

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Resources

*Offshore Petroleum and Greenhouse Gas Storage Act 2006*

*Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage)  
Regulations 2023*

### **Purpose and Operation**

The purpose of the *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023* (the GHG Regulations) is to remake the *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011* (the 2011 GHG Regulations) in substantially the same form, with minor amendments to provide consistency with current drafting practices, simplify language, restructure provisions to provide for ease of navigation, and remove duplicative processes. The 2011 GHG Regulations are due to sunset on 1 April 2024.

The Department of Industry, Science and Resources (the department), in consultation with the National Offshore Petroleum Titles Administrator (NOPTA) and the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), reviewed the effectiveness and efficiency of the operation of the 2011 GHG Regulations. The department found that the 2011 GHG Regulations are still required and fit for purpose, and that they should be remade without substantive change.

Details of the GHG Regulations are set out in Attachment A.

Under section 15AC of the *Acts Interpretation Act 1901* (the AIA), where an Act has expressed an idea in a particular form of words, and a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style, the ideas shall not be taken to be different merely because different forms of words were used. The AIA applies to the GHG Regulations as if they were an Act because of paragraph 13(1)(a) of the *Legislation Act 2003*. Where the language used in a provision of the GHG Regulations has been revised to improve clarity compared to the previous provision in the 2011 GHG Regulations, this should not be seen as reflecting an intention to change the policy set out in the previous provision.

The provisions of the 2011 GHG Regulations have been renumbered in the GHG Regulations. A table setting out the equivalent provision for each provision of the 2011 GHG Regulations is at Attachment B.

### **Background**

The GHG Regulations deal with a number of matters to facilitate and regulate greenhouse gas (GHG) injection and storage operations in offshore areas.

Certain decisions under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act) require the decision-maker to determine whether there is a significant risk that an operation carried on under a title will have a significant adverse impact on operations carried on under another title. This is considered in the context of potential interactions

between petroleum operations and GHG injection and storage operations. Part 2 of the GHG Regulations deals with how that matter is determined.

Part 3 and Schedule 1 of the GHG Regulations deal with requirements for applications for declarations of parts of geological formations as identified GHG storage formations. There are several steps before a part of a geological formation is determined to be suitable for the injection and permanent storage of a GHG substance. First, a titleholder may discover a ‘potential GHG storage formation’, which is a part of a geological formation that is suitable, with or without engineering enhancements, for the permanent storage of a GHG substance injected into that part (see subsection 20(1) of the OPGGS Act).

Following further analysis of the potential GHG storage formation, the titleholder must notify the responsible Commonwealth Minister (under section 451 or 451A of the OPGGS Act) if they have reasonable grounds to suspect that a part of a geological formation, wholly situated in the titleholder’s title area, could be an ‘eligible GHG storage formation’. An ‘eligible GHG storage formation’ (defined in section 21 of the OPGGS Act) is a part of a geological formation that is suitable, with or without engineering enhancements, for the permanent storage of a particular amount (being at least 100,000 tonnes) of a particular GHG substance injected at a particular point or points into that part over a particular period.

Under section 312 or 312A of the OPGGS Act, if a titleholder has reasonable grounds to believe that a part of a geological formation is an eligible GHG storage formation, the titleholder may apply to the responsible Commonwealth Minister for the declaration of the part as an identified GHG storage formation. The Minister may declare the part of the formation to be an ‘identified GHG storage formation’ if the Minister is satisfied that part is an eligible GHG storage formation and the estimate of the spatial extent of the formation is a reasonable estimate of the spatial extent of the eligible GHG storage formation. The declaration is the first step in establishing the technical viability of a potential storage site for GHG injection and storage operations.

Once a declaration is in force, a titleholder may apply for a GHG injection licence over the identified GHG storage formation under Part 3.4 of the OPGGS Act. An application must be accompanied by a draft site plan that the responsible Commonwealth Minister may approve. One of the criteria for grant of a GHG injection licence is that the Minister is satisfied that the draft site plan satisfies the criteria specified in the GHG Regulations. Part 4 and Schedule 2 of the GHG Regulations deal with the criteria that site plans must satisfy.

Part 4 of the GHG Regulations also sets out the requirement for an approved site plan to be in force when a GHG injection licensee carries on operations in relation to an identified GHG storage formation, and for the licensee to comply with the approved site plan.

Other parts of the GHG Regulations deal with preliminary matters (Part 1), reportable incidents (Part 5), information that the responsible Commonwealth Minister may make publicly available (Part 6), enforcement of provisions of the GHG Regulations (Part 7), and application, saving and transitional provisions (Part 8).

Apart from minor changes to simplify and update language and the renumbering of provisions, some additional minor changes have been made in the GHG Regulations, compared to the 2011 GHG Regulations, to ensure the GHG Regulations remain fit-for-purpose. The changes to the GHG Regulations:

- Modernise penalty provisions to provide additional mechanisms to apply within a graduated range of enforcement tools to encourage and support industry compliance. This includes revising penalty amounts for offence provisions, and inserting alternative enforcement mechanisms such as injunctions and enforceable undertakings.
- Correct and simplify provisions for determining if there is a significant risk that an operation carried on under a title will have a significant adverse impact on operations carried on under another title.
- Remove prescriptive requirements for submitting site plans. Part 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011* (the RMA Regulations) sets out requirements for submitting documents (including site plans) that are required or permitted to be given to the responsible Commonwealth Minister or NOPTA under the OPGGS Act and regulations. The provisions in Part 11A of the RMA Regulations are less prescriptive about the manner in which documents may be given, and provide improved technology neutrality.
- Remove provisions relating to provisional decommissioning plans, final decommissioning plans and publications of summaries of site plans. This avoids duplication with the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (the Environment Regulations). An environment plan under the Environment Regulations will need to be submitted, and accepted by NOPSEMA, prior to undertaking any decommissioning activities under a GHG title. As NOPSEMA is the offshore environmental regulator, this is the most appropriate regulatory process for approval of decommissioning activities. In addition, appropriate consultation on proposed GHG injection and storage operations will be undertaken through the environmental assessment and authorisation process, such as through consultation with relevant persons during development of an environment plan under the Environment Regulations.
- Clarify that an application for the declaration of an identified GHG storage formation must only relate to blocks to which the formation extends.

The GHG Regulations commence three months after registration on the Federal Register of Legislation. The delayed commencement allows time for NOPTA to update processes and guidance material in line with the GHG Regulations, prior to commencement.

The 2011 GHG Regulations are repealed by the *Offshore Petroleum and Greenhouse Gas Storage Legislation (Repeal and Consequential Amendments (No. 2)) Regulations 2023*.

### **Authority**

The OPGGS Act provides the legal framework for the exploration and recovery of petroleum, and the injection and storage of GHG substances, in offshore areas. Provisions of the OPGGS Act provide for regulations to be made on a range of matters. Section 781 of the OPGGS Act provides that the Governor-General may make regulations prescribing matters required or

permitted by the OPGGS Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the OPGGS Act.

Subsection 782(1) of the OPGGS Act provides that the regulations may make provision for securing, regulating, controlling or restricting specific matters. This includes injection and storage of GHG substances into a part of a geological formation, and the carrying on of operations and the execution of works for those purposes (item 2B of the table in subsection 782(1)).

### **Consultation**

The department consulted with NOPTA and NOPSEMA during its review of the 2011 GHG Regulations, and in the development of the draft GHG Regulations. The department also conducted targeted stakeholder consultation, including with industry, through release of a limited circulation exposure draft of the GHG Regulations and an associated information session in August/September 2023. The department received five submissions which were considered in finalising the GHG Regulations.

### **Regulatory Impact**

The Office of Impact Analysis (OIA) has confirmed that a Regulatory Impact Statement is not required for the GHG Regulations. The OIA reference is OBPR22-02091.

### **Statement of Compatibility with Human Rights**

A Statement of Compatibility with Human Rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment C.

## **Abbreviations used in this Explanatory Statement**

ARC	Administrative Review Council
GHG	greenhouse gas
GHG Regulations	<i>Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023</i>
Guide	<a href="#"><u><i>A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i></u></a> , September 2011
2011 GHG Regulations	<i>Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011</i>
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NOPTA	National Offshore Petroleum Titles Administrator
OPGGS Act	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>
Environment Regulations	<i>Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023</i>
PU	penalty unit
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
SROSAI	significant risk of a significant adverse impact

Details of the Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023

## Part 1—Preliminary

### Section 1 – Name

This section provides that the name of this instrument is the *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023*.

### Section 2 – Commencement

This section provides that the GHG Regulations commence three months after the instrument is registered on the Federal Register of Legislation. The delayed commencement allows time for NOPTA to update processes and guidance material in line with the GHG Regulations, prior to commencement.

### Section 3 – Authority

This section provides that the GHG Regulations are made under the OPGGS Act.

### Section 4 – Simplified outline of this instrument

This section sets out a simplified outline of the GHG Regulations. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

### Section 5 – Definitions

Subsection 5(1) provides for the definitions of terms used in the GHG Regulations that are not already defined in the OPGGS Act. It also provides notes directing the reader to various sections of the OPGGS Act for definitions of other terms used in the GHG Regulations. Further context for some of the main terms is provided below.

The *long-term bond rate* is defined, for the purposes of subsection 9(6) of the GHG Regulations, as the average (expressed as a decimal rounded to 4 decimal places) of the capital market yields on Commonwealth Government 10 year bonds for the latest available 12 months, as published by the Reserve Bank of Australia (RBA). The reference to yields published by the RBA is a reference to the fact of what the yield is at a particular point in time, rather than to a specified publication or other document. Information about those yields is publicly available at no cost on the RBA's website at [www.rba.gov.au/statistics/tables](http://www.rba.gov.au/statistics/tables).

A key term used in Part 2 of the GHG Regulations is *SROSAI section*, which is defined in section 5 as each of sections 25, 26, 27, 27A, 28, 28A and 29 of the OPGGS Act. Those provisions relate to a determination whether there is a significant risk that an operation

carried on under a title will have a significant adverse impact on operations carried on under another title. This is considered in the context of potential interactions between petroleum operations and GHG injection and storage operations, and is intended to protect existing title rights and provide investment certainty. It also provides a management system for overlapping titles which will enable both industries to co-exist.

Section 5 also defines *potentially affected title* for the purposes of making a determination in accordance with a SROSAI section. For the purposes of a determination in accordance with section 25 of the OPGGS Act, there are no references to particular titles in that section. However, the references to titles appear in the operative sections to which section 25 relates (that is, sections 100, 101, 137, 138, 163 and 164 of the OPGGS Act).

In addition, for the purposes of a determination in accordance with section 29 of the OPGGS Act, the operative section to which section 29 relates (section 383) always applies in the context of an overlap between a GHG injection licence and another title. Therefore, while the wording of section 29 does not refer to operations to recover petroleum under a particular title, in context the title is always identifiable.

Subsection 5(2) of the GHG Regulations provides for ascertaining the expected migration pathway or pathways of a particular GHG substance when determining the spatial extent of an eligible GHG storage formation. Subsection 21(3) of the OPGGS Act defines the *spatial extent* of an eligible GHG storage formation as the expected migration pathway or pathways, over the period mentioned in that subsection, of the particular amount of the particular GHG substance injected in whichever of paragraph 21(1)(a) or (b) of the OPGGS Act is applicable. Paragraph 21(5)(b) of the OPGGS Act states that the regulations may provide that the expected migration pathway or pathways are to be ascertained on the basis of a level of probability specified in the regulations. For the purposes of paragraph 21(5)(b), subsection 5(2) of the GHG Regulations provides that the expected migration pathway or pathways are to be ascertained on the basis of the level of probability specified in subclause 6(1) of Schedule 1 to the GHG Regulations (that is, a probability of occurrence of more than 10%).

## **Section 6 – References to declarations under sections 312 and 312A of the Act**

This section provides that if a declaration of an identified GHG storage formation by the responsible Commonwealth Minister under section 312 or 312A of the OPGGS Act is varied, a reference in the GHG Regulations to the declaration is a reference to the declaration as varied. A declaration of an identified GHG storage formation includes information such as the spatial extent and fundamental suitability determinants of the formation, and retains its significance over the life of a GHG injection and storage project. Section 6 ensures it is clear that the current declaration at a particular point in time (which may be a declaration as varied) is relevant where the GHG Regulations refer to the declaration.

## **Part 2 – Significant risk of a significant adverse impact**

### **Section 7 – Simplified outline of this Part**

This section sets out a simplified outline of Part 2 of the GHG Regulations. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

### **Section 8 – Purpose of this Part**

This section sets out the purpose of Part 2 of the GHG Regulations. Part 2 prescribes particular matters for the purposes of each SROSAI section. See discussion regarding the definition of *SROSAI section* in section 5 above.

### **Section 9 – Manner of determining whether there is significant risk of significant adverse impact**

Subsection (1) of each SROSAI section in the OPGGS Act provides that the question of whether there is a significant risk that an operation carried on under a title will have a significant adverse impact on operations under another title is to be determined in a manner ascertained in accordance with the regulations. For the purposes of those subsections, subsection 9(1) of the GHG Regulations sets out the manner of determining whether there is a significant risk of a significant adverse impact (SROSAI).

Subsection 9(1) provides that there is a significant risk of a main operation having a significant adverse impact on potentially affected operations under a potentially affected title if the probability-weighted impact cost of the main operation is at least 00.15% of the potential economic value of the potentially affected operations. The terms *main operation*, *potentially affected operations* and *potentially affected title* are defined in section 5. Subsection 9(2) provides for the manner in which the probability-weighted impact cost of the main operation is to be determined. Subsection 9(5) provides for the manner in which the potential economic value of the potentially affected operations is to be determined.

The note to subsection 9(1) informs the reader that certain additional matters are set out in each SROSAI section in the OPGGS Act that must be considered when a decision-maker is determining whether there is a SROSAI. For example, subsection (5) of each SROSAI section provides that a main operation will have an adverse impact on potentially affected operations only if the main operation will result in an increase in the capital costs or operating costs of the potentially affected operations, a reduction in the rate of injection of a GHG substance or rate of recovery of petroleum (as applicable), or a reduction in the quantity of a GHG substance that will be able to be stored or the quantity of petroleum that will be able to be recovered (as applicable).

Subsection (6) of each SROSAI section refers to the amount that, under the regulations, is taken to be the probability-weighted impact cost of a main operation. For the purposes of those subsections, subsection 9(2) sets out the manner of determining the probability-weighted impact cost of a main operation.

The probability-weighted impact cost of a main operation is determined by applying statistical techniques that are appropriate to risk assessment to the probability-weighted



impact costs of events that could occur as a result of the main operation. It is the particular events that could occur as a result of a main operation that may have the potential to cause adverse impacts on operations carried on under potentially affected titles. However, as set out in subsection 9(1), a SROSAI determination requires consideration of the probability-weighted impact costs of a main operation, rather than of particular events. Subsection 9(2) therefore provides a manner of taking the probability-weight impact cost of events (determined in accordance with subsection 9(3)) and using these to determine the probability-weighted impact cost of a main operation.

The manner of determining the probability-weighted impact costs of events that could occur as a result of a main operation and that, if they occurred, could have an adverse impact on potentially affected operations under a potentially affected title is set out in subsection 9(3). The probability-weighted impact cost of an event is determined by multiplying the estimated probability of the event occurring and having an adverse impact, by the estimated loss in potential economic value in relation to the potentially affected operations if the event occurred and had an adverse impact. Subsection 9(6) is relevant to this determination, as it requires estimates of the loss in potential economic value to be adjusted to present values.

Subsection 9(4) provides further that, when estimating the probability of an event occurring and having an adverse impact on potentially affected operations in accordance with paragraph 9(3)(a), the estimated probability of an adverse impact on potentially affected operations that are not currently being carried on must take into account the probability of their being carried on in the future. This may apply in a couple of circumstances. For example, this would take account of circumstances in which there is a potentially affected title that is currently in force, but particular operations have not yet commenced under that title. Alternatively, given that certain SROSAI sections also consider potentially affected operations under future titles, this would take account of the probability of operations occurring under those future potentially affected titles.

For subsection 9(1), subsection 9(5) provides for the manner of determining the potential economic value of potentially affected operations that are being, or could be, carried on under a potentially affected title. Paragraph (a) concerns petroleum operations and paragraph (b) concerns GHG operations. Subsection 9(6) is relevant to this determination, as it sets out the discounting rate for adjusting estimates of the potential economic value to present values.

