided in the Schedule 1 inserted by item 21 of Schedule 1 to the proposed Regulations (the "WHS modifications").

The WHS modifications represent the changes necessary to ensure that the WHS Regulations can operate appropriately in the OEI context. Some modifications have been made in relation to diving work. Further, more minor changes have also been made, including in relation to the registration of plant designs and items of plant, principal contractor duties, consultation with workers, the notification of dangerous incidents, the scope for reviewing decisions made by the Regulator, and the extraterritorial application of the WHS Regulations.

Diving work

While Part 4.8 of the WHS Regulations already governs diving work, these provisions are not considered to be appropriate for the OEI context. They are targeted more towards the risk profile of onshore (i.e. river and lake) and coastal water diving, as opposed to the higher risks associated with the deep sea diving that will take place during OEI construction and maintenance. The diving that will occur in OEI projects is more akin to the diving that already takes place in offshore petroleum and gas projects. Such diving is covered, from a WHS perspective, by Chapter 4 of the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (OPGGS Safety Regulations).

Item 21 of the WHS modifications (the "diving provisions") consequently replaces Part 4.8 of the WHS Regulations with a modified version of Chapter 4 of the OPGGS Safety Regulations, which would represent a better model for ensuring diving safety in the OEI context. Note that the diving provisions are an adaptation of Chapter 4 of the OPGGS Safety Regulations rather than a direct copy. Modifications have been necessary to tailor the provisions for the OEI context and to achieve harmonisation with the definitions, concepts and general regulatory approach taken in the wider WHS Regulations.

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[76] See Part 1 of Chapter 6 of the OEI Act. Note that the Regulator is the regulator for the purposes of the WHS Act as applied by the OEI Act: see section 227 of the OEI Act.

[77] See section 243 of the OEI Act.

The *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024* (OPGGS Bill) was introduced into Parliament on 15 February 2024. This OPGGS Bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to implement the outcomes of a review of the offshore safety regime for the offshore resources sector workers which was undertaken by the Department of Industry, Science and Resources between 2019 and 2021. The reforms aim to modernise diving legislation to improve health and safety compliance in diving operations and dive vessels. The majority of the proposed changes from the Safety Review will be implemented through the remaking of the OPGGS Safety Regulations. Should Chapter 4 of the OPGGS Safety Regulations change, the diving provisions set out in the proposed Regulations will be amended as necessary to ensure consistency between the two regimes.

The main features of the diving provisions are as follows:[78]

- **Provisions apply to PCBUs:** In keeping with the approach taken in the WHS Act and WHS Regulations, the diving provisions will apply generally to any relevant person conducting a business or undertaking (PCBU).[79] For example, PCBUs will need to ensure that a diving safety management system (DSMS) and a diving project plan are in place and are adhered to for any diving work,[80] and will have a general duty to manage all WHS risks associated with diving work.[81] Amongst other requirements, PCBUs must also oversee the appointment of diving supervisors,[82] must ensure divers are aware of all relevant tasks and processes,[83] and must ensure diving takes place at the correct depths using the correct equipment.[84] The concept of a PCBU in the WHS Act and WHS Regulations is broad,[85] and there are likely to be multiple PCBUs involved in a particular diving work. WHS duties cannot be transferred,[86] and PCBUs are expected to collaborate to ensure that each PCBU discharges their WHS duties.[87]

- **DSMS:** A DSMS is a high-level system for managing WHS risks associated with diving work in general.[88] Every diving project must be "covered" by an accepted DSMS. An accepted DSMS covers a diving project if each PCBU involved in the project has committed to complying with

[78] Interested readers should carefully consider the diving provisions against Chapter 4 of the OPGGS Safety Regulations to gain a clear understanding of the similarities and differences between the two regimes.

[79] This is in contrast to the approach taken in the OPGGS Safety Regulations, which impose safety responsibilities more narrowly on "diving operators" and "diving contractors", and impose different responsibilities on each.

[80] See sections 168A and 169A and subsections 171A(2) and 171B(1) of the diving provisions.

[81] See subsection 171A(1) of the diving provisions. Note that PCBUs already have broad WHS duties under Part 2 of the WHS Act that apply to diving work.

[82] See section 172A of the diving provisions.

[83] See subsection 171B(2) of the diving provisions.

[84] See section 171C of the diving provisions.

[85] See, for example, Safe Work Australia, The meaning of "person conducting a business or undertaking".

[86] See section 14 of the WHS Act.

[87] See sections 16 and 46 of the WHS Act.

