

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Climate Change and Energy

Offshore Electricity Infrastructure Act 2021

Offshore Electricity Infrastructure Regulations 2022

Purpose and Operation

The *Offshore Electricity Infrastructure Act 2021* (OEI Act) establishes a legal framework to enable the construction, installation, commissioning, operation, maintenance, and decommissioning of offshore electricity infrastructure (OEI) in the Commonwealth offshore area. The OEI Act commenced on 2 June 2022.

The OEI Act provides a robust framework for granting licences to undertake OEI activities in the Commonwealth offshore area, while providing for co-existence with other marine users, the effective management of environmental impacts, the safety of workers and the protection of OEI. Providing regulatory certainty will enable a new offshore industry to develop in Australia, delivering significant benefits including employment, regional development and a more reliable electricity network.

Section 305 of the OEI Act provides that the Governor-General may make regulations prescribing matters required or permitted by the OEI Act or necessary or convenient for carrying out or giving effect to the OEI Act. The OEI Act contains a number of provisions providing for the making of regulations, with the intention being that certain elements of the OEI framework would be addressed through subsequent regulations rather than established through the primary legislation.

The *Offshore Electricity Infrastructure Regulations 2022* (OEI Regulations) set out the detailed arrangements of the OEI framework that are considered crucial for the framework to become operational: namely the OEI licencing scheme, spatial datum provisions, arrangements for pre-existing infrastructure, and the application of fees and levies. Once established, the OEI Regulations will be amended as necessary in the future to include the remaining arrangements for the framework.

Background

As noted above, the OEI Regulations cover the OEI licencing scheme, spatial datum provisions, pre-existing infrastructure, and the application of fees and levies. Further background on the OEI licencing scheme and the application of fees and levies is provided directly below. Further background on spatial datum provisions and arrangements for pre-existing infrastructure will be provided later in the sections outlining those substantive provisions.

Licensing scheme

Section 15 of the OEI Act prohibits the construction and operation of offshore electricity generation and transmission infrastructure in the Commonwealth offshore area without a licence. The OEI Act sets out three pathways for licensing to accommodate a range of potential types of developments:

- A commercial pathway, which includes a feasibility licence to allow a licence holder to undertake exploratory and scoping work and then to seek a subsequent commercial licence to develop long-term, large-scale offshore renewable energy infrastructure (e.g. an offshore wind farm with fixed or floating wind turbines).
- A research and demonstration pathway, which provides a licence for short-term projects to trial and test new technologies or undertake infrastructure-based exploration and research activities (e.g. demonstration of floating solar generation or tidal generation technologies).
- A transmission and infrastructure pathway, which provides a licence to construct and operate offshore electricity transmission infrastructure (e.g. cables connecting an offshore renewable energy generation facility to onshore, or interconnectors between Tasmania and mainland Australia).

Section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme. This licensing scheme, amongst other things, will establish a system for licence applications, offering and granting of licences, variations to licences, extension of licences, transfers of licences, and changes in control of licence holders. The licensing scheme will be administered by the Offshore Infrastructure Registrar (the Registrar), who will maintain a register of licences and manage the licence application process.

Application of fees and levies

Parts 1 and 2 respectively of Chapter 5 of the OEI Act establish the Registrar and the Offshore Infrastructure Regulator (the Regulator) to administer and regulate the OEI framework. In addition, the relevant Commonwealth Department is responsible for ongoing policy oversight of the framework.

Part 3 of Chapter 5 of the OEI Act further sets out arrangements for the payment of fees and levies by OEI participants. Under subsection 189(1) of the OEI Act the Commonwealth (or the Regulator or Registrar, on behalf of the Commonwealth) may charge a fee for dealing with an application made, performing functions, or exercising power under the OEI Act or the applied work health and safety provisions. Under subsection 190(1) of the OEI Act certain OEI participants must also pay levies where applicable under the *Offshore Electricity Infrastructure (Regulatory Levies) Act 2021* (OEI Levies Act) and associated *Offshore*

Electricity Infrastructure (Regulatory Levies) Regulations 2022 (OEI Levies Regulations).¹ The aim of these provisions is to enable the Commonwealth to recover, from OEI licence holders, any costs associated with administering or regulating the OEI framework.

Sections 189 and 190 of the OEI Act provide for the regulations to prescribe various obligations and requirements pertaining to the application of fees and levies.

Authority

Section 305 of the OEI Act provides that the Governor-General may make regulations prescribing matters required or permitted by the OEI Act or necessary or convenient for carrying out or giving effect to the OEI Act.

The OEI Act also sets out various further provisions that authorise specific regulations. For the aspects of the OEI framework set out in the OEI Regulations, these provisions broadly include section 9 (spatial datum), section 29 (the licencing scheme), sections 189 and 190 (fees and levies) and section 309 (pre-existing infrastructure). Where other authorising provisions are relied upon, these are indicated in the relevant sections below.

Consultation

The then Department of Industry, Science, Energy and Resources (the Department) undertook public consultation on an exposure draft of the OEI Regulations from 22 March to 22 April 2022. Thirty-six submissions were received. Those submissions that were not marked as confidential will be published on the relevant Commonwealth Department's website.

As part of the development of the OEI Regulations, the Department worked with the Department of Finance and staff supporting the Registrar and the Regulator to develop a Cost Recovery Implementation Statement (CRIS). The CRIS itemises the regulatory activities and estimated costings associated with implementing and administering the OEI framework, with the aim of guiding the setting of fees and levies under the OEI Regulations and OEI Levies Regulations such that the Commonwealth's administration of the framework is fully cost-recovered. The CRIS was developed in accordance with the requirements of the Australian Government Charging Framework and Cost Recovery Guidelines. A draft CRIS was provided as part of the public consultation process, and 15 of the 36 submissions received commented on fees, levies and/or the CRIS. The final CRIS will be available on the relevant Commonwealth Department's website.

During the consultation period the Department, along with staff supporting the Registrar and the Regulator, also undertook meetings with around 30 different stakeholders. These

¹ Note that, at the time of preparation of this Explanatory Statement, the OEI Levies Regulations had been prepared but not yet made. The remainder of this Explanatory Statement assumes that the OEI Levies Regulations have been made as prepared.

stakeholders included industry developers, state governments, non-government agencies and existing users of Australia's offshore area.

Overall, stakeholders were supportive of the exposure draft of the OEI Regulations and the proposed cost-recovery arrangements.

In addition to the people and entities mentioned above, the following stakeholders were also consulted during the development of the OEI Regulations: the Attorney-General's Department; the Australian Government Solicitor; the Office of Parliamentary Counsel.

Regulatory Impact

A Regulatory Impact Statement (RIS) was prepared for the OEI Act.² This RIS was included in the Explanatory Memorandum for the OEI Act. The Office of Best Practice Regulation has advised that no further RIS is required for the OEI Regulations.

² Office of Best Practice Regulation reference number 42703.

Details of the *Offshore Electricity Infrastructure Regulations 2022*

PART 1 – PRELIMINARY

Section 1 – Name

Section 1 provides that the title of the OEI Regulations is the *Offshore Electricity Infrastructure Regulations 2022*.

Section 2 – Commencement

Section 2 provides that the OEI Regulations commence the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the OEI Regulations are made under the *Offshore Electricity Infrastructure Act 2021*.

Section 4 – Definitions

Section 4 provides definitions for the following terms used in the OEI Regulations:

- “Act” means the *Offshore Electricity Infrastructure Act 2021*.
- “Decision maker” has the meaning given in subsection 43(2) of the OEI Regulations.
- “Financial offer group” has the meaning given in subsection 14(2) of the OEI Regulations.
- “Licence application” means an application for, or that relates to, a licence.
- “Offshore electricity infrastructure levy” has the same meaning as the corresponding term in the *Offshore Electricity Infrastructure (Regulatory Levies) Act 2021*.
- “Overlap”, in relation to feasibility licence applications, occurs when the licence areas proposed in such applications cover wholly or partly the same area.
- “Overlapping application group” has the meaning given in subsection 11(2) of the OEI Regulations.
- “Proposed project”, in relation to a licence or an application for a licence, means either the proposed commercial offshore infrastructure project for the licence (for feasibility licences) or else the offshore infrastructure project proposed to be carried out under the licence (for all other licences).

An explanatory note at the top of section 4 also clarifies that a number of terms used in the OEI Regulations, including “eligible person”, “licence”, “proposed commercial offshore infrastructure project”, “Registrar” and “Regulator”, are defined in the OEI Act. Unless otherwise specified, all terms from the OEI Act that are used in the OEI Regulations have the meaning given in the OEI Act.

PART 2 – THE LICENSING SCHEME

Division 1 – Operation of this Part

Section 5 – Operation of this Part

As noted at “Background” above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraphs 29(1)(a)-(e) deal with applications for licences, the offering and granting of licences, transfers of licences, changes in control of licence holders, and management plans. Paragraph 29(1)(f) further provides that the licensing scheme may cover any matters left by the OEI Act to the licensing scheme that are not dealt with in paragraphs 29(1)(a)-(e). This might include, for example, matters such as extending and varying licences,³ the imposition of additional licence conditions⁴ or the consideration of the licensing merit criteria.⁵ Finally, subsection 29(2) provides that the licensing scheme may cover any other matters that the OEI Act authorises to be included in the regulations.

Section 5 of the OEI Regulations clarifies that Part 2 of the OEI Regulations sets out the licensing scheme under section 29 of the OEI Act. It should be noted that some elements of the licensing scheme, such as requirements for management plans, will be added to Part 2 by future regulations.

Division 2 – Licence areas

Section 6 – Operation of this Division

The OEI Act restricts the maximum allowable size of a licence area that may be granted for feasibility and commercial licences.⁶ Paragraph 33(4)(c) of the OEI Act provides that the licence area for a feasibility licence must not exceed the maximum area prescribed by the licensing scheme, while paragraph 42(4)(c) provides the same with respect to commercial licences. Paragraph 42(4)(e) also provides that the licence area for a commercial licence must either consist of or be entirely within the licence area of the feasibility licence that preceded it.⁷

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraphs 29(1)(a)-(e) deal with applications for licences, the offering and granting of licences, transfers of licences, changes in control of licence holders, and management plans. Paragraph 29(1)(f) further provides that

³ See Division 5 of Part 2 of the OEI Regulations.

⁴ See Division 6 of Part 2 of the OEI Regulations.

⁵ See Subdivision B of Division 4 of Part 2 of the OEI Regulations.

⁶ Note that there are no such restrictions placed on research and demonstration licences or transmission and infrastructure licences.

⁷ Note that a person may only apply for a commercial licence for a certain area if they already hold a feasibility licence in relation to that area: see subsection 41(1) of the OEI Act.

the licensing scheme may cover any matters left by the OEI Act to the licensing scheme that are not dealt with in paragraphs 29(1)(a)-(e).

Section 6 of the OEI Regulations clarifies that Division 2 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under paragraph 29(1)(f) of the OEI Act, maximum licence areas for the purposes of paragraphs 33(4)(c) and 42(4)(c) of the OEI Act.

Section 7 – Licence areas

Subsection 7(1) of the OEI Regulations prescribes that the maximum area for a feasibility licence is 700 km². An explanatory note also clarifies the link with paragraph 33(4)(c) of the OEI Act that is explained at section 6 above.

The granting of feasibility licences will be a competitive process, as the licence areas of feasibility licences cannot overlap.⁸ Depending on the size of a declared area,⁹ setting a maximum licence area will allow for multiple feasibility licences to be issued in that area. It will also encourage efficient use of the marine area, reduce the risk of OEI participants accumulating larger licence areas than they need, and help balance the needs of other marine users.

The maximum licence area of 700 km² was chosen following consultation with offshore wind industry stakeholders and a comparison with relevant overseas OEI projects. A prospective proponent with a project that requires an area greater than 700 km² may apply for multiple adjacent licences, although each licence application will be considered individually, meaning that each application would need to contain a “standalone” project that would be viable on its own merits. There is also no guarantee that a successful application would mean that adjacent applications will also be successful.

Subsection 7(2) of the OEI Regulations prescribes that the maximum area for a commercial licence is 700 km². An explanatory note also clarifies the link with paragraph 42(4)(c) of the OEI Act that is explained at section 6 above.

Given that commercial licences transition from prior feasibility licences, and must be within the licence area of those prior feasibility licences, it is necessary to clarify that a commercial licence area cannot exceed the size of a feasibility licence area.

⁸ See paragraph 33(4)(b) of the OEI Act.

⁹ The area declaration process is set out in Part 2 of Chapter 2 of the OEI Act.

Division 3 – Applications for licences

Subdivision A – Operation of this Division

Section 8 – Operation of this Division

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraph 29(1)(a) deals with applications for licences.

Section 8 of the OEI Regulations clarifies that Division 3 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under paragraph 29(1)(a) of the OEI Act, matters relating to applications for licences.

Subdivision B – Applications for feasibility licences

Section 9 – Invitations to apply for feasibility licences

Paragraph 32(1)(a) of the OEI Act provides for the licensing scheme to prescribe procedures for eligible persons to be invited to apply for feasibility licences. Section 9 of the OEI Regulations is made for the purposes of this provision.

Subsection 9(1) of the OEI Regulations provides for the Minister to invite eligible persons¹⁰ to apply for feasibility licences. For clarity, the plural of “persons” here refers to the fact that more than one eligible person may apply under the invitation, not that two or more eligible persons may jointly apply for any particular licence.¹¹

Subsection 9(2) provides that an invitation must be made by the Minister in writing, and must be registered on the Federal Register of Legislation as a notifiable instrument. This is to ensure transparency and public accessibility. As noted above, an invitation instrument can invite more than one eligible person at the same time, and it is expected that each instrument will by default be an open invitation to anyone who meets the eligibility requirements.