Subsection 9(6) sets out the discounting rate to adjust the estimates of potential economic value, and of the loss in potential economic value, to present values. The estimates are to be adjusted to present values using a discount rate equal to the long-term bond rate plus 5%. The *long-term bond rate* is defined in section 5 of the GHG Regulations (see discussion at that section above).

## **Section 10 – Prescribed costs**

Subsection (5) of each SROSAI section in the OPGGS Act (as defined in section 5 of the GHG Regulations) provides that a main operation will have an adverse impact on potentially affected operations under a potentially affected title only in certain circumstances. These include where the main operation will result in an increase in the capital costs (other than prescribed costs), or an increase in the operating costs (other than prescribed costs), of the potentially affected operations. Section 10 of the GHG Regulations prescribes costs for the purposes of those subsections.

## Section 11 – Threshold amount

Subsection (6) of each SROSAI section in the OPGGS Act (as defined in section 5 of the GHG Regulations) provides that a risk is not to be treated as significant, and an adverse impact is not to be treated as significant, if the amount that, under the regulations, is taken to be the probability-weighted impact cost of a main operation is less than the amount that, under the regulations, is taken to be the threshold amount. Subsection 9(2) of the GHG Regulations sets out the manner of determining the probability-weight impact cost of a main operation – see discussion above.

Section 11 of the GHG Regulations provides for the calculation of the threshold amount on a particular day. If the probability-weighted impact cost of a main operation is less than the threshold amount determined under section 11, there cannot be a determination that there is a SROSAI. A quantifiable threshold that is subject to indexation provides a consistent, objective and current basis for determining whether there is a SROSAI.

It is not necessarily the case that there will be a SROSAI if the probability-weighted impact cost is higher than the threshold amount. Rather, subsection 9(1) of the GHG Regulations will need to be considered in those circumstances to determine if there is a SROSAI.

Subsection 11(1) provides the formula for calculating the threshold amount. The threshold amount on a day is calculated by multiplying the base amount of \$7,000,000 by a quotient which is calculated as the most recent Gross Domestic Product (GDP) deflator divided by the commencement GDP deflator. The relevant day will be the day on which the assessment is undertaken as to whether the probability-weighted impact cost is lower or higher than the threshold amount.

The *commencement GDP deflator* is defined as the sum of the index numbers for the last four quarters before commencement of the GHG Regulations, and will remain the same for all threshold calculations. The *most recent GDP deflator* is defined as the sum of the index numbers for the most recent four quarters for which index numbers have been published, and accordingly it will vary over time.

The *index number*, for a quarter, is defined as the Implicit Price Deflator for Expenditure on GDP published by the Australian Statistician for that quarter. The reference to indexes published by the Australian Statistician is a reference to the fact of what the index is at a particular point in time, rather than to a specific publication or other document. Quarterly statistics including the Implicit Price Deflator for Expenditure on GDP are publicly available at no cost at [www.abs.gov.au/statistics/economy/national-accounts](http://www.abs.gov.au/statistics/economy/national-accounts) (Australian National Accounts: National Income, Expenditure and Product).

The threshold amount is calculated on a particular day rather than being subject to annual indexation. The amount on a particular day will be straightforward and quick to calculate, based on published and freely available figures, for the sophisticated industry that is regulated by the GHG Regulations.

Paragraph 11(2)(a) requires threshold amounts to be worked out using only the index numbers published in terms of the most recently published index reference period. Paragraph 11(2)(b) provides that index numbers published in substitution for previously published index numbers are to be disregarded, except where the substituted numbers are

published to take account of changes in the index reference period. This will ensure that consistent numbers are used for working out the threshold amount in different quarters, rather than using one number for a calculation in a particular quarter, and a different (substituted) number for a calculation in a subsequent quarter.

## **Section 12 – Notice of intended determination**

Section 12 is made for the purposes of paragraph 781(b) of the OPGGS Act, being necessary or convenient for carrying out or giving effect to the OPGGS Act. This section gives those parties who may be affected by a determination made in accordance with a SROSAI section under the OPGGS Act (as defined in section 5 of the GHG Regulations) the opportunity to make a written submission before a determination is made. It requires a decision maker to give written notice of the intended determination to:

- the person proposing to undertake, or currently undertaking, a main operation (as defined in section 5 of the GHG Regulations), or applying for a title under which a main operation could be carried on; and
- the person or persons under whose existing or future potentially affected title there are potentially affected operations (as defined in section 5 of the GHG Regulations), of a kind mentioned in the relevant SROSAI section, that are being or could be carried on.

The notice must set out details of the intended determination and the reasons for it, and invite the recipient to make a written submission within a specified time. The decision maker must take into account any submissions that are made in accordance with the notice.

Paragraph 12(2)(a) lists certain provisions of the OPGGS Act that require a determination to be made, and sets out who is required to be notified of an intended determination when a potentially affected title is a future title. The list does not include subsections 292(12) and 292A(12) of the OPGGS Act, as these would already be covered by a determination required under subsection 292(6) or 292A(6) (which are listed in subparagraphs 12(2)(a)(vi) and (vii) of the GHG Regulations). That is, the responsible Commonwealth Minister would make a determination as to whether the Minister is satisfied that there is a SROSAI on operations that could be carried on under a future petroleum title under subsection 292(6) or 292A(6). Then, if the Minister is satisfied that there is a SROSAI in relation to a future petroleum title, and that future petroleum title is a pre-commencement petroleum title, subsection 292(12) or 292A(12) would apply without the need to make a separate determination for those subsections.

A determination as to whether there is a SROSAI is not subject to merits review. It is the OPGGS Act, rather than the GHG Regulations, which includes the provisions that require a determination to be made. The OPGGS Act does not provide for merits review of a determination, or of the ultimate decision for the purposes of which a determination is made.

## **Part 3 – Applications for declarations of identified greenhouse gas storage formations**

### **Section 13 – Simplified outline of this Part**

This section sets out a simplified outline of Part 3 of the GHG Regulations. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

### **Section 14 – Information to be set out in applications and requirements for estimates of spatial extent**

Paragraphs 312(3)(c) and 312A(3)(c) of the OPGGS Act require an application for a declaration of an identified GHG storage formation to include the information specified in the regulations. Subsection 14(1) of the GHG Regulations provides that the relevant provisions of Schedule 1 specify the required information.

Subparagraphs 312(3)(b)(ii) and 312A(3)(b)(ii) of the OPGGS Act require an application for a declaration of an identified GHG storage formation to set out an estimate of the spatial extent of the eligible GHG storage formation that the applicant seeks to have declared as an identified storage formation. Subsections 312(4) and 312A(4) of the OPGGS Act provide that an estimate of spatial extent must comply with such requirements as are specified in the regulations. Subsection 14(2) of the GHG Regulations provides that the relevant provisions of Schedule 1 set out the requirements for estimates of spatial extent.

### **Section 15 – Notices about varying applications**

This section is made for the purposes of paragraph 781(b) of the OPGGS Act, being necessary or convenient for carrying out or giving effect to the OPGGS Act. If an application is made for a declaration of a part of a geological formation as an identified GHG storage formation under section 312 or 312A of the OPGGS Act, the responsible Commonwealth Minister is required to consider the application. Under subsection 312(11) and 312A(11), one of the criteria for the Minister to make a declaration is that the Minister is satisfied that the part of a geological formation is an eligible GHG storage formation (as defined in subsection 21(1) of the OPGGS Act).

Section 15 of the GHG Regulations requires the responsible Commonwealth Minister to give the applicant a notice giving the applicant an opportunity to vary the application if the Minister is not satisfied that the part of the geological formation is an eligible GHG storage formation, but reasonably believes that the applicant could vary the application to so satisfy the Minister.

The notice must inform the applicant that the responsible Commonwealth Minister is not so satisfied and of the reasons that the Minister is not satisfied, and give the applicant an opportunity to vary the application. Subsections 312(7) to (10) and 312A(7) to (10) of the OPGGS Act provide for applications to be varied. The Minister is not required to consider the

application further until the applicant has varied it, noting that the Minister would be required to refuse the application under subsection 312(15) or 312A(15) if it is not varied.

If the application is varied, and the responsible Commonwealth Minister is still not satisfied that the part of a geological formation is an eligible GHG storage formation, but reasonably believes that the applicant could again vary the application to so satisfy the Minister, then the Minister must give a further opportunity to vary the application (subsection 15(3)).

## **Part 4 – Site plans**

### **Division 1 – Preliminary**

The aim of Part 4 is to ensure that GHG injection and storage operations are undertaken in a way which ensures that the storage is safe and secure. Part 4 does this by requiring operations to be undertaken in accordance with an approved site plan for an identified GHG storage formation that sets out predictions for the behaviour of a GHG substance stored in the identified GHG storage formation, identifies and provides for the management of risks, and provides for monitoring to identify any new or increased risks in a timely manner. The information in the plan must be consistent with the declaration of an identified GHG storage formation.

#### **Section 16 – Simplified outline of this Part**

This section sets out a simplified outline of Part 4 of the GHG Regulations. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

### **Division 2 – Criteria for draft site plans**

#### **Section 17 – Purpose of this Division**

Under the OPGGS Act, an application for a GHG injection licence over the block or blocks to which an identified GHG storage formation extends is required to be accompanied by a draft site plan for the formation. Under paragraph 24(c) of the OPGGS Act, a site plan is divided into Part A (which sets out predictions for the behaviour of a GHG substance stored in the formation) and Part B (which deals with other matters).

Under paragraph 362(1)(h), 362(2)(h), 368B(1)(j), 368B(2)(j) and 370(i) of the OPGGS Act, one of the criteria for the grant of a licence is that the responsible Commonwealth Minister is satisfied that the draft site plan satisfies the criteria specified in the regulations. Section 17 of the GHG Regulations provides that Division 2 of Part 4 sets out the criteria for a draft site plan for the purposes of those paragraphs of the OPGGS Act.

The criteria for draft site plans fall into three categories, which are addressed by the next three sections: general criteria (section 18), criteria for Part A (section 19) and criteria for Part B (section 20).

## **Section 18 – Criteria for draft site plans – general**

This section sets out general criteria for a draft site plan. The responsible Commonwealth Minister must be reasonably satisfied that the site plan meets the criteria in order to approve a draft site plan (see subsection 25(2)).

The focus of these criteria is ensuring that injection and storage operations will result in the safe and secure permanent storage of GHG substances, including both the substances that are proposed to be injected and stored, and any that are already stored in the identified GHG storage formation. The criteria also aim to ensure that geological risks associated with proposed operations are appropriately identified and addressed, either by demonstrating that the risk will be eliminated, or reduced to as low as reasonably practicable and with an acceptable level of residual risk.

Regulation of other risks arising from GHG operations will occur under other parts of the OPGGS Act and regulations, particularly through the requirements to prepare an environment plan for environmental management of offshore GHG activities, a well operations management plan for well activities, and a safety case to address occupational health and safety at offshore facilities.

## **Section 19 – Criteria for draft site plans – Part A**

This section sets out the criteria for Part A of a draft site plan. Under subparagraph 24(c)(i) of the OPGGS Act, Part A is to set out predictions for the behaviour of a GHG substance stored in the identified GHG storage formation. This includes both the substances that are proposed to be injected and stored, and any that are already stored in the identified GHG storage formation. The responsible Commonwealth Minister must be reasonably satisfied that a draft site plan meets the criteria in order to approve the draft plan (see subsection 25(2)).

Under paragraphs 379(1)(e) and (f) of the OPGGS Act, a serious situation will exist in relation to an identified GHG storage formation if a GHG substance has behaved or is behaving otherwise than as predicted in Part A of a site plan, or if there is a significant risk that a GHG substance will behave otherwise than as predicted in Part A of the site plan. The predictions in Part A are therefore relevant to determining whether there is a serious situation in relation to an identified GHG storage formation. The responsible Commonwealth Minister has certain powers under the OPGGS Act to deal with a serious situation.

Section 19 of the GHG Regulations requires Part A to set out predictions for the behaviour, at specified times, of each GHG substance that is already stored in, or proposed to be injected into and stored in, the formation. For the purposes of paragraph 19(1)(b), it is expected that a range of predictions is to be provided (e.g. at P10/P50/P90 probability estimates). Further detail will be provided in guidelines that will be made to support implementation of the GHG Regulations.

Subsection 19(2) sets out more detailed requirements for the predictions, including the requirements for the timing of the predictions (paragraph 19(2)(a)). Rather than predictions being required at set intervals specified in the GHG Regulations, paragraph 19(2)(a) recognises that the frequency of predictions will be site specific. For example, sites which utilise a relatively larger part of storage capacity in any one year will require predictions at

more frequent intervals. In addition, more frequent predictions will generally be expected at the start of injection operations to ensure that any issues can be detected early. The frequency of predictions will also be linked to requirements for monitoring the behaviour of the GHG substance in the formation, which must ensure that comparison of the actual and predicted behaviours of each substance will enable timely detection of serious situations in relation to the formation (subparagraph 19(2)(a)(ii)). The predictions must be set out and explained in sufficient detail to demonstrate that they are soundly based (paragraph 19(2)(b)).

The remaining criteria in subsection 19(2) aim to ensure that the predictions must consider the known or expected migration pathways and rates of each GHG substance, and demonstrate that the predicted behaviours are consistent with the containment of the GHG substances within the formation.

Paragraph 19(3) sets out information from the application for a declaration of an identified GHG storage formation, or from an application to vary a declaration, that must be included in the draft site plan. The information relates to the integrity, and estimates of the spatial extent, of the formation. This information is relevant to the predictions, and will assist the responsible Commonwealth Minister in considering whether the predictions are soundly based and consistent with the spatial extent of the formation.

## **Section 20 – Criteria for draft site plans – Part B**

This section sets out the criteria for Part B of a draft site plan in relation to an identified GHG storage formation. Under subparagraph 24(c)(ii) of the OPGGS Act, Part B is to deal with matters other than the predictions for the behaviour of a stored GHG substance within the formation (which is covered by Part A of the plan). The responsible Commonwealth Minister must be reasonably satisfied that a draft site plan meets the criteria in order to approve the draft plan (see subsection 25(2)).

This section requires Part B of a draft site plan to set out certain information, including the information specified in Schedule 2 to the GHG Regulations. Part B must also set out information relating to operational matters, such as an integrated operations management plan, an implementation strategy, and ongoing arrangements for monitoring, recording and reporting in relation to implementation of and compliance with the plan.

The information in Part B must not be inconsistent with the declaration of an identified GHG storage formation (which may include a declaration as varied) (subsection 20(2)). A declaration of an identified GHG storage formation includes information such as the spatial extent and fundamental suitability determinants of the formation, and retains its significance over the life of a GHG injection and storage project.

## **Division 3 – Obligations for greenhouse gas injection licensees**

### **Section 21 – Purpose of this Division**

This section states that Division 3 is made for the purposes of subsections 457(1) and (2) of the OPGGS Act. Subsection 457(1) provides that the regulations may provide that a GHG injection licensee must not carry on any operations in relation to an identified GHG storage

formation unless an approved site plan is in force. Subsection 457(2) provides that the regulations may provide that a licensee must comply with an approved site plan.

## **Section 22 – Carrying on operations**

Under subsection 357(1) of the OPGGS Act, a GHG injection licence authorises the licensee to inject and permanently store a GHG substance into an identified GHG storage formation that is specified in the licence. Subsection 357(2) provides that the rights conferred on a licensee by subsection 357(1) are subject to the OPGGS Act and regulations.

Section 22 of the GHG Regulations provides that a GHG injection licensee must not carry on any operations relating to an identified GHG storage formation specified in the licence without an approved site plan in force in relation to the formation (subsection (1)). A licensee must also comply with an approved site plan that is in force (subsection (2)).

A failure to comply with either of those obligations is an offence of strict liability, punishable by a maximum penalty of 100 PU. The maximum penalty for a failure to comply where the offence is committed by a body corporate is five times that amount, due to the operation of subsection 4B(3) of the *Crimes Act 1914*. A person is also liable to a civil penalty of 1,000 PU if the person contravenes subsection 22(1) or (2).

It is appropriate to impose a criminal penalty for a breach of these obligations because of the potential for serious harm to be caused to the environment and/or to the operations of other titleholders if operations are undertaken other than in compliance with subsections 22(1) and (2). The process whereby the responsible Commonwealth Minister carefully considers the detailed site plan before approving the plan, and subsequently granting the injection licence, would be rendered futile if penalties were not significant and criminal sanctions did not apply to breaches of fundamental regulatory obligations. A GHG injection licensee who is granted a licence will be aware of the legislative requirements regulating their operations.

