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Senate Standing Committees on Environment and Communications
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Submission on Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021 and Offshore Electricity Infrastructure Bill 2021

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Dear Committee Secretary,

Please find enclosed our Submission on:

1. the Submission on Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021 (**Levy Bill**).
2. and Offshore Electricity Infrastructure Bill 2021, (**Infrastructure Bill**),
(If together, **the Bills**).

Thank you for the invitation to make a submission regarding the Bills.

We welcome and support the introduction of legislation to establish a regulatory framework for the development of offshore renewable energy in Commonwealth Waters. We briefly present and discuss key aspects of the Bills that should be considered in this inquiry, with the aim of improving the current proposed legislation.

1. Legislative drafting

We commend the Commonwealth government for drafting legislation that rightfully places much of the day-to-day regulation of offshore electricity activities in the yet-to-be drafted Regulations. This approach is good regulatory practice and reduces legislative changes to the principal act.

However, without knowledge of the content of the regulations, there is difficulty in determining the content and scope of those regulations. Furthermore, the Bill refers many critical regulatory requirements to the Regulations (such as requirements to be included in the Register) but does not determine what WILL be in the Regulations – at present the Bill only indicates what MAY be in the regulations. This creates uncertainty for investors and project proponents and requires clarity for the Bill to proceed.

2. Weak protections for the environment

Although the Infrastructure Bill requires the submission of a Management Plan, the Bills do not provide an adequate for marine ecosystems that may be affected by proposed offshore wind farm.

Adequate management plans for projects must comply with federal environment law and should comply with international best practice for offshore wind projects. We submit that at present the Bills fail to meet such Best Practice:

A. Federal Environmental Law Compliance

The Independent Review of the EPBC Act is now complete and the Final Report prepared by Professor Graeme Samuel AC (**Final Report**) recommends a significant overhaul of Australia's existing federal environmental laws, with specific regard to the *Environment Protection and Biodiversity Conservation Act 1999*.² We recommend that this Inquiry should have regard to all the recommendations contained in the Final Report, particularly in relation to 'Chapter 11 – *Environmental monitoring, evaluation and reporting*', prior to the finalisation of this Inquiry into the Bills.

The Final Report also acknowledges that the complexity inherent in the management of Australia's environment is 'a shared responsibility between the Commonwealth and the States and Territories, and jurisdictions work in partnership with the community and the private sector'³. Currently, the Infrastructure Bill mandates a Management Plan in Chapter 4, Part 1, Division 2, however the sole environmental reference is in section 115(1)(c) which prescribes that a Plan must address the

¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

² <https://epbcactreview.environment.gov.au/resources/final-report/executive-summary>

³ Final Report, 11.3.1

requirements of the EPBC Act and any regulations thereunder.⁴ There are no details regarding these requirements. Presumably the requirements may be part of yet-to-be drafted regulations or outlined in a guidance note. Without clear legal enforcement set out in the Infrastructure Bill, guidelines are not legally enforceable, and merely act as a guide. Therefore, at present there are no legally enforceable detailed environmental requirement.

Furthermore, this level of generality does not address the overlap of Federal and State laws in offshore jurisdictions, and at best leaves any subsequent Regulations with a lot of work to in managing marine ecosystems. Apart from section 115(1)(c), all other sections which address environmental management are reactive, rather than proactive, and include:

- Section 126 – Remedial Actions by the Regulator;
- Section 177 – Functions of the Regulator;
- Section 207 – Prohibition Notices; and
- Section 209 – Improvement Notices.