Subsection 9(3) provides that an invitation must identify the declared area for which licence applications are being sought and any special conditions that the relevant declaration requires licences granted in that declared area to be subject to.¹² The invitation must also specify the day by which applications must be made. For clarity, each invitation will cover no more than one declared area, although multiple invitations may be issued if necessary for each particular

¹⁰ The term “eligible person” is defined in section 8 of the OEI Act.

¹¹ Under the OEI Act there can only be one licence holder for each licence: see e.g. the use of “the” licence holder in sections 31, 40, 50 and 59 of the OEI Act.

¹² See further subsection 20(4) of the OEI Act.

declared area.¹³ In practice, it is expected that there will only ever be one invitation (if any) open in a declared area at any one time.

An explanatory note to subsection 9(3) clarifies that feasibility licences will also be subject to the other conditions specified in section 35 of the OEI Act. For clarity, any special conditions specified in an invitation under paragraph 9(3)(c) of the OEI Regulations are only those that arise from the terms of the relevant declaration.¹⁴

Subsection 9(4) provides that an invitation may specify additional information or documents that must accompany applications.

Section 10 – Applications for feasibility licences

Paragraph 32(1)(b) of the OEI Act provides for the licensing scheme to prescribe procedures for eligible persons to apply for feasibility licences. Sections 10-16 of the OEI Regulations are made for the purposes of this provision.

Subsection 10(1) of the OEI Regulations provides for an eligible person to apply for a feasibility licence in response to an invitation by the Minister under section 9. For clarity, an eligible person may apply for more than one feasibility licence in any particular declared area, including in an adjoining configuration.¹⁵

Subsection 10(2) provides that an application must:

- Be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.¹⁶
- Be made by the day specified in the invitation under paragraph 9(3)(b).
- Include a description of the proposed commercial offshore infrastructure project.¹⁷ This will help ensure that projects proposed at the feasibility licence application stage end up being substantially similar to projects constructed under subsequent commercial licences.¹⁸ Nonetheless, it is acknowledged that various elements of the project may change between the feasibility and commercial stages (due to, for example, advances in technology available or optimised infrastructure design), and so

¹³ This would happen, for example, if the Minister chose to hold subsequent invitation rounds in a declared area following the initial invitation round.

¹⁴ See paragraph 35(1)(b) of the OEI Act.

¹⁵ Note however that each licence application will be considered individually, meaning that each application would need to contain a “standalone” project that would be viable on its own merits. There is also no guarantee that a successful application would mean that adjacent applications will also be successful.

¹⁶ See section 307 of the OEI Act.

¹⁷ The term “proposed commercial offshore infrastructure project” is defined in paragraph 30(a) of the OEI Act. Note that the licensing scheme must require an application to provide such a description: see subsection 32(2) of the OEI Act.

¹⁸ As required by subparagraph 42(1)(h)(i) of the OEI Act.

there will be flexibility for a commercial licence applicant to make reasonable departures from the description provided with their feasibility licence application.¹⁹

- Be accompanied by any other information or documents specified in the invitation under subsection 9(4).

Subsection 10(3) provides that an application is taken to include a description of the proposed commercial offshore infrastructure project, or be accompanied by any information or documents required by the approved form or the invitation, if the relevant material is given to the Registrar within 30 days after the closing date specified in the invitation. The intention of this provision is to give applicants and the Registrar time after the application closing date to identify whether applications are missing the specified material, and for applicants to be able to provide this material without prejudice to their applications. Applicants should still aim to provide the specified material by the application closing date if they want the chance to correct unforeseen errors. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the application closing date.

Subsection 10(4) provides that, if the Registrar receives an application for a feasibility licence that overlaps with an existing licence area, the Registrar may at its discretion invite the existing licence holder to make a submission in relation to the potential grant of the feasibility licence. If the Registrar does invite the existing licence holder to make a submission, it will also provide further details on the proposed feasibility project including the kind of project involved, the location, shape and size of the proposed licence area and the name of the applicant. It is expected that feasibility licence applicants will consult with relevant existing licence holders and provide information on this as part of the application process, so the Registrar is only likely to use its discretion in subsection 10(4) where a feasibility licence application falls short in this area.

An explanatory note to subsection 10(4) clarifies that, under paragraph 33(4)(b) of the OEI Act, the licence area of a feasibility licence must not include any part of the licence area of any other feasibility or commercial licence. This is a reminder that the Registrar will not need to use its discretion in subsection 10(4) where an application for a feasibility licence overlaps with an existing feasibility or commercial licence, as a feasibility licence could not be offered to the applicant in that situation. Subsection 10(4) will only be necessary where an application for a feasibility licence overlaps with an existing research and demonstration or transmission and infrastructure licence.

Section 11 – Applications for feasibility licences that overlap – Minister may determine overlapping application groups

The granting of feasibility licences will be a competitive process, as the licence areas of feasibility licences cannot overlap. This means that a feasibility licence cannot be granted in

¹⁹ See subparagraph 42(1)(h)(ii) of the OEI Act.

the area as an existing feasibility licence. In the event that two or more feasibility licence applications overlap, only one of those licences can be granted.

This is not problematic where one of the overlapping applications has a higher merit than the applications that it overlaps, as the Minister in this situation will have a clear pathway to guide their decision-making process. The outcome may not be so clear, however, where there are overlapping applications of equal merit. Sections 11-16 of the OEI Regulations set out a process that the Minister may choose to follow to guide their decision-making in this situation. In very simple summary, overlapping applicants of equal merit will be given a chance to revise and resubmit their applications to remove their overlaps. Any applicants who are still overlapping after the revision process may be required to take the additional step of making a competitive financial offer to secure their licence.

An example: Overlapping feasibility licence applications

To clarify the meaning and effect of sections 11-16, some of these sections contain explanatory notes that make use of a simple example involving three overlapping feasibility licence applications: application A, application B and application C. In this example, applications A and B overlap each other, and applications B and C overlap each other, but applications A and C do not overlap each other. This scenario can be represented diagrammatically as follows:



This scenario will be referred to as the “simple example” where it arises in sections 11-16 of the OEI Regulations.

Subsection 11(1) provides that section 11 applies if two or more feasibility licence applications have been made in response to the same invitation issued by the Minister under section 9. For clarity, an application is only considered to have been “made” for the purposes of subsection 11(1) if it meets the formal requirements prescribed in subsections 10(2)-(3).

Subsection 11(2) provides for the Minister to determine an “overlapping application group”. The Minister may only determine such a group if all of the following apply:

- The group comprises two or more feasibility licence applications made in response to the same invitation issued under section 9. For clarity, the group does not have to comprise every feasibility licence application made in response to the same invitation, nor does it have to comprise every feasibility licence application that could be part of the group under section 11.

- Having regard to the criteria listed in subsection 11(3) of the OEI Regulations, the Minister considers all applications in the group to be of equal merit.
- The proposed licence area of each application in the group overlaps the proposed licence area of at least one other application in the group, and the proposed licence areas of all applications in the group together form a continuous area.
- The Minister is satisfied that, if not for the overlap or overlaps in question, a feasibility licence could be offered to each of the applicants in the group. A licence application might contravene this requirement if, for example, it proposed a licence area that did not meet the relevant requirements,²⁰ if it did not meet the merit criteria,²¹ or if the licence applicant was not an eligible person.²²

An explanatory note to subsection 11(2) clarifies that, in the simple example provided above, it might be possible for applications A, B and C to comprise an overlapping application group. This is because the proposed licence area of each application overlaps the proposed licence area of at least one other application, and the proposed licence areas of all applications together form a continuous area. It should be noted that this example does not consider whether the other requirements in subsection 11(2) have also been met.

A further explanatory note to subsection 11(2) clarifies that the term “overlap” is defined in section 4 of the OEI Regulations: that is, that feasibility licence applications overlap when the licence areas proposed in such applications cover wholly or partly the same area.

Subsection 11(3) provides matters for the Minister to consider when determining the relative merits of overlapping feasibility licence applications for the purposes of subsection 11(2). In performing this task, the Minister must have regard to all of the following:

- The technical and financial capability that the applicant is likely to have, or to be able to arrange to have, to carry out the proposed commercial offshore infrastructure project.
- The likely viability of the proposed commercial offshore infrastructure project.
- The suitability of the applicant to hold the licence.
- The national interest.

The Minister may also have regard to any other matters they consider relevant, including any of the matters provided in section 26 of the OEI Regulations. Section 26, as will be further explained below, provides matters that the Minister may consider when determining whether a licence meets the merit criteria.²³

²⁰ See paragraph 33(1)(d) of the OEI Act.

²¹ See paragraph 33(1)(e) of the OEI Act.

²² See paragraph 33(1)(a) of the OEI Act.

²³ For example, under paragraphs 33(1)(e), 42(1)(i), 52(1)(f) and 61(1)(c) of the OEI Act.

For clarity, although the matters in subsection 11(3) of the OEI Regulations are similar to those in paragraph 33(1)(e) and subsection 34(1) of the OEI Act,²⁴ the task of the Minister under each set of provisions is different. Under subsection 11(3) of the OEI Regulations the Minister considers the relative merits of a feasibility licence application as a precedent step to resolving overlaps with one or more other feasibility licence applications, whereas under paragraph 33(1)(e) and subsection 34(1) of the OEI Act the Minister considers whether a feasibility licence application meets the merit criteria as a precedent step to granting the licence.²⁵ A paragraph 33(1)(e) and subsection 34(1) consideration comes at the end of the licence application process, and will always be necessary; a subsection 11(3) consideration comes earlier in the process, and may not be necessary. Nonetheless, where both are required, the considerations will in practice be very similar or even identical in most cases.

Subsection 11(4) of the OEI Regulations clarifies that the Minister may determine more than one overlapping application group in relation to the same invitation issued under section 9. This might be necessary, for example, where there are two groups of applications that are separated from each other but which otherwise meet all of the requirements of subsection 11(2).

Section 12 – Registrar may invite applicants in overlapping application group to revise and resubmit applications

Subsection 12(1) of the OEI Regulations provides that section 12 applies if the Minister determines an overlapping application group under section 11.

Subsection 12(2) provides that, if the Minister determines an overlapping application group, the Registrar must notify the relevant applicants and invite them to revise and resubmit their applications to remove the overlaps involving them. A notification and invitation must be issued to all members of the relevant overlapping application group.

Subsection 12(3) provides that a notice and invitation issued by the Registrar to an applicant must:

- Be in writing.
- Specify the day by which a revised application must be resubmitted. For clarity, it is expected that the specified day will be consistent across all invitations issued by the Registrar to members of the same overlapping application group, and also (to the extent possible) across all invitations issued by the Registrar to members of other overlapping application groups determined in relation to the same initial invitation issued by the Minister under section 9.

²⁴ As supplemented by section 25 of the OEI Regulations, for reasons which will be explained below.

²⁵ Note that the Minister may also need to consider paragraph 33(1)(e) and subsection 34(1) of the OEI Act in order to satisfy themselves that a feasibility licence could be offered to an applicant for the purposes of paragraphs 11(2)(d) and 14(2)(c) of the OEI Regulations.

- Refer to the requirements in section 13 of the OEI Regulations that must be met for a revised application to be successfully resubmitted.
- Provide the names of all overlapping application group members whose applications overlap the applicant’s application, as well as the areas of overlap and details of the kinds of projects involved. The Registrar may also at its discretion provide any other information that it considers reasonable about such overlapping applications.

Finally, the Registrar may also at its discretion provide any information that it considers reasonable about any other applications adjacent to or nearby the applicant’s application. For clarity, the “other applications” here could include any other feasibility licence applications, regardless of whether or not they are in an overlapping application group with the applicant. It could also include commercial, research and demonstration, or transmission and infrastructure licence applications if relevant.

The aim of subsection 12(3) is to ensure that members of overlapping application groups are provided with all the information they need to be able to revise their applications to remove existing overlaps without creating new ones. Applicants in this situation are strongly encouraged to collaborate with each other to resolve overlaps and avoid the need to use the financial offer process outlined in sections 14-16 of the OEI Regulations.

Subsection 12(4) provides that the feasibility licence application requirements specified in subsections 10(2)-(4) – namely the rules around how such applications should be made and the possibility of the Registrar consulting with existing licence holders – apply in relation to the resubmission of feasibility licence applications under section 12. However, when reading paragraph 10(2)(b) and subsection 10(3), the relevant time marker is now the day specified by the Registrar under paragraph 12(3)(e) in the invitation to resubmit rather than the day specified by the Minister under paragraph 9(3)(b) in the invitation to apply.

Subsection 12(5) provides that an applicant who revises an application in response to an invitation to resubmit is not required to pay any additional fee. For clarity, this means that such an applicant is not required to pay an additional application fee under table item 1 of section 45 of the OEI Regulations,²⁶ and since no additional fee is required, the revised application will be considered to have been validly made under section 46. It should be further noted that subsection 12(5) is intended to operate regardless of whether or not the applicant’s resubmission is successful.

Subsection 12(6) provides that, if an applicant’s resubmission is successful, the revised application replaces the original application (which is disregarded). An applicant’s resubmission is successful if all of the following apply:

- The applicant was invited to resubmit under subsection 12(2).

²⁶ The applicant will, however, be subject to the usual fees for all later applications made in relation to the licence, including any applications that might be considered to revise the licence (for example, an application to vary a licence) once it has been granted.

- The applicant does so by the day specified in the invitation under paragraph 12(3)(e).²⁷
- The revised application is in accordance with section 13.

An explanatory note to subsection 12(6) clarifies that, if an applicant’s resubmission is not successful, the original application remains in effect and the revised application is disregarded.

Section 13 – Requirements for revised applications

Subsection 13(1) of the OEI Regulations provides criteria that a revised application made under section 12 must meet in order to be successfully resubmitted. Specifically, the Registrar must be satisfied that both of the following apply:

- The revised application is, so far as is reasonably possible, substantially similar to the original application before it was revised.
- The revised application does not overlap any other feasibility licence applications made in response to the same invitation issued under section 9 (regardless of whether or not those other applications are in an overlapping application group with the original application).