[88] See section 168B of the diving provisions. Note that references to "a diving project" here are references to diving projects in general, and not to any particular diving project.

the DSMS for the purposes of the project.[89] Any PCBU may give a DSMS to the Regulator for acceptance.[90] Consultation must be undertaken in preparing a DSMS for acceptance.[91]

- **Diving project plan:** A diving project plan is a detailed plan for managing WHS risks associated with a particular diving project.[92] Every diving project must have an approved diving project plan in place. Any PCBU may prepare a diving project plan,[93] but the plan must be approved by the holder of the licence under which the diving project is being conducted.[94] Consultation must be undertaken in preparing a diving project plan.[95]

- **Start-up notice:** A licence holder must give a start-up notice to the Regulator at least 28 days (unless otherwise agreed between the licence holder and the Regulator) before diving work begins on a diving project connected with the licence.[96]

- **Diving supervisors:** Each diving operation must have at least one diving supervisor. Diving supervisors have various duties relating to on-water safety, notifications and record-keeping.[97]

- **Qualifications:** Divers and diving supervisors must be competent and hold appropriate qualifications under the Australian Diver Accreditation Scheme (ADAS).[98] Divers must also have valid medical certificates.[99]

- **Log book:** Divers must maintain a log book covering each of their dives.[100]

[89] See definition of "covers" in item 5 of the WHS modifications.

[90] See section 168C of the diving provisions.

[91] See subsections 170A(1) and (3) of the diving provisions.

[92] See section 169C of the diving provisions.

[93] See subsection 170A(2) of the diving provisions.

[94] See section 169B of the diving provisions. Note that the licence holder, as a PCBU, could also prepare the plan.

[95] See subsection 170A(2) of the diving provisions.

[96] See section 173A of the diving provisions.

[97] See sections 172B and 175B of the diving provisions.

[98] See subsections 172A(2) and 174A(1) and (2) of the diving provisions.

[99] See subsection 174A(3) and section 174B of the diving provisions.

[100] See section 175C of the diving provisions.

Question 23:

Divers and diving supervisors must hold appropriate qualifications under the Australian Diver Accreditation Scheme (ADAS). Is an ADAS qualification an appropriate reference standard? Are there other qualifications that could provide proof of diving or diving supervision competency?

Question 24:

Subparagraphs 174B(2)(c)(i) and (ii) of the diving provisions of the proposed Regulations prescribe qualifications that demonstrate that a medical practitioner may conduct medical examinations for divers. Should any qualifications be added or removed?

Question 25:

Section 173A of the diving provisions in the proposed Regulations requires a licence holder to give a start-up notice to the Regulator at least 28 days (unless otherwise agreed) before diving work begins on a diving project connected with the licence. Noting that the Regulator will need time after receiving a start-up notice to review it and make further investigations, are there any concerns with the time period? If yes, what changes would you recommend?

Question 26:

The diving provisions are modelled on Chapter 4 of the OPGGS Safety Regulations. Therefore, there is an opportunity to further align the regulatory processes under both schemes. For example, it might be possible to provide that a DSMS accepted under one scheme was taken to be accepted under the other. Considering the similarities and differences between the schemes, are there any risks or benefits with this dual recognition?

Other WHS changes

The WHS modifications make further minor changes to the WHS Regulations. This is to ensure that the WHS requirements operate effectively alongside the design notification scheme and the management plan process.

Other WHS changes include:

- **Plant:** Items 35 and 62 remove the requirement in the WHS Regulations for certain plant designs and items of plant to be registered. This registration scheme is not necessary in the OEI context, as the design notification scheme and the management plan approval process will give the Regulator ample opportunity to verify and monitor the safety of plant used in OEI projects. Where possible, the additional duties in Part 5.2 of the WHS Regulations have been retained in relation to the types of plant design and items of plant that would have previously needed to be registered.[101]

- **Principal contractor duties:** Item 36 of the WHS modifications broadens the scope of section 293(2) of the WHS Regulations to recognise the existence of multiple workplaces in an OEI

[101] See items 21 to 34 of the WHS modifications.

project. Ordinarily, the principal contractor is the person who exercises the principal contractor duties in relation to, and has management or control of, the workplace for the relevant construction project. The principal contractor duties arise in relation to individual construction projects and apply to the workplace for each project.

There will be multiple workplaces for OEI projects managed or controlled by different persons. To recognise this and ensure the WHS Regulations apply to the intended PCBU under the OEI framework, the meaning of principal contractor in section 293 of the WHS Regulations will be amended by removing the specification related to 'management or control of the workplace'.