To remedy this, and to provide specificity for marine ecosystems that may be affected by the proposal, consideration should be had to the Final Report's endorsement of the 'The Reef 2050 Long-term Sustainability Plan'⁵ (**The Reef Plan**), which provides a management plan for the Great Barrier Reef. The Reef Plan could provide a blueprint for marine life management plans for offshore wind projects, which is a joint venture between the Federal and Queensland governments as a monitoring, modelling, and reporting program that supports an adaptive management approach.⁶

Given the overlap of state/Territory and Federal legislative frameworks for any offshore project, the Bills should mandate federal environmental oversight. Further, given the 'inherently fragile' nature of bilateral assessment agreements under the EPBC Act, projects which trigger the requirement for environmental impact assessments should have reference to a relevant National Environmental Standard. The relevant Standard, as relevant to Australian offshore wind projects, could a form a Schedule in the Infrastructure Bill or subsequent regulations, establishing a set of criteria to mitigate any impacts on marine ecosystems.

Regard should be had to the first major legislative attempts to enacting the recommendations of the Final Report, being the *EPBC Amendment (Standards and Assurance) Bill 2021*⁷, and its precursor the *EPBC Amendment (Streamlining Environmental Approvals) Bill 2020*.⁸ These EPBC Amendment Bills are currently before the Senate, and the Bills before this enquiry should maintain consistency with the former's current drafting to ensure legislative consistency. In this respect, as section 175 of the Infrastructure Bill provides that NOPSEMA will be the Regulator in respect of the Bills, there must be consistency between the legislation that governs NOPSEMA's statutory role,⁹ and the proposed amendments to the EPBC Act.

Proactive requirements of proposed offshore wind projects that ensure consistency between governing legislation, the EPBC Act and adequate Management Plans are critical to both developers and affected stakeholders. Given the significant (20-25 year) lifespan of offshore wind projects,¹⁰

⁴ Infrastructure Bill s115(1)(c)

⁵ <http://www.environment.gov.au/system/files/resources/35e55187-b76e-4aaf-a2fa-376a65c89810/files/reef-2050-long-term-sustainability-plan-2018.pdf>

⁶ Final Report, Box 39.

⁷ *EPBC Amendment (Standards and Assurance) Bill 2021* (Cth).

⁸ *EPBC Amendment (Streamlining Environmental Approvals) Bill 2020* (Cth).

⁹ See Part 6.9 (National Offshore Petroleum Safety and Environmental Management Authority) of the Offshore Petroleum and Greenhouse Gas Storage Act 2006.

¹⁰ Tosin Adedipe, Mahmood Shafiee. An economic assessment framework for decommissioning of offshore wind farms using a cost breakdown structure. *The International Journal of Life Cycle Assessment*, 2021; DOI: 10.1007/s11367-020-01793-x

environmental protections should be addressed prior to development, rather than addressed throughout the lifetime of a project.

B. International Best Practice

The North Sea jurisdiction provides a comprehensive blueprint for offshore wind international best practice, with lessons drawn particularly from development of the offshore wind industry in both Denmark and the United States.

In a report on the industry by the Danish Energy Agency,¹¹ pioneering companies were required to undertake an environmental monitoring programme on offshore farms with specific reference to salinity, currents and tides, and different locations providing for different species, habitats and any impact on migratory patterns.¹² To assist in the environmental and planning processes in the early offshore industry, a Marine Spatial Planning Committee for offshore windfarms undertook GIS mapping that surveyed a proposed project site for environment protection sites, and their nexus with the offshore wind infrastructure.¹³

In the United States, a detailed publication by K&L Gates recommended best practice planning for offshore wind incorporate a 'workability assessment' that considers marine spread hydrodynamic behaviour.¹⁴ The US framework also integrates the US National Environmental Policy Act (1969)¹⁵, with other federal legislation that addresses endangered species and coastal management.¹⁶ According to DAWE's website (<http://www.environment.gov.au/epbc/publications/national-environment-law-basics-environmental-impact-assessments-and-approvals-projects>), the whole environment (not just the matters of national environmental significance) must be considered when activities take place in Commonwealth marine areas. However, the EPBC Act only covers select environmental issues,¹⁷ and therefore excludes the inclusion of other important federal or state legislation relating to ocean management, coastal management and threatened species.¹⁸