Subsection 13(2) provides that, in considering the first element above (the “substantially similar” test), the Registrar may take into account anything it considers relevant, including the location, shape and size of the original and revised proposed licence areas and the details of the original and revised proposed commercial offshore infrastructure projects. While the intention of section 12 is to give overlapping application group members the opportunity to resolve their overlaps by revising their applications, the revisions should be the minimum necessary to achieve this aim. Subsection 13(2) ensures that overlapping application group members cannot submit revised applications that unreasonably alter the design, size, location or other key details of their original project. For example, a proposed 1 Gigawatt (GW) wind generation project with a licence area of 500 km² should remain substantially a 1 GW / 500 km² project after any application revisions, and any proposed relocation should be for the minimum distance necessary to resolve any overlaps with other applications. Applicants should not treat the revision process in section 12 as an opportunity to submit an essentially new project proposal.

Subsection 13(3) provides that, in considering the second element above (the “overlap” test), the Registrar must compare all revised proposed licence areas simultaneously. That is, a revised application will have no overlaps if it does not overlap: (i) any other feasibility licence application that has not been revised under section 12; or (ii) the revised (not original) proposed licence area of any other feasibility licence application that has been revised under

²⁷ The resubmitted application must also meet the relevant requirements specified in subsection 12(4).

section 12. All revised applications should be assessed for overlaps simultaneously, and any replacements of original applications with revised ones under subsection 12(6) should also be performed simultaneously. It should also be remembered that the Registrar will assess for overlaps with all unresolved feasibility licence applications made in response to the same invitation issued under section 9, including (where relevant) original and revised applications from other overlapping application groups as well as standalone applications that are not part of any overlapping application group.

Section 14 – Applications for feasibility licences that overlap after opportunity to revise and resubmit – Minister may determine financial offer groups

Subsection 14(1) of the OEI Regulations provides that section 14 applies if the Registrar has invited two or more overlapping application group members to revise their applications under section 12, and the deadline for resubmission (as specified in the invitation under paragraph 12(3)(e)) has passed.²⁸ It also clarifies that, if these conditions are met, section 14 applies regardless of whether or not any applicants actually revised their applications in response to the Registrar’s invitation.

Subsection 14(2) provides for the Minister to determine a “financial offer group”. The Minister may only determine such a group if all of the following apply:

- The group comprises two or more feasibility licence applications from the same overlapping application group. For clarity, the group does not have to comprise every feasibility licence application that could be part of the group under section 14.
- The proposed licence area of each application in the group overlaps the proposed licence area of at least one other application in the group, and the proposed licence areas of all applications in the group together form a continuous area.
- The Minister is satisfied that, if not for the overlap or overlaps in question, a feasibility licence could be offered to each of the applicants in the group. A licence application might contravene this requirement if, for example, it proposed a licence area that did not meet the relevant requirements,²⁹ or if it did not meet the merit criteria.³⁰

An explanatory note to subsection 14(2) clarifies that, in the simple example provided above, it might be possible for applications A, B and C to comprise a financial offer group. This is because the proposed licence area of each application overlaps the proposed licence area of at least one other application, and the proposed licence areas of all applications together form a

²⁸ As noted at section 12 above, it is expected that the specified deadline will be consistent across all invitations issued by the Registrar to members of the same overlapping application group.

²⁹ See paragraph 33(1)(d) of the OEI Act.

³⁰ See paragraph 33(1)(e) of the OEI Act.

continuous area. It should be noted that this example does not consider whether the other requirements in subsection 14(2) have also been met.

A further explanatory note to subsection 14(2) clarifies that the term “overlap” is defined in section 4 of the OEI Regulations: that is, that feasibility licence applications overlap when the licence areas proposed in such applications cover wholly or partly the same area.

Subsection 14(3) provides that, if there is more than one overlapping application group in relation to the same invitation issued under section 9, and the Registrar has therefore issued two or more sets of revision invitations under section 12, the Minister may only begin determining financial offer groups after the latest of the deadlines for resubmission (as specified in any of the sets of invitations under paragraph 12(3)(e)).³¹ In other words, in relation to applications made in response to a particular invitation issued under section 9, the Minister should not move on to the financial offer process (if this is necessary) until the overlapping application revision process has effectively concluded for all applications. In practice this provision may not often be needed, as it is expected that resubmission deadlines will as much as possible be consistent across all revision invitations issued to members of different overlapping application groups determined in relation to the same initial invitation issued by the Minister under section 9.

Subsection 14(4) clarifies that the Minister may determine more than one financial offer group in relation to the same invitation issued under section 12. This might be necessary, for example, where there are two groups of applications from the same overlapping application group that are separated from each other but which otherwise meet all of the requirements of subsection 14(2).

In summary, overlapping application group members will be given, under sections 12 and 13, an opportunity to revise their applications to remove any overlaps. If after this process any overlaps still remain, the Minister will be able to organise any overlapping application group members that still have overlaps into one or more financial offer groups. Financial offer group members will then need to go through the financial offer process outlined in sections 15-16 of the OEI Regulations in order to be offered a feasibility licence. This financial offer process is made under subsection 32(3) of the OEI Act, which allows the licensing scheme to enable the Minister to invite feasibility licence applicants to submit financial offers in relation to their applications and to allocate licences on the basis of such offers.

Section 15 – Financial offers for feasibility licences

Subsection 15(1) of the OEI Regulations provides that section 15 applies if the Minister determines a financial offer group under section 14.

³¹ As noted at section 12 above, it is expected that the specified deadline will be consistent across all invitations issued by the Registrar to members of the same overlapping application group.

Subsection 15(2) provides that, if the Minister determines a financial offer group, the Minister may invite the relevant applicants to submit financial offers in relation to their applications. Any such invitations must be issued in writing, and must be issued to all members of the relevant financial offer group.

Subsection 15(3) of the OEI Regulations provides that an invitation issued by the Minister to an applicant must:

- Specify the day by which a financial offer must be made. For clarity, it is expected that the specified day will be consistent across all invitations issued by the Minister to members of the same financial offer group, and also (to the extent possible) across all invitations issued by the Minister to members of other financial offer groups determined in relation to the same initial invitation issued by the Minister under section 9.
- Specify how financial offers must be made, and require an applicant to provide evidence of their ability to pay any such amounts. Unless otherwise specified, it is expected that an invitation will require financial offers to be made by secret auction with a single round of uncapped bids. It is also expected that an invitation will clarify what will be considered acceptable forms of evidence for substantiating an ability to pay the offer.
- Set out the procedure in section 16 of the OEI Regulations for dealing with financial offers.

An invitation may also specify other requirements that an applicant must address in the submission of their financial offer. These might include, for example, information as to the source of funds and compliance with anti-money laundering provisions.

Subsection 15(4) provides that a financial offer made in response to an invitation issued by the Minister must be made in writing, to the Registrar and by the deadline for submission specified in the invitation under subparagraph 15(3)(a)(ii). A financial offer must also address any other requirements specified in the invitation under paragraph 15(3)(b). For clarity, a financial offer is only considered to have been “made” for the purposes of subsection 15(4) if it also meets the formal requirements prescribed in subparagraphs 15(3)(a)(i) and (iii).

Section 16 – Procedure for dealing with financial offers

Subsection 16(1) of the OEI Regulations provides that section 16 applies if the Minister invites the members of a financial offer group to submit financial offers in relation to their applications under section 15.

Subsection 16(2) provides that the Minister, when considering applications from members of a financial offer group that has been invited to submit financial offers, may only offer to grant a feasibility licence to the applicant that has submitted the highest financial offer. If, because of the application elimination process that may occur under subsection 16(5), there is only

one remaining application in the financial offer group, the Minister may offer to grant a feasibility licence to that applicant regardless of the size of their financial offer.

Subsection 16(3) clarifies, for the purposes of subsection 16(2), what happens if there is no single highest financial offer because two or more “tied applicants” have submitted equal financial offers:

- If a tied application does not overlap any other tied application, the Minister may offer to grant a feasibility licence to that first tied applicant. For clarity, the Minister may be able to offer to grant two or more feasibility licences simultaneously in this way, if none of the applications overlap any of the others.
- If a tied application does overlap any other tied application, the Minister may invite those tied applicants to submit increased financial offers. If after this there is still not a single highest financial offer amongst those tied applicants, the Minister may at their discretion offer to grant a feasibility licence to any of those tied applicants.

Subsection 16(4) provides that the financial offer submission requirements specified in subsections 15(3)-(4) – namely the rules around what invitations for such offers should look like and how offers should be made – apply in relation to any invitations issued by the Minister to tied applicants to submit increased financial offers under subsection 16(3)(b) and any financial offers made in response.

Subsection 16(5) provides an application elimination process that may allow financial offer group members that did not initially submit the highest financial offer to nonetheless be offered a feasibility licence following the resolution of other applications. Subsection 16(5) is triggered if the Minister offers to grant a feasibility licence to a member³² of a financial offer group that has been invited to submit financial offers, and any of the following occurs:

- The licence is granted.
- The applicant withdraws the application.
- The application lapses.³³
- The licence is not granted for some other reason (including because the applicant does not pay a financial offer in relation to the application under subsection 16(6)³⁴).

If, after one of the specified events occurs, there are still unresolved applications from the financial offer group and at least one of the associated applicants could still be offered a feasibility licence, section 16 applies again. However, this time any references to a “financial offer group” are taken to refer to the unresolved applications that could still be offered a feasibility licence. This process can continue, with each successive “financial offer group”

³² Note that this provision will also apply where two or more tied applicants, none of whom overlap each other, are offered feasibility licences under paragraph 16(3)(a).

³³ See paragraph 27(3)(h) of the OEI Regulations.

³⁴ See also paragraph 27(3)(f) of the OEI Regulations.

becoming progressively smaller until there are no unresolved applications left that could still be offered a feasibility licence.

An explanatory note clarifies the operation of subsection 16(5) by using the simple example provided above. Under the example, and where applicants A, B and C are all invited to submit a financial offer and applicant A submits the highest offer, the Minister may only offer to grant a feasibility licence to applicant A under paragraph 16(2)(a). Following this:

- If a licence is subsequently granted to applicant A, subsection 16(5) is triggered and section 16 applies again as though applicant C alone now comprises the financial offer group. The Minister may offer to grant a feasibility licence to applicant C under paragraph 16(2)(b), regardless of the size of their financial offer.
- Alternatively, if a licence is not granted to applicant A, subsection 16(5) is triggered and section 16 applies again as though applicants B and C now comprise the financial offer group. The Minister may offer to grant a feasibility licence to whichever applicant submitted the highest financial offer under paragraph 16(2)(a).

It should be noted that this example does not consider whether any other relevant rules or requirements in section 16 have also been met.

Subsection 16(6) provides that the Minister may only grant a feasibility licence to an applicant if that applicant has paid to the Commonwealth any financial offer that they submitted in relation to their application. For clarity, where an applicant has made more than one financial offer because they submitted a higher financial offer under paragraph 16(3)(b), the applicant must pay to the Commonwealth the higher of the financial offers.

An explanatory note to subsection 16(6) clarifies that a financial offer must still be paid by an applicant even if at the time their licence would be granted there are no other applicants overlapping them. For clarity, a tied applicant selected by the Minister under paragraph 16(3)(c) must also still pay any financial offer submitted in relation to their application.

Subsection 16(7) clarifies that an applicant that does not submit a financial offer after being invited to do so is taken to have submitted a financial offer of nil. For clarity, this would include applicants who submit financial offers that are invalid (for example, because the offer does not meet the formal requirements prescribed in subsections 15(3)-(4)). Subsection 16(7) further clarifies that the requirement in subsection 16(6) for an applicant to “pay” their financial offer to the Commonwealth does not prevent the Minister from granting a licence to an applicant with a nil financial offer, as the payment requirement will be automatically satisfied in this scenario.

Subdivision C – Applications for other licences

Section 17 – Commercial licences

Paragraph 41(2)(a) of the OEI Act provides for the licensing scheme to prescribe procedures for an eligible person that holds a feasibility licence to apply for a commercial licence. Section 17 of the OEI Regulations is made for the purposes of this provision.

Subsection 17(1) of the OEI Regulations provides that an eligible person that holds a feasibility licence may apply for a commercial licence. For clarity, this does not mean that any feasibility licence holder can apply for any commercial licence. A commercial licence can only be granted in relation to the particular feasibility licence that preceded it, and the licence holder for both must be the same eligible person.³⁵

Subsection 17(2) provides that an application must:

- Be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.³⁶
- Include a description of the offshore infrastructure project to be carried out under the commercial licence.³⁷ This will inform the assessment of whether the project is substantially similar to what was proposed at the feasibility licence application stage.³⁸ Nonetheless, it is acknowledged that various elements of the project may change between the feasibility and commercial stages (due to, for example, advances in technology available or optimised infrastructure design), and so there will be flexibility for a commercial licence applicant to make reasonable departures from the description provided with their feasibility licence application.³⁹
- Be accompanied by evidence that the Regulator has approved a management plan for the commercial licence.⁴⁰ For clarity, provisions relating to management plans will be added to the licensing scheme in future amendments to the OEI Regulations.

Subsection 17(3) provides that an application is taken to include a description of the offshore infrastructure project to be carried out under the commercial licence, or be accompanied by evidence of an approved management plan or any information or documents required by the approved form, if the relevant material is given to the Registrar within 30 days after the application is made. The intention of this provision is to give an applicant and the Registrar time after the application is made to identify whether the application is missing the specified

³⁵ See, for example, subparagraph 42(1)(h)(i) and paragraph 42(4)(e) of the OEI Act.

³⁶ See section 307 of the OEI Act.

³⁷ Note that the licensing scheme must require an application to provide such a description: see subsection 41(3) of the OEI Act.

³⁸ As required by subparagraph 42(1)(h)(i) of the OEI Act.

³⁹ See subparagraph 42(1)(h)(ii) of the OEI Act.