The amendment will operate so that the principal contractor duties can apply to the licence holder if they choose to retain, and not delegate, the principal contractor role. As each OEI construction project may comprise multiple worksites that require detailed coordination of concurrent operations, it may be appropriate for the licence holder to retain the principal contractor role and duties and maintain oversight of all the worksites, while the contractors or PCBUs are directly in control of each worksite.

The amendment will not otherwise affect any of the provisions involving the principal contractor duties (for example, the requirement for the principal contractor to prepare a WHS management plan for the workplace for the relevant construction project, or for PCBUs to take this plan into account when preparing a safe work method statement).

- **Consultation:** Item 11 provides that licence holders must consult with workers when preparing or revising management plans if the content being prepared or revised might affect the health or safety of those workers.[102]

- **Incident notifications:** Item 49 prescribes certain events as dangerous incidents that will require an incident notification under section 38 of the WHS Act. This modified definition of dangerous incident includes three new incident descriptors that will add to the existing list of dangerous incidents in section 37 of the WHS Act and other categories of notifiable incidents in section 35 of the WHS Act, which include a death of a person, a serious injury or illness or a dangerous incident. These new incident descriptors provided by item 49 are consistent with the new reporting duties of diving supervisors in section 172B(d) of the proposed Regulations.

- **Reviewable decisions:** Items 42 to 48 remove obsolete items from the list of decisions that are reviewable under the WHS Regulations and add in some items relating to the new diving provisions.

- **Extraterritoriality:** Item 10 provides that all provisions of the WHS Regulations will apply in the Commonwealth offshore area where regulated offshore activities are, or are reasonably expected, to be carried out. It also clarifies that certain provisions of the WHS Regulations, dealing with persons such as designers, manufacturers and suppliers who may be located overseas, apply outside Australia more generally. The application of WHS Regulations will be

[102] Such consultation is likely to have been required in any case under section 49 of the WHS Act. Item 11 merely confirms this requirement.

subject to the qualifications provided in Part 1 of Chapter 6 of the OEI Act and elsewhere in the OEI Act, WHS Act and WHS Regulations.

Question 27:

Item 49 of the WHS modifications prescribes certain events as dangerous incidents. Dangerous incidents will require an incident notification under section 38 of the WHS Act. Noting there are some circumstances in section 37 of the WHS Act which may not be relevant to OEI activities, are there any additional incident types that should be included as dangerous incidents for OEI activities? Are the three new listed dangerous incidents appropriately categorised and described?

Question 28:

Chapter 9 of the WHS Regulations regulates "major hazard facilities", which are facilities where certain chemicals are present above predetermined threshold quantities. Schedule 15 of the WHS Regulations prescribes the relevant chemicals and threshold quantities. Are the types of chemicals and the quantities specified in Schedule 15 appropriate for the OEI context? Should any chemicals be added, and should any quantities be added?

Question 29:

Regulations under the OEI Act may prescribe codes of practice that apply to OEI work.[103] The proposed Regulations do not prescribe any codes given the need to undertake detailed evaluation, in collaboration with industry and representatives, of the appropriateness of each code to be prescribed under the OEI Act.

Are there any codes of practice currently under the WHS Act that could be adopted in the proposed Regulations (either as is or with minor modifications)?[104] Should existing codes from other regimes be adopted?[105] Alternatively, should bespoke codes tailored to the OEI context that are focused on specific issues (for example, diving, laying or repairing subsea electrical cables, vessel-based construction work, etc.) be produced for OEI activities?

Record-keeping

Licence holders should be required to make and maintain detailed records on a variety of matters. This will assist the licence holder and can ensure information can be retrieved for regulatory and compliance matters.

Division 2 of Part 1 of Chapter 7 of the OEI Act establishes a regime under which the Registrar may issue data management directions requiring people to keep certain records. Part 8 of the proposed Regulations provides a further, and more generalised, regime for record-keeping. Under these

[103] See section 240 of the OEI Act.

[104] For example, the code of practice *Managing the work environment and facilities* might be modified to fit the non-standard OEI working environment.

[105] For example, the code of practice *Health and Safety in Shipboard Work, including Offshore Support Vessels*, which is an approved code under the *Occupational Health and Safety (Maritime Industry) Act 1993*.

provisions (the "record-keeping provisions"), a licence holder must keep the following types of records:[106]

- audit or inspection reports of licence infrastructure or licence activities;
- records relating to the licence holder's WHS obligations;
- records relating to the licence holder's compliance with their management plan and the OEI Act and OEI Regulations;
- records that substantiate any statements made by the licence holder in an annual or final report under paragraphs 33(4)(b) or 33(8)(b) of the OEI Regulations.