Recommendation 1

We recommend the following amendments to the Infrastructure Bill:

- a. The inclusion of a higher degree of specificity in a Management Plan developed under section 115(1)(c);
- b. The inclusion of legislative requirements for discrete marine ecosystems issues relevant to offshore wind under Chapter 4, Part 1, Division 2, including underwater noise and impacts on fish spawning.
- c. Adapting Chapter 4, Part 1, Division 2 to include comprehensive environmental monitoring programmes for marine ecosystems prior to project approval.
- d. The inclusion of a reference to relevant federal and state legislation that interrelates with the coastal zone and ecosystem in section 115(1).

¹¹ Danish Energy Agency, 'Danish Experiences from Offshore Wind Development' (March 2017), accessible at https://ens.dk/sites/ens.dk/files/Globalcooperation/offshore_wind_development_0.pdf

¹² Ibid, 12.

¹³ Ibid, 13.

¹⁴ K & L Gates, '2019 Offshore Wind Handbook' (2019), accessible at https://files.klgates.com/files/uploads/documents/2019_offshore_wind_handbook.pdf, 71.

¹⁵ NEPA (42 U.S.C. §§ 4321-4347)

¹⁶ Endangered Species Act (16 U.S.C. § 1531 et seq.), Coastal Zone Management Act (16 U.S.C. § 1451 et seq.)

¹⁷ <https://www.environment.gov.au/epbc/what-is-protected>

¹⁸ See for example for Cth: *Underwater Cultural Heritage Act 2018* or the *Water Act 2007*. See for example in NSW, *Coastal Management Act 2016* or the *Biodiversity Conservation Act 2016*.

3. Native Title holders rights and interests

Offshore energy project developers are prohibited from interfering with Native Title rights and interests. But the bill allows interference of such rights where “necessary” for the for the “reasonable exercise” of project rights and obligations. This raises a critical question — what is considered “necessary” and “reasonable”?

This vague wording could see projects approval occur even [when it conflicts with](#) Aboriginal and Torres Strait Islander communities and their Native Title rights. Such conflict between Native title has been particularly expressed regarding projects in onshore jurisdictions, such as the Asian Renewable Energy Hub, as well as conflict between energy projects and the rights accorded to indigenous persons under the *Aboriginal Land Rights (Northern Territory) Act, 1976* (NT).

Although the likelihood that Native Title will extend to offshore jurisdictions beyond Coastal Waters is low, the Native title Act 1993 (Cth) extends to ‘each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*’.¹⁹ Therefore, given that the NTA extends to the jurisdiction of the Bills, native title rights and interests must be clarified and protected.

4. Inadequate safety provisions

Offshore wind energy development holds inherent risks, such as transporting and constructing wind turbine components in hazardous environments, which are often subject to extreme weather. Without a solid safety framework, construction may lead to injuries or deaths, similar to those that have [occurred in the North Sea](#).

Under the proposed Bills, the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) would be appointed as the offshore wind regulator. NOPSEMA would oversee safety using the generic Work, Health and Safety Act 2011 (WHS Act). However, the recognises that parts of the WHSA will [need to be modified](#) so they’re “fit for purpose”. It would require extra provisions, exclusions, and workarounds, making the assurance of structures difficult.

Compare this to offshore petroleum operations, which get a [bespoke safety framework](#) NOPSEMA is already familiar with. Why isn’t one put in place for offshore wind farms? There is ample industry and academic literature that addresses the issue of offshore wind safety.²⁰

Safety cases and validation - NOPSEMA

NOPSEMA mandates that a ‘facility cannot be constructed, installed, operated, modified or decommissioned without a safety case in force for that stage in the life of the facility’.²¹

The operator of a facility must submit the safety case to NOPSEMA with either a NOPSEMA pro-forma cover sheet or a covering letter stating that it is being submitted for assessment. Since it is the operator that must submit the safety case, registration of the operator must be completed (and a scope of validation for a proposed facility agreed) prior to safety case submission.