⁴⁰ Note that a commercial licence cannot be granted unless the Regulator has already approved a management plan for it: see paragraph 42(1)(f) of the OEI Act.

material, and for an applicant to be able to provide this material without prejudice to their application. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the day it is first submitted.

Subsection 17(4) provides that, if the Registrar receives an application for a commercial licence that overlaps with an existing licence area, the Registrar may at its discretion invite the existing licence holder to make a submission in relation to the potential grant of the commercial licence. If the Registrar does invite the existing licence holder to make a submission, it will also provide further details on the proposed commercial project including the kind of project involved, the location, shape and size of the proposed licence area and the name of the applicant. It is expected that commercial licence applicants will consult with relevant existing licence holders and provide information on this as part of the application process, so the Registrar is only likely to use its discretion in subsection 17(4) where a commercial licence application falls short in this area.

An explanatory note to subsection 17(4) clarifies that, under paragraph 42(4)(b) of the OEI Act, the licence area of a commercial licence must not include any part of the licence area of any other commercial or feasibility licence. This is a reminder that the Registrar will not need to use its discretion in subsection 17(4) where an application for a commercial licence overlaps with an existing commercial or feasibility licence, as a commercial licence could not be offered to the applicant in that situation. Subsection 17(4) will only be necessary where an application for a commercial licence overlaps with an existing research and demonstration or transmission and infrastructure licence.

Section 18 – Research and demonstration licences – application

Paragraph 51(1)(a) of the OEI Act provides for the licensing scheme to prescribe procedures for eligible persons to apply for research and demonstration licences. Section 18 of the OEI Regulations is made for the purposes of this provision.

Subsection 18(1) of the OEI Regulations provides that an eligible person may apply for a research and demonstration licence.

Subsection 18(2) provides that an application must:

- Be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁴¹
- Include a description of the offshore infrastructure project to be carried out under the research and demonstration licence.⁴²

⁴¹ See section 307 of the OEI Act.

Subsection 18(3) provides that an application is taken to include a description of the offshore infrastructure project to be carried out under the research and demonstration licence, or be accompanied by any information or documents required by the approved form, if the relevant material is given to the Registrar within 30 days after the application is made. The intention of this provision is to give an applicant and the Registrar time after the application is made to identify whether the application is missing the specified material, and for an applicant to be able to provide this material without prejudice to their application. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the day it is first submitted.

Subsection 18(4) provides that, if the Registrar receives an application for a research and demonstration licence that overlaps with an existing licence area, the Registrar may at its discretion invite the existing licence holder to make a submission in relation to the potential grant of the research and demonstration licence. If the Registrar does invite the existing licence holder to make a submission, it will also provide further details on the proposed research and demonstration project including the kind of project involved, the location, shape and size of the proposed licence area and the name of the applicant. It is expected that research and demonstration licence applicants will consult with relevant existing licence holders and provide information on this as part of the application process, so the Registrar is only likely to use its discretion in subsection 18(4) where a research and demonstration licence application falls short in this area. It should also be remembered that, under paragraph 52(1)(e) of the OEI Act, the Minister may only grant a research and demonstration licence if they are satisfied that any activities carried out under the proposed licence will not unduly interfere with the activities of any existing licence holders in the proposed licence area.

Section 19 – Research and demonstration licences – applications for licences that cover the same area

The granting of research and demonstration licences is not a competitive process, as research and demonstration licences can be granted in the same licence area as other licence types (and vice versa).⁴³ Nonetheless, it may often be the case that research and demonstration licence holders would prefer their licences to have non-overlapping licence areas if possible.

Subsection 19(1) of the OEI Regulations provides that, if research and demonstration licence applications contain overlapping proposed licence areas, the Registrar may notify the relevant applicants and invite them to revise and resubmit their applications to remove the overlaps involving them. For clarity, the Registrar might choose to only notify applicants that it

⁴² Note that the licensing scheme must require an application to provide such a description: see subsection 51(2) of the OEI Act.

⁴³ Transmission and infrastructure licences are also not competitive in this sense. Compare with feasibility and commercial licences, which are competitive licence types (at least between themselves).

considered were likely to meet the relevant merit criteria,⁴⁴ as it would be unnecessary for applicants to revise if they were ultimately unlikely to be successful in any case.

Subsection 19(2) provides that a notice and invitation issued by the Registrar to an applicant must:

- Be in writing.
- Specify the day by which a revised application must be resubmitted.
- Refer to the requirements in section 20 of the OEI Regulations that must be met for a revised application to be successfully resubmitted.
- Provide the names of all applicants whose applications overlap the applicant's application, as well as the areas of overlap and details of the kinds of projects involved. The Registrar may also at its discretion provide any other information that it considers reasonable about such overlapping applications.

Finally, the Registrar may also at its discretion provide any information that it considers reasonable about any other applications adjacent to or nearby the applicant's application. For clarity, the "other applications" here could include any other research and demonstration licence applications. It could also include feasibility, commercial, or transmission and infrastructure licence applications if relevant.

The aim of subsection 19(2) is to ensure that overlapping research and demonstration licence applicants are provided with all the information they need to be able to revise their applications (if they choose to do so) to remove existing overlaps without creating new ones. Applicants in this situation are strongly encouraged to collaborate with each other to resolve overlaps, unless they think the overlaps can be successfully managed.

Subsection 19(3) provides that the research and demonstration licence application requirements specified in subsections 18(2)-(4) – namely the rules around how such applications should be made and the possibility of the Registrar consulting with existing licence holders – apply in relation to the resubmission of research and demonstration licence applications under section 19. However, subsection 18(2) should now be read as additionally requiring an application to be made by the day specified by the Registrar under paragraph 19(2)(e) in the invitation to resubmit.

Subsection 19(4) provides that an applicant who revises an application in response to an invitation to resubmit is not required to pay any additional fee. For clarity, this means that such an applicant is not required to pay an additional application fee under table item 3 of section 45 of the OEI Regulations,⁴⁵ and since no additional fee is required, the revised application will be considered to have been validly made under section 46. It should be

⁴⁴ See subsection 53(1) of the OEI Act and sections 25-26 of the OEI Regulations.

⁴⁵ The applicant will, however, be subject to the usual fees for all later applications made in relation to the licence, including any applications that might be considered to revise the licence (for example, an application to vary a licence) once it has been granted.

further noted that subsection 19(4) is intended to operate regardless of whether or not the applicant's resubmission is successful.

Subsection 19(5) provides that, if an applicant's resubmission is successful, the revised application replaces the original application (which is disregarded). An applicant's resubmission is successful if all of the following apply:

- The applicant was invited to resubmit under subsection 19(1).
- The applicant does so by the day specified in the invitation under paragraph 19(2)(e).⁴⁶
- The revised application is in accordance with section 20.

An explanatory note to subsection 19(5) clarifies that, if an applicant's resubmission is not successful, the original application remains in effect and the revised application is disregarded.

Section 20 – Research and demonstration licences – requirements for revised applications

Subsection 20(1) of the OEI Regulations provides criteria that a revised application made under section 19 must meet in order to be successfully resubmitted. Specifically, the Registrar must be satisfied that the revised application is, so far as is reasonably possible, substantially similar to the original application before it was revised.

Subsection 20(2) provides that, in considering this criteria, the Registrar may take into account anything it considers relevant, including the location, shape and size of the original and revised proposed licence areas and the details of the original and revised proposed offshore infrastructure projects. While the intention of section 19 is to give overlapping research and demonstration licence applicants the opportunity to resolve their overlaps by revising their applications, the revisions should be the minimum necessary to achieve this aim. Subsection 20(2) ensures that overlapping applicants cannot submit revised applications that unreasonably alter the design, size, location or other key details of their original project. For example, a proposed tidal generation research project with a licence area of 10 km² should remain substantially a tidal generation research project with a licence area of 10 km² after any application revisions, and any proposed relocation should be for the minimum distance necessary to resolve any overlaps with other applications. Applicants should not treat the revision process in section 19 as an opportunity to submit an essentially new project proposal.

⁴⁶ The resubmitted application must also meet the relevant requirements specified in subsection 19(3).

Subsection 20(3) provides that applications may be made to the Administrative Appeals Tribunal for review of a decision made by the Registrar under section 20 that a revised application is not in accordance with section 20.

Section 21 – Transmission and infrastructure licences – application

Paragraph 60(1)(a) of the OEI Act provides for the licensing scheme to prescribe procedures for eligible persons to apply for transmission and infrastructure licences. Section 21 of the OEI Regulations is made for the purposes of this provision.

Subsection 21(1) of the OEI Regulations provides that an eligible person may apply for a transmission and infrastructure licence.

Subsection 21(2) provides that an application must:

- Be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁴⁷
- Include a description of the offshore infrastructure project to be carried out under the transmission and infrastructure licence.⁴⁸

Subsection 21(3) provides that an application is taken to include a description of the offshore infrastructure project to be carried out under the transmission and infrastructure licence, or be accompanied by any information or documents required by the approved form, if the relevant material is given to the Registrar within 30 days after the application is made. The intention of this provision is to give an applicant and the Registrar time after the application is made to identify whether the application is missing the specified material, and for an applicant to be able to provide this material without prejudice to their application. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the day it is first submitted.

Subsection 21(4) provides that, if the Registrar receives an application for a transmission and infrastructure licence that overlaps with an existing licence area, the Registrar may at its discretion invite the existing licence holder to make a submission in relation to the potential grant of the transmission and infrastructure licence. If the Registrar does invite the existing licence holder to make a submission, it will also provide further details on the proposed transmission and infrastructure project including the kind of project involved, the location, shape and size of the proposed licence area and the name of the applicant. It is expected that transmission and infrastructure licence applicants will consult with relevant existing licence holders and provide information on this as part of the application process, so the Registrar is only likely to use its discretion in subsection 21(4) where a transmission and infrastructure

⁴⁷ See section 307 of the OEI Act.

⁴⁸ Note that the licensing scheme must require an application to provide such a description: see subsection 60(2) of the OEI Act.

licence application falls short in this area. It should also be remembered that, under paragraph 61(1)(b) of the OEI Act, the Minister may only grant a transmission and infrastructure licence if they are satisfied that any activities carried out under the proposed licence will not unduly interfere with the activities of any existing licence holders in the proposed licence area.

Section 22 – Transmission and infrastructure licences – applications for licences that cover the same area

The granting of transmission and infrastructure licences is not a competitive process, as transmission and infrastructure licences can be granted in the same licence area as other licence types (and vice versa).⁴⁹ Nonetheless, it may often be the case that transmission and infrastructure licence holders would prefer their licences to have non-overlapping licence areas if possible.

Subsection 22(1) of the OEI Regulations provides that, if transmission and infrastructure licence applications contain overlapping proposed licence areas, the Registrar may notify the relevant applicants and invite them to revise and resubmit their applications to remove the overlaps involving them. For clarity, the Registrar might choose to only notify applicants that it considered were likely to meet the relevant merit criteria,⁵⁰ as it would be unnecessary for applicants to revise if they were ultimately unlikely to be successful in any case.

Subsection 22(2) provides that a notice and invitation issued by the Registrar to an applicant must:

- Be in writing.
- Specify the day by which a revised application must be resubmitted.
- Refer to the requirements in section 23 of the OEI Regulations that must be met for a revised application to be successfully resubmitted.
- Provide the names of all applicants whose applications overlap the applicant's application, as well as the areas of overlap and details of the kinds of projects involved. The Registrar may also at its discretion provide any other information that it considers reasonable about such overlapping applications.

Finally, the Registrar may also at its discretion provide any information that it considers reasonable about any other applications adjacent to or nearby the applicant's application. For clarity, the "other applications" here could include any other transmission and infrastructure licence applications. It could also include feasibility, commercial, or research and demonstration licence applications if relevant.

⁴⁹ Research and demonstration licences are also not competitive in this sense. Compare with feasibility and commercial licences, which are competitive licence types (at least between themselves).

⁵⁰ See subsection 62(1) of the OEI Act and sections 25-26 of the OEI Regulations.

The aim of subsection 22(2) is to ensure that overlapping transmission and infrastructure licence applicants are provided with all the information they need to be able to revise their applications (if they choose to do so) to remove existing overlaps without creating new ones. Applicants in this situation are strongly encouraged to collaborate with each other to resolve overlaps, unless they think the overlaps can be successfully managed.

Subsection 22(3) provides that the transmission and infrastructure licence application requirements specified in subsections 21(2)-(4) – namely the rules around how such applications should be made and the possibility of the Registrar consulting with existing licence holders – apply in relation to the resubmission of transmission and infrastructure licence applications under section 22. However, subsection 21(2) should now be read as additionally requiring an application to be made by the day specified by the Registrar under paragraph 22(2)(e) in the invitation to resubmit.

Subsection 22(4) provides that an applicant who revises an application in response to an invitation to resubmit is not required to pay any additional fee. For clarity, this means that such an applicant is not required to pay an additional application fee under table item 4 of section 45 of the OEI Regulations,⁵¹ and since no additional fee is required, the revised application will be considered to have been validly made under section 46. It should be further noted that subsection 22(4) is intended to operate regardless of whether or not the applicant's resubmission is successful.

Subsection 22(5) provides that, if an applicant's resubmission is successful, the revised application replaces the original application (which is disregarded). An applicant's resubmission is successful if all of the following apply:

- The applicant was invited to resubmit under subsection 22(1).
- The applicant does so by the day specified in the invitation under paragraph 22(2)(e).⁵²
- The revised application is in accordance with section 23.

An explanatory note to subsection 22(5) clarifies that, if an applicant's resubmission is not successful, the original application remains in effect and the revised application is disregarded.

Section 23 – Transmission and infrastructure licences – requirements for revised applications

Subsection 23(1) of the OEI Regulations provides criteria that a revised application made under section 22 must meet in order to be successfully resubmitted. Specifically, the

⁵¹ The applicant will, however, be subject to the usual fees for all later applications made in relation to the licence, including any applications that might be considered to revise the licence (for example, an application to vary a licence) once it has been granted.