It is also appropriate to apply strict liability to the offence to promote compliance with the regulatory regime and ensure subsections 22(1) and (2) can be effectively enforced, particularly given the risks to containment of a GHG substance if a licensee carries on operations without an approved site plan in force, or other than in compliance with the approved site plan. This is consistent with the principles outlined in section 2.2.6 of the Guide. Given the remote and complex nature of offshore operations, and the prevalence of joint venture titleholder arrangements, it can be extremely difficult to prove intent, and requiring that proof may make it impractical to enforce the regime. A GHG injection licensee is responsible for preparing the draft site plan for approval by the responsible Commonwealth Minister and for reviewing it at regular intervals or on request. They would be well aware of the requirement to have an approved site plan in place before carrying on operations in relation to the storage formation that is the subject of the licence, as well as their obligation to comply with the plan they have developed. The licensee would also be aware that a licence is granted on the understanding that licensees will take all reasonable steps to ensure that regulatory obligations are complied with, noting the high-hazard nature of operations, and that tenure over the relevant licence area is granted to the licensee based on factors such as their capacity to undertake safe and sustainable operations. If there is an honest and reasonable mistake of fact on the licensee's part, this may be raised in defence to a prosecution.



The maximum penalty of 100 PU is authorised by section 790 of the OPGGS Act, which provides that regulations may provide for offences against the regulations punishable by penalties not exceeding a fine of 100 PU. The maximum penalty is appropriate, noting that it is higher than the preference stated in the Guide for a maximum of 60 PU for an individual (300 PU for a body corporate) for strict liability offences. Offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. In this context, a smaller penalty for a significant offence would not be sufficient to appropriately punish the offending conduct, especially considering the potential for severe risks to or impact on the environment as well as on the operations of other titleholders.

The offence provision has been included in the GHG Regulations, rather than the OPGGS Act, despite the relatively high penalties that may be imposed for non-compliance. As noted above in relation to section 21, the OPGGS Act sets out a range of regulation-making powers to prescribe matters in relation to GHG injection and storage, including the matters provided for in section 22 of the GHG Regulations. It is considered that setting out all of the provisions (including enforcement provisions) in one instrument provides greater clarity to licensees, rather than including the substantive provisions in the regulations, and matters relating to enforcement of those provisions in the OPGGS Act.

It is also appropriate to have the option of imposing a civil sanction through a civil penalty of 1,000 PU. As noted above, offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. To be an effective deterrent, the penalty must therefore be sufficiently significant to overcome any sense that the potential imposition of a fine for non-compliance with a fundamental obligation might otherwise be perceived as a ‘cost of doing business’. The size of the penalty also reflects the cost of court proceedings that may be necessary to enforce the penalty (see further at section 57 below).

Imposing both a criminal and civil penalty will provide additional mechanisms to apply within a graduated range of enforcement tools to encourage and support industry compliance. Previous reviews have considered strong evidence that regulators are best able to secure compliance when they have a range of graduated sanctions that can be imposed, depending upon the severity of the misconduct or breaches of regulatory requirements. Providing such alternative enforcement tools will enable an appropriate and proportionate response, depending on the nature and relative seriousness of the breach that has occurred.

In addition, the application of civil penalties (in the form of financial sanctions) as a supplement or alternative to criminal penalties, and set at an appropriate level to reflect the offshore GHG storage industry as a high-hazard industry, will encourage improved compliance with the Regulations. This will further enhance the objectives of the GHG storage regime by supporting continuous improvement by industry, which is responsible under the regime to manage risks of operations.

## **Division 4 – Approval of draft site plans**

### **Section 23 – Purpose of this Division**

This section states that Division 4 is made for the purposes of subsection 457(3) of the OPGGS Act, which states that regulations may provide for approval of draft site plans by the responsible Commonwealth Minister.

## **Section 24 – Application of this Division**

This section sets out the circumstances in which Division 4 applies. Division 4 will apply if the responsible Commonwealth Minister receives a draft site plan in relation to an identified GHG storage formation accompanying an application for a GHG injection licence, to require the Minister to make a decision in relation to the plan.

## **Section 25 – Decision on approval of draft site plan**

This section requires the responsible Commonwealth Minister to either approve or refuse to approve a draft site plan. The Minister may approve the draft site plan if reasonably satisfied that it meets the criteria set out in Division 2 of Part 4 of the GHG Regulations. The Minister may also have regard to any other matters the Minister considers relevant in deciding whether to approve the draft site plan.

The responsible Commonwealth Minister's decision under section 25 is not subject to merits review. This accords with the principles set out by the ARC in its publication [\*What decisions should be subject to merit review?\*](#) (1999). The ARC considered that preliminary or procedural decisions would be unsuitable for review as a review may lead to unnecessary frustration or delay of the administrative decision-making process. The Minister's decision as to whether a draft site plan should be approved is a preliminary step in the substantive decision under the OPGGS Act as to whether to give an applicant for a GHG injection licence an offer document telling the applicant that the Minister is prepared to grant the licence (which is itself not a reviewable decision).

In addition, a decision to approve or refuse to approve a draft site plan involves the evaluation of complex and competing facts, and highly technical matters such as predictions of the behaviour of a GHG substance within an identified GHG storage formation. A merits review tribunal would be required to possess or obtain expertise in relation to the risks and management of GHG storage operations. The costs, difficulty and potential delays in finding expertise may outweigh any impact a lack of merits review may have on the applicant. Further, if the responsible Commonwealth Minister refuses to approve a draft site plan, the Minister must provide reasons (under section 28 of the GHG Regulations). As long as the applicant's existing title remains in force, the applicant will be able to submit a further application for a GHG injection licence, including a new plan that takes account of those reasons.

Before approval of a draft site plan is refused on the basis that the responsible Commonwealth Minister is not satisfied that the plan meets the criteria set out in Division 2, the applicant must be given an opportunity to vary the draft site plan, or provide further information, if the Minister reasonably believes that varying the plan or providing the additional information could so satisfy the Minister (see section 27 below).

## **Section 26 – Decision-making process – requests for further information**

This section allows the responsible Commonwealth Minister or NOPTA to ask an applicant for a GHG injection licence for further written information relating to any of the criteria set out in Division 2 of Part 4 of the GHG Regulations (criteria for draft site plans). An application for a GHG injection licence is required to be accompanied by a draft site plan.

Section 26 allows flexibility for the responsible Commonwealth Minister or NOPTA to request additional information from the applicant during assessment of the draft site plan (i.e., prior to the Minister determining whether the Minister is satisfied that draft plan meets the criteria). This ensures that, if a plan does not include relevant information, or information in the plan requires clarification, the Minister or NOPTA can request the information to enable the Minister to have regard to that information.

The request, which must be by written notice to the applicant, must specify each criterion in relation to which information is requested, and give a reasonable period for providing the information. What is a reasonable period will be considered on a case-by-case basis, depending on matters such as the nature of the information sought, and the number of criteria in relation to which further information is sought. If the applicant provides the information within the specified period, or a longer period agreed to by the responsible Commonwealth Minister or NOPTA, a reference in Division 4 to the draft site plan includes the draft site plan as including the further information. This ensures it is clear that the Minister must consider the further information provided when deciding whether to approve, or refuse to approve, the draft site plan, and in determining whether the applicant needs to be provided an opportunity to vary the draft site plan or provide additional information (see section 27).

The responsible Commonwealth Minister is not required to consider the draft site plan further until the applicant has provided the further information. This ensures that the Minister can assess and make a decision in relation to the draft site plan on the basis of all of the relevant information.

### **Section 27 – Decision-making process – notices about meeting criteria**

This section applies where the responsible Commonwealth Minister is not satisfied that the draft site plan meets the criteria set out in Division 2 of Part 4 of the GHG Regulations, but reasonably believes that the applicant could vary the draft plan or provide additional information to so satisfy the Minister. The Minister must notify the applicant in writing that the Minister is not so satisfied and the reasons why, and give the applicant an opportunity to vary the draft site plan or provide the additional information.

If the applicant varies the draft site plan or provides additional information in response to a notice, a reference in Division 4 of Part 4 of the GHG Regulations to the draft site plan includes a reference to the draft site plan as varied or as including the additional information (subsection 27(2)). This ensures it is clear that the responsible Commonwealth Minister must consider the draft plan as varied, or the additional information provided, when deciding whether to approve, or refuse to approve, the draft site plan. It also means that if the draft plan is varied or additional information provided, and the Minister is still not satisfied that the draft plan meets the criteria in Division 2, but reasonably believes that the applicant could again vary the application or provide additional information to so satisfy the Minister, then the Minister must give a further opportunity to vary the application or provide the additional information.

The responsible Commonwealth Minister is not required to consider the draft site plan further until the applicant has varied the draft plan or provided the additional information (subsection 27(3)).

## **Section 28 – Notice of decision**

This section provides that the responsible Commonwealth Minister must give the applicant written notice of the decision to approve, or refuse to approve, a draft site plan under section 25.

If the responsible Commonwealth Minister approved the draft site plan, the notice must include the time of the approval. Under section 30, an approved site plan comes into force at the time of the approval.

If the responsible Commonwealth Minister refused to approve the draft site plan, the notice must include the reasons for the refusal.

## **Division 5 – Duration of approved site plans**

### **Section 29 – Purpose of this Division**

This section provides that Division 5 is made for the purposes of subsection 457(4) of the OPGGS Act. Subsection 457(4) states that regulations may provide that an approved site plan comes into force at the time of the approval, and remains in force either until the responsible Commonwealth Minister withdraws approval under the regulations or otherwise indefinitely.

### **Section 30 – Duration of approved site plans**

This section provides for when an approved site plan is in force. An approved site plan will come into force at the time of the approval. The plan remains in force indefinitely, unless the responsible Commonwealth Minister withdraws approval of the plan under section 32. If the Minister withdraws approval, the plan ceases to be in force on the withdrawal.

## **Division 6 – Withdrawal of approval of approved site plans**

### **Section 31 – Purpose of this Division**

This section provides that Division 6 is made for the purposes of subsection 457(5) of the OPGGS Act. Section 457(5) provides that regulations may make provision for the responsible Commonwealth Minister to withdraw approval of approved site plans.

### **Section 32 – Withdrawal of approval of site plans**

This section enables the responsible Commonwealth Minister to withdraw approval of a site plan on any of the grounds specified in the section.

Under section 30, the site plan ceases to be in force upon the withdrawal of approval. Under subsection 22(1), a GHG injection licensee commits an offence, or is liable to a civil penalty, if they carry on operations in relation to an identified GHG storage formation specified in the licence and there is no approved site plan in force in relation to the formation. Therefore, the licensee cannot legally undertake operations in relation to the formation if the responsible Commonwealth Minister withdraws approval of the site plan.

Section 33 provides for steps to be taken prior to withdrawing approval to ensure procedural fairness for the licensee (see below).

The grounds for withdrawal of approval of a site plan, as set out in paragraph 32(1)(b), relate to non-compliance with the OPGGS Act or GHG Regulations by a GHG injection licensee. The responsible Commonwealth Minister has a range of graduated enforcement mechanisms available to enforce non-compliance, and has a discretion to withdraw approval of a site plan when a ground under subsection 32(1) arises. Provided that such a ground exists, the Minister can take account of all relevant circumstances in deciding whether to withdraw approval. This may include whether the licensee has made genuine attempts to comply, or whether the failure to comply has caused the Minister to be concerned that there may be a risk relating to containment of a GHG substance.

The responsible Commonwealth Minister's decision under section 32 is not subject to merits review. The basis for withdrawing approval of the site plan arises from non-compliance with key obligations under the GHG Regulations and the OPGGS Act, each of which is sufficiently serious to be punishable by an offence and/or a civil penalty. The decision to withdraw approval of a site plan is therefore an enforcement decision. This accords with the principles set out by the ARC in its publication [\*What decisions should be subject to merit review?\*](#) (1999). The ARC considered that decisions of a law enforcement nature should not be made subject to merits review.

These matters would be investigated before a decision is made to withdraw approval of the site plan, and it would cause unnecessary delay and the potential for risk of serious harm to the environment or the operations of other affected titleholders if the withdrawal of approval of the site plan could be delayed by an application for merits review.

### **Section 33 – Steps to be taken before withdrawing approval**

This section sets out the steps that the responsible Commonwealth Minister must take before the Minister can withdraw approval of a site plan under section 32. The purpose of the provision is to ensure procedural fairness for the GHG injection licensee given the potentially severe consequences of a decision to withdraw approval, such as potential increases to project costs and delays as the licensee would no longer be able to undertake their operations without a site plan in force.

The responsible Commonwealth Minister is required to give at least 30 days' notice to the licensee of the Minister's intention to withdraw approval of a site plan. The Minister is also able to give a copy of the notice to any other persons that the Minister thinks fit. This may occur, for example, in circumstances where the Minister considers that another person may be directly impacted by the proposed decision, or where the Minister considers that another person may have information that is relevant to the decision.

The responsible Commonwealth Minister is required to give the licensee, and any other person to whom a copy of the notice has been given, an opportunity to submit any matters for the Minister to take into account in deciding whether to withdraw approval of the plan. The notice of intent to withdraw approval is required to specify a day by which submissions must be made.

Subsection 33(5) sets out matters that the responsible Commonwealth Minister must take into account in deciding whether to withdraw approval of a site plan. The Minister is required to take into account any action taken by the licensee to remove the ground for withdrawal of approval or to prevent the ground occurring again. The Minister is also required to take into account any matter submitted by the licensee or any other person in response to the notice of intent to withdraw approval given by the Minister, where that submission has been provided before the date specified in the notice.

### **Section 34 – Notice of withdrawal of approval**

This section provides that the responsible Commonwealth Minister must notify the licensee in writing of the withdrawal of approval of a site plan. The notice must specify the reasons for the withdrawal and the day when the withdrawal takes effect.

## **Division 7 – Review and variation of approved site plans**

### **Section 35 – Purpose of this Division**

This section provides that Division 5 is made for the purposes of subsection 457(6) of the OPGGS Act. Subsection 457(6) provides that regulations may make provision for and in relation to the variation of approved site plans.

This section further provides that sections 39 (draft variations to remove inconsistency with directions), 42 (decision on approval of draft variation) and 45 (effect of approval of draft variations), which are contained in Division 5, are made for the purposes of subsections 376(11), 380(13) and 383(13) of the OPGGS Act. Those subsections provide that if a direction under section 376, 380 or 383 is in force, and the direction would be inconsistent with anything in an approved site plan, then the licensee must, within the period ascertained in accordance with the regulations, prepare a draft variation of the plan and give the draft to the responsible Commonwealth Minister. The Minister must approve or refuse to approve the variation.

### **Section 36 – Five-yearly reviews and draft variations**

This section requires a GHG injection licensee to review an approved site plan at least once every five years and decide whether the plan should be varied. A periodic review at least once every five years helps to ensure the ongoing suitability of the site plan in light of experience at that site as well as the evolution of industry best practice. The review must take into account the matters set out in section 38.

The licensee must, within 30 days after making a decision about whether the plan should be varied, give the responsible Commonwealth Minister written notice of the decision, the date it was made and the reasons for it. If it was decided that the plan should be varied, the licensee must give the Minister a draft variation of the plan within 180 days after making the decision or a longer period as agreed by the Minister. The ability for the Minister to agree a longer period reflects that, given the technical complexity and range of matters that a site plan covers, it may take some months for a licensee to prepare a draft variation.

Section 42 requires the responsible Commonwealth Minister to approve or refuse to approve a draft variation of a site plan.

It is a strict liability offence, punishable by 50 PU, not to comply with these requirements. This is consistent with the principles outlined in section 3.3 of the Guide, which states that penalties in regulations generally should not exceed 50 PU. Section 2.2.6 of the Guide also states that application of strict liability is generally only considered appropriate where the offence is punishable by a fine of up to 60 PU. The maximum penalty for a failure to comply where the offence is committed by a body corporate is five times the specified penalty amount, due to the operation of subsection 4B(3) of the *Crimes Act 1914*.

It is appropriate to impose a criminal penalty for a breach of these requirements because of the potential for considerable harm to be caused to the environment and/or to the operations of other titleholders if the approved site plan is no longer suitable for the safe and sustainable operations for injection and storage of a GHG substance. A GHG injection licensee who is granted a licence would be aware of the legislative requirements regarding site plans.