International best practice considers that the most successful safety regimes incorporate tripartite decision-making. This is particularly relevant in offshore energy infrastructure regulation following the

¹⁹ Section 6, *Native Title Act 1993* (Cth)

²⁰ See E Wifa and T Soliman Hunter, ‘Mitigating occupational health and safety risks in the proposed Australian offshore wind energy industry: lessons from the safety case regime’ (2021) *Journal of Energy and Natural Resources Law* <https://doi.org/10.1080/02646811.2021.1879547>

²¹ <https://www.nopsema.gov.au/offshore-industry/safety/safety-cases-and-validation>

Cullen Report and the Piper Alpha disaster.²² In Norway, safety protocols are developed by the government in conjunction with both the energy workforce and the relevant companies involved in offshore production.

5. Community compensation

In [Denmark](#), offshore wind turbines are located less than [16 kilometres](#) from the coastline, and offshore wind law requires that obliged local citizens whose visual amenity is impacted by offshore energy installations are offered compensatory benefits amounting to at least 20% of ownership shares of the project.

Under Australia's proposed Bill, there are no explicit community benefit schemes. This is an important omission, since creating laws to increase community participation and engagement could reduce any risk of "not in my backyard" (Nimbyism) attitudes, even when the activity is located offshore. Good visibility on a clear day means that structures are easily seen up to 15 km, and therefore it is critical that the Infrastructure Bill addresses community compensation. This would also ensure host communities are actively involved, early and frequently, throughout the lifecycle of offshore wind projects.

In crafting best practice regulation coupled with community benefit schemes, the opportunities are limitless. A first step could be to create further public submission opportunities for communities to comment on the concerns regarding possible impact of offshore activities under the infrastructure Bill.

6. Declared areas and Marine Spatial Planning

Pursuant to section 17(3)(c) of the Infrastructure Bill, the Minister must consult the Defence Minister and the Minister administering section 1 of the *Navigation Act 2012* before declaring an area as suitable for offshore renewable energy infrastructure. We suggest that the Commonwealth Minister for the Environment should also be consulted before such a declaration is made. This requirement should trigger strategic assessments of environmental conditions of proposed areas for offshore renewable energy infrastructure, thereby contributing to adequate marine spatial planning.

More details about such strategic environmental assessments should be included in the regulations. By including this requirement, critical environmental issues of proposed areas may be flagged before a decision is made by the Minister. Without prior strategic environmental assessments, environmental issues will only be considered in environmental assessments submitted by project proponents, i.e., after an area is declared as suited for offshore renewable energy infrastructure. Consequently, project proponents who were granted licences under the proposed licensing scheme may have an increased risk of experiencing delays in their environmental approval processes (or even approval refusals). Critical environmental issues should be flagged as early as possible to avoid the declaration of areas that are not environmentally suited for offshore renewable infrastructure.

Consultation with affected states and territories should also precede the declaration of suitable areas. States and territories will play a key role in most offshore energy projects developed in Commonwealth waters due to associated onshore infrastructure required for construction, operation, maintenance, and decommissioning activities. Consequently, states and territories may provide valuable inputs before a declaration is made. By participating in the process outlined in section 17 of the Infrastructure Bill, states and territories will be able to propose adjustments in the location of proposed areas to consider existing port infrastructure capacity, issues regarding grid connection, potential conflicts in uses outside Commonwealth waters, among other issues.

²² <https://www.hse.gov.uk/offshore/piper-alpha-public-inquiry-volume1.pdf>

Lastly, to support marine spatial planning, the Commonwealth Government should be actively involved in the collection of environmental and social baseline data that may inform future decisions concerning the declaration of suitable areas for offshore renewable energy infrastructure. Data collection should not be left to the private sector only. In this sense, we suggest the inclusion of provisions that explicitly allow and incentivise the use of money from financial offers, fees and levies for the collection and dissemination of such data.