⁵² The resubmitted application must also meet the relevant requirements specified in subsection 22(3).

Registrar must be satisfied that the revised application is, so far as is reasonably possible, substantially similar to the original application before it was revised.

Subsection 23(2) provides that, in considering this criteria, the Registrar may take into account anything it considers relevant, including the location, shape and size of the original and revised proposed licence areas and the details of the original and revised proposed offshore infrastructure projects. While the intention of section 22 is to give overlapping transmission and infrastructure licence applicants the opportunity to resolve their overlaps by revising their applications, the revisions should be the minimum necessary to achieve this aim. Subsection 23(2) ensures that overlapping applicants cannot submit revised applications that unreasonably alter the design, size, location or other key details of their original project. For example, a proposed transmission project comprising a cable of a certain design and voltage should remain substantially a transmission project with the same sort of cable after any application revisions, and any proposed relocation should be for the minimum distance necessary to resolve any overlaps with other applications. Applicants should not treat the revision process in section 22 as an opportunity to submit an essentially new project proposal.

Subsection 23(3) provides that applications may be made to the Administrative Appeals Tribunal for review of a decision made by the Registrar under section 23 that a revised application is not in accordance with section 23.

Division 4 – Offering and granting of licences

Subdivision A – Operation of this Division

Section 24 – Operation of this Division

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraph 29(1)(b) deals with the offering and granting of licences.

Section 24 of the OEI Regulations clarifies that Division 4 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under paragraph 29(1)(b) of the OEI Act, matters relating to the offering and granting of licences.

Subdivision B – Considering applications

Section 25 – Additional merit criteria – national interest

A licence applied for or held under the OEI Act must meet the merit criteria.⁵³ Subsections 34(1), 44(1), 53(1) and 62(1) of the OEI Act prescribe the merit criteria for feasibility, commercial, research and demonstration, and transmission and infrastructure licences respectively. Paragraphs (a)-(c) of each of these provisions relate to the eligible person's technical and financial capability (the "capability test"), the eligible person's suitability (the

⁵³ See paragraphs 33(1)(e), 42(1)(i), 52(1)(f), 61(1)(c) and 73(1)(c) of the OEI Act.

“suitability test”) and the proposed project’s viability (the “viability test”), while paragraph (d) of each provision permits further criteria to be prescribed by the licensing scheme.

Subsection 25 of the OEI Regulations prescribes an additional merit criteria for all licence types under paragraphs 34(1)(d), 44(1)(d), 53(1)(d) and 62(1)(d) of the OEI Act, namely that the relevant project⁵⁴ must be in the national interest (the “national interest test”).

Section 26 – Merit criteria – matters to be considered

As noted at section 25 above, subsections 34(1), 44(1), 53(1) and 62(1) of the OEI Act prescribe the merit criteria for feasibility, commercial, research and demonstration, and transmission and infrastructure licences respectively. These merit criteria are also supplemented by the national interest test prescribed by section 25 of the OEI Regulations.

Paragraphs 34(2)(a), 44(2)(a), 53(2)(a) and 62(2)(a) of the OEI Act further provide that the licensing scheme may prescribe matters that may or must be considered when deciding whether any of the licence types meet these merit criteria.

Section 26 of the OEI Regulations prescribes matters that the Minister may consider, under paragraphs 34(2)(a), 44(2)(a), 53(2)(a) and 62(2)(a) of the OEI Act, for the purposes of being satisfied that a licence meets the merit criteria.

Subsection 26(1) provides that, for the purposes of being satisfied that an eligible person has, is likely to have or is likely to be able to arrange to have the technical and financial capability to carry out a proposed project under a licence, the Minister may consider:

- The technical advice that is or will be available to the person.
- The financial resources that are or will be available to the person.
- The person’s ability to carry out the operations and works that will be authorised by the licence.⁵⁵
- The person’s ability to discharge the obligations in relation to the licence that will be imposed by the OEI Act or OEI Regulations.⁵⁶
- Any other matters the Minister considers relevant.

Subsection 26(2) provides that, for the purposes of being satisfied that a proposed project for a licence is likely to be viable, the Minister may consider:

- The complexity of the project.

⁵⁴ While this will be the “proposed project” at the licence application stage, it may be an actual project when subsequently considering the ongoing obligation to meet the merit criteria under paragraph 73(1)(c) of the OEI Act. Note also that the term “proposed project” is defined in section 4 of the OEI Regulations.

⁵⁵ This might include whether the eligible person has already been granted any other licences and the effect that granting them a further licence might have on their ability to meet their portfolio commitments.

⁵⁶ For example, this might include decommissioning obligations or activities required under a remedial direction.

- The route-to-market for the project.
- The estimated commercial return to the licence holder.
- Any other matters the Minister considers relevant.⁵⁷

Subsection 26(3) provides that, for the purposes of being satisfied that an eligible person is suitable to hold a licence, the Minister may consider:

- The person’s past performance in offshore infrastructure projects, or other large infrastructure projects, in Australia or internationally.⁵⁸
- The person’s past financial performance.
- The person’s corporate governance structure.
- Any other matters the Minister considers relevant.

Subsection 26(4) provides that, for the purposes of being satisfied that a proposed project for a licence is in the national interest, the Minister may consider:

- The project’s impact on, and contribution to, the Australian economy and local communities. This would include (but is not limited to) the project’s impact on, and contribution to, regional development, job creation, Australian industries, and the use of Australian goods and services.⁵⁹
- National security.
- Whether the project is likely to be delivered within a reasonable time.
- Whether the project is likely to make efficient use of the licence area.
- Conflicts that might arise with other uses or users of the licence area, and any measures that are proposed to mitigate such conflicts.
- Any other matters the Minister considers relevant.⁶⁰

An explanatory note to subsection 26(4) clarifies that, under section 42 of the OEI Regulations, the Minister when considering a licence application must have regard to any relevant information, assessment, analysis, report, advice or recommendation given to them by the Registrar. This means that the Minister must have regard to any such information provided by the Registrar to assist them in determining whether a licence being applied for meets the merit criteria.

It should be noted that the merit criteria contain some differences across the different licence types.⁶¹ While the suitability and national interest tests are the same for all licence types, the

⁵⁷ For example, this might include how well the proposed project integrates with the electricity system and its future capacity needs.

⁵⁸ It is not intended for consideration of a person’s past performance to be limited to only economic outcomes, but rather all aspects of performance might be considered (for example, environmental management or worker safety record).

⁵⁹ Relevant considerations might include, for example, the extent to which a proposed project involves “local content” or encourages the development of Australian businesses.

⁶⁰ For example, this might include whether the eligible person has already been granted any other licences and the effect that granting them a further licence might have on competition.

⁶¹ See subsections 34(1), 44(1), 53(1) and 62(1) of the OEI Act and section 25 of the OEI Regulations.

viability and capability tests contain some differences in the definition of the relevant project, and the capability test requires a lower threshold for feasibility licences than for the other types. This is reflected in the wording of subsections 26(1)-(4), which use the term “proposed project”⁶² as a stand-in for the different formulations of the relevant project, and also contain different thresholds for capability in subsection 26(1). It is expected that the Minister, when considering the matters in section 26, will choose the appropriate wording for the licence type they are considering. For example, under subsection 26(1) the Minister would consider the capability that an eligible person “has” if considering a commercial, research and demonstration, or transmission and infrastructure licence, but would consider the capability that an eligible person “is likely to have or is likely to be able to arrange to have” if considering a feasibility licence.

It should also be emphasised that each of the matters in section 26 are things that the Minister may consider, rather than things they are required to consider. The Minister may consider as many or as few of these matters as they think appropriate in each individual case. Each of the subsections also permits the Minister to consider “any other matters” that they think relevant for each of the merit criteria. This provides the Minister with a broad discretion to consider whatever matters they consider most appropriate in the context of each particular project and for each particular licence type.

In this vein, it should be noted that the expectations under each of the merit criteria will differ depending on what type of licence is being assessed and what particular matters the Minister considers to be most relevant in any particular case. For example, assessments around commercial return may be crucial for a commercial or feasibility licence, relevant in more general terms for a transmission and infrastructure licence, and mostly irrelevant for a research and demonstration licence, with commensurate levels of information expected to be provided for each. Likewise, in the context of assessing impact on and contribution to the Australian economy and local communities, future or projected impacts or contributions may be sufficient for a project at the feasibility stage, whereas a project at the commercial stage may require evidence of actual impacts or contributions.

Subdivision C – Offering and granting of licences

Section 27 – Offer of licence

Paragraphs 32(1)(d), 41(2)(c), 51(1)(c) and 60(1)(c) of the OEI Act provide for the licensing scheme to prescribe procedures for the Minister to offer to grant feasibility, commercial, research and demonstration, and transmission and infrastructure licences respectively. Sections 27 and 28 of the OEI Regulations are made for the purposes of these provisions.

⁶² Note that, while this will be the “proposed project” at the licence application stage, it may be an actual project when subsequently considering the ongoing obligation to meet the merit criteria under paragraph 73(1)(c) of the OEI Act. Note also that the term “proposed project” is defined in section 4 of the OEI Regulations.

Subsection 27(1) of the OEI Regulations provides that the Minister must offer a licence to an applicant before granting it.

Subsection 27(2) provides that the Minister may offer a licence to an applicant by arranging for the Registrar to give the offer to the applicant. For clarity, under this provision the offer must still be made by the Minister. The Registrar's role is limited to effecting delivery of the offer.

Subsection 27(3) provides that an offer must:

- Be in writing.
- Specify the day by which the offer must be accepted, and state that if the offer is not accepted by that day the application will lapse. For a feasibility licence, the offer must also specify the day by which any financial offer (if relevant) must be paid to the Commonwealth if the offer is accepted.⁶³
- State the method for accepting the offer, which may include giving the acceptance or other information to the Registrar.
- State the day on which the licence would come into force⁶⁴ and the end day of the licence.⁶⁵
- Specify the licence area for the licence.⁶⁶
- Specify the conditions that would apply to the licence, including the requirement to pay any offshore electricity infrastructure levy.⁶⁷

Section 28 – Granting licences

Section 28 of the OEI Regulations provides that if a licence offer under section 27 is accepted, the licence granted must be consistent with the details set out in the offer. For example, the licence should be consistent with the start and end days provided in the offer, and should have the same licence area and the same licence conditions as specified in the offer.⁶⁸ For clarity, a licence offer is only considered to have been “accepted” for the purposes of section 28 if it meets the formal requirements prescribed in subsection 27(3).

An explanatory note to section 28 clarifies that the grant of a licence must be recorded in the Register of Offshore Infrastructure Licences under section 163 of the OEI Act.

A further explanatory note to section 28 clarifies that other rules relating to the granting of licences are set out in sections 33, 42, 52 and 61 of the OEI Act.

⁶³ Under subsection 16(6) of the OEI Regulations, the Minister may only grant a feasibility licence to an applicant if that applicant has paid to the Commonwealth any financial offer that they submitted in relation to their application.

⁶⁴ See paragraphs 33(3)(b), 42(3)(b), 52(3)(b) and 61(4)(b) of the OEI Act.

⁶⁵ See sections 36, 46, 55 and 64 of the OEI Act.

⁶⁶ See subsections 33(4), 42(4), 52(4) and 61(2) of the OEI Act.

⁶⁷ See sections 35, 45, 54 and 63 of the OEI Act.

⁶⁸ See further subsections 33(3), 42(3), 52(3) and 61(4) of the OEI Act.

A further explanatory note to section 28 clarifies that the Minister may delegate to the Registrar, under section 303 of the OEI Act, the function of giving notice to an applicant of the grant of a licence they applied for.⁶⁹

Division 5 – Extending and varying licences

Section 29 – Operation of this Division

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraphs 29(1)(a)-(e) deal with applications for licences, the offering and granting of licences, transfers of licences, changes in control of licence holders, and management plans. Paragraph 29(1)(f) further provides that the licensing scheme may cover any matters left by the OEI Act to the licensing scheme that are not dealt with in paragraphs 29(1)(a)-(e).

Section 29 of the OEI Regulations clarifies that Division 5 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under paragraph 29(1)(f) of the OEI Act, matters relating to extending and varying licences.

Section 30 – Extending the term of a licence

Subsections 37(1), 47(1), 56(1) and 65(1) of the OEI Act provide for the licensing scheme to permit the Minister in certain circumstances to extend the end day of feasibility, commercial, research and demonstration, and transmission and infrastructure licences respectively. Section 30 of the OEI Regulations is made for the purposes of these provisions.

Subsection 30(1) of the OEI Regulations provides that the Minister may extend the end day of a licence if the licence holder applies for an extension.

Subsection 30(2) provides that an application for a licence extension must:

- Be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁷⁰
- If for a commercial licence, be made at least five years before the end day of the licence.⁷¹
- If for any other type of licence, be made before the end day of the licence.

⁶⁹ The Minister is ordinarily responsible for giving notice of the grant of a licence: see subsections 33(1), 42(1), 52(1) and 61(1) of the OEI Act.

⁷⁰ See section 307 of the OEI Act.

⁷¹ See subsection 47(2) of the OEI Act.

Subsection 30(3) provides that an application is taken to be accompanied by any information or documents required by the approved form if the relevant material is given to the Registrar within 30 days after the application is made. The intention of this provision is to give an applicant and the Registrar time after the application is made to identify whether the application is missing the specified material, and for an applicant to be able to provide this material without prejudice to their application. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the day it is first submitted.

Subsection 30(4) provides that the Minister may extend the end day of a feasibility or research and demonstration licence on the Minister's own initiative.

Subsection 30(5) provides that the Minister must give a licence holder written notice of any extension of their licence.

Subsection 30(6) provides that the Minister may give the notice of extension to a licence holder by arranging for the Registrar to give the notice to the licence holder. For clarity, under this provision the notice must still be made by the Minister. The Registrar's role is limited to effecting delivery of the notice.