Records that are required to be kept under the record-keeping provisions or under a data management direction must be stored securely, in a manner that permits timely retrieval, and for a period of at least 7 years after the record is made or modified. They must also be stored at a location in Australia where the licence holder makes decisions that impact the health or safety of workers (i.e., at 'related onshore premises' as defined in section 228 of the OEI Act, rather than a decentralised storage facility).[107]

These storage obligations continue to apply to existing records even after a licence ceases.[108] If a licence is transferred, the storage obligations apply to existing records for the transferor but do not apply to the transferee.[109]

Question 30:

Subsections 134(1) and (2) of the proposed Regulations provide for certain types of records that licence holders must keep. Please note that the ability to prescribe types of records that must be kept is limited to the types of records mentioned in paragraphs 268(1)(a) and (b) of the OEI Act. Is it appropriate for licence holders to keep the certain types of records specified? Are there any other types of records that should be kept?

Question 31:

Subsections 134(3) and (4) of the proposed Regulations establish storage requirements for records that licence holders must keep. Are these appropriate? Are there any other storage standards that might be relevant?

[106] See subsections 134(1) and (2) of the proposed Regulations.

[107] The intention of this is to ensure that a WHS entry permit holder who intends to enter a workplace under Part 7 of the WHS Act is not prevented from doing so by section 127 of the WHS Act. (Under the WHS Act as applied by the OEI Act, paragraph 127(a) will never apply, meaning that paragraph 127(b) will need to apply in all cases.)

[108] See subsection 134(5) of the proposed Regulations. Note that the obligation in paragraph 134(3)(b) does not persist after a licence ceases, since there will no longer be a licence holder in this scenario.

[109] See subsection 134(6) of the proposed Regulations.

Data management

Paragraph 268(1)(c) of the OEI Act allows data management regulations to be made that require the giving of reports, returns and other documents in connection with the matters in paragraphs 268(1)(a) and (b) to the Registrar or a specified person.

Survey reports and data generated as part of renewable energy feasibility activities could provide insights into offshore geology and natural resources at a higher resolution or scale than what has been previously collected in the Commonwealth offshore area. The survey reports and data could inform future activities such as (but not limited to) planning for future area declarations under the OEI Act, research studies into Australia's offshore natural resources and marine environment, environmental assessments, and be included in marine navigational charting to support Safety of Life at Sea (SOLAS).

While not currently included in the proposed Regulations, it is intended that a regulation will be developed to require licence holders to provide to the Commonwealth geophysical and geotechnical survey data, collected as part of offshore renewable energy feasibility survey activities.

Survey data is an input to the design and location of the offshore renewable energy projects, as well as environmental approvals, which gives it significant commercial value to licence holders. Given this, licence holders may not want the data to be made immediately available. However, the data may have a confidentiality shelf life, and once it has served its original purpose, could benefit the broader community.

The Department is seeking preliminary views to enable the development of a data management regulation.

Question 32:

Would organisations benefit from geophysical and geotechnical data being made publicly available? If yes, which organisations would benefit?

Question 33:

How regularly should licence holders be required to submit survey data to the Commonwealth? For example, should it be provided on an annual basis, or more or less frequently?

Question 34:

For survey data that may be commercially sensitive, should there be an embargo period in which the data would not be published until the embargo period has ended? If yes, what is a reasonable embargo timeframe or milestone that could trigger the release of data, either publicly or under licence?

Fees

The OEI framework operates on a full cost-recovery basis through fees and levies. The applicable fees are set out in the OEI Regulations.

Application fees

Section 45 of the OEI Regulations contains a schedule of fees. These fees apply to applications to extend, vary, transfer or surrender a licence and applications for a change in control of a licence holder.

Item 18 of Schedule 1 to the proposed Regulations adds four applications into this schedule (each has an application fee of $10,000):

- applying for approval of an initial management plan;
- applying for approval of a revised management plan;
- applying for the Regulator to make, vary or revoke a safety zone; and
- applying for the Regulator to make, vary or revoke a protection zone.

Assessment fees

Item 20 of Schedule 1 to the proposed Regulations contains a further schedule of fees charged by the Regulator when assessing applications or submissions. The fees are for:

- assessing an application for approval of an initial management plan;
- assessing an application for approval of a revised management plan;
- assessing an application for the Regulator to make, vary or revoke a safety zone;
- assessing an application for the Regulator to make, vary or revoke a protection zone; and
- assessing a design notification.