It is also appropriate to apply strict liability to the offence to promote compliance with the regulatory regime and ensure subsections 36(1), (2) and (3) can be effectively enforced, particularly given the risks to containment of a GHG substance if a licensee carries on operations when an approved site plan is no longer suitable. This is consistent with the principles outlined in section 2.2.6 of the Guide. Given the remote and complex nature of offshore operations, and the prevalence of joint venture titleholder arrangements, it can be extremely difficult to prove intent, and requiring that proof may make it impractical to enforce the regime. A GHG injection licensee would be aware of their obligations in relation to an approved site plan and of the need to have an up to date and suitable site plan to authorise their operations. The licensee would also be aware that a licence is granted on the understanding that licensees will take all reasonable steps to ensure that regulatory obligations are complied with, noting the high-hazard nature of operations, and that tenure over the relevant licence area is granted to the licensee based on factors such as their capacity to undertake safe and sustainable operations. If there is an honest and reasonable mistake of fact on the licensee's part, this may be raised in defence to a prosecution.

Subsection 36(5) is a continuing offence under section 4K of the *Crimes Act 1914*. Section 62 of the GHG Regulations sets out that the maximum penalty for each day that an offence under subsection 36(5) continues is 10% of the maximum penalty that can be imposed in respect of that offence.

Subsection 36(3) provides that the licensee is also liable to a civil penalty of 500 PU for a failure to comply with subsection 36(1), (2) or (3). Offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. To be an effective deterrent, the penalty must therefore be sufficiently significant to overcome any sense that the potential imposition of a fine for non-compliance with a fundamental obligation might otherwise be perceived as a 'cost of doing business'.

As noted above in relation to section 22, it is appropriate for regulators to have recourse to both civil and criminal penalties – see the discussion at that section.

Subsection 36(6) is a continuing civil penalty provision under section 93 of the Regulatory Powers Act. Section 62 of the GHG Regulations sets out that the maximum civil

penalty for each day that a contravention referred to in subsection 36(6) continues is 10% of the maximum civil penalty that can be imposed in respect of that contravention.

### **Section 37 – Reviews requested by Minister and draft variations**

This section enables the responsible Commonwealth Minister, by written notice to a GHG injection licensee, to request a review of an approved site plan in force in relation to an identified GHG storage formation specified in the licence if:

- the licensee applies under section 313 of the OPGGS Act for a variation of the declaration of identified GHG storage formation,
- the licensee applies for a variation of a matter specified in the licence under section 374 or 374A of the OPGGS Act, or
- a reportable incident (defined in section 49 of the GHG Regulations) occurs.

This ensures that the responsible Commonwealth Minister can request review of an approved site plan in circumstances where the Minister considers it is necessary to do so to deal with any potential new or previously unidentified risks of GHG injection and storage operations arising as a result of one of the circumstances listed above, or to consider the impact of a variation of a declaration, or matter specified in a licence, on the content and ongoing suitability of the site plan.

The licensee must, within the period specified by the responsible Commonwealth Minister in the notice (being at least 60 days):

- review the plan, taking into account the matters mentioned in section 38;
- decide if the plan should be varied and, if so, prepare a draft variation of the plan; and
- give the Minister written notice of the decision, the date it was made and the reasons for it and, if it was decided that the plan should be varied, the draft variation.

The responsible Commonwealth Minister's decision to request review of an approved site plan, in the circumstances set out in paragraph 37(1)(b), is not subject to merits review as it is preliminary in nature. This accords with the principles set out in the ARC in its publication [\*What decisions should be subject to merit review?\*](#) (1999). The ARC considered that preliminary or procedural decisions would be unsuitable for merits review as a review may lead to unnecessary frustration or delay of the administrative decision-making process. The effect of the Minister's decision is that a GHG injection licensee must review the approved site plan and decide whether the plan should be varied. It is therefore up to the licensee to determine whether the plan remains suitable for safe and sustainable operations. Submission of a variation does not directly follow because of the Minister's request. In addition, the approved site plan continues in force while the licensee undertakes the review and while the Minister assesses a draft variation of the plan (if the licensee decides that the plan should be varied). Therefore, there is no impact on the licensee's ability to continue GHG injection and storage operations during that time.

It is a strict liability offence, punishable by 100 PU, for a licensee not to comply with the requirements in subsection 37(3). The maximum penalty for a failure to comply where the offence is committed by a body corporate is five times the specified penalty amount, due to the operation of subsection 4B(3) of the *Crimes Act 1914*.



It is appropriate to impose a criminal penalty for breach of these obligations, particularly where a reportable incident has occurred and there is a risk of considerable harm to the environment where the approved site plan may no longer be suitable for the safe and sustainable operations for the injection and storage of a GHG substance. There is also the need to ensure that it is clear that non-compliance with a Ministerial request will be treated seriously and warrants criminal punishment. If new or increased risks will or may arise as a result of a circumstance mentioned in paragraph 37(1)(b), the responsible Commonwealth Minister must be able to require review of the approved site plan. The Minister's capacity to ensure that all relevant matters have been considered in a site plan will be diminished if penalties for the licensee's non-compliance were not significant.

It is also appropriate to apply strict liability to the offence to promote compliance with the regulatory regime and ensure section 37 can be effectively enforced, particularly given the risks to containment of a GHG substance if a licensee carries on operations when an approved site plan is no longer suitable. This is consistent with the principles outlined in section 2.2.6 of the Guide. Given the remote and complex nature of offshore operations, and the prevalence of joint venture titleholder arrangements, it can be extremely difficult to prove intent, and requiring that proof may make it impractical to enforce the regime. A GHG injection licensee is responsible for reviewing and, if considered necessary, preparing a variation of a site plan for approval by the responsible Commonwealth Minister. The licensee would be aware of their obligations in relation to an approved site plan and of the need to have an up to date and suitable site plan to authorise their operations. If one of the circumstances in paragraph 37(1)(b) applies, the site plan may no longer be appropriate. It is therefore of significant importance that the plan is reviewed if requested by the responsible Commonwealth Minister. The licensee would also be aware that a licence is granted on the understanding that licensees will take all reasonable steps to ensure that regulatory obligations are complied with, noting the high-hazard nature of operations, and that tenure over the relevant licence area is granted to the licensee based on factors such as their capacity to undertake safe and sustainable operations. If there is an honest and reasonable mistake of fact on the licensee's part, this may be raised in defence to a prosecution.

As discussed above in relation to section 22, a maximum penalty of 100 PU is authorised by section 790 of the OPGGS Act. The maximum penalty of 100 PU is appropriate, noting that it is higher than the preference stated in the Guide for a maximum of 60 PU for an individual (300 PU for a body corporate) for strict liability offences. Offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. In this context, a smaller penalty for a significant offence would not be sufficient to appropriately punish the offending conduct. Non-compliance with a Ministerial request to review a site plan would undermine the regulatory regime. For example, the request to review a plan may be in response to a specific issue. If the plan is not reviewed in response to a request, the effect may be similar to not having a site plan in force in relation to that particular matter. There may be significant consequences in relation to containment of a GHG substance in an identified GHG storage formation that result from the failure of a licensee to revise a plan to consider and set out how to manage that matter.

The offence provision has been included in the GHG Regulations, rather than the OPGGS Act, despite the relatively high penalties that may be imposed for non-compliance. The OPGGS Act sets out a range of regulation-making powers to prescribe matters in relation

to GHG injection and storage. This includes subsection 457(6) of the OPGGS Act, which states that the regulations may make provision for and in relation to the variation of approved site plans. Section 37 of the GHG Regulations is made for the purposes of subsection 457(6) of the OPGGS Act. It is considered that setting out all of the provisions (including enforcement provisions) in one instrument provides greater clarity to licensees, rather than including the substantive provisions in the regulations, and matters relating to enforcement of those provisions in the OPGGS Act.

Subsection 37(5) is a continuing offence under section 4K of the *Crimes Act 1914*. Section 62 of the GHG Regulations sets out that the maximum penalty for each day that an offence under subsection 37(5) continues is 10% of the maximum penalty that can be imposed in respect of that offence.

The licensee is also liable to a civil penalty of 1,000 PU for a failure to comply with subsection 37(3). As noted above, offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. To be an effective deterrent, the penalty must be sufficiently significant to overcome any sense that the potential imposition of a fine for non-compliance might otherwise be perceived as a ‘cost of doing business’. The size of the penalty also reflects the cost of court proceedings that may be necessary to enforce the penalty (see further at section 57 below).

As noted above in relation to section 22, it is appropriate for regulators to have recourse to both civil and criminal penalties – see the discussion at that section.

Subsection 37(6) is a continuing civil penalty provision under section 93 of the Regulatory Powers Act. Section 62 of the GHG Regulations sets out that the maximum civil penalty for each day that a contravention referred to in subsection 37(6) continues is 10% of the maximum civil penalty that can be imposed in respect of that contravention.

The criminal and civil penalties that may apply for a failure to review a plan on request by the responsible Commonwealth Minister under section 37 are twice those imposed for a failure to undertake a five-year review of a plan under section 36. The five-year review of a plan is intended to ensure that a licensee considers the plan on a regular basis, and updates the plan if considered necessary. A request by the Minister to review a plan, on the other hand, would generally be made in response to a specific, identified issue. A failure to review the plan as requested by the Minister may therefore have more significant consequences, and warrants a higher penalty.

### **Section 38 – Matters to be taken into account in reviews**

This section sets out certain matters that must be taken into account when an approved site plan is reviewed by a GHG injection licensee (see paragraphs 36(1)(a) and 37(3)(a)).

Subsection 38(2) sets out matters that must be considered in relation to the predictions for the behaviour of GHG substances that are set out in Part A of the site plan. This ensures that a licensee can reconsider the predictions, and determine whether any revisions to Part A are necessary, taking into account matters such as experience gained and the monitoring of the actual migration pathways of GHG substances within the storage formation.

Subsection 38(3) sets out matters that must be considered in relation to certain plans and programs that are set out in Part B of the site plan – see paragraphs 38(3)(a) to (d) of the GHG Regulations. This ensures that a licensee can consider the plans and programs in light of industry best practice and the experience gained through operations, and make any revisions as necessary. For the plan for carrying out work that is required to remediate the formation at the end of operations, mentioned in paragraph 38(3)(d), the licensee will obtain a better understanding of the work required as operations progress, and should make any updates to the plan as necessary to reflect their increased understanding.

### **Section 39 – Draft variations to remove inconsistency with directions under sections 376, 380 and 383 of the Act**

This section applies if a direction under section 376, 380 or 383 of the OPGGS Act is in force in relation to a GHG injection licence, and the direction is inconsistent with anything in an approved site plan. Section 376 enables the responsible Commonwealth Minister to give a direction to a licensee where there is a risk that operations under the licence could have a significant adverse impact on a geological formation that contains or is likely to contain a petroleum pool, or could otherwise compromise the exploitation of petroleum. Section 380 enables the responsible Commonwealth Minister to give a direction to a licensee to deal with serious situations, such as where a GHG substance has leaked or is leaking from an identified GHG storage formation specified in the licence. Section 383 enables the responsible Commonwealth Minister to give a direction to a licensee to protect petroleum discovered in the overlapping title area of a pre-commencement petroleum title (as defined in the OPGGS Act).

The licensee must within 60 days beginning on the day the direction came into force, or a longer period agreed by the responsible Commonwealth Minister, prepare a draft variation of the approved site plan in order to remove the inconsistency, and give the draft variation to the Minister. The ability for the Minister to agree a longer period reflects that, given the technical complexity and range of matters that a site plan covers, it may take some months for a licensee to prepare a draft variation.

Section 42 requires the responsible Commonwealth Minister to approve or refuse to approve a draft variation of a site plan.

It is a strict liability offence, punishable by 50 PU, for a licensee not to comply with the requirements in subsection 39(2). This is consistent with the principles outlined in section 3.3 of the Guide, which states that penalties in regulations generally should not exceed 50 PU. Section 2.2.6 of the Guide also states that application of strict liability is generally only considered appropriate where the offence is punishable by a fine of up to 60 PU. The maximum penalty for a failure to comply where the offence is committed by a body corporate is five times the specified penalty amount, due to the operation of subsection 4B(3) of the *Crimes Act 1914*.

It is appropriate to impose a criminal penalty for a breach of these obligations, given the nature of the matters in relation to which the responsible Commonwealth Minister may give a direction to a licensee. In these circumstances it is important that the site plan is varied to ensure consistency with a direction, such that the plan continues to be suitable for the safe and sustainable operations for injection and storage of a GHG substance. Variation of the site

plan will also ensure that the titleholder can be compliant with both the direction and the plan.

It is also appropriate to apply strict liability to the offence to promote compliance with the regulatory regime and ensure section 39 can be effectively enforced. This is consistent with the principles outlined in section 2.2.6 of the Guide. Given the remote and complex nature of offshore operations, and the prevalence of joint venture titleholder arrangements, it can be extremely difficult to prove intent, and requiring that proof may make it impractical to enforce the regime. A GHG injection licensee is responsible for preparing a variation of a site plan for approval by the responsible Commonwealth Minister in the circumstances set out in section 39. They would be aware of their obligations in relation to an approved site plan and of the need to have an up to date and suitable site plan to authorise their operations, including the importance of ensuring that a site plan is consistent with a direction given by the responsible Commonwealth Minister. The licensee would also be aware that a licence is granted on the understanding that licensees will take all reasonable steps to ensure that regulatory obligations are complied with, noting the high-hazard nature of operations, and that tenure over the relevant licence area is granted to the licensee based on factors such as their capacity to undertake safe and sustainable operations. If there is an honest and reasonable mistake of fact on the licensee's part, this may be raised in defence to a prosecution.

Subsection 39(4) is a continuing offence under section 4K of the *Crimes Act 1914*. Section 62 of the GHG Regulations sets out that the maximum penalty for each day that an offence under subsection 39(4) continues is 10% of the maximum penalty that can be imposed in respect of that offence.

The licensee is also liable to a civil penalty of 500 PU for a failure to comply with subsection 39(2). Offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. To be an effective deterrent, the penalty must therefore be sufficiently significant to overcome any sense that the potential imposition of a fine for non-compliance with a fundamental obligation might otherwise be perceived as a 'cost of doing business'.

As noted above in relation to section 22, it is appropriate for regulators to have recourse to both civil and criminal penalties – see the discussion at that section.

Subsection 39(5) is a continuing civil penalty provision under section 93 of the Regulatory Powers Act. Section 62 of the GHG Regulations sets out that the maximum civil penalty for each day that a contravention referred to in subsection 39(5) continues is 10% of the maximum civil penalty that can be imposed in respect of that contravention.

#### **Section 40 – Draft variations following occurrence of certain circumstances**

This section applies if an approved site plan is in force in relation to an identified GHG storage formation and a circumstance, mentioned in the table in subsection 40(1), occurs.

In broad terms those circumstances are where:

- the plan is no longer accurate and up to date because of new information that significantly alters the determination of key matters

- the licensee proposes to change the way operations are carried out in a manner that will affect predictions in Part A of a site plan for the behaviour of a GHG substance stored in, or to be injected and stored in, the formation or the risks associated with those operations
- the licensee proposes to make a significant change to the way operations are managed that will affect the integrated operations management plan (required to be set out in Part B of a site plan under section 20).

The licensee must, within 60 days beginning on the day the circumstance occurs or a longer period agreed by the responsible Commonwealth Minister, prepare and give to the Minister a draft variation of the plan for the purpose of addressing the circumstance. The ability for the Minister to agree a longer period reflects that, given the technical complexity and range of matters that a site plan covers, it may take some months for a licensee to prepare a draft variation.

Section 42 requires the responsible Commonwealth Minister to approve or refuse to approve a draft variation of a site plan.

It is a strict liability offence, punishable by 100 PU, for a licensee not to comply with the requirements in subsection 40(2). The maximum penalty for a failure to comply where the offence is committed by a body corporate is five times the specified penalty amount, due to the operation of subsection 4B(3) of the *Crimes Act 1914*.

It is appropriate to impose a criminal penalty for breach of these obligations because of the potential for considerable harm to be caused to the environment and/or to the operations of other titleholders if the approved site plan is no longer suitable for the safe and sustainable operations for injection and storage of a GHG substance.