An explanatory note to subsection 30(6) clarifies that a licence extension must be recorded in the Register of Offshore Infrastructure Licences under table item 7 of subsection 164(1) of the OEI Act.

A further explanatory note to subsection 30(6) clarifies that other rules relating to licence extensions are set out in sections 37, 47, 56 and 65 of the OEI Act.

Section 31 – Application to vary a licence

Subsections 38(2), 48(2), 57(2) and 66(2) of the OEI Act provide for the licensing scheme to permit licence holders to apply for a variation of certain aspects of feasibility, commercial, research and demonstration, and transmission and infrastructure licences respectively. Section 31 of the OEI Regulations is made for the purposes of these provisions.

Subsection 31(1) of the OEI Regulations provides that an application for a licence variation must be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁷²

Subsection 31(2) provides that an application is taken to be accompanied by any information or documents required by the approved form if the relevant material is given to the Registrar within 30 days after the application is made. The intention of this provision is to give an applicant and the Registrar time after the application is made to identify whether the

⁷² See section 307 of the OEI Act.

application is missing the specified material, and for an applicant to be able to provide this material without prejudice to their application. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the day it is first submitted.

An explanatory note to subsection 31(2) clarifies that a licence variation must be recorded in the Register of Offshore Infrastructure Licences under table item 1 of subsection 164(1) of the OEI Act.

A further explanatory note to subsection 31(2) clarifies that other rules relating to licence variations are set out in sections 38, 48, 57 and 66 of the OEI Act.

A further explanatory note to subsection 31(2) clarifies that the Minister may delegate to the Registrar, under section 303 of the OEI Act, the function of giving notice to an applicant of the variation of their licence.⁷³

Division 6 – Licence conditions

Section 32 – Operation of this Division

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraphs 29(1)(a)-(e) deal with applications for licences, the offering and granting of licences, transfers of licences, changes in control of licence holders, and management plans. Paragraph 29(1)(f) further provides that the licensing scheme may cover any matters left by the OEI Act to the licensing scheme that are not dealt with in paragraphs 29(1)(a)-(e).

Section 32 of the OEI Regulations clarifies that Division 6 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under paragraph 29(1)(f) of the OEI Act, matters relating to licence conditions.

Section 33 – Reports

Paragraphs 35(1)(c), 45(1)(c), 54(1)(c) and 63(1)(b) of the OEI Act provide for the licensing scheme to prescribe conditions that all feasibility, commercial, research and demonstration, and transmission and infrastructure licences respectively are subject to. Section 33 of the OEI Regulations is made for the purposes of these provisions.

Subsection 33(1) of the OEI Regulations provides that it is a condition of all licences that the licence holder must give the Registrar or the Minister reports in accordance with section 33.⁷⁴ These reports comprise annual reports and final reports.

⁷³ The Minister is ordinarily responsible for giving notice of the variation of a licence: see subsections 38(1), 48(1), 57(1) and 66(1) of the OEI Act.

⁷⁴ Note that failure to meet this condition is grounds for cancellation of the licence under paragraph 73(1)(a) of the OEI Act.

Subsection 33(2) provides that a licence holder must give the Registrar annual reports. For clarity, where a licence holder has multiple licences, they must provide separate annual reports for each licence.

Subsection 33(3) provides that an annual report must:

- Be given in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁷⁵
- Be given within 30 days after each anniversary of the grant of the relevant licence, or later if agreed with the Registrar.
- Relate to the activities of the licence holder during the reporting period, which for an annual report is the 12-month period immediately preceding the latest anniversary of the licence grant. For clarity, where a licence holder has multiple licences, the relevant activities of the licence holder for the purposes of an annual report are only those related to the licence for which that annual report is required.

Subsection 33(4) additionally provides that an annual report must include:

- A description of all work, evaluations and studies carried out in relation to the licence area during the reporting period. This information must include an itemised breakdown of expenditure and a summary of all relevant results. As noted above, the reporting period here refers to the 12-month period immediately preceding the latest anniversary of the licence grant.
- Details of how the licence has, during the reporting period, continued to meet the merit criteria for the licence.⁷⁶
- A summary of anticipated work, evaluations and studies to be carried out in relation to the licence area during the next reporting period. This information must include a summary of estimated expenditure for the specified activities. For clarity, the next reporting period here refers to the 12-month period immediately following the latest anniversary of the licence grant.
- Any other information or documents (not including any information or documents required under subsection 33(3) or paragraphs 33(4)(a)-(c)) that a condition of the licence requires the annual report to include. It is expected that, where applicable, any such conditions will clearly state that certain information or documents must be included in annual reports. For example, a condition placed on a licence by the Minister or under a declaration might specifically require the licence holder to provide certain information in their annual reports.⁷⁷

⁷⁵ See section 307 of the OEI Act.

⁷⁶ The Minister may cancel a licence if it no longer meets the merit criteria for that licence type: see paragraph 73(1)(c) of the OEI Act. As explained at sections 25-26 above, the merit criteria for the different licence types are prescribed by subsections 34(1), 44(1), 53(1) and 62(1) of the OEI Act and section 25 of the OEI Regulations.

⁷⁷ For conditions on licences generally see sections 35, 45, 54 and 63 of the OEI Act.

Subsection 33(5) provides that an annual report is taken to include or be accompanied by the information or documents specified in paragraph 33(3)(d) or subsection 33(4) if the relevant material is given to the Registrar within 10 days after the annual report is given to the Registrar. The intention of this provision is to give a licence holder and the Registrar time after an annual report submission to identify whether the annual report is missing the specified material, and for a licence holder to be able to provide this material without prejudice to their reporting obligations. For clarity, licence holders must still give the annual report itself (that is, the submission made in the approved manner and form) by the specified submission deadline.⁷⁸

Subsection 33(6) provides that a licence holder may also need to give the Minister a final report. This will be necessary if the licence holder intends to apply to the Minister under subsection 74(1) of the OEI Act for consent to surrender the licence, and the surrender involves the entire licence area for the licence. In such a case the licence would cease to be in force,⁷⁹ and so it will be necessary for the licence holder to make a final report on the licence before the licence effectively terminates. For clarity, where a licence holder has multiple licences, they must provide separate final reports (if and when required) for each licence.

Subsection 33(7) of the OEI Regulations provides that a final report must:

- Be given in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁸⁰
- Accompany the relevant application to the Minister for consent to surrender the licence under subsection 74(1) of the OEI Act.
- Relate to the activities of the licence holder during the reporting period, which for a final report is the period from the most recent anniversary of the licence grant to the day before the relevant application under subsection 74(1) is made. For clarity, where a licence holder has multiple licences, the relevant activities of the licence holder for the purposes of a final report are only those related to the licence for which that final report is required.

Subsection 33(8) of the OEI Regulations additionally provides that a final report must include:

⁷⁸ That is, within 30 days after the latest anniversary of the grant of the relevant licence, or later if agreed with the Registrar: see paragraph 33(3)(b) of the OEI Regulations.

⁷⁹ See paragraph 74(6)(a) of the OEI Regulations. Where a surrender involves part only of the licence area for a licence, the licence remains in force in relation to the part of the licence area that has not been surrendered: see paragraph 74(6)(b).

⁸⁰ See section 307 of the OEI Act.

- A description of all work, evaluations and studies carried out in relation to the licence area during the reporting period. This information must include an itemised breakdown of expenditure and a summary of all relevant results. As noted above, the reporting period here refers to the period from the most recent anniversary of the licence grant to the day before the relevant application under subsection 74(1) of the OEI Act is made.
- Details of how the licence has, during the reporting period, continued to meet the merit criteria for the licence.⁸¹
- Any other information or documents (not including any information or documents required under subsections 33(3) or (4) of the OEI Regulations) that a condition of the licence requires the annual report to include.⁸² It is expected that, where applicable, any such conditions will clearly state that certain information or documents must be included in annual reports. For example, a condition placed on a licence by the Minister or under a declaration might specifically require the licence holder to provide certain information in their annual reports.⁸³

Subsection 33(9) provides that:

- A final report is taken to include or be accompanied by the information or documents specified in paragraph 33(7)(d) or subsection 33(8) if the relevant material is given to the Minister within 10 days after the relevant application under subsection 74(1) of the OEI Act is made.
- The final report itself (that is, the submission made in the approved manner and form) is taken to accompany the relevant application under subsection 74(1)⁸⁴ if the final report is given to the Minister within 10 days after the application is made.

The intention of subsection 33(9) is to give a licence holder and the Minister time after a final report submission to identify whether the final report is missing the specified material, and for a licence holder to be able to provide this material without prejudice to their reporting obligations. It is also intended to give a licence holder, who omits to give the Minister a final report at the same time as applying for consent to surrender a licence, time to correct this omission without prejudice to their reporting obligations. It should be noted that, since the

⁸¹ The Minister may cancel a licence if it no longer meets the merit criteria for that licence type: see paragraph 73(1)(c) of the OEI Act. As explained at sections 25-26 above, the merit criteria for the different licence types are prescribed by subsections 34(1), 44(1), 53(1) and 62(1) of the OEI Act and section 25 of the OEI Regulations.

⁸² Where such a condition is incapable of being fully met due to differences between the annual and final reporting contexts, it should still be met to the fullest possible extent. For example, in relation to a condition that requires a licence holder to provide certain annualised data in its annual reports, that licence holder should provide such data in its final report covering the fullest possible reporting period (in this case, the period from the most recent anniversary of the licence grant to the day before the relevant application under subsection 74(1) of the OEI Act is made).

⁸³ For conditions on licences generally see sections 35, 45, 54 and 63 of the OEI Act.

⁸⁴ As required by paragraph 33(7)(b) of the OEI Regulations.

requirement to provide a final report is a condition of every licence, a failure to fully comply with this requirement provides grounds for the Minister to decline to consent to the surrender of a licence.⁸⁵

Division 7 – Transferring licences

Section 34 – Operation of this Division

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraph 29(1)(c) deals with licence transfers.

Section 34 of the OEI Regulations clarifies that Division 7 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under paragraph 29(1)(c) of the OEI Act, matters relating to licence transfers.

Section 35 – Application to transfer a licence

Subsection 69(3) of the OEI Act provides for the licensing scheme to prescribe procedures for a licence holder to apply to the Registrar for a transfer of the licence from the licence holder (the “transferor”) to another eligible person (the “transferee”), and for the Minister to consider such an application. Sections 35-37 of the OEI Regulations are made for the purposes of this provision.

Subsection 35(1) of the OEI Regulations provides that an application for a licence transfer must be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁸⁶

An explanatory note to subsection 35(1) clarifies that such an application must be made to the Registrar under subsection 69(2) of the OEI Act.

Subsection 35(2) of the OEI Regulations provides that an application is taken to be accompanied by any information or documents required by the approved form if the relevant material is given to the Registrar within 30 days after the application is made. The intention of this provision is to give an applicant and the Registrar time after the application is made to identify whether the application is missing the specified material, and for an applicant to be able to provide this material without prejudice to their application. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the day it is first submitted.

Section 36 – Assessment by Registrar

⁸⁵ See paragraph 74(3)(b) of the OEI Act.

⁸⁶ See section 307 of the OEI Act.

Subsection 36(1) of the OEI Regulations provides that if a licence transfer application is made, the Registrar must assess the application against the criteria set out in subsection 70(1) of the OEI Act. This means that the Registrar will assess whether:

- The application has been validly made under section 69. For clarity, this will include assessing whether the application meets the formal requirements prescribed in section 35 of the OEI Regulations (which is made under section 69 of the OEI Act).
- The Minister could reasonably be satisfied that the licence would meet the merit criteria if it was held by the transferee.⁸⁷
- The Minister could reasonably be satisfied that the transferee, if it held the licence, would be able to comply with the financial security obligations in sections 117 and 118 (subject to section 72) of the OEI Act. For clarity, section 72 provides that the licensing scheme may extend the financial security obligations in certain ways. While subsections 37(2)-(4) of the OEI Regulations do extend these obligations in relation to the transferor, they do not do so in relation to the transferee,⁸⁸ meaning that the Registrar will consider sections 117 and 118 of the OEI Act without regard to section 72 when conducting its assessment.
- Any other requirements prescribed by the licensing scheme are satisfied.

After making an assessment, the Registrar must also provide advice to the Minister in relation to it.⁸⁹

Subsection 36(2) of the OEI Regulations provides that the Registrar, in making an assessment, may consult with the Regulator or any other person.

Section 37 – Decision by Minister

While a licence transfer application is made to the Registrar under subsection 69(2) of the OEI Act and section 35 of the OEI Regulations, and the Registrar makes an assessment of the application under section 36 of the OEI Regulations, it is the Minister under subsection 70(1) of the OEI Act who decides whether a licence is transferred.

Subsection 37(1) of the OEI Regulations provides that, in deciding whether or not to transfer a licence, the Minister may consult with, and take into account any advice or recommendations given or made by, the Registrar, the Regulator or any other person. The Minister must have regard to any advice provided by the Registrar in relation to its initial

⁸⁷ The Minister may cancel a licence if it no longer meets the merit criteria for that licence type: see paragraph 73(1)(c) of the OEI Act. As explained at sections 25-26 above, the merit criteria for the different licence types are prescribed by subsections 34(1), 44(1), 53(1) and 62(1) of the OEI Act and section 25 of the OEI Regulations.

⁸⁸ See subsection 37(4) of the OEI Regulations.

⁸⁹ The Minister must have regard to this advice when deciding whether or not to transfer a licence: see paragraph 37(1)(c) of the OEI Regulations.

assessment of the licence transfer application made under section 36 of the OEI Regulations.⁹⁰

An explanatory note to subsection 37(1) clarifies that a licence transfer must be recorded in the Register of Offshore Infrastructure Licences under table item 2 of subsection 164(1) of the OEI Act.

A further explanatory note to subsection 37(1) clarifies that other rules relating to licence transfers are set out in Part 2 of Chapter 3 of the OEI Act.