The "assessment fee" is the total amount of the expenses incurred by the Regulator for assessing an application or submission. The Regulator will issue an invoice which will specify how and when payment is due.

The Minister, Registrar or Regulator may decline to perform a function or exercise a power under the OEI Act for a person who has an outstanding assessment fee. If there are good reasons, the Regulator may remit an assessment fee.

WHS fees

Items 52 to 61 of the WHS modifications vary the fees prescribed in Schedule 2 to the WHS Regulations, which relate to the Regulator's exercise of certain powers under the WHS Act and WHS Regulations. Items 52 to 61 reflect the fact that the final quantum of some of the WHS fees has not yet been determined.[110] Additionally, item 57 removes three obsolete fees and replaces them with two new fees in relation to the acceptance of a DSMS under the new diving provisions. The fees required to

[110] Note that the final quantum of the fees is likely to increase in all cases.

cover costs associated with assessing applications for these items will be developed in future under a revised Cost Recovery Implementation Statement.

Updates to the licensing scheme

Local content

The Australian Government is committed to establishing the offshore wind industry in Australia. For this to occur, it is important to provide opportunities to build the capacity of Australian businesses to service the industry.

Section 33 of the OEI Regulations provides that OEI licences are subject to the condition that the licence holder reports annually on a range of information relating to the OEI project. The proposed Regulations add to the information required to be reported on to include a requirement for licence holders to report annually on how they are contributing to, or will contribute to the Australian and local communities, including in relation to the use of Australian goods and services.[111]

In addition, licensing conditions to maximise the use of Australian supplier businesses and workers in offshore renewable energy industries are being developed. The conditions will ensure early engagement between feasibility licence holders and Australian businesses and workers to provide visibility of the supply chain and job opportunities and to encourage collaborative approaches to build local industry capability to support both the construction and operation phase of projects.

Question 35:

What offshore renewable energy supply chain components could be sourced from or manufactured in Australia and are there specific companies to support this?

Question 36:

What approaches to maximising the use of local supply chains will support both the development of local suppliers and project economics?

Overlapping applications for feasibility licences

Once the Minister has declared an area suitable for offshore renewable energy, an invitation to submit a feasibility licence application is issued. In their licence applications, applicants submit proposed licence areas, which might unintentionally overlap with the area proposed by another applicant. Licences cannot be granted to overlapping applications, as a final feasibility licence area must be exclusive from other areas. Where the licence area proposed in one feasibility licence application overlaps with the proposed licence area in another, and the applications are considered to be of equal

[111] See section 14 of the proposed Regulations.

merit,[112] the OEI Regulations set out a process for those businesses to communicate to resolve overlaps by revising and resubmitting their applications.

If any overlaps remain after the applicants have revised and resubmitted their applications, sections 14 to 16 of the OEI Regulations set out a process for the Minister to invite and deal with 'financial offers'. The Minister may determine that a group of 2 or more applications forms a 'financial offer group'. The Minister may then, in writing, invite the applicants to submit financial offers in relation to their applications. The Minister may only offer to grant a feasibility licence to the applicant that has submitted the highest (or only) financial offer out of the group.

Consideration is being given to amending the OEI Regulations to allow the Minister the ability to skip the process of requiring feasibility licence applicants, whose applications are of equal merit, to revise and resubmit their applications to remove overlap. Instead, the Minister would invite these applicants to submit a financial offer, which will be used as a mechanism to differentiate applications of equal merit. Declared areas can vary in size. Some are large enough to accommodate multiple projects, while others may only be able to accommodate 1-2 projects. There may be circumstances where there is insufficient space available in a declared area for equally meritorious applications to remove the overlap. It may, therefore, be more efficient to move directly to inviting financial offers.

The OEI Regulations may also be amended to allow the Minister to offer a feasibility licence applicant a smaller area than what was applied for. Given the level of interest in securing a feasibility licence in Australia, it is likely that feasibility licence applicants will apply for an area that overlaps with the proposed area of other applicants. Some of these overlaps may be significant, while others may be very minor and easily resolved. In the case of minor overlaps, allowing the Minister the ability to offer an area that is smaller than what was applied would remove the need for applicants to be invited to revise and resubmit their application. This would lead to efficiencies in the process for granting feasibility licences.

[112] The merit criteria are set out in section 34 of the OEI Act and section 26 of the OEI Regulations.