It is also appropriate to apply strict liability to the offence to promote compliance with the regulatory regime and ensure section 40 can be effectively enforced, particularly given the risks to containment of a GHG substance if a licensee carries on operations when an approved site plan is no longer suitable. This is consistent with the principles outlined in section 2.2.6 of the Guide. Given the remote and complex nature of offshore operations, and the prevalence of joint venture titleholder arrangements, it can be extremely difficult to prove intent, and requiring that proof may make it impractical to enforce the regime. A GHG injection licensee is responsible for preparing a variation of a site plan for approval by the responsible Commonwealth Minister in the circumstances set out in section 40. The licensee would be aware of their obligations in relation to an approved site plan and of the need to have an up to date and suitable site plan to authorise their operations. The licensee would also be aware that a licence is granted on the understanding that licensees will take all reasonable steps to ensure that regulatory obligations are complied with, noting the high-hazard nature of operations, and that tenure over the relevant licence area is granted to the licensee based on factors such as their capacity to undertake safe and sustainable operations. If there is an honest and reasonable mistake of fact on the licensee's part, this may be raised in defence to a prosecution.

As discussed above in relation to section 22, a maximum penalty of 100 PU is authorised by section 790 of the OPGGS Act. The maximum penalty of 100 PU is appropriate, noting that it is higher than the preference stated in the Guide for a maximum of 60 PU for an individual

(300 PU for a body corporate) for strict liability offences. Offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. In this context, a smaller penalty for a significant offence would not be sufficient to appropriately punish the offending conduct. Given that the approved site plan authorises the operations that are carried out in relation to the injection and storage of GHG substances, it is vital to effective industry regulation that the plan is accurate and up to date and the operations are managed and carried out in accordance with it. There may be significant consequences in relation to containment of a GHG substance in an identified GHG storage formation that result from the failure of a licensee to revise a plan.

The offence provision has been included in the GHG Regulations, rather than the OPGGS Act, despite the relatively high penalties that may be imposed for non-compliance. The OPGGS Act sets out a range of regulation-making powers to prescribe matters in relation to GHG injection and storage. This includes subsection 457(6) of the OPGGS Act, which states that the regulations may make provision for and in relation to the variation of approved site plans. Section 40 of the GHG Regulations is made for the purposes of subsection 457(6) of the OPGGS Act. It is considered that setting out all of the provisions (including enforcement provisions) in one instrument provides greater clarity to licensees, rather than including the substantive provisions in the regulations, and matters relating to enforcement of those provisions in the OPGGS Act.

Subsection 40(4) is a continuing offence under section 4K of the *Crimes Act 1914*. Section 62 of the GHG Regulations sets out that the maximum penalty for each day that an offence under subsection 40(4) continues is 10% of the maximum penalty that can be imposed in respect of that offence.

The licensee is also liable to a civil penalty of 1,000 PU for a failure to comply with subsection 40(2). As noted above, offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. To be an effective deterrent, the penalty must be sufficiently significant to overcome any sense that the potential imposition of a fine for non-compliance might otherwise be perceived as a ‘cost of doing business’. The size of the penalty also reflects the cost of court proceedings that may be necessary to enforce the penalty (see further at section 57 below).

As noted above in relation to section 22, it is appropriate for regulators to have recourse to both civil and criminal penalties – see the discussion at that section.

Subsection 40(5) is a continuing civil penalty provision under section 93 of the Regulatory Powers Act. Section 62 of the GHG Regulations sets out that the maximum civil penalty for each day that a contravention referred to in subsection 40(5) continues is 10% of the maximum civil penalty that can be imposed in respect of that contravention.

The criminal and civil penalties that may apply for a failure to vary a plan following the occurrence of certain circumstances under section 40 are twice those imposed for a failure to vary a plan to remove inconsistency with a direction under section 376, 380 or 383 of the OPGGS Act under section 39. A direction under section 376, 380 or 383 prevails over anything in an approved site plan, to the extent of any inconsistency. Therefore, while it is important that the site plan is varied for consistency with the direction, the impact of a failure to do so is likely to be less severe than a failure to vary a plan to take account of

circumstances such as new information or changes in operations. Non-compliance with section 40 therefore warrants a higher deterrent against non-compliance by imposing a larger penalty.

#### **Section 41 – Draft variations initiated by licensees**

This section allows a GHG injection licensee to apply to the responsible Commonwealth Minister for approval to vary an approved site plan. The application must be in writing and must include the draft variation.

The licensee may wish to vary a site plan to reflect matters such as updated operational or risk management matters, in circumstances other than those envisaged by sections 36, 37, 39 or 40. This is particularly the case where a licensee proposes to undertake future operations other than in accordance with the existing site plan in force, but does not wish to breach the obligation to comply with the plan in subsection 22(2).

Section 42 requires the responsible Commonwealth Minister to approve or refuse to approve a draft variation of a site plan.

#### **Section 42 – Decision on approval of draft variation**

This section requires the responsible Commonwealth Minister to either approve or refuse to approve a draft variation of a site plan submitted by a GHG injection licensee.

The responsible Commonwealth Minister may approve the draft variation if reasonably satisfied that:

- (a) if the draft variation was prepared under section 36 (five-yearly review), 37 (review requested by the Minister) or 41 (variation initiated by licensee), the approved site plan should be varied as set out in the draft variation
- (b) if the draft variation was prepared under section 39 (variation to remove inconsistency with directions under section 376, 380 or 383 of the OPGGS Act), it would remove the inconsistency with the direction
- (c) if the draft variation was prepared under section 40 (variation following occurrence of certain circumstances), it would address the circumstance in relation to which it was prepared and, if the circumstance in relation to which the draft variation was prepared is mentioned in item 2 of the table in subsection 40(1), the approved site plan as varied would meet the criteria set out in Division 2 of Part 4.

The responsible Commonwealth Minister may also have regard to any other matters the Minister considers relevant in deciding whether to approve the draft variation.

The responsible Commonwealth Minister's decision under section 42 is not subject to merits review. A decision to approve or refuse to approve a draft variation involves the evaluation of complex and competing facts, and highly technical matters such as predictions of the behaviour of a GHG substance within an identified GHG storage formation. A merits review tribunal would be required to possess or obtain expertise in relation to the risks and management of GHG storage operations. The costs, difficulty and potential delays in finding expertise may outweigh any impact a lack of merits review may have on the applicant. If the

Minister refuses to approve a draft variation of a site plan, the Minister must provide reasons (under section 44 of the GHG Regulations). The licensee will have the option to submit a further draft variation of the site plan that takes account of those reasons. In the meantime, the licensee's existing plan will continue in force.

### **Section 43 – Decision-making process – requests for further information**

This section allows the responsible Commonwealth Minister or NOPTA to ask a GHG injection licensee to provide further written information relating to a draft variation of a site plan submitted by the licensee.

The provision allows flexibility for the responsible Commonwealth Minister or NOPTA to request additional information during assessment of the draft variation (i.e., prior to the Minister deciding whether to approve, or refuse to approve, the draft variation). This ensures that, if a draft variation does not include relevant information, or information in the draft variation requires clarification, the Minister or NOPTA can request the information to enable the Minister to have regard to that information.

The request, which must be by written notice to the licensee, must specify each matter in relation to which information is requested, and give a reasonable period for providing the information. What is a reasonable period will be considered on a case-by-case basis, depending on matters such as the nature of the information sought, and the number of matters in relation to which further information is sought.

If the licensee provides the information within the specified period, or a longer period agreed to by the responsible Commonwealth Minister or NOPTA, a reference in Division 7 of Part 4 to the draft variation includes a reference to the draft variation as including the further information. This ensures it is clear that the Minister must consider the further information provided when deciding whether to approve, or refuse to approve, the draft variation.

The responsible Commonwealth Minister is not required to consider the draft variation further until the licensee has provided the further information. This ensures that the Minister can assess and make a decision in relation to the draft variation on the basis of all of the relevant information.

### **Section 44 – Notice of decision**

This section provides that the responsible Commonwealth Minister must give the licensee written notice of the decision to approve, or to refuse to approve, a draft variation of a site plan under section 42.

If the responsible Commonwealth Minister refused to approve the draft variation, the notice must include the reasons for the refusal.

### **Section 45 – Effect of approval of draft variations**

This section provides that if a draft variation of an approved site plan is approved under section 42, the approved site plan is varied accordingly. The licensee is required to comply with the approved site plan as varied.



## **Section 46 – References to approved site plans**

This section provides that if an approved site plan is varied under section 45, a reference in the GHG Regulations to the approved site plan is a reference to the approved site plan as varied. This ensures it is clear that the provisions of the GHG Regulations that relate to approved site plans apply in relation to the most current version of the approved site plan.

## **Part 5 – Reportable incidents**

### **Division 1 – Preliminary**

#### **Section 47 – Simplified outline of this Part**

This section sets out a simplified outline of Part 5 of the GHG Regulations. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

#### **Section 48 – Purpose of this Part**

This section states that Part 5 is made for the purposes of item 2B of the table in subsection 782(1) of the OPGGS Act. Subsection 782(1) states that regulations may provide for securing, regulating, controlling or restricting the matters set out in the table in that subsection. Item 2B of the table specifies the injection and storage of a GHG substance into a part of a geological formation, and the carrying on of operations and the execution of works for those purposes.

#### **Section 49 – Reportable incidents, notification periods and reporting deadlines**

This section sets out incidents that are reportable incidents and which are required to be notified and reported by a GHG injection licensee to the responsible Commonwealth Minister and relevant responsible State or Territory Minister, and the deadlines for providing notifications and reports.

Subsection 49(1) defines four types of ‘reportable incidents’ in relation to an identified GHG storage formation specified in a GHG injection licence. In broad terms they are:

- (a) An event set out in Part B of the site plan in relation to the formation in accordance with subclause 6(3) of Schedule 2 that causes or has the potential to cause a serious situation in relation to the formation. Under subclause 6(3) of Schedule 2, Part B of a site plan is required to set out each event in the behaviour of a GHG substance that is a reportable incident.
- (b) A serious situation in relation to the formation of the kind mentioned in paragraph 379(1)(a) of the OPGGS Act which involves a leakage of a GHG substance to the seabed. Under subsection 379(1)(a), a serious situation exists if a GHG substance injected into the formation has leaked or is leaking from the formation.
- (c) An event that causes a serious situation in relation to the formation of the kind mentioned in paragraph 379(1)(b) of the OPGGS Act which involves a risk of leakage of a GHG substance to the seabed. Under subsection 379(1)(b), a serious situation

exists if there is a significant risk that a GHG substance injected into the formation will leak from the formation.

- (d) A leakage of a GHG substance from the bore of a well that forms part of the operations carried out under the licence that causes or has the potential to cause a serious situation in relation to the formation. The reference to a well “that forms part of the operations carried out under the licence” is to differentiate from pre-existing wells that are not drilled or used for the purpose of the GHG injection and storage operations. Wells that form part of operations may include injection wells, monitoring wells and pressure management wells.

A *serious situation* in relation to an identified GHG storage formation specified in a licence is defined in section 379 of the OPGGS Act.

Subsection 49(2) includes a table which sets out notification periods and reporting deadlines for each type of reportable incident. The notification periods and reporting deadlines are shortest in the case of a serious situation involving a leakage or risk of leakage of a GHG substance to the seabed (paragraphs (b) and (c) above).

## **Division 2 – Notifying and reporting**

### **Section 50 – Application of this Division**

This section provides that Division 2 applies if a reportable incident in relation to an identified GHG storage formation specified in a GHG injection licence occurs and a GHG injection licensee becomes aware of the occurrence of the incident. See the definition of *reportable incident* in subsection 49(1).

### **Section 51 – Notifying responsible Commonwealth and State/Territory Ministers**

Subsection 51(1) requires a GHG injection licensee to notify the responsible Commonwealth Minister that a reportable incident has occurred, before the notification deadline set out in subsection 49(2) for the particular type of reportable incident. The notification may be either oral or in writing and must contain all material facts and circumstances concerning the incident that are known or can be obtained by reasonable search or enquiry, details of any action taken to avoid or mitigate adverse environmental impacts, and details of corrective action already taken or proposed to be taken to prevent the occurrence of a similar incident.

Subsection 51(2) requires a GHG injection licensee to notify the responsible State or Territory Minister of the reportable incident within three days of giving the notification to the responsible Commonwealth Minister. This ensures that the relevant State or Territory Minister is also made aware of the occurrence of the incident.

The term *responsible State/Territory Minister* is defined in section 5. If the incident occurred in the offshore area of a State, the responsible State Minister in relation to that State must be notified. If the incident occurred in the Principal Northern Territory offshore area, the responsible Northern Territory Minister must be notified. The terms ‘responsible State Minister’ and ‘responsible Northern Territory Minister’ are defined in section 7 of the OPGGS Act. The responsible State Minister for all States other than Tasmania is the Minister who is the State member of the Joint Authority for the offshore area of the relevant State. The

responsible State Minister for Tasmania is the Minister of Tasmania who is responsible for administering the Tasmanian *Petroleum (Submerged Lands) Act 1982*. The responsible Northern Territory Minister is the Minister who is the Northern Territory member of the Joint Authority for the Principal Northern Territory offshore area.

As an example, if the incident occurred in the offshore area of Western Australia, the titleholder is required to give notification to the Western Australian Minister who is the State member of the Joint Authority for Western Australia.

A failure to comply with the requirement to give notification of a reportable incident is an offence of strict liability, punishable by a maximum penalty of 100 PU in the case of failing to notify the responsible Commonwealth Minister and 50 PU in the case of failing to notify the responsible State or Territory Minister. The maximum penalty for a failure to comply where the offence is committed by a body corporate is five times that amount, due to the operation of subsection 4B(3) of the *Crimes Act 1914*. The person is also liable for a civil penalty of 1,000 PU for contravening the requirement to notify the responsible Commonwealth Minister and 500 PU for contravening the requirement to notify the responsible State or Territory Minister.

It is appropriate to impose a criminal penalty for breach of these obligations given the importance of ensuring that Ministers are made aware of the occurrence of a reportable incident. The requirement to notify the responsible Commonwealth Minister in particular is intended to ensure that the Minister is made aware of the incident to enable any regulatory action to be taken where required, such as issuing a direction under the OPGGS Act. A GHG injection licensee will be aware of the legislative requirements regulating their operations.

It is also appropriate to apply strict liability to the offence to promote compliance with the regulatory regime and ensure the notification requirements can be effectively enforced, particularly given the serious consequences that may result from a reportable incident. The nature of the offence provision is intended to ensure that the licensee is accountable and notifies of incidents in relation to offshore operations. Strict liability is appropriate to ensure this level of accountability. This is consistent with the principles outlined in section 2.2.6 of the Guide. Given the remote and complex nature of offshore operations, and the prevalence of joint venture titleholder arrangements, it can be extremely difficult to prove intent, and requiring that proof may make it impractical to enforce the regime. A GHG injection licensee would be aware of the requirement to notify incidents to the responsible Commonwealth Minister and responsible State/Territory Minister. The licensee would also be aware that a licence is granted on the understanding that licensees will take all reasonable steps to ensure that regulatory obligations are complied with, noting the high-hazard nature of operations, and that tenure over the relevant licence area is granted to the licensee based on factors such as their capacity to undertake safe and sustainable operations. If there is an honest and reasonable mistake of fact on the licensee's part, this may be raised in defence to a prosecution.

The maximum penalty of 100 PU for a failure to notify the responsible Commonwealth Minister is also appropriate, noting that it is higher than the preference stated in the Guide for a maximum of 60 PU for an individual (300 PU for a body corporate) for strict liability offences. The maximum penalty is authorised by section 790 of the OPGGS Act, which

provides that regulations may provide for offences against the regulations punishable by penalties not exceeding a fine of 100 PU. Offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. In this context, a smaller penalty for a significant offence would not be sufficient to appropriately punish the offending conduct, especially considering the potential for severe consequences as a result of a reportable incident. It is vital to effective industry regulation as well as to an appropriate and timely response that the Minister is advised of the reportable incident and of any action that the licensee has taken or is proposing. Allowing the notice to be given orally allows for urgent circumstances.

The offence provision has been included in the GHG Regulations, rather than the OPGGS Act, despite the relatively high penalties that may be imposed for non-compliance. All the provisions relating to reporting events in relation to identified GHG storage formations are contained in the GHG Regulations, rather than in the OPGGS Act. It is considered that setting out all of the provisions (including enforcement provisions) in one instrument provides greater clarity to licensees, rather than including the substantive provisions in the regulations, and matters relating to enforcement of those provisions in the OPGGS Act.

The maximum penalty of 50 PU for a failure to notify the responsible State/Territory Minister is consistent with the principles outlined in section 3.3 of the Guide, which states that penalties in regulations generally should not exceed 50 PU. Section 2.2.6 of the Guide also states that application of strict liability is generally only considered appropriate where the offence is punishable by a fine of up to 60 PU.

Subsections 51(3) and (4) are continuing offences under section 4K of the *Crimes Act 1914*. Section 62 of the GHG Regulations sets out that the maximum penalty for each day that an offence under subsection 51(3) or (4) continues is 10% of the maximum penalty that can be imposed in respect of that offence.

It is also appropriate to have the option of imposing a civil sanction through a civil penalty of 1,000 PU for a failure to notify the responsible Commonwealth Minister, or 500 PU for a failure to notify the responsible State/Territory Minister. As noted above, offshore operations require a very high level of expenditure, and therefore licensees are well-resourced, sophisticated entities. To be an effective deterrent, the penalty must therefore be sufficiently significant to overcome any sense that the potential imposition of a fine for non-compliance with a fundamental obligation might otherwise be perceived as a ‘cost of doing business’. The size of the penalty also reflects the cost of court proceedings that may be necessary to enforce the penalty (see further at section 57 below). Significant penalties help to ensure that the industry understands the seriousness of reportable incidents and the need to keep both responsible Commonwealth and State/Territory Ministers advised.

As noted above in relation to section 22, it is appropriate for regulators to have recourse to both civil and criminal penalties – see the discussion at that section.

Subsections 51(5) and (6) are continuing civil penalty provisions under section 93 of the Regulatory Powers Act. Section 62 of the GHG Regulations sets out that the maximum civil penalty for each day that a contravention referred to in subsection 51(5) or (6) continues is 10% of the maximum civil penalty that can be imposed in respect of that contravention.

The criminal and civil penalties for failing to notify the responsible State or Territory Minister of a reportable incident are half those for failing to notify the responsible Commonwealth Minister. The Commonwealth is responsible for activities in offshore areas, and is best placed to take certain regulatory actions in the event of an incident occurring. This is reflected in the higher penalty for failure to notify the responsible Commonwealth Minister.

## **Section 52 – Reporting to responsible Commonwealth and State/Territory Ministers**

This section requires a GHG injection licensee to give a written report of a reportable incident to the responsible Commonwealth Minister, no later than the reporting deadline set out in subsection 49(2) for the particular type of reportable incident. The report must contain all material facts and circumstances concerning the incident that are known or can be obtained by reasonable search or enquiry, details of any action taken to avoid or mitigate adverse environmental impacts of the incident, and details of corrective action already taken or proposed to be taken to prevent the occurrence of a similar incident.

Where the incident involves the existence of a serious situation involving a leakage or a risk of leakage of a GHG substance to the seabed (as set out in paragraph 49(1)(b) or (c)), the report must include additional information. The information includes an estimate of the amount of GHG substance that has leaked or is likely to leak to the seabed, and a comparative estimate of the amount of GHG substance that would leak to the seabed if action were taken to avoid or mitigate any adverse environmental impacts of the incident and the amount that would leak if no such action were taken.

The licensee must also give a copy of the report to the responsible State or Territory Minister within seven days of giving the report to the responsible Commonwealth Minister. See the discussion at section 51 above regarding the definition of *responsible State/Territory Minister*.

A failure to comply with the requirement to give a written report of a reportable incident to the responsible Commonwealth Minister, or a copy of a report to the responsible State/Territory Minister, is a strict liability offence punishable by a maximum penalty of 50 PU. The maximum penalty for a failure to comply where the offence is committed by a body corporate is five times that amount, due to the operation of subsection 4B(3) of the *Crimes Act 1914*. The person is also liable for a civil penalty of 500 PU for contravening the requirement to report to the responsible Commonwealth Minister or to give a copy of the report to the responsible State or Territory Minister.

It is appropriate to impose a criminal penalty for a breach of these obligations. The requirement to give a written report to the responsible Commonwealth Minister in particular is intended to ensure that the Minister is provided with additional information in relation to an incident, further to the initial notification under section 51, to ensure it can consider and take regulatory action where required, such as issuing a direction under the OPGGS Act. A GHG injection licensee will be aware of the legislative requirements regulating their operations.

It is also appropriate to apply strict liability to the offence to promote compliance with the regulatory regime and ensure the reporting requirements can be effectively enforced,

particularly given the serious consequences that may result from a reportable incident. For further justification, see the discussion at section 51.

The maximum penalty of 50 PU is consistent with the principles outlined in section 3.3 of the Guide, which states that penalties in regulations generally should not exceed 50 PU. Section 2.2.6 of the Guide also states that the application of strict liability is generally only considered appropriate where the offence is punishable by a fine of up to 60 PU.

Subsections 52(3) and (4) are continuing offences under section 4K of the *Crimes Act 1914*. Section 62 of the GHG Regulations sets out that the maximum penalty for each day that an offence under subsection 52(3) or (4) continues is 10% of the maximum penalty that can be imposed in respect of that offence.

It is also appropriate to have the option of imposing a civil sanction through a civil penalty of 500 PU. For a justification of the imposition of a civil penalty, see the discussion at section 51.

As noted above in relation to section 22, it is appropriate for regulators to have recourse to both civil and criminal penalties – see the discussion at that section.

Subsections 52(5) and (6) are continuing civil penalty provisions under section 93 of the Regulatory Powers Act. Section 62 of the GHG Regulations sets out that the maximum civil penalty for each day that a contravention referred to in subsection 52(5) or (6) continues is 10% of the maximum civil penalty that can be imposed in respect of that contravention.

## **Part 6 – Information that may be made publicly available**

### **Section 53 – Simplified outline of this Part**

This section sets out a simplified outline of Part 6 of the GHG Regulations. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

### **Section 54 – Information relating to leakages during transport or injection or from well bores**

This section is made for the purposes of paragraph 781(b) of the OPGGS Act, being necessary or convenient for carrying out or giving effect to the OPGGS Act.

Section 54 allows for publication of information held by the Commonwealth that relates to detecting and monitoring of leakages of GHG substances, either during transport and injection or from well bores. The detection and monitoring is under the programs that are set out in Part B of a site plan (see clauses 7 and 8 of Schedule 2).

The responsible Commonwealth Minister may make the following information publicly available:

- the results of the detection and monitoring; and
- any raw data collected during the detection and monitoring.

The responsible Commonwealth Minister may decide to make information publicly available for transparency, and to assure the public of ongoing monitoring to ensure continued safe and sustainable operations.

## **Part 7 – Enforcement**

### **Division 1 – Preliminary**

#### **Section 55 – Simplified outline of this Part**

This section sets out a simplified outline of Part 7 of the GHG Regulations. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

The note to section 55 is intended to inform the reader that the GHG Regulations are a *listed NOPSEMA law* as defined in section 601 of the OPGGS Act. This means that the OPGGS Act makes the GHG Regulations subject to monitoring under Part 2 of the Regulatory Powers Act, and offences and civil penalty provisions of the GHG Regulations subject to investigation under Part 3 of the Regulatory Powers Act.

#### **Section 56 – Purpose of this Part**

This section states that the provisions of Part 7, other than subsection 62(1) concerning continuing offences, are made for the purposes of section 790A of the OPGGS Act. Section 790A enables the regulations to provide that a civil penalty provision of the regulations may be enforced under Part 4 of the Regulatory Powers Act, and that a provision of the regulations is enforceable under Part 6 (which deals with enforceable undertakings) and Part 7 (which deals with injunctions) of the Regulatory Powers Act. Section 790A also provides for the regulations to specify matters for the purposes of the Regulatory Powers Act (for example, who is an authorised applicant in relation to a civil penalty provision).

The ability to provide for the application of the Regulatory Powers Act in regulations under the OPGGS Act was inserted by the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013*, the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Act 2013* and the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Act 2019*. In each case, Parliament had the ability to consider the appropriateness of prescribing these matters in regulations prior to passing the legislation. A similar provision is also included in section 308 of the *Offshore Electricity Infrastructure Act 2021*.

In addition, the OPGGS Act sets out a range of regulation-making powers to prescribe matters in relation to GHG injection and storage, such as matters relating to site plans, in the regulations. As a result, the GHG Regulations comprehensively deal with these matters, rather than provisions set out in the OPGGS Act. It is considered that setting out all of the provisions (including enforcement provisions) in one instrument provides greater clarity to licensees, rather than including the substantive provisions in the regulations, and matters relating to enforcement of those provisions in the OPGGS Act.

It is considered necessary and appropriate that a broad range of enforcement tools be available in relation to regulatory provisions to ensure that sufficient incentive is provided for a GHG injection licensee to return to compliance and to ensure that enforcement actions can be targeted, proportionate and effective in achieving safe and sustainable operations.

Section 790 of the OPGGS Act also provides authority for section 61, which relates to contraventions of offence provisions and civil penalties, and subsection 62(1), which concerns continuing offences. Section 790 states that regulations may provide for offences against the regulations. Under subsection 790(2), the penalties for offences against the regulations must not exceed a fine of 100 PU, or a fine of 100 PU for each day on which the offence occurs.

## **Division 2 – Civil penalties**

### **Section 57 – Civil penalty provisions**

This section applies Part 4 of the Regulatory Powers Act to enforce the civil penalty provisions in the GHG Regulations. Part 4 of the Regulatory Powers Act allows a civil penalty provision to be enforced by obtaining an order for a person to pay a pecuniary penalty for the contravention of the provision. See the discussion at section 56 regarding the authority to trigger application of the Regulatory Powers Act by regulation.

Subsection 57(2) provides that the responsible Commonwealth Minister is the “authorised applicant” who can make an application for a civil penalty order.

Subsection 57(3) provides for a “relevant court” for the purposes of Part 4 of the Regulatory Powers Act to be the Federal Court, the Federal Circuit and Family Court of Australia (Division 2), and the Supreme Court of a State or Territory. An authorised applicant may make an application for a civil penalty order to any one of those courts.

Subsection 82(6) of the Regulatory Powers Act applies if a relevant court is satisfied that a person has contravened a civil penalty provision, and orders a person to pay a pecuniary penalty. In determining the pecuniary penalty, the court must take into account all relevant matters, including:

- the nature and extent of the contravention
- the nature and extent of any loss or damage suffered because of the contravention
- the circumstances in which the contravention took place
- whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

## **Division 3 – Enforceable undertakings**

### **Section 58 – Enforceable undertakings**

This section triggers the application of Part 6 of the Regulatory Powers Act to enforce offence and civil penalty provisions in the GHG Regulations. Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings



relating to compliance with provisions. See the discussion at section 56 regarding the authority to trigger application of the Regulatory Powers Act by regulation.

Subsection 58(2) provides that the Minister is the “authorised person” who can accept written undertakings under Part 6 of the Regulatory Powers Act.

Subsection 58(3) provides for a “relevant court” for the purposes of Part 6 of the Regulatory Powers Act to be the Federal Court, the Federal Circuit and Family Court of Australia (Division 2), and the Supreme Court of a State or Territory. An authorised person may make an application to a relevant court for an order in relation to enforcement of undertakings, if the authorised person considers that a person has breached an undertaking.

### **Section 59 – Publication of enforceable undertakings**

This section requires that the responsible Commonwealth Minister publish an undertaking that the Minister has accepted under section 114 of the Regulatory Powers Act, and that has not been withdrawn or cancelled. The Minister must publish the undertaking on the website of the Minister’s department.

It is considered desirable that enforceable undertakings are required to be published, given ongoing work across government to increase transparency. The publicity attached to undertakings may also act as a deterrent for GHG injection licensees from non-compliance with the GHG Regulations.

Subsection 59(2) requires the responsible Commonwealth Minister to take such steps as are reasonable in the circumstances to ensure any personal information (within the meaning of the *Privacy Act 1988*) that is contained in the undertaking is de-identified before the undertaking is published. This is to ensure the protection of personal information and the right to privacy. Under subsection 59(3), information is ‘de-identified’ if it is no longer about an identifiable individual or an individual who is reasonably identifiable.

A GHG injection licensee and the responsible Commonwealth Minister can work together to ensure that undertakings are written in a manner that will avoid or reduce risks of prejudice to commercial interests when they are published.

## **Division 4 – Injunctions**

### **Section 60 – Injunctions**

This section triggers the application of Part 7 of the Regulatory Powers Act to enforce offence and civil penalty provisions in the GHG Regulations. Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions. See the discussion at section 56 regarding the authority to trigger application of the Regulatory Powers Act by regulation.

The ability for a court to grant an injunction will ensure that persons who are failing to meet their regulatory obligations can be required to return to a position of compliance, in addition or as an alternative to the application of any financial penalty for a contravention. It also aims to encourage future behavioural change; for example, an injunction against a company whose

breach is due to poor compliance programs and internal controls will encourage that company to address those internal deficiencies, and thereby reduce the risk of future non-compliance.

Subsection 60(2) provides that the Minister is the “authorised person” who can apply to the court for an injunction under Part 7 of the Regulatory Powers Act.

Subsection 60(3) provides for a “relevant court” for the purposes of Part 7 of the Regulatory Powers Act to be the Federal Court, the Federal Circuit and Family Court of Australia (Division 2), and the Supreme Court of a State or Territory. An authorised person may make an application to a relevant court for an injunction.

Section 121 of the Regulatory Powers Act sets out the circumstances in which a relevant court may grant an injunction. However, subsection 60(4) of the GHG Regulations provides that a relevant court may grant an injunction by consent of all the parties to proceedings, whether or not the court is satisfied that section 121 of the Regulatory Powers Act applies. This would aim to reduce the necessity for the court to consider the merits of an application for an injunction in instances where the parties are in agreement, and thereby reduce the time taken for an injunction to be granted, and free up the court’s time for other matters in dispute.

## **Division 5 – Other matters**

### **Section 61 – Contravening offence provisions and civil penalty provisions**

This section applies if a provision of the GHG Regulations provides that a person contravening another provision of the regulations (the ‘conduct provision’) commits an offence or is liable to a civil penalty. For the purposes of the regulations and the Regulatory Powers Act, a reference to a contravention of an offence provision or a civil penalty provision includes a reference to a contravention of the conduct provision.

This section supports references in the GHG Regulations and the Regulatory Powers Act to contraventions of offence and civil penalty provisions. In many cases, an offence or civil penalty provision in the GHG Regulations states that a person is liable to a penalty for a contravention or breach of another provision, which contains a conduct rule. For example, subsection 22(4) states that a person is liable to a civil penalty if the person contravenes subsection 22(1) or (2). Subsection 22(1) prohibits a GHG injection licensee from carrying on operations in relation to an identified GHG storage formation unless an approved site plan is in force. Subsection 22(2) requires a licensee to comply with an approved site plan. Subsections 22(1) and (2) are therefore the relevant conduct provisions.

Provisions in the GHG Regulations or the Regulatory Powers Act may refer to contravention of an offence or civil penalty provision. For example, subsection 82(3) of the Regulatory Powers Act provides that if a relevant court is satisfied that a person has contravened a civil penalty provision, the court may order the person to pay a pecuniary penalty for the contravention as the court determines to be appropriate. For the purposes of this provision, as a result of the application of section 61 of the GHG Regulations, a person will be taken to have contravened the civil penalty provision if the person has contravened the requirement of the conduct provision. Continuing with the previous example, a person will be taken to have contravened subsection 22(4) if the person has contravened subsection 22(1) or (2).

## **Section 62 – Daily penalties for continuing offences and continuing contraventions of civil penalty provisions**

A number of the offence provisions in the GHG Regulations (listed in subsection 62(1)) are continuing offences under section 4K of the *Crimes Act 1914*. Subsection 62(1) sets out the maximum daily penalty that may be imposed for a continuing offence as 10% of the maximum penalty that can be imposed in respect of the relevant offence.

Similarly, a number of the civil penalty provisions in the GHG Regulations (listed in subsection 62(2)) are continuing civil penalty provisions under section 93 of the Regulatory Powers Act. Subsection 62(2) sets out the maximum daily penalty that may be imposed for contravention of a civil penalty provision as 10% of the maximum penalty that can be imposed in respect of the contravention.

## **Part 8 – Application, saving and transitional provisions**

### **Division 1 – Provisions relating to this instrument as made**

#### **Section 63 – Applications for declarations of identified greenhouse gas storage formations**

The the 2011 GHG Regulations were repealed at the same time as the GHG Regulations commenced. This section provides for transitional arrangements where an application for a declaration of an identified GHG storage formation was made under section 312 or 312A of the OPGGS Act before commencement of the GHG Regulations, but was not finally determined by the time of that commencement (and repeal of the 2011 GHG Regulations).

To ensure continuity and certainty for an applicant, the 2011 GHG Regulations will continue to apply in relation to such applications as if those regulations had not been repealed.

# **Schedule 1 – Information to be set out in applications for declarations of identified greenhouse gas storage formations and requirements for estimates of spatial extent**

## **Part 1 – Preliminary**

### **Clause 1 – Preliminary**

Subclause 1(1) of Schedule 1 provides that Parts 2 and 4 of Schedule 1 specify information that must be set out in an application for the declaration of a part of a geological formation as an identified GHG storage formation.

Subclause 1(2) of Schedule 1 provides that Part 3 of Schedule 1 specifies requirements that an estimate of the spatial extent of an eligible GHG storage formation must comply with.

Certain information in the application and the estimate of the spatial extent will assume that the part of a geological formation is an eligible GHG storage formation, noting that this is required in paragraph 312(3)(b) or 312A(3)(b) of the OPGGS Act.

Part 3 of Schedule 1 (in particular subclause 6(1)) is also relevant to subsection 5(2) – see discussion of that subsection above at section 5.

## **Part 2 – Information about the part of the geological formation**

This Part specifies the information that must be set out about a part of a geological formation in an application for a declaration of the part of the formation as an identified GHG storage formation under section 312 or 312A of the OPGGS Act.

### **Clause 2 – Geological features of the part of the geological formation**

This clause requires an application for a declaration of an identified GHG storage formation to include a description and detailed analysis of the geological features of the part of the geological formation in relation to which the declaration is sought. This must include the effective sealing feature, attribute or mechanism. The concept of a “seal” is a term of art in the context of the GHG Regulations that is well understood by the offshore GHG storage industry. The term “effective sealing feature, attribute or mechanism” has therefore not been defined for the purposes of the GHG Regulations.

### **Clause 3 – Integrity of the part of the geological formation**

This clause requires an application for a declaration of an identified GHG storage formation to include information relating to the integrity of the formation in sufficient detail to demonstrate the applicant has an understanding of the geological environment.

The information must be set out in sufficient detail to demonstrate that the applicant’s understanding is sufficient to allow the applicant to identify all geological risks relating to containment of the GHG substance to be stored, and to propose strategies for elimination or reduction and management of those risks. This does not require an applicant to provide the actual strategies for eliminating or reducing and managing risks. Rather, the applicant must show that they have sufficient understanding of the integrity of the part of the geological formation to be able to identify risks and propose strategies. To support the information in

subclause (1), under subclause (2) the applicant must explain how they can identify risks and proposes strategies on the basis of that information.

Subclause 3(3) sets out information that must be included at a minimum for the purposes of subclause 3(1). Subclause (3) includes a number of technical terms of art in the context of the GHG Regulations that are well understood by the offshore GHG storage industry. These terms have therefore not been defined for the purposes of the GHG Regulations.

#### **Clause 4 – Model of reservoirs and seal rocks**

This clause requires an application for a declaration of an identified GHG storage to include a depositional model of the reservoirs and the seal rocks of the part of the geological formation in relation to which the declaration is sought. The terms “depositional model” and “seal rocks” are terms of art in the context of the GHG Regulations that are well understood by the offshore GHG storage industry. These terms have therefore not been defined for the purposes of the GHG Regulations.

#### **Clause 5 – Other relevant geological information**

This clause requires an application for a declaration of an identified GHG storage formation to include any other geological information that may be relevant to the long-term safe and secure storage of the GHG substance to be stored.

The information must include information that would be relevant to the responsible Commonwealth Minister declaring a closure assurance period in relation to the part of the geological formation in relation to which the declaration is sought. A closure assurance period may be declared by the Minister under section 399 of the OPGGS Act at least 15 years after the issue of the site closing certificate in relation to an identified GHG storage formation, where the Minister is satisfied the injected GHG substance is behaving as predicted and there is no significant risk of significant adverse impacts to the environment or human health or safety, amongst other matters. Once a closure assurance period has been declared, the Commonwealth takes on liability for any damages attributable to an act done or omitted to be done in the carrying out of operations authorised by a GHG injection licence in relation to the identified GHG storage formation, where the liability is incurred or accrued after the end of the closure assurance period (see sections 400 and 401 of the OPGGS Act).

### **Part 3 – Requirements for estimates of spatial extent**

#### **Clause 6 – Predicted expected migration pathways**

An application for a declaration of an eligible GHG storage formation as an identified GHG storage formation under section 312 or 312A of the OPGGS Act is required to include an estimate of the spatial extent of the eligible formation. Clause 6 requires the estimate of the spatial extent to include a description of each predicted expected migration pathway of the particular amount of the particular GHG substance to be injected into the part of the geological formation as mentioned in whichever of paragraph 21(1) or (b) of the OPGGS Act is applicable, for which the applicant has estimated the probability of occurrence to be more than 10%.

Subclause 6(1) refers to whichever of paragraph 21(1)(a) or (b) of the OPGGS Act is applicable. This means that, if the eligible GHG storage formation is suitable for permanent

storage of a particular amount of a particular GHG substance with engineering enhancements, the predictions must consider the application of those enhancements. Otherwise, the predictions must consider the expected migration pathways without engineering enhancements.

Subclause 6(1) requires the predictions to cover the period mentioned in subsection 21(3) of the OPGGS Act. That period is the period beginning at the start of injection operations and ending at the ‘notional site closing certificate time’. The *notional site closing certificate time* is worked out under subsection 21(6) of the OPGGS Act as the estimated earliest time, after injection operations cease in relation to the identified GHG formation, when the responsible Commonwealth Minister would be in a position to issue a site closing certificate under Division 7 of Part 3.4 of the OPGGS Act.

It is common practice in the oil and gas industry to have a probabilistic view of likely outcomes, where decisions are often based around likelihoods of 10%, 50% and 90% certainty, depending on the type of decision. At the time that an application for a declaration of an identified GHG storage formation is submitted, understanding of the expected behaviour of a GHG substance in the formation is likely to be lower, compared to at a later time (e.g. during operations). It is therefore considered appropriate for predictions of expected migration pathways of a GHG substance to be set at a lower level of probability of occurrence of 10% for the purposes of estimating spatial extent for an application for an identified GHG storage formation.

The description of each expected migration pathway of the GHG substance must be set out and explained in sufficient detail to demonstrate that the prediction is soundly based (subclause 6(2)).

### **Clause 7 – Modelling**

This clause requires an applicant for a declaration of an identified GHG storage formation to include in the application details of any modelling undertaken to make the prediction of each expected migration pathway required under clause 6 of Schedule 1 – see discussion at that clause. This must include details of the methodology used, the types of models used, and any assumptions made. The information is intended to assist the responsible Commonwealth Minister to understand the basis of the prediction, in order to make an assessment of whether the prediction is soundly based.

### **Clause 8 – Probability distributions**

This clause requires an applicant for a declaration of an identified GHG storage formation to include in the application the probability distributions associated with the prediction of each expected migration pathway required under clause 6 of Schedule 1 – see discussion at that clause. A probability distribution is a mathematical function that describes the probability of different possible values of a variable. Probability distributions are often depicted using graphs or probability tables.

### **Clause 9 – Blocks occupied by pathways**

This clause requires an application for a declaration of an identified GHG storage formation to include a description of each block that the applicant reasonably believes will be occupied by a migration pathway described in accordance with clause 6 of Schedule 1. For the

purposes of clause 9, a block means a block as defined in the OPGGS Act (see section 7). If the declaration is made by the responsible Commonwealth Minister, the blocks occupied by a migration pathway will be the blocks to which the identified GHG storage formation extends. These will therefore be the blocks in relation to which a subsequent application may be made for a GHG injection licence under section 361, 368A or 369 of the OPGGS Act.

#### **Clause 10 – Sealing feature, attribute or mechanism**

This clause requires an application for a declaration of an identified GHG storage formation to include an explanation of the three-dimensional extent of the effective sealing feature, attribute or mechanism within the spatial extent of the part of the geological formation in relation to which the declaration is sought. The effective sealing feature, attribute or mechanism will be the same as that described in accordance with clause 2 of Schedule 1. The concept of a “seal” is a term of art in the context of the GHG Regulations that is well understood by the offshore GHG storage industry. The term “effective sealing feature, attribute or mechanism” has therefore not been defined for the purposes of the GHG Regulations.

### **Part 4 – Information about engineering enhancements**

#### **Clause 11 – Application of this Part**

This clause states that Part 4 of Schedule 1 applies if the fundamental suitability determinants of an eligible GHG storage formation, which are set out in an application for a declaration of an identified GHG storage formation in accordance with subparagraph 312(3)(b)(i) or 312A(3)(b)(i) of the OPGGS Act, include engineering enhancements.

The ‘fundamental suitability determinants’ of an eligible GHG storage formation are defined in subsection 21(8) of the OPGGS Act. If an eligible GHG storage formation is suitable with engineering enhancements for the permanent storage of a particular amount of a particular GHG substance injected over a particular period, then the fundamental suitability determinants include those engineering enhancements.

#### **Clause 12 – Description of engineering enhancements**

This clause applies if the fundamental suitability determinants of an eligible GHG storage formation, to which an application for a declaration of an identified GHG storage formation relates, include engineering enhancements – see discussion above regarding clause 11 of Schedule 1. The application must include a description of the engineering enhancements. The description must be set out in sufficient detail to demonstrate that, taking into account those enhancements, the risks relating to the containment of the GHG substance to be stored in the part of the geological formation are likely to be acceptable.

Generally, “engineering enhancements” refer to anything that is done by persons (as opposed to natural features) to assist with GHG storage, primarily with regards to reducing risks of leakage, but also any measures to significantly enhancement reservoir properties. This may include, for example, remediating any existing wells from previous operations that penetrate into the storage formation, pressure management (such as injection and potential extraction of water, or increasing the injectivity potential via various methods.

### **Clause 13 – Risk assessment analysis**

This clause requires an application for a declaration of an identified GHG storage formation to include details of the risk assessment analysis used by the applicant to support the engineering enhancements described in accordance with clause 12 of Schedule 1 – see discussion above. At the time that an application is submitted, understanding of the risks relating to containment of a GHG substance is likely to be lower, compared to at a later time (e.g. during operations). The risk assessment will therefore only be expected to reflect the level of project definition and maturity at the stage of the application.

## **Schedule 2 – Information in Part B of draft site plan**

A note points the reader to paragraph 20(1)(b) of the GHG Regulations, which requires Part B of a draft site plan to set out the information specified in Schedule 2.

### **Clause 1 – Preliminary**

Section 24 of the OPGGS Act states that a site plan, in relation to an identified GHG storage formation, is divided into two parts. Part B deals with “other matters”. Clause 1 of Schedule 2 provides that Schedule 2 specifies information that must be set out in Part B of a draft site plan that accompanies an application for a GHG injection licence.

### **Clause 2 – Operations planning and management**

This clause requires Part B of a draft site plan to include information set out in sufficient detail to demonstrate that adequate planning has taken place in relation to the proposed operations for the plan, that would be carried out under the GHG injection licence (if granted). The information would assist to assure the responsible Commonwealth Minister that adequate consideration has been given to the nature and manner of carrying out the proposed operations.

### **Clause 3 – Overview of proposed operations**

This clause requires Part B of a draft site plan to include information about matters relating to the proposed operations that would be carried out under a GHG injection licence (if granted). The information must include:

- whether the application is made by multiple registered holders of a title under the OPGGS Act and, if so, details of any joint venture arrangements between them
- details of any commercial agreements, or negotiations undertaken, with suppliers of GHG gas substances in relation to the injection of a GHG substance into the formation
- a description of the infrastructure facilities for engaging in the activities involved in the proposed operations and details, as specified in paragraph 3(3)(b) of Schedule 2, of each kind of GHG substance that is proposed to be injected
- a schedule for carrying out the proposed operations, including the timing for each major milestone
- information about significant works and upgrades that are planned over the life of the proposed operations.



In relation to details of commercial agreements or negotiations undertaken with suppliers of GHG substances, it is important for the responsible Commonwealth Minister to obtain an understanding of the source and certainty of potential GHG streams that will support the ongoing viability of operations. Under section 736 of the OPGGS Act, a document accompanying an application for a GHG injection licence is an “applicable document”. This includes a draft site plan submitted with an application for a licence. Confidentiality provisions apply to information contained in an applicable document under Part 8.3 of the OPGGS Act. For example, the responsible Commonwealth Minister and NOPTA must not make the information publicly available, or make the information known to another person (other than a Commonwealth, State or Northern Territory Minister), unless the Minister or NOPTA does so in accordance with particular regulations or for the purposes of the administration of the OPGGS Act or regulations.

In relation to information about significant works and upgrades that are planned over the life of the proposed operations (subclause (5)), the information expected to be provided would only be that which is reasonably known to the applicant at the time, given the length of time over which operations to inject and permanently store GHG substances are conducted. An approved site plan may later be varied to take account of updates, such as for the purposes of a five-year review or where the licensee proposes certain changes to operations (see the discussion of sections 36 to 41 of the GHG Regulations above).

#### **Clause 4 – Engineering enhancements**

This clause requires Part B of a draft site plan to include the information about engineering enhancements (if any) that was included in an application for declaration of an identified GHG storage formation (including the application as varied), or in any application for a variation of a declaration. This ensures that up-to-date information about the engineering enhancements is included in the site plan.

For subclause (1), the application (or varied application) would only have included information about engineering enhancements if the fundamental suitability determinants of the eligible GHG storage formation in relation to which the declaration was sought included engineering enhancements – see discussion above regarding clause 11 of Schedule 1. The information about engineering enhancements that is required for an application for a declaration is set out in Part 4 of Schedule 1.

#### **Clause 5 – Risks relating to containment of greenhouse gas substances**

This clause requires Part B of a draft site plan to include information about any identified risks to containment of a GHG substance that were not included in the application for declaration of an identified GHG storage formation (see, for example, clause 13 of Schedule 1 for information about risks that is included in an application for a declaration). Part B must also include details of the risk assessment analysis used to identify each of those risks. The details that must be provided (see subclause 5(2)) include strategies for eliminating the risk or reducing it to as low as is reasonably practicable, and information demonstrating that any residual risk will be acceptable.

Regulation of other risks arising from GHG operations will occur under other parts of the OPGGS Act and regulations, particularly through the requirements to prepare an environment plan for environmental management of offshore GHG activities, a well operations

management plan for well activities, and a safety case to address occupational health and safety at offshore facilities.

### **Clause 6 – Monitoring behaviour of stored greenhouse gas substances**

This clause requires Part B of a draft site plan to include information relating to how the behaviour of GHG substances in an identified GHG storage formation will be monitored.

Under subclause (1), the draft site plan must include a plan for monitoring the behaviour of GHG substances in the reservoirs of the formation (a monitoring plan). Monitoring is a key part of the management of a GHG storage site. The GHG Regulations do not specify what sort of monitoring should be undertaken, as this will be highly site specific. However, the monitoring plan must be set out in sufficient detail to demonstrate that significant events in the reservoirs will be detected in a timely manner. This is important to ensure that any necessary mitigation and remediation activities can be initiated as soon as practicable. The monitoring plan must also be set out in sufficient detail to demonstrate that the timing and nature of the monitoring will detect any variations from the predictions set out in Part A of the draft site plan (see discussion at section 19). Under section 379 of the OPGGS Act, a serious situation exists if a GHG substance has behaved or is behaving otherwise than as predicted in Part A.

Under subclause (2), if it is proposed that any substance would be used to facilitate the monitoring of the behaviour of a GHG substance, Part B of the draft site plan must set out details of the substance, including the concentration of the substance. Broadly speaking, such substances would be injected with the GHG substance to distinguish it from naturally occurring substances in the formation and enable an understanding of the migration of the injected substance.

Under subclause (3), Part B of the draft site plan must establish triggers for incident reporting. Section 49 of the GHG Regulations provides that a reportable incident includes an event set out in Part B of the site plan (as per subclause 6(3)) that causes or has the potential to cause a serious situation (as defined in section 379 of the OPGGS Act) to exist – see discussion at that section. The event would be in the behaviour of the GHG substance, and would include a departure from a predicted migration pathway or predicted migration rate of the substance.

Part B of the draft site plan must also include a plan for detecting and monitoring any leakage of a GHG substance stored in the formation to the seabed. This will enable the early detection of potential reportable incidents and/or serious situations, so that the responsible Commonwealth Minister can be advised and action can be taken to remedy the leakage.

### **Clause 7 – Detecting and monitoring leakages during transport and injection**

This clause requires Part B of a draft site plan to include a program for detecting and monitoring any leakages of a GHG substance during transport for the purpose of injection (e.g. transport by pipeline), and at the point of injection into an identified GHG storage formation. The program should enable early detection of leakages to enable action to be taken to remedy or mitigate the leakage as soon as practicable.

### **Clause 8 – Detecting and monitoring leakages from well bores**

This clause requires Part B of a draft site plan to include a program for detecting and monitoring any leakages of a GHG substance from a well bore. The program should enable early detection of leakages to enable action to be taken to remedy or mitigate the leakage as soon as practicable.

### **Clause 9 – Site closure – remediation and monitoring**

This clause requires Part B of a draft site plan for an identified GHG storage formation to include:

- a plan for carrying out any work that is required to remediate the formation once operations to inject and store a GHG substance have ceased (subclause 9(1))
- a plan for monitoring the behaviour of GHG substances stored in the formation after operations have ceased (subclause 9(2)).

Noting that a draft site plan is submitted with an application for a GHG injection licence (i.e. before the licence is granted and operations have commenced), the information provided in accordance with clause 9 will necessarily be at a high level. However, the plan in Part B for carrying out any work required to remediate the formation will be taken into account in reviews of a site plan (once approved) – see paragraph 38(3)(d). This means that the information can be updated as operations progress and a greater understanding of what is required to remediate the formation is obtained.

When injection and storage operations cease at the end of a project, the licensee must apply for a site closing certificate under Division 7 of Part 3.4 of the OPGGS Act. A site closing certificate may be issued by the responsible Commonwealth Minister under section 392 of the OPGGS Act once certain requirements have been satisfied.

To some extent, the information required in subclause 9(1) would duplicate information required in the environment plan under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023*. However, given the decision-making role of the responsible Commonwealth Minister in relation to a site closing certificate, a higher-level plan for remediation should be included in the information required for the draft site plan.

**Attachment B****Renumbering table - Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011 and Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023**

<i>Old number (2011 Regulations)</i>	<i>New number (2023 Regulations)</i>
1.1	1
Not in 2011 Regulations	2
Not in 2011 Regulations	3
Not in 2011 Regulations	4
1.3	5
Not in 2011 Regulations	6
Not in 2011 Regulations	7
Not in 2011 Regulations	8
1.4	Not in 2023 Regulations
1.5	9
1.5(7) (table item 7)	10
1.6	11
1.7	12
1.8	12
Not in 2011 Regulations	13
2.1	14
2.2(1) and (2)	Not in 2023 Regulations
2.2(3) and (4)	15
Not in 2011 Regulations	16
Not in 2011 Regulations	17
3.1	Not in 2023 Regulations
3.2(1) and (2)	21 and 22
3.2(3) to (5)	Not in 2023 Regulations
3.3(1)	23 and 25
3.3(2) and (3)	18(1) and (2)
3.3(4)	20(1)(c)
3.3(5) to (7)	18(3)
3.3(8) and (9)	20(1)(d) and (e)
3.3(10) to (12)	Not in 2023 Regulations
3.3(13) and (14)	27
3.4(1)	23 and 25
3.4(2) to (5)	19
3.5(1)	23 and 25
3.5(2) to (4)	20
3.5(5)	54
3.6	Not in 2023 Regulations
3.7(1)	24
3.7(2) and (3)	Not in 2023 Regulations
Not in 2011 Regulations	26
Not in 2011 Regulations	28
3.8	29 and 30
3.9(1)	31 and 32

<i>Old number (2011 Regulations)</i>	<i>New number (2023 Regulations)</i>
3.9(2)	33 and 34
3.10(1) and (2)	36
3.10(3) and (4)	37
3.10(5) and (6)	38
3.11(1) to (3)	35(2) and 39
3.11(4)	35(1) and 40
Not in 2011 Regulations	41
Not in 2011 Regulations	42
Not in 2011 Regulations	43
Not in 2011 Regulations	44
Not in 2011 Regulations	45
Not in 2011 Regulations	46
Not in 2011 Regulations	47
Not in 2011 Regulations	48
4.1	49(1)
Not in 2011 Regulations	50
4.2	51
4.2A	51
4.3	52
4.4	49(2)
4.5(1) and (2)	49(2)
4.5(3)	52(1)
4.6	49(2)
4.7	Not in 2023 Regulations
4.8	Not in 2023 Regulations
4.9	Not in 2023 Regulations
Not in 2011 Regulations	53
Not in 2011 Regulations	Part 7 (55 to 62)
Not in 2011 Regulations	63
Not in 2011 Regulations	1 of Schedule 1
1.1 of Schedule 1	2 of Schedule 1
1.2 of Schedule 1	2 of Schedule 1
1.3 of Schedule 1	3 of Schedule 1
1.4 of Schedule 1	4 of Schedule 1
1.5 of Schedule 1	5 of Schedule 1
2.1 of Schedule 1	6 of Schedule 1
2.2 of Schedule 1	7 of Schedule 1
2.3 of Schedule 1	8 of Schedule 1
Not in 2011 Regulations	11 of Schedule 1
3.1 of Schedule 1	12 of Schedule 1
3.2 of Schedule 1	13 of Schedule 1
4.1(1) of Schedule 1	9 of Schedule 1
4.1(2) of Schedule 1	Not in 2023 Regulations
4.2 of Schedule 1	Not in 2023 Regulations
4.3 of Schedule 1	10 of Schedule 1
Not in 2011 Regulations	1 of Schedule 2
1.1 of Schedule 2	2 of Schedule 2

<i>Old number (2011 Regulations)</i>	<i>New number (2023 Regulations)</i>
1.2 of Schedule 2	3(1) and (2) of Schedule 2
1.3 of Schedule 2	20(1)(c)
2.1 of Schedule 2	3(3)(a) of Schedule 2
2.2 to 2.5 of Schedule 2	3(3)(b) of Schedule 2
2.6 and 2.7 of Schedule 2	3(4) of Schedule 2
2.8 of Schedule 2	3(5) of Schedule 2
3.1 of Schedule 2	19(3)
Not in 2011 Regulations	4 of Schedule 2
Part 4 of Schedule 2	19(3)
Part 5 of Schedule 2	19
6.1 of Schedule 2	Not in 2023 Regulations
6.2 and 6.3 of Schedule 2	5 of Schedule 2
6.4 of Schedule 2	Not in 2023 Regulations
Part 7 of Schedule 2	6 of Schedule 2
8.1 of Schedule 2	7 of Schedule 2
8.2 of Schedule 2	Not in 2023 Regulations
9.1 of Schedule 2	8 of Schedule 2
9.2 of Schedule 2	Not in 2023 Regulations
Part 10 of Schedule 2	Not in 2023 Regulations
Part 11 of Schedule 2	Not in 2023 Regulations
Part 12 of Schedule 2	9 of Schedule 2
Part 13 of Schedule 2	Not in 2023 Regulations
Schedule 3	Not in 2023 Regulations

## **Statement of Compatibility with Human Rights**

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

*Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023*

This 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 Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023* (the Regulations) is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations deal with a number of matters to facilitate and regulate safe and secure greenhouse gas (GHG) injection and storage operations in offshore areas. These matters include:

- (a) determining whether there is a significant risk that an operation carried on under a permit, lease or licence will have a significant adverse impact on other operations;
- (b) applications for declarations by the responsible Commonwealth Minister of parts of geological formations as identified GHG storage formations;
- (c) site plans in relation to identified GHG storage formations;
- (d) reporting about events, known as reportable incidents, in relation to identified GHG storage formations;
- (e) information that the responsible Commonwealth Minister may make publicly available;
- (f) enforcement of the provisions of the Regulations.

The purpose of the Regulations is to remake the *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011* (the 2011 GHG Regulations) in substantially the same form, with minor amendments to provide consistency with current drafting practices, simplify language, restructure provisions to provide for ease of navigation and remove duplicative processes.

The 2011 GHG Regulations are due to sunset on 1 April 2024.

The Department of Industry, Science and Resources (the department), in consultation with the National Offshore Petroleum Safety and Environmental Management Authority and the National Offshore Petroleum Titles Administrator, reviewed the effectiveness and efficiency

of the 2011 GHG Regulations. The department found that the 2011 GHG Regulations are still required and fit for purpose, and that they should be remade without substantive change.

### **Human rights implications**

The Regulations engage, or have the potential to engage, the following rights:

- Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) – criminal process rights, specifically the right to be presumed innocent until proven guilty according to law
- Article 17 of the ICCPR – right to privacy and reputation.

#### ***Right to be presumed innocent until proven guilty (Article 14(2) of the ICCPR)***

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of an offence beyond reasonable doubt. Offences of strict liability engage the presumption of innocence. This is because a fault element, such as intention to do an act or not do an act, is not required to be proved.

This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

The Regulations provide that a GHG injection licensee commits an offence of strict liability if they:

- carry on any operations in relation to an identified GHG storage formation without an approved site plan in force in relation to the formation, or fail to comply with an approved site plan that is in force (section 22)
- fail to review an approved site plan and decide whether the plan should be varied at least once in each period of five years during which the plan is in force; fail to notify the responsible Commonwealth Minister of the decision as to whether the plan should be varied, the date of the decision and the reasons for the decision, within 30 days after making the decision; or fail to give a draft variation of the plan to the Minister within the applicable period if the decision was that the plan should be varied (section 36)
- fail to review an approved site plan on request by the responsible Commonwealth Minister, decide whether the plan should be varied, prepare or give to the Minister a draft variation of the plan if decided the plan should be varied, or give notice to the Minister of the decision as to whether the plan should be varied, the date of the decision or reasons for the decision, within the specified period (section 37)
- fail to prepare or give to the responsible Commonwealth Minister a draft variation to an approved site plan to remove an inconsistency with a direction under section 376, 380 or 383 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act), within 60 days of the direction coming into force or such longer period agreed by the Minister (section 39)



- fail to prepare or give to the responsible Commonwealth Minister a draft variation of an approved site plan to address a certain circumstance that has occurred, within 60 days of the circumstance occurring or such longer period agreed by the Minister (section 40)
- fail to notify the responsible Commonwealth Minister within the specified time that a reportable incident has occurred, or fail to notify the responsible State or Territory Minister within three days of notifying the responsible Commonwealth Minister (section 51)
- fail to give a written report of a reportable incident to the responsible Commonwealth Minister within the specified time, or fail to give a copy of the report to the responsible State or Territory Minister within seven days of giving the report to the responsible Commonwealth Minister (section 52).

Strict liability is applied to these offence provisions to enhance the effectiveness of the provisions in deterring certain conduct, and thereby reduce the likelihood of non-compliance. Strict liability will also ensure that the provisions can be effectively enforced.

There would be risks to the containment of GHG substances and potentially severe consequences if a GHG injection licensee were to undertake an activity without an approved site plan or contrary to an approved plan that is in force. Site plan requirements under the Regulations are complex and detailed, requiring amongst other things an assessment of all relevant risks based on predictions of the behaviour of a GHG substance in an identified GHG storage formation, strategies for eliminating those risks or reducing them to an acceptable level, and monitoring of the behaviour of stored GHG substances in the formation over time.

Strict liability is also appropriate to ensure licensees are accountable for notifying and reporting on incidents relating to offshore operations given the serious consequences that may result from an incident, particularly if remedial action is not taken quickly. It is also appropriate to ensure that licensees are accountable for ensuring that the site plans for their operations are kept up to date and fit for purpose to ensure safe and sustainable operations, given the risks to containment of a GHG substance, and consequent risks to the environment and operations of other titleholders, if an approved site plan is no longer suitable.

For all of the strict liability offences, the remote and complex nature of offshore operations and the prevalence of joint venture titleholder arrangements means it can be extremely difficult to prove intent, and requiring that proof may make it impractical to enforce the regime. Application of strict liability is therefore necessary to ensure that the Regulations can be enforced more effectively and thereby improve compliance with the regulatory regime. This is consistent with the principles outlined in [\*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers\*](#), September 2011 (the Guide), including the principle that the punishment of offences not involving fault may be appropriate where it is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct.

A GHG injection licensee would be well aware of their obligations under the Regulations. A licensee would also be aware that a licence is granted on the understanding that licensees will take all reasonable steps to ensure that regulatory obligations are complied with, noting the high-hazard nature of operations, and that tenure over the relevant licence area is granted

to the licensee based on factors such as their capacity to undertake safe and sustainable operations.

The penalty imposed for failure to comply with several of the strict liability offence provisions is 50 penalty units, which is consistent with the Guide's preference for a maximum of 60 penalty units for offences of strict liability.

Four of the strict liability offences in the Regulations apply a penalty of 100 penalty units (subsections 22(3), 37(5), 40(4) and 51(3)). The imposition of a penalty of up to 100 penalty units for an offence against the Regulations is authorised by section 790 of the OPGGS Act. It is appropriate to apply this penalty, noting this is higher than the preference stated in the Guide for a maximum of 60 penalty units. The penalty of 100 penalty units applies to the four most serious offences within the Regulations. The potential for serious consequences resulting from a breach of these provisions justifies the application of a higher penalty. In addition, offshore resources activities, as a matter of course, require a very high level of expenditure and therefore GHG injection licensees are well-resourced, sophisticated entities. In this context, a smaller penalty for a significant offence would not be sufficient to appropriately punish the offending conduct, especially considering the potential for severe risks to or impact on the environment as well as on the operations of other titleholders.

Offences of strict liability allow the accused person to raise a defence of honest and reasonable mistake of fact. While the burden is on the accused to raise evidence in support of the defence (noting that the circumstances are likely to be exclusively within the knowledge of the defendant), the prosecution is then required to persuade the court that there was no mistake or that the mistake was unreasonable. This is in keeping with the fundamental principle that a person is innocent until guilt is proved beyond reasonable doubt.

The presumption of innocence is afforded to *individuals*, whereas in the offshore regulatory regime investigations and prosecutions are conducted largely, if not solely, in relation to corporations. Prosecutions to date have only been in relation to corporations, and it is not anticipated that this regulatory approach would change in the future given the nature of the industry and the requirements imposed.

The inclusion of strict liability offences in the Regulations is aimed at the legitimate objective of deterring misconduct and reducing the likelihood of non-compliance with licensee obligations that have been put in place to eliminate or reduce the risk of serious adverse consequences to the environment and the operations of other titleholders. The strict liability offences are reasonable, necessary and proportionate to that objective.

### ***Right to privacy and reputation (Article 17 of the ICCPR)***

Article 17 of the ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with their privacy, family, home or correspondence, as well as unlawful attacks on their honour and reputation. It also provides that a person has the right to the protection of the law against such interference or attacks.

The right to privacy and reputation may be limited, provided that the interference with the right is authorised by law and not arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

Section 59 of the Regulations provides if that the responsible Commonwealth Minister has accepted an undertaking under section 114 of the *Regulatory Powers (Standard Provisions) Act 2014* relating to compliance with a provision of the Regulations, and the undertaking has not been withdrawn or cancelled, the Minister must publish the undertaking on the department's website. This requirement is considered important in the context of ongoing work across government to increase transparency.

To ensure the right to privacy is safeguarded, subsection 59(2) of the Regulations provides that if an undertaking contains personal information within the meaning of the *Privacy Act 1988* (the Privacy Act), the responsible Commonwealth Minister must take steps that are reasonable in the circumstances to ensure that the information is de-identified before publication. Subsection 59(3) provides that information is 'de-identified' if it is no longer about an identifiable individual or an individual who is reasonably identifiable.

The protection of a person's personal information by de-identification before the responsible Commonwealth Minister publishes an enforceable undertaking is in accordance with the principles of the Privacy Act. Accordingly, the right to privacy and reputation under Article 17 of the ICCPR is promoted by the Regulations.

### **Conclusion**

The Regulations are compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

**The Hon Madeleine King MP**  
**Minister for Resources**