A further explanatory note to subsection 37(1) clarifies that the Minister may delegate to the Registrar, under section 303 of the OEI Act, the function of giving notice to the transferor and transferee of a decision to transfer, or not to transfer, a licence.⁹¹

Subsections 37(2)-(4) of the OEI Regulations extend the financial security obligations in sections 117 and 118 of the OEI Act in the context of licence transfers. As noted at section 36 above, section 72 of the OEI Act provides that the licensing scheme may extend the operation of sections 117 and 118 in certain ways. Specifically, subsection 72(2) provides that the licensing scheme may require both the transferor and the transferee to comply with sections 117 and 118 in relation to a licence,⁹² while subsection 72(3) provides that the licensing scheme may specify when the transferor is no longer required to comply with sections 117 and 118 under this scenario. Subsections 37(2)-(4) of the OEI Regulations are made under subsections 72(2)-(3) of the OEI Act.

Subsection 37(2) of the OEI Regulations provides that, following a licence transfer, the transferor must comply with sections 117 and 118 of the OEI Act as if the transferor was still the licence holder. This ongoing compliance must continue until the Minister issues a notice under subsection 37(3) or, if this never occurs, until the licence ceases to be in force. For clarity, a licence remains in force until it is either cancelled or surrendered.⁹³

Subsection 37(3) of the OEI Regulations provides that the Minister may issue a written notice to the transferor and transferee to determine that the transferor no longer needs to comply with sections 117 and 118 of the OEI Act under subsection 37(2) of the OEI Regulations. The Minister may only do so if they are satisfied that the transferee is in compliance with sections 117 and 118 of the OEI Act in relation to the licence.

⁹⁰ See also section 42 of the OEI Regulations, which prescribes a more general requirement for the Minister to have regard to the Registrar's input when considering a licence application.

⁹¹ The Minister is ordinarily responsible for giving notice of a decision to transfer, or not to transfer, a licence: see subsection 70(2) of the OEI Act.

⁹² Ordinarily the transferor would not need to comply with sections 117 and 118 once a licence has been transferred, as those provisions are only addressed to licence holders.

⁹³ See sections 73 and 74 respectively of the OEI Act. A feasibility licence will also cease to be in force when a subsequent commercial licence takes effect that encompasses the entire licence area of that feasibility licence: see paragraph 36(4)(a) of the OEI Act.

An explanatory note to subsection 37(3) clarifies that the Minister may delegate to the Registrar, under section 303 of the OEI Act, the function of giving notice to the transferor and transferee of a determination under subsection 37(3).⁹⁴

Subsection 37(4) of the OEI Regulations clarifies that subsection 37(2) does not affect any obligation of the transferee to comply with sections 117 and 118 of the OEI Act. That is, the fact that the transferor must comply with sections 117 and 118 as if it was still the licence holder does not suspend the transferee's obligation, as the actual licence holder, to comply with sections 117 and 118; both must simultaneously comply with sections 117 and 118 until the transferor is released by a notice under subsection 37(3).

In summary, subsections 37(2)-(4) of the OEI Regulations provide that, following a licence transfer, the transferor and the transferee must both comply with the financial security obligations as though each was the licence holder. This continues until the Minister is satisfied that the transferee is in compliance with sections 117 and 118 of the OEI Act and issues a notice accordingly. The purpose of these provisions is to ensure that there will still be sufficient financial security in place during any potential gap between the transferee becoming the licence holder and the transferee being able to demonstrate full compliance with the financial security obligations. In this scenario, the transferor will effectively "cover" for the transferee until full compliance can be demonstrated. These provisions do not permit a transferee to delay or avoid compliance with the financial security obligations. Section 118 of the OEI Act prescribes penalties for failing to comply with the financial security obligations, and it is expected that a transferee will take steps to comply as soon as they become the licence holder.

Division 8 – Change in control of licence holder

Section 38 – Operation of this Division

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraph 29(1)(d) deals with changes in control of licence holders.

Section 38 of the OEI Regulations clarifies that Division 8 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under paragraph 29(1)(d) of the OEI Act, matters relating to changes in control of licence holders.

As a preliminary clarification, it should be noted that the licensing scheme does not provide a fee or any method for calculating a fee under section 111 of the OEI Act, which permits the

⁹⁴ The Minister is ordinarily responsible for giving notice of a determination under subsection 37(3); see subsection 37(3) of the OEI Regulations.

inspection of instruments on payment of such a fee for the purposes of the change in control provisions in Part 3 of Chapter 3 of the OEI Act. The absence of such a fee or method for calculating a fee should be taken to imply that no fee is required, not that no fee can be paid (and therefore that any relevant instruments cannot be inspected).

Section 39 – Application for approval of change in control of licence holder

Section 86 of the OEI Act provides for the licensing scheme to permit a person who proposes to begin to control,⁹⁵ or cease controlling, a licence holder to apply to the Registrar for approval of this change in control⁹⁶ of the licence holder. Section 39 of the OEI Regulations is made for the purposes of this provision.

Subsection 39(1) of the OEI Regulations provides that an application for approval of a change in control of a licence holder must be made in the manner and form that is approved by the Registrar and published on its website, and be accompanied by any information or documents required by this approved form.⁹⁷

An explanatory note to subsection 39(1) clarifies that such an application must be made to the Registrar under section 86 of the OEI Act.

A further explanatory note to subsection 39(1) clarifies that certain matters in relation to a change in control of a licence holder must be noted in the Register of Offshore Infrastructure Licences under section 94 of the OEI Act.

A further explanatory note to subsection 39(1) clarifies that other rules relating to a change in control of a licence holder are set out in Part 3 of Chapter 3 of the OEI Act.

Subsection 39(2) provides that an application is taken to be accompanied by any information or documents required by the approved form if the relevant material is given to the Registrar within 30 days after the application is made. The intention of this provision is to give an applicant and the Registrar time after the application is made to identify whether the application is missing the specified material, and for an applicant to be able to provide this material without prejudice to their application. For clarity, there is no provision for applicants to make the application itself (that is, the submission made in the approved manner and form) beyond the day it is first submitted.

Division 9 – General matters

Subdivision A – Operation of this Division

Section 40 – Operation of this Division

⁹⁵ The term “control” is defined in section 84 of the OEI Act.

⁹⁶ The term “change in control” is defined in section 84 of the OEI Act.

⁹⁷ See section 307 of the OEI Act.

As noted at section 5 above, section 29 of the OEI Act provides for the regulations to prescribe a licensing scheme covering certain topics. Paragraphs 29(1)(a)-(e) deal with applications for licences, the offering and granting of licences, transfers of licences, changes in control of licence holders, and management plans. Paragraph 29(1)(f) further provides that the licensing scheme may cover any matters left by the OEI Act to the licensing scheme that are not dealt with in paragraphs 29(1)(a)-(e). Finally, subsection 29(2) provides that the licensing scheme may cover any other matters that the OEI Act authorises to be included in the regulations.

Section 40 of the OEI Regulations clarifies that Division 9 of Part 2 of the OEI Regulations prescribes, for the licensing scheme under section 29 of the OEI Act, general matters relating to the operation of the licensing scheme. For clarity, sections 41-42 of the OEI Regulations are made under paragraph 29(1)(a) of the OEI Act and sections 43-44 of the OEI Regulations are made under subsection 29(1) of the OEI Act. Sections 43-44 of the OEI Regulations are also supported by the necessary or convenient power in paragraph 305(b) of the OEI Act.⁹⁸

Subdivision B – Support by Registrar

Section 41 – Request for further information

Subsection 41(1) of the OEI Regulations provides that the Registrar may request additional information from licence applicants for the purposes of advising the Minister in relation to licence applications. This is a broad provision that allows the Registrar to seek from a licence applicant any additional information that the Registrar considers necessary to advise the Minister in relation to the relevant application, and regardless of whether or not the Minister has specifically requested the advice or information. For clarity, a licence application in this context has a broad meaning that encompasses any application for, or that relates to, a licence.⁹⁹ A licence application would therefore include an application for any of the licence types, as well as an application to extend, vary, transfer or seek consent to surrender any of the licence types. It would not include an application for approval of a change in control of a licence holder, as this is a decision made by the Registrar and not the Minister, and therefore the Registrar has no reasonable need to advise the Minister in relation to such an application.¹⁰⁰

Subsection 41(2) provides that a request for further information must be in writing. It must specify the information that is required, when the information is required by, and the manner in which it must be provided to the Registrar.

⁹⁸ Sections 43-44 of the OEI Regulations are supported by the necessary or convenient power in their application to licence surrender, since this is not a matter covered by section 29 of the OEI Act but is dealt with instead in section 74 of the OEI Act. Note that, to the extent that sections 43-44 of the OEI Regulations are supported by the necessary or convenient power, they are still considered part of the licensing scheme under subsection 29(2) of the OEI Act.

⁹⁹ The term “licence application” is defined in section 4 of the OEI Regulations.

¹⁰⁰ The Registrar has specific powers to gather information in relation to an application for approval of a change in control of a licence holder: see Division 4 of Part 3 of Chapter 3 of the OEI Act.

Subsection 41(3) provides that if the requested information is not provided within the specified timeframe, the Minister may at their discretion refuse to consider the relevant application any further. For clarity, such a refusal is not considered equivalent to a decision to deny a licence application at the end of the application process (for example, declining to grant a licence or consent to a licence surrender), as the refusal takes place at a stage prior to considering the application for the purposes of making a formal decision. A refusal would therefore not be subject to the procedural fairness process set out for the decisions specified in subsection 43(1) of the OEI Regulations¹⁰¹ or the merits review process provided in section 297 of the OEI Act.¹⁰²

Subsection 41(4) provides that if the Minister refuses to consider an application any further, the Minister must notify the relevant applicant in writing of their refusal.

Subsection 41(5) clarifies that section 41 applies to a feasibility licence application at the time that the Minister is considering determining an overlapping application group or a financial offer group under subsections 11(2) or 14(2) of the OEI Act. For example, the Minister might require further information to decide whether certain overlapping applications are of equal merit under paragraph 11(2)(a) of the OEI Act. A failure to provide information in this context could lead to the Minister refusing to consider the relevant application any further, regardless of whether the application had been validly made and was viable up until that point.

Section 42 – Advice given by the Registrar

Subsection 42(1) of the OEI Regulations provides that the Minister, when considering a licence application, must have regard to any information, assessment, analysis, report, advice or recommendation given by the Registrar in relation to the application. It is expected that the Registrar will play a significant role in assessing licence applications and advising the Minister on matters like the merit criteria or whether relevant legislative requirements have been met, and so subsection 42(1) formalises an advisory function for the Registrar. For clarity, subsection 42(1) applies to any input provided by the Registrar that meets the specified requirements, and not only where the Registrar is exercising an advisory power that is formally set out in legislation or regulations.¹⁰³ Further, the Minister must consider (but does not need to adopt) any such input that meets the specified requirements, regardless of whether or not the Minister specifically requested it. A licence application for the purposes of subsection 42(1) would include an application for any of the licence types, as well as an application to extend, vary, transfer or seek consent to surrender any of the licence types, but

¹⁰¹ Note that paragraph 43(1)(a) would not be relevant in any case for a refusal in relation to a feasibility licence application, while paragraph 43(1)(f) would not be relevant at all because there cannot be a refusal in relation to an application for approval of a change in control of a licence holder (as such an application is not considered by the Minister).

¹⁰² Note that paragraphs 297(c) and (e) would not be relevant in any case, for similar reasons to those provided in the preceding footnote.

¹⁰³ For example, the Registrar's formal assessment role in relation to licence transfers established by section 36 of the OEI Regulations.

would not include an application for approval of a change in control of a licence holder (as such an application is considered by the Registrar rather than the Minister).¹⁰⁴

Subsection 42(2) clarifies that section 42 applies to a feasibility licence application at the time that the Minister is considering determining an overlapping application group or a financial offer group under subsections 11(2) or 14(2) of the OEI Act. For example, the Registrar might provide input to the Minister to help them decide whether certain overlapping applications are of equal merit under paragraph 11(2)(a) of the OEI Act. The Minister would need to consider (but would not be required to adopt) any such input provided.

Subdivision C – Procedural fairness

Section 43 – Proposed decision to refuse application

Section 297 of the OEI Act provides for applications to be made to the Administrative Appeals Tribunal for review of certain decisions of the Minister, most of which involve those made at the end of a licence application process. Licence applicants¹⁰⁵ therefore already have access to external merits review.

Sections 43-44 of the OEI Regulations further provide licence applicants with an avenue for procedural fairness, by requiring the Minister or the Registrar to consult with them and ultimately provide written reasons for any decision made to decline an application.¹⁰⁶

Subsection 43(1) of the OEI Regulations provides that this procedural fairness process applies to any of the following proposed decisions made at the end of a licence application process:

- A decision not to offer to grant a licence (other than a feasibility licence).
- A decision not to extend, vary, transfer or consent to the surrender of any of the licence types.
- A decision not to approve a change in control of a licence holder.

The procedural fairness process therefore covers all licence applications under the OEI Act with the exception of feasibility licence applications.¹⁰⁷

Subsection 43(2) of the OEI Regulations clarifies the identity of the relevant decision maker for the decisions listed in subsection 43(1). The Minister is the relevant decision maker for all

¹⁰⁴ See further the discussion on the meaning of “licence application” at section 41 above.

¹⁰⁵ With the exception of feasibility licence applications, applications to vary a licence or applications to approve a change in control of a licence holder, none of which are covered in section 297 of the OEI Act.

¹⁰⁶ Note that the procedural fairness process in sections 43-44 of the OEI Regulations is not intended to displace any relevant common law procedural fairness rules.

¹⁰⁷ Since the feasibility licence application process is competitive and involves the allocation of a scarce resource, it would be inappropriate to allow applicants the same opportunity to comment on proposed decisions. Feasibility licence applications were also excluded from the merits review process in paragraph 297(a) of the OEI Act for a similar reason.

listed decisions except for a decision not to approve a change in control of a licence holder, for which the Registrar is the relevant decision maker.

Subsection 43(3) provides that, if a decision maker proposes to make one of the listed decisions, they must first give the relevant applicant written notice of the proposed decision.

Subsection 43(4) provides that, if the decision maker is the Minister, they may give the notice required by subsection 43(3) by arranging for the Registrar to give the notice. For clarity, under this provision the notice must still be made by the Minister. The Registrar's role is limited to effecting delivery of the notice.

Subsection 43(5) provides that a notice must set out the decision maker's reasons for the proposed decision and invite the relevant applicant to make a written submission about the proposed decision within a specified timeframe.

Subsection 43(6) provides that the timeframe specified in a notice must be reasonable having regard to the circumstances.

Subsection 43(7) provides that any submission made by an applicant in response to a notice must be given to the Registrar.

Subsection 43(8) provides that, if an applicant makes a submission in response to a notice, the relevant decision maker must take this submission into account when deciding whether to make the proposed decision. For clarity, a submission does not need to be considered if it is not made in accordance with the formal requirements prescribed in paragraphs 43(5)(b)-(c) and subsection 43(7).¹⁰⁸

Section 44 – Notice of refusal decision

Section 44 of the OEI Regulations provides that, if following the procedural fairness process outlined in section 43 a decision maker decides to make one of the listed decisions, the decision maker must give the relevant applicant written notice of their decision and the reasons for it.

An explanatory note to section 44 clarifies that the Minister may delegate to the Registrar, under section 303 of the OEI Act, the function of giving notice to the relevant applicant of the making of a listed decision and the reasons for it.¹⁰⁹

For clarity, section 44 of the OEI Regulations is not intended to displace any notice requirements that might exist under the *Administrative Appeals Tribunal Act 1975* in relation to decisions made under sections 20 and 23 of the OEI Regulations that are subject to review by the Administrative Appeals Tribunal.

¹⁰⁸ That is, a submission must be made in writing, by the specified deadline, and given to the Registrar.

¹⁰⁹ The Minister is ordinarily responsible for giving notice of the making of a listed decision and the reasons for it: see section 44 of the OEI Regulations.

PART 3 – FEES

Section 45 – Application fees

As noted at “Background” above, the Commonwealth (or the Regulator or Registrar, on behalf of the Commonwealth) may, under subsection 189(1) of the OEI Act, charge a fee for dealing with an application made, performing functions, or exercising power under the OEI Act or the applied work health and safety provisions.¹¹⁰ Subsection 189(2) further provides that the amount of any fee charged under subsection 189(1), or the method for working it out, is to be prescribed by the regulations. Section 45 of the OEI Regulations is made for the purposes of these provisions.

The table in section 45 of the OEI Regulations specifies the fees the Commonwealth (or the Regulator or Registrar, on behalf of the Commonwealth) will charge for dealing with certain applications made under the OEI Act.¹¹¹ These applications are:

- An application for any of the licence types.
- An application to extend, vary, transfer or seek consent to surrender any of the licence types.¹¹²
- An application for approval of a change in control of a licence holder.

The fees specified in the table are intended to cover the costs incurred by the Commonwealth, Regulator or Registrar in dealing with each type of application. The fees reflect the cost of receiving and assessing an application, preparing information for the relevant decision-maker and implementing the decision. The Cost Recovery Implementation Statement, which will be available on the relevant Commonwealth Department’s website, explains in detail how the amounts of the fees have been calculated to provide for full cost recovery. It should be noted that all licence applications are voluntary, meaning that none of these fees will be raised without informed consent. The fees are also directly related to a service provided to each applicant, meaning that the fees cannot be characterised as a tax as per the requirement of subsection 189(3) of the OEI Act.

It is expected that the Registrar will publish guidelines clarifying how applicants should pay the relevant fees and when these payments will be due.

Section 46 – Applications taken to have been made only if fee paid

Paragraph 189(5)(a) of the OEI Act provides for the regulations to determine that an application under the OEI Act or the applied work health and safety provisions is only taken

¹¹⁰ The term “applied work health and safety provisions” is defined in section 8 of the OEI Act.

¹¹¹ Note that none of the fees in the table relate to the applied work health and safety provisions.

¹¹² For clarity, in the case where an applicant seeks to remove from a licence area one or more areas where no offshore infrastructure activities have yet begun, this would be classed as an application to vary a licence under paragraphs 38(1)(c), 48(1)(c), 57(1)(c) or 66(1)(c) of the OEI Act rather than an application to seek consent to surrender part of a licence area under section 74 of the OEI Act.

to have been made if a fee has been paid in relation to the application. Section 46 of the OEI Regulations is made for the purposes of this provision.

Section 46 of the OEI Regulations provides that an application listed in the table under section 45 is only taken to have been made once the specified fee has been paid. For clarity, a fee will only be considered to have been paid once the payment has been formally completed. For example, for a fee paid by bank transfer, the payment will be considered to have been paid when the funds clear rather than on the making of the transfer.

PART 4 – PAYMENT OF OFFSHORE ELECTRICITY INFRASTRUCTURE LEVY

Section 47 – Payment of levy

As noted at “Background” above, in addition to paying fees under section 189 of the OEI Act, certain OEI participants must also pay an offshore electricity infrastructure levy. This OEI levy is another part of the Commonwealth’s cost recovery arrangements, and is intended to fund ongoing activities of the Commonwealth, Registrar or Regulator that cannot be attributed to a specific OEI licence or participant. In this sense, the levy provides for cost recovery of functions that are not specifically “fee for service”.¹¹³

The arrangements for imposing the OEI levy are split between the OEI Act and the OEI Levies Act. Broadly speaking, the OEI Levies Act (and the OEI Levies Regulations made under it) provide for who the levy is imposed on, the periods for which it is imposed and what the relevant amounts are. Section 190 of the OEI Act then provides for how the levy is paid, when it is due and the circumstances in which it can be refunded. Much of the detail of section 190 is left to the regulations, and sections 47-48 of the OEI Regulations are made for these purposes.

Subsection 47(1) of the OEI Regulations provides that section 47 is made for the purposes of subsection 190(1) of the OEI Act. For context, subsection 190(1) of the OEI Act provides that the OEI levy is due and payable in accordance with the regulations. Section 47 of the OEI Regulations therefore sets out the terms on which the levy will be due and payable.

Subsection 47(2) provides that an OEI levy payable for a particular period is due and payable 30 days after the beginning of that period. For example, if a levy applied to a licence holder for each 12 month period they held that licence, the levy would first become due and payable 30 days after the commencement of that licence, and would then be due and payable annually on that same day for every subsequent year the licence was held. Note that the levies payable for a particular period are prescribed in sections 5-8 of the OEI Levies Regulations.

¹¹³ For further background on the context and rationale for the OEI levy see the Explanatory Statement to the OEI Levies Regulations.

Subsection 47(3) of the OEI Regulations provides for who the OEI levy should be paid to. It provides that annual licence levies and annual Commonwealth levies¹¹⁴ must be paid to the Registrar, and annual compliance levies should be paid to the Regulator. It is expected that the Registrar and the Regulator will inform affected entities as to the quantum of any levies that are payable and the required method of payment.

Section 48 – Refunds of levy

Subsection 48(1) of the OEI Regulations provides that section 48 is made for the purposes of subsection 190(2) of the OEI Act. For context, subsection 190(2) of the OEI Act provides that the regulations may permit the remittal or refund of all or part of the OEI levy.

Section 48 of the OEI Regulations therefore sets out the circumstances in which the levy will be refunded.

Subsection 48(2) provides that, where an OEI levy is overpaid, the person to whom the levy was paid must refund the overpaid amount. For clarity, the person to whom the levy was overpaid will be either the Registrar or the Regulator.¹¹⁵

Subsection 48(3) provides some circumstances in which an OEI levy is considered to have been overpaid. These include the following:¹¹⁶

- Where the person paying the levy accidentally paid too much.
- Where a levy is paid by a licence holder for a particular period of time, and the licence is subsequently held for less than this period of time (for example, because it is cancelled, surrendered, or otherwise ceases to be in effect). Note that the adjustment of levies following a licence ceasing to be in effect, which may lead to a levy being overpaid, is covered in section 10 of the OEI Levies Regulations and any applicable amounts of overpayment will be calculated under that provision.
- Where a levy is paid by a licence holder for a particular licence area for a particular period of time, and the licence area subsequently decreases during this period of time (but not because the licence as a whole ceases to be in effect). Note that the adjustment of levies following a decrease in licence area, which may lead to a levy being overpaid, is covered in section 11 of the OEI Levies Regulations and any applicable amounts of overpayment will be calculated under that provision.

For clarity, if a licence holder overpays an OEI levy and subsequently transfers the licence before the overpayment is refunded, the refund will be paid to the new licence holder. This follows from the fact that the levy in these circumstances was imposed on the licence holder and not on a specific person. It is assumed that the parties to the licence transfer would have

¹¹⁴ Note that annual Commonwealth levies, once received by the Registrar, will then be transferred to the relevant Commonwealth Department. In this sense, the identity of the Registrar as initial recipient is for administrative purposes only.

¹¹⁵ See subsection 47(3) of the OEI Regulations.

¹¹⁶ Note that these provisions are not exhaustive, meaning that there may be further circumstances not specified in subsection 48(3) in which a levy is considered to have been overpaid.

considered and factored the cost of the outstanding levy refund into the transfer arrangements agreed between them.

PART 5 – OTHER PROVISIONS

Section 49 – Datum provisions

Under section 17 of the OEI Act the Minister may declare an area in the Commonwealth offshore area¹¹⁷ as suitable for OEI activities. The purpose of a declaration is to allow feasibility, commercial, and research and demonstration licences to be granted within the declared area.¹¹⁸ Licence applicants will also need to specify their proposed licence areas when making licence applications.

The precise location of areas under the OEI Act will be determined through the use of a datum, which is a reference frame for defining spatial position through geographic coordinates. Subsection 9(1) of the OEI Act determines that the default datum for the Act is the Australian Geodetic Datum as defined in Gazette No. 84 of 6 October 1966 (AGD66 geodetic data set). However, subsection 9(2) further provides that the regulations may substitute an alternative datum for the Act. Section 49 of the OEI Regulations is made for this purpose.

Section 49 of the OEI Regulations provides that, under paragraph 9(2)(a) of the OEI Regulations, the datum for the OEI Act will be the Geocentric Datum of Australia as defined in Gazette No. 35 of 6 September 1995 (GDA94 geocentric data set). This datum was chosen following consultation with the National Offshore Petroleum Titles Administrator and Geoscience Australia, which determined that the 1995 datum was the most appropriate data set for the OEI framework at this point in time. Note that the datum may be updated in the future through amendments to section 49 of the OEI Regulations, although this would not be done without a prior consultation process.

Section 50 – Pre-existing infrastructure

Section 309 of the OEI Act exempts from the operation of the Act certain “pre-existing infrastructure”¹¹⁹ that was already being operated in the Commonwealth offshore area at the time the Act received Royal Assent. This means that such pre-existing infrastructure can continue to operate without a licence and without any of the obligations imposed on licence

¹¹⁷ The term “Commonwealth offshore area” is defined in section 8 of the OEI Act.

¹¹⁸ Note that transmission and infrastructure licences do not need to be within a declared area: see subsection 61(2) of the OEI Act.

¹¹⁹ Namely fixed or tethered infrastructure that would be offshore renewable energy infrastructure or offshore electricity transmission infrastructure if section 309 was disregarded. These terms are defined respectively in sections 8, 10 and 11 of the OEI Act.

holders under the OEI Act. The purpose of this is to ensure that the operators of pre-existing infrastructure are not disadvantaged by being required to meet new obligations that were not in place when they installed their infrastructure.

Subsection 309(3) of the OEI Act further provides that the regulations may modify a number of elements of this pre-existing infrastructure scheme. Paragraph 309(3)(b) in particular provides that the regulations may determine that offshore renewable energy infrastructure or offshore electricity transmission infrastructure constructed, installed or commissioned in connection with the operation or maintenance (including the replacement) of pre-existing infrastructure is also to be treated as pre-existing infrastructure. Section 50 of the OEI Regulations is made under this provision.

Section 50 of the OEI Regulations extends the definition of pre-existing infrastructure to offshore renewable energy infrastructure or offshore electricity transmission infrastructure that is constructed, installed or commissioned for the purposes of operating, maintaining, repairing or replacing pre-existing infrastructure. For example, section 50 would allow for the replacement of pre-existing infrastructure with new infrastructure in the event that the pre-existing infrastructure was damaged. For clarity, section 50 does not permit pre-existing infrastructure to be expanded or to be upgraded in ways that are substantially unrelated to the infrastructure's original purpose or design. The intention of section 50 is to permit the operators of pre-existing infrastructure to continue operating that infrastructure, but not to allow them to expand or alter their operations without needing to meet the requirements of the OEI Act. So, for example, a portion of transmission cable that was pre-existing infrastructure could be replaced under section 50, but only by another transmission cable placed in the same location, with the same general capabilities and design as the original cable, and installed to deliver the same outcomes and purposes as the original cable was approved for.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Offshore Electricity Infrastructure Regulations 2022

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Offshore Electricity Infrastructure Regulations 2022* (the OEI Regulations) set out details of the offshore electricity infrastructure licensing scheme relating to applications for licences, offering and granting of licences, variations to licences, extension of licences, transfers of licences, and changes in control of licence holders.

The OEI Regulations further set out the fees that will be imposed on licence applicants and certain arrangements for the payment of levies. Fees and levies will be used to recover the costs to government for administering and regulating the offshore electricity infrastructure framework.

The OEI Regulations also cover the use of a datum for defining spatial positions and geographic coordinates and clarify arrangements for operators of pre-existing infrastructure.

Human rights implications

The OEI Regulations do not engage any of the applicable rights or freedoms.

Conclusion

The OEI Regulations are compatible with human rights as they do not raise any human rights issues.

The Hon Chris Bowen MP
Minister for Climate Change and